

## ANOTHER LOOK AT THE STATE COLLEGE PRESS

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### INTRODUCTION

The collegiate press is big business.<sup>1</sup> In the state of Nebraska alone, the newspapers of the University of Nebraska system and the state colleges reach more than thirty-four thousand readers.<sup>2</sup> In some communities the collegiate press exceeds the circulation of the local newspaper.<sup>3</sup>

On public college campuses the newspaper may serve as a bulletin board for administrative and student notices. It may also provide a sounding board for a wide range of ideas generated both on and off campus.<sup>4</sup> Campus newspapers have crossed the line of common decency,<sup>5</sup> but nevertheless have been held to be protected under the first amendment of the United States Constitution from censorship<sup>6</sup>

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1. At the major state colleges in the states comprising the Eighth Circuit, the combined circulation of the campus newspapers approaches a quarter of a million readers. At Iowa State University in Ames, Iowa, the campus paper has a circulation of 18,000 and an annual budget of \$675,000. D. POLITELLA, *DIRECTORY OF THE COLLEGE STUDENT PRESS IN AMERICA* 88-89 (6th ed., D. Politella, ed. 1986).

2. *Id.* at 153-55. At the University of Nebraska at Lincoln, *The Daily Nebraskan* has a budget of \$750,000 and claims that 93 percent of its revenue is derived from advertising. *Id.* at 155. At the University of Nebraska at Omaha, the campus newspaper, *The Gateway*, claims a circulation of 7000 and advertising revenue comprising 40 percent of its budget. *Id.*

3. At the University of Iowa, the campus newspaper claims a circulation of 16,000. *Id.* at 91. The Iowa City Press Citizen has a circulation of 15,591. *Editor and Publisher International Yearbook 1987*, at I-124.

4. It is not unusual for a campus newspaper to subscribe to a major wire service and to solicit or borrow material from other media. In *Arrington v. Taylor*, 380 F. Supp. 1348, 1354 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), it was noted that *The Daily Tar Heel* of the University of North Carolina subscribes to United Press International. Currently, *The Daily Nebraskan* subscribes to the Associated Press and carries features from *The Washington Post*, the Universal Press Syndicate and *The New York Times*. See 87 *The Daily Nebraskan*, March 10, 1988.

5. In *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), the Eighth Circuit held that a public university could not constitutionally take adverse action against a student newspaper which satirized Christ, the Roman Catholic Church, evangelical religion and public figures and which used scatological language and explicit and implicit reference to sexual acts. *Id.* at 280-82. The university had proposed to change the method of funding to allow students to obtain a refund of the previously compulsory fee. *Id.* at 281.

6. *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970) held that a university may only regulate the content of a student newspaper when the regulation is nec-

and other forms of retribution.<sup>7</sup>

Public college newspapers occupy a unique position in the constellation of opinion molders for while they may enjoy independence from censorship by administrators they nevertheless may be financed in whole or part by mandatory fees extracted from an unwilling student body.<sup>8</sup> They may be located on state-owned property and enjoy a myriad of public benefits.<sup>9</sup>

Despite the apparent symbiotic relationship between the student press and the state-run university, it is not at all axiomatic that the newspaper will be viewed as an instrument of state action.<sup>10</sup> Thus, the campus paper apparently is free from the demands imposed on the traditional public forums that they be open to the free expression of ideas subject only to reasonable time, place, and manner restrictions.<sup>11</sup>

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essarily related to the maintenance of order and discipline within the educational process. *Id.* at 1336.

7. In *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), it was held that a state university violated the first amendment rights of student editors by disbanding the newspaper in response to editorial positions taken by the editors. *Id.* at 461.

8. In *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb. 1973), a University of Nebraska student challenged the constitutionality of the imposition of mandatory fees used to subsidize *The Daily Nebraskan* and other student programs. Judge Urbom sustained the validity of the fees, holding that a state university is not constitutionally prohibited from providing a forum for the expression of political and personal opinions. *Id.* at 152. Judge Urbom justified his conclusion by finding the activities to be "educational in nature." *Id.*

9. See, e.g., *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1084-85 (5th Cir. 1976) (Goldberg, J., dissenting) (noting that major financing for the paper involved came from the student activity fund, and that the paper was printed on school facilities and was regarded as an official organ of the university). Like *The Daily Nebraskan*, a campus paper may have free office space, janitorial services, police protection, and utilities. *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 149 (D. Neb. 1986).

10. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (stating that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"). See also *Marshall v. Sawyer*, 301 F.2d 639, 646 (9th Cir. 1962) (finding that a violation of constitutional rights is actionable under federal law only when accomplished by one who is "clothed with the authority of the state and . . . purporting to act thereunder"); Van Alstyne and Karst, *State Action*, 14 STAN. L. REV. 3, 10-11 (1961) (stating that "in the absence of some conduct by a state official which makes plausible an outsider's assumption that the actor has in fact been authorized to act for the state in some manner, the actor's conduct will not satisfy the state action requirement"). Cf. *Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470, 477-78 (7th Cir. 1970) (noting that a state tax exemption, *inter alia*, while representing "state involvement" in a limited sense, did not amount to state participation in the conduct of the enterprise); *Resident Participation of Denver, Inc. v. Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971) (stating that "where private conduct is concerned, there must be some justification for concluding that the private party serves as an alter ego for government").

11. See Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. In *Police Dept. v. Mosley*, 408 U.S. 92 (1972), it was held that when the state has provided a public forum through which speakers might have access to listeners,

In a recent case decided by a panel of the United States Court of Appeals for the Eighth Circuit,<sup>12</sup> the issue was whether the newspaper of the University of Nebraska at Lincoln was independent from the state for purposes of a suit brought under 42 U.S.C. § 1983.<sup>13</sup> That provision of the Civil Rights Act serves to redress grievances suffered at the hands of state agencies. Thus, if a threshold determination were made that no state action was involved, the court would not have to reach and decide questions such as what the appropriate "public forum" analysis should be when access to a state college newspaper is at issue.

If the collegiate press is private it could only be compelled to print a proffered advertisement if there is a general constitutional mandate of access.<sup>14</sup> As this Article will show, the United States Supreme Court has uniformly rejected a rule which would impose any such duty on the privately-owned American newspaper.<sup>15</sup>

#### THE *SINN* CASE

*Sinn v. Daily Nebraskan*<sup>16</sup> arose in September, 1984, when a woman, Pam Pearn, attempted to place an ad for a lesbian roommate in *The Daily Nebraskan* and the ad was rejected because it would sub-

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the state may not discriminate among speakers because of the content of their messages. *Id.* at 96.

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

13. *Id.* at 663. Section 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1982).

14. See Newell, *A Right of Access to Student Newspapers at Public Universities*, 4 J. COLL. & UNIV. L. 209 (1977). In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court rejected any right of access to the privately owned press, striking down a Florida statute criminalizing refusal of a publication to print a reply from a target of the newspaper. *Id.* at 258. Citing *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court said that a "government enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* at 257 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)).

15. *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971). The *Times Mirror* court held that a newspaper could not be compelled to accept and print advertising in the exact form submitted, though such advertising was not legally obscene or otherwise unlawful and despite a contention that the newspaper had a virtual monopoly and was, thus, in a quasi-public position. *Id.* at 134-36.

*Times Mirror* is not, as the *Sinn* majority states, a case involving a newspaper published by students at a public university, although it alludes to a freedom of the university press to exercise subjective editorial discretion in rejecting a proffered advertisement. *Id.* at 135. See *Sinn*, 829 F.2d at 665-66.

16. 829 F.2d 662 (8th Cir. 1987).

ject the woman to the "risk of harassment."<sup>17</sup>

At that time, *The Daily Nebraskan* had no written policy barring the ad although there was, according to the district court, an "articulated policy barring objectionable advertising."<sup>18</sup> Notwithstanding that policy, the newspaper had published items relating to gay and lesbian activities as well as articles concerning the denial of the advertisement.<sup>19</sup>

The Publications Committee of the University of Nebraska at Lincoln voted, during the fall of 1984, to amend the existing policy by adding "sexual orientation" to the list of characteristics protected from discrimination in advertising.<sup>20</sup> This amendment was interpreted to ban any advertisements indicating the advertiser's sexual preference.<sup>21</sup> The district court found that this policy's purpose was "not to punish or censor the expression of homosexual orientation, but to prevent discrimination in advertising."<sup>22</sup>

In January of 1985, the same woman attempted to run the following advertisements in the campus newspaper: (1) "Lesbian woman needs roommate to share large 4 bedroom house with fireplace. \$125 month—near south location—on bus line. 476-3996 evenings;" and (2) "Lesbian pet lover to share large 4 bedroom house with fireplace. \$125 month—near south location—on bus line. 476-3996

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17. The statement of facts is more fully set out in *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 145-46 (D. Neb. 1986). The decision to reject the ad was made or authorized by the editor-in-chief and conveyed to Pearn by the general manager of the paper. *Id.*

18. *Id.* at 145.

19. *Id.*

20. *Id.* at 145-46. Judge Urbom explained that the business affairs of the newspaper are governed by the Committee which "approves all major decisions concerning budget, income, expenditures, and policy," and oversees compliance with the ethics code for student publications. *Id.* at 145. The Committee has nine members: five UNL students nominated by the student government and appointed by the Chancellor, two staff representatives nominated by the Faculty senate and appointed by the Chancellor, and two newspaper professionals from outside the university. *Id.* All serve without pay. *Id.*

21. *Id.* at 146. The record revealed that some Board members thought that the self-descriptive ads discriminated against non-gay or non-lesbian readers in a fashion similar to an advertisement stating "only homosexuals need apply." *Id.* at 146. Judge Urbom concluded that it was not unreasonable for the paper to find that the advertisements, in effect, discriminated on the basis of sexual orientation and that compelling publication would "open the door to less subtle forms of discrimination" in the advertising. *Id.* at 151. Judge Urbom did not indicate whether this "discrimination" was of a moral or legal nature.

It is a violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(b) (1982) for any person subject to the Act to publish any notice or advertisement relating to employment and indicating a preference or discrimination based on race, color, religion, sex or national origin. 42 U.S.C. § 2000e-3(b) (1982). See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376 (1973).

22. *Sinn*, 628 F. Supp. at 146.

evenings."<sup>23</sup>

In August of that same year, Michael Sinn attempted to place an advertisement reading: "Gay male seeks roommate. Phone 423-7670. Try again!"<sup>24</sup> *The Daily Nebraskan* refused all three ads, deeming them contrary to its advertising policy.<sup>25</sup>

Pearn and Sinn sued the newspaper, the Regents of the University of Nebraska, the Publications Committee, and the newspaper's general manager for declaratory and injunctive relief, arguing that the refusal to print the advertisements violated their first amendment right to free expression.<sup>26</sup>

#### STATE ACTION AND FREEDOM OF THE PRESS

Freedom of expression is no simple concept. Its permutations go on and on, with the possibility of conflicting rights colliding at every turn. While in the context of the newspaper it might be tempting to try to reduce freedom of expression to a simple tug-of-war between an editor's right to edit and the reader's right to read, this approach is unproductive. It does not work because where vigorous exchange of ideas is at stake, layer upon layer of legal claims clash. Does a person have a right to be spared information?<sup>27</sup> When does one person's idea become another's litter?<sup>28</sup> What rule should govern "fighting words"?<sup>29</sup> What about noisy expression of an idea?<sup>30</sup> What of libel?<sup>31</sup> What of obscenity?<sup>32</sup> What about "good taste"?<sup>33</sup>

To resolve the question of what first amendment right a college

23. *Id.*

24. *Id.*

25. *Id.*

26. See *supra* note 13 and accompanying text.

27. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (nudity on a drive-in movie screen); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (utterance of a vulgar epithet); *Cohen v. California*, 403 U.S. 15 (1971) (wearing of a jacket with a vulgar remark printed on it).

28. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

29. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that "fighting words," which by their very utterance inflict injury, are constitutionally unprotected).

30. *Saia v. New York*, 334 U.S. 558, 559-60 (1948) (holding invalid an ordinance prohibiting the use of amplification devices without the permission of the police chief). See also *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sustaining the validity of an ordinance banning devices such as sound trucks, loud speakers or sound amplifiers which emit "loud and raucous noises").

31. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding that there is "no constitutional value in false statements of fact"). See also *Hustler Magazine v. Falwell*, 56 U.S.L.W. 4180 (U.S. Feb. 23, 1988) (concluding that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'").

32. *Miller v. California*, 413 U.S. 15 (1973).

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

newspaper has, then, is not to define what right a student who is not in the perhaps enviable and always powerful position of running a daily newspaper may have to express an idea which may be controversial or just uncomfortable to others.<sup>34</sup>

In the *Sinn* case, the Eighth Circuit virtually abandoned the discussion of first amendment issues, other than to acknowledge Judge Urbom's point that the amendment applies to states and hence to the campus newspaper of a state-supported institution.<sup>35</sup> The appellate opinion adopted Judge Urbom's view that "the editors of a campus newspaper are entitled to the freedom of expression necessary to choose what the newspaper will publish and reject"<sup>36</sup> and that the paper would be penalized "were it compelled to publish what it otherwise chose to withhold."<sup>37</sup> This view, of necessity, avoids resolution of any other arguable first amendment rights at stake in the complex interaction of college newspaper and reader, newspaper and target of editorial or reportage, and newspaper and advertiser.

Judge Urbom began his analysis by noting that the United States Supreme Court in *Healy v. James*<sup>38</sup> had concluded that the first amendment "is fully applicable to the states and 'state colleges and universities are not enclaves immune from [its] sweep.'"<sup>39</sup> Thus, Judge Urbom wrote, freedom of expression for newspaper editors, which is a constitutional protection afforded the press, is also available to the campus newspaper at a state college.<sup>40</sup> According to

34. *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb. 1973).

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

36. *Id.*

37. *Id.*

38. 408 U.S. 169 (1972). *Healy* is a strange starting point for an opinion which blocks access to a means of communication. The case arose when a group of students sued a state college after being denied official campus recognition for a Students for a Democratic Society chapter. *Id.* at 174. The Supreme Court held that the lower courts erred in discounting the petitioners' cognizable first amendment associational interest. *Id.* at 184-85. The lower courts, moreover, even though the students had made an appropriate application, mistakenly assumed that the burden was on the students to show they were entitled to recognition rather than on the college to justify nonrecognition. *Id.* at 183-84. Mr. Justice Powell, writing for the Court, stated:

If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. . . . [T]he organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.

*Id.* at 181-82.

39. *Sinn*, 638 F. Supp. at 146 (quoting *Healy v. James*, 408 U.S. 169 (1972)). See also *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969) (stating that "the unmistakable holding of the Court for almost 50 years" is that teachers and students, "in light of the special characteristics of the school environment," have first amendment rights).

40. *Sinn*, 638 F. Supp. at 146.

Judge Urbom, these student editors, in refusing or accepting to print materials, necessarily exercise their subjective discretion.<sup>41</sup>

Moreover, Judge Urbom reasoned that "[t]he degree of discretion which editors utilize in rejecting advertisements is not distinguishable, under first amendment analysis, from that exercised over any other submitted matter."<sup>42</sup> Judge Urbom cited *Miami Herald Publishing Co. v. Tornillo*<sup>43</sup> for the proposition that the content chosen for publication must involve both interpretation and selection. These "inevitably result in editorial suppression."<sup>44</sup>

If the *Doily Nebraskan* were compelled to publish what it chose to withhold, Judge Urbom wrote, a penalty would be imposed on the paper.<sup>45</sup> "Its finite space and resources would be appropriated. Its editorial discretion would inescapably be intruded upon. Even if the paper were to experience no added cost or to omit no material it preferred to print, the First Amendment bars governmental impingement upon the functions of the editors."<sup>46</sup>

Several years before the *Sinn* case arose, Professor William Canby, Jr. wrote that "when a constitutional prohibition appears likely to collide with well-established practices, the almost irresistible temptation is to escape the dilemma by manipulating the state action concept."<sup>47</sup> In the collegiate press context, that is precisely what has happened. While acknowledging the dependency of the press on the state institution which created it, the courts have erected a virtually impenetrable wall of separation between state and press. This, in turn, in the name of freedom of the press, has prevented the state from reseizing control. It has resulted in the capture of the student body—at least insofar as the students are forced to pay the state-sponsored organ to espouse opinions which may be offensive to them. It has left them without a forum by which their ideas—surely as valid and valuable as those of the student editors—may be aired. It has eliminated the opportunity to effect Alexander Meiklejohn's suggestion that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."<sup>48</sup>

To demonstrate how the state action doctrine has been manipulated and how the student press has been elevated to the olympian

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41. *Id.*

42. *Id.*

43. 418 U.S. 241 (1974).

44. *Sinn*, 638 F. Supp. at 146.

45. *Id.*

46. *Id.*

47. Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1125 (1974).

48. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

heights of their fellow guardians for the first amendment, a close examination of the facts in *Sinn* is necessary.

Whether "state action" was present in the editorial decision-making of *The Daily Nebraskan* became the central question in *Sinn* for, as the Eighth Circuit noted, if state action was absent, then a suit brought under section 1983 must fail.<sup>49</sup> In the district court, Judge Urbom reasoned that the newspaper was not an agency of the state for all purposes, and held that because in its editorial decision-making *The Daily Nebraskan* functioned like a private enterprise, "the exercise of editorial discretion [did] not constitute state action."<sup>50</sup>

In a four-part analysis, Judge Urbom undertook to demonstrate how the University of Nebraska fosters editorial independence.<sup>51</sup> First, Judge Urbom wrote, the Bylaws of the Board of Regents state "that student publications must be supervised such that 'editorial freedom will be maintained and that the corollary responsibilities will be governed by the canons of ethical journalism.'"<sup>52</sup> Judge Urbom added that the Publications Board both publishes the paper and conducts its general business operation, but "the *Daily Nebraskan* is editorially independent."<sup>53</sup> Its information, ideas and opinions are not those of the University but rather of the editors and writers.

Second, Judge Urbom observed, the editorial policies of the newspaper are governed by the *Guidelines for the Student Press*.<sup>54</sup> The *Guidelines* states that "[t]he editorial policies of the Student Publications shall be entirely in the hands of student editors and no faculty member or University officer shall interfere in such policies."<sup>55</sup>

Third, he pointed to the Joint Statement on Rights & Freedoms of Students contained in the *Guidelines*, which carefully spells out the safeguards for editorial freedom.<sup>56</sup>

Finally, Judge Urbom noted the factual stipulation that while *The Daily Nebraskan* "facilitates communication between the Uni-

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49. *Sinn*, 829 F.2d at 665.

50. *Sinn*, 638 F. Supp. at 149. It is noteworthy that in the case of *Veed v. Schwartzkopf*, Judge Urbom, in justifying the mandatory student fee to support *The Daily Nebraskan*, acknowledged that the creation of the newspaper was equivalent to the creation of a public forum. *Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb. 1973).

51. *Sinn*, 638 F. Supp. at 147.

52. *Id.* (quoting plaintiff's Exhibit #1, *Sinn v. Daily Nebraskan*, 638 F. Supp. 143 (D. Neb. 1986)).

53. *Id.*

54. *Id.* The Regents adopted the *Guidelines* in 1918 and have reaffirmed them periodically. *Id.*

55. *Id.* (quoting plaintiff's Exhibit #3, *Sinn v. Daily Nebraskan*, 638 F. Supp. 143 (D. Neb. 1986)).

56. *Id.*

versity and the students by printing various announcements," the paper does not guarantee the printing of such announcements.<sup>57</sup> If the University wants to guarantee publication of an announcement, it must buy advertising space.<sup>58</sup>

The trial court opinion stated that staff members of the paper may not serve as representatives in the student government.<sup>59</sup> There is "no suggestion that the *Daily Nebraskan* was created or, in fact, serves as a means for the propagation of University philosophies."<sup>60</sup> While the editor-in-chief and general manager are hired by the Publications Committee, "[t]here is no evidence that the University . . . has attempted . . . to regulate or direct the content of the *Daily Nebraskan*."<sup>61</sup>

In light of these factual conclusions, Judge Urbom reviewed the development of state action doctrine over the previous quarter century.<sup>62</sup> He began by noting that "[n]o precise method of determining the existence of state action exists; consequently, a cautious analysis of the quality and degree of the government relationship to the challenged acts is required."<sup>63</sup> He stressed the analytical framework set down in *Burton v. Wilmington Parking Authority*,<sup>64</sup> which had called for a case-by-case determination.<sup>65</sup>

In 1982, the Supreme Court handed down three decisions which discuss state action.<sup>66</sup> Judge Urbom cautioned, however, that those cases are not necessarily dispositive of the status of an actor such as a public college newspaper "since each deals with the concept of state action as it applies to the conduct of wholly private parties. Here, *The Daily Nebraskan* is a hybrid."<sup>67</sup>

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57. *Id.*

58. *Id.* No conclusion was reached as to what would happen if the newspaper refused to run the advertisement.

59. *Id.* At the University of Nevada at Las Vegas the student government provides more than half the annual budget and confirms the choice of the editor-in-chief. Staff members have taken the unusual step of running for the student senate in response to attempts to turn financial control into editorial control. Hoyt, *Look Who's Cracking Down on Press Freedom Now*, 25 COLUMBIA JOURNALISM REV., March-April 1987 at 52, 56.

60. *Sinn*, 638 F. Supp. at 148.

61. *Id.*

62. *Id.*

63. *Id.*

64. 365 U.S. 715 (1961).

65. *Id.* at 726.

66. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

67. *Sinn*, 638 F. Supp. at 148. In *Rendell-Baker* the Supreme Court held that a private school whose primary business was teaching students with educational or behavioral difficulties did not exercise state action when it discharged staff members, even though it received most of its funding from governmental sources. *Rendell-Baker*, 457 U.S. at 844. In *Blum*, a nursing home was held not to exercise state action when it

After examining the relationship between *The Daily Nebraskan* and the University, Judge Urbom acknowledged that for some purposes the campus paper functions as a private newspaper, while in all other aspects it is a state agency.<sup>68</sup> *The Daily Nebraskan* is a creature of, and thus sponsored by, the University. It does not pay for the space it occupies in a state building nor for janitorial service, utilities, police protection, maintenance, or repairs.<sup>69</sup>

The paper receives \$39,000 in University Program and Facilities fees along with student fees assessed on a credit hour basis. While the paper maintains its own bank account, three professional staff payroll checks are drawn through the University. The remainder of the 175 employees are paid through the paper's accounts.<sup>70</sup>

The central theory of Judge Urbom's decision was that the newspaper, in making editorial decisions, functions like a private newspaper.<sup>71</sup> He concluded that "the exercise of editorial discretion does not constitute state action."<sup>72</sup>

Judge Urbom relied in part on *Polk County v. Dodson*,<sup>73</sup> in which the Supreme Court held that a public defender was not a state actor for all purposes even though the state created the office and paid her salary.<sup>74</sup> The Court based its holding on the belief that the public defender's relationship with her client was "identical to that existing between any other lawyer and client."<sup>75</sup>

Judge Urbom also examined *Arrington v. Taylor*,<sup>76</sup> a campus newspaper case in which the court had ruled that a public univer-

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discharged or transferred patients, even though the home and the patients were recipients of government funds. *Blum*, 457 U.S. at 1028. In *Lugar* the Court held that a debtor could challenge on due process grounds a state-authorized system by which a creditor obtained a pretrial writ of attachment against the debtor's property through an *ex parte* petition. *Lugar*, 457 U.S. at 942. Because the state judicial system was involved in issuing the writ and the county sheriff was implicated in executing it, the case could be distinguished from a "self-help" procedure said not to be state action in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). *Lugar*, 457 U.S. at 938-39.

68. *Sinn*, 638 F. Supp. at 148-49.

69. *Id.* at 149.

70. *Id.*

71. *Id.*

72. *Id.*

73. 454 U.S. 312 (1981).

74. *Id.* at 318.

75. *Id.*

76. 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). *Arrington*, like *Veed*, was a mandatory student fees case. *Arrington*, 380 F. Supp. at 1363. *Arrington* relied heavily on *Lathrop v. Donohue*, 367 U.S. 820 (1961), a case in which the Supreme Court rejected the challenge of a Wisconsin lawyer to the integrated bar of that state, holding that the plaintiff could be compelled to give financial support to the institution. *Lathrop*, 367 U.S. at 822. The justices in the plurality in *Lathrop* declined to reach the question whether the plaintiff could be compelled to support the bar's legislative activities. *Id.* at 845.

sity's student newspaper could be a creature of the state but is not an agency of the state for all purposes.<sup>77</sup> That case in turn had relied on *Joyner v. Whiting*,<sup>78</sup> which had attempted to establish a test for determining what campus-related activities at a state institution constitute state action for the purpose of civil rights matters.<sup>79</sup>

The *Joyner* test, however, turns out to be singularly unhelpful to the resolution of the *Sinn* case, for it is as follows: if an entity is established under the authority of the state and receives financial support, whether direct or indirect, from the state, it is an agency of the state.<sup>80</sup> *Joyner* goes on to hold that a state college student newspaper may not discriminate on account of race without offending the Civil Rights Act.<sup>81</sup> Whether the student newspaper is a "free agent" and not a state actor in all other manifestations is not addressed.

*Polk County* marks both a completion of the circle of public-function-as-state-action cases<sup>82</sup> and a tacit rejection of the cases

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77. *Arrington*, 380 F. Supp. at 1363.

78. 341 F. Supp. 1244 (M.D.N.C. 1972), *rev'd on other grounds*, 477 F.2d 456 (4th Cir. 1973). *Joyner* involved a suit by students to enjoin the university president from withholding financial support from the campus newspaper. *Id.* at 1245. The paper had engaged in a program of harassment and hostility toward white persons. *Id.* at 1246. The editor stated that no whites would be hired nor would "white" advertising be carried. *Id.* at 1245-46. The court held that a student newspaper is part of the press and, therefore, entitled to the protections of the first amendment. *Id.* at 1250. But the court also held that a state agency, such as this newspaper, could not legally discriminate on the basis of race, color or national origin. *Id.* at 1248. Thus the actions of the paper were held to be unlawful under the Civil Right Act of 1964. *Id.* at 1250. The specific provision of the Civil Rights Act relied on is found at 42 U.S.C. § 2000d (1982).

79. *Joyner*, 341 F. Supp. at 1247.

80. *Id.* That, of course, begs the question whether a dissident has the right to have a view published in a college newspaper. *Joyner* cites *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), which held that the student newspaper, as part of the press, is entitled to constitutional protections under the first amendment. *Id.* at 617-19. *Dickey*, however, is a censorship case, not an access case. *Id.* at 615-17.

81. *Joyner*, 341 F. Supp. at 1248.

82. The public function cases stem from *Marsh v. Alabama*, 326 U.S. 501 (1946). *Marsh* barred punishment of an individual distributing religious tracts in a company-owned town. *Id.* at 509. Except for the fact that the community was owned by the Gulf Shipbuilding Corporation, the town had characteristics common to any other American community. *Id.* at 502. The *Marsh* Court found that "[s]ince these facilities [were] built and operated primarily to benefit the public and since their operation [was] essentially a public function, it [was] subject to state regulation." *Id.* at 506.

There was an abrupt end to this line of analysis in the context of modern shopping centers. See *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). *Logan Valley* had found the shopping center the equivalent of the business district in *Marsh*. *Logan Valley*, 391 U.S. at 318. *Lloyd* and *Hudgens*, however, backed away from such a sweeping conclusion. *Hudgens*, 424 U.S. at 513-21; *Lloyd*, 407 U.S. at 556-64.

*Evans v. Newton*, 382 U.S. 296 (1966) involved a park created pursuant to a will which effected racial discrimination in enjoyment of the facility. *Id.* at 297. Following desegregation the city ceased serving as trustee for the park and a state court ap-

which had focused on any single element, whether regulation<sup>83</sup> or receipt of public funds,<sup>84</sup> as satisfying the state action link. While the public defender in *Polk County* was clearly a public actor, the critical inquiry was what function the defender performed in relation to the party seeking to label her a state actor.<sup>85</sup> Although there was no disputing that the state paid the salary, because the public defender served as a lawyer for a client, she was like any other private attorney.<sup>86</sup>

Thus, a public employee may be a state actor at one instant, such as when making hiring and firing decisions or performing certain administrative and investigative duties,<sup>87</sup> but a private actor when doing what private lawyers do. The critical question is not "did the state pay" or "did the state regulate" but, rather, "is the state responsible for the decision."<sup>88</sup>

According to Judge Urbom:

The state is responsible for the decision of a private party

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pointed private trustees. *Id.* at 298. The nature of the service rendered by a park is municipal, Justice Douglas wrote. *Id.* at 301-02.

More recently, however, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Court rejected the assertion that a privately owned utility is a state actor simply because it provides an essential service. *Id.* at 358-59. Justice Rehnquist stressed that such might be accurate if the service were one exclusively reserved to the state. *Id.* at 350-51. All businesses affected with the public interest are not state actors. *Id.* at 353. See also *Flagg Bros.*, 436 U.S. at 164 (holding there is no state action in a proposed sale of goods entrusted to a warehouseman to satisfy a lien under the Uniform Commercial Code); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927). *Terry*, *Smith*, and *Nixon* are collectively known as the "White Primary Cases," which held that a political party could not exclude blacks from participating in the franchise by disguising decision-making gatherings as private functions.

83. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). In *Moose Lodge*, Justice Rehnquist said of state liquor regulation of an otherwise private club that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." *Id.* at 176-77.

84. In *Greenya v. George Washington Univ.*, 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975), the D.C. Circuit collects the cases concerning whether significant government funding is sufficient to transform private schools into state actors. *Id.* at 560. The *Greenya* court found that in cases where the private school recipients of government funding practiced racial discrimination, courts had held such funding sufficient to consider the schools state actors. *Id.* This fact had led one court to observe that such a practice was "so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action.'" *Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring).

85. *Polk County*, 454 U.S. at 322-25.

86. *Id.* at 318.

87. *Sinn*, 638 F. Supp. at 149. See *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (discussing why officials conducting adjudicatory and prosecutorial functions have great immunity from civil lawsuits). Immunity is not the equivalent of absence of state action, it must be remembered.

88. *Sinn*, 638 F. Supp. at 149.

where it has affirmatively compelled or directed the result. The evidence in the present case indicates that the Publications Committee, in support of the prior decision of the editor-in-chief not to print Pearn's advertisement, amended its policy regarding discrimination in advertising. Nevertheless, the student advertising editor ultimately interpreted and necessarily applied the policy. . . . [T]he University . . . could not have directed the *Daily Nebraskan* not to publish the advertisement had it chosen to do so. Censorship of content impermissibly would exist if the University were to dictate what the *Daily Nebraskan* could or could not print. Consequently, I do not find that the rejection of the plaintiffs' advertisements "must in law be deemed to be that of the state."<sup>89</sup>

The Eighth Circuit adopted Judge Urbom's reasoning,<sup>90</sup> declining to follow a decision rendered in the District Court for the Western District of Wisconsin which the Seventh Circuit had affirmed.<sup>91</sup> The court in *Sinn* stated that applicable Supreme Court guidelines do not demand a conclusion that state action exists "where state control, or bare potential for control, is so attenuated and even speculative."<sup>92</sup>

The Eighth Circuit chose instead to rely on *Avins v. Rutgers, State University*,<sup>93</sup> where the Third Circuit had rejected the contention that the law review of a state university was "a public instrumentality in the columns of which all must be allowed to present their ideas, the editors being without discretion to reject an article because in their judgment its nature or ideological approach is not suitable for publication."<sup>94</sup> In *Avins*, the court focused on the exer-

89. *Id.* at 150. See also *Blum*, 457 U.S. at 1004-05 (1982) (reasoning that a state is responsible for a private decision only when it has coerced the result or provided such significant encouragement that the choice must in law be said to be the state's. Mere approval or acquiescence is not enough to hold the state responsible).

90. *Sinn*, 829 F.2d at 665.

91. *Id.* The decision was *Lee v. Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971). *Lee* had adopted the reasoning of *Zucker v. Panitz*, 299 F. Supp. 102, 103 (S.D.N.Y. 1969) that one "cannot admit that [an entity] is a campus newspaper, . . . and simultaneously try to label it as a private venture or 'mere journalistic experiment.'" *Lee*, 306 F. Supp. at 1100. The trial court in *Lee* had concluded that the newspaper acted to disseminate news and express opinions and thus should be open to the views of anyone willing to pay. *Id.* at 1100-01.

Too broad a reading should not be given to the statement in *Lee* that several courts adhere to the view that "refusal to accept and print editorial advertisements constitutes a denial of free speech and freedom of expression." *Id.* at 1101. This is because cases like *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) sustained the limiting of access to transit system advertising space via reasonable legislative objectives analysis. *Id.* at 304.

92. *Sinn*, 829 F.2d at 665.

93. 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

94. *Id.* at 152. *Avins* clearly represents a greater state actor rather than public

cise of editorial judgment, which was said to be a private function,<sup>95</sup> notwithstanding the fact that the law review received at least part of its support from the state.<sup>96</sup>

The Eighth Circuit analyzed two other appellate opinions. *Associates & Aldrich Co. v. Times Mirror Co.*<sup>97</sup> was from the Ninth Circuit and, in truth, had nothing to do with whether a campus newspaper is a state actor and everything to do with the editorial independence of a private newspaper. The other case was *Mississippi Gay Alliance v. Goudelock*,<sup>98</sup> a Fifth Circuit decision which, in denying the existence of state action, based its conclusion on the complete lack of control over the student newspaper on the part of university officials.<sup>99</sup>

The *Sinn* court was careful to note that its opinion "should not be read to imply that state action can never be present in the decisions of a student newspaper."<sup>100</sup> Rather, it rejected the suggestion that state action is always present in the editorial choices of such a publication.<sup>101</sup>

The 1982 trilogy of cases,<sup>102</sup> together with *Polk County*, in formulating the current state action analytical framework, draw no bright lines for determining state action. All four insist on case-by-case analysis for determining whether the function performed is fairly attributable to the state.<sup>103</sup>

These cases illustrate just one more passage through which state action has moved during the last half century. Many have attempted to determine whether there is a litmus test by which state action can be identified.<sup>104</sup> Judge Urbom himself noted that the 1982 decisions

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forum model, for there, the court acknowledged that the publication is part of the educational program of the law school and that editorial work is done by law students under general faculty guidance. *Id.* at 153.

95. *Id.* at 153-54.

96. *Id.*

97. 440 F.2d 133 (9th Cir. 1971). *Times Mirror* was an action by a movie production company against a private newspaper to prevent the paper from screening, censoring or changing proffered advertising copy. *Id.* at 134. The Ninth Circuit held that the private newspaper could not be compelled to accept and print ads in the exact form submitted. *Id.* at 136. In dictum, the court stated that "even if state action were present, as in an official publication of a state supported university, there is still the freedom to exercise subjective editorial discretion in rejecting a proffered article." *Id.* at 135.

98. 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977).

99. *Id.* at 1075.

100. *Sinn*, 829 F.2d at 666.

101. *Id.*

102. *See supra* note 66.

103. *Sinn*, 638 F. Supp. at 150.

104. *See, e.g.*, Newell, *A Right of Access to Student Newspapers at Public Universities*, 4 J. COLL. & UNIV. L. 209 (1977); Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEXAS L. REV. 1123 (1974); Lewis,

at least acknowledged the existence of past practices in four particulars: "(1) extensive regulation, (2) receipt of public funds, (3) type of function involved, and (4) presence of a symbiotic relationship."<sup>105</sup>

One could take up far more space than an exhaustive analysis deserves "reinventing the wheel" on the evolution of state action. Suffice it to say that other commentators have done the job quite adequately<sup>106</sup> and this writer mercifully will spare the reader the drudgery of replowing that ground. The Supreme Court today is wed to a model which contemplates looking at all facets of the alleged state action and deciding on the basis of the totality of circumstances.

When all is said and done—despite the fact that it makes questionable the vitality of single-factor cases—this is the only approach which makes sense. Single-factor analysis can result in confusing, even conflicting patterns of law.

The following cases demonstrate the problem with single-factor analysis. In *Board of Education v. Allen*,<sup>107</sup> the Supreme Court sustained a law requiring that textbooks be provided to all school children, including those attending church-sponsored institutions.<sup>108</sup> The Court upheld this scheme notwithstanding claims that the law was a clear violation of the establishment clause of the first amendment.<sup>109</sup>

In *Norwood v. Harrison*,<sup>110</sup> on the other hand, the Court struck down a state textbook loan program for students attending racially discriminatory schools.<sup>111</sup> Forced to distinguish *Norwood* from *Allen*, the Court concluded that in the case of the church schools, "the transcendent value of free religious exercise" allowed state support.<sup>112</sup>

The funding plus regulation cases do not fare much better, when all is said and done, in the quest for a sustainable theory. The private hospital-state action cases provide a good place to begin this analysis.

If a private hospital is charged with violating an individual's constitutional rights, a court will look, as it did in *Simkins v. Moses H.*

*The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Note, *The First Amendment in Conflict: Advertising Access to State University Student Newspapers*, 24 SANTA CLARA L. REV. 763 (1984); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

105. *Sinn*, 638 F. Supp. at 149.

106. See, e.g., J. NOWAK, R. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW 421-50 (3d ed. 1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688-1720 (2d ed. 1988).

107. 392 U.S. 236 (1968).

108. *Id.* at 238-39.

109. See also *Mueller v. Allen*, 463 U.S. 388, 402 (1983) (sustaining state income tax deduction for education, including parochial school tuition). But see *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (striking down reimbursement for parents of parochial school students for transportation on public buses).

110. 413 U.S. 455 (1973).

111. *Id.* at 466-68.

112. *Id.* at 469.

*Cone Memorial Hospital*,<sup>113</sup> at the existence of public funding<sup>114</sup> and elaborate regulatory schemes.<sup>115</sup> *Simkins*, it should be noted, was a racial discrimination matter in which it was alleged that professionals as well as patients were denied access because of their race.<sup>116</sup> Whether state action would have been found if the source of the complaint were other than race cannot be known.

Suppose the hospital were charged with some constitutional deprivation relating to its professional care, rather than in hiring and access. Under modern functional analysis state action might not be found, either because governments don't exclusively operate hospitals or because they have not traditionally provided medical services.<sup>117</sup>

Some cases have insisted that the traditional or exclusive function analysis be separated from the symbiosis or significant involvement inquiry. Thus, in *Lowell v. Wantz*,<sup>118</sup> where the question was whether a private police academy was a state actor, the court first determined that the central specialty of the institution, training in lethal weapons, was a function neither traditionally nor exclusively reserved to the state.<sup>119</sup>

Having completed that inquiry, the court looked to the myriad of links allegedly intertwining the private academy with the state. These ranged from a certification of the academy from the state police, to certification of teachers, to transfer of ownership being subject to state control, to clearance of students before admission, to forwarding of firing scores to the state.<sup>120</sup> No, the court held, these were not indicia of symbiosis.<sup>121</sup>

If the 1982 trilogy of Supreme Court decisions is helpful in any way other than to repudiate any lingering bright line, single function

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113. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

114. *Id.* at 962-63. The public funding in *Simkins* was authorized under 42 U.S.C. § 291 (1982), a provision of the Hill Burton Act, the purpose of which is to stimulate modernization of public health care facilities. 42 U.S.C. § 291 (1982).

115. *Simkins*, 323 F.2d at 967. In Nebraska, for example, private hospitals may become agents of the state for providing services to the poor. NEB. REV. STAT. § 68-104 (Reissue 1981). See also *Creighton-Omaha Regional Health Care Corp. v. Douglas County*, 202 Neb. 686, 691, 277 N.W.2d 64, 68 (1979) (holding that a county may be liable for the reasonable value of necessary hospital services furnished to indigents when the county board, after receiving notice, neglects or refuses to make arrangements for care).

116. *Simkins*, 323 F.2d at 961.

117. See, e.g., *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 312-14 (9th Cir. 1974) (observing that constitutional standards may apply if a hospital acquires a quasi-public character).

118. 85 F.R.D. 286 (E.D. Pa. 1980), *aff'd*, 636 F.2d 1209 (3d Cir. 1980).

119. *Id.* at 288.

120. *Id.*

121. *Id.* at 289.

analysis, it is by suggesting that neither regulation nor subsidization, without more, will transform private action into state action.<sup>122</sup> Whether, as in the hospital cases, regulation plus subsidization would be enough remains to be seen.

That leaves one with the two-pronged formula consisting of function and symbiosis. Moreover, if function is limited to those activities the state has exclusively or even traditionally undertaken, the analysis become even easier.

If function alone were the test, of course, a college daily newspaper would never be a state actor for states simply have not operated the press. Symbiosis is another matter, however. There are endless possibilities of interconnections between the state and private actors.

But what about a campus newspaper? From a "symbiosis" point of view (funding, plus regulation, plus other things which breathe life into the entity and its operations), the campus paper is fairly a state actor.

The classic symbiosis case is *Burton v. Wilmington Parking Authority*,<sup>123</sup> which involved discrimination in a restaurant located in a parking garage. The building was owned and operated by a government entity and the restaurant was operated privately under lease from the government. The state supreme court denied that the restaurant was a state actor, concluding that the only connection between the restaurant and the public facility was the payment of rent.<sup>124</sup>

The Supreme Court rejected that finding, however, and, focusing instead on such factors as the public use dedication of the building itself, concluded that there were benefits which were mutually conferred.<sup>125</sup> "It is irony," the Court wrote, "amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen."<sup>126</sup>

Even here the Court cautioned against drawing any universal conclusions, however, reciting the now-famous admonition that each case must be resolved "only in the framework of the peculiar facts or circumstances present."<sup>127</sup>

What factors will assist a court in discerning whether symbiosis

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122. *Sinn*, 638 F. Supp. at 149.

123. 365 U.S. 715 (1961).

124. *Wilmington Parking Auth. v. Burton*, 39 Del. Ch. 10, —, 157 A.2d 894, 902 (1960).

125. *Burton*, 365 U.S. at 724.

126. *Id.*

127. *Id.* at 726.

is sufficiently present to satisfy the state action test? Two circuit court cases provide a list which, while not exhaustive, sketch the outline for the inquiry.<sup>128</sup> The questions to be asked are: What is the source of authority for the private action? Is regulation of the private entity so pervasive so as to entangle the private and public sectors? Is the state a joint participant? Are mutual benefits conferred? Does a contract exist between the state and the private entity outlining the mutual and legal obligations? Is there a delegation of what has traditionally or exclusively been a government function? What is the degree to which the private entity depends on government funding? Has the private organization a legitimate claim to recognition as "private" in associational or other constitutional terms?

#### A PUBLIC FORUM

The *Sinn* case was disposed of by the Eighth Circuit's conclusion that the exercise of editorial discretion even in a state-created college newspaper is not state action.<sup>129</sup> Judge Urbom had taken the next step, asking whether the creation of a state newspaper was the creation of a public forum.<sup>130</sup> In truth the public forum analysis cannot be overlooked, for if such a forum for the expression of ideas was created, the burden is on the state to demonstrate that it has not foreclosed reasonable access to those who wish to utilize it.<sup>131</sup>

In his analysis, Judge Urbom had simply concluded that there is no right of access to government property which is not a public forum.<sup>132</sup> While this statement might be regarded as begging the question, he went on to draw at length from *Perry Education Association v. Perry Local Educators' Association*<sup>133</sup> for his rationale as to why the newspaper is not a public forum.

In *Perry* it was held that a public school district could, pursuant to its collective bargaining agreement with the Perry Education Association, deny access to the interschool mail system and teachers' mail boxes to all unions except the exclusive bargaining agent.<sup>134</sup> The *Perry* majority stated that the first amendment does not require "equivalent access to all parts of a school building in which some

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128. *Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976); *Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975).

129. *Sinn*, 829 F.2d at 666.

130. *Sinn*, 638 F. Supp. at 148-49.

131. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). See generally Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. CT. REV. 1 (discussing the development of judicial interpretation of free speech in public forums).

132. *Sinn*, 638 F. Supp. at 150-51.

133. 460 U.S. 37 (1983).

134. *Id.* at 55.

form of communicative activity occurs."<sup>135</sup>

The *Perry* Court noted that three claims to the existence of a public forum have been recognized.<sup>136</sup> First, there is the quintessential forum, such as streets, sidewalks and parks.<sup>137</sup> Second, is property the state has opened for general use by the public for expressive activity.<sup>138</sup> Third, is property which neither by tradition nor designation has been considered a public forum and on which there is no per se constitutional right of access.<sup>139</sup> There is no access in this last category merely because the government either owns or controls property.<sup>140</sup>

Judge Urbom concluded that *The Daily Nebraskan* fell within this last category because it had not consented to unrestricted access by the general public to its pages.<sup>141</sup> There was no evidence that the paper had relinquished its editorial control over advertisements by accepting material for publication as a matter of course.<sup>142</sup> Citing *Miami Herald Publishing Co. v. Tornillo*,<sup>143</sup> Judge Urbom reasoned that it is the presence of this editorial discretion "which precludes a constitutional right of access to the columns of the newspaper."<sup>144</sup>

Almost as an aside, Judge Urbom remarked that it was not unreasonable for *The Daily Nebraskan* to find that the plaintiffs' advertisements "in effect, discriminated against readers on the basis of sexual orientation."<sup>145</sup>

Two fact patterns appear in the college publication cases. One is similar to the *Sinn* case: A public college newspaper or magazine is charged with violating some claimed access right of a student. In a typical scenario, a student may claim a right of access to the campus newspaper for an idea not otherwise endorsed by the editors of the paper.<sup>146</sup> In that situation, the question is whether the publication

135. *Id.* at 44.

136. *Id.* at 45-46.

137. *Id.* See *Hague v. CIO*, 307 U.S. 496, 515 (1939).

138. *Perry Local Educators' Ass'n*, 460 U.S. at 145. See *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981).

139. *Perry Local Educators' Ass'n*, 460 U.S. at 146.

140. *Id.* at 46; *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns.*, 453 U.S. 114, 129 (1981).

141. *Sinn*, 638 F. Supp. at 151.

142. *Id.* It would seem that this analysis is backwards. Unlike the *Times Mirror* case, where the assertion and evidence were that the newspaper had tried to change the proffered advertisement, the burden in *Sinn* appears to be on the plaintiff to show that the newspaper never changed advertising. *Sinn*, 638 F. Supp. at 151.

143. 418 U.S. 214 (1974).

144. *Sinn*, 638 F. Supp. at 151.

145. *Id.* See *supra* note 21.

146. *Lee v. Board of Regents*, 306 F. Supp. 1097, 1098 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

must allow the view to be printed or risk violating the first amendment.

The modern weight of authority holds that in any exercise of editorial discretion, even the campus journal with significant relationships to the state—subsidy by mandatory student fees, subsidy by appropriated monies, free space provided, assistance from some school employees—the journal is not a state actor but is serving as a private editor.<sup>147</sup> Since privately owned newspapers, even those which enjoy near monopoly in their respective trade areas, are enshrouded in the first amendment,<sup>148</sup> the courts refuse to acknowledge that virtually anyone has a right of access contrary to the wishes of the editors.<sup>149</sup>

Not all campus newspapers enjoy this special status. If the paper is merely a message center for the administration, or a classroom exercise linked closely with the work of an academic department, it would be hard-pressed to assert its similarities to the independent press.<sup>150</sup>

Whether the campus newspaper is a public forum because of its special links to the traditional functions of an institution of higher education remains an intriguing question. The cases hold that it is not. But in *Mississippi Gay Alliance*,<sup>151</sup> Judge Goldberg, in a powerful dissent, pressed two arguments. First, he argued that the first amendment's guarantee of free speech carries with it some requirement that the state provide minimum access—that is, that speakers' attempts to obtain access to listeners be accommodated. Second, he stated that the state has provided a forum and it may not allow some

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147. See generally Comment, *The First Amendment in Conflict: Advertising Access to State University Student Newspapers*, 24 SANTA CLARA L. REV. 763 (1984) (proposing that "the constitutional conflict between speaker and student press be resolved in favor of the press").

148. See, e.g., *Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970) (observing that there has been a history of disassociation between the press and the state instead of the state participating in the operation of the news media).

149. Even in libel cases, where a law-making body prescribes a "right of retraction," it is couched in non-obligatory language. See NEB. REV. STAT. § 25-840.01 (Supp. 1987). Cf. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding that requiring a newspaper to print anything is unconstitutional).

150. See, e.g., *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (finding that the campus paper was "more than a mere activity time and place sheet" and was thus entitled to first amendment protection); *Avins v. Rutgers, State Univ.*, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968) (stating that "[t]raditionally, a law review is student edited and the student editors determine the policies and decide which of the submitted articles and other material are to be published").

151. 536 F.2d 1073 (5th Cir. 1976), cert. denied, 430 U.S. 982 (1977). The plaintiff sought to compel the Mississippi State University campus newspaper to publish an advertisement for a gay counseling center. *Id.* at 1074. The trial court had rejected the allegation that the refusal was state action and the Fifth Circuit agreed. *Id.*

members of the public to communicate their message to a certain audience while others are prohibited from using the forum because of the content of their message.

Judge Goldberg charged through the case law relating to "state publications" and concluded that such publications could not constitutionally refuse advertisements advocating one side of a public issue while accepting advertisements on the other side.<sup>152</sup> No less constitutionally offensive, Judge Goldberg wrote, would be the situation in which a state publication printed advertisements on public issues generally, while selectively and arbitrarily excluding those on specific issues.<sup>153</sup> Judge Goldberg acknowledged that the analysis hinges on, first of all, whether the paper is a state actor, and secondly, whether there might be some "right to edit" which precludes application of the public forum/equal access analysis.<sup>154</sup>

Judge Goldberg went immediately to the heart of the problem of modern state action analysis, recognizing that if the question is whether direct and active involvement by state officials is a prerequisite to a finding of state action, cases beginning with *Marsh v. Alabama*<sup>155</sup> would have to be overruled and "cases like *Hudgens v. N.L.R.B.*, . . . *Moose Lodge No. 107 v. Irvis*, . . . and *Golden v. Biscayne Bay Yacht Club*, . . . would be very easy cases."<sup>156</sup>

Reviewing the factual allegations regarding the Mississippi State University newspaper, including its "official" status, its financing from the Student Activity Fund, its printing on MSU facilities, and its being an organ of the University, Judge Goldberg urged that a racially discriminatory hiring decision would be state action and "the pure 'state action' question should be the same in the first amendment context."<sup>157</sup>

On the second factor—whether there is a right to edit which precludes any claim of equal access—Judge Goldberg's analysis of the case law persuaded him that the rule is that once state school officials have provided a forum for free expression by students, the school may not censor the content of the students' messages.<sup>158</sup> "That rule," he reasoned, "would not be inconsistent with a requirement that the columns of the state-sponsored paper be open to any-

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152. *Id.* at 1085-87 (Goldberg, J., dissenting).

153. *Id.*

154. *Id.* at 1084-85 (Goldberg, J., dissenting).

155. 326 U.S. 501 (1946).

156. *Mississippi Gay Alliance*, 536 F.2d at 1084 (Goldberg, J., dissenting) (citations omitted).

157. *Id.* at 1085 (Goldberg, J., dissenting).

158. *Id.* at 1086 (Goldberg, J., dissenting).

one with anything to say."<sup>159</sup>

Judge Goldberg was not willing to require wide-open access to the student press, however. Editors must necessarily exercise some discretion, he conceded. On this point, Judge Goldberg was influenced by *Avins v. Rutgers, State University*,<sup>160</sup> which had stressed the impossibility and undesirability of a requirement that student editors publish every article submitted. Having reached this point, however, could it be said that Judge Goldberg was any further along in his analysis than the cases which had stopped their inquiries with the finding that the student press is not a state actor because of the editorial function, and is thus entitled to refuse publication of editorial or advertising materials?<sup>161</sup>

Judge Goldberg's solution is a rule which would permit student editors "unfettered discretion" over the editorial material but require that if the paper accepts unedited outside advertising, "access to such space must be made available to other similarly situated individuals on a nondiscriminatory basis."<sup>162</sup>

Judge Goldberg noted that the student editors in *Mississippi Gay Alliance* did not "purport to exercise editorial responsibility over the issues raised by the content of these paid advertisements."<sup>163</sup> Moreover, Judge Goldberg wrote, "[n]o one would be likely to confuse statements appearing in them as officially endorsed by the students or the school."<sup>164</sup> Recognizing the problems which could arise if such access were permitted to all comers, Judge Goldberg would invoke careful circumscription.<sup>165</sup>

Finally, Judge Goldberg cautioned that "[w]hen no rules guide the decision to exclude a controversial message from what otherwise appears to be a public forum, the courts are properly very skeptical of any proffered justification for the exclusion."<sup>166</sup>

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159. *Id.*

160. 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

161. *See, e.g., Bazaar v. Fortune*, 476 F.2d 570, 575-76 (5th Cir.), *aff'd as modified*, 489 F.2d 225 (5th Cir. 1973) (en banc) (noting that the campus paper's receipt of advice from the English department did not render the paper a state actor); *Arrington v. Taylor*, 380 F. Supp. 1348, 1360 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) (finding that the campus paper was not a state agency but, instead, an independent newspaper).

162. *Mississippi Gay Alliance*, 536 F.2d at 1087-90 (Goldberg, J., dissenting).

163. *Id.* at 1087 (Goldberg, J., dissenting).

164. *Id.*

165. *Id.* at 1088 (Goldberg, J., dissenting).

166. *Id.* at 1089 (Goldberg, J., dissenting). In *Arrington*, 380 F. Supp. at 1364, the court suggests that the magnitude of the operation of *The Daily Tar Heel* makes it appropriate for the editors to consider its being independent of the university. *Id.* On each of the particulars (1125 square feet of office space, revenue, links with a wire service, paid editor) the North Carolina paper pales by comparison with *The Daily Ne-*

Another writer scrutinizing public forum doctrine in the context of the *Perry*<sup>167</sup> case concluded that the doctrine is simply flawed because by focusing only on "the location of the speech, it obscures the first amendment's proper focus on ideas and speakers."<sup>168</sup> The public forum doctrine assures only partial equality of access rather than minimal access to government property, the argument continues.<sup>169</sup>

The second class of cases typically embroiling the campus press involves censorship of one form or another by campus officials.<sup>170</sup> This class of cases is easier to understand by one's having mastered Judge Goldberg's dissent in *Mississippi Gay Alliance*, but the results are murky if one accepts as accurate the assertion that once the state has created a public forum it may not restrict access to it except in accordance with classical time, place and manner limitations.<sup>171</sup>

*Healy v. James*<sup>172</sup> applied *Tinker v. Des Moines School District*<sup>173</sup> to the state college campus, holding that it is not an enclave immune from the sweep of the first amendment.<sup>174</sup> In *Papish v. Board of Curators*<sup>175</sup> the Supreme Court took the next step and held that expulsion of a student for circulating an underground newspaper which offended the conventions of decency violated the first amendment.<sup>176</sup>

In one case after another throughout the last quarter century the federal courts limited the power of state college officials to regulate the content of campus newspapers.<sup>177</sup> The one significant variation

*braskan. Compare Sinn*, 638 F. Supp. at 148-49 (noting that *The Daily Nebraskan* occupies 2694 square feet of office space, considerably more than *The Daily Tar Heel*).

167. 460 U.S. 37 (1983).

168. Schmedemann, *Of Meetings and Mailboxes: The First Amendment and Exclusive Representation in Public Sector Labor Relations*, 72 VA. L. REV. 91, 113 (1986). See also Farber and Nowak, *The Misleading Nature of the Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1235 n.81 (1984) (suggesting that the modern public forum analysis is inspired by the Burger Court's preoccupation with property values).

169. Schmedemann, *supra* note 168, at 113-14.

170. See, e.g., *Stanley v. McGrath*, 719 F.2d 279, 280 (8th Cir. 1983) (changing funding methods of university paper); *Joyner v. Whiting*, 341 F. Supp. 1244, 1245 (M.D.N.C. 1972), *rev'd on other grounds*, 477 F.2d 456 (4th Cir. 1973) (withholding of financial support from campus paper); *Trujillo v. Love*, 322 F. Supp. 1266, 1269 (D. Colo. 1971) (requiring students to submit controversial articles to faculty advisor for approval); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613, 616 (M.D. Ala. 1967) (prohibiting editorials criticizing state officials).

171. *Joyner*, 341 F. Supp. at 1249.

172. 408 U.S. 169 (1972).

173. 393 U.S. 503 (1969).

174. *Healy*, 408 U.S. at 180.

175. 410 U.S. 667 (1973) (per curiam).

176. *Id.* at 671.

177. See *supra* note 170. See also *Kania v. Fordham*, 702 F.2d 475, 476 (4th Cir. 1983) (reaffirming *Arrington*); *Bazaar*, 476 F.2d 570 (5th Cir.), *aff'd as modified en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (holding that a uni-

on the theme was a case noted by the *Sinn* court, *Lee v. Board of Regents*,<sup>178</sup> which held that persons willing to pay to have their message published in a state college newspaper ought to be granted a right of access under public forum doctrine.<sup>179</sup>

## CONCLUSION

The Eighth Circuit opinion in the *Sinn* case, unfortunately, does not resolve the critical first amendment access questions which, although recognized by Judge Urbom in the district court, did not control his conclusion. The protection given to the collegiate press by the courts, in the sense that it allows legitimate discussion of sensitive social issues to flourish, has been in accord with the highest traditions of the first amendment.<sup>180</sup> Where the courts have lost their way has been in the taking of one of two wrong paths toward maximizing freedom.

First, it really does not make much sense to equate the state-supported college press with the privately owned and historically protected newspaper when the issue is whether the campus paper may exclude a controversial idea from its paid advertising space. This is particularly true where it is shown that the advertising columns are open to outside advertisers and controversial ones as well.

It would seem that where advertising is sought out, the publicly-owned newspaper would have the burden to show that it would suffer a harm by including such lineage.<sup>181</sup> Furthermore, to suggest that a particularly sensitive right of a student editor is infringed by requiring the advertising columns to include representative want ads stretches the first amendment beyond its usual limits.

Second, at least in the context of the state sponsored, state funded, state supported forum, the traditional newspaper rules ought

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versity could not censor the contents of a student magazine despite a requirement that the magazine be published with the English department's advice); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (finding that the first amendment would not permit a campus newspaper "to be simply a vehicle for ideas the state or the college administration deems appropriate).

178. 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

179. *Id.* at 1101.

180. See Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1037 (1969).

181. Judge Urbom suggested that forcing *The Daily Nebraskan* to publish the advertisements in *Sinn* would penalize the newspaper. *Sinn*, 638 F. Supp. at 146. "Its finite space and resources would be appropriated." *Id.* A recent review of the sixteen page *Daily Nebraskan* shows that out of a sixteen page edition, two full-page advertisements were carried (neither for a campus organization) plus 373 inches of other non-classified advertising. Sixty-four inches of classified advertising were carried, including ads for male roommate, responsible female, male models, and topless and nontopless dancers. 87 *The Daily Nebraskan* No. 122 (March 10, 1988).

not to apply. While it is only reasonable to prevent raucous demonstrators from interfering with jailhouse discipline,<sup>182</sup> it makes no common sense to hold that a state college campus newspaper that is anything more than an administration bulletin board has no obligation to publish viewpoints—especially when they are paid for in space which is available. Such a policy does no disservice to the independence of the newspaper or the prerogatives of the editors to write and print what they want.

The cases are at best ambivalent on freedom of expression on the campus when the inapt analogy between the college press and the private newspaper is eliminated. They seem to be consistent in concluding that once newspapers are established they have to be left alone by their creators. They have to be left alone because as forums for ideas they should be free from official interference, free, that is, to espouse controversial ideas.

It would seem that cases such as *Sinn* stand for the proposition that only some controversial ideas need be expressed on a college campus in a state sponsored newspaper. The irony is that the creature of the state thus becomes the censor and the newspaper itself violates the principle that expression must not be prohibited because of disagreement with or dislike for its content.<sup>183</sup>

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182. *Adderley v. Florida*, 385 U.S. 39, 46-48 (1966).

183. See generally *Wright*, *supra* note 180 (asserting that the first amendment applies with full vigor to student expression).