



4-1-1987

Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers under the Federal and California Constitutions

Jeri Christine Okamoto

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Jeri C. Okamoto, *Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers under the Federal and California Constitutions*, 20 Loy. L.A. L. Rev. 1055 (1987).

Available at: <https://digitalcommons.lmu.edu/llr/vol20/iss3/12>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

**PRIOR RESTRAINT AND THE PUBLIC HIGH SCHOOL
STUDENT PRESS: THE VALIDITY OF
ADMINISTRATIVE CENSORSHIP OF STUDENT
NEWSPAPERS UNDER THE FEDERAL AND
CALIFORNIA CONSTITUTIONS**

As we approach the bicentennial of the Constitution in 1987, some educators still feel that practicing the Bill of Rights in the public schools is risky. But . . . our Constitution says we must take this risk, and our history says the risk is worth it. Thus, there may be no better way for schools to observe the coming bicentennial than by practicing what [they] teach about the law—by risking on the side of the Constitution.¹

CONTENTS

I.	Introduction	1056
II.	Historical Background	1062
	A. The First Amendment	1062
	B. California Constitution, Article I, Section 2(a)	1068
	C. Recognizing Students' Free Expression Rights in Public Schools	1070
	1. Early developments	1071
	2. The <i>Tinker</i> decision	1075
III.	The California Scheme: Legislating Student Press Freedom	1078
	A. Legislative History	1078
	1. An invitation to legislate: <i>Rowe v. Campbell</i> <i>Union High School District</i>	1079
	2. The reply: Education Code section 10611	1087
	B. California Education Code Section 48907	1096
IV.	Analysis: Challenging the Constitutionality of Education Code Section 48907	1098
	A. Legislative Authority	1100
	B. The Recommended Approach for Determining the Constitutionality of Section 48907: Prior Restraints as Per Se Unconstitutional	1104

1. Schimmel, *Speech: The First Freedom, If Courts Recognized Student Rights*, UPDATE ON LAW-RELATED EDUC., Spring 1980, at 58.

C.	An Alternative Approach for Determining the Constitutionality of Section 48907: Official Student Publications and the Forum Theory	1107
1.	The forum theory	1107
2.	Official student publications as limited public forums.....	1110
3.	An illustrative model of analysis: the California three-prong test	1116
a.	prong I: rational and reasonable relationship .	1118
b.	prong II: balancing the state's and students' interests	1122
1)	substantial disruption.....	1123
2)	obscenity	1123
3)	libel	1129
c.	prong III: least restrictive alternative.....	1132
1)	alternatives to prior restraint	1133
2)	vagueness	1135
3)	overbreadth	1140
4)	lack of procedural safeguards	1142
5)	summary	1145
V.	Recommendations.....	1147
A.	Banning Prior Review and Prior Restraints	1147
B.	Defining the Terms in Section 48907	1147
C.	Establishing and Implementing Student Publication Guidelines at the Local Level	1151
VI.	Conclusion.....	1155
VII.	Appendix A: California Education Code Section 48907...	1157
VIII.	Appendix B: Student Press Law Center Model Guidelines for Student Publications	1158
IX.	Appendix C: The Society of Professional Journalists Sigma Delta Chi Code of Ethics	1163

I. INTRODUCTION

Free and open communication, unfettered by government intervention, is a fundamental and revered value; the freedom to express thoughts and ideas is the cornerstone of the American and California constitutional systems.² Yet, there exists an area in which that freedom, as set

2. M. Simpson, *The Rights and Responsibilities of the Student Press* 29 (Aug. 1979) (unpublished manuscript prepared for presentation to the S.I. Newhouse School of Public Communications Super Conference on Scholastic Journalism). See generally J. NOWAK, R.

forth in the first amendment to the United States Constitution³ and article I, section 2(a) of the California Constitution,⁴ is rarely realized in full: the public high school student press.⁵ The censorship of student newspapers is not peculiar to the small towns or little red schoolhouses in California; on the contrary, censorship exists in even the most sophisticated school districts.⁶ This is so despite the declaration by both the United

ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 858 (1984) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom'")) [hereinafter NOWAK].

3. The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

4. Article I, section 2(a) of the California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2, cl. a.

5. The extent of student press censorship in America's public high schools was documented in J. NELSON, CAPTIVE VOICES: THE REPORT OF THE COMMISSION OF INQUIRY INTO HIGH SCHOOL JOURNALISM (1974). In 1973, a commission of students, teachers, journalists, school administrators, lawyers and community organizers conducted hearings in six American cities and surveyed thousands of students, journalism teachers, faculty advisers and professional editors. The Commission of Inquiry into High School Journalism (Commission) concluded that "[c]ensorship and the systematic lack of freedom to engage in open, responsible journalism characterize high school journalism. Unconstitutional and arbitrary restraints are so deeply embedded in high school journalism as to overshadow its achievements, as well as its other problems." *Id.* at 47. With regard to the effects of censorship on the creativity and vibrancy of student journalism, the Commission reported that "[c]ensorship is the fundamental cause of the triviality, innocuousness, and uniformity that characterize the high school press. It has created a high school press that in most places is no more than a house organ for the school administration." *Id.* at 48. The Commission further found that "[c]ensorship persists even where litigation or administrative action has destroyed the legal foundation of censorship; such decisions are either ignored or interpreted in such a way as to continue the censorship policy." *Id.*

To help eliminate the legal ignorance exposed by its findings and, more generally, to improve the quality of scholastic journalism, the Commission recommended the formation of a national law center to advocate first amendment protections for student journalists. M. Simpson, *supra* note 2, at 1-2. In 1974, the Robert F. Kennedy Memorial (the convener of the Commission), in conjunction with the Reporters' Committee for Freedom of the Press, established the Student Press Law Center. *Id.* The Center, which is the only national organization devoted exclusively to protecting student journalists' rights, is staffed by an attorney and student interns and provides direct legal assistance to students and advisers facing administrative censorship. *Id.* at 2. Inquiries may be made directly to the Student Press Law Center at 800-18th Street, N.W., Washington, D.C. 20006, (202) 466-5242.

6. See *infra* note 18 and accompanying text. For a discussion of the censorship problems in California during the early 1970's, see generally J. NELSON, *supra* note 5, at 11-16, 19-24, 25-26, 96; see also *infra* note 205.

An entire chapter in the Commission's report, J. NELSON, *supra* note 5, is devoted to a Novato, California high school student's censorship experiences as editor of her high school newspaper. *Id.* at 11-16. Her story is typical of the student press controversies in California and throughout the nation. The controversy arose when Janice Fuhrman, the editor of the

States Supreme Court and the California Supreme Court that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁷

Novato High School student newspaper, criticized the principal for banning a county-wide student publication, *Free Youth*, from campus. *Id.* at 11. She wrote that:

“[The principal] objected to the use of the words chicken - - - and bull - - - (words he called obscene), and an article about the Viet Nam war which suggested a violent act (burning a school building down), and the fact that the author of the article was not named. Principals of San Rafael, Drake, Terra Linda, Redwood and Tamalpais high schools did not see it necessary to forbid distribution and because of the objections by Novato . . . the Free Youth committee decided to censor out the objectionable article. Novato seems to be some kind of puritanical community and I guess [the principal] wants to keep it that way.”

Id. at 11-12 (quoting Janice Fuhrman in the *Hornet's Buzz*). The principal suspended Janice. Janice later reported to the Commission that the principal told her that the article was libelous and made him look like a “bad guy.” *Id.* at 12.

Unlike most students, Janice was aware of her legal rights and contacted an attorney regarding her suspension. Instead of filing suit against the principal, however, the attorney went to the *San Francisco Chronicle* with the facts of Janice's case. *Id.* at 14. According to Janice, the minute the story came out, the principal contacted Janice's father claiming that the suspension was “all a big misunderstanding.” *Id.* Although Janice was able to return to school, the censorship persisted. Janice told the Commission that upon her return to school, the principal informed her that she “‘was not the owner of the school paper, that the school district was, and they had the right to determine editorial policy, and that as long as the district was giving [the students] the money to write the paper, [the students] weren't . . . to criticize the district.’” *Id.* (quoting Janice Fuhrman). Janice also informed the Commission that “‘every time [the students] came out with something the least bit controversial [the County Board of Supervisors] would threaten to cut off [the newspaper's] funds, and [the students] had to answer to them, because [the Board of Supervisors was] paying for it’” *Id.* at 12 (quoting Janice Fuhrman); see *infra* notes 272-321 for a discussion regarding the unconstitutionality of the principal's actions.

The controversy arose during Janice's junior year of high school. She observed during her senior year that students were “avoiding” controversial topics and that the adviser had appointed a new editor who would “steer the paper clear of articles critical of school policy.” *Id.* at 15.

The Commission also reported on cases involving the dismissal or censuring of California journalism advisers for advocating their students' first amendment rights. In one case, the adviser of the Los Alamitos High School newspaper, the *Crusader*, lost her position as adviser after opposing the principal's policies of prior review and censorship of student articles that he “considered offensive or unworthy of publication.” *Id.* at 25. In another case, the adviser of the Torrance High School student newspaper, was fired by the board of education for “insubordination.” *Id.* at 23. The insubordination consisted mainly of the adviser's refusal to submit student articles to the principal for prior review. *Id.* The adviser later filed suit in federal court alleging that his employment was wrongfully terminated as a result of constitutionally protected actions that he took as the school's newspaper adviser. *Nicholson v. Board of Educ. Torrance Unified School Dist.*, 682 F.2d 858, 861 (9th Cir. 1982). The court of appeals ultimately held that Nicholson's first amendment rights were not violated when he was discharged for failure to submit articles on sensitive topics to school officials. *Id.* at 865.

7. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); *Adcock v. Board of Educ.*, 10 Cal. 3d 60, 67, 513 P.2d 900, 905, 109 Cal. Rptr. 676, 681 (1973) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)); *Serrano v. Priest*, 5 Cal. 3d 584, 608 n.25, 487 P.2d 1241, 1258 n.25,

Judicial recognition of students' first amendment rights came in 1969 with the landmark United States Supreme Court ruling in *Tinker v. Des Moines Independent School District*.⁸ There, the Court proclaimed that "it can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students."⁹

In the wake of *Tinker*, the California Legislature enacted California Education Code section 10611¹⁰ in a bold move to officially recognize students' rights of free expression.¹¹ In doing so, the legislature enacted the nation's first statutory scheme for protecting students' free expression on school campuses. Section 10611 evolved into its present form: California Education Code section 48907. Section 48907 provides that "[t]here shall be no prior restraint of material prepared for official school publications."¹² The section does allow, however, for prior restraints of certain categories of expression specified in the statute, such as obscenity and libel.¹³ In addition, section 48907 requires that each school district governing board and each county board of education adopt written publication guidelines.¹⁴

Great hopes were placed on California's legislative effort to define the parameters of student expression in official student publications.¹⁵ Other states watched the California experiment for guidance in developing their own systems of student publication regulation.¹⁶ Unfortunately, the California experiment has yet to yield significant results.

96 Cal. Rptr. 601, 618 n.25 (1971) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). See also M. Simpson, *supra* note 2, at 1.

8. 393 U.S. 503 (1969); see *infra* notes 87-100 and accompanying text.

9. *Tinker*, 393 U.S. at 506.

10. See *infra* note 167.

11. See *infra* notes 166-70 and accompanying text.

12. CAL. EDUC. CODE § 48907 (West Supp. 1987). See *infra* Appendix A for the full text of § 48907.

13. CAL. EDUC. CODE § 48907.

14. *Id.*

15. The scope of this Comment is limited to the discussion of "official school publications," specifically school newspapers. Education Code § 48907 defines official school publications as "material produced by students in the journalism, newspaper . . . or writing classes and distributed to the student body either free or for a fee." CAL. EDUC. CODE § 48907. Thus, unofficial or "underground" student newspapers will not be specifically addressed. For a discussion of "underground" newspapers in California's schools, see Letwin, *Regulation of Underground Newspapers on Public School Campuses in California*, 22 UCLA L. REV. 141 (1974).

16. See generally Eveslage, *Can Students Acquire Press Freedom Through Grass Roots Efforts? Are Model Guidelines Possible Through State?*, COMMUNICATION: JOURNALISM EDUC. TODAY, Fall 1982, at 16, 17.

Surveys indicate that many school districts are not aware of the legislation and/or they have not established student publications guidelines.¹⁷ Furthermore, reports of censorship still emerge throughout the state.¹⁸

17. See *infra* notes 524-26 and accompanying text.

18. *Id.* One might presume that censorship has not been a problem in California high schools since no cases have been reported challenging Education Code § 48907 and since many school districts have not drafted publications guidelines. *But see infra* note 216. On the contrary—incidences of censorship still appear throughout the state.

For example, a controversy arose in Palo Alto over whether the Palo Alto High School newspaper should run an advertisement from a gay and lesbian support group. Wright, *P.A. Gay Ad Sparks Dispute: School Paper's Right to Run It At Issue*, San Jose Mercury News, Oct. 23, 1985, (copy on file at *Loyola of Los Angeles Law Review*). The controversy arose when a local teacher objected to the advertisement claiming that it might induce students to engage in homosexual activity. *Id.* In Oakland, the managing editor of *Green and Gold*, the award-winning Fremont High School newspaper, was suspended for trying to photograph the aftermath of the shooting of a fellow student. Brydolt, *Censorship of School Newspapers Isn't New*, Tribune, Nov. 10, 1985, at 1, col. 1; see also United Press Int'l (UPI), *Suspension Lifted for School Editor*, Nov. 1, 1985 (NEXIS, UPI file). The faculty adviser believed that "student journalists have a legal right under California law to cover a legitimate story." UPI, *supra*. The adviser added that "I see this as a prior restraint At what point can an administrator step in and say 'You can't cover this?'" *Id.* (quoting adviser Stephen O'Donoghue). In 1982, the principal of Hoover High School, in Fresno, confiscated copies of a lampoon issue of the school newspaper. *School Paper's Lampoon Issue Confiscated*, Stockton Record, June 6, 1982, at 7, col. 4. The principal reportedly even collected one copy from a student's home. *Id.* The principal objected to a number of photographs, including one of the newspaper staff standing in front of an adult bookstore named "House of Erotica." *Id.* He also objected to another photograph showing the backs of students pretending to urinate. *Id.*

High school students in Southern California have also had their share of censorship problems. In September 1984, students at Fallbrook High School in San Diego published *The Hatchet Job*, an unofficial student newspaper. *San Diego Chapter Report*, Open Forum, Apr. 1986, at 1, col. 3 (monthly newspaper of the American Civil Liberties Union of Southern California). The principal adjudged some of the material in the newspaper obscene and libelous and, thus, seized copies of the paper. He then suspended two of the paper's reporters. *Id.* The Fallbrook Unified School District later filed suit for a declaration that the suspension was lawful. *Id.* The superior court judge ruled in favor of the students and held that under state law, the principal did not have the authority to suspend the students. *Id.* at 3, col. 1. In February 1986, the parties settled; the students to receive \$22,000 and a letter of apology from the district. *Id.* In addition, the district must sponsor a training program for teachers and administrators in the area of students' free speech and free press rights. *Id.*

In 1985, a high school student in Huntington Beach wrote an editorial in the school newspaper criticizing Reverend Jerry Falwell and a congressman for allegedly misinforming the public about acquired immune deficiency syndrome (AIDS). Kossen, *Orange Co. Students at Cutting Edge of Censorship Law*, L.A. Daily J., Jan. 30, 1986, § 2, at 1, col. 3. School district officials believed that the editorial was potentially libelous and, thus, banned its publication. *Id.* The student claimed that his first amendment rights had been violated. The school district, on the other hand, maintained that constitutional rights were not at issue, claiming instead that standards of journalism were the issue. *Id.* In December 1985, a superior court judge ordered the Huntington Beach Union High School District to allow publication of the editorial. *Id.* at cols. 3-4. The school district appealed, but subsequently decided not to pursue the appeal because the "controversy and expense that surrounded the situation approached an unreasonable level." *Id.* at col. 4 (quoting Huntington Beach Union High School District spokeswoman Catharine McGough). See also *Leeb v. DeLong*, *appeal docketed*, 4 Civ. No. G

Hence, it appears that section 48907 has failed to impact school officials' regulation of student publications in a recognizable way.

Nevertheless, section 48907 has not been completely ignored. Some school districts have established publication guidelines pursuant to section 48907.¹⁹ The majority of these district guidelines, however, simply mimic the broad language of the statute and offer no further guidance as to the meaning of the legal "terms of art" contained in the statute.²⁰ Since school districts rely on the statute for guidance, it is vitally important that the statute be a clear, comprehensive and constitutional model. What constitutes a clear, comprehensive and constitutional statutory model is the subject of this Comment.²¹

To fully understand the dynamics of Education Code section 48907 and the relationship between student press rights and administrative censorship, one first must appreciate the deep-rooted national and state commitments to the freedoms of expression and press. Thus, the inquiry into what constitutes a constitutional model begins with a discussion, in Part II, of the historical foundations for these freedoms as held by both adults and young persons.

002587 (4th Dist. Aug. 1986), a case involving another Orange County high school student, discussed *infra* at note 216. In addition, the Court of Appeals for the Ninth Circuit recently decided a student press case involving the publication policies of the Grossmont Union High School District in San Diego. *San Diego Committee Against Registration and the Draft (CARD) v. Governing Bd.*, 790 F.2d 1471 (9th Cir. 1986); see *infra* notes 275-97 for a discussion of this case.

Furthermore, students are not the only parties who feel the effects of administrative censorship. In 1981, a journalism adviser at Redwood High School in Larkspur, California unsuccessfully attempted to have the courts order a letter of reprimand removed from her personnel file. See Brydolt, *supra*. The adviser had allowed her student reporters to reveal that they had been sold alcohol illegally at a number of local liquor stores. The student reporters had written permission from their parents to participate in the investigative activities. In addition, the adviser hired a private attorney to review the article before publication. *Id.* Nevertheless, the adviser's role in the publication of the article was deemed "unprofessional" and the letter of reprimand remains in her file. The adviser remarked that she is still technically required to submit all potentially controversial stories to her superiors. She, however, ignores the rule. *Id.* Other advisers in similar predicaments have been transferred, demoted or had their classes eliminated or their newspaper budgets cut. *Id.*

19. See *infra* notes 524-26 and accompanying text.

20. See *infra* notes 450-54 and accompanying text & notes 464-70 and accompanying text for a discussion of the constitutional problems arising from the use of legal "terms of art."

21. A further, and perhaps more difficult problem concerns how to inform and educate the school boards, school district officials, teachers and students about students' press rights under the United States and California Constitutions. Obviously, even if Education Code § 48907 is reconstructed to conform with constitutional standards, it will hardly serve its purpose of establishing students' free expression guarantees if school officials and students are not made aware of it. For a discussion of how this problem might be solved, see *infra* notes 527-48 and accompanying text.

In the context of public secondary education, however, the government's interest in promoting free expression and a free press must be balanced against the competing governmental interest in providing an orderly environment in which the process of education may take place. The California Legislature attempted to strike this balance in enacting section 48907. How the legislature arrived at this balance is discussed in Part III. Part IV examines whether the balance struck by the California Legislature is constitutional and sets forth the recommended approach that California courts should take in addressing this issue. Finally, Part V provides an amendment to section 48907 which will bring the statute within constitutional bounds and enable the statute to better suit the needs of California public school educators and students.

II. HISTORICAL BACKGROUND

California journalists' right to be free from governmental censorship is derived from the free expression and press provisions of the United States and California Constitutions. Thus, the inquiry into whether California's student journalists enjoy this same freedom necessarily begins with these provisions.

A. *The First Amendment*

"Congress shall make no law . . . abridging the freedom . . . of the press . . ."²² These few but potent words in the first amendment establish some of the most fundamental freedoms held by Americans: the freedom to write, print and distribute one's thoughts, ideas and opinions without governmental interference.²³ This freedom protects not only expression which conforms with the majority viewpoint, but, more importantly, that expression which may offend the general public or criticize those in power.²⁴

Historically, governments suppressed and censored disagreeable expression prior to its dissemination to the public.²⁵ Thus, to prevent the

22. U.S. CONST. amend. I; *see supra* note 4.

23. *See* J. LIEBERMAN, *FREE SPEECH, FREE PRESS, AND THE LAW* 9 (1980).

24. *Id.* at 12. In other words:

[F]reedom of speech and the press means freedom not merely for the people whom you admire and agree with; more importantly, it means freedom for the people you hate and distrust. It can mean freedom for people who are saying mean and ugly things, who are advocating dangerous policies, or who are willing to tell things that many people believe ought to be kept secret.

Id. Furthermore, "[a]s a result, many people in the heat of the moment forget or ignore the fundamental importance of free speech and a free press in order to shut up someone whom they find obnoxious." *Id.*

25. *See generally* NOWAK, *supra* note 2, at 858-61.

new American government from exercising prior restraints²⁶ on publications with which it disagreed, the first amendment was ratified in 1791 to constitutionalize the press' right to operate freely without the threat of governmental censorship of the ideas and viewpoints published.²⁷

26. In general, "prior restraint" is the prohibition by the federal, state or local government of the publication, distribution and/or production of objectionable expression. *See generally* D. PEMBER, *MASS MEDIA LAW* 73 (1977). Stated another way, "[p]rior restraint is a matter not of punishing someone *after* he speaks or publishes, but of stopping him *before* he has the chance to do so." *Id.* (emphasis added). One should not be misled by the simplicity of this definition of prior restraint—commentators commonly agree that the doctrine of prior restraint is anything but clear and simple. *See, e.g.,* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 725 n.12 (1978) (quoting Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648, 649 (1955) ("Despite an ancient and celebrated history, the doctrine of prior restraints remains curiously confused and unformed.")).

27. *See* L. TRIBE, *supra* note 26, at 724 (citing *Near v. Minnesota*, 283 U.S. 697, 713 (1931)); *see also* *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (per curiam) (Douglas, J., concurring); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). *Cf.* *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (prevention of prior restraint a "leading purpose," not chief purpose in the adoption of the first amendment).

In *Near v. Minnesota*, 283 U.S. 697 (1931), the seminal prior restraint decision, the defendant newspaper published articles charging that city officials were dishonest and had engaged in racketeering. These officials subsequently sought to enjoin further publication of the newspaper. Pursuant to a state statute which authorized the abatement as a public nuisance of publications deemed "malicious, scandalous or defamatory," the trial court perpetually enjoined the publishers from "producing, editing, publishing, circulating, having in their possession, selling or giving away" such publications. *Id.* at 706.

Under the statute, once an official brought the publisher to court, the burden rested on the publisher to prove that the charges in the paper were true and were "published with good motives and for justifiable ends." *Id.* at 713. If the publisher failed to meet this burden, then the newspaper was suppressed and further publication constituted contempt of court. *Id.* The government argued that the statute was not an unconstitutional prior restraint because the publisher could stop an injunction by meeting the burden. *Id.* at 721. The Court flatly responded:

If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer . . . , and required to produce proof of the truth of his publication, or of what he intended to publish and of his motive, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship.

Id. The Court ultimately found the state's statutory system unconstitutional as it was philosophically incompatible with the first amendment and constituted the "essence of censorship." *Id.* at 713.

The Court relied heavily on the historical notions of press freedom in formulating its ruling and adopted the view that the first amendment's guarantee of a free press was a mere extension of the English common law ban on prior restraints. *Id.* at 713-17. In recognizing "liberty of the press" as a constitutional right, the Court adopted English political theorist Sir William Blackstone's view that the "liberty of the press is . . . essential to the nature of a free state" and "consists in laying no *previous* restraints upon publications." *Id.* at 713 (quoting 4 W. BLACKSTONE, *COMMENTARIES* *151-52) (emphasis in original). Accordingly, freedom of

The freedom of the press, however, is not without limits. Despite the United States Supreme Court's regard of prior restraints as "the most serious and least tolerable infringement on First Amendment rights,"²⁸ it has nevertheless refused to apply an absolute ban on such restraints.²⁹ The Court allows the imposition of prior restraint in extreme circumstances,³⁰ such as obscenity³¹ or when national security is threatened.³²

the press would be destroyed if free persons were denied their "undoubted right to lay what sentiments [they] please before the public." *Id.* at 714 (quoting 4 W. BLACKSTONE, COMMENTARIES *151-52).

Most legal scholars also regard the English common law as the foundation for the American prior restraint doctrine. See, e.g., C. PRITCHETT, *THE AMERICAN CONSTITUTION* 333 (1977); L. TRIBE, *supra* note 26, at 724. According to Tribe, the First Congress' approval of the first amendment "was undoubtedly intended to prevent government's imposition of any system of prior restraints similar to the English licensing system under which nothing could be printed without the approval of the state or church authorities." L. TRIBE, *supra* note 26, at 724 (footnote omitted).

28. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

29. The first amendment commands that "Congress shall make no law . . . abridging the freedom . . . of the press . . ." See *supra* note 3. Thus, if the first amendment is interpreted as an absolute then any prior restraint on the press by Congress would be a violation of the first amendment and, thus, unconstitutional. See generally NOWAK, *supra* note 2, at 865-67; D. PEMBER, *supra* note 26, at 52-53. The majority of the Supreme Court has not adopted this absolutist interpretation, however, and has stated repeatedly that the first amendment guarantee is not absolute. See, *Near*, 283 U.S. at 708, 716; see also *Nebraska Press Ass'n*, 427 U.S. at 570; *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (per curiam) (Brennan, J., concurring); *id.* at 748 (Burger, C.J., dissenting). See generally K. DEVOL, *MASS MEDIA AND THE SUPREME COURT: THE LEGACY OF THE WARREN YEARS* 34 (1976); NOWAK, *supra* note 2, at 865-67; D. PEMBER, *supra* note 26, at 52-53.

30. *Near*, 283 U.S. at 716. The *Near* Court explained:

[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

Id. (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)) (citations and footnotes omitted).

31. See *Miller v. California*, 413 U.S. 15 (1973); see also *infra* note 371.

32. See *New York Times Co.*, 403 U.S. 713 (Pentagon Papers case). In the Pentagon Papers case, the federal government sought to enjoin the *New York Times* from publishing excerpts of a top secret Vietnam military policy statement. The government argued that the release of the papers might pose a threat to national security and should thus be restrained. Most of the justices agreed that publication *may* be harmful to the nation, but reasoned that "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result from the publication of material [which] 'could,' or 'might,' or 'may' prejudice the national interest in various ways." *Id.* at 725-26 (Brennan, J., concurring); see also *id.* at 731 (White, J., concurring).

But if the government attempts to impose a prior restraint, it must grant the publisher access to the courts to challenge the restraint.³³ Furthermore, the government must institute judicial proceedings against those who wish to express themselves to assure that there will be *prompt* judicial review of the censorship system.³⁴

When any prior restraint does come before the courts, it comes with a "heavy presumption against its constitutional validity"³⁵ and the government censor "carries [the] heavy burden of showing justification for the imposition of such a restraint."³⁶ While this burden amounts to an almost "blanket prohibition" against prior restraints,³⁷ the Court has not foreclosed the ability of the government or private parties to obtain sanctions against the press *subsequent* to the publication and distribution of certain categories of expression which are not protected by the first amendment³⁸ or which are protected but are outbalanced by some over-

33. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965). Summarizing *Freedman v. Maryland*, Professor Tribe stated that the following procedures are required by the first amendment:

- (1) The burden of proof must rest on the government to justify any restraint on free expression prior to its judicial review and on government to demonstrate the particular facts necessary to sustain a limitation on expressive behavior;
- (2) The administrator of a censorship of licensing scheme regulating speech activities must act within a specified brief period of time;
- (3) The administrator of a censorship of licensing scheme must be required, by statute or authoritative judicial construction, either to issue a license or to go to court to restrain unlicensed expressive acts; mere denial cannot create an enforceable legal bar to expressive activities;
- (4) No *ex parte* court order is valid if an adversary hearing on the question of interim relief is practicable;
- (5) "Any restraint imposed in advance of a final judicial determination on the merits must be . . . limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution;"
- (6) A scheme of censorship or licensing must assure a "prompt final judicial decision" reviewing any "interim and possibly erroneous denial of a license;"
- (7) If a prior restraint is ordered by a court, the state must either stay the order pending its appeal or provide immediate appellate review.

L. TRIBE, *supra* note 26, at 734-36 (citing and quoting in part *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1968)) (footnotes omitted).

34. See *supra* note 33.

35. *New York Times Co.*, 403 U.S. at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Prior restraints are presumptively unconstitutional because of the "chilling" effect that they have on the freedoms of speech and of the press. As the Court has noted, "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n*, 427 U.S. at 559 (footnote omitted). Accordingly, the Court has held that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). See also *infra* note 39.

36. *New York Times Co.*, 403 U.S. at 714 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

37. *Nebraska Press Ass'n*, 427 U.S. at 594 (Brennan, J., concurring).

38. See *Near*, 283 U.S. at 715, 717. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

riding governmental interest. The Supreme Court, in comparing prior restraint and subsequent punishment, determined that punishment after the publication of the speech is to be preferred over the extinguishment of speech before it is heard or read. The Court reasoned:

Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free wheeling censorship are formidable.³⁹

While the government may not prohibit expression outright, it may reasonably regulate the time, place or manner of expression occurring on public property if it does so without regard to the content of the expression.⁴⁰ To prevent governmental abuse of this regulatory power and to assure that a regulation is reasonable, the courts will independently determine if the regulation was drawn with "narrow specificity."⁴¹ In other words, the regulation must be the narrowest means of protecting the interests involved; it must not be overbroad,⁴² and it must not be so vague as to include protected speech within the prohibition or leave an individual without clear guidance as to the type of speech for which the speaker

39. *Southeastern Promotions*, 420 U.S. at 559 (citation omitted) (emphasis in original). The Supreme Court also noted:

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

Nebraska Press Ass'n, 427 U.S. at 589-90 (quoting T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970) (footnote omitted)).

40. NOWAK, *supra* note 2, at 977. See, e.g., *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) ("when the [school] board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of . . . the content of their speech").

41. *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)). The actual degree of specificity required is determined by the nature of the "forum" in which the speech in question is to take place. The Supreme Court recently identified three types of "forums": (1) a traditional public forum; (2) a limited public forum; and (3) a nonpublic forum. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). See *infra* notes 277-89 and accompanying text for a general discussion of the forum theory; see also *infra* notes 290-321 and accompanying text for a discussion of decisions categorizing public high school publications as limited public forums.

42. See *infra* note 458 and accompanying text.

or publisher can be punished.⁴³

Although the first amendment originally served only as a limitation on actions taken by the federal government, the Supreme Court determined that since the freedoms of expression and press are fundamental to the well-being of the American system of democracy, the first amendment should also limit the actions of state and local governments.⁴⁴ Thus, through the fourteenth amendment, citizens' first amendment guarantees of free speech and press are protected against infringement by state and local governments.⁴⁵ Therefore, state legislators, school board members, public school officials and teachers, as agents of the state or local government, should not be able to make or enforce any law abridging the first amendment free expression and press rights of the nation's young citizens.⁴⁶

43. See *Smith v. Goguen*, 415 U.S. 566 (1974). In *Goguen*, the defendant sewed a small United States flag to the seat of his pants and was convicted of violating a state flag-misuse statute. *Id.* at 568-70. The Court overturned the conviction on the grounds that the statute was vague. The Court explained that

[the void for vagueness doctrine] incorporates notions of fair notice or warning. . . . [I]t requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Id. at 572-73 (footnotes omitted).

44. In *Gitlow v. New York*, 268 U.S. 652 (1925), the United States Supreme Court declared that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

45. See *id.*

46. See *infra* text accompanying note 80. As a general rule, the United States Constitution only limits the power of the government in its dealings with individuals—the first amendment protections from government and its agents do not apply to actions by individuals acting in a purely private capacity. Therefore, students attending private schools do not enjoy the same federal constitutional protections from private school officials and teachers as do their public school counterparts. Generally speaking, private school officials may restrict student expression to any extent that they desire without violating the Constitution. See generally R. TRAGER & D. DICKERSON, *COLLEGE STUDENT PRESS LAW* 11-13 (1976); 1 J. RAPP, *EDUCATION LAW* § 3.05(4)(b)(iii)(A)(C) (1985).

In order for actions by purely private individuals or entities to be limited by the federal constitution, a court must find that the actor's conduct constituted governmental or "state action" of a type regulated by a constitutional provision. See *NOWAK, supra* note 2, at 497. See generally *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (private action may become state action when "to some significant extent the State in any of its manifestations has been found to have become involved").

In the private school context, the courts have rejected the argument that "private" action becomes "state" action when the school receives substantial public funding. *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982) (public funds constituted 90-99% of the private high school's

B. California Constitution, Article I, Section 2(a)

In addition to the protection afforded by the first amendment to the United States Constitution, California citizens' free expression and press rights are also protected by the California Constitution. Article I, section 2(a) of the California Constitution guarantees that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."⁴⁷

Like the first amendment, the purpose of article I, section 2(a) was to abolish governmental censorship⁴⁸ and to constitutionalize society's substantial interest in vigorously protecting the right to comment on issues of public concern.⁴⁹ Article I, section 2(a) is not, however, merely an

operating budget); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 546 (S.D.N.Y. 1968) (public funds constituted 40-45% of the private university's income).

The courts also have rejected the argument that private schools are state actors because they are performing a "public function," i.e., education. *Rendell-Baker*, 457 U.S. at 842; *Grossner*, 287 F. Supp. at 549. The Supreme Court in *Rendell-Baker* also was not persuaded by the fact that the school was heavily regulated and closely supervised by the state and provided a substitute for required public education. 457 U.S. at 848 (Marshall, J., dissenting).

While private school students may have difficulty bringing a federal constitutional claim, they may have a claim under the California Constitution. In *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979), the California Supreme Court extended the "state action" doctrine and held that a private business could not constitutionally discriminate against private parties in making its employment decisions. The court pointed out that "Article I, section 7, subdivision (a) of the California Constitution provides simply that: 'A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws.'" *Id.* at 468, 595 P.2d at 598, 156 Cal. Rptr. at 20 (emphasis added by court). The court noted that the "explicit language" of the fourteenth amendment to the United States Constitution operated as "restrictions on the actions of states." *Id.* (footnote omitted) (emphasis added). By contrast, the court found that "the California Constitutional provision contains no such explicit 'state action' requirement." *Id.* at 468, 595 P.2d at 598, 156 Cal. Rptr. at 20.

By a parity of reasoning, California's private school students may argue that private school administrators are constitutionally proscribed from interfering with the students' free expression and press rights since article I, § 2(a) provides that "[e]very person may freely speak, write and publish," and does not mention the state. See *infra* note 52 for a discussion of the various clauses of article I, § 2(a) and how they interact.

47. CAL. CONST. art. I, § 2, cl. a. See *supra* note 4.

48. *Dailey v. Superior Court*, 112 Cal. 94, 97, 44 P. 458, 459 (1896) (man on trial for murder sought and received from trial court an injunction prohibiting performance of play based upon facts of his case). The *Dailey* court relied on Blackstone, see *supra* note 27, and other legal commentators in overturning the injunction as an unconstitutional prior restraint. *Id.* at 98, 44 P. at 459-60.

49. *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975) ("In this state [the courts] have consistently viewed with great solicitude the right to uninhibited comment on public issues."). The California Supreme Court recognized a "profound national commitment" to the principle that debate on public issues be "uninhib-

analog to the first amendment.⁵⁰ Early California courts indicated that the drafters of the California Constitution could have adopted the federal standard,⁵¹ yet chose instead to create a standard "more definitive and inclusive than the First Amendment."⁵² This broad protection afforded by the California provision signifies the "*special dignity* accorded the rights of free speech and free press under the California Constitution."⁵³

The California Supreme Court has interpreted article I, section 2(a) of the California Constitution to mean that the "right of the citizen[s] to freely speak, write, and publish [their] sentiments is unlimited," and that citizens "shall have no censor over [them] to whom [they] must apply for permission to speak, write, or publish."⁵⁴ In other words, "[a]lthough

ited, robust, and wide-open.'" *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

50. *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, 154 Cal. App. 3d 1157, 1163, 201 Cal. Rptr. 837, 843 (1984). There, the court noted that "the California Constitution does not *mirror* the First Amendment either in form or content." *Id.* (emphasis in original). Instead, the court "draw[s] on both provisions for the analysis required in this state." *Id.* When the California courts undertake a state constitutional analysis, "[f]ederal principles are relevant but not conclusive so long as federal rights are protected." *Id.* (quoting *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 909, 592 P.2d 341, 346, 153 Cal. Rptr. 854, 863 (1979), *aff'd*, 447 U.S. 74 (1980)).

51. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 908, 592 P.2d 341, 346, 153 Cal. Rptr. 854, 859 (1979), *aff'd*, 447 U.S. 74 (1980).

52. *Id.* (quoting *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975)); *Pines v. Tomson*, 160 Cal. App. 3d 370, 394, 206 Cal. Rptr. 866, 881 (1984) (quoting *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975)); *see also Dailey*, 112 Cal. at 98, 44 P. at 460.

The court in *Pines v. Tomson* determined that the section is "comprised of three subparts: (1) an affirmation that all persons may freely speak, write and publish their 'sentiments,' (2) a provision allowing for liability once that right is abused and (3) a prohibition against laws which infringe freedom of speech or the press." 160 Cal. App. 3d at 393, 206 Cal. Rptr. at 880-81. The court concluded that "[o]nly the third subpart is paralleled, more or less in the federal constitution ('Congress shall make no law . . . abridging the freedom of speech or of the press . . .')." *Id.*, 206 Cal. Rptr. at 881.

According to the court the "first subpart of the section, '[e]very person may freely speak, write and publish his or her sentiments on all subjects,' is qualified only by the second subpart which provides for responsibility *after the fact* if that right is abused." *Id.* (emphasis in original).

53. *Laguna Publishing Co. v. Golden Rain Found.*, 131 Cal. App. 3d 816, 853, 182 Cal. Rptr. 813, 835 (1982) (emphasis in original).

54. *Pines*, 160 Cal. App. 3d at 394, 206 Cal. Rptr. at 881 (quoting *Dailey v. Superior Court*, 112 Cal. 94, 97, 44 P. 458, 459 (1896)). The *Dailey* court, in an often quoted passage, declared that:

The wording of [article I, section 2(a)] is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exer-

the section does not use the term 'prior restraint,' the plain meaning of the first sentence of article I, section 2(a) is that 'sentiments' are protected from any pre-publication sanctions, that is, from all prior restraints."⁵⁵ Therefore, unlike the first amendment, article I, section 2(a) creates an absolute ban on prior restraints.⁵⁶ If the rights are abused, however, the abuser will be held "accountable to the law for what he speaks, what he writes, and what he publishes," but only *after* the exercise of those rights.⁵⁷

The California Supreme Court has determined, however, that the California government may impose reasonable time, place and manner restrictions on expression occurring on state property.⁵⁸ As under the federal standard, the state or local regulations may not be vague or overbroad.⁵⁹

C. *Recognizing Students' Free Expression Rights in Public Schools*

Under a literal interpretation of the first amendment to the United States Constitution and article I, section 2(a) of the California Constitution, state legislators, school board members, public school officials and

cised there can be no responsibility. The purpose of this provision of the constitution was the *abolishment of censorship*, and for courts to act as censors is directly violative of that purpose. This provision of the constitution as to freedom of speech varies somewhat from that of the constitution of the United States, and also more or less from the provisions of many state constitutions treating of this question; but, if there is a material difference in the various provisions, it works no harm to this petitioner, for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted.

Dailey, 112 Cal. at 97-98, 44 P.2d at 459 (emphasis added).

55. *Pines*, 160 Cal. App. 3d at 393, 206 Cal. Rptr. at 881 (citing *Dailey v. Superior Court*, 112 Cal. 94, 97, 44 P. 457, 459 (1896)).

56. *See Dailey*, 112 Cal. at 97, 44 P. at 459.

57. *Pines*, 160 Cal. App. 3d at 394, 206 Cal. Rptr. at 881 (quoting *Dailey v. Superior Court*, 112 Cal. 94, 97, 44 P. 457, 459 (1896)).

58. *See Robins*, 23 Cal. 3d at 909, 592 P.2d at 347, 153 Cal. Rptr. at 860. In *Robins v. Pruneyard Shopping Center*, the private owners of a shopping center denied high school students use of the shopping center premises to solicit signatures for a petition to the state government. *Id.* at 902, 592 P.2d at 342, 153 Cal. Rptr. at 855. The students sought to enjoin that denial of access. *Id.* The California Supreme Court held that "the California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860. The court added that in so holding, they did not mean to "imply that those who wish to disseminate ideas have free rein." *Id.* Accordingly, the court held that private "property owners as well as government may regulate speech as to time, place, and manner." *Id.*

59. *Id.*; *see also supra* notes 40-44 and accompanying text. *See generally Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 231, 461 P.2d 375, 392, 82 Cal. Rptr. 175, 192 (1969) ("[c]ivil as well as criminal statutes must be sufficiently clear to give a fair warning of the conduct prohibited and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies.").

teachers may not exercise prior restraint over student publications.⁶⁰ The courts, however, did not apply any semblance of that idea for nearly a half century after their rejection of prior restraints of the adult press.⁶¹ During this period, students did not have any recognized constitutional rights, let alone free speech and press rights.⁶² Instead, it was generally accepted that school officials stood in the stead of parents, i.e., *in loco parentis*, and thus had parent-like authority to control all student conduct and expression.⁶³

1. Early developments

In 1915, a California court allowed a school board to expel a high school student for making disrespectful remarks about school authorities during a school assembly.⁶⁴ The student criticized the school administration for compelling the student body to hold its meetings, social events and class productions in an unsafe and potentially fire hazardous building.⁶⁵

There, the student's constitutional right to freely express himself was neither argued by the student nor discussed by the court. The court simply stated what was then the obvious: students in school, as in their families, have an "obligation of obedience to lawful commands, subordination and civil deportment, respect for the rights of others and fidelity to duty."⁶⁶ The court determined that these obligations were "inherent in any proper school system" and constituted the "common law of the school."⁶⁷ Relying on this "common law of the school" concept, the

60. See *infra* notes 242-43 and accompanying text; see also STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 8 (1985) [hereinafter LAW OF THE STUDENT PRESS]. The LAW OF THE STUDENT PRESS booklet is available from Quill and Scroll, School of Journalism and Mass Communication, University of Iowa, Iowa City, IA 52242.

61. See generally R. FREEMAN, PUBLIC EDUCATION IN THE UNITED STATES: FROM REVOLUTION TO REFORM 79 (1978).

62. *Id.* at 81.

63. The term "*in loco parentis*" means "[i]n the place of a parent, instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 708 (5th ed. 1979). See generally *In re Donaldson*, 292 Cal. App. 2d 509, 513, 75 Cal. Rptr. 220, 223 (1969). In validating the search of a student's locker, the court reasoned that the school stands *in loco parentis* and shares, in matters of discipline, the parent's right to use force in obtaining obedience. See *infra* notes 70-73 and accompanying text.

64. *Wooster v. Sunderland*, 27 Cal. App. 51, 148 P. 959 (1915).

65. *Id.* at 52-53, 148 P. at 959. The student also denounced the school officials' prohibition of an annual student event known as a "donkey fight." *Id.* at 53-54, 148 P. at 959. During his address to the student body, the student declared that it "was not fair of the board of education to forbid a donkey fight, in which the boys took their own chances of being injured, and force them to take chances of being injured in a fire trap." *Id.*

66. *Id.* at 55, 148 P. at 960.

67. *Id.*

court found that the student's conduct amounted to "insubordination to constituted authority."⁶⁸ Accordingly, the court held that the school officials had full authority to expel the student to assure that "the discipline of the school . . . be maintained unimpaired by anything that was said and done by the [student]."⁶⁹

The position adopted by this early California court, that school officials possess almost absolute authority over students, exemplifies the judicially created *in loco parentis* doctrine.⁷⁰ By rationalizing that during the school day school officials acted *in loco parentis*,⁷¹ the courts found constitutional nearly all school actions imposing regulations designed to protect the morals, welfare and safety of students⁷² or punishing students for misconduct, irrespective of the actions' connection to or impact on student expression.⁷³ Consequently, any attempt at that time to challenge the school's broad regulatory authority over students on the ground that students possessed constitutional rights of free expression would have been met by the courts with incredulity.

It was not until 1940 that students' rights were judicially recognized. In *West Virginia State Board of Education v. Barnette*,⁷⁴ the United States Supreme Court struck down a compulsory flag salute stat-

68. *Id.*

69. *Id.* at 56, 148 P. at 961.

70. See generally Mawdsley, *In Loco Parentis: A Balancing of Interests*, 61 ILL. B.J. 638 (1973); see also Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1455-56 (1977).

71. See *supra* note 63.

72. See generally W. WADLINGTON, C. WHITEBREAD & S. DAVIS, *CHILDREN IN THE LEGAL SYSTEM* 277-80 (1982).

73. *Id.* In recent decisions, the United States Supreme Court appears to be taking a more conservative view of students' rights and, in fact, regressing back to the days when the *in loco parentis* doctrine ruled. See, e.g., *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), discussed *infra* notes 376-95 and accompanying text. *But see* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In *T.L.O.*, the Court determined that school officials need only satisfy a "reasonableness" test instead of the stricter adult standard of "probable cause" to justify the search of a student's purse. *Id.* at 341-42. The Court nevertheless rejected the argument that "[t]eachers and school administrators . . . act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment." *Id.* at 336 (citations omitted). The Court instead held that "[s]uch reasoning is in tension with contemporary reality and the teachings of [the] Court." *Id.* The majority pointed out that the Court had "held school officials subject to the commands of the First Amendment [in *Tinker*] and the Due Process Clause of the Fourteenth Amendment [in *Goss v. Lopez*, 419 U.S. 565 (1975)]." *Id.* The Court further noted that "'the concept of parental delegation' as a source of school authority is not entirely 'consonant with the compulsory education laws.'" *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 666 (1977)). As such, the Court concluded that "[t]oday's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.*; see also *infra* note 382.

74. 319 U.S. 624 (1943).

ute and ruled that elementary and secondary public school students have the right under the first amendment to refuse to salute the flag and recite the Pledge of Allegiance.⁷⁵

The West Virginia statute regarded a student's refusal to salute the flag as an act of insubordination and treated it accordingly—with expulsion.⁷⁶ By this time the persuasiveness of the *in loco parentis* doctrine had waned somewhat and the courts were instead espousing a new theory of education: the “indoctrination” theory. Under this theory, a school's function is to “indoctrinate” school children with American values and morals.⁷⁷

The West Virginia State Board of Education argued that since the compulsory flag salute law was enacted “for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of American-

75. *Id.* at 642.

76. *Id.* at 626, 629.

77. The two rationales are not necessarily mutually exclusive. The Court has recently applied both theories. See *supra* note 73 for a recent discussion of the *in loco parentis* rationale. The indoctrination of American values rationale was recently espoused by the Court in Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159. In *Fraser*, the Supreme Court examined the role and purpose of the American public school system and determined that “‘public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.’” *Id.* at 3164 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)). The *Fraser* Court noted that the Court in *Ambach v. Norwick* made a similar determination in finding that “the objectives of public education [are] the ‘inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.’” *Id.* at 3164 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). See *infra* note 382 for the *Fraser* Court's discussion of the *in loco parentis* doctrine.

Similarly, in addressing the constitutionality of library book removals from public high schools, a plurality of the United States Supreme Court determined that a primary function of the school is to inculcate society's values and help children to become fully adjusted adults. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion). According to the Court, schools are responsible for both transmitting the necessary information and techniques of learning and instilling citizenship, discipline and acceptable morals. *Id.*

The different theories of education have been discussed extensively in connection with the controversy surrounding book removals from public school libraries. See F. DUTILE, *SEX, SCHOOLS AND THE LAW* 3-34, 71-89, 186-97 (1986), for a discussion of the theories of education and how the courts have applied them with regard to library censorship and student press censorship; see also Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1 (1984); Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know*, 57 J. URB. L. 523 (1980); Comment, *Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98 (1982); Comment, *What Will We Tell the Children? A Discussion of Current Judicial Opinion on the Scope of Ideas Acceptable for Presentation in Primary and Secondary Education*, 56 TUL. L. REV. 960 (1982).

ism, and increasing the knowledge of the organization and machinery of the government,' " the law was constitutional.⁷⁸ The Supreme Court disagreed, reasoning that compelling school children to participate in the flag ceremony infringed on the constitutional rights of students because it coerced them to accept and orally affirm political beliefs and ideas with which they might not agree.⁷⁹ The Court declared that the Constitution "protects the citizen against the State itself and all of its creatures—*Boards of Education not excepted.*"⁸⁰ The local boards of education have "important, delicate, and highly discretionary functions," but, according to the Court, "none that they may not perform within the limits of the Bill of Rights."⁸¹ The Court reasoned that since schools are "educating the young for citizenship" there is ample reason for "scrupulous protection" of the constitutional freedoms of the students so as not to "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁸²

The *Barnette* decision is significant not only because it is the first case in which the Supreme Court recognized that school children have first amendment rights, but also because it specifically overruled the earlier decision in *Minersville School District v. Gobitis*.⁸³ The *Gobitis* Court had erroneously held that the states and school officials had absolute authority to regulate student expression regarding the flag salute and Pledge of Allegiance.⁸⁴ That Court justified its "hands off" position by declaring that "the courtroom is not the arena for debating issues of educational policy," and, moreover, that the Court should not be the "school board for the country."⁸⁵

In overruling the *Gobitis* decision, the *Barnette* Court began eroding the notion that the states and school officials were immune from judicial scrutiny regarding the enactment and enforcement of educational policies and regulations. Setting the stage for the future development of students' rights, the Court proclaimed:

If there is any fixed star in our constellation, it is that no

78. *Barnette*, 319 U.S. at 625 (quoting W. VA. CODE § 1734 (Supp. 1941)).

79. *Id.* at 642.

80. *Id.* at 637, cited with approval in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507 (1969) (emphasis added).

81. *Id.*

82. *Id.*

83. 310 U.S. 586 (1939), *rev'd*, *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942). See Comment, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 DEPAUL L. REV. 387, 388-401 (1979), for a more detailed discussion of the development of students' constitutional rights.

84. *Id.* at 597-98.

85. *Id.* at 598.

official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁸⁶

2. The *Tinker* decision

Although the *Barnette* Court took the first step toward acknowledging students' first amendment rights, the Supreme Court did not specifically recognize students' free expression rights until 1969, when it decided *Tinker v. Des Moines Independent Community School District*.⁸⁷ The question before the Court was whether public school administrators could stifle on-campus student expression with which they disagreed or thought might be controversial.⁸⁸ The Court declared that school officials possessed no such power, as students have first amendment rights to express themselves peacefully on school grounds.⁸⁹

The *Tinker* action arose after school administrators punished junior and senior high school students for wearing black armbands to school in protest of the Vietnam war.⁹⁰ The principals in the Des Moines school district learned of the planned protest and adopted a policy prohibiting any student from wearing an armband to school. When the students refused to remove their armbands, they were suspended.⁹¹ The students then sued the school officials claiming a violation of their first amendment right to freely express themselves.⁹²

In ruling, the Supreme Court recognized that school officials had

86. *Barnette*, 319 U.S. at 642 (footnote omitted).

87. 393 U.S. 503 (1969).

88. *Id.* at 504-05, 507-08, 510.

89. *Id.* at 511.

90. *Id.* at 504.

91. *Id.*

92. *Id.* The students brought suit under 42 U.S.C. § 1983. They prayed for an injunction restraining the school officials and school district board of directors from disciplining the students. The students also sought nominal damages. *Id.*

The district court acknowledged that "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment." *Id.* at 505 (discussing the district court's findings). Nevertheless, the district court dismissed the complaint and upheld the constitutionality of the school officials' actions. *Id.* at 504-05. The district court reasoned that the officials' actions were justified because they were taken to prevent disturbance of the school discipline. *Id.* (discussing the district court's ruling).

On appeal, the court of appeals affirmed the decision of the district court without opinion. *Id.* at 505 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 383 F.2d 988 (8th Cir. 1967)).

generally been given comprehensive authority to prescribe and control conduct in the schools.⁹³ The Court nevertheless declared that this authority does not extend to administrative censorship of public school students' nondisruptive expression.⁹⁴ Students, according to the Court, possess first amendment rights and do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹⁵ The Court cautioned that although students' first amendment rights are to be "applied in light of the special characteristics of the school environment,"⁹⁶ the "state-operated schools may not be enclaves of totalitarianism" where students are "confined to the expression of those sentiments that are officially approved."⁹⁷

The Court rejected the lower court's findings that the school administrators' actions were justified since they were based on fears of disturbance from the wearing of the armbands.⁹⁸ Instead, the Court found that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."⁹⁹ A prohibition against student expression or conduct will not stand unless the administrators show that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" ¹⁰⁰

93. *Id.* at 507.

94. *Id.* at 511.

95. *Id.* at 506.

96. *Id.*

97. *Id.* at 511.

98. *Id.* at 508; *see supra* note 92. In explaining its rejection of the district court's holding, the Supreme Court noted that:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09 (citations omitted).

99. *Id.* at 508.

100. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). In *Burnside v. Byars*, the United States Court of Appeals for the Fifth Circuit ruled that high school authorities could not enforce a regulation forbidding students to wear "freedom buttons." 363 F.2d 744, 748-49 (5th Cir. 1966). The *Tinker* Court found it instructive that on the same day, the same Fifth Circuit panel reached the opposite result on different facts. The Fifth Circuit refused to enjoin enforcement of a similar regulation in another school where the students wearing freedom buttons harassed students who did not wear the buttons and thereby created a disturbance. *Tinker*, 393 U.S. at 505 n.1 (construing *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)).

In focusing on these two seemingly inconsistent holdings, the Supreme Court demon-

Although *Tinker* vitalized students' freedom to express themselves on campus, it left unanswered an important question: whether administrative censorship of student publications, i.e., prior review and prior restraint,¹⁰¹ is constitutional in the public school setting.¹⁰²

Since 1969, a number of lower federal courts have developed a significant body of student press law in trying to decide this issue and, in doing so, have applied and refined the *Tinker* Court's broad pronouncements to fit within this unsettled area of the law.¹⁰³ Most of the nation's public school officials and students are bound by this federal student press case law. The United States Court of Appeals for the Ninth Circuit has decided several student expression cases, but all were based on the first amendment;¹⁰⁴ none considered the California Constitution or Cali-

strated that whether certain expression is potentially disruptive will almost always depend on the environment or atmosphere of the school and not the specific language used by the students or their intent. In *Blackwell v. Issaquena County Board of Education*, the court upheld the ban after school authorities showed that the buttons were forced on unwilling students and thrown through school windows, thus creating a *substantial* disturbance. 363 F.2d 749, 751-53, 754 (5th Cir. 1966) (footnote omitted). On the other hand, in *Burnside*, the school officials did not adequately show a disturbance. Instead, their only evidence was "a showing of mild curiosity on the part of the other school children." *Burnside*, 363 F.2d at 748.

101. Prior restraint as it applies to the student press has been defined as any official interference with student expression before that expression actually occurs or is published. C. Fager, *Ownership and Control of the Student Press: A First Amendment Analysis* 15 (1976) (unpublished manuscript prepared for the Student Press Law Center). Accordingly, school regulations requiring or allowing official approval of student press copy before it is distributed constitute prior restraint. *Id.* Also, any administrative censorship *before* distribution constitutes a prior restraint. *Id.*

102. The United States Supreme Court will soon render the first decision regarding the extent to which school administrators may constitutionally control student expression in official student newspapers. See *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836). See *infra* note 299 for a discussion of the *Kuhlmeier* case.

103. For a discussion of these cases see L. INGELHART, *PRESS LAW AND PRESS FREEDOM FOR HIGH SCHOOL PUBLICATIONS: COURT CASES AND RELATED DECISIONS DISCUSSING FREE EXPRESSION GUARANTEES AND LIMITATIONS FOR HIGH SCHOOL STUDENTS AND JOURNALISTS* (1986); *LAW OF THE STUDENT PRESS*, *supra* note 60, at 10-54 (1985); Annotation, *Validity Under Federal Constitution, of Public School or State College Regulation of Student Newspapers, Magazines, or Other Publications—Federal Cases*, 16 A.L.R. FED. 182 (1973 & Supp. 1986).

104. When compared with the decisions of other federal courts (except the Seventh Circuit courts), see *supra* note 103, the Ninth Circuit and the district courts in the Ninth Circuit appear to have taken an approach somewhat more protective of students' first amendment rights. See *San Diego Comm. Against Registration and the Draft (CARD) v. Governing Bd.*, 790 F.2d 1471 (9th Cir. 1986) (school board violated first amendment when it excluded antidraft advertisement from official school publication after creating limited public forum by accepting military recruitment advertisements in publication); *Fraser v. Bethel School Dist.* No. 403, 755 F.2d 1356 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3159 (1986) (court of appeals held that school district violated first amendment when it suspended a student without showing that the student's use of sexual innuendo substantially disrupted educational process); *Nicholson v.*

ifornia Education Code section 48907.¹⁰⁵ Furthermore, the California courts have yet to develop sufficient student press law to meaningfully guide administrators, teachers and students.¹⁰⁶ But the public school districts, officials and students in California do have another source of guidance—the California Education Code.

III. THE CALIFORNIA SCHEME: LEGISLATING STUDENT PRESS FREEDOM

A. Legislative History

In theory, the *Tinker* Court's broad pronouncements of students' free expression rights also established free press rights for the nation's students, including California's students. In practice, however, few school districts in California altered their student publication policies to reflect what was then an expansive interpretation of *Tinker*.¹⁰⁷ School

Board of Educ. Torrance Unified School Dist., 682 F.2d 858 (9th Cir. 1982) (writers on high school newspaper do not have unfettered constitutional right to be free from administrative prepublication review—review of sensitive articles for *accuracy* rather than for possible censorship does not implicate first amendment rights); *Hatter v. Los Angeles City High School Dist.*, 452 F.2d 673 (9th Cir. 1971) (students have right to hand out leaflets and wear buttons urging fellow students to boycott school's annual chocolate drive as long as school not disrupted); *Pliscou v. Holtville Unified School Dist.*, 411 F. Supp. 842 (S.D. Cal. 1976) (prior restraint on publications distributed on school premises cannot stand in absence of any criteria to be followed by school authorities in determining whether to allow distribution and in absence of any safeguard providing for expeditious review of school authorities' decisions); *Poxon v. Board of Educ.*, 341 F. Supp. 256 (E.D. Cal. 1971) (school rule requiring prior submission of non-school sponsored publication for approval by school officials is unconstitutional prior restraint). *But see Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517 (C.D. Cal. 1969) (temporary suspension of high school students for use of profanity or vulgarity appearing in off-campus student newspaper published by them and distributed to students outside main campus gate did not violate suspended students' first amendment rights of freedom of speech).

105. Traditionally, students have brought suit in the federal courts to vindicate their rights under the first amendment. Hence, questions regarding the applicability of state law to free expression and press cases have been neither raised nor addressed. As a result, there may be some inconsistencies between what school officials and students may do under the federal law and what they may or may not do under California law. The Ninth Circuit decisions may, however, serve as a gauge to determine the extent to which student press rights in California will be recognized.

106. Like the federal courts, the California courts also have not addressed student press rights since the enactment of Education Code § 48907. *But see supra* note 102 & *infra* note 216.

107. Wiener, *The Right to Make Waves: Free Press in the High Schools*, NATION, Jan. 28, 1978, at 83; *School Board to Weigh 'Free Press' Censorship: Principal's Right to Dictate Contents of Newspaper at Stake*, L.A. Times, Apr. 8, 1974, pt. II, at 1, col. 2 [hereinafter *School Board*]. The *Times* article was written prior to the school board meeting at which the validity of administrative censorship of student publications was to be discussed. The article focused on the state of the student press in the Los Angeles public schools. According to a member of the Commission of Inquiry Into High School Journalism, *see supra* note 5, Los Angeles ap-

districts opposed to recognizing student press freedom argued that *Tinker* applied only to student expression occurring outside the classroom. Since the school-sponsored newspapers were produced inside the classroom, many educators believed that the in-class activity and its product—the newspaper—should be under the absolute control of school officials.¹⁰⁸ Although the *Tinker* decision did not seem to affect student press rights at the local level, the California courts were not long in adopting the *Tinker* rationale to reshape the California law governing student expression.

1. An invitation to legislate: *Rowe v. Campbell*
Union High School District

Prior to *Tinker*, California public school students' publications were regulated by sections 9012 and 9013 of the California Education Code. Those statutes banned "partisan" and "propoganda" publications on campuses.¹⁰⁹

peared to be "the only big-city district to balk at conforming to new court interpretations on newspaper censorship." See *School Board, supra*, at 1, cols. 2-3. For example, the *Times* writer reported that "[a]t one junior high school in Los Angeles, . . . the principal reads all the stories for the student newspaper and he 'censors two and passes one' as a matter of routine." *Id.* at col. 1. The writer also described the situation at an inner-city high school where approximately 10% of the female students were mothers. There, the principal banned articles on venereal disease, pregnancy and unwed motherhood. *Id.*

108. *School Board, supra* note 107, at 1, col. 2. According to the school board's legal counsel, principals should retain censorship powers because "as part of the school curriculum newspapers are subject to complete control by the board and its administrators." *Id.* This attitude is still evident with today's administrators. See *infra* notes 134 & 176.

109. Former California Education Code § 9012 provided:

Except with respect to junior colleges, no publication of a sectarian, partisan, or denominational character, shall be distributed, displayed, or used for sectarian, partisan, or denominational purposes on school premises, but such publications may be used in school library collections and for legitimate instructional purposes.

Publications of a sectarian, partisan, or denominational character may be issued and distributed for sectarian, partisan, or denominational purposes on the grounds and premises of a junior college; provided, that such activity is carried on in a manner which does not impede the orderly conduct of school classes and programs, and shall be subject to rules and regulations of the governing board. Such rules and regulations shall include a provision specifying that no publication which advocates the commission of an unlawful act may be issued or distributed under this section.

CAL. EDUC. CODE § 9012 (1969) (repealed 1971), reprinted in STATE OF CALIFORNIA, CALIFORNIA LAWS, STATUTES, ETC. 531 (1969).

Former California Education Code § 9013 provided:

No bulletin, circular, publication, or article of any character, whose purpose is to spread propaganda, shall be distributed or displayed to anyone, or suffered to be distributed or displayed to anyone, for propaganda purposes on the school premises during school hours or within one hour before the time of opening or within one hour after the time of closing of the school, but such bulletin, circular, publication, or

In *Rowe v. Campbell Union High School District*,¹¹⁰ a case decided shortly after *Tinker*, a three-judge court in the Northern District of California found sections 9012 and 9013 unconstitutional.¹¹¹ The constitutional challenge to the Education Code sections was brought by a public high school student, David Rowe, whose principal denied him permission to distribute on campus a student newspaper dealing with student activities, affairs and opinions.¹¹² The principal informed Rowe that state law—sections 9012 and 9013—as well as school policy,¹¹³ “prohibited on-campus distribution without prior approval of form and content by school officials.”¹¹⁴ Rowe was also informed that any attempt to dis-

article may be used in school library collections and for legitimate instructional purposes.

During school hours or within one hour before the time of opening or within one hour after the time of closing of the school, no bulletin, circular, publication, or article of any character, the purpose of which is to foster membership in or subscriptions to the funds of any organization not directly under the control of the school authorities, shall be distributed or displayed to anyone or suffered to be distributed or displayed to anyone on the school premises unless the organization is a nonpartisan organization, the purpose of such distribution or display is a nonpartisan purpose, and such distribution or display has been approved by the state board, or by the county board of education, or by the governing board of the school district in which the school is located.

The prohibition of this section shall not apply to bulletins or circulars concerning the meetings of organizations issued by any parent-teacher association or by any organization of parents formed for the purpose of cooperating with the school authorities in improving school conditions in the district.

The prohibitions of this section shall not apply with respect to junior colleges; provided that any such otherwise prohibited activity is carried on in a manner which does not impede the orderly conduct of school classes and programs, and such activities shall be subject to rules and regulations of the governing board. Such rules and regulations shall include a provision specifying that no material which advocates the commission of an unlawful act may be issued or distributed under this section.

CAL. EDUC. CODE § 9013 (1969) (repealed 1971), reprinted in STATE OF CALIFORNIA, CALIFORNIA LAWS, STATUTES, ETC. 532 (1969).

110. No. 51060 (N.D. Cal. filed Sept. 4, 1970). The court issued two opinions: (1) Memorandum and Order, filed September 4, 1970 [hereinafter *Rowe I*] and (2) Memorandum and Order Supplementing Memorandum and Order of September 4, 1970, filed February 4, 1971 [hereinafter *Rowe II*]. Although these orders significantly impacted the development of California student press law, neither opinion was certified for publication.

111. *Rowe I*, No. 51060, slip op. at 10.

112. *Id.* at 1-2. The opinion did not include facts specifying the content of the Rowe's newspaper, *The Free Press*.

113. The Campbell Union High School District's provision provided in pertinent part:

The distribution or publication of printed matter in any of the schools of this District is hereby prohibited except in such instances where the person or groups preparing, distributing or publishing the same has secured the written authority of this Board so to do and has complied with Education Code Sections 16551, et seq., requiring identification and full disclosure of the nature or capacity of such person or group desiring to distribute or publish the same.

Campbell Union High School Dist. Bd. Res. 170-R, adopted Mar. 27, 1962, quoted in *Rowe I*, No. 51060, slip op. at 15 n.2.

114. *Rowe I*, No. 51060, slip op. at 2.

tribute the paper in contravention of those rules, would result in suspension or other discipline.¹¹⁵ Rowe filed an action against the school officials and won a temporary restraining order preventing the officials from "interfering with the distribution of [Rowe's] newspaper and from disciplining [him] or others for such distribution."¹¹⁶

In the summary judgment proceeding that followed, Rowe alleged that sections 9012 and 9013 were unconstitutionally overbroad because they prohibited protected as well as unprotected speech.¹¹⁷ He also argued that the use of the terms "propoganda" and "partisan" rendered the sections unconstitutionally vague.¹¹⁸

In reviewing the code sections, the *Rowe* court pointed out that "regulations which limit or prohibit speech must be drawn as narrowly as possible so that the legitimate governmental object may be achieved with the minimum burden on speech."¹¹⁹ The court added that this "elementary principle of constitutional law" applied to students.¹²⁰ Relying on *Tinker*,¹²¹ the court concluded that sections 9012 and 9013 were impermissibly overbroad since they prohibited expression whether or not it created a disruption of legitimate educational activities.¹²² The court noted that under sections 9012 and 9013, "so innocent and innocuous a

115. *Id.*

116. *Id.*

117. *Id.* at 3.

118. *Id.*

119. *Id.* (footnote omitted); see also *supra* note 41 and accompanying text.

120. *Rowe I*, No. 51060, slip op. at 3.

121. The *Rowe* court delineated the basic principles set forth by the Supreme Court in *Tinker* as follows:

1. Students are "persons" within the meaning of the Constitution and are possessed of fundamental rights which are not lost in school.
2. Students are not the "closed circuit" recipients [sic] of only that which the state wishes to communicate; they may not be confined to officially-approved sentiments.
3. Student freedom of speech includes personal intercommunication of controversial ideas.
4. School officials have the burden of showing constitutionally-valid justifications for limitations on student speech.
5. A generalized fear or apprehension of a disturbance is not a constitutionally adequate justification. A desire to avoid the expression of controversial or unpopular ideas or the discomfort and unpleasantness which accompany them is not a constitutionally adequate justification.
6. School officials must demonstrate that the prohibited speech would have actually caused substantial and material disruption of, or interference [sic] with, classwork, or with the requirements of discipline appropriate to the operation of the school. Reasonable time, place and manner regulations regarding expression of ideas orally or in writing are permissible, as they are in any other public institution or facility.

Id. at 3-4 (summarizing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969)). The court also referred to numerous other lower federal court decisions which elaborated on and developed these principles in the student press setting. See *id.* at 4, 15 n.4.

122. *Id.* at 5-6.

document as a leaflet explaining one's First Amendment rights or urging students to write their Congressmen on some current issue would be, and indeed have been, prohibited."¹²³

In response to the overbreadth argument, the school district argued that the statutes were valid as they were merely reasonable time, place and manner regulations on student speech.¹²⁴ The court rejected this argument, finding first that section 9012 was a "complete *prohibition* rather than a regulatory provision."¹²⁵ Although section 9013 was not on its face a total prohibition, the court reasoned that it was a prohibition in effect because it excluded the time period when the "vast majority of the desired [student] audience" was present and available for receiving the communication.¹²⁶ Consequently, the court characterized sections 9012 and 9013 as unreasonable time, place and manner restrictions.¹²⁷

The school district also argued that the students' immaturity justified the restrictions of the statutes.¹²⁸ The court concluded that "while immaturity is a valid reason for certain specific, well defined limitations on high school students' rights, it cannot justify the comprehensive restrictions of [sections] 9012-13."¹²⁹ Moreover, the court found unpersuasive the district's *in loco parentis* argument finding instead that "[i]n the area of political and social opinions . . . the authority of school boards is limited."¹³⁰

Finally, the court dismissed the school district's arguments that the

123. *Id.* (footnote omitted). The court further noted that "[c]ampaign literature of the established political parties would also violate the statutes. Even an article decrying environmental pollution might be considered 'propoganda' or 'partisan' and therefore not permissible." *Id.*

124. *Id.* at 5; see also *supra* note 40 and accompanying text.

125. *Rowe I*, No. 51060, slip op. at 5 (emphasis in original).

126. *Id.* at 6. The court also pointed out that "[t]he First Amendment includes the right to receive as well as to disseminate information." *Id.* (citing *Lamont v. Postmaster Gen.*, 381 U.S. 310 (1965)). The court noted that "[i]t is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas. The rationale of *Tinker* carries beyond the facts in that case." *Id.* (quoting *Zucker v. Panitz*, 299 F. Supp. 102, 105 n.5 (S.D.N.Y. 1969)). Furthermore, the court was unpersuaded by the argument that "the existence of an alternative forum or mode of expression permits suppression of the chosen one." *Id.* (citing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969); *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967)).

127. *Id.*

128. *Id.*

129. *Id.* at 7.

130. *Id.* (footnote omitted). The school district also argued that the prohibitions in the statutes were necessary because the student audience was a "captive audience." *Id.* at 7. The court did not find merit in this argument because students were not "forced to take any of the disputed publications." *Id.* Furthermore, the court stated that if a student attempted to force material on another student, he could be punished. *Id.*

“disruptions” of Rowe’s newspapers justified the sections’ prohibitions.¹³¹ The court indicated that disruption arguments could be divided into two categories: “intellectual” and “physical” disruption.¹³² The school district’s interest in freedom from intellectual disruption was based on the belief that students are entitled to an “unimpaired” education.¹³³ Thus, “the administration should have control over virtually all of a student’s intellectual experiences during the school hours in order to insure the type of education it deems best.”¹³⁴ The school district argued that the “disagreeable and sometimes impolite contents of the student publications not authorized by the school officials ‘disrupt’ this controlled situation.”¹³⁵ Applying the *Tinker* “substantial disruption” standard,¹³⁶ the court found this concept of disruption unacceptable.¹³⁷

The court also rejected the other branch of the intellectual disruption argument which theorized that the distribution of student newspapers “critical of the faculty and administration . . . [would] impair the effectiveness of the criticized parties by reducing students’ respect and confidence in them and undermining their authority.”¹³⁸ The court ruled that “the problems presented by such criticism do not justify the total

131. *Id.* at 7-9.

132. *Id.* at 7-8.

133. *Id.* at 8.

134. *Id.* In his affidavit in the *Rowe* matter, then State Superintendent of Schools Max Rafferty stated:

Since the most important teaching aid is the printed word, it follows also that the school must have full control of that same printed word whenever and wherever it wanders into the confines of the school itself . . . [.] A school cannot live in an internal environment which it does not itself govern, any more than a court can so live It would be a sorry irony indeed if the school were compelled to use its own immemorial weapon against the powers of ignorance to cut its own throat If a school is not to control all publications within its walls and on its grounds, then the lid is indeed off. Make way for stag films, filthy postcards, and the *Memoirs of the Marquis de Sade*.

Affidavit of State Superintendent Max Rafferty, quoted in Weiner, *Little-Known California Case Influences Freedom of All High School Publications*, *SCHOOL PRESS REV.*, Dec. 1972, at 3.

135. *Rowe I*, No. 51060, slip op. at 8. (footnote omitted).

136. See *supra* note 100 and accompanying text.

137. *Rowe I*, No. 51060, slip op. at 8. The court indicated that “[t]he fact that students may think about the newspapers during class is not a ‘disruption’ justifying restriction.” *Id.* (emphasis in original). The court recognized that “teachers unquestionably have the right to control class discussion and to discipline those who persist in talking about other things or refuse to respond to questions regarding the subject matter of the discussion.” *Id.* at 8-9. Accordingly, the court found that “[t]hese are the narrower, more specific type of restrictions on student communication that are proper and do relate to actual disruption of classwork or discipline.” *Id.* at 9.

138. *Id.*

prohibition of [such criticism]."¹³⁹

With regard to the physical disruptions alleged, the court required that such disruptions be subject to narrower and more particular regulation than that found in sections 9012 and 9013.¹⁴⁰ As for areas which the school could control, the court suggested that littering could be prohibited and punished and the time, place and manner of newspaper distribution could be regulated.¹⁴¹ The court also added that disruption caused by the advocacy of the violation of school rules "may be prohibited, and like obscenity, may be part of a prior restraint scheme."¹⁴²

Although the court believed the primary infirmity of the statutes to be overbreadth, it also found that the statutes were "vague in the sense that their terms [were] impermissibly unclear."¹⁴³ The court stated that "[e]ven assuming, as we do not, that the school authorities could ban 'propoganda' or other 'partisan' materials, a person would be acting at his peril in trying to ascertain what is prohibited."¹⁴⁴ This lack of clarity was especially impermissible because suspension or expulsion could result from violation of the statutes.¹⁴⁵ The court invalidated the school regulation¹⁴⁶ as well, finding it unconstitutionally overbroad¹⁴⁷ and unable to meet the substantial disruption standard. It declined to reach the issue of whether the regulation was an unconstitutional prior restraint.¹⁴⁸

In concluding, the court reemphasized that, although it voided sections 9012 and 9013, it did not preclude the school district from "enacting and enforcing reasonable time, place and manner regulations or from controlling certain aspects of the contents of student publications."¹⁴⁹ Although the court noted that the United States Supreme Court views prior restraints with disfavor and requires certain procedural safeguards when such restraints have been permitted,¹⁵⁰ it indicated that "a system

139. *Id.*

140. *Id.*

141. *Id.* (footnote omitted).

142. *Id.* (footnote omitted).

143. *Id.* at 10 (footnote omitted).

144. *Id.*

145. *Id.* (footnote omitted). The court noted that "[d]isciplinary rules do not have to be drawn with the clarity required of criminal statutes. However, since serious penalties can result from their enforcement, they must be sufficiently specific to reasonably warn students of what is prohibited." *Id.* at 18 n.20 (citations omitted).

146. *See supra* note 113.

147. *Rowe I*, No. 51060, slip op. at 11. The court stated that the language used in the regulation referring to "[a]ll printed materials" was overbroad as such materials "certainly could not be deemed likely to cause types of disruption which can be prohibited." *Id.*

148. *Id.*

149. *Id.* at 12.

150. *Id.* (footnote omitted); *see also supra* note 33 and accompanying text.

of prior review may be constitutionally permissible in the secondary school setting.¹⁵¹ The court qualified its statement, however, by stressing that "student communications cannot be prohibited because the school officials disagree with what is being said or because they think students should only be exposed to ideas which they approve."¹⁵² The court then gave the school district ninety days to submit a proposed regulation concerning the distribution and dissemination of printed materials on school grounds.¹⁵³

Although the Campbell school board adopted new regulations, it still imposed extensive prior restraints on students who sought to distribute literature on campus.¹⁵⁴ The same three-judge panel found the proposed prior restraint system unconstitutional as "too encompassing and potentially devastating to withstand constitutional scrutiny."¹⁵⁵

In reviewing the proposed system, the court focused on the system's lack of procedural safeguards¹⁵⁶ and noted that "[w]hen a student publisher's interests are not economic, but political or social, and the effectiveness of the item may be severely diminished by even a brief delay in its distribution, it may be that even one day's restraint is an impermissible burden."¹⁵⁷ Hence, the *Rowe* court, apparently after reassessing its previous suggestions, prophesied that "[i]t may be that *no* system of prior restraint in the area of student publications can be devised which imposes a restraint sufficiently short-lived and procedurally protected to be constitutional."¹⁵⁸

The court did suggest, however, that "[w]hat may well be best—although perhaps not constitutionally compelled—is a simple prohibition against the distribution of certain categories of material."¹⁵⁹ According

151. *Rowe I*, No. 51060, slip op. at 11-12 (footnote omitted).

152. *Id.* at 11. The court added that:

Rules which appear arbitrary to students detract from the credibility of attempts to instill rationality and individualism in them. Adherence to a rule which has not been or cannot be justified may provoke or contribute to disorder in the schools.

. . . .
The societal interest in allowing a free flow of information, allowing a person to develop both socially and intellectually through expression, allowing dissent both as a political safety valve and as a means of exposing error are applicable to children as well as adults.

Id. (quoting Note, *Public Secondary Education: Judicial Protection of Student Individuality*, 42 S. CAL. L. REV. 126, 130-32 (1969)).

153. *Id.* at 12-13 (footnote omitted).

154. *Rowe II*, No. 51060, slip op. at 1-2.

155. *Id.*

156. *Id.* at 2.

157. *Id.* at 3 n.1.

158. *Id.* at 2 (emphasis added).

159. *Id.*

to the court, the prohibition "could be coupled with the prior submission of the material to school authorities for informational purposes only, and with reasonable time, place, and manner regulations."¹⁶⁰ This "straight-forward system," the court believed, "would allow the unfettered distribution of student publications except in those instances where the content of the material is outside the protections of the First Amendment."¹⁶¹ In those instances, the court suggested that "school authorities could prevent distribution by prior court order."¹⁶²

The court added that school officials could seize objectionable material without a court order; however, if they did so, they would be acting "at their peril."¹⁶³ The court further suggested that in situations "where the content is unobjectionable but there is an infraction of reasonable regulations controlling the manner of distribution, the student could . . . be disciplined in the same manner as for infractions of any duly adopted school regulation."¹⁶⁴ After setting forth what it considered to be the constitutional parameters of student press regulation, the court invited the State Board of Education to promulgate statewide guidelines in this area.¹⁶⁵

160. *Id.*

161. *Id.* As examples of proper standards, the court suggested "obscenity, criminal libel, advocacy of law-breaking or inciting to violence." *Id.* at 3.

162. *Id.* at 2 (footnote omitted).

163. *Id.* at 4 n.2.

164. *Id.* at 2.

165. In its order dated September 4, 1970, the *Rowe* court requested that the State Department of Education and the State Board of Education "promulgate guidelines for the distribution of printed material on high school campuses which would be in the form of recommendations to all of the school districts within the State and that these guidelines be submitted to this Court for approval . . ." *Rowe I*, No. 51060, slip op. at 3. The *Rowe II* court repeated this request. *Rowe II*, No. 51060, slip op. at 3.

On March 11, 1971, following the *Rowe* decisions, the State Superintendent of Public Instruction submitted a draft of student publication guidelines to a committee of the State Board of Education. The State Board recommended that those guidelines be presented to the *Rowe* court for its approval. On June 23, following a hearing on the matter, the court approved the guidelines as amended by the court. See *Bright v. Los Angeles Unified School Dist.*, 18 Cal. 3d 450, 460, 556 P.2d 1090, 1096, 134 Cal. Rptr. 639, 645 (1976).

In the meantime, the California Legislature was preparing to enact § 10611 of the California Education Code (Senate Bill No. 890). See *infra* note 166 and accompanying text. The State Superintendent of Public Instruction wrote a memorandum to the State Board of Education urging adoption of the guidelines proposed by the State Superintendent. The Superintendent believed that adoption of the guidelines "would indicate to [local school] districts the limits of their authority [pursuant to Senate Bill No. 890], to the extent that overly restrictive regulations, if tested in court would fail. . . . The guidelines presented to the Board will help the schools to comply with the mandates of Senate Bill 890." *Bright*, 18 Cal. 3d at 460, 556 P.2d at 1096, 134 Cal. Rptr. at 645 (quoting Memorandum from State Superintendent of Public Instruction to State Board of Education (Sept. 24, 1971)).

The State Board of Education adopted the guidelines on October 15, 1971. The Board's

2. The reply: Education Code section 10611

In 1971, the California Legislature responded to the *Rowe* decision and repealed sections 9012 and 9013 of the Education Code. The legislature then enacted Education Code section 10611.¹⁶⁶ Section 10611, entitled Student Exercise of Free Expression, provided that “students of the

resolution uncompromisingly indicated that the school district’s authority stopped short of any form of prior restraint. *Id.* The guidelines provided in pertinent part:

The 18 year old has recently been granted the right to vote in national, state and local elections.

The preparation of the newly enfranchised youth to exercise their rights and duties as citizens in a democratic society includes the inter-communication of ideas, and the need for a forum to express such ideas.

This process of inquiry includes an expansion of student rights regarding circulation of petitions, circulars, newspapers, and other printed matter, the use of bulletin boards, and the wearing of insignia.

Schools should encourage students to express opinions, to take stands, to support causes, and to present ideas. Students should realize that such rights are subject to reasonable time, place and manner restrictions and to certain prohibitions. *There should be no prior censorship or requirements of approval of the contents or wording of the printed materials related to student expression on campus.*

The following guidelines are intended to aid each school or school district in drafting its own set of guidelines for student expression on the campus of the school wherein the students attend as pupils in the California public school system. The guidelines are not intended for the control of persons who are not students of the school wherein such guidelines are implemented.

CALIFORNIA STATE BD. OF EDUC., GUIDELINES FOR STUDENT EXPRESSION ON CAMPUS (1971) (emphasis added), *reprinted in Bright*, 18 Cal. 3d at 461 n.7, 556 P.2d at 1097 n.7, 134 Cal. Rptr. at 646 n.7.

The Guidelines provided as follows:

CIRCULATION OF PETITIONS, CIRCULARS, NEWSPAPERS AND
OTHER PRINTED MATTER.

Students should be allowed to distribute petitions, circulars, leaflets, newspapers, and other printed matter. . . .

. . . .

PROHIBITED MATERIAL

1. Material which is obscene to minors according to current legal definitions.
2. Material which is libelous according to current legal definitions.
3. Material which incites students so as to create a clear and present danger of the imminent commission of unlawful acts or of the substantial disruption of the orderly operation of the school.
4. Material which expresses or advocates racial, ethnic, or religious prejudice so as to create a clear and present danger of imminent commission of unlawful acts or of the substantial disruption of the orderly operation of the school.
5. Material which is distributed in violation of the time, place, and manner requirements.

Id.

166. In construing Education Code § 10611, the California Supreme Court remarked that: Insofar as [§ 10611] restricted [students’] right of free expression it followed the suggestion by the *Rowe* court to a remarkable degree: it contained a simple prohibition against the distribution of certain categories of material, made no specific provision for any system of prior restraint, and authorized the enactment of reasonable time, place and manner regulations. To an even more remarkable degree the language of [§ 10611] paralleled the guidelines drawn up by the State Superintendent of Public Instruction. . . . [T]he guidelines specifically excluded any form of prior restraint.

public schools have the right to exercise free expression."¹⁶⁷

Section 10611 authorized the distribution of literature, use of bulle-

Bright, 18 Cal. 3d at 461, 556 P.2d at 1096, 134 Cal. Rptr. at 645-46 (footnote omitted). See *supra* note 165 for the guidelines referred to by the *Bright* court.

The actual grassroots beginnings of California's legislation began in the Los Angeles Unified School District with a handful of high school journalism teachers. Wiener, *supra* note 107, at 83. In 1973, the Los Angeles City Schools published its "Course of Study for Advanced Journalism" and advised that "[t]he concept of freedom of the press does not apply to high school newspapers." *Id.* (quoting LOS ANGELES CITY SCHOOLS, COURSE OF STUDY FOR ADVANCED JOURNALISM (1973)). When the Los Angeles Journalism Teachers Association (LAJTA) applied to the school board for clarification of that statement, they were advised that the handbook was being revised. The Student Rights and Responsibilities Handbook was revised; however, it still provided that "[a]lthough a high degree of freedom is extended to the school newspaper staff, advisers and administrators retain the authority to censor when necessary. . . . In occasionally exercising censorship, the adviser is protecting the student's privilege to produce a newspaper." Wiener, *supra* note 134, at 4 (quoting LOS ANGELES CITY SCHOOLS, STUDENT RIGHTS AND RESPONSIBILITIES); see also J. NELSON, *supra* note 5, at 96. Since the handbook provided nothing further to explain what constituted "when necessary," administrators "retained a free hand to edit as [they] saw fit." Wiener, *supra* note 107, at 83.

In November 1973, representatives from the LAJTA spoke before the Los Angeles school board and requested that they revise the existing board rules to conform with *Tinker, Rowe* and the newly enacted Education Code § 10611. *Id.* The board dismissed the request and instructed the LAJTA representatives to gather more information about the subject. A Los Angeles Times reporter at the board meeting publicized this presentation and soon other media focused on the issue, bringing it to the public forefront. See, e.g., *School Board*, *supra* note 107; A. Schreiber, *Free Press With Censorship: Nonsense* (KFWB Radio 98 editorial, Apr. 10, 1974) ("Student reporters may not always express their conclusions as soundly as we'd like, they're learning, and we should try to understand. What we don't want is self-serving censorship because that's contrary to everything we believe.") (copy on file at *Loyola of Los Angeles Law Review*); see also *Local Teacher Fights For Student Newspaper Rights*, *Canoga Park Chronicle*, Apr. 17, 1974, p. 1, col. 2.

Three "long, stormy" hearings were held before the school board committees. Wiener, *supra* note 107, at 84. Finally, in April 1974, a motion to grant free press rights to student journalists was made and debated before the board of education, an overflow audience and a crowd of television cameras and radio microphones. *Id.* The motion was defeated, five to two. The board subsequently adopted Board Rule 1275 on April 22, 1974. Board Rule 1275 is set forth in full, *infra* note 191.

167. CAL. EDUC. CODE § 10611 (West 1972) (repealed 1976). Former California Education Code § 10611 provided:

Students of the public schools have the right to exercise free expression including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, and other insignia, except that expression which is obscene, libelous, or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school, shall be prohibited.

Each governing board of a school district and each county superintendent of schools shall adopt rules and regulations relating to the exercise of free expression by students upon the premises of each school within their respective jurisdictions, which shall include reasonable provisions for the time, place, and manner of conducting such activities.

Id. The legislature also enacted § 25425.5 which governs community colleges. Section 25425.5 (now codified as § 76120) was identical to § 10611 in all respects except that such

tin boards and the wearing of buttons and badges with restrictions only on material that was obscene, libelous or slanderous "according to current legal standards" or which "so incite[d] students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school."¹⁶⁸ Additionally, the statute required each school district governing board and each county superintendent of schools to adopt rules and regulations to govern the exercise of free expression by students on school premises of each school. These regulations were to contain "reasonable provisions for the time, place, and manner of conducting [student expression]."¹⁶⁹ Section 10611 did not, however, provide any penalty for the failure of the school districts or boards of education to enact such regulations. Although the enactment of section 10611 enhanced the protection of student expression in general, the statute quickly became the target of controversy since it contained no specific reference to official student newspapers.¹⁷⁰

In reaction to this controversy, the California Legislative Counsel issued an opinion in 1974, and announced its conclusion that the first amendment and section 10611 protected student expression in official student newspapers.¹⁷¹ The Legislative Counsel determined that school administrators could not exclude material from school publications unless it was obscene, libelous or would substantially disrupt school

phrases as "pupils" and "school district" in § 10611 were replaced by "students" and "community college district" in § 25425.5.

Under the California Constitution, the legislature does not have authority to enact rules governing the University of California. The University of California Board of Regents is autonomous and propounds its own rules. Apparently, since there is no state college equivalent to § 10611, the legislature felt that a law comparable to § 10611 was not needed for California's nineteen state colleges and universities, which are within the legislature's purview. W. Overbeck, *Protecting Student Press Freedom By State Law: The Experience in California 5* (1977) (unpublished manuscript presented to the Secondary School Division, Association for Education in Journalism).

168. CAL. EDUC. CODE § 10611.

169. *Id.*

170. See *infra* notes 205-06 and accompanying text.

171. See W. Overbeck, *supra* note 167, at 6. See generally W. OVERBECK & R. PULLEN, *MASS MEDIA LAW IN CALIFORNIA* 176 (1979). The Legislative Counsel opined:

[W]hen a school district acts as the publisher of a high school newspaper, its power to control the content of such a publication is necessarily more limited than would be the case if a private publisher was involved. Once the school district establishes a student activity which involves elements of free expression, any control or censorship which exists must be consistent with First Amendment constitutional guarantees.

Op. Off. Legis. Counsel (Mar. 20, 1974), reprinted in Overbeck, *supra* note 167, at 6. See *infra* notes 272-74 and accompanying text & notes 298-306 and accompanying text for a discussion of whether the school or school district is in fact the "publisher" of an official school newspaper.

activities.¹⁷²

Despite the Legislative Counsel's opinion, many school systems ignored section 10611's provisions regarding the regulation of student expression in student publications.¹⁷³ For example, the Los Angeles Unified School District, the largest school district in California,¹⁷⁴ maintained its policy that "the principle of freedom of the press does not apply to high school newspapers."¹⁷⁵ When confronted with the Legislative Counsel's opinion, the Los Angeles Unified School District's lawyers simply stated that they disagreed.¹⁷⁶ Hence, the Los Angeles school district maintained its policy of granting school principals broad power to censor student publications.¹⁷⁷

The question of whether the provisions of section 10611 protected student expression in student publications from administrative censorship was soon addressed by the California Supreme Court. In *Bright v. Los Angeles Unified School District*,¹⁷⁸ the California Supreme Court interpreted section 10611 and determined that the legislature did not intend the statute to "confer upon local school districts *carte blanche* to enact regulations embodying constitutionally suspect prior restraint systems."¹⁷⁹ Rather, section 10611 only permitted the *subsequent punishment* of students distributing literature containing the categories of

172. The Legislative Counsel directed:

While the governing board of a school district is given certain broad powers to control the editorial and advertising content of a high school newspaper published as part of a course of study in journalism, . . . it is our opinion that material cannot be excluded from such publications unless it is obscene or libelous or would substantially disrupt or materially interfere with school activities.

Op. Off. Legis. Counsel (Mar. 20, 1974), reprinted in Overbeck, *supra* note 167, at 6.

173. W. OVERBECK & R. PULLEN, *supra* note 171, at 176; see Letwin, *supra* note 15, at 160-65, for a discussion of school district survey results following the enactment of Education Code § 10611.

174. The Los Angeles Unified School District is still the largest school district in California and in 1984, had an enrollment of approximately 556,865 students. See CAL. STATE DEP'T OF EDUC., CALIFORNIA PUBLIC SCHOOL DIRECTORY 207 (1985).

175. Wiener, *supra* note 107, at 83 (quoting Los Angeles City Schools' Course of Study for Advanced Journalism (1973)); see also W. OVERBECK & R. PULLEN, *supra* note 171, at 176.

176. W. OVERBECK & R. PULLEN, *supra* note 171, at 176; see also *School Board*, *supra* note 107. The *Los Angeles Times* reported that the Los Angeles school board's legal counsel, Ron Apperson, "simply disagrees with [the legislative counsel's] opinion." *Id.* Paraphrasing Apperson's position, the *Times* stated that he "insisted that if newspapers are considered a part of the instructional program . . . then the law gives principals authority to control them." *Id.* Apperson emphasized that "if anything goes in (the newspapers) that is offensive to the community, it is the representative of the board (principal) who gets the phone call, not the teacher or the (student) writer." *Id.* (quoting Ron Apperson) (parenthetical additions in original).

177. See *supra* note 166.

178. 18 Cal. 3d 450, 556 P.2d 1090, 134 Cal. Rptr. 639 (1976).

179. *Id.* at 464, 556 P.2d at 1099, 134 Cal. Rptr. at 648.

expression delineated in the statute.¹⁸⁰

The *Bright* case arose in the Los Angeles Unified School District in 1974, when University High School officials refused sophomore Sushannah Bright permission to distribute on campus her newspaper, the *Red Tide*.¹⁸¹ The newspaper contained an article entitled "Students Fight Rules at Locke," which concerned the Locke High School dress code.¹⁸² A portion of the article appeared on the newspaper's front page under the subheading "[P]rincipal Lies." The article contained claims that the principal at Locke High School had lied in explaining how that school's new dress code had been adopted.¹⁸³

As required by the school district's regulations,¹⁸⁴ Ms. Bright submitted her newspaper to the school administrators for their approval prior to the distribution of the newspaper on campus. The administrators postponed distribution as they were concerned that the subtitle and

180. *Id.*

181. The *Red Tide* was intended for distribution to high school students but was produced independently of the public school system, thus making the newspaper an "unofficial" or "underground" student publication. See *supra* note 15.

182. *Bright*, 18 Cal. 3d at 453, 556 P.2d at 1091-92, 134 Cal. Rptr. at 640-41.

183. *Id.* at 453-54, 556 P.2d at 1092, 134 Cal. Rptr. at 641. The new Locke High School dress code prohibited male students from wearing hats in class. *Id.* at 453, 556 P.2d at 1092, 134 Cal. Rptr. at 641. The author of the article in the *Red Tide* asserted:

[Locke principal] Hobbs stated a number of lies (1) that the no hats in class rule was made both by students and teachers, and not by him, (2) that the hats question is neither a frequent or heated subject of debate in faculty meetings and in fact the faculty is generally in support of the no hats rule, (3) that the student council has never made any attempt to change this rule, and (4) that the faculty and students are generally in support of this rule.

Id. at 454 n.3, 556 P.2d at 1092 n.3, 134 Cal. Rptr. at 641 n.3. This issue of the *Red Tide* also contained articles which discussed the right of pregnant minors to obtain abortions without parental consent, described the heroic portrayal of Abraham Lincoln in textbooks as a myth, and examined the relationship between Patricia Hearst's family and the Symbionese Liberation Army. *Id.* at 457 n.4, 556 P.2d at 1094 n.4, 134 Cal. Rptr. at 643 n.4.

184. The challenged Los Angeles School Board Administrative Regulation 1276-1 provided in pertinent part:

The procedures to be followed in the implementation of guidelines relating to student expression on campus are as follows:

a. Circulation of Petitions, Circulars, Newspapers, and Other Printed Matter. Students should be allowed to distribute petitions, circulars, leaflets, newspapers, and other printed matter subject to the following limitations:

d. Prohibited Material

1. Material which is obscene to minors according to current legal definitions.

2. Material which is libelous according to current legal definitions.

3. Material which incites students so as to create a clear and present danger of the imminent commission of unlawful acts or of the substantial disruption of the orderly operation of the school.

4. Material which expresses or advocates racial, ethnic, or religious prejudice so as to create a clear and present danger of imminent commission of un-

article might be libelous.¹⁸⁵ The University High administrators independently investigated the truth of the assertion that the Locke High School principal had lied¹⁸⁶ and, upon advice of county counsel, tried to contact the Locke principal.¹⁸⁷ The assistant principal at Locke stated that the charges in the *Red Tide* were inaccurate and thus, distribution of the *Red Tide* was further postponed.¹⁸⁸ The University High principal finally spoke with the Locke principal and he verified the statements attributed to him in the *Red Tide*; he denied that they were false.¹⁸⁹ After consulting with Los Angeles school district and county attorneys, the University High principal banned distribution of that issue of the *Red Tide*.¹⁹⁰

lawful acts or of the substantial disruption of the orderly operation of the school.

5. Material which is distributed in violation of the time, place, and manner requirements.

e. Disciplinary Action.

Any student who wilfully and knowingly:

1. distributes any petitions, circulars, newspapers, and other printed matter;
2. wears any buttons, badges, or other insignia;
3. posts on a bulletin board any item in violation of the aforementioned prohibitions should be suspended, expelled or otherwise penalized depending on the severity of the violation, and in accordance with established disciplinary procedures.

Los Angeles School Bd. Admin. Reg. 1276-1, *reprinted in Bright*, 18 Cal. 3d at 453 n.2, 556 P.2d at 1091 n.2, 134 Cal. Rptr. at 640 n.2.

University High School students were informed of this board regulation and the procedures to which they had to adhere by circulars, such as the following:

UNIVERSITY HIGH SCHOOL

TO: STUDENTS

FROM: John Welch, Principal

SUBJECT: DISTRIBUTION OF "NON SCHOOL LITERATURE"

The rules at University High School regarding distribution of "Non-School Literature" are based on the STUDENT RIGHTS AND RESPONSIBILITIES HANDBOOK (1972) page 6.

A student wishing to distribute "Non-School Literature" must attach an informational copy of the literature to this form and give them to the principal or his secretary 24 hours in advance of desired distribution time. Within 24 hours the principal will respond to your request, and return this sheet to you. It is necessary to have this signed sheet before distribution is made. Permission to distribute this material does not imply approval of contents by either the Board of Education or the administration of University High School.

Memorandum from Principal John Welch to University High School Students (undated), *reprinted in Bright*, 18 Cal. 3d at 454 n.2, 556 P.2d at 1091 n.2, 134 Cal. Rptr. at 640 n.2.

The circular also provided that the printed materials were subject to limitations on the time, place and manner of distribution. *Id.*

185. *Bright*, 18 Cal. 3d at 453-54, 556 P.2d at 1092, 134 Cal. Rptr. at 641.

186. *Id.* at 454, 556 P.2d at 1092, 134 Cal. Rptr. at 641.

187. *Id.* at 453-54, 556 P.2d at 1092, 134 Cal. Rptr. at 641.

188. *Id.*

189. *Id.* at 454, 556 P.2d at 1092, 134 Cal. Rptr. at 641.

190. *Id.* The University High School officials, however, did permit the distribution of a

Ms. Bright then sued the school district claiming that the district's rules and regulations¹⁹¹ constituted an illegal prior restraint system violative of section 10611 and of the first amendment to the United States Constitution and article I, section 2(a) of the California Constitution.¹⁹²

After discussing the *Tinker* and *Rowe* decisions and examining the legislative history of section 10611,¹⁹³ the California Supreme Court concluded that the section did not authorize any form of prior restraint of student expression.¹⁹⁴ The court specified that under section 10611 school officials were authorized only to halt distribution of the offensive material once it had begun and to then discipline the students responsible for such distribution.¹⁹⁵ The school officials were "not . . . authorized [by section 10611] to prevent the distribution in the first place through prior

student flyer which protested the administrative decision to ban the issue of the *Red Tide*. They also authorized a noon protest meeting. *Id.*

191. For the text of the challenged regulation, see *supra* note 184. In existence at the time of this controversy was Los Angeles School Board Policy 1275 which provided:

A school newspaper is primarily designed to serve as a vehicle for instruction and is, in addition, intended as a means of communication. Therefore, it is operated, substantially financed, and controlled by the School District. The ultimate decision regarding the material to be included in such a newspaper must, therefore, be left to the judgment of the school principal.

A school newspaper can best function when a full opportunity is provided for students to inquire, question, and exchange ideas. Articles should reflect all areas of student interest, including topics about which there may be dissent and controversy. It is the intent of the board that students be provided with avenues for the research of ideas and causes of interest to them and should be allowed to express their opinions. Controversial subjects should be presented in depth with a variety of viewpoints published simultaneously.

In the event of disagreement with the principal over a news article or editorial, the student editor and the journalism teacher may appeal the decision of the principal to the area superintendent.

Los Angeles School Bd. Policy 1275 (adopted Apr. 22, 1974), reprinted in Overbeck, *supra* note 167, at app. II.

192. *Bright*, 18 Cal. 3d at 455, 556 P.2d at 1092-93, 134 Cal. Rptr. at 641-42. Ms. Bright claimed that the rules and regulations were unconstitutional on their face and as applied. In addition to her prior restraint arguments, Ms. Bright presented equal protection and due process causes of action under both the federal and state constitutions. *Id.* at 455, 556 P.2d at 1093, 134 Cal. Rptr. at 641-42. She sought relief on two counts: first, for the banning of the distribution of the newspaper because it contained libelous material; and second, for the ban on the sale of underground newspapers. *Id.*

The trial court denied Ms. Bright's request for a preliminary injunction against the enforcement of the regulations and denied her relief and damages. *Id.* The court received no oral testimony and made no findings of fact or conclusions of law. *Id.* The court based its decision on the verified pleadings, declarations, affidavits and exhibits. *Id.* Ms. Bright then appealed.

193. *Id.* at 455-61, 556 P.2d at 1093-97, 134 Cal. Rptr. at 642-46; see also *supra* notes 165-66.

194. *Id.* at 462, 556 P.2d at 1098, 134 Cal. Rptr. at 647.

195. *Id.*

administrative censorship or prior restraint of its content."¹⁹⁶ The court found that it was "difficult to conceive that the Legislature in enacting section 10611 intended to resurrect a system of prior restraint without specifically so stating."¹⁹⁷ This was especially so "since former sections 9012 and 9013 for which section 10611 was a replacement had just been declared unconstitutional . . . because they purported to permit prior restraints on the free expression of secondary school students."¹⁹⁸ Moreover, the court believed that the legislature was well aware of the "sensitive and complicated constitutional problems" involved in dealing with attempts to control student newspapers.¹⁹⁹ Accordingly, the *Bright* court also invalidated the portions of the district's regulations which authorized content-based prior restraint of student publications.²⁰⁰

While *Bright* stands as California's landmark case in establishing that students possess some free press rights, two observations indicate that the decision was by no means an absolute triumph for student press freedom. First, the *Bright* decision involved an unofficial student newspaper, not a school-sponsored or "official" student newspaper.²⁰¹ Thus, although the court did not limit its holding to unofficial papers, school officials could arguably deny the decision's binding authority on the regulation of official newspapers.²⁰² Second, and more significantly, the

196. *Id.* at 464, 556 P.2d at 1099, 134 Cal. Rptr. at 648. Plaintiff *Bright* and the defendant school district asserted diametrical positions with respect to the meaning of the language in § 10611, specifically with regard to the word "prohibited." *Id.* at 462, 556 P.2d at 1097, 134 Cal. Rptr. at 646. *Bright* argued that the statute's declared objective and the legislative history indicated that the legislature intended to reject any system of prior restraint. *Id.* Furthermore, since the *Rowe* court and the State Board of Education used the word "prohibited" to mean a system rejecting prior censorship, *Bright* argued that the word, as used by the legislature in § 10611, should be construed likewise. *Id.*

On the other hand, the defendant school district argued that by its use of the phrase "shall be prohibited" the legislature intended that the types of expression falling within the exceptive language should not be disseminated on high school campuses. *Id.* The word "prohibit," defendants argued, was synonymous with the word "prevent." Thus, according to the defendants, § 10611 allowed school authorities to completely forbid distribution of the specified categories of student expression. *Id.*

The court recognized that "prohibit" was capable of both interpretations but chose to accept plaintiff *Bright*'s connotation of the language. *Id.*; see also *supra* note 166.

197. *Id.* at 463, 556 P.2d at 1098, 134 Cal. Rptr. at 647.

198. *Id.*

199. *Id.*

200. *Id.* at 464, 556 P.2d at 1099, 134 Cal. Rptr. at 648. The court held that "the regulations of defendant Los Angeles Unified School District here under review . . . insofar as they purport to authorize prior censorship of the contents of student publications, are invalid." *Id.*

201. See *supra* note 15.

202. Less than a month after the *Bright* decision the Los Angeles School Board adopted new guidelines which still contained extensive provisions for prior censorship under a wide range of circumstances. The revised Board Policy 1275 provides the following:

Bright court did not prohibit censorship outright. The court invalidated

INTRODUCTION: A school newspaper is designed to serve as a vehicle for instruction and is, in addition, a means of communication. It is operated, substantially financed, and controlled by the Student Body and the school district. A school newspaper can best function when a full opportunity is provided for students to inquire, question, and exchange ideas. Articles should reflect all areas of student interest, including topics about which there may be dissent and controversy. It is the intent of the [Los Angeles School] Board that students be provided with avenues for the research of ideas and causes of interest to them and should be allowed to express their opinions. Controversial subjects should be presented in depth with a variety of viewpoints published.

PURPOSES OF OFFICIAL STUDENT NEWSPAPERS: (1) To exist as an instructional device for the teaching of writing and other journalistic skills; (2) To provide a forum for opinions of students, school staff, and members of the community; (3) To serve the entire school by reporting school activities.

RIGHTS OF STUDENT JOURNALISTS: (1) To print factual articles dealing with topics of interest to the student writers; (2) To print, on the editorial page, opinions on any topic, whether school related or not, which they feel is of interest to themselves or to the readers.

RESPONSIBILITIES OF STUDENT JOURNALISTS: (1) To submit copy that conforms to good journalistic writing style; (2) To re-write stories, as required by the journalism advisor, to improve journalistic structure, sentence structure, grammar, spelling and punctuation; (3) To check facts and verify quotes; (4) In the case of editorials on controversial issues, to provide space for rebuttals, in the same issue if possible, but otherwise no later than the following issue; (5) Subject to the specific limitations in these Guidelines, student editors are responsible for determining the contents of their official student newspapers.

MATERIAL NOT PERMITTED IN SCHOOL NEWSPAPERS: (1) Material which is libelous or which violates the right to privacy; (2) Material which is obscene, according to the current standards of the community; (3) Profanity, hereby defined as that language which would not be used in the L.A. Times or the L.A. Herald-Examiner; (4) Material which advocates the breaking of any law; (5) Material which criticizes or demeans any race, religion, sex or ethnic group; (6) Ads for cigarettes, liquor, or any other product not permitted to teenagers; (7) Any material, the publication of which would cause substantial disruption of the school. Substantial disruption is hereby defined as the threat of physical violence in the school or nearby community and/or the disruption of the school's educational program; (8) Endorsements of political candidates or ballot measures, whether such endorsements are made by editorial, article, letter, photograph or cartoon. The newspaper may, however, publish "fact sheet" types of articles on candidates and ballot measures provided such articles do not endorse any person or position, and provided equal space is provided for all candidates for a particular office and for both sides of a ballot measure.

DETERMINATION OF APPROPRIATENESS: (1) The newspaper advisor shall have the primary responsibility for reviewing each article, prior to its publication, to determine if it satisfies all of the conditions of these Guidelines; (2) The school principal or his [or her] designated representative other than the newspaper advisor may also review copy prior to its publication, if he so requests; however, such copy must be returned to the student editors within 24 hours after it is submitted for review; (3) No copy may be censored except for reasons specifically listed in these Guidelines; (4) Nothing in these Guidelines is intended to allow censoring of any article merely because it is controversial or because it criticizes a particular school, a school procedure, or the school system itself.

RESOLUTION OF DIFFERENCES: (1) In the event of disagreement as to whether an article shall be printed, each school shall have a Publications Board, which shall meet within 24 hours to submit its opinion; (2) The Publications Board shall consist of the principal or his [or her] designated representative; the journalism advisor; the editor-in-chief; a representative from student government, from the [Par-

the school's prior restraint system primarily because section 10611 did not authorize prior restraints.²⁰³ As the court indicated, its decision did not preclude the legislature from someday establishing a system of prior restraint in the school environment.²⁰⁴ Hence, because the court's ruling was based primarily on the court's statutory interpretation of section 10611, the scope of *Bright* is limited. Nevertheless, although *Bright* is somewhat limited, the position taken by the California Supreme Court bolsters students' free press rights and gives some guidance as to how the courts should construe Education Code section 48907.

B. California Education Code Section 48907

In recognition of the remaining potential for administrative censorship of official student publications, journalism teachers in Northern and Southern California lobbied for an amendment to section 10611 which would specifically include official school publications.²⁰⁵ Within a month of the 1976 *Bright* decision, legislation was introduced in the California Senate to accommodate those concerns.²⁰⁶

ent Teacher Association/Parent Teacher Student Association] and from the Advisory Council; and other members as mutually agreed upon; (3) If the Publications Board cannot solve the dispute, then an appeal may be made to the Area Superintendent, who may seek advice from the Board's legal staff in making his decision; (4) Further appeal may be made in accordance with Secondary School Curriculum Guide for Instruction, pages 35-38, titled *Controversial Material*.

Los Angeles School Bd. Policy 1275 (adopted Jan. 20, 1977). These guidelines are presently in effect.

203. *Bright*, 18 Cal. 3d at 464, 556 P.2d at 1099, 134 Cal. Rptr. at 648. The court did, however, address first amendment concerns in ruling. See *supra* note 193.

204. *Id.*

205. In gathering facts to present to the Los Angeles School Board in their fight to revise the district guidelines, the LAJTA discovered that student newspapers in 25% of the Los Angeles senior high schools and 40% of the junior high schools had experienced overt censorship. See Wiener, *supra* note 107, at 84. Even more newspapers had been curbed by covert censorship. *Id.* For example, the LAJTA found that the following articles had been censored: A junior high school newspaper article which contained the phrase "bosom buddies" was labeled obscene and was therefore suppressed. Twenty-five thousand copies of a student newspaper containing the word "masturbate" in a movie review of *The Exorcist* were destroyed. A drawing showing a student smoking was also banned as was an editorial calling for the decriminalization of marijuana. School officials also excised an article criticizing a bicentennial pageant which would cost the school board several hundred thousand dollars. *Id.* Spurred by this predominance of censorship, the LAJTA redirected its attention from the local entities and aimed for the California Legislature. See Wiener, *supra* note 107, at 84.

206. On December 9, 1974, Assemblyman John Vasconcellos, introduced Assembly Bill 207 to amend Education Code section 10611 to specifically include official student newspapers within the ambit of its protection. 1 LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE ASSEMBLY, 1975-76 Reg. Sess., at 132. See Wiener, *supra* note 107, at 84. The bill included language giving students "the right of publication in student newspapers" subject to the existing restrictions in section 10611. Cal. A.B. 207, 1975-76 Reg. Sess. (1974). The bill breezed through the assembly and was sent to the senate on May 12, 1975. 2 LEGISLATURE OF

Despite prior unsuccessful attempts to amend section 10611,²⁰⁷ the California Legislature passed a new law, Education Code section 48907, which specifically protects student expression in official school publications.²⁰⁸ This protection, however, is not absolute: section 48907 reauthorizes administrative censorship of student publications.²⁰⁹

Section 48907 takes direct aim at the *Bright* decision and reinstates some prior restraint in the public schools.²¹⁰ Section 48907 provides in

THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 1975-76 Reg. Sess., at 3458 [hereinafter SENATE JOURNAL]. It received a "do pass" recommendation from the Senate Education Committee, 3 SENATE JOURNAL, *supra*, at 4090, but was defeated on the senate floor 20 to 11 on August 14, 1975, 3 SENATE JOURNAL, *supra*, at 6566, after a senator charged that the bill would open the door for students to proliferate four-letter words in their newspapers. Wiener, *supra* note 107, at 84.

207. After a motion to reconsider, Assembly Bill 207 was amended several times. At one point the amended bill read "[p]rior review or restraint in advance of distribution of student newspapers . . . is prohibited." Cal. A.B. 207, Reg. Sess. 1975-76 (as amended Apr. 17, 1975). A subsequent amendment excised the exception to obscene expression. *Id.* (as amended May 7, 1975). Both provisions were later deleted.

At this time, the Kennedy Commission was investigating student press censorship at the national level. *See supra* note 5. The Commission's dispiriting report encouraged other groups in California to lobby against the "unconscionable and unconstitutional" censorship of the student press. In 1976, Senator Alan Robbins of Los Angeles reintroduced Assembly Bill 207 as Senate Bill 2120. Although well supported, the bill failed on a 17 to 17 vote. 7 SENATE JOURNAL, *supra* note 206, at 13322. The bill was brought to another senate vote on August 11, 1976, where it failed 21 to 17. *Id.* at 15146.

Meanwhile, back in Los Angeles, the LAJTA addressed a new liberal school board panel. Community support had become well organized and television and radio newsmen, journalism professors, attorneys, the Parent Teacher Association, teachers and students testified before the board. Victory was finally won after a six to one vote. The Los Angeles Unified School District became the first large city school system to officially grant first amendment rights to student journalists as part of its board of education rules. Wiener, *supra* note 107, at 84.

The LAJTA then made a final effort to get legislative protection for student journalists' rights. Backed by the California Association of School Boards, the California Teachers Association and the Los Angeles Board of Education, Senator Ralph Dills introduced Senate Bill 357 on February 22, 1977. The bill passed and became the present Education Code section 48907.

208. Education Code § 10611 was renumbered as § 48916 in 1976, prior to its amendment in 1977. Section 48916 as amended did not officially become § 48907 until 1983. All post-amendment references in this Comment, however, will be made to § 48907 for the purpose of simplification. *See infra* Appendix A for the full text of Education Code § 48907.

209. CAL. EDUC. CODE § 48907 (West Supp. 1987). In addition to the inclusion of official student publications within the ambit of statutory protection, § 48907 differs from § 10611 in a number of other ways. The third paragraph of § 48907 contains provisions which define the previously undefined roles of student editors and journalism advisers. The student editors are now responsible for assigning and editing the news, editorial and feature content of their publications. The adviser's role is to "supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of [§ 48907]." CAL. EDUC. CODE § 48907.

210. *Id.* *See supra* notes 195-200 and accompanying text.

pertinent part:

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or the means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is *obscene, libelous, or slanderous*. Also prohibited shall be *material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school*.

. . . .

There shall be *no prior restraint of material prepared for official school publications except insofar as it violates this section*. School officials shall have the burden of showing justification *without undue delay* prior to any limitation of student expression under this section.²¹¹

Section 48907 also requires each governing board of a school district and each county board of education to "adopt rules and regulations in the form of a *written publications code* . . . which shall include reasonable provisions for the time, place, and manner of conducting . . . activities within its . . . jurisdiction."²¹²

IV. ANALYSIS: CHALLENGING THE CONSTITUTIONALITY OF EDUCATION CODE SECTION 48907

By enacting Education Code section 48907, the California legislature firmly established that California students have statutory free press rights.²¹³ Although the legislature has taken a commendable step by legislating student press freedom, the potential constitutional infirmities in section 48907 render the statute a dangerous license for impermissible

211. CAL. EDUC. CODE § 48907 (emphasis added).

212. *Id.* (emphasis added).

213. While California students have *statutory* free press rights, it does not necessarily follow that they have constitutionally based free press rights. The legislative history indicates, however, that these statutory rights are indeed the codification of students' constitutional rights. The failing of § 48907 is that it does not encompass all of these rights. Hence, students are not allowed to fully enjoy their first amendment and article I, § 2(a) freedoms.

administrative censorship of student expression in official school publications.

The primary difficulty with section 48907 is that by permitting administrators to exercise prior restraint in certain circumstances, the legislature may have authorized activity which unconstitutionally infringes on students' free speech and press rights.²¹⁴ Another difficulty concerns the construction of the statute itself. Thus, section 48907 may also be unconstitutional because of the vagueness and overbreadth of its terms and requirements.²¹⁵

Nearly a decade has passed since the adoption of section 48907, yet to date there are no reported cases interpreting the statute's language or validating its constitutionality under either the United States or California Constitutions.²¹⁶ A California court deciding a case of first impres-

214. See *infra* notes 240-511 and accompanying text.

215. See *infra* notes 428-80 and accompanying text.

216. In 1981, the First District Court of Appeal generally referred to § 48907 (then § 48916) in deciding whether a high school student had a first amendment right to wear a badge which contained the message "Fuck the Draft" to school. *Hinze v. Superior Court*, 119 Cal. App. 3d 1005 (1981) (ordered depublished) (LEXIS, States library, Cal file).

Presently on appeal before the California Court of Appeal for the Fourth District is a case brought by the editor-in-chief of a public high school newspaper, David Leeb, against his principal and the Garden Grove Unified High School District (GGUHSD) for the allegedly unconstitutional censorship of the school newspaper. See *Leeb v. DeLong, appeal docketed*, 4 Civ. No. G 002587 (4th Dist. filed Aug. 1985); see also, Kossen, *supra* note 18.

The case arose in the spring of 1984, when the Rancho Los Alamitos High School principal and GGUHSD associate superintendent barred the distribution of the April Fools' edition of the school newspaper. Appellant's Opening Brief at 6, *Leeb v. DeLong, appeal docketed*, 4 Civ. No. G 002587 (4th Dist. Aug. 1985). The school administrators feared that "the use of the word 'nude' in the headline of an article reporting that Playboy magazine was going to do a photographic feature on the 'Girls of Rancho' would draw too much attention, and that members of the community would object on the ground that the use of such language in a high school newspaper was inappropriate." *Id.* at 5. The article was accompanied by a photograph of some female students. The ultimate grounds for the decision to bar distribution were that the photograph "might be libelous." *Id.* at 6. The school administrators acted pursuant to GGUHSD Administrative Regulation 7120.1 which provides that:

There shall be no prior restraint of materials prepared for official school publications except where material for publication or expression may:

- a. be obscene, libelous, or slanderous;
- b. incite students as to create a clear and present danger of the commission of unlawful acts on school premises;
- c. violate lawful school regulations;
- d. substantially disrupt the orderly operation of the school.

Id. at 10.

On June 4, 1984, David Leeb filed suit in Orange County Superior Court challenging the constitutionality of the seizure of the school newspaper and sought a temporary restraining order releasing the paper for distribution. *Id.* at 2. The superior court denied Leeb's request and instead set an expedited hearing on his application for a preliminary injunction. *Id.* On February 7, 1985, cross motions for summary judgment were heard in the superior court regarding the constitutionality of Education Code § 48907 and the GGUHSD administrative

sion brought under section 48907 could, however, look to California education law predating the enactment of the statute, such as *Bright v. Los Angeles Unified School District*,²¹⁷ as well as federal precedent for guidance in resolving the constitutional issues.²¹⁸

In deciding student expression and press cases brought before them, federal courts have fairly explicated many of the free speech terms used in section 48907, such as obscenity,²¹⁹ libel²²⁰ and substantial disruption.²²¹ Left unresolved by the courts, however, is the difficult question of whether or not a system of prior restraint like section 48907 is a proper method of regulating student expression.

A. Legislative Authority

The California Legislature has the constitutional duty and power to maintain a system of free public education for the state.²²² The legislature has plenary power to set educational policies as long as it does not

regulation. The court found in favor of the school district and held that § 48907 does not violate article I, § 2 of the California Constitution. *Id.* at 3. Leeb appealed the decision to the California Court of Appeal for the Fourth District. The case is now pending.

The issues presented by appellant Leeb are (1) whether "Article I, Section 2 of the California Constitution . . . appl[ies] to public school students, thereby rendering the prior restraint system erected by Education Code Section 48907 and GGU[H]SD Administrative Regulation 7120.1 unconstitutional per se"; and (2) whether, "[e]ven if Article I, Section 2, as applied to public school students, allows for imposition of a system of prior restraint, . . . the prior restraint provisions of Education Code Section 48907 and GGU[H]SD Administrative Regulation 7120.1 [are] unconstitutional because of their failure to provide specific procedural protections and exact definitions of prohibited material?" *Id.* at 3-4. This case presents the California Court of Appeal with its first opportunity to construe and define the scope of § 48907.

217. 18 Cal. 3d 450, 556 P.2d 1090, 134 Cal. Rptr. 639 (1977).

218. See Annotation, *supra* note 103, for an excellent collection and summarization of federal student press cases.

Following *Tinker*, numerous student press cases were brought. Between 1969 and 1984, United States District Courts in 18 states and Puerto Rico heard 25 cases concerning high school student journalists. L. INGELHART, *supra* note 103, at 62. During the 1980's, however, the influx of such cases subsided; but presently, according to Mark Goodman, the executive director of the Student Press Law Center, nearly a dozen student censorship cases are presently active. Kossen, *supra* note 18, at 1, col. 2. Goodman noted that "[n]ot since the turbulent 1970s have so many student press issues been in court." *Id.*

219. See *infra* notes 370-75 and accompanying text.

220. See *infra* notes 396-412 and accompanying text.

221. See *infra* notes 348-56 and accompanying text & notes 464-70 and accompanying text.

222. CAL. CONST. art. IX, §§ 1, 5; see *Myers v. Arcata Union High School Dist.*, 269 Cal. App. 2d 549, 551, 75 Cal. Rptr. 68, 72 (1969); *Akin v. Board of Educ.*, 262 Cal. App. 2d 161, 167, 68 Cal. Rptr. 557, 561 (1968), *cert. denied*, 393 U.S. 1041 (1969).

Article IX, § 1, entitled Encouragement of Education, provides that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." CAL. CONST. art. IX, § 1.

violate the federal or California Constitutions.²²³ By statute, the legislature has delegated to local school district governing boards the general authority to operate the public schools within their respective jurisdictions²²⁴ and to promulgate the rules and regulations necessary to control student conduct.²²⁵ This delegation of legislative authority is permissible as long as the legislature prescribes reasonable standards for those entities to follow in enacting local policies and regulations.²²⁶

223. 29 Op. Att'y Gen. 82, 83 (1957); *see also* Mountain View Union High School Dist. v. City Council of Sunnyvale, 168 Cal. App. 2d 89, 335 P.2d 957 (1959); *see generally* 1 J. RAPP, EDUCATION LAW § 3.02(3)(a), 3-12 (1986); Project, *supra* note 70, at 1375-76.

The California Legislature, unlike the majority of other states, has taken a major interest in formulating educational policy. Project, *supra* note 70, at 1377 n.8. Other states generally leave the formulation of educational policy to state and local administrative agencies and various elected bodies, such as school boards. *Id.* at 1377. As the California Attorney General advised, "the public schools of this state are a matter of state-wide rather than local or municipal concern . . . and the state Legislature is given comprehensive powers in relation thereto." 29 Op. Att'y Gen. 82, 83 (quoting *Hall v. City of Taft*, 47 A.C. 179, 181-82 (1956)); *see also* *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments").

224. *Myers*, 269 Cal. App. 2d at 551, 75 Cal. Rptr. at 72 (citing CAL. EDUC. CODE § 921 (West 1969)); *Akin*, 262 Cal. App. 2d at 163, 68 Cal. Rptr. at 561. Former California Education Code § 921 provided that "[e]very school district shall be under the control of a board of school trustees or a board of education." CAL. EDUC. CODE § 921 (West 1969) (recodified as CAL. EDUC. CODE §§ 35010, 72230). *See generally* CAL. CONST. art. IX, § 14. Article IX, § 14 provides:

The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts . . . , of every kind and class, and may classify such districts.

The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.

CAL. CONST. art. IX, § 14; *see also* CAL. EDUC. CODE § 35160 (West 1978). Education Code § 35160 provides:

On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

CAL. EDUC. CODE § 35160. The California Attorney General has stated that the enactment of Education Code § 35160 was intended by the legislature to be a grant of general authority to school districts on school-related subjects. 64 Op. Att'y Gen. 146, 147-48 (1981). The Attorney General noted that the passage of Article IX, § 14, served to significantly expand the authority of school districts. 61 Op. Att'y Gen. 75, 76 (1978).

225. *Myers*, 269 Cal. App. 2d at 566, 75 Cal. Rptr. at 72 (citing CAL. EDUC. CODE § 10604 (West 1969)). Former § 10604 provided in pertinent part:

The governing board of any school district may make and enforce all rules and regulations needful for the government and discipline of the schools under its charge. Any governing board shall enforce the provisions of this section by suspending or, if necessary, expelling a pupil in any elementary or secondary school who refuses or neglects to obey any such rules or regulations.

CAL. EDUC. CODE § 10604 (West 1969) (repealed 1977).

226. *See generally* J. RAPP, *supra* note 223, at 3-17.

Courts disagree as to the degree of specificity that the legislature must use in delegating its education authority and in prescribing the standards for the local entities to follow.²²⁷ The standard varies according to the nature of the ultimate objective and the problems involved.²²⁸ As a general rule, however, broad guidelines which are consistent with a legislative plan will generally suffice to meet constitutional requirements if they provide adequate standards to reasonably guide and restrain the exercise of delegated authority.²²⁹

No other state in the country has legislated student press freedom.²³⁰ Therefore, although a number of courts have addressed the issue of student press rights, none have determined the requirements which a student press rights statute must meet in order to pass constitutional muster. Courts have, however, determined the constitutional requirements for student press regulations promulgated at the school district and individual school levels.²³¹

It may be argued that legislation need not be as specific as local regulations since the role of the legislature is merely to delegate its authority to govern education and to provide general guidance for local education entities to follow. Nevertheless, "while legislatures 'ordinarily may delegate power under broad standards . . . , [the] area of permissible indefiniteness narrows . . . when the regulation . . . potentially affects fundamental rights,' like those protected by the first amendment."²³² Furthermore, "where a law authorizes a system of prior licensing, the Supreme Court has consistently required the statutory delegation to provide 'narrowly drawn, reasonable and definite standards for the [administering] officials to follow.'"²³³

In addition, when the legislature enacts general rules for the multifarious school districts to follow, it presumes that each district will adopt a particular procedure or policy best suited to local needs. This presumption may hold true when the districts receive general directives to create new schools or to set the length of the school day; but, with regard to section 48907, the legislative presumption is misplaced. Through section 48907, the legislature directs each school district governing board and

227. *Id.* at 3-18.

228. *Id.* at 3-19.

229. *Id.* at 3-20.

230. LAW OF THE STUDENT PRESS, *supra* note 60, at 35.

231. *See infra* notes 502-11.

232. L. TRIBE, *supra* note 26, at 732-33 (quoting *United States v. Robel*, 389 U.S. 258, 274-75 (1968) (Brennan, J., concurring)); *see, e.g., supra* notes 119-27 and accompanying text.

233. L. TRIBE, *supra* note 26, at 732-33 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

each county board of education to adopt written publication guidelines which comport with the standards set forth in the statute.²³⁴ Nevertheless, many school districts have failed to act accordingly.²³⁵ Furthermore, those districts which do have guidelines generally provide no more specific guidance than does the statute.²³⁶ Although broad language may at times be tolerated at the legislative level, it cannot be at the local level.²³⁷

In order for section 48907 to be a constitutional and an effective guide to school districts drafting local student press guidelines, the statute must provide specific terminology and criteria for the districts to follow.²³⁸ To assure its effectiveness, section 48907 should not be analyzed leniently as a general statute, but rather under the more rigorous standard used for determining the constitutional validity of local regulations.²³⁹

234. CAL. EDUC. CODE § 48907.

235. See *infra* notes 524-26 and accompanying text.

236. *Id.*; see *supra* notes 19-21 and accompanying text.

237. See *supra* notes 232-33 and accompanying text & *infra* notes 458-80 and accompanying text.

238. A number of California school districts have directly incorporated the language of § 48907 into their guidelines. Unfortunately, the guidelines provide nothing further to elucidate the conditions under which student publications may be censored. See *infra* text accompanying notes 524-26.

239. Statutes imposing criminal sanctions are scrutinized under a more rigorous standard than are general statutes. See *supra* note 43. At least one California court has analogized student regulations which, if violated, result in the student's expulsion from school to criminal statutes. In *Myers v. Arcata Union High School District*, a California court of appeal noted that a high school's dress policy was "not a 'law' in the sense that criminal sanctions attend its violation," however, the court found it significant that "a violation mean[t] suspension from school." 269 Cal. App. 2d at 560, 75 Cal. Rptr. at 74. The court added that since "[t]he importance of an education to a child is substantial . . . the state cannot condition its availability upon compliance with an unconstitutionally vague standard of conduct." *Id.* at 560, 75 Cal. Rptr. at 74-75 (citations omitted). See also *supra* note 145 and accompanying text for the *Rowe* court's discussion of this matter.

The United States Supreme Court, however, appears to have rejected this reasoning. In *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), the Court held that school officials had not violated a student's fourteenth amendment due process rights when they suspended him for giving an "offensive" speech. *Id.* at 3166. The Court held that "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Id.* The Court thus found that the two day suspension imposed on the student did "not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution." *Id.*

B. The Recommended Approach for Determining the Constitutionality of Section 48907: Prior Restraints as Per Se Unconstitutional

A statute which conflicts with the California Constitution or deprives a person of a federal constitutional right is unconstitutional and thereby void.²⁴⁰ Whether a statute is unconstitutional depends upon whether or not it is broad enough to authorize unconstitutional action.²⁴¹ Therefore, the constitutionality of section 48907 depends upon whether the action it authorizes—administrative prior restraint—is an unconstitutional action. This determination, in turn, depends upon the extent to which school administrators can constitutionally exercise control over students and their publications.

Under California law, prior restraints of the press are per se unconstitutional under article I, section 2(a) of the California Constitution.²⁴² If the language of this section, which states that “every person may freely speak, write and publish his or her sentiments on all subjects,” is interpreted literally, then “every person” includes students and no prior restraints may be imposed on any student expression.²⁴³ Under this interpretation, section 48907 would be unconstitutional and void because it violates the article I, section 2(a) ban against prior restraints.

At the federal level, the position that prior restraints of the student press are per se unconstitutional is not unprecedented. The United States Court of Appeals for the Seventh Circuit held that a system in which public school administrators review publications prior to distribution is an unconstitutional method of controlling student conduct and expression.²⁴⁴ The court of appeals in *Fujishima v. Board of Education*²⁴⁵ concluded that *Tinker v. Des Moines Independent School District*,²⁴⁶ when read in conjunction with United States Supreme Court cases forbidding prior restraint,²⁴⁷ bars any form of prior restraint in secondary

240. See *Provident Land Corp. v. Provident Irrigation Dist.*, 94 P.2d 83, 85 (Cal. Ct. App. 1939); see also *Wright v. Compton United School Dist.*, 46 Cal. App. 3d 177, 183, 120 Cal. Rptr. 115, 119 (1975) (“state Constitution is controlling and statutes which are inconsistent with and contrary to constitutional provisions cannot stand”).

241. See *In re Blanc*, 81 Cal. App. 105, 252 P. 1053 (1927).

242. See *supra* notes 47-59 and accompanying text.

243. CAL. CONST. art. I, § 2, cl. a; see *supra* note 4. In *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980), the California Supreme Court held that under the California Constitution, *high school students* had the right to reasonably exercise their free speech rights on private property. *Id.* at 910, 592 P.2d at 342, 153 Cal. Rptr. at 855; see *supra* note 58.

244. See *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972).

245. 460 F.2d 1355.

246. 393 U.S. 503 (1969); see *supra* notes 87-103 and accompanying text.

247. 460 F.2d at 1357 (citing *Near v. Minnesota*, 283 U.S. 697 (1931)); *id.* at n.2 (citing

schools.²⁴⁸ This argument is even stronger in California since the California Constitution is more protective and, accordingly, the courts' attitude toward prior restraint is more hostile than at the federal level.²⁴⁹

In *Fujishima*, three high school students brought a class action suit challenging the constitutionality of a school regulation which prohibited distribution on school premises of any publication unless it had been approved by the superintendent of schools.²⁵⁰ Under this regulation, two students were suspended for distributing their underground newspaper without permission. Another student was suspended for giving a fellow student a petition and later distributing leaflets without permission.²⁵¹

The school board argued that the regulation was permissible because it did not require approval of the content of the publication before distribution.²⁵² The court rejected this argument and found that the school board previously had interpreted the rule to require content approval.²⁵³ In fact, the court indicated that the school principals believed that the rule required prior approval of a publication's content.²⁵⁴ After analyzing the decisions by other federal courts,²⁵⁵ the *Fujishima* court determined that administrative review of student publications prior to distribution and any subsequent censorship of those publications constituted an unconstitutional prior restraint.²⁵⁶ The court concluded that the *Tinker* forecast rule is the proper "formula for determining when the requirements of school discipline justify *punishment* of students for the exercise of their First-Amendment rights."²⁵⁷ The court declared that the rule is "not a basis for establishing a system of censorship and licensing designed to *prevent* the exercise of [those] rights."²⁵⁸

New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)); see *supra* notes 26-43 and accompanying text.

248. *Fujishima*, 460 F.2d at 1357-58.

249. See *supra* notes 50-57 and accompanying text.

250. *Fujishima*, 460 F.2d at 1356. Section 6-19 of the Chicago Board of Education Rules provided: "No person shall be permitted . . . to distribute on the school premises any books, tracts, or other publications, . . . unless the same shall have been approved by the General Superintendent of Schools." Chicago Bd. of Educ. Rules § 6-19, *reprinted in Fujishima*, 460 F.2d at 1356.

251. *Fujishima*, 460 F.2d at 1356.

252. *Id.* at 1357.

253. *Id.*

254. *Id.*

255. *Id.* at 1357-58 (citing *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Riseman v. School Comm.*, 439 F.2d 148 (1st Cir. 1971)).

256. *Id.* at 1359.

257. *Id.* at 1358 (emphasis in original).

258. *Id.* (emphasis in original).

The court stated that the school board could promulgate reasonable and specific regulations setting forth the time, place and manner in which the distribution of written materials may occur.²⁵⁹ The court warned, however, that boards should not interpret the language to mean that they may require a student to obtain administrative approval of the time, place and manner of the particular distribution the student proposes.²⁶⁰

In short, the *Fujishima* court found that the first amendment, vis-a-vis *Tinker*, was broad enough to encompass a student's right to be free from administrative prior restraint. Since the California courts have repeatedly found that the rights of free expression and free press under the California Constitution are broader than similar rights found under the United States Constitution,²⁶¹ students clearly should be protected from prior restraints under the California Constitution. This position, together with the reasoning employed by the *Fujishima* court, is consistent with the legislative history of Education Code section 48907²⁶² and with the reasoning of the courts in *Rowe v. Campbell Unified School District*²⁶³ and *Bright v. Los Angeles Unified School District*.²⁶⁴ The *Rowe* court held that "it may be that no system of prior restraint in the area of student publications can be devised which imposes a restraint sufficiently short-lived and procedurally protected to be constitutional."²⁶⁵ Furthermore, the California Supreme Court in *Bright* was reluctant to find prior restraint of student publications acceptable.²⁶⁶ Although the *Bright* court could have interpreted section 10611 as allowing prior restraints, it did not. Instead, the court extensively reviewed the legislative history of section 10611 and determined that the courts and the legislature intended to prohibit the exercise of prior restraints of student publications.²⁶⁷ Punishment of the student *after* the distribution of offensive material was sufficient.²⁶⁸

Given the hostile attitude of the California courts toward prior re-

259. *Id.* at 1359.

260. *Id.*

261. *See supra* notes 50-57 and accompanying text.

262. *See supra* note 166 and accompanying text.

263. *Rowe v. Campbell Union High School Dist.*, No. 51060 (N.D. Cal. order filed Sept. 4, 1970) [hereinafter *Rowe I*]; *Rowe v. Campbell Union High School Dist.* (N.D. Cal. order filed Feb. 4, 1971) [hereinafter *Rowe II*]; *see supra* note 110 and accompanying text & notes 159-62 and accompanying text.

264. 18 Cal. 3d 450, 556 P.2d 1090, 134 Cal. Rptr. 639 (1977).

265. *Rowe II*, No. 51060, slip op. at 2.

266. *Bright*, 18 Cal. 3d 450, 556 P.2d 1090, 134 Cal. Rptr. 639; *see supra* notes 178-80 and accompanying text.

267. *Id.*

268. *Id.*

straint,²⁶⁹ the courts should find that any system of prior restraint in the secondary school setting is per se unconstitutional and, accordingly, should strike that portion of Education Code section 48907 which authorizes prior restraint.²⁷⁰

C. *An Alternative Approach for Determining the Constitutionality of Section 48907: Official Student Publications and the Forum Theory*

Despite the strong legislative history and precedent supporting the ban of prior restraints, California courts may hold otherwise. Although the legislature cited article I, section 2(a) of the California Constitution as authority for the enactment of section 48907, the courts may nevertheless find that high school students are not entitled to the constitution's full protection. In other words, students have a constitutional right to speak, write and publish freely, but that right may be limited by prior restraint due to the demands of the "special characteristics" of the school environment. In recent decisions on student press issues, courts adopting this position employed the "forum theory" analysis to determine the constitutionality of content-based administrative regulation of student speech.

1. The forum theory

Education Code section 48907 provides free press rights to student journalists writing for the "official publications" of the school.²⁷¹ Student journalists enjoy these rights regardless of whether the school publi-

269. See *supra* notes 47-59 and accompanying text.

270. Presently before the United States Supreme Court, in *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368 (8th Cir. 1986), cert. granted, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836), is the question of whether school administrators may exercise content-based prior restraint over material in a public high school student newspaper.

The Eighth Circuit Court of Appeals rejected the per se rule and held instead that "the *Tinker* standards are to be applied whenever administrators can reasonably predict that the content of a student publication will violate the *Tinker* standard." *Kuhlmeier*, 795 F.2d at 1374 n.5 (citing *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971)). The court advised, however, that "if student writings are to be censored prior to publication, the *least restrictive means* are to be followed." *Id.* (emphasis added).

Irrespective of the Supreme Court's ruling on this first amendment issue, the California courts may still find prior restraint of the student press per se unconstitutional under article I, § 2 of the California Constitution. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that the State of California has authority "to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81; see *supra* note 58.

271. CAL. EDUC. CODE § 48907; see *supra* note 15.

cation is supported financially by the school or is produced using school facilities.²⁷² Nevertheless, school authorities may believe that since the official school publication is an organ of the school, it should be under their complete control. They may argue that this control should parallel the complete control that private publishers exercise over their publications: they can censor content for any reason whatsoever, halt distribution of an edition they do not like, or fire editors and staff at will.²⁷³

Every court faced with this argument by school officials has rejected it and instead declared that school administrators do not have the power to control the content of school publications just because the publication is funded and sponsored by the school.²⁷⁴ The legal reasoning adopted in these cases is based on the "forum theory."

The Court of Appeals for the Ninth Circuit, in *San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of the Grossmont Union High School District*,²⁷⁵ recently applied the forum the-

272. CAL. EDUC. CODE § 48907; see *supra* note 171.

273. See, e.g., *supra* note 134. See also *Comm Board's Role, Power as Publisher Debated*, UCLA Daily Bruin, Feb. 25, 1987, at 1, col. 1. On February 11, 1987, the *Daily Bruin*, the University of California, Los Angeles student newspaper, published a controversial comic strip containing alleged racial slurs. The UCLA Communications Board, which is composed of students and administrators, is considering whether it can ban the comic strip from the *Daily Bruin* without violating the first amendment. The primary issue under debate is whether a public college newspaper enjoys the same rights and power of control as the publisher of a commercial paper or instead, is more restricted because it is an agent of the state. *Id.* at cols. 1, 4.

274. See *Kuhlmeier v. Hazelwood School Dist.*, 790 F.2d 1368 (8th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836); *San Diego Comm. Against Registration and the Draft (CARD) v. Governing Bd.*, 790 F.2d 1471 (9th Cir. 1986); *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 1577 (4th Cir. 1977); see also LAW OF THE STUDENT PRESS, *supra* note 60, at 14.

The *Gambino v. Fairfax County School Board* court was one of the first courts to deem a high school newspaper a public forum entitled to first amendment protection. In *Gambino*, school officials enforced school regulations to prohibit publication of an article that they found objectionable. The article was entitled, "Sexually Active Students Fail to Use Contraception." 429 F. Supp. at 737. In finding the school board's actions unconstitutional, the court reasoned that:

While the state may have a particular proprietary interest in a publication that legitimately precludes it from being a vehicle for First Amendment expression, it may not foreclose constitutional scrutiny by mere labeling. Once a publication is determined to be in substance a free speech forum, constitutional protections attach and the state may restrict the content of that instrument only in accordance with First Amendment dictates.

Id. at 734 (citations omitted). For a more thorough discussion of the forum theory in the school setting, see generally Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970); Note, *Public Forum Theory in the Educational Setting: The First Amendment and the Student Press*, 1979 U. ILL. L.F. 879; see also LAW OF THE STUDENT PRESS, *supra* note 60, at 14-22.

275. 790 F.2d 1471 (9th Cir. 1986).

ory analysis to determine whether and to what extent school officials could regulate the content of official school newspapers. The suit arose after the school board rejected an anti-draft advertisement submitted by CARD for placement in a number of the district's student newspapers.²⁷⁶

The court began its analysis by acknowledging that "[c]ertain state facilities which may be appropriately used for communication, enjoy special constitutional status as 'public forums.'"²⁷⁷ The court added that "[i]n these public forums, the First Amendment narrowly circumscribes the government's power to exclude or regulate speech."²⁷⁸ The court then explained that the United States Supreme Court has identified three types of public forums: (1) traditional public forums; (2) limited public forums; and (3) nonpublic forums.²⁷⁹

The court explained that a "traditional public forum" is a place, such as a street or a park, " 'which by long tradition or by government fiat [has] been devoted to assembly and debate.' "²⁸⁰ In a traditional public forum, " 'the rights of the State to limit expressive activity are sharply circumscribed.' "²⁸¹ The court declared that:

"In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a *compelling state interest* and that it is *narrowly drawn* to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are *content-neutral*, are *narrowly tailored to serve a significant government interest*, and *leave open ample alternative channels of communication.*"²⁸²

The second type of forum, a "limited public forum," consists of " 'public property which the State has opened for use by the public as a

276. *Id.* at 1472-73. The Board rejected the advertisement because it believed that publication of the advertisement would contribute to the solicitation of illegal acts by the district's students. *Id.* at 1473 (footnote omitted).

277. *Id.* at 1474 (citing *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

278. *Id.* at 1475.

279. *Id.*

280. *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *accord Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985)).

281. *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *accord Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985)).

282. *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citations omitted); *accord Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3448-49 (1985)) (emphasis added).

place for expressive activity.’”²⁸³ Once the state creates a limited public forum, its rights to impose constraints on the type of expression permitted in that forum are also quite restricted. The court stated that in a limited public forum, “‘[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be *narrowly drawn* to effectuate a *compelling state interest*.’”²⁸⁴ The court added that “‘the identical broad free speech rights attach to the first and second types of public forums,’ although in the latter type of forums those broad rights apply only within the particular boundaries of the specific forum that has been established.”²⁸⁵

The third type of forum, a “non-public forum,” is “[p]ublic property [such as a military base or a jail] which is not by tradition or designation a forum for public communication.”²⁸⁶ The court explained that this type of forum is governed by standards different from those governing the traditional and limited public forums.²⁸⁷ In a non-public forum, the state, in addition to time, place and manner regulations, “‘may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is *reasonable* and not an effort to suppress expression merely because public officials oppose the speaker’s view.’”²⁸⁸ In addition, the court pointed out that “‘[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination.’”²⁸⁹

2. Official school publications as limited public forums.

The school board in *San Diego Committee* contended that school newspapers should be classified as non-public forums and, therefore, the

283. *Id.* (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *accord* *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985)).

284. *Id.* (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (citations omitted)) (emphasis added).

285. *Id.* at 1475-76 (quoting *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2115 (1985); *accord* *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3448 (1985)).

286. *Id.* at 1476 (quoting *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 568 n.8 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2115 (1985) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

287. *Id.*

288. *Id.* (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983); *accord* *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3448 (1985)) (emphasis in original).

289. *Id.* (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3454 (1985)).

regulations need only be reasonable to be constitutional.²⁹⁰ The court disagreed and held that the school newspapers were limited public forums.²⁹¹

The court stated that the determination of whether the school newspaper was a limited public forum or a non-public forum depended upon the "type of forum the government intended to create."²⁹² The court added that the government's intent may be "evidenced by '[its] policy and practice . . . [as well as] the nature of the property and its compatibility with expressive activity.'"²⁹³ Observing that "[e]verything that appears in a newspaper is speech, whether commercial, political, artistic, or some other type," the court concluded that "[n]ewspapers, including the Board's, are devoted entirely to expressive activity."²⁹⁴ Accordingly, the court admitted that it would be "difficult to think of any other kind of property that [was] more compatible with expressive activity."²⁹⁵ Thus, the evidence in the case clearly indicated to the court that the school board intended to create a limited public forum.²⁹⁶

The court then held that "[h]aving established a limited public forum, the [School] Board [could not], absent a compelling governmental interest, exclude speech otherwise within the boundaries of the forum."²⁹⁷

290. *Id.*

291. *Id.*

292. *Id.* (citing *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985)).

293. *Id.* (citing *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985)).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 1478. The task before the *San Diego Committee* court was to define the precise limitations on the topics which could be discussed by *non*-students in the limited public forum that the board created, i.e., the school newspaper. *Id.* at 1476. Thus, the court focused primarily on the "access" component of the forum theory analysis.

The school board contended that it permitted use of the paper by non-students only for "non-political commercial speech." *Id.* at 1477. The board claimed that while recruitment advertisements by the military services were non-political, CARD's ads were political. *Id.*

The court held that the military service ads (1) offered vocational or career opportunities to students; and (2) were political. *Id.* The court reasoned that "the government's interest in promoting military service is not an economic one; it is essentially political or governmental." *Id.* The court concluded that "[b]ecause the Board permitted the publication of advertisements advocating military service, there can be no question but that the Board intended to open the newspapers for advertisements on this topic—at least by one side to the debate." *Id.* at 1478.

Accordingly, the court held that the board could not "allow presentation of one side of an issue, but prohibit the presentation of the other side." *Id.* (citing *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976)). Hence, the

As discussed above, under traditional forum theory analysis, once a school newspaper is deemed to be a public forum school officials must first demonstrate that the particular content-based regulation of student expression advances a compelling state interest.²⁹⁸ The compelling state interest advanced is usually the interest in maintaining an environment where the educational process may occur without disruption.²⁹⁹ There

board violated the first amendment when it banned CARD's advertisements from the school newspapers. *Id.*

The court held in the alternative that even if the student paper was a nonpublic forum, the board's conduct was still unconstitutional as it was unreasonable and constituted viewpoint-based discrimination. *Id.* Under the reasonableness prong, the court determined that the board's different characterization of the military service ads and the CARD ads was incorrect and therefore unreasonable. *Id.* at 1478-79. Furthermore, the court found the board's arguments that the ads urged illegal conduct and reduced the available space for student expression unpersuasive. *Id.* at 1479-80. Finally, the court held that since the board provided advertising space to advocates of military service, yet refused to allow space for opposing advertisements, the board had engaged in viewpoint-based discrimination. *Id.* at 1481.

298. See *supra* note 282 and accompanying text.

299. See, e.g., *Myers v. Arcata Union High School Dist.*, 269 Cal. App. 2d 549, 561, 75 Cal. Rptr. 68, 73 (1969); *Akin v. Board of Educ.*, 262 Cal. App. 2d 161, 167-68, 68 Cal. Rptr. 557, 561 (1968), *cert. denied*, 393 U.S. 1041 (1969). See generally *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969).

In addition to the substantial disruption standard, the *Tinker* Court held that student expression could be curtailed if it involved the "invasion of the rights of others." 393 U.S. at 513. Put another way, the state has a substantial or compelling interest in preventing students from invading the rights of others.

The question of how to construe the phrase "invasion of the rights of others" is presently before the United States Supreme Court. *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836). The general question presented in this case is whether school administrators violated the school newspaper staff's first amendment rights by deleting two pages from the paper because the administrators objected to the content of two articles on those pages. *Id.* at 1370.

The administrators objected to one story concerning three unnamed Hazelwood High female students and their experiences with teen pregnancy. The other story dealt with the impact of divorce on young persons. *Id.* at 1374-75. The principal objected because he believed that the girls in the pregnancy article could be identified. He found the divorce article objectionable because the parents of the students interviewed had not consented to the stories. *Id.* at 1371. Accordingly, the principal excised the pages on which the articles appeared without consulting the student staff. *Id.*

In addressing the constitutionality of the administration's actions, the court first discussed whether the school newspaper was a public forum. *Id.* at 1371-74. The Eighth Circuit found that the paper was a public forum "because it was intended to be and operated as a conduit for student viewpoint." *Id.* at 1372.

Having established the newspaper as a public forum, the court held that the administrators could censor only if the school officials could "demonstrate that the prohibition was 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'" *Id.* at 1374 (quoting *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 511 (1969)). The Eighth Circuit held that "invasion of rights of others" referred only to tortious acts. *Id.* at 1375-76 (citing Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 640 (1984)). Accordingly, the court held that "school officials are justified in limiting student speech under this standard only when publication of that speech

may be other similar interests advanced, such as an interest in "teaching students the boundaries of socially appropriate behaviour."³⁰⁰

In addition, school officials must show that content-based regulations are narrowly drawn to achieve the compelling interest.³⁰¹ Despite the presence of an arguably colorable state interest, it is difficult to justify Education Code section 48907's authorization of administrative content-based prior restraint as a narrowly tailored restriction.³⁰²

Some courts have suggested that the traditional or limited forum theory analyses do not apply in the high school context; instead, the standard is somewhat lower.³⁰³ Those courts interpreted the standard set forth in *Tinker v. Des Moines Independent School District*,³⁰⁴ and proposed that "in order for a prohibition on protected speech to be adjudged valid, school officials must demonstrate that the prohibition was 'neces-

could result in tort liability of the school." *Id.* at 1376. The court announced that "[a]ny yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance." *Id.*

The Eighth Circuit determined that on the facts of the case, the only conceivable tort action which could have been maintained against the school had the pregnancy case study been published was an "invasion of privacy" action. *Id.* at 1376. After examining the facts, the court concluded that no tort action would lie against the school. *Id.* Therefore, the school officials were not justified in censoring and their doing so violated the students' first amendment rights. *Id.*

While the students emerged victorious from the court of appeals, the administrators were left in a rather awkward position by the court. Apparently, before any prior restraint is justified under the "invasion of rights" standard, administrators will have to consult an attorney for an advisory opinion regarding the likelihood of actual tort liability. Presumably, unless the decision to censor was based on at least a reasonable belief that tort liability could ensue, the administrators would not meet their burden and any censorship would therefore be unconstitutional. While this approach is somewhat burdensome, it nevertheless assures that some preliminary legal investigation will occur before censorship decisions are made. Since *Kuhlmeier* deals only with the invasion of privacy tort, the question of whether administrators may censor potentially libelous material will remain unanswered by the Supreme Court (unless it adopts a more expansive interpretation of "invasion of the rights of others" and/or provides dicta regarding libel). See *infra* notes 396-412 and accompanying text for a discussion of administrative authority to censor potentially libelous expression. See *infra* note 404 for a discussion of one court's grant of broad discretion to school officials with regard to potential libel. See *supra* note 33 and *infra* notes 481-501 and accompanying text for a discussion of what procedural safeguards are constitutionally required in censorship systems.

300. *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986). The court in *Nicholson v. Board of Education Torrance Unified School District*, 682 F.2d 858 (9th Cir. 1982), in upholding prior review by the school principal to assure accuracy, stated that "the school possessed a substantial educational interest in teaching young student writers journalistic skills which stressed accuracy and fairness." *Id.* at 863.

301. See *supra* note 282 and accompanying text.

302. See *infra* notes 413-501 and accompanying text for arguments against finding § 48907 a narrowly tailored restriction.

303. See, e.g., *Kuhlmeier*, 795 F.2d 1368.

304. 393 U.S. 503.

sary to avoid material and substantial interference with school work or discipline . . . , or the rights of others.' ”³⁰⁵ The Ninth Circuit Court of Appeals requires a “*strong* showing on the part of the school administrators that publication of the forbidden materials [will] ‘materially and substantially interfere with the requirements of appropriate discipline or the operation of the school’ ” before it will allow “outright prohibition or censorship.”³⁰⁶

Although the California state courts have not had the opportunity to apply a forum theory analysis to student publications, the limited public forum theory has been applied in an analogous context. In *Bailey v. Loggins*,³⁰⁷ the California Supreme Court applied the forum theory analysis to a prison newspaper. The court determined that although the prison environment was restrictive, by statute “California prisoners retain[ed] all rights encompassed under the heading of the freedom of the press in the First Amendment to the United States Constitution and article I, section 2 of the California Constitution, except to the extent that such rights must be curtailed for institutional security and public safety.”³⁰⁸ Consequently, the court found that established constitutional principles applied in defining the prison journalists’ rights.³⁰⁹ Similarly, it may be argued that pursuant to Education Code section 48907, students retain the same constitutional rights, subject to restrictions based on order and safety. Accordingly, constitutional principles should govern in defining student journalists’ rights.

In deciding how to categorize the prison newspaper, the *Bailey* court looked to the intended purpose of the newspaper. The court determined that the Department of Correction’s regulations made it “clear that the department contemplated that the institutional publication it authorized would include expressions of prisoners’ ideas and views.”³¹⁰ Thus, the court ruled that the prison newspaper operated as a “limited public forum for prisoner expression.”³¹¹ Section 48907 similarly provides that

305. *Kuhlmeier*, 795 F.2d at 1374 (citing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 511 (1969)); *Nicholson*, 682 F.2d at 863 n.3; *Trujillo v. Love*, 322 F. Supp. 1266, 1270 (D. Colo. 1971)).

306. *Nicholson*, 682 F.2d at 863 n.3 (citing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 509 (1969)). The *Nicholson* court also cited Education Code § 48916 (now § 48907) for this proposition. See *supra* note 300.

307. 32 Cal. 3d 912, 654 P.2d 758, 187 Cal. Rptr. 575 (1982).

308. *Id.* at 915, 654 P.2d at 763, 187 Cal. Rptr. at 580.

309. *Id.*

310. *Id.* at 916, 654 P.2d at 764, 187 Cal. Rptr. at 581. This court’s reasoning is similar to that employed by the *San Diego Committee* court. See *supra* notes 292-96 and accompanying text.

311. *Id.* at 915, 654 P.2d at 763, 187 Cal. Rptr. at 580.

official publications shall be vehicles for student expression; it expressly provides that “[s]tudents of the public schools shall have . . . the right of expression in official publications”³¹² Thus, section 48907 makes it “clear that the [legislature] contemplated that the institutional publication[s] it authorized would include expressions of [students’] ideas and views.” Consequently, California students’ publications are also limited public forums.

Having determined that the prison newspaper was a limited public forum, the *Bailey* court proceeded to analyze whether the prison newspaper “enjoy[ed] any protection under the First Amendment or correlative California provisions.”³¹³ The court determined that the paper was entitled to such protection and rejected the two most commonly propounded arguments against such a finding. First, the court rejected the argument that “state financial support of the paper permitted the state, as publisher, to exercise complete control over its contents.”³¹⁴ Second, the court rejected the argument that “the state as publisher enjoys the same total control over the content of the newspaper as a private publisher.”³¹⁵ The court pointed out that “that contention overlooks the critical distinction between a government as publisher and a private publisher.”³¹⁶ The court then observed that

[w]hen identical claims based on the state’s right as publisher have been asserted to justify censorship of high school and college newspapers, the courts have emphatically rejected those claims. A state university—and the same is true of the Department of Corrections—“is clearly an arm of the state and this fact will always distinguish it from the purely private publisher as far as censorship rights are concerned.”³¹⁷

312. CAL. EDUC. CODE § 48907.

313. *Bailey*, 32 Cal. 3d at 918, 654 P.2d at 765, 187 Cal. Rptr. at 582.

314. *Id.*

315. *Id.* at 918-19, 654 P.2d at 766, 187 Cal. Rptr. at 583 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255 (1974)).

316. *Id.* at 919, 654 P.2d at 766, 187 Cal. Rptr. at 583.

317. *Id.* (citing *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir.), *aff’d*, 489 F.2d 255 (1973)). The *Bailey* court also cited *Gambino*, 429 F. Supp. 731, for its position on the forum theory. In *Gambino*, the school board argued that because high school students are less mature, the board as publisher had total control over the newspaper’s content. *Id.* at 734-35. The court rejected this argument. The *Bailey* court adopted the reasoning of the *Gambino* court and held:

“While the scope of constitutional freedom may vary with the nature of the environment and the maturity of the individuals affected, the considerations governing the applicability of First Amendment analysis in the first instance does not change. Either the First Amendment is operative, or it is not. And if it is applicable, only then does the distinction between the extent to which speech is protected . . . become significant.”

The court ultimately held that under the applicable constitutional provisions, the Department of Corrections could not censor newspapers “merely because it disagree[d] with the views presented, object[ed] to in-mate criticism of administration policy, or [sought] to avoid discussion of controversial issues.”³¹⁸ In conclusion, the court declared:

[A]lthough the department retains greater powers to regulate and censor than would be appropriate outside the prison walls, it does not have total or arbitrary power, but must exercise its authority even-handedly and with sensitivity to the values protected by the First Amendment and corresponding California constitutional and statutory provisions.³¹⁹

In sum, since section 48907 governs official—school-sponsored—school publications, the forum theory analysis is applicable. In *Bailey*, the Supreme Court recognized that even given the sensitive atmosphere of a prison, absolute censorship by state officials was incompatible with the constitutional guarantees of free speech and press found in the first amendment and in article I, section 2(a). By analogy, the California courts should find that while school officials may “retain greater powers to regulate and censor than would be appropriate outside the [school] walls,” they must exercise their authority “even-handedly and with sensitivity” to the applicable constitutional and statutory provisions.

Accordingly, if a student publication is more than a “mere activity, time and place sheet,” that is, it serves as a “forum” for student expression,³²⁰ then school officials may not censor the content of the publication simply because it is a school-sponsored publication. School authorities cannot censor content which they disfavor, withdraw financial support because they object to the content, or dismiss or suspend editors and staff because of disagreement over the viewpoints expressed in the articles published.³²¹

3. An illustrative model of analysis: the California three-prong test

While *Bailey* is quite instructive regarding the California Supreme Court’s application of the forum theory to institutional publications, the California courts have not had a direct opportunity to decide the consti-

Bailey, 32 Cal. 3d at 919 n.7, 654 P.2d at 583 n.7, 187 Cal. Rptr. at 583 n.7 (quoting *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731, 734-35, *aff’d*, 564 F.2d 157 (1977)).

318. *Bailey*, 32 Cal. 3d at 920, 654 P.2d at 767, 187 Cal. Rptr. at 584.

319. *Id.* at 922, 654 P.2d at 768, 187 Cal. Rptr. at 585.

320. Note, *supra* note 274, at 883 (citing *Zucker v. Panitz*, 299 F. Supp. 102, 103 (S.D.N.Y. 1969)).

321. *Id.* at 882-88.

tutionality of student press regulations since *Bright v. Los Angeles Unified School District*³²² was decided and section 48907 was enacted. Accordingly, they have yet to develop a method of analyzing content-based prohibitions on student speech. The courts have, however, addressed the constitutional validity of other school regulations involving students' free expression rights.

In evaluating district and school regulations regarding student grooming regulations,³²³ the California courts have employed a three-prong test to determine whether the school policy constitutes an unconstitutional infringement on the students' rights.³²⁴ First, the court decides whether the restraint imposed on the student's right rationally and reasonably relates to the enhancement of a free public education. The second inquiry is whether the benefits which the public gains by the restraint on that freedom outweigh the resulting impairment of the student's right. Finally, the court will determine whether any alternative less subversive or less restrictive of the student's constitutional right is available.

The components of this test encompass the elements in a modified "limited public forum" analysis; however, this test most closely resembles the analysis employed if the forum is non-public.³²⁵ Although this commentator strongly urges adoption of the limited forum theory analysis³²⁶ (as the alternative to the per se rule), application of the less stringent California three-prong test illustrates that section 48907 suffers from constitutional infirmities which cannot satisfy the minimum requirements under even the most lenient analytic model. Thus, irrespective of

322. 18 Cal. 3d 450, 556 P.2d 1090, 134 Cal. Rptr. 639 (1976).

323. The *Myers* court held that a student's long hairstyle and the wearing of a beard were rights entitled to protection under the first amendment. *Myers*, 269 Cal. App. 2d at 557, 75 Cal. Rptr. at 72 (citing *Akin v. Board of Educ.*, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), *cert. denied*, 393 U.S. 1041 (1961)).

324. See *Akin*, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557. In determining whether the defendant school district's "Good Grooming Policy" constituted an unreasonable infringement on the student plaintiff's constitutional rights, the *Akin* court adopted the California Supreme Court's three-prong test set forth in *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 501-02, 421 P.2d 409, 414-15, 55 Cal. Rptr. 401, 406-07 (1965). The *Akin* court, as well as other courts employing this test, refer to the three-pronged analysis as the *Bagley* test. For purposes of discussion here, however, the test will be referred to as the *Akin* test.

325. See *supra* text accompanying notes 286-89. For most courts it is a given that the state has a compelling or substantial interest in maintaining order and discipline in the schools. Hence, the focus shifts to the means employed to achieve those ends. Whether a regulation is reasonable may depend on the outcome of the California balancing test. Moreover, all of the tests (public forum, nonpublic forum and California) require that the state use the least restrictive means available (i.e., the restriction must be narrowly tailored to the state interest).

326. See *supra* text accompanying notes 283-85.

whether the traditional, limited or non-public forum analysis is applied, Education Code section 48907 does not pass constitutional scrutiny.

a. prong I: rational and reasonable relationship

In deciding the constitutionality of student dress code regulations³²⁷ and the search and seizure of students and their belongings,³²⁸ California courts have repeatedly claimed that school authorities "may impose more stringent regulations upon the constitutional rights of minors than upon those of adults."³²⁹ The courts find that it is "manifestly clear that not every public restriction or limitation placed upon the exercise of secondary students' constitutional rights is . . . prohibited. Where there is an invasion of protected freedoms . . . 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'"³³⁰ Thus, the courts hold that the "imposition of reasonable restraints on the exercise of constitutional rights may be proper."³³¹ The question presented under the first prong therefore becomes whether the imposition of prior restraints and the authorization of administration censorship is reasonably related to the maintenance of a proper learning environment.³³² School officials may try to satisfy this requirement by showing that unrestrained student conduct will disrupt school activities.³³³

327. See *Akin*, 262 Cal. App. 2d at 168, 68 Cal. Rptr. at 562; see also *Myers*, 269 Cal. App. 2d 549, 551, 75 Cal. Rptr. 68, 74.

328. See, e.g., *In re Donaldson*, 292 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); see *supra* note 63.

329. See *Myers*, 269 Cal. App. 2d at 558, 75 Cal. Rptr. at 73.

330. *Akin*, 262 Cal. App. 2d at 162, 68 Cal. Rptr. at 560 (quoting *Ginsberg v. New York*, 390 U.S. 629, 638 (1968)); see also *Myers*, 269 Cal. App. 2d at 552, 75 Cal. Rptr. at 73 (quoting *Ginsberg v. New York*, 390 U.S. 629, 638 (1968)).

331. *Akin*, 262 Cal. App. 2d at 166, 68 Cal. Rptr. at 561 (citations omitted).

332. The issue has been similarly framed by the federal courts. See *infra* note 333.

333. See *Akin*, 262 Cal. App. 2d at 168, 68 Cal. Rptr. at 562; see also *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972). The *Shanley* court held that "[i]n formulating regulations . . . school officials have a wide latitude of discretion. But the school is always bound by the requirement that the rules and regulations must be reasonable." *Id.* at 969 (quoting *Burnside v. Byars*, 363 F.2d 744, 748-49 (5th Cir. 1966)). The court cautioned that it was not the court's function to consider whether such rules are "wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities." *Id.* The *Burnside* court explained that:

Regulations which are essential in maintaining order and discipline on school property are reasonable. Thus, school rules which assign students to a particular class, forbid unnecessary discussion in the classroom and prohibit the exchange of conversation between students are reasonable even though these regulations infringe on such basic rights as freedom of speech and association, because they are necessary for the orderly presentation of classroom activities. Therefore, a reasonable regulation is one which measurably contributes to the maintenance and order and decorum within the educational system.

In *Akin v. Board of Education*,³³⁴ a California court of appeal found that the Riverside Unified School District's "Good Grooming Policy" which forbade students from wearing beards was rationally and reasonably related to the enhancement of a free public education.³³⁵ There, the court found that the administrative policy was "the result of the considered judgment of a number of persons who were experienced in the field of education."³³⁶ The administrators and teachers testified that the wearing of a beard would "definitely [be] disruptive of the educational process . . . [and] such a disturbance would have a prejudicial effect on the educational environment and adverse effects on other students . . ."³³⁷ The school officials also claimed that "the academic system and maintenance of discipline were best served when there were no such influences [because the] proper classroom atmosphere and decorum flourished where such . . . students were not subjected to distraction by other pupils."³³⁸ In addition to these general statements, the school district was able to cite specific instances when disruption resulted from a student wearing a beard.³³⁹ The court of appeal in *Myers v. Arcata Union High School District*,³⁴⁰ reasoned similarly in finding that the school district's hair length policy was a reasonable way to prevent disruption.³⁴¹ Thus, that policy satisfied the first prong of the test.³⁴²

In addressing whether section 48907 meets this first prong, supporters of the section's prior restraint system will attempt to justify its imposition on students' rights by arguing that restraints on student expression are a reasonable means by which the officials may maintain "proper classroom atmosphere and decorum."³⁴³ Because school authorities traditionally have been granted broad powers to control student conduct,³⁴⁴ the courts could find that restraints on obscene, libelous and disruptive

Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966) (emphasis added); see also *supra* note 100 for a discussion of *Burnside*.

334. 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), *cert. denied*, 393 U.S. 1041 (1969).

335. *Id.* at 168, 68 Cal. Rptr. at 562.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* For example, school officials testified that disruption resulted when male students wished to follow the example set by a foreign exchange student and a basketball player who wore beards. *Id.* The school officials claimed that the foreign visitor was the subject of teasing and harassment. *Id.*

340. 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969).

341. *Id.* at 559, 75 Cal. Rptr. at 74.

342. The court briefly discussed the first prong. It stated matter of factly that "long hair, on male students, had a disruptive effect at Arcata High School." *Id.*

343. *Akin*, 262 Cal. App. 2d at 163, 68 Cal. Rptr. at 562.

344. *Id.* at 167, 68 Cal. Rptr. at 561.

student expression are reasonably related to the state's goal of fostering an environment conducive to learning.³⁴⁵ Allowing supposedly obscene and libelous expression could seriously impair the "proper classroom atmosphere and decorum."³⁴⁶ Expression inciting students to break school rules or destroy school property could also stain the pristine learning environment. Because these types of expression are potentially distracting and disruptive, there is a reasonable relationship between restraining speech and the legislative goal of maintaining order. Following this reasoning, section 48907 would pass the first prong.

Although the first prong of the *Akin* three-prong test appears to be easily met, it is important to note that both *Akin* and *Myers* predate *Tinker v. Des Moines Independent School District*.³⁴⁷ The *Tinker* Court proclaimed that students may express themselves even though their expression may be somewhat distracting or disruptive. Only when student expression "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" may school officials infringe on that expression.³⁴⁸ The Court advised that before any student expression may be restrained, administrators must "be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."³⁴⁹ Furthermore, administrative action may not be the result of an "undifferentiated fear" of disruption.³⁵⁰ Therefore, California courts today must look beyond the mere fact that student expression *could* disrupt or distract students. Instead, they must employ the *Tinker* test to determine whether substantial disruption or disorder *will* result if the expression is not inhibited. This requirement as modified by *Tinker* parallels the first component of the modified limited forum analysis.³⁵¹

345. See, e.g., *Fraser v. Bethel School Dist.*, 755 F.2d 1356 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3159 (1986).

346. *Akin*, 262 Cal. App. 2d at 168, 68 Cal. Rptr. at 562.

347. 393 U.S. 503 (1969). Thus, while both the *Akin* and *Myers* courts recognized that students had the constitutional right to express themselves via their choice to wear a beard or have long hair, those courts were not guided by the substantial disruption standard. Nevertheless, apparent from the criteria used by these courts is that they required a factual showing by the school district that the student conduct disrupted school activity in some way.

348. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1969)).

349. *Id.*

350. *Id.*

351. See *Montalvo v. Madera Unified School Dist.*, 21 Cal. App. 3d 323, 98 Cal. Rptr. 593 (1971). The *Montalvo* court stated that when first amendment rights are involved, the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 332, 98 Cal. Rptr. at 599 (quoting *Dennis v. United States*, 341 U.S. 494, 510 (1950)).

Since *Tinker*, other courts construing the "substantial disruption" standard have held that neither a "mild curiosity" by students, nor an administrator's belief that a particular expression "could" or "might" cause a disruption is sufficient to justify suppression of student speech. In addition, a school official's mere "intuition" that disruption will result is insufficient.³⁵² In short, the lower courts have concluded that in order to justify suppression of student expression, an administrator needs demonstrable facts that disruption will occur.³⁵³

A California court in *Montalvo v. Madera Unified School District*,³⁵⁴ adopted the substantial disruption standard and held that only upon a showing of substantial disruption will there be a reasonable relationship

352. The *Montalvo* court noted that "if First Amendment rights are involved, the court will give little weight to expert opinion testimony expressing fears of disruption, divisiveness, and interference with the educational process where the opinions are not based on actual incidents." *Id.* at 332, 98 Cal. Rptr. at 599 (citations omitted).

353. See *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986) (school district's imposition of sanctions on student for lewd and indecent speech permissible); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (use of profanity in newspaper distributed on college campus not disruptive of school environment); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977) (prohibition against distribution of sex questionnaire permitted on ground it would substantially disrupt high school—holding based on affidavits of psychologists and psychiatrists advising that survey could cause "significant emotional harm" to some students); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (university could not withdraw financial support from school paper which editorialized in favor of racial segregation without evidence that expression disrupted school); *Sullivan v. Houston Indep. School Dist.*, 475 F.2d 1071 (5th Cir. 1973) (high school administrators could not suppress distribution of newspaper on disruption ground simply because some students read newspaper during class); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972) (court prohibited discipline of high school students for distributing newspaper advocating reform of marijuana laws and containing birth control information because no evidence of disruption); *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970) (court reversed discipline of students for selling newspaper urging students to refuse to accept or to destroy any "propaganda" issued by the school, claiming that the dean had a "sick mind" and containing the statement "[o]ral sex may prevent tooth decay" because no evidence that paper disruptive); *Norton v. Discipline Committee*, 419 F.2d 195 (6th Cir. 1969) (court upheld suspension of students for distributing literature which urged college students to engage in disorderly and destructive activities, including seizure of buildings), *cert. denied*, 399 U.S. 906 (1970); *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979) (court upheld principal's seizure of school paper based on two letters to editor: one from several lacrosse team members who physically threatened sports editor, the other accused student government officer of using school computer to change grade which justified forecast of substantial disruption); *Leibner v. Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977) (court upheld right of student to distribute "racist" student newspaper because school unable to show distribution would disrupt school).

354. 21 Cal. App. 3d 323, 332, 98 Cal. Rptr. 593, 601 (1971) (citing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 514 (1969)). The *Montalvo* court held that the burden is on the school board to justify a constitutional invasion by "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities." *Id.*; see also *Los Angeles Teachers Union v. Los Angeles City Bd. of Educ.*, 71 Cal. 2d 550, 559, 199 Cal. Rptr. 35, 42 (1969).

between the goal of order and the restraint of student expression.³⁵⁵ Since the outcome of the test is so dependent upon the facts in each case, it is difficult to make any generalizations about the disruptive or distracting quality of student expression in their publications. Hence, the courts may simply construe the statute as authorizing regulations which require such a factual showing.³⁵⁶ Nevertheless, the test no longer appears to be that the regulation be merely a reasonable means of achieving order and discipline. Instead, regulations must be *necessary* to achieve those ends. In short, the regulation will be reasonable only when school officials can show that disruption *will* result if they do not intervene.

b. prong II: balancing the state's and students' interests

Prong two of the *Akin* test requires a balancing of the benefits to the public education system against the burdens placed on the students' exercise of their rights.³⁵⁷ The *Akin* court found that the school's anti-beard policy easily passed the second prong. After having determined that bearded students would have disrupted the school environment, the court held that the "public derives benefit where public school students are academically trained in a classroom climate devoid of disruptive influences."³⁵⁸ The court added that since "the public assumes the cost of maintaining the public school system . . . [they] are entitled to have [their] schools operated with a minimum of interruption."³⁵⁹ The court therefore concluded that the public benefit derived from ensuring "[g]ood study habits and proper conduct on the part of youngsters . . . outweigh[ed] the restraint on the peripheral right to grow a beard."³⁶⁰

Section 48907's system of prior restraint would similarly benefit the public. But, unlike the right to grow a beard, the rights of free expression and press are not peripheral rights; they are fundamental rights.³⁶¹ Moreover, the right to be free from prior restraint is a *super* fundamental right.³⁶² Therefore, on balance, the scales might not tip so easily in favor of the restraint. As the long line of cases disfavoring prior restraint of expression illustrates, the state's interest must far outweigh the individu-

355. *Montalvo*, 21 Cal. App. 3d at 332, 98 Cal. Rptr. at 601.

356. See *infra* notes 516-20 for recommendations regarding how the legislature can define these terms.

357. *Akin*, 262 Cal. App. 2d at 168, 68 Cal. Rptr. at 562; see also *Myers*, 269 Cal. App. 2d at 551, 75 Cal. Rptr. at 74.

358. *Akin*, 262 Cal. App. 2d at 162, 68 Cal. Rptr. at 562.

359. *Id.*

360. *Id.*

361. See *supra* notes 22-59 and accompanying text.

362. *Id.*

als' or press' right to express themselves.³⁶³ This is true even for students.³⁶⁴

One argument that may be put forth is that the state's or public's interest in maintaining order *never* outweighs the students' free speech and press rights. Therefore, students' rights prevail over any statute or regulation imposing a prior restraint on student expression.³⁶⁵ Nevertheless, implicit in section 48907 is the notion that the state's interest in maintaining order and discipline in the school may outweigh the students' rights to express themselves if the expression is obscene, libelous or creates a clear and present danger³⁶⁶ of: (1) the commission of unlawful acts on school premises; (2) the violation of lawful school regulations; or (3) the substantial disruption of orderly school operation.³⁶⁷

1) substantial disruption

When school officials can show that student expression will create a "substantial disruption of the orderly operation of the school," then prior restraint of that expression is statutorily permissible.³⁶⁸ In other words, the state's interest in maintaining order will outweigh the students' free expression rights. As discussed in connection with the first prong of the test, however, the potential for disruption must be factually substantiated.³⁶⁹

2) obscenity

Section 48907 also provides that students' rights of free expression and press fall when that expression is obscene.³⁷⁰ Again the state and public interest in maintaining a public school where "students are academically trained in a classroom climate devoid of disruptive influences" arguably outweighs the student's right.

363. See *supra* notes 30-36 and accompanying text.

364. See *supra* note 297 and accompanying text.

365. See *supra* notes 242-70 and accompanying text.

366. In the adult context, there are several requirements before speech may be suppressed because it creates a "clear and present danger" of an unwanted act or occurrence. The censor must show that: (1) the speaker is directly inciting imminent lawless action; (2) the speaker is advocating that the action is to be taken immediately; and (3) the speech is likely to incite or produce the action advocated. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*). The censor must also show that the harm or evil to be prevented is a serious one. Moreover, the burden rests on the censor to show that the least restrictive alternative available to accomplish the state's purpose is used.

367. CAL. EDUC. CODE § 48907. See *infra* Appendix A for the full text of § 48907.

368. CAL. EDUC. CODE § 48907.

369. See *supra* notes 352-56 and accompanying text.

370. CAL. EDUC. CODE § 48907.

The primary justification used by the courts which have addressed the issue of restraining obscene student speech is that obscenity is not protected by the first amendment.³⁷¹ Caution should be exercised by the courts in this area because, while obscenity is not protected by the first amendment, other closely related categories of speech are protected. Although the United States Supreme Court has expressly held that "four letter" words are not obscene,³⁷² nearly every charge of obscenity asserted against student publications was provoked by the presence of non-sexual offensive language or simple profanity.³⁷³ In ruling in student press cases, the federal courts have held that students' expression rights prevail over the state's interest in restraining "inappropriate and indecent" speech, "earthy" words, profanity or "offensive material."³⁷⁴ The

371. The United States Supreme Court has ruled that obscenity is not protected by the first amendment. See *Miller v. California*, 413 U.S. 15 (1973). Thus, several courts have suggested that school officials may constitutionally impose a prior restraint on obscene material sought to be distributed on high school campuses. See Nichols, *Vulgarity and Obscenity in the Student Press*, 10 J.L. & EDUC. 207 (1981), and LAW OF THE STUDENT PRESS, *supra* note 60, for a discussion of such cases. See generally F. DUTILE, *supra* note 77, at 189-97. The difficult question is, however, how to define obscenity. The current test, as set forth in *Miller v. California*, requires that the material meet the following three criteria in order to qualify as legally obscene:

- a) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest;
- b) Whether the work depicts or describes, in a patently offensive way, sexual conduct as defined by state law;
- c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller, 413 U.S. at 24.

Obscenity, in general, is hard core pornography: the explicit and graphic description of sexual activity that arouses sexual feelings. The Supreme Court has ruled, however, that what may not be obscene for adults may be obscene for minors. See *Ginsberg v. New York*, 390 U.S. 629 (1968); see also *New York v. Ferber*, 458 U.S. 747 (1982). Nevertheless, the material must still depict explicit sex and must meet the three prongs of the *Miller* test. It must appeal to the prurient interest of a minor, depict sexual conduct, and lack serious literary, artistic, political or scientific value for a minor. *Ginsberg*, 390 U.S. at 646. See also CAL. PENAL CODE § 313 (West Supp. 1987), *infra* note 516.

372. *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam). In *Papish*, the Court held that a college student could not be expelled for distributing his underground paper which contained four-letter words and a cartoon of the Goddess of Justice and Statue of Liberty being raped by a policeman. The Court ruled that the material was not constitutionally obscene and declared that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670.

373. LAW OF THE STUDENT PRESS, *supra* note 60, at 39. See generally Nichols, *supra* note 371.

374. LAW OF THE STUDENT PRESS, *supra* note 60, at 39; see, e.g., *Jacobs v. Board of School Comm'rs*, 490 F.2d 601 (7th Cir. 1973) (court reversed ban on underground newspaper on ground that it contained "four-letter" words); *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970); *Koppell v. Levine*, 347 F. Supp. (E.D.N.Y. 1972) (despite presence of "four-letter"

courts have uniformly rejected school officials' arguments that the presence of such words justifies prior restraint of student expression.³⁷⁵ Therefore, the state's interest only outweighs the student's right to "speak and write freely" when obscenity, as legally defined, is involved.

The United States Supreme Court recently addressed a related issue in *Bethel School District No. 403 v. Fraser*.³⁷⁶ In *Fraser*, a high school student filed a civil rights action against the school district after he was disciplined for giving a speech which was allegedly "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at [a student elections] assembly."³⁷⁷ The school district's hearing examiner determined that the speech fell within the "ordinary meaning of 'obscene'" as used in the school's disciplinary rule prohibiting the use of obscene language in the school. The student was then suspended for three days and was removed from the list of candidates for graduation speaker.³⁷⁸ The student then filed suit alleging that his first

words and depiction of couple in bed, court reversed suppression of school literary magazine, finding that magazine contained no extended narrative tending to excite sexual desires or predominantly appealing to a prurient interest and was therefore not obscene); *cf.* *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986) (Court held school district acted within its permissible authority in sanctioning student who gave "lewd" and "indecent" speech at high school assembly—such speech not protected by first amendment); *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517 (C.D. Cal. 1969) (court upheld discipline of students for use of "profanity and vulgarity" in student newspaper). The *Baker* decision may have been implicitly overturned by *Papish*, 410 U.S. 667. On the other hand, in light of *Fraser*, the *Baker* decision may still be valid.

375. *See supra* note 374.

376. 106 S. Ct. 3159 (1986).

377. *Id.* at 3162. High school student Matthew Fraser gave his speech to an audience of approximately 600 high school students at a student government pre-election assembly. Seeking support for his candidate for office, Fraser declared:

"I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

"Jeff Kulman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

"Jeff is a man who will go to the very end—even the climax, for each and every one of you.

"So vote for Jeff for A.S.B vice-president—he'll never come between you and the best our high school can be."

Id. at 3167 (Brennan, J., concurring) (quoting Matthew Fraser, speech delivered at Bethel High School, Bethel, Washington, Apr. 26, 1983)).

378. *Id.* at 3162. The high school disciplinary rule prohibiting the use of obscene language in school provided: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* (quoting Bethel High School's disciplinary rule). The majority did not discuss whether the student's speech was "conduct" or whether the speech was indeed "speech" and therefore entitled to greater protection. The Court appeared to have presumed that the speech was "conduct" and fell within the ambit of the disciplinary rule. In dissent, Justice Stevens argued that the Court's "reliance on the school's authority to prohibit . . . conduct . . . [was] mis-

amendment freedom of speech right had been violated.³⁷⁹

In addressing the constitutionality of the suspension, the Court first noted that “[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanction.”³⁸⁰ The inculcation of these speech values is, according to the Court, “truly the ‘work of the schools.’”³⁸¹ The Court therefore concluded that “a highly appropriate function of public school education [is] to prohibit the use of vulgar and offensive terms in public discourse.”³⁸²

placed.” *Id.* at 3170 n.4 (Stevens, J., dissenting). He believed that the student’s speech “was not ‘conduct’ prohibited by the disciplinary rule.” *Id.* at 3170 (Stevens, J., dissenting).

379. *Id.* at 3163. The district court held that the school’s sanctions violated the student’s first amendment rights. *Id.* at 3163. The district court also held that the school’s disruptive conduct rule, *see supra* note 378, was unconstitutionally vague and overbroad. *Fraser*, 106 S. Ct. at 3163. The Supreme Court did not decide these issues. The district court also held that the removal of the student’s name from the graduation speaker list violated the due process clause of the fourteenth amendment. *Id.* The court awarded the student monetary relief and issued an injunction ordering the school district to allow Fraser to speak at the graduation. *Id.*

The Court of Appeals for the Ninth Circuit affirmed the district court’s judgment and held that the student’s speech was no different than the black protest armband worn by the students in *Tinker*, 393 U.S. 503. The school district argued that it had an interest in protecting the “captive” student audience from lewd and indecent language. The court rejected this argument finding instead that “the school board’s ‘unbridled discretion’ to determine what discourse is ‘decent’ would ‘increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.’” *Id.* (quoting *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356, 1363 (9th Cir. 1986)). The court also rejected the school’s argument that the power to determine the school curriculum included power to control the language used to express ideas during a school-sponsored activity. *Id.*

380. *Id.* at 3165.

381. *Id.* (citing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508 (1969)).

382. *Id.* The Supreme Court began its analysis by defining the objective of American public education as “the inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.” *Id.* at 3164; *see supra* note 77. The Court noted that the “fundamental values of ‘habits and manner of civility’ essential to a democratic society” include a tolerance of divergent and perhaps unpopular political and religious views. Nevertheless the Court held that: “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” *Id.* at 3164.

The Court proceeded to reaffirm the proposition that “the constitutional rights of students in public school are not coextensive with the rights of adults . . .” *Id.* at 3164 (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)). The Court then discussed the line of cases which limited first amendment protection for speakers using sexually explicit language to address an audience possibly including children. *Id.* at 3165 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968) (Court upheld New York statute banning sale of sexually oriented materials to minors, even though identical material entitled to first amendment protection with respect to adults); *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (plurality opinion) (school board has authority to remove vulgar books from public school library without violating first amendment); *id.* at 879-81 (Blackmun, J., concurring); *id.* at 918-20 (Rehnquist, J., concurring)). The Court explained that these cases “illustrate the obvious concern on the part of parents, and school authorities acting *in loco parentis* to protect

Accordingly, the Court held that “[t]he determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board.”³⁸³

The student argued that under *Tinker v. Des Moines Independent School District*,³⁸⁴ the school could not sanction a student for expressing a political viewpoint.³⁸⁵ The Court, however, distinguished *Tinker* and found instead that “[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed [on the student here] were unrelated to any political viewpoint.”³⁸⁶ The Supreme Court thus held that the first amendment did not bar the school district from disciplining the student for giving the “offensively lewd and indecent” speech at the assembly.³⁸⁷

While the Supreme Court appears to have granted broad discretion to school officials in dictating the tenor of student speech, the *Fraser* decision should not be read for more than it is worth. At issue in *Fraser* was whether the student could be punished *after* giving his speech. Only after examining the effect of the speech on the audience could the court determine whether or not the student’s punishment was constitutional.³⁸⁸ The *Fraser* Court did *not* sanction prior restraint of “lewd and indecent” speech. As Justice Brennan noted in his concurrence: “the Court’s holding concern[ed] only the authority that school officials have to restrict a high school student’s use of disruptive language *in a speech given to a*

children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.” *Id.*; see *supra* notes 70-73 for a discussion of the *in loco parentis* doctrine.

The Court also relied on *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). The *Pacifica* Court recognized an interest in protecting minors from being exposed to vulgar and offensive spoken language, *id.* at 749, and held that it was within the power of the Federal Communications Commission to regulate a radio broadcast deemed to be indecent but not obscene. *Id.* at 750-51. The *Fraser* Court adopted the reasoning of the *Pacifica* Court and held that lewd and offensive words “‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” *Fraser*, 106 S. Ct. at 3166 (quoting *Federal Communications Comm’n v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))). Unlike the Ninth Circuit, the Supreme Court did not distinguish *Pacifica* as a unique case involving the broadcast media.

383. *Id.* at 3165.

384. 393 U.S. 503; see *supra* notes 87-100 for a discussion of the *Tinker* decision.

385. *Fraser*, 106 S. Ct. at 3163. The Court apparently did not find it significant that the speech was given at a student government assembly preceding student body officer elections; i.e., in a “political speech” context.

386. *Id.* at 3166.

387. *Id.*

388. *Id.* at 3165. In fact, school officials warned Fraser that his speech may be inappropriate. They nevertheless did not censor his speech or prevent him from speaking. See *id.* at 3171 (Stevens, J., dissenting).

high school assembly.”³⁸⁹ Justice Brennan noted that the same speech may well be protected if given under different circumstances.³⁹⁰

Justice Brennan added that there was no suggestion in the case that school officials attempted to regulate the student’s speech because they disagreed with his views.³⁹¹ Moreover, the school officials did not attempt to ban written materials they considered “inappropriate” for high school students, or to limit what the students could hear, read or learn about.³⁹² In short, the school officials did not discipline the student because they opposed the ideas expressed in his speech.

Justice Brennan further counseled that “[t]he authority school officials have to regulate speech by high school students is not limitless.”³⁹³ Specifically, “school officials . . . do [not] have limitless discretion to apply their own notions of indecency.”³⁹⁴ Brennan advised that “[c]ourts have a first amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar.”³⁹⁵

In sum, while the *Fraser* Court suggested that “lewd and indecent” speech may be inappropriate in certain circumstances and therefore subject the speaker to discipline, it did not sanction prior restraint. There-

389. *Id.* at 3168 (Brennan, J., concurring in the judgment) (emphasis added).

390. *Id.* (Brennan, J., concurring in the judgment). In his dissent, Justice Stevens noted that “vulgar language, like vulgar animals, may be acceptable in some contexts and intolerable in others.” *Id.* at 3171 (Stevens, J., dissenting). Thus, vulgar language is often times simply “a pig in the parlor instead of the barnyard.” *Id.* (Stevens, J., dissenting) (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

Justice Brennan also disagreed with the Court’s suggestion that school officials could legitimately punish indecent or lewd speech because it was “insulting” to female students and “seriously damaging” to the 14-year olds in the audience. *Id.* at 3168 n.2. Justice Brennan stated:

There is no evidence in the record that any students, male or female, found the speech “insulting.” And while it was not unreasonable for school officials to conclude that [the student’s] remarks were inappropriate for a school-sponsored assembly, the language [he] used does not even approach the sexually explicit speech regulated in *Ginsberg v. New York*, or the indecent speech banned in *FCC v. Pacific Foundation*. Indeed, to my mind, [his] speech was no more “obscene,” “lewd,” or “sexually explicit” than the bulk of programs currently appearing on prime time television or in the local cinema.

Id. at 3168 n.2.

391. *Id.* (Brennan, J., concurring in the judgment).

392. *Id.* (Brennan, J., concurring in the judgment) (citing *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982)).

393. *Id.* (Brennan, J., concurring in the judgment) (citing *Thomas v. Board of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the result)).

394. *Id.* (Brennan, J., concurring in the judgment) (quoting *Thomas v. Board of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the result)).

395. *Id.* (Brennan, J., concurring in the judgment) (quoting *Thomas v. Board of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the result)).

fore, the courts should not read *Fraser* to stand for that proposition. Accordingly, the state's interest will not necessarily outweigh the student's interests even though the language used may be lewd, indecent or profane.

3) libel

Libelous expression, like obscenity, is not always protected speech.³⁹⁶ There are instances, however, when libelous expression may be privileged; for example, when the libel concerns a public official, public figure or topic of public interest.³⁹⁷ Despite the sensitive nature of this expression, the United States Supreme Court ruled that the first amendment does not permit the government to impose a prior restraint on the publication of a libelous commercial newspaper.³⁹⁸ The California courts have similarly ruled.³⁹⁹ The remedy for libel is a sanction *after* the expression has occurred.⁴⁰⁰ Notwithstanding this, section 48907 clearly provides that school administrators may exercise prior restraint over material that they deem to be libelous.⁴⁰¹ The *Bright* court dealt with the prior restraint of a potentially libelous student publication and ruled that prior restraints could not be imposed.⁴⁰²

396. See *New York Times v. Sullivan*, 376 U.S. 254 (1964); see also *supra* note 27 for discussion of *Near v. Minnesota*, 283 U.S. 697 (1931).

397. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (matters of public concern); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (public figures); *New York Times*, 376 U.S. 254 (public officials).

398. See *supra* note 38 and accompanying text.

399. See *supra* notes 54-57 and accompanying text.

400. See *supra* note 57 and accompanying text.

401. CAL. EDUC. CODE § 48907.

402. See *supra* notes 193-200 and accompanying text. Since 1975, only six libel suits against high school publications have been reported to the Student Press Law Center. *Who Really Pays for Libel? Liability and the Student Press*, STUDENT PRESS L. CENTER REP., Fall 1985, at 32 [hereinafter *Libel*, SPLC REP.]; see also "What Are You Afraid of, Mr. Jarvis and Mr. Gann?", STUDENT PRESS L. CENTER REP., Winter 1978-79, at 7 [hereinafter *Jarvis*, SPLC REP.]; *Coach 0-Newspaper Won*, STUDENT PRESS L. CENTER REP., Winter 1978-79, at 8. See generally L. INGELHART, *supra* note 103, at 84, 86.

In 1978, Howard Jarvis and Paul Gann filed an \$800,000 libel suit against the Granite Hills High School student newspaper (El Cajon, California). *Jarvis*, SPLC REP., *supra*, at 7. The student newspaper erroneously reported that Jarvis and Gann owned substantial California real estate and would save millions of dollars when the Proposition 13 tax initiative passed. *Id.* Jarvis and Gann eventually dropped the suit.

In 1985, the school cook at Orinsky Falls High School in New York sued the school district after an article in a newspaper-format class project described the cafeteria food as "not fit for dogs to eat." *Classroom 'Newspaper' Loses Libel Suit*, STUDENT PRESS L. CENTER REP., Spring 1985, at 12. In 1985, a jury awarded the cook and her husband \$10,001 in damages. The district has requested that the court review the verdict. *Id.*

A student at Madison High School in New Jersey and her father sued the school newspaper reporter, adviser and the school board for compensatory and punitive damages claiming

School officials have argued that censorship authority over potentially libelous material is necessary in order to protect themselves, the school district and ultimately the taxpayers from debilitating damage judgments.⁴⁰³ They maintain that if school districts are held liable, then the state's interest in protecting taxpayers as well as preserving order in their schools outweighs the students' right of free expression. These arguments, however, are legally unsupportable. The courts that have addressed this issue have held that where administrators have not exercised control over the content of student publications, neither they nor the school districts were held responsible for the libel appearing in the publications.⁴⁰⁴ When, however, administrators exercise their power of review, the courts may hold them and their schools liable for the contents

that a photograph in the student newspaper damaged their reputations. *'Student Romance' Sparks Libel Suit*, STUDENT PRESS L. CENTER REP., Fall 1985, at 26. The student appeared with a male student in a photograph accompanying an article entitled, "Student Romance Gives Hallway 'R' Rating." *Id.* The suit is pending.

The other libel suits involved student yearbooks. For example, a student at Christian City High School in Kentucky brought a \$50,000 libel suit against the school after her name appeared below the picture of a dog. The mistake was attributed to computer error and the suit was dismissed. *L. INGELHART, supra note 103, at 82.*

403. LAW OF THE STUDENT PRESS, *supra note 60, at 36; see also Libel*, SPLC REP., *supra note 402, at 32.* For example, in *Leeb v. DeLong, appeal docketed, 4 Civ. No. G 002587 (4th Dist. Aug. 1985)*, *see supra note 216*, the respondent principal and school district argued:

[I]t is clear that the Legislature enacted Education Code Section 48907 so that school districts as publishers of official school publications could exercise some control over the publications for which they are civilly liable. Such a regulation is in the public interest in that it protects the taxpayers' funds from civil suits resulting from the publication of defamatory articles written by immature high school students.

.....
 If it were determined that school districts had no right to prohibit the publication of certain materials, school districts would be at the mercy of inexperienced students who might, intentionally or unintentionally, publish libelous, slanderous or otherwise damaging material. Since most students are judgment proof, it would be the school districts that would pay any judgment. Such a result would be bad public policy and unfair to the state's taxpayers who would have to pay for the misdeeds of unrestrained minor students.

Respondents' Opening Brief at 22-24, *Leeb v. DeLong, appeal docketed, 4 Civ. No. G 002587 (4th Dist. Aug. 1985)*.

404. LAW OF THE STUDENT PRESS, *supra note 60, at 37; Libel*, SPLC REP., *supra note 402, at 37; see also Mazart v. New York, 441 N.Y.S.2d 600 (1981)* (plaintiffs sued State of New York for libelous letter printed in state university's student newspaper; court dismissed suit finding that since state did not direct or participate in publication of newspaper and could not exercise prior restraint, state could not be held responsible for content of paper); *see also Milliner v. Turner, 436 So. 2d 1300 (La. App.), cert. denied, 442 So. 2d 453 (La. 1983).*

In *Milliner*, two state college faculty members brought a defamation action against student reporters who had printed articles in the school newspaper describing one plaintiff as a "proven fool" and the other as a "racist." 436 So. 2d at 1301. The court found that the relationship between a university and its student newspaper was not analogous to a private publisher and his or her newspaper, since publishers may censor as much as they like. *Id.* at 1302. The court concluded that since the first amendment barred state schools from exercising

of such publications.⁴⁰⁵

Furthermore, even if school districts could be held liable for libelous

anything but advisory control over student newspapers, these colleges could not be held liable for any defamatory articles in the student newspapers. *Id.* at 1303.

By a parity of reasoning, the public high schools in the Seventh Circuit, where prior restraint is prohibited, are likewise not liable for the libelous statements of their student journalists. *Libel*, SPLC REP., *supra* note 402, at 34 (citing *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1335 n.6 (D. Mass. 1970)).

A more difficult case is presented where the school officials exercise some control over the content of the school publication. It has been suggested that even though public high school administrators do not exercise control because they have developed a "hands off" policy, they and/or the school may nevertheless be held liable because they had the legal authority to control. *Id.* at 35. Thus, in California, the prior restraint provision in § 48907 may subject school officials and school districts to liability. In other words, schools could be held liable simply by virtue of the presence of the statutory authorization to censor. *See Farmers Educ. & Coop. Union of Am. v. WDAY*, 360 U.S. 525, 531-35 (1959) (radio station sued for allegedly libelous statements made in political candidate's speech—court held that station immune from liability for defamation because station required by statute to broadcast unedited political speeches).

For a contrary viewpoint, see *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979). In *Frasca*, a high school principal ordered that an issue of the official school newspaper be seized and destroyed. *Id.* at 1048. The newspaper carried an allegedly libelous and obscene letter to the editor accusing a student body officer of being a "total disgrace to the school" and of using the school computer illegally to change his grade. *Id.* at 1046. The district court judge dismissed the students' attempts to prove that their assertions were true, thus denying them the opportunity to establish a complete defense to the libel charge. *Id.* at 1052. The court stated that even if a determination was made that the statements were true and not libelous, the only thing that would be established would be that the principal made a mistake. *Id.* The court found this irrelevant and reasoned that the "disputes which arise in the day-to-day operations of . . . public schools cannot as a general rule be resolved by federal district judges. . . ." *Id.* at 1052. Since federal judges could only view the disputes from a distance, the court ruled that great deference should be given to school officials' decisions, even if they later turn out to be wrong. *Id.* As long as there is a "substantial and reasonable basis" for the administrators' decision, then this court would uphold their decision. *Id.*

Following the rationale of the *Frasca* court in the area of libel would be dangerous. Since § 48907 officially authorizes the exercise of prior restraint over libel, administrators would have to do little more than to "speculate" and "intuit" that something was libelous in order to justify suppressing the questionable material. Under *Frasca* the correctness of their decision would be irrelevant. Moreover, the student journalists whose expression was suppressed would have been erroneously and unconstitutionally deprived of their rights to free expression and seemingly without remedy.

If prior restraint of libel is allowed, the courts should not apply a rational basis test, but instead should review the prior restraint according to the well-established rule: with a "heavy presumption" against its constitutional validity. *See supra* note 35. The special characteristics of the school, including the superior and authoritative position that administrators hold over students, should not warrant deference from the court. On the contrary, the courts should carefully scrutinize administrative censorship over student expression. This may be especially true in the area of libel since the school's interest involves more than just maintaining order. In the interest of self-protection, the school officials may be censoring in fear of personal liability for the libelous expression.

405. LAW OF THE STUDENT PRESS, *supra* note 60, at 37-38; *Libel*, SPLC REP., *supra* note 402, at 35. The law in this area is still unsettled.

student publications, the potential economic imposition on taxpayers is an insufficient and unacceptable justification for the abrogation of students' constitutional rights. It is a well-established principle that the "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."⁴⁰⁶

Finally, the argument that potential liability justifies control is even less persuasive in California because of California's broad retraction law.⁴⁰⁷ The retraction law requires that a person anticipating a libel suit must demand a retraction from the publication within twenty days of the time he learns that the defamation has been published.⁴⁰⁸ Failure to file the retraction demand will severely limit the damages which may be recovered.⁴⁰⁹ If faced with a libel suit, a student publication would likely not refuse to print a retraction.⁴¹⁰

Thus, with respect to the prior restraint of libelous expression, the state's economic interest is not so great as to necessarily tip the scales in favor of restraint. On the other hand, as with obscenity and substantial disruption, the state still has an interest in facilitating the learning process by maintaining a noncontroversial atmosphere.⁴¹¹ Whether this interest is strong enough to overcome the general rule that libel is not to be restrained prior to publication is doubtful.⁴¹²

c. prong III: least restrictive alternative

Even if the courts are deferential with respect to the first two prongs of the *Akin* test and conclude first, that a reasonable relationship between the statute or regulation and the state's interest is sufficient and, second, that the state's interest outweighs students' rights, the statute still fails. In order for a regulation to pass prong three, the court must conclude that no alternative exists which is less subversive or less restrictive of

406. *Watson v. Memphis*, 373 U.S. 526, 537 (1963); *see also* *Rush v. Obledo*, 517 F. Supp. 905 (N.D. Cal. 1981). In *Rush*, the court evaluated California statutes and regulations which permitted warrantless inspections of family day care homes. *Id.* at 906-07. The state defended its measures by arguing that it did not have the resources available to conduct surveillance of the homes by exterior observation, and that this lack of resources justified its use of warrantless searches. The court rejected this argument, stating that neither administrative convenience nor budgetary constraints justify governmental deprivation of fundamental constitutional rights. *Id.* at 915 n.16.

407. *See* CAL. CIV. CODE § 48(a) (West 1982).

408. *Id.*

409. *Id.*

410. *See infra* note 541.

411. *See supra* notes 343-46.

412. *See supra* note 299.

students' free expression and press rights.⁴¹³ Section 48907 fails to meet this test for four reasons: first, prior restraint is not the least restrictive alternative available to maintain an orderly school environment; second, section 48907 is vague; third, section 48907 is overbroad; and finally, section 48907 lacks proper procedural safeguards to protect students' expression rights.

1) alternatives to prior restraint

The major fear cooling attempts to remove censorship authority from school officials is that irresponsible student expression will strip administrators of authority and thereby result in a disruption of the educational process.⁴¹⁴ Justice Black, dissenting fervently in *Tinker v. Des Moines Independent School District*, warned of chaos if students' expression rights were recognized.⁴¹⁵ He predicted "the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."⁴¹⁶ Furthermore, he prophesied that administrative authority would be undermined and control would be transferred from the educators to the "whims and caprices of [the] loudest-mouthed, but maybe not [the] brightest students."⁴¹⁷ Contrary to Justice Black's predictions, however, *Tinker* did not begin a "new revolutionary era" of judicially fostered permissiveness in the public schools; nor has the recognition of

413. *Akin*, 262 Cal. App. 2d at 168, 68 Cal. Rptr. at 562; *see also Myers*, 269 Cal. App. 2d at 551, 75 Cal. Rptr. at 74. In *Kuhlmeier*, the Eighth Circuit noted that "if student writings are to be censored prior to publication, the least restrictive means are to be followed." 795 F.2d at 1374 n.5; *see supra* note 299. If the court determines that the least restrictive means were not used, then the statute is not "narrowly tailored" to the state's interest.

414. *See generally* Schimmel, *supra* note 1.

415. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 515-26 (Black, J., dissenting).

416. *Id.* at 518 (Black, J., dissenting). Justice Black declared: "[I]f the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness fostered by the judiciary." *Id.* (Black, J., dissenting).

417. *Id.* at 525 (Black, J., dissenting); *see also* Schimmel, *supra* note 1, at 58. According to Justice Black:

One does not need to be a prophet or a son of a prophet to know that after the Court's holding today some students in . . . all schools will be ready, able, and willing to defy their teachers on practically all orders. . . . Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States This case . . . subjects all of the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 states.

Id. at 525-26 (Black, J., dissenting) (footnote omitted).

student press rights.⁴¹⁸ In a survey conducted in the Seventh Circuit, where prior restraint is per se unconstitutional, only 8 out of 1200 schools experienced any increase in disruptions following the court's ruling.⁴¹⁹ Since little evidence supports Justice Black's warnings of chaos where administrative censorship is prohibited, the need for prior restraint is questionable.

In the Seventh Circuit, students may publish what they please,⁴²⁰ but if they violate school regulations regarding what may properly be published they will be sanctioned accordingly.⁴²¹ This was also the California rule until section 48907 was enacted.⁴²² The reasons for including prior restraint in section 48907 were political, not constitutional.⁴²³ If administrative fear of disruption or liability is unwarranted, then mainte-

418. *Id.*

419. *Survey Reveals Little Change in Censorship Following Ruling Banning Prior Restraint*, STUDENT PRESS L. CENTER REP., Spring 1977, at 1. During May and April 1976, Robert Trager, assistant professor of journalism at Southern Illinois University at Carbondale, together with the Student Press Law Center, conducted a survey of 1200 public schools in the Seventh Circuit to determine the impact of the *Fujishima* decision on student newspapers. *Id.* Questionnaires were sent to principals, journalism advisers and student editors which asked about "school size, location, newspaper distribution and sponsorship, underground publications, disruptions, censorship, libel, written policies, and the journalism background of advisor and principal." *Id.* (quoting Robert Trager).

The survey results indicated that the decision had little noticeable effect on the prior review practices of the surveyed individuals. *Id.* Only 15% of the principals and 10% of the advisers knew of the *Fujishima* case. Approximately 62% of the respondents believed that administrators still had the authority to review student works before publication. *Id.* Despite these figures, Trager found that in 82% of the schools, administrators do not exercise prior review "as a matter of course."

Most significantly, the Trager survey revealed that the prohibition of prior restraints after *Fujishima* did not result in "more disruption of school functions." *Id.* Only eight schools reported any increase in disruption following the 1972 decision. Trager stated that it "was difficult to conclude that the (*Fujishima*) ruling has had any effect' on journalistic practices in the Seventh Circuit." *Id.* Nevertheless, Trager noted that the "ruling has not caused any significant problems for administrators." Furthermore, Trager recognized that "[s]ome courts, in sustaining prior review in the high school context have done so out of a fear that . . . high school students would abuse their rights." *Id.* (quoting Robert Trager). To that Trager responded, "[t]he survey reveals no such abuse." *Id.* (quoting Robert Trager).

A similar survey was conducted in 1978. High school journalism teacher James Nyka surveyed 121 Illinois high schools with student populations greater than 1000. *'Press' Four-Letter Word in Illinois*, STUDENT PRESS L. CENTER REP., Spring 1978, at 9. Nyka concluded that "[m]any newspaper advisers and administrators appear either unaware of students' constitutionally protected rights, or have simply chosen to ignore them, hoping that the legal pendulum will swing the other way." *Id.* (quoting James Nyka). Nyka reported that 40% of the respondents stated that "material considered 'controversial' does not escape the attention of administrators." *Id.*

420. See *Fujishima*, 460 F.2d 1355; see also *supra* notes 245-60 and accompanying text.

421. *Fujishima*, 460 F.2d at 1359.

422. See *supra* notes 196-97 and accompanying text.

423. See *supra* note 166.

nance of the section 48907 prior restraint system would condone restriction of speech based only on undifferentiated fear or apprehension of disturbance.⁴²⁴ This exercise of censorship was clearly prohibited by the *Tinker* Court.⁴²⁵

Furthermore, the United States Supreme Court has noted that while the threat of subsequent punishment may "chill" speech, prior restraint "freezes" it.⁴²⁶ Clearly the chill of subsequent punishment is less restrictive than the freeze of prior restraint.⁴²⁷ The censored speech may in fact be protected; yet, the speech frozen by prior restraint never reaches its audience.

2) vagueness

As the court in *Myers v. Arcata Union High School District*⁴²⁸ declared, "the standards of permissible statutory vagueness [in areas of freedom of expression] are strict and government may regulate 'only with narrow specificity.'"⁴²⁹

The *Myers* court advised that "a 'law' violates due process 'if it is so vague and standardless that it leaves the public uncertain as to the conducts it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.'"⁴³⁰ The court noted that while the school policy was not "law" in the sense that criminal sanctions would attach if violations occurred, the potential for suspension existed if the student violated the policy.⁴³¹ Since the "importance of an education to a child is substan-

424. See *Tinker*, 393 U.S. at 508-09.

425. *Id.*

426. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (footnote omitted); see also *supra* note 35.

427. See generally *Fujishima*, 460 F.2d 1355; see also *Shanley*, 462 F.2d at 973 (reasonable regulation of expression is constitutionally preferable to restraint); *supra* note 39.

The court in *Baughman* advised that it thought that "letting students write first and be judged later [was] far less inhibiting than vice versa." 478 F.2d at 1350. The court reasoned that

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

Id. (quoting *A Quantity of Books v. Kansas*, 378 U.S. 205, 223 (1964) (Harlan, J., dissenting)). Accordingly, the *Baughman* court held that "a regulation requiring prior submission of material for approval *before* distribution must contain narrow, objective, and reasonable standards by which the material will be judged." *Id.*; see *infra* note 441 and accompanying text.

428. 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969).

429. *Id.* at 560, 75 Cal. Rptr. at 74.

430. *Id.* (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (citations omitted)).

431. *Id.*

tial,"⁴³² the court ruled that the state could not condition the availability of education on an "unconstitutionally vague standard of conduct."⁴³³

In *Myers*, the court ruled that the term "extremes of hair styles" was too vague to pass the third prong of the *Akin* test.⁴³⁴ The court reasoned that "[e]xtremes of hair styles" were not facts, they were matters of opinion and the "definitive opinion . . . rested in the sole—and neither controlled nor guided—judgment of a single school official."⁴³⁵ The school official's good faith was irrelevant to the court; it was concerned with the policy itself. The court concluded that the school policy was "far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society' . . . and . . . totally lack[ed] the 'specificity' required of governmental regulations which limit the exercise of constitutional rights."⁴³⁶

The federal courts have held that in order for regulations or guidelines to pass constitutional muster they must contain clear and precise standards which define prohibited materials.⁴³⁷ By requiring the rules to be as specific as possible, the courts have sought to avoid the danger of

432. *Id.* at 560, 74 Cal. Rptr. at 74-75; see also *supra* note 145 and accompanying text. *But see supra* note 239.

433. *Myers*, 269 Cal. App. 2d at 560, 74 Cal. Rptr. at 75.

434. *Id.*

435. *Id.*

436. *Id.*

437. In *Shanley*, 462 F.2d at 976-77, the Court of Appeals for the Fifth Circuit invalidated a school regulation prohibiting the distribution of printed matter. The court found the regulation unconstitutionally vague and overbroad because it did not:

(1) state clearly the means by which students are to submit proposed materials to the principal or school administration; (2) state a brief and reasonable period of time during which the principal or administration must make their decisions; (3) state clearly a reasonable appellate mechanism and its methodology; and (4) state a brief and reasonable time during which the appeal must be decided.

Id. at 978; see also *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Leibner v. Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971).

The leading Second Circuit case is *Eisner v. Stamford Board of Education*. There, the court of appeals held that the school rule banning material which "will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder or will constitute an invasion of the rights of others" was not vague or overbroad. *Eisner*, 440 F.2d at 808-09. The court did strike down the prior review procedure here because of "its lack of procedure for prior submission by students for school administration approval, of student written material before 'distribution.'" *Id.* at 810. In short, it failed to set a time limit for review and to specify to whom and how material was to be submitted for clearance. *Id.* The Court of Appeals for the Second Circuit and district courts within that circuit have also decided numerous other student press cases. See *Thomas v. Board of Educ.*, 607 F.2d 1043 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979); *Bayer v. Kinzler*, 383 F. Supp. 1164 (1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975); *Koppell*

“unconstitutionally chok[ing] off criticism either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive.”⁴³⁸

In striking down the defendant school’s system of prior submission, the United States Court of Appeals for the Fourth Circuit in *Baughman v. Freienmuth*⁴³⁹ noted that any system of prior submission comes before the court bearing a “heavy presumption” against its constitutionality.⁴⁴⁰ The *Baughman* court proceeded to set out the minimum requirements for a constitutional prior submission regulation: Any regulation requiring the prior submission of material for approval before its distribution “must contain narrow, objective, and reasonable standards by which the material will be judged.”⁴⁴¹ The court required such a standard so that the school officials enforcing the regulation would not have “impermissible power to judge the material on an *ad hoc* and subjective basis.”⁴⁴² The court further reasoned that the forbidden activity should be “clearly delineated” so that basic first amendment freedoms would not be inhibited.⁴⁴³

The degree of precision required to establish a constitutional system of prior restraint is well illustrated by the Fourth Circuit’s subsequent

v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

438. *Baughman*, 478 F.2d at 1351 (citing *Scoville v. Board of Educ.*, 425 F.2d 10, 14 (7th Cir.), cert. denied, 400 U.S. 826 (1970)).

439. 478 F.2d 1345 (4th Cir. 1973). See *infra* note 487 for the regulation at issue. Note the similarity between the language in the challenged regulation and that found in § 48907.

440. *Baughman*, 478 F.2d at 1350.

441. *Id.*

442. *Id.*

443. *Id.* In reviewing the publication regulations before it, the *Baughman* court held that the proscription against “distribution” is unconstitutionally vague. With respect to some communicative material there may be no prior restraint unless there is “a *substantial* distribution of written material, so that it can reasonably be anticipated that in a significant number of instances there would be a likelihood that the distribution would disrupt school operations.”

Id. at 1349 (quoting *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 811 (2d Cir. 1971)). The *Baughman* court added:

With respect to other types of material, *e.g.*, pornography, one copy, indeed the *only* copy may be the subject of what is legitimate prior restraint if what is forbidden is precisely defined. The prohibition of material which “advocates illegal actions, or is grossly insulting to any group or individual” seems to belong in the first category and thus goes beyond the permissible standard (for that type of material) of forecasting substantial disruption.

Id. (footnote omitted). The court concluded that “material which is, in the *constitutional sense*, unprivileged libel or obscenity if read by children can be banned from school property by school authorities.” *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)). The court further advised that “a regulation imposing prior restraint must be much more precise than a regulation imposing post-publication sanctions.” *Id.*

decision in *Nitzberg v. Parks*.⁴⁴⁴ Following the issuance of a preliminary injunction, the defendant school district redrafted its regulations establishing a system of prior restraint in an attempt to comply with the standards set forth in *Baughman*.⁴⁴⁵ Despite the detailed definition of libel contained in that regulation⁴⁴⁶ and the establishment of specific time periods for appeals,⁴⁴⁷ the court nevertheless invalidated the regulation. The court ruled that the definition of "libelous" material in the school board's regulation failed to incorporate current constitutional stan-

444. 525 F.2d 378 (4th Cir. 1975).

445. *Id.* at 380-81; see *supra* notes 439-43 and accompanying text. Baltimore County Board of Education Rule 5130.1(b) provided in part:

Literature may be distributed and posted by the student of the subject school in designated areas on school property as long as it is not obscene or libelous . . . and as long as the distribution of said literature does not reasonably lead the principal to forecast substantial disruption of or material interference with school activities.

If a student desires to post or make a distribution of free literature which is not officially recognized as a school publication, the student shall submit such non-school material to the principal for review and prior approval. In exercising this right of prior restraint, principals shall follow the procedures specified in this policy. The principal shall render a decision and notify the student within two (2) pupil days of such submission. If the decision is in the negative, the principal shall state his reasons to the student in writing. During this period of review, any supply of the material may be retained by the student or may be left with the principal for safekeeping. Distribution of such material during the review and appeal period, or following a negative decision, shall be sufficient grounds for confiscation of such material and suspension of the student by the principal. If the student is dissatisfied with the decision of the principal with respect to the distribution of a non-school publication, the student may appeal this decision to the appropriate area assistant superintendent who shall render a decision, stating his reasons in writing, within three (3) pupil days of such appeal. If an administrator fails to act within the time periods specified in this paragraph, the student(s) who submitted the literature for review may distribute same. (Appeal from a decision of an assistant superintendent is to the superintendent of schools and thence to the Board of Education at the time of its next regularly scheduled meeting.)

Nitzberg, 525 F.2d at 381 (parenthetical in original).

446. The board policy defined "libel or libelous material" as follows:

The First Amendment of the Constitution of the United States protects the right of free expression by an individual, either in writing or in speech, on all matters of public or general concern about a person, without regard to whether such person is famous or anonymous, in whom the community and press have a legitimate and substantial interest because of who he is or what he has done. However, a written or oral statement about such a person which is made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or which was made with a high degree of awareness of its probable falsity, is subject to sanction and is not protected by the First Amendment of the Constitution.

A statement is libelous and not protected by the First Amendment if it is made with "actual malice" and if it tends to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or if it induces an evil opinion of one in the minds of right-thinking persons, or if it causes one to be shunned and avoided in society.

Id. at 381 n.3.

447. See *supra* notes 196-99 and accompanying text.

dards.⁴⁴⁸ The board's regulations were thus void for vagueness and overbreadth.⁴⁴⁹

Section 48907 allows school officials to censor student expression which is libelous, obscene, creates a clear and present danger of the breaking of school rules or will cause a substantial disruption of school activities. The section provides no other guidance to school officials or students regarding which student expression is unprotected by the statute. According to a number of federal courts, the use of those legal terms of art without more renders the statute unconstitutionally vague.⁴⁵⁰ One court declared that "[t]he use of terms of art such as 'libelous' and 'obscene' are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria."⁴⁵¹ The court also noted that "such terms are troublesome to lawyers and judges" and pointed out that "[n]one other than a Justice of the Supreme Court has confessed that obscenity 'may be undefinable.'"⁴⁵² The court further observed that "'[l]ibelous' is [a] legal term of art which is difficult to apply to a given set of words."⁴⁵³ Moreover, the court explained that a determination "that words *are* libelous is not the end of the inquiry [because] libel is often privileged."⁴⁵⁴

It may be argued that in interpreting and applying section 48907, administrators, teachers and students can rely on the definitions provided in the California Civil and Penal Codes.⁴⁵⁵ However, it is unlikely that these individuals will have the legal sophistication necessary to cross-reference the Education Code or their local guidelines with these codes. Moreover, section 48907 does not make any reference to the other codes or to any other sources for definitions of the legal terms used in the statute. Therefore, since section 48907 simply provides that obscene, libelous or substantially disruptive expression may be subject to prior restraint with neither an explanation of what is obscene, libelous or substantially disruptive in the school setting, nor any cross-references to the

448. *Nitzberg*, 525 F.2d at 383.

449. *Id.*; see also *infra* notes 467-71 and accompanying text.

450. See *Nitzberg*, 525 F.2d 378; *Baughman*, 478 F.2d at 1350-51.

451. *Baughman*, 478 F.2d at 1350.

452. *Id.* (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)) (footnote omitted).

453. *Id.* at 1351.

454. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

455. See, e.g., CAL. CIV. CODE § 45 (West 1982) (libel); CAL. CIV. CODE § 45a (West 1982) (libel on its face; other actionable defamatory language); CAL. CIV. CODE § 48a (West 1982) (libel in newspaper); CAL. PENAL CODE § 248 (West 1982) (libel defined); CAL. PENAL CODE § 252 (West 1982) (publication defined); CAL. PENAL CODE § 311 (West Supp. 1987) (obscenity defined); CAL. PENAL CODE § 313 (West Supp. 1987) (harmful matter to minors defined).

Civil or Penal Codes, the statute is unconstitutionally vague.⁴⁵⁶ This is especially so since the purpose of the statute was to define students' free expression rights and responsibilities and to guide administrators, advisers and students with regard to those rights.⁴⁵⁷

3) overbreadth

As a general rule, "[a] law is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive . . . rights."⁴⁵⁸ Because of the related problem of vagueness with regard to the terms obscene, libelous and substantially disruptive, as used in section 48907, the problem of overbreadth arises.⁴⁵⁹ As the federal court decisions show, school administrators tend to use a colloquial and not a legal definition of obscenity.⁴⁶⁰ Likewise, school officials generally are not in a position to determine whether expression is legally libelous or obscene.⁴⁶¹ Most officials simply adhere to the "I know it when I see it" standard.⁴⁶² Thus, protected speech is often censored erroneously.

Unlike determinations of which speech is to be categorized as obscenity and libel, which are made after a judicial finding, the determination of what constitutes substantial disruption may best be made by school officials.⁴⁶³ The simple use of the term of art in the statute, however, does not adequately provide guidance to school officials or to students regarding the criteria used in making the determination that some conduct or expression is disruptive.⁴⁶⁴ As the courts have indicated, mere "intuition" or "speculation" that student expression will cause dis-

456. See *infra* note 516.

457. See *supra* notes 205-06.

458. L. TRIBE, *supra* note 26, at 710 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing void on its face since it banned peaceful picketing protected by first amendment)).

459. See generally *id.* at 712-16.

460. See *infra* notes 503-04.

461. See *supra* notes 450-54.

462. This is the standard which former Supreme Court Justice Potter Stewart used to determine whether or not material was "obscene." See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

463. See *Fraser*, 105 S. Ct. at 3164-65. With regard to "offensive speech," Justice Stevens observed that the student "was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime." *Id.* at 3169 (Stevens, J., dissenting) (footnote omitted).

464. *Nitzberg*, 525 F.2d at 383.

ruption is not enough to justify suppression.⁴⁶⁵ Still, protected student expression is often suppressed on those very grounds.⁴⁶⁶ Thus, use of the term substantial disruption in section 48907 provides school officials with the authority to censor protected as well as unprotected expression. In short, the term substantial disruption without more is both unconstitutionally vague and overbroad.⁴⁶⁷ As the *Nitzberg* court observed in reviewing the challenged regulation before it:⁴⁶⁸

A crucial flaw exists in this directive since it gives no guidance whatsoever as to what amounts to a "substantial disruption of or material interference with" school activities; and, equally fatal, it fails to detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption.⁴⁶⁹

The court added that although the terms used came "directly from the language in *Tinker*, . . . [i]t does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific . . . to convey to students or people in general of what is prohibited."⁴⁷⁰

Similar difficulties arise in determining what kind of student expression will "create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations."⁴⁷¹

Section 48907 also suffers from the problem of "overbroad delegation."⁴⁷² As one commentator stated:

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate—to achieve indirectly through

465. See *supra* notes 352-54 and accompanying text.

466. *Id.*

467. *Nitzberg*, 525 F.2d at 383.

468. See *supra* note 445 for the regulation.

469. *Nitzberg*, 525 F.2d at 383.

470. *Id.* (quoting *Jacobs v. Board of School Comm'rs*, 490 F.2d 601, 605 (7th Cir. 1973) (footnote omitted), *vacated as moot*, 420 U.S. 128 (1975)).

471. What is a "clear and present danger" and to what must the clear and present danger relate—to the mere act of violating the regulation; or to the results if the regulation is violated? Furthermore, what kind of a showing must administrators make before they may censor on that basis? See *supra* note 366 for a discussion of the "clear and present danger" test in the adult context. If a student editorial advocated that students violate the "no chewing gum in class" rule, could administrators exercise prior restraint on the ground that the editorial would "create a clear and present danger of . . . the violation of lawful school regulations"?

472. See generally L. TRIBE, *supra* note 26, at 732-34.

selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.⁴⁷³

The commentator further noted that "first amendment protection often depends on balancing free speech rights and governmental interests in particular situations, which depends in turn on a close, after-the-fact scrutiny of the factual circumstances by the reviewing court."⁴⁷⁴ Furthermore, "[e]xcept in those rare instances when bad faith is manifest, the abuse of administrative discretion is likely to find shelter behind a record of contradictory testimony and retrospective rationalization."⁴⁷⁵ This commentator thus concluded that "covert censorship cannot be checked adequately by judicial review of the scheme as applied in particular cases."⁴⁷⁶

In addition, even though "a court may seek to make its own characterization of the expressive activity, [its] perception of the facts is inherently subjective."⁴⁷⁷ For example, the court will have to determine if the violation of lawful school rules was indeed imminent or if an expression would have substantially disrupted the school. The commentator found that the courts tended to "be satisfied that the evidence is sufficient if the record is not 'totally devoid of evidentiary support,' the minimal due process standard."⁴⁷⁸ Therefore, "[f]actual review is . . . an unreliable cure for an overbroad delegation."⁴⁷⁹ Accordingly, "the Supreme Court has consistently chosen facial invalidation of statutes containing essentially standardless delegations in areas affecting first amendment rights."⁴⁸⁰ Section 48907 "open-endedly delegates to administering officials the power to decide how and when [prior restraints] are applied." Therefore, all of the coordinate dangers attach to this system of discretionary delegation of free speech and press rights. The pitfalls accompanying after-the-fact review of the school officials' justifications for the restraint are especially troublesome in light of the great deference usually given by the courts to such officials.

4) lack of procedural safeguards

Finally, students' constitutional rights may be unnecessarily infringed upon because section 48907 lacks any procedural mechanisms to

473. *Id.* at 733 (citing *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965)).

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.* (citing *Thomas v. Louisville*, 362 U.S. 199 (1960)).

479. *Id.*

480. *Id.* at 733-34.

safeguard against erroneous classification of protected expression as unprotected.⁴⁸¹ Section 48907 sets forth neither a prompt and adequate time period for review nor an appellate procedure for review of administrative decisions.

As the federal courts indicate, "quick disposition" is necessary in free speech cases.⁴⁸² Section 48907 provides only that officials must act without "undue delay." What is undue delay? This standard is too discretionary as it "rest[s] in the sole—and neither controlled nor guided—judgment of a single school official."⁴⁸³ Furthermore, section 48907 does not provide students with an opportunity to appeal a censorship decision. As the courts have held, in order for a student press regulation to pass constitutional muster, it must provide for an expedient appeals procedure.⁴⁸⁴

In striking down the defendant school's system of prior submission, the United States Court of Appeals for the Fourth Circuit in *Baughman*,⁴⁸⁵ noted that any system of prior submission comes before the court bearing a "heavy presumption" against its constitutionality, and that such systems are tolerated only where they operate under judicial superintendence and assure almost immediate judicial review of the validity of the restraint.⁴⁸⁶ The court ruled that the regulation at issue⁴⁸⁷ was constitutionally deficient because: (1) it lacked a specific and reasonably short time period within which the principal must act; and (2) it did not provide for the principal's failure to act.⁴⁸⁸ The court also held that the rule was constitutionally deficient because it failed to provide for an

481. See generally *Freedman v. Maryland*, 380 U.S. 51 (1965); see *supra* note 33.

482. *Nitzberg*, 525 F.2d at 384; see also *Baughman*, 478 F.2d at 1349; *Shanley*, 462 F.2d at 977; see also *supra* notes 156-58 for the *Rowe* court's discussion of the impact of delay on the student press.

483. See *Myers*, 269 Cal. App. at 559, 75 Cal. Rptr. at 74.

484. *Eisner*, 440 F.2d 803; see *supra* note 437; see also *infra* note 510.

485. 478 F.2d 1345; see *supra* note 439.

486. *Id.* at 1350 (citing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957)).

487. The challenged board regulations provided in pertinent part:

Under the following procedures, student publications produced without school sponsorship may be distributed in schools:

4) A copy must be given to the principal for his review. (He may require that the copy be given him up to three school days prior to its general distribution.) If, in the opinion of the principal, the publication contains *libelous or obscene language, advocates illegal actions*, or is grossly insulting to any group or individual, the principal shall notify the sponsors of the publication that its distribution must stop forthwith or may not be initiated, and state his reasons therefor. The principal may wish to establish a publications review board composed of staff, students, and parents to advise him in such matters.

Id. at 1347 (emphasis added).

488. *Id.* at 1348.

“expeditious review procedure” of an adverse decision by school authorities.⁴⁸⁹

The *Nitzberg* court also attacked a timetable for administrative review.⁴⁹⁰ The court noted that its decision in *Baughman* “made it quite plain that a prior restraint procedure, to be valid, must provide prompt and adequate review.”⁴⁹¹ Here, the court found that the procedures to be followed by the school administration were unclear for several reasons. First, the regulation required the principal to render a decision on a proposed publication within two “pupil days” and the assistant superintendent reviewing the principal’s decision had to render his decision within three “pupil days.”⁴⁹² The court struck down this provision since the term “pupil days” was undefined and because no specific time limit was provided for an appeal from the assistant superintendent’s decision to the superintendent.⁴⁹³ In addition, the ultimate review by the school board was permitted only “at the time of its next regularly scheduled meeting.”⁴⁹⁴ The court declared that “[s]uch protracted steps in the appeals procedure are obviously incompatible with the quick disposition so necessary in free speech cases.”⁴⁹⁵

In *Bailey v. Loggins*,⁴⁹⁶ the California Supreme Court observed that “[n]ewspaper articles often must be published within a few days of the event they describe, or the articles will lose all value as reportage of current events; delay is often as effective form of censorship as suppression of the article.”⁴⁹⁷ The court accordingly held that “the prison administration must . . . ensure an expeditious review procedure. To be valid, the regulations must prescribe a *definite* brief time within which the review of submitted material will be completed.’”⁴⁹⁸

The regulations at issue in *Bailey* provided for three levels of appeal and permitted a period of forty-five days between the initial grievance and the final decision, with extra time for extraordinary cases.⁴⁹⁹ Despite this elaborate appeals procedure, the court concluded that this grievance procedure was “not one suitable for occasions when timeliness and First

489. *Id.* at 1349 (quoting *Quarterman v. Byrd*, 453 F.2d 54, 59 (4th Cir. 1971)).

490. *Nitzberg*, 525 F.2d at 383-84.

491. *Id.* at 383.

492. *Id.* at 383-84.

493. *Id.* at 384.

494. *Id.*

495. *Id.*

496. 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575; see also *supra* notes 307-19.

497. *Id.* at 921, 654 P.2d at 768, 187 Cal. Rptr. at 585.

498. *Id.* (quoting *The Luparar v. Stoneman*, 382 F. Supp. 495, 502 (D. Vt. 1974)).

499. *Id.*

Amendment considerations are implicated.”⁵⁰⁰

When measured against the foregoing requirements, the casual reference to “undue delay” found in section 48907 is constitutionally unacceptable. Moreover, section 48907 fails to provide an appeals procedure during which time the “undue delay” clock is to run. Often times students must simply wait until the next school board meeting which may be weeks away.

Unchecked and unchallengeable censorship, which section 48907 fails to prohibit, infringes upon students’ expression and press rights in an unnecessarily restrictive way. A censored student’s only recourse is to turn to the courts. Given the imposing nature of litigation and its inherent costs, most students will simply fail to fight for their chance to be heard.⁵⁰¹

5) summary

To summarize, the courts require that student press guidelines meet the following requirements in order to overcome claims of vagueness, overbreadth and a lack of procedural safeguards.

First, regulations must contain criteria and specific examples of what is considered to be disruptive, obscene or defamatory so that students will understand what expression is prohibited.⁵⁰² For example, use of the *Tinker* phrases “substantial disruption” and “material interference” is unacceptable without specific “criteria by which an administrator might reasonably predict the occurrence of such a disruption.”⁵⁰³ The courts have held that a regulation which simply mimics the “phrasing of a constitutional standard” does not necessarily render the regula-

500. *Id.*

501. In a recent interview, Mark Goodman, Executive Director of the Student Press Law Center, remarked: “It’s a rare situation when a student chooses to go to court. Everything is against [him or her] [including a] lack of support from parents, school administrators, and often other students.” Kossen, *supra* note 18, at 1, col. 4 (quoting Mark Goodman). A further and more significant barrier which students must overcome is the cost of litigation. The attorney for student David Leeb, *see supra* note 216, estimates that Leeb’s suit against the school district has cost Leeb approximately \$12,000. *Id.*

If students file suit under 42 U.S.C. § 1983 for violation of their civil rights by state officials, they may be entitled to statutory attorneys’ fees under 42 U.S.C. § 1988. However, unless the student does “prevail” he or she will be responsible for all of his or her own attorneys’ fees and the costs of litigation. Following *Fraser*, 106 S. Ct. 3159, the Ninth Circuit panel concluded that he had not prevailed on any issue and was therefore not entitled to any attorneys’ fees. *Fraser v. Bethel School Dist. No. 403*, Nos. 83-3987, 83-4142 (9th Cir. Jan. 15, 1987) (LEXIS, Genfed library, courts file).

502. LAW OF THE STUDENT PRESS, *supra* note 60, at 55 (citing *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975); *Baughman v. Freienmuth*, 478 F.2d 1345, 1351 (4th Cir. 1973)).

503. *Nitzberg*, 525 F.2d at 383.

tion "sufficiently specific . . . to convey notice to students or people in general of what is prohibited."⁵⁰⁴

Second, the regulations must provide definitions of all key terms used in the regulation such as "disruption," "obscenity," "defamation" and "distribution."⁵⁰⁵ Simply using terms of art such as "libelous" and "obscene" is "not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria."⁵⁰⁶

Third, "publication guidelines must be included in the official school publications or circulated to students in the same manner as other official material."⁵⁰⁷

Fourth, "when publication guidelines provide for prior review by school officials, they must specify to whom the material is to be submitted for approval."⁵⁰⁸

Fifth, "any system of prior review must give students the right to a prompt hearing before the decision-maker and to argue why distribution should be allowed."⁵⁰⁹

Sixth, publication guidelines must precisely limit the time in which the official has to reach a decision on whether to prevent distribution. The time period "must be reasonable, and the guidelines must provide for the contingency of a school official failing to issue a decision within the time specified."⁵¹⁰

Finally, "any system of prior review must include an expeditious procedure for appealing an administrator's decision to suppress student expression."⁵¹¹

When the prior restraint system set forth in Education Code section 48907 is measured against the foregoing requirements, it is evident that the system does not survive constitutional scrutiny. Section 48907 not

504. *Id.* (quoting *Jacobs v. Board of School Comm'rs*, 490 F.2d 601, 606 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975)).

505. *LAW OF THE STUDENT PRESS*, *supra* note 60, at 55 (citing *Hall v. Board of School Comm'rs*, 681 F.2d 965 (5th Cir. 1982); *Nitzberg v. Parks*, 525 F.2d 378, 382 (4th Cir. 1975)).

506. *Baughman*, 478 F.2d at 1350.

507. *LAW OF THE STUDENT PRESS*, *supra* note 60, at 55 (citing *Nitzberg v. Parks*, 525 F.2d 378, 384 (4th Cir. 1975)).

508. *Id.* (citing *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 804 (2d Cir. 1971)).

509. *Id.* (citing *Leibner v. Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977)).

510. *Id.* (citing *Baughman v. Freienmuth*, 478 F.2d 1345, 1351 (4th Cir. 1973); *Quarterman v. Byrd*, 453 F.2d 54, 56 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 804 (2d Cir. 1971)); *see also Bailey*, 32 Cal. 3d at 921, 654 P.2d at 768, 187 Cal. Rptr. at 585.

511. *Id.* (citing *Hall v. Board of School Comm'rs*, 681 F.2d 965, 966 (5th Cir. 1982); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 970 (5th Cir. 1972); *Leibner v. Sharbaugh*, 429 F. Supp. 744, 747 (E.D. Va. 1977)).

only fails to define legal terms of art, such as obscenity and libel, but it also fails to provide a time limit within which administrators must review student publications. Section 48907 merely provides that school officials shall show justification for an imposition of prior restraint "without undue delay." Moreover, the statute fails to establish any appeal procedure for adverse decisions and does not provide for judicial review.

Section 48907 does not appear to pass the *Akin* three-prong test for constitutionally restraining students' rights. Not only is prior restraint not the "least subversive" means of achieving order in the school, but the language of the statute was not drawn with "narrow specificity" and, therefore, does not provide adequate guidance to school officials or students. Hence, although the legislature's goal in fostering student press freedom is admirable, their means of achieving that goal, section 48907, falls short of the constitutional minimum required to safeguard the rights of free expression and press.

V. RECOMMENDATIONS

A. *Banning Prior Review and Prior Restraints*

The position taken by the Student Press Law Center, as reflected in their guidelines, is that there shall be no prior restraint of the student press.⁵¹² In their words, "[n]o student publication . . . will be reviewed by school administrators prior to distribution."⁵¹³ This position is consistent with both the first amendment of the United States Constitution and article I, section 2(a) of the California Constitution. As the Seventh Circuit illustrates, schools can function in the absence of administrative control and censorship of the student press.⁵¹⁴ The California Legislature should remove administrative prior restraint authority and return the freedom from prior restraint to the California student press. In doing so, the legislature would be taking the final step in meaningfully legislating student press freedom. Only then would section 48907 truly reflect the legislative and judicial history of the statute.⁵¹⁵

B. *Defining the Terms in Section 48907*

One of the primary problems plaguing Education Code section 48907 is its lack of specific definitions for the categories of prohibited

512. See *Student Press Law Center Model Guidelines for Student Publications*, reprinted in *LAW OF THE STUDENT PRESS*, *supra* note 60, app. A at 79-82 [hereinafter *Model Guidelines*]. See *infra* Appendix B for the full text of the *Model Guidelines*.

513. *Model Guidelines*, *supra* note 512, at 82.

514. See *supra* notes 418-19.

515. See *supra* notes 107-213 and accompanying text.

speech. The definitions of libel and obscenity may be found in the California Civil and Penal Codes.⁵¹⁶ Thus, at the very least, section 48907 should be amended to provide cross-references to these sections for definitions of the legal terms. Since the special characteristics of the school environment and the presence of minors will have to be taken into consideration in applying those general code sections to student expression, the better solution is to amend section 48907 by adding a definitions section which takes these factors into account.

The Student Press Law Center Model Guidelines for Student Publications set forth definitions of the terms used in section 48907.⁵¹⁷ As the definitions reflect the positions of the various federal courts which have construed these terms, the California Legislature should adopt these definitions and incorporate them into section 48907. With regard to official school publications, the Model Guidelines provide:

1. Students cannot publish or distribute material which is "obscene as to minors". Obscene as to minors is defined as:

516. See *supra* note 455. California Penal Code § 311 defines "obscene matter" as matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary statewide standards, is to prurient interest, meaning a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole lacks significant literary, artistic, political, educational, or scientific value.

CAL. PENAL CODE § 311 (West Supp. 1987).

California Penal Code § 313 defines "harmful matter" as it relates to minors. Section 313 provides in pertinent part:

(a) "Harmful matter" means matter taken as a whole, the predominant appeal of which to the average person, applying contemporary statewide standards, is to prurient interest, meaning a shameful or morbid interest in nudity, sex, or excretion, and is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and matter which taken as a whole lacks significant literary, artistic, political, educational, or scientific value for minors.

(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter lacks significant literary, artistic, political, educational, or scientific value for minors.

CAL. PENAL CODE § 313 (West Supp. 1987).

California Civil Code § 45 defines "libel" as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." CAL. CIV. CODE § 45 (West 1982).

517. *Model Guidelines, supra* note 512.

(a) the average person, applying contemporary community standards, would find that the publication, taken as a whole, appeals to a minor's prurient interest in sex; and

(b) the publication depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts (normal or perverted), masturbation, excretory functions, and lewd exhibition of the genitals; and

(c) the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) "Minor" means any person under the age of eighteen.

2. Students cannot publish or distribute material which is "libelous", defined as a false and unprivileged statement about a specific individual which injures the individual's reputation in the community. If the allegedly libeled individual is a "public figure" or "public official" as defined below, then school officials must show that the false statement was published "with actual malice", i.e., that the student journalists knew that the statement was false, or that they published the statement with reckless disregard for the truth—without trying to verify the truthfulness of the statement.

(a) A public official is a person who holds an elected or appointed office.

(b) A public figure is a person who either seeks the public's attention or is well known because of his achievements.

(c) School employees are to be considered public officials or public figures in articles concerning their school-related activities.

(d) When an allegedly libelous statement concerns a private individual, school officials must show that the false statement was published willfully or negligently, i.e., the student journalist has failed to exercise the care that a reasonably prudent person would exercise.

(e) Under the "fair comment rule" a student is free to express an *opinion* on matters of public interest. Specifically, a student enjoys a privilege to criticize the performance of teachers, administrators, school officials and other school employees.

3. Students cannot publish or distribute material which will cause "a material and substantial disruption of school activities."

(a) Disruption is defined as student rioting; unlawful seizures of property; destruction of property; widespread shouting or boisterous conduct; or substantial student participation in a school boycott, sit-in, stand-in, walk-out or other related form of activity. *Material that stimulates heated discussion or debate does not constitute the type of disruption prohibited.*

(b) In order for a student publication to be considered disruptive, there must exist specific facts upon which it would be reasonable to forecast that a clear and present likelihood of an immediate, substantial material disruption to normal school activity would occur if the material were distributed. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able to affirmatively show substantial facts which reasonably support a forecast of likely disruption.

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

(d) School officials must act to protect the safety of advocates of unpopular viewpoints.

(e) "School activity"—means educational activity of students sponsored by the school and includes, by way of example and not by way of limitation, classroom work, library activities, physical education classes, individual decision time, official assemblies and other similar gatherings, school athletic contests, band concerts, school plays, and scheduled in-school lunch periods.⁵¹⁸

518. *Id.*

The Model Guidelines, like section 48907, provide that school officials may regulate the time, place and manner of student publication distribution. "Distribution" is defined as the "means of dissemination of a publication to students at a time and place of normal school activity, or immediately prior or subsequent thereto . . . in areas of the school generally frequented by students."⁵¹⁹

By including specific definitions in section 48907, the legislature can more effectively guide county boards and school districts in their drafting of guidelines.⁵²⁰ While having a clear and precise statute on the books is favorable from a legal standpoint, what may best serve the needs of students and school officials may be specific guidelines promulgated by the State Department of Instruction or State Board of Education⁵²¹ or by local school districts and schools.⁵²²

C. *Establishing and Implementing Student Publication Guidelines at the Local Level*

Even if Education Code section 48907 is reconstructed to conform to constitutional standards, its presence is no guarantee that student press rights will be realized.⁵²³ Statutory protection only protects if administrators know of the law and act to implement it. This does not appear to have happened on a wide-scale degree with section 48907.

In the fall of 1985, the 58 county boards of education in California and 182 selected school districts in each of those counties were surveyed regarding section 48907 and student press guidelines.⁵²⁴

519. *Id.* at 81.

520. *See generally supra* notes 527-48 and accompanying text.

521. *But see infra* note 529.

522. *See infra* notes 523-48.

523. *See supra* text accompanying notes 512-16.

524. A similar survey was conducted in 1978-79, soon after Education Code § 48907 (then § 48916) was enacted. *See R. Pullen & P. Rasmussen, The Stark Reality of the 1977 California Education Code and Student Press Freedom 5-13* (Aug. 1980) (unpublished manuscript presented to the Secondary Education Division at the Association for Education in Journalism Annual Convention in Boston, Massachusetts).

In the Pullen-Rasmussen survey, fifty randomly selected California school districts were surveyed. Twenty-five districts responded. Fifteen districts reported that they had a copy of the statute, while nine said that they did not. Twelve respondents were very familiar with the code, nine were somewhat familiar and two were not familiar. *Id.* at 5. Thirteen of the districts responding had established a publications code as required by the statute. Also, most schools had no appeals procedure for students who wished to challenge a censorship decision. *Id.* at 6.

Telephone interviews with journalism advisers were also conducted. Many of the advisers tolerated administrative censorship or censored themselves "fearing reprisals in the form of poor teaching assignments, transfers, or contract termination." *Id.* at 13. These responses, together with the survey results, led the surveyors to conclude that many districts were ignorant of or were ignoring the Education Code and thus were continuing to censor. *Id.* at 14.

Eighteen of the 58 county boards of education responded. None of them had adopted written publications guidelines for the school districts and individual schools in their jurisdiction to follow. Of the 182 school districts surveyed, 57 responded. Twenty-four of the school district superintendents surveyed were unaware of any legislation governing student publications. An additional 5 school district superintendents were not aware of the legislation, but their district guidelines did refer to section 48907. Accordingly, it was not surprising to find that only 24 of the 57 school districts had actual formal student press guidelines. Six of the school districts reported that the decision to have guidelines was left to the individual discretion of the schools in their districts.

Many of the school district guidelines were quite comprehensive,⁵²⁵ while other districts simply stated that there was an "understanding" between the principal and the newspaper editor about what was acceptable. None of the district guidelines, however, appeared to satisfy the requirements set forth in the Fourth Circuit cases.⁵²⁶ All districts provided for some type of prior restraint of obscene or libelous expression. Few of the districts provided any sort of definition or description of what would constitute obscenity or libel. Likewise, few districts provided speedy and specified time periods for review and appeal of censorship decisions.

The first step in implementing student press rights at the local level is educating administrators, advisers and students about developments in the law.⁵²⁷ One commentator suggests that state and regional journalism associations take responsibility for educating their members.⁵²⁸ The associations, through its members, can then take the next step in implementing student press rights: establishing written publication guidelines at the district and individual school levels. Local guidelines may be drafted or revised in the following manner.⁵²⁹

They recommended that the State Board of Public Instruction lead the way in formulating guidelines which comply with the Education Code. *Id.* at 14-15.

525. See the Los Angeles Unified School District's student press guidelines, Board Policy 1275, *supra* note 202.

526. Several school district representatives who responded to the survey requested that their guidelines not be critiqued. Accordingly, no direct references will be made to a specific district's guidelines (with the exception of the Los Angeles Unified School District's guidelines).

527. Administrators responding to the survey who knew of § 48907 stated that they received legal information from various journalism associations, the district's legal counsel or from journalism publications. See *supra* text accompanying note 513.

528. Eveslage, *supra* note 16, at 16, 17.

529. These recommendations are set forth in Eveslage, *Guidelines: Protection or Trap*, STUDENT PRESS L. CENTER REP., Winter 1983-84, at 19-21 [hereinafter *Guidelines*]. Statewide guidelines may be promulgated; however, the effectiveness of such guidelines is debatable. In 1982, the Journalism Education Association (JEA) conducted a survey of 12 states to determine whether the states had any code, law, guidance or policy regulating student journalists.

First, administrators and educators should strive for local acceptance of the guidelines.⁵³⁰ The Student Press Law Center's Model Guidelines for Student Publications⁵³¹ may serve as a prototype and may be modified and adapted to meet the needs of each district, school, publication and staff.⁵³² Personalized guidelines are more likely to garner local support by students and administrators and "compliance might be greater than if the regulations came to them from a state agency."⁵³³

Second, the guidelines should "be specific and focus on legal 'do's' and 'don'ts'—what [advisers] can and cannot do and what can and cannot be done to the [adviser] and . . . staff."⁵³⁴ Prohibited content should be specified⁵³⁵ and, if prior review is allowed, the review and appeals procedures should be clearly delineated.⁵³⁶

Third, the guidelines must clearly distinguish between the "enunciation of constitutional rights and limitations" and statements concerning how a responsible and ethical journalist should perform.⁵³⁷ Although constitutional rights are not predicated upon one's conformity to standards or responsible behavior,⁵³⁸ guidelines which do not distinguish between "rights" and "responsibilities" may be viewed as a single contract or agreement between the student journalists and the administration.⁵³⁹ Hence, administrators may use the guidelines as authority for rendering student's free speech and free press rights contingent upon the student's

Eveslage, *supra* note 16, at 16. The uninformed responses by state officials (e.g., officials in Attorney Generals' offices and Departments of Education) led the JEA to conclude that "those higher in the education structure may have limited awareness of existing state and federal law and regulations in [the area of student press law]." *Id.* at 16-17. Based on those findings, the following question arose: Is a "state law or code . . . the best way to increase awareness of student rights, induce among local educators acceptance of such imposition by state legislators, or prompt greater student press freedom?" *Id.* at 17. Pointing to the failure of California administrators and advisers to comply with the state law requiring the school districts to implement publication guidelines, the JEA observed that "the existence of state law, even when it dictates specific action, is no guarantee [of student press rights]." *Id.*

The JEA indicated that "judges, attorneys and educators seem to believe that school decisions are best made in a specific way at the local or district level. Anything from outside or above is perceived as advisory and subject to local interpretation and adaptation." *Id.*

530. *Guidelines, supra* note 529, at 20.

531. *See infra* Appendix B.

532. *Guidelines, supra* note 529, at 20.

533. Eveslage, *supra* note 16, at 17.

534. *Guidelines, supra* note 529, at 20.

535. Numerous cases illustrate the required degree of specificity in using terms of art such as libel and obscenity in student publications guidelines. *See supra* notes 437-54 and accompanying text.

536. *See supra* notes 482-95 and accompanying text.

537. *Guidelines, supra* note 529, at 21.

538. *Id.*

539. *Id.*

conformity with the prescribed behavior.⁵⁴⁰

Fourth, the staff's duties and responsibilities should be set forth.⁵⁴¹ A code of journalism ethics is also useful as it informs students and administrators that with press freedom comes ethical responsibility.⁵⁴²

In addition to guidelines, schools or school districts may establish an informal administration-student relations committee to discuss mutual concerns. The court in *Nitzberg v. Parks*⁵⁴³ suggested that the use of such a committee might alleviate "the disruption and bitterness generated by an unpopular refusal of the administrator to allow circulation of a student publication."⁵⁴⁴ The court observed that

[t]hrough such a joint effort, final answers may be found for the many difficult questions precipitated by prior restraint of student publications. For example, such a committee might decide (1) where on school property it would be appropriate to distribute approved material; (2) the type of material that might cause distractions and disruptions among the students; and (3) the question of how serious a "disruption" must be before prior restraint would be justified. Such a course would lessen the possibility of arbitrary action and unfair treatment which, in turn, we think, would improve teacher-student relations.⁵⁴⁵

In sum, arbitrary censorship is less likely if *constitutional* guidelines and a forum for administration-student communication are in place.⁵⁴⁶ When objectionable content is clearly defined and legal procedures are described, the ground rules are set for both administrators and students

540. *Id.* at 20, 21. For example, students' protected rights may be made contingent upon the performance of ethical and journalistic behavior if the guidelines contain statements such as "news articles will be objective" or "students will verify the accuracy of all quotations." *Id.* at 21.

541. *Id.* Education Code § 48907 provides some guidance in this area as it specifies the adviser's and editors' roles. See LAW OF THE STUDENT PRESS, *supra* note 60, at 38 (list of safeguards that student journalists should take to reduce the likelihood of libel suits); *id.* at 40 (issues to consider before publishing profanity); *id.* at 49 (students' use of copyrighted material); *id.* at 74-77 (role of the adviser and safeguards to be taken as adviser).

542. *Guidelines*, *supra* note 529, at 21; see *infra* Appendix C for the Society of Professional Journalists Sigma Delta Chi Code of Ethics. Eveslage suggests that the list of duties and the code of ethics be kept distinct from the guidelines based on legal precedent. *Guidelines*, *supra* note 529, at 21.

543. 525 F.2d 378 (4th Cir. 1975).

544. *Id.* at 385; see also LAW OF THE STUDENT PRESS, *supra* note 60, at 67 (chapter discussing conflict resolution).

545. *Id.*

546. *Guidelines*, *supra* note 529, at 19.

prior to the occurrence of any controversy.⁵⁴⁷ Furthermore, guidelines and committees foster better administration-student relations. A "mutual understanding of one another's position should make each side more sensitive and short-circuit confrontation."⁵⁴⁸

VI. CONCLUSION

We would like to think that we have come a long way since the early days of public education when school officials had absolute authority over students' conduct and expression. But have we? Nearly half a century ago the United States Supreme Court observed that since boards of education "are educating the young for citizenship [there] is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁵⁴⁹ Education Code section 48907 does not provide scrupulous protection for the freedom of the student press. Instead, its broad measures validate almost unlimited administrative censorship.

Allowing section 48907's prior restraint system to remain on the books as drafted licenses arbitrary administrative censorship of student expression in their publications. In the process of censoring, school officials disparage students' conceptions of free speech and free press rights. As one journalism adviser remarked, it is quite ironic that students learn about freedoms fundamental to American government, such as free speech and press, in civics class only to walk across the hallway to journalism class to find that those freedoms do not exist for students.⁵⁵⁰

The "vigilant protection of constitutional freedoms *is* nowhere more vital than in the community of American schools."⁵⁵¹ The California courts and legislature must not forget that

547. *Id.*

548. *Id.*

549. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

550. Interview with Mark Wiener, Journalism Adviser at Canoga Park High School and former president of the Los Angeles Journalism Teachers Association, in Canoga Park, California (Nov. 6, 1985). Similarly, one federal court advised that "[p]erhaps it would be well if those entrusted to administer the teaching of American history and government to our students began their efforts by practicing the document on which that history and government are based." *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 978 (5th Cir. 1972). The court added that "[i]t is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass." *Id.* at 972 (footnote omitted). See also *supra* note 1 and accompanying text & note 152.

551. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)) (citation omitted) (emphasis added); see also *supra* note 7.

[i]t is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.⁵⁵²

If there is to be a climate of respect for freedom of expression, it must begin with the young, with students. Only through an uncensored student press can young people experience and grow to respect the real meaning of free speech.⁵⁵³

*Jeri Christine Okamoto**

552. *Baughman v. Freienmuth*, 478 F.2d 1345, 1349 (4th Cir. 1973) (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689 (1968)). As the Supreme Court advised, “[t]o do otherwise is to leave administrators adrift upon a boundless sea.” *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952)).

553. See M. Simpson, *supra* note 2, at 29; see also N. HENTOFF, *THE FIRST FREEDOM* 22 (1980) (quoting journalist and press historian Ben Bagdikian) (“If freedom of expression becomes merely an empty slogan in the minds of enough children, it will be dead by the time they are adults.”).

* The author is a former Student Press Law Center intern. This Comment is dedicated to Professor Emeritus C. Herman Pritchett, University of California, Santa Barbara, for his inspiration.

APPENDIX A

CALIFORNIA EDUCATION CODE SECTION 48907*

Student exercise of free expression

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is *obscene, libelous, or slanderous*. Also prohibited shall be *material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school*.

Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.

Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.

There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification *without undue delay* prior to any limitation of student expression under this section.

“Official school publications” refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

* CAL. EDUC. CODE § 48907 (West Supp. 1987) (emphasis added).

APPENDIX B

STUDENT PRESS LAW CENTER MODEL GUIDELINES FOR
STUDENT PUBLICATIONS*

I. STATEMENT OF POLICY

It is undeniable that students are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States. Accordingly, it is the responsibility of school officials to insure the maximum freedom of expression to all students.

It is the policy of the _____ Board of Education that _____ (newspaper), _____ (yearbook), and _____ (literary magazine), official, school-sponsored publications of _____ High School have been established as forums for student expression. As a forum, each publication should provide a full opportunity for students to inquire, question and exchange ideas. Content should reflect all areas of student interest, including topics about which there may be dissent or controversy.

It is the policy of the _____ Board of Education that student journalists shall have the ultimate and absolute right to determine the content of official student publications.

II. OFFICIAL SCHOOL PUBLICATIONS

A. Responsibilities of Student Journalists

Students who work on official student publications will:

1. Rewrite material, as required by faculty advisers, to improve sentence structure, grammar, spelling and punctuation;
2. Check and verify all facts and verify the accuracy of all quotations;
3. In the case of editorials or letters to the editor concerning controversial issues, provide space for rebuttal comments and opinions; [and]
4. Determine the content of the student publication.

B. Prohibited Material

1. Students cannot publish or distribute material which is "obscene as to minors". Obscene as to minors is defined as:

- (a) the average person, applying contemporary community

* STUDENT PRESS LAW CENTER MODEL GUIDELINES FOR STUDENT PUBLICATIONS, reprinted in STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 79-82 (1985).

standards, would find that the publication, taken as a whole, appeals to a minor's prurient interest in sex; and

(b) the publication depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts (normal or perverted), masturbation, excretory functions, and lewd exhibition of the genitals; and

(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) "Minor" means any person under the age of eighteen.

2. Students cannot publish or distribute material which is "libelous", defined as a false and unprivileged statement about a specific individual which injures the individual's reputation in the community. If the allegedly libeled individual is a "public figure" or a "public official" as defined below, then school officials must show that the false statement was published "with actual malice", i.e., that the student journalists knew that the statement was false, or that they published the statement with reckless disregard for the truth—without trying to verify the truthfulness of the statement.

(a) A public official is a person who holds an elected or appointed public office.

(b) A public figure is a person who either seeks the public's attention or is well known because of his [or her] achievements.

(c) School employees are to be considered public officials or public figures in articles concerning their school-related activities.

(d) When an allegedly libelous statement concerns a private individual, school officials must show that the false statement was published willfully or negligently, i.e., the student journalist has failed to exercise the care that a reasonably prudent person would exercise.

(e) Under the "fair comment rule" a student is free to express an *opinion* on matters of public interest. Specifically, a student enjoys a privilege to criticize the performance of teachers, administrators, school officials and other school employees.

3. Students cannot publish or distribute material which will cause "a material and substantial disruption of school activities."

(a) Disruption is defined as student rioting; unlawful seizures of property; destruction of property; widespread shouting or boisterous conduct; or substantial student participation in a school boycott, sit-in, stand-in, walk-out or other related form of activity. *Material*

that stimulates heated discussion or debate does not constitute the type of disruption prohibited.

(b) In order for a student publication to be considered disruptive, there must exist specific facts upon which it would be reasonable to forecast that a clear and present likelihood of an immediate, substantial material disruption to normal school activity would occur if the material were distributed. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able to affirmatively show substantial facts which reasonably support a forecast of likely disruption.

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

(d) School officials must act to protect the safety of advocates of unpopular viewpoints.

(e) "School activity"—means educational activity of students sponsored by the school and includes, by way of example and not by way of limitation, classroom work, library activities, physical education classes, individual decision time, official assemblies and other similar gatherings, school athletic contests, band concerts, school plays, and scheduled in-school lunch periods.

C. Legal Advice

1. If, in the opinion of the student editor, student editorial staff or faculty adviser, material proposed for publication may be "obscene", "libelous", or "cause a substantial disruption of school activities", the legal opinion of a practicing attorney should be sought. It is recommended that the services of the attorney for the local newspaper be used.

2. Legal fees charged in connection with this consultation will be paid by the board of education.

3. The final decision of whether the material is to be published will be left to the student editor or student editorial staff.

III. PROTECTED SPEECH

School officials cannot:

1. Ban the publication or distribution of birth control information in student publications;
2. Censor or punish the occasional use of vulgar or so-called "four-letter" words in student publications;
3. Prohibit criticism of school policies or practices;
4. Cut off funds to official student publications because of disagreement over editorial policy;
5. Ban speech which merely advocates illegal conduct without proving that such speech is directed toward and will actually cause imminent lawless action;
6. Ban the publication or distribution of material written by nonstudents;
7. Prohibit the school newspaper from accepting advertising.

IV. NONSCHOOL-SPONSORED PUBLICATIONS

School officials may not ban the distribution of nonschool-sponsored publications on school grounds. However, students who violate any rule listed under II.B. may be disciplined after distribution.

1. School officials may regulate the time, place and manner of distribution.

(a) Nonschool-sponsored publications will have the same rights of distribution as official school publications.

(b) "Distribution"—means dissemination of a publication to students at a time and place of normal school activity, or immediately prior or subsequent thereto, by means of handing out free copies, selling or offering copies for sale, accepting donations for copies of the publication, or displaying the student publication in areas of the school which are generally frequented by students.

2. School officials cannot:

(a) Prohibit the distribution of anonymous literature or require that literature bear the name of the sponsoring organization or author;

(b) Ban the distribution of literature because it contains advertising;

(c) Ban the sale of literature.

V. ADVISER JOB SECURITY

No teacher who advises a student publication will be fired, transferred or removed from the advisership for failure to exercise editorial control over the student publication or to otherwise suppress the rights of free expression of student journalists.

VI. PRIOR RESTRAINT

No student publication, whether nonschool-sponsored or official, will be reviewed by school administrators prior to distribution.

VII. CIRCULATION

These guidelines will be included in the handbook on student rights and responsibilities and circulated to all students in attendance.

APPENDIX C

THE SOCIETY OF PROFESSIONAL JOURNALISTS SIGMA
DELTA CHI CODE OF ETHICS*

The Society of Professional Journalists, Sigma Delta Chi, believes the duty of journalists is to serve the truth.

We believe the agencies of mass communication are carriers of public discussion and information, acting on their Constitutional mandate and freedom to learn and report the facts.

We believe in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public's right to know the truth.

We believe those responsibilities carry obligations that require journalists to perform with intelligence, objectivity, accuracy and fairness.

To these ends, we declare acceptance of the standards of practice here set forth.

*** Responsibility:** The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

*** Freedom of the Press:** Freedom of the press is to be guarded as an inalienable right of people in a free society. It carries with it the freedom and responsibility to discuss, question and challenge actions and utterances of our government and of our public and private institutions. Journalists uphold the right to speak unpopular opinions and the privilege to agree with the majority.

*** Ethics:** Journalists must be free of obligation to any interest other than the public's right to know the truth.

1. Gifts, favors, free travel, special treatment or privileges can compromise the integrity of journalists and their employers. Nothing of value should be accepted.

2. Secondary employment, political involvement, holding public office and service in community organizations should be avoided if it compromises the integrity of journalists and their employers. Journalists and their employers should conduct their personal lives in a manner which protects them from conflict of interest, real or apparent. Their

* THE SOCIETY OF PROFESSIONAL JOURNALISTS SIGMA DELTA CHI CODE OF ETHICS (adopted 1926, revised 1973 & 1984), *reprinted in* STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 83-84 (1985).

responsibilities to the public are paramount. That is the nature of their profession.

3. So-called news communications from private sources should not be published or broadcast without substantiation of their claims to news value.

4. Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business is conducted in public and that public records are open to inspection.

5. Journalists acknowledge the newsman's ethic of protecting confidential sources of information.

6. Plagiarism is dishonest and is unacceptable.

***Accuracy and Objectivity:** Good faith with the public is the foundation of all worthy journalism.

1. Truth is our ultimate goal.

2. Objectivity in reporting the news is another goal, which serves as the mark of an experienced professional. It is a standard of performance toward which we strive. We honor those who achieve it.

3. There is no excuse for inaccuracies or lack of thoroughness.

4. Newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight a minor incident out of context.

5. Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free of opinion or bias and represent all sides of an issue.

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.

7. Journalists recognize their responsibility for offering informed analysis, comment and editorial opinion on public events and issues. They accept the obligation to present such material by individuals whose competence, experience and judgment qualify them for it.

8. Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such.

*** Fair Play:** Journalists at all times will show respect for the dignity, privacy, rights and well-being of people encountered in the course of gathering and presenting the news.

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.

2. The news media must guard against invading a person's right to privacy.

3. The media should not pander to morbid curiosity about details of vice and crime.

4. It is the duty of news media to make prompt and complete correction of their errors.

5. Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers and listeners should be fostered.

* **Pledge:** Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people.

