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One of the stickier first amendment problems is the issue of prior restraint. When may government officials constitutionally suppress (as opposed to subsequently punish) a publication which may ultimately turn out to be unprotected for one reason or another? The usual answer to this question is virtually never.[1] The risks that protected expression will be suppressed are so great that the Supreme Court has created a presumption against the constitutionality of regulations imposing a prior restraint.[2] Although the Court has not established a rule of *per se* invalidity, only the most overriding public interests will suffice to support a prior restraint of non-obscene material.[3] With regard to allegedly obscene material, prior restraint is permitted only when necessary in order for the suppressing officials to have an opportunity to establish the unprotected nature of the expression in a judicial forum.[4]

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[1] Near v. Minnesota, 283 U.S. 697 (1931) (injunction against publication of a "malicious, scandalous, and defamatory" newspaper struck down); New York Times Co. v. United States (The Pentagon Papers Case) 403 U.S. 713 (1971) (no justification established for enjoining classified or sensitive government papers relating to the conduct of foreign affairs). *Cf.* Freedman v. Maryland, 380 U.S. 51 (1961) and Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) permitting limited prior restraint only for the seeking and obtaining of a *judicial* determination of obscenity, with the burden to be cast upon the censors.

[2] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[3] New York Times Co. v. United States, 403 U.S. 713 (1971) (Douglas, J. concurring); (Brennan, J. concurring); (Stewart, J. concurring); (White, J. concurring). (Black, J. concurring believed that newspapers could never be previously restrained).

[4] Freedman v. Maryland, 380 U.S. 51 (1965); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975).

Before *Tinker v. Des Moines Independent School District,*[5] school officials did not have to deal with even the less sticky first amendment issues with regard to student expression, and certainly they had the authority to forbid the distribution of material within the school, whether it was written there or not. But did *Tinker* alter that?

In *Tinker* the Court held that school officials could not punish the exercise of pure speech on the part of students unless it could be reasonably forecast that the expression would cause substantial disruption of or material interference with school activities or interfere with the rights of others. Taken with *Ginsberg v. New York,*[6] where the Court held that the state had a broader authority in regulating the sale of sexually oriented material to children than it did with adults, *Tinker* loosely defined the first amendment rights of students to be somewhat less than those enjoyed by adults, although still deserving of respect and protection. Despite the "forecast" language of *Tinker,* the case concerned the subsequent punishment of students for wearing armbands in defiance of an explicit ban thereon. The question of prior restraint never arose. In the decade since *Tinker,* however, the United States Courts of Appeals have had to deal with cases of prior restraint of student publications by school officials without guidance from the Supreme Court. Not remarkably, they have reached extraordinarily different conclusions.

Fourth Circuit

The United States Court of Appeals for the Fourth Circuit has developed the longest line of post-*Tinker* cases that define the rights of high school students against prior restraint of publications. These cases up until recently assigned a relatively high priority to the first amendment rights of high school students and assumed that any prior restraints on high school publications "come to the court with a presumption against their constitutionality."[7]

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[5] Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969). This case grew out of a ruling by public school officials that prohibited students from wearing black armbands as symbols of their opposition to the Vietnam war. This is the controlling case for determining the First Amendment rights of minors. The Supreme Court declared that students had First Amendment rights that could be abridged only when their exercise threatened a material disruption of normal school procedures.

[6] Ginsberg v. New York, 390 U.S. 629 (1968). This case tested the constitutionality of a state law which prohibited the sale to minors under seventeen years of age material defined to be obscene on the basis of its appeal to children. The U.S. Supreme Court decided that the state could apply different standards than those applied to adults in determining what is obscene. In reality, this was not a First Amendment case since obscenity is not protected speech.

[7] Baughman v. Feinmuth, 478 F.2d 1345 at 1347 (4th Cir. 1973).

This approach was first enunciated in *Quarterman v. Byrd.*[8] The plaintiff was a tenth-grade high school student who was briefly suspended from school for violating a school rule that specifically forbade any pupil from distributing, while under school jurisdiction, "any advertisements, pamphlets, printed material, announcements or other paraphernalia without the express permission of the principal of the school."[9]

The court clearly stated that in normal circumstances the federal judiciary should not interfere with the operation of public schools:

> Were the issue simply a matter of discretionary school discipline, we might, recognizing that "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint, [citations omitted] appropriately defer to the "expertise" of the school authorities" . . . This is so because it is not the policy of Federal Courts to "intervene in the resolution of conflicts which arise in the daily operation of the school systems and which do not directly and sharply implicate basic constitutional values." [citations omitted][10]

However, where interference with student expression was alleged, the case became exceptional to this general attitude of deference:

> But the issue posed by the plaintiff in this case as to the validity of the rule is not a simple matter of school discipline; it is not related to any question of state law; it deals "directly" and "sharply" with a fundamental constitutional right under the First Amendment.[11]

In *Quarterman,* exceptional as it may be, as in all other student publication cases arising in the Fourth Circuit, the court was careful to point out that the first amendment rights of juveniles are not equivalent with the first amendment rights of adults.

> Free speech under the First Amendment, though available to juveniles and high school students, is not absolute and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed. Thus, publications may be protected when directed to adults but not when made available to minors, citing *Ginsberg v. New York* or, as Justice Stewart emphasized in his concurring opinion in *Tinker,* First Amendment rights of children are not "co-extensive with those of adults." Similarly, a difference may exist between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university.[12]

However, in *Quarterman* the court interpreted *Tinker* in such a

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[8] Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).
[9] *Id.* at 55.
[10] *Id.* at 56.
[11] *Id.* at 57.
[12] *Id.* at 58.

way that requires high school authorities to clear a high hurdle if they are to constitutionally exercise prior restraint. According to the court, officials can impose prior restraint only in those special circumstances when they can "reasonably forecast *substantial* disruption of or *material* interference with school activities"[13] because of the distribution of the material. The court also held that prior restraint could only be accomplished on the basis of pre-existing criteria established by school authorities. In addition, an "expeditious review procedure"[14] must be set up for the appeal of any prior restraint decision by any school official. Thus, the court in *Quarterman* found the school rule constitutionally invalid in view of the fact that none of the procedural requirements were met.[15]

The second in the series of Fourth Circuit cases was *Baughman v. Freienmuth.*[16] Acting on behalf of their high school age children, a group of parents attacked certain regulations contained in a state and local school policy statement which required that publications produced without school sponsorship could be distributed *only after* they had been given to the principal for review and he had made a determination that the publications were free from "libelous or obscene language," the advocacy of illegal actions, or any gross insulting of any group or individual.[17] The challenge contended that the policy constituted prior restraint on the distribution of non-school sponsored literature in violation of the first amendment.

The court noted that while students' first amendment rights are not co-extensive with those of adults and that in certain circumstances prior restraints may be valid, prior restraints come to court with a presumption of their unconstitutionality. Relying on the *Quarterman* standard that school authorities can only engage in prior restraint when they can "reasonably forecast substantial disruption of or material interference with school activities"[18] because of the distribution of the material in question, the court held that the policy imposed a direct impermissible prior restraint on publication.[19]

The regulations in *Baughman,* like those in *Quarterman,* did not provide for a "specified and reasonably short time period in which the principal must act."[20] Likewise, the court noted that the regula-

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[13] *Id.*
[14] *Id.* at 59, 60.
[15] *Id.*
[16] 478 F.2d 1345 (4th Cir. 1973).
[17] *Id.* at 1347.
[18] *Id.* at 1348.
[19] *Id.* at 1351.
[20] *Id.*

tions failed to provide for the contingency of the principal's failure to act within a specified brief time, i.e., whether or not the material could then be distributed. Further, the court said that the potential for application of the prohibition on distribution of material which "advocates illegal actions, or is grossly insulting to any group or individual" to one copy made it unconstitutionally vague, since unless there was a "substantial distribution" of such material, it was unreasonable to forecast substantial disruption.[21] Only material which, in the constitutional sense, was unprivileged libel or obscenity for children could be subject to such prior restraint by school officials.[22]

The court favored a system that would allow students to "write first and be judged later."[23] If, however, according to the court, schools were going to impose rules, those rules must "contain narrow, objective, and reasonable standards by which the material will be judged."[24] Furthermore:

> The use of terms of art such as "libelous" and "obscene" are not sufficiently precise and understandable to high school students and administrators untutored in the law to be acceptable criteria. Indeed, such terms are troublesome to lawyers and judges.[25]

Growing out of *Baughman* and *Quarterman* is a rule which provides that prior restraint of secondary school student publications is constitutional only when the material restrained was legally libelous or obscene; or when, because of the nature of the material and its width of distribution, a forecast of substantial disruption was reasonable; in addition, pre-existing precise criteria and procedures for prohibition had to be established; approval or disapproval of material had to be prompt, and a swift and complete appeal had to be available.

In *Nitzberg v. Parks*[26] the court invalidated a rule of the Baltimore County Board of Education under which school officials had ordered two private student newspapers to cease publication.[27] The rule in question stated in pertinent part:

> Literature may be distributed and posted by the student of the subject

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[21] *Id.* at 1349.
[22] *Id.*
[23] *Id.* at 1350.
[24] *Id.*
[25] *Id.*
[26] 525 F.2d 378 (4th Cir. 1975).
[27] Although the order of the officials related to publication, the court only considered the facial validity of the school rule which regulated distribution of non-school literature. *Id.* at 380.

> school in designated areas on school property as long as it is not obscene or libelous (as defined below) 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.[28]

The rule required the principal to render a decision within two days, provided for the appeal of an adverse decision to an assistant superintendent to be completed within three additional days if so desired by the student, and permitted distribution of the literature if the authorities failed to act within the stated time limits. Also contained in the rule were lengthy definitions of "distribution," "libelous material" and "obscene material," both attempting to incorporate the latest Supreme Court standards.

Quite obviously, the rule was drafted in an attempt to comply with *Baughman* and *Quarterman*. Nevertheless, the rule was found to be constitutionally infirm; Mr. Justice Clark sitting by designation held:

> 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.[29]

Thus, simply using the *Tinker* language was not enough; instead, in the Fourth Circuit, a prior restraint rule would have to clearly define what a "substantial disruption" of school activities really was, and what criteria an administrator planned to use to predict such a disruption. Drafting a permissible rule would apparently require a great deal of reflection and ingenuity on the part of school officials and their counsel.

The next case in the Fourth Circuit Court of Appeals series addressed a different issue than that which had been previously adjudicated. In *Gambino v. Fairfax County School Board*,[30] the court affirmed a district court decision that a student high school newspaper published by journalism students was protected by the first amendment restrictions outlined in *Quarterman, Baughman* and *Nitzberg*. The school authorities had urged that the newspaper could be regulated as part of the curriculum and therefore exempted from the requirements of the earlier cases. The court rejected this contention,

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[28] *Id.* at 381.
[29] *Id.* 383.
[30] 564 F.2d 157 (1977).

finding that the newspaper was a forum for student expression not subject to the general power of the school regarding course content.

The district court had ruled that the school officials' decision to prohibit publication of a newspaper article entitled "Sexually Active Students Fail to Use Contraception," based on school regulations subjecting the school paper to the "same administrative controls as other educational programs," violated the first amendment.[31]

School board officials contended that the student newspaper, written and edited in the school during school hours by students enrolled in journalism and receiving academic credit for their efforts, and financially supported in part by school board funds, was in fact an "in-house organ of the school system," or alternatively that the students were a "captive audience," rendering the publication subject to reasonable regulation.[32]

The court dismissed both of these contentions, holding that the extent of state funding and state facilities for the paper were not relevant factors in determining whether or not the state could control the content of student newspapers, citing numerous precedents[33] that "the state is not necessarily the unrestrained master of what it creates and fosters."[34] The student newspaper was instead considered a public forum subject to first amendment protection which required that any prior restraint must comply with "the detailed criteria required by the line of Fourth Circuit decisions defining the permissible regulation of protected speech in high schools."[35]

In this line of cases, the Fourth Circuit considered regulations that allowed for the prior restraint of materials on the basis of advocacy of illegal action, obscenity or a forecast of material disruption of school activities; very substantial governmental and educational interests were at stake. In this context, the court had developed fairly stringent standards for school officials to meet before suppression of material would be approved. In *Williams v. Spencer,*[36] the court was presented with a regulation which prohibited "the distribution of material which encourages actions which endanger the health and safety of students."

Beyond the problem associated with the court's *sub silentio* determination that the school's interest in the "health and safety of [its]

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[31] Gambino v. Fairfax County School Board, 429 F. Supp. 731 (1977).

[32] *Id.* at 734.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 736.

[36] Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980).

students" was as compelling as the interest in maintaining discipline and order within the school itself, the court radically departed from its posture of requiring extremely precise descriptions of the material that could legitimately be proscribed from distribution. Despite previous Fourth Circuit decisions that had found too vague school rules that banned literature advocating "illegal actions," was grossly insulting to any group or individual," was "demeaning to the school," was "libelous," was "obscene," and had even struck down as too vague the phrase "causes a substantial disruption to the school," the court in *Williams* held:

> We find no merit to the argument that a reasonably intelligent high school student would not know that an advertisement promoting the sale of drug paraphernalia encourages actions that endanger the health or safety of students. The district court took notice of the problem of drugs in today's society and their danger to the health and safety of those who use them. We find no error in that determination by the district court. Because of the infinite variety of materials that might be found to encourage actions which endanger the health or safety of students, we conclude that the regulations describe as explicitly as is required the type of material of which the principal may halt distribution.[37]

Of course the heart of the constitutional proscription of overly vague regulations lies in the proposition that people should not have to guess at what conduct is unlawful and what is not, thereby placing their liability at the whim of the enforcement authority. If there is indeed an "infinite variety" of potentially harmful encouragements of actions which are harmful to the health and safety of students, by what standard are the administrators to pick and choose to ban some but not others, and how are the students expected to know which will be suppressed and which not? Against the background of the earlier Fourth Circuit decisions, *Williams* appears as an aberration which begs the fundamental question presented.

The court did acknowledge the earlier Fourth Circuit precedents but found the case distinguishable from them on several grounds. First, the court seemed to think that the fact that the regulation was designed to promote the health and safety of the students somehow brought it out from under the analysis used in the prior cases. This is a dubious proposition at best since the difference (if any) lies only in the nature of the power being exercised by the government (*parens patriae* or *in loco parentis* as opposed to peace keeping and discipline); this difference should only alter the constitutional analysis if it can be determined that the interests that the government is pursu-

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[37] *Id.* at 1205.

ing in *Williams* are of a higher order than those it was pursuing in the other cases.[38]

Secondly, the court noted that the regulation did not require the prior approval of the material by the school authorities. It was only after the paper had been circulated for a time that the actions to halt distribution were undertaken, and no students were subjected to disciplinary actions. Hence, although the court treated the regulation as one burdened with a presumption of unconstitutionality, it noted that the case was not, strictly speaking, one involving prior restraint. (Interestingly, the students had sought and received pre-publication permission from school authorities to distribute the paper; the offending copies were the second issue of the publication.) Thirdly, the court noted that the advertisement which caused the confiscation of the paper was "commercial speech" which while entitled to first amendment protections was not as sacrosanct as material "containing an article of some literary value that may examine drugs and drug use." The first of these distinctions might be one without a difference, for the effect upon the first amendment rights of students would seem to be the same under a regime of prior approval or subsequent confiscation. The second distinction seems to ignore the precept running through the cases that an utterance or publication must be judged upon its whole content, and not just an excerpted portion of it.

Finally, the court noted that in the *Quarterman, Baughman* and *Nitzberg* cases the school regulations all suffered from failures to meet "minimal constitutional requirements," citing the failure to provide for an appeals process in *Quarterman.* Although the same defect existed in *Baughman* (in addition to the vagueness of the regulation), one must be left to wonder at the lacking "minimal constitutional requirement" in *Nitzberg,* since the case was squarely predicated upon the failure of the term "substantial disruption" to be sufficiently precise to survive the void-for-vagueness analysis.

Williams is clearly inconsistent with the previous decisions of the Fourth Circuit. Whether this is because the case was decided by a panel of judges none of whom had sat on the previous cases or whether it signals a new approach in the circuit must await future

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[38] Only one other case, *Trachtman v. Anker,* 563 F.2d 512 (2d Cir. 1977) has predicated the power of prior restraint upon the health or welfare of the student body, as opposed to advocacy of illegal conduct, obscenity or forecast of substantial disruption. *Williams,* however, made no reference to *Trachtman.* For an analysis of the proposition as advanced in *Trachtman, see* Diamond, *Interference with the Rights of Others: Authority to Restrict Student's First Amendment Rights,*8 J.L. & EDUC. 347 (1979).

litigation. Until such time as the cases become reconciled, the status of students' publication rights in the Fourth Circuit must be perceived through muddied waters.

Second Circuit

The United States Court of Appeals for the Second Circuit has adopted a position at odds with all but the last of the Fourth Circuit. "It is to everyone's advantage that decisions with respect to the operation of local schools be made by local officials."[39] "In determining the constitutionality of restrictions on student expression such as are involved here, it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students."[40]

Eisner v. Stamford Board of Education[41] focused on a policy adopted by the board of education which regulated distribution of printed or written matter as follows:

> The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitations: No person shall distribute any printed or written matter on the grounds of any school or building unless the distribution of such material shall have prior approval by the school administration.
> In granting or denying approval the following guidelines shall apply: No material shall be distributed which, either by its content or by the manner of distribution itself, 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.[42]

The plaintiffs wished to distribute, free of the restraint imposed by the policy, a mimeographed newspaper they had created. The district court agreed with their contention that the board's policy limited their right to freedom of expression, declared the policy unconstitutional, and enjoined the school board from enforcing any requirement that students obtain prior approval before publishing or distributing any literature. The Court of Appeals affirmed in part the lower court's decision, but in so doing it outlined what it termed "reasonable and fair regulations" that the Board might employ which would not be "unconstitutional prior restraint."[43]

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[39] Eisner v. Stamford Board of Education, 440 F.2d 803-10 (2d Cir. 1971).

[40] Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. den.* 98 U.S. 925 (1978).

[41] 440 F.2d 803 (2d Cir. 1971).

[42] *Id.* at 805.

[43] *Id.*

The court began with a discussion of *Near v. Minnesota*[44] and its progeny, which, the court said, catalogued several varieties of exceptional cases that would justify a prior restraint:

> Thus, it was well established then as it is now that "the constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effects of force.'" Nor did it question that "the primary requirements of decency may be enforced against obscene publications."[45]

The court turned to two major questions: First, was the board's policy justified because it was one of those "exceptional cases" where prior restraints are permissible? Secondly, was the policy as narrowly drawn as "may be reasonably expected so as to advance the social interests that justify it"[46] or does it unduly restrict protected speech?

From the outset, the court of appeals took the position that the content of the mimeographed newspaper was not at issue; it was the policy itself which was the focal point of the case. The court used *Tinker* to decide that the school situation was one of those "exceptional cases" where prior restraints were permissible:

> Moreover, we cannot ignore the oft-stressed and carefully worded dictum in the leading precedent, *Tinker v. Des Moines School District* . . . that protected speech in public secondary schools may be forbidden if school authorities reasonably "forecast substantial disruption of or material interference with school activities."[47]

The court also found support for prior restraint of student expression in the fighting words doctrine[48] and the clear and present danger doctrine,[49] even though neither of those doctrines evolved in prior restraint cases:

> . . . we cannot deny that Connecticut has authority to minimize or eliminate influences that would dilute or disrupt the effectiveness of the educational process as the state conceives it. The task of judging the actual effects of school policy statements and regulations is a delicate and difficult one. But, to the extent that the Board's policy statement here merely vests school officials under state law with authority which under *Tinker* they may constitutionally exercise, it is on its face unexceptionable.[50]

Unlike the Fourth Circuit which, until its most recent case, im-

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[44] 283 U.S. 713 (1934).
[45] 440 F.2d 803, 806 (2d Cir. 1971).
[46] *Id.*
[47] *Id.* at 807.
[48] 311 U.S. 568 (1942).
[49] 249 U.S. 47, 52 (1919).
[50] 440 F.2d 803 (2d Cir. 1971).

posed procedural requirements out of sensitivity to the dangers that prior restraint of expression poses for the suppression of constitutionally protected speech, the Second Circuit relied upon the good faith of school administrators and their ability to restrain themselves from suppressing expression that would create only minor disturbances, and indeed did not even require that the words "material" or "substantial" be part of the rules.

> Although the policy does not specify that the foreseeable disruption be either "material" or "substantial" as *Tinker* requires, we assume that the Board would never contemplate the futile as well as unconstitutional suppression of matter that would create only an immaterial disturbance.[51]

This faith in school authorities forms a crucial difference between the Second and Fourth Circuits' approaches and accounts for much of the conflict between the two circuits in the area of freedom of student expression. The predicate in *Eisner,* that "It is to everyone's advantage that decisions with respect to the operation of local schools be made by local officials",[52] is in marked contrast to the predicate of the Fourth Circuit in *Quarterman* that the validity of rules governing student expression are "not a simple matter of school discipline," but instead deal "directly and sharply with a constitutional right under the First Amendment."[53] In *Eisner,* the Court specified that to be constitutional, regulations set up by school authorities to govern student expression need only ensure an expeditious review procedure, specifying to whom and how material may be submitted.

Following this case, *Koppell v. Levine*[54] held that the seizure of a literary magazine in a New York high school by school administrators was constitutional, despite the fact that the magazine, which contained some four-letter words, was admittedly not obscene. But in *Bayer v. Kinzler,*[55] the court seemed to deviate from the deferential stance posited in *Eisner.* An issue of the student newspaper contained a sex information supplement composed of articles dealing with contraception and abortion, which were serious in tone and obviously intended to convey information. The principal had ordered the seizure of 700 undistributed copies and also had ordered that there be no further distribution of the newspaper and supplement. The editor of the paper and a student alleging a desire to receive the

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[51] *Id.*

[52] 440 F.2d 803, 810 (2d Cir. 1971).

[53] Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).

[54] 347 F. Supp. 456 (E.D.N.Y. 1972).

[55] 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd* 515 F.2d 504 (2d Cir. 1975).

supplement brought suit.

The district court noted that under *Tinker*, abridgement of student expression can only occur in schools when the action "is necessary to avoid material and substantial interference with school work or discipline."[56] The court held that the newspaper staff's attempt to educate their fellow students was "at least equally deserving of protection under the First and Fourteenth Amendments as the symbolic wearing of an armband, the protected activity in *Tinker*,"[57] and concluded that the seizure of the supplement and refusal to allow distribution were not reasonably necessary to avoid material and substantial interference with schoolwork or discipline. The court did not defer to (indeed it seemed disdainful of) the principal's assertions to the contrary.[58] The Second Circuit affirmed without comment.[59]

But in *Trachtman v. Anker*[60] the Second Circuit reaffirmed the reasoning in *Eisner* and further held that students' first amendment rights were subordinate to the power of school administrators to protect the students under their care. Two high school students attempted to survey the sexual attitudes of fellow students and publish the results in the school paper. The students' plan to orally interview a cross section of the student population was turned down by school administrators. The students then sought permission to distribute a written questionnaire as a means of gathering information for a story. The questionnaire asked for "rather personal and frank information about the students' sexual attitudes"[61] including such topics as "premarital sex, contraception, homosexuality, masturbation and the extent of students' sexual experience."[62] The board of education refused permission to distribute the questionnaire, stating: "Freedom of the press must be affirmed; however, no inquiry should invade the rights of other persons."[63] The board's decision indicated that the type of survey proposed could be conducted only by professional researchers with consent of the students' parents, and that the students themselves lacked the requisite experience to conduct such a survey and did not guarantee anonymity to the respondents.

The district court judge held that permission to distribute the questionnaire could be denied only if the school authorities could

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[56] *Id.* at 1165.
[57] *Id.*
[58] *Id.*
[59] 515 F.2d 504 (2d Cir. 1975).
[60] 563 F.2d 512 (2d Cir. 1977), *cert. den.* 98 U.S. 503 (1978).
[61] *Id.* at 515.
[62] *Id.*
[63] *Id.*

prove that "there is a strong possibility the distribution of the questionnaire would result in significant psychological harm to members of Stuyvesant High School."[64] This was found proven with regard to thirteen- and fourteen-year-old students, but not with regard to older students. Distribution of the questionnaire to eleventh- and twelfth-grade students was ordered to be allowed.

At first, the Second Circuit set out a standard of reviewing the school administrator's decision on the issue of interference with school functions:

> In interpreting the standard laid down in *Tinker*, this court has held that in order to justify restraints on secondary school publications, which are to be distributed within the confines of school property, school officials must bear the burden of demonstrating a *reasonable basis* for interference with student speech, and courts will not rest content with officials' bare allegation that such a basis existed. (Citations omitted; emphasis added.)
> At the same time, it is clear that school authorities *need not wait* for a potential harm to occur before taking protective action. (Citations omitted; emphasis added.)[65]

The court added in a footnote:

> Although *Tinker* provides that "undifferentiated fear or apprehension" of a disturbance is not sufficient cause to justify interference with students' freedom of speech, school authorities need only demonstrate that the basis of their belief in a potential disruption is *reasonable* and not based on speculation. (Citations omitted; emphasis added.)[66]

On its face, this "reasonable basis" standard would seem to require more from the school officials than the *Eisner* assumption of validity approach. But the court continued:

> In determining the constitutionality of restrictions on student expression such as are involved here, *it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students.* (Emphasis added.)[67]

And concluded:

> We believe that school authorities are sufficiently experienced and knowledgeable concerning these matters, which have been entrusted to them by the community; a federal court ought not impose its own views in such mat-

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[64] *Id. Trachtman*, like Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980), did not involve potential disruption. Instead the court held that the state's interest in privacy rights of the students could outweigh a student's first amendment right. *Id.* at 519-20. *See* Diamond, *Interference with the Rights of Others: Authority to Restrict Students' First Amendment Rights*, 8 J.L. & EDUC. 347 (1979).

[65] *Id.* at 517.

[66] *Id.*

[67] *Id.* at 519.

> ters where there is a rational basis for the decisions and actions of the school authorities.[68]

In other contexts, "rational basis" has become a term of legal art essentially meaning that there exists a set of facts from which it is possible to conclude that which it is necessary to conclude. In a school context, this would mean that suppression of expression is constitutional if there are facts from which it is possible to conclude that disruption or harm to others could result from distribution of the material. Hence, it is a review standard of a highly deferential nature, very close to the *Eisner* "assumption of propriety" standard.

The court reversed the judgment of the district court insofar as it restrained the school authorities from prohibiting the distribution of the questionnaire to eleventh- and twelfth-graders; according to the court it was constitutionally permissible for the school authorities to completely restrain the questionnaire.

The position taken by the court in *Trachtman,* then, was that any school authority can engage in prior restraint whenever a court can conclude that there is a reasonable basis for the school official to forecast disruption as known to others. And the courts will give the school authority the benefit of the doubt as regards both the seriousness of the possible disruption and the reasonableness of the authority in predicting the possible disruption.

To the dissenting judge, the majority opinion was a misreading of *Tinker:*

> Where physical disruption or violence is threatened, some inroads on free expression are tolerable because the interests of students and school officials are relatively specific and lend themselves to concrete evaluation. But a general undifferentiated fear of emotional disturbance on the part of some student readers strikes me as too nebulous and as posing too dangerous a potential for unjustifiable destruction of constitutionally protected free speech rights to support a prior restraint.[69]

He went on to say:

> Other courts, when faced with substantially the same problem, have not hesitated to find that distribution of sexual material in school to students is protected by the First Amendment and that school authorities failed to sustain their heavy burden of demonstrating that prohibition of such distribution was reasonably necessary to guard against harm to the students rights.[70]

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[68] *Id.*
[69] *Id.* at 521.
[70] *Id.* at 526.

The dissenting judge also noted that the court was not being consistent:

> Indeed, in *Bayer v. Kinzler* [citations omitted], we affirmed a district court decision finding that the distribution of a sex information supplement to a school newspaper was constitutionally protected. I fail to find any significant legal distinction between these holdings and the present case.[71]

The legacy of the majority opinion in *Trachtman* is apparent in the 1978 case of *Frasca v. Andrews.*[72] A district court held that the first amendment was *not* violated by a high school principal's refusal to distribute an issue of the school newspaper because the principal had a "rational basis" for forecasting disruption and a belief that a portion of the paper was falsely injurious to the reputation of a particular student. This was despite the fact that the material under question, while vulgar,[73] was admittedly not obscene, not defamatory, and not inciteful to violence. The court noted that under the Second Circuit doctrine the actual truth or falsity of the material did not bear on the issue of prior restraint:

> The rule has been wisely established that decisions of school officials will be sustained, even in a First Amendment context, when, on the facts before them at the time of the conduct which is challenged, there was a substantial and reasonable basis for the action taken.[74]

In summary, the United States Court of Appeals for the Second Circuit has taken the position that the first amendment rights of high school students must yield to "reasonable" decisions by school officials that expression in a publication may cause disruption or harm to some people. No procedural protections beyond prompt review to guard against unconstitutional prior restraint are required and judicial review will be highly deferential since "it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students."[75]

FIFTH CIRCUIT

This court has spoken only once in the area of students' first amendment rights. In *Shanley v. Northeast Independent School*

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[71] *Id.*

[72] 463 F. Supp. 1043 (D.C.N.Y. 1978). For a discussion of this aspect of student publication law, *see* Nichols, *Vulgarity and Obscenity in the Student Press*, 10 J.L. & Educ. 207 (1981).

[73] *Id.* at 1047.

[74] *Id.* at 1052.

[75] Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) at 519.

District,[76] several high school students who distributed an "underground" newspaper before and after school hours entirely off-campus (but which ended up on campus) were suspended for failure to comply with a school policy which forbade any distribution of materials without administrative approval. The newspaper was found by the court to be "vanilla-flavored," containing no "libelous, obscene, or inflammatory material."[77] No disruptions or disturbances were attributable to the paper.[78]

The Court in *Shanley* approvingly cited *Eisner v. Stamford Board of Education* in concluding that "there is nothing unconstitutional per se in a requirement that students submit materials to the school administration prior to distribution,"[79] but the court departed from the *Eisner* rationale by imposing burdens of justifying prior restraint:

> (1) expression by high school students can be prohibited altogether if it materially and substantially interferes with school activities or with the rights of other students or teachers or if the school administration can demonstrate reasonable cause to believe that the expression would engender such material and substantial interference; (2) expression by high school students cannot be prohibited solely because other students, teachers, administrators or parents may disagree with its content; (3) efforts at expression by high school students may be subjected to prior screening under clear and reasonable regulations; and (4) expression by high school students may be limited in manner, place, or time by means of reasonable and equally-applied regulations.[80]

The standard of "reasonable cause" sounds like the "reasonable basis" phrase in *Trachtman;* however, the attitude of deference to the decisions of school authorities and the reluctance to intervene in school matters are both missing in the Fifth Circuit *Shanley* decision. While "reasonableness" is, in the court's words, a "neutral corner,"[81] it admonished school authorities that they must tread with caution:

> We do conclude, however, that the school board's burden of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory.[82]

Likewise, the *Shanley* court noted that "even reasonably forecast dis-

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[76] 462 F.2d 960 (5th Cir. 1972).
[77] *Id.* at 964.
[78] *Id.*
[79] *Id.* at 969.
[80] *Id.* at 970.
[81] *Id.* at 977.
[82] *Id.*

ruption is not *per se justification* for prior restraint or subsequent punishment of expression afforded to students by the First Amendment,"[83] since "disturbances [by those with opposing views] themselves can be wholly without reasonable or rational basis,"[84] and such should not be cause to curtail reasonable exercises of first amendment rights. Although the court held "great respect for the intuitive abilities of administrators," it cautioned that "such paramount freedoms as speech and expression cannot be stifled on the sole ground of intuition."[85] In addition to the above cautions, the court in *Shanley* mandated that any school-imposed rules must clearly outline submission requirements, establish a brief period within which an administrator must respond, and provide for an appeals process with a short time limitation.[86]

In summary, the Fifth Circuit has taken the position that a prior submission and approval rule does not violate the first amendment if it is correctly administered. Authorities may act if a substantial disruption is likely to occur as a result of the student expression, but school authorities have the burden of proving the imminence and gravity of a disruption; they must take a close look at whether a forecast reactive disruption itself has a rational basis and consider alternative methods of controlling such before imposing burdens on first amendment rights.

Seventh Circuit

The first judicial consideration of high school students' rights of freedom of expression in the Seventh Circuit came in two cases early in the 1970's. In these cases, *Scoville v. Board of Education*[87] and *Fujishima v. Board of Education,*[88] the Seventh Circuit articulated an analysis that provides even greater protection against unconstitutional prior restraint than that originally developed by the Fourth Circuit. The Seventh Circuit unequivocally forbids *any* prior submission requirement and insists on a literal reading of *Tinker*. The court has rejected both *Eisner* and *Quarterman* as being too restrictive of students' first amendment rights:

> We believe that the court erred in *Eisner* in interpreting *Tinker* to allow prior restraint—long a constitutionally prohibited power—as a tool of

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[83] *Id.* at 973.
[84] *Id.* at 974.
[85] *Id.*
[86] *Id.*
[87] 425 F.2d 10 (7th Cir. 1970).
[88] 460 F.2d 1355 (7th Cir. 1972).

> school officials in "forecasting" substantial disruption of school activities.[89] The Fourth Circuit in *Quarterman v. Byrd* seems to follow *Eisner* in finding lack of criteria and procedural safeguards, rather than the imposition of a prior restraint, as the regulation's "basic vice." (Citations omitted.)[90]

The Seventh Circuit allows *no* prior restraint, only subsequent punishment in certain cases.

In the first case adjudicated by the Seventh Circuit after *Tinker*, *Scoville v. Board of Education* (1970), the plaintiffs were expelled from high school after writing, off school premises, a publication which they then distributed in school. The publication contained material critical of school policies and school authorities. No charge was made that the publication was libelous or obscene. As the Seventh Circuit Court framed the issue:

> The *Tinker* rule narrows the question before us to whether the writing of "Grass High" and its sale in school to sixty students and faculty members could "reasonably have led them [the board] to forecast substantial disruption of or material interference with school activities . . . or intrusion into the school affairs or lives of others."[91]

The court noted that "*Tinker* announces the principles which underlie our holding: High school students are persons entitled to First and Fourteenth Amendment protections."[92] The court held that, absent any showing by the school authorities that the action was taken upon a reasonable forecast of a substantial disruption, the students' first amendment rights had been violated and they were entitled to injunctive and damage relief.

In *Fujishima v. Board of Education,* the court went much further. The case challenged the constitutionality of the rule of the Chicago Board of Education that:

> 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.[93]

The plaintiffs were three high school students who were disciplined for violation of this rule. Two of the students distributed about 350 copies of the *Cosmic Frog,* an "underground" newspaper, between classes and during lunch breaks and were suspended for their actions. Another student was suspended for giving a student an unsigned

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[89] *Id.* at 1358.

[90] *Id.*

[91] Scoville v. Board of Education, 425 F.2d 10, 12 (7th Cir. 1970).

[92] *Id.* at 13.

[93] Fujishima v. Board of Education, 460 F.2d 1355, 1356 (7th Cir. 1972).

copy of a petition calling for teach-ins about the war in Vietnam.

The Seventh Circuit found that, because the rule required prior approval of publications, it was unconstitutional as a prior restraint in violation of the First Amendment. The court said:

> *Tinker* held that, absent a showing of material and substantial interference with the requirements of school discipline, schools may not restrain the *full* First Amendment rights of their students. (Emphasis added.)[94]

This interpretation isolates the Seventh Circuit from the other circuit courts, as all the other courts have held that the rights of students may be subject to some forms of prior restraint. The Seventh Circuit, however, reads *Tinker* to allow only subsequent punishment of student expression:

> *Tinker* in no way suggests that students may be required to announce their intentions of engaging in certain conduct beforehand so school authorities may decide whether to prohibit the conduct. Such a concept of prior restraint is even more offensive when applied to the long protected area of publication.
>
> The *Tinker* forecast rule is properly a formula for determining when the requirements of school discipline justify *punishment* of students for exercise of their First Amendment rights. It is not a basis for establishing a system of censorship and licensing designed to *prevent* the exercise of First Amendment rights.[95]

Characterizing *Eisner* as "unsound constitutional law," the Seventh Circuit declared the rule unconstitutional and remanded the case for entry of an injunction against its enforcement. The court added that the injunction would not prevent school authorities from promulgating reasonable uniform regulations concerning time, manner, and place of distribution. However, the court emphasized that no student had to obtain prior administrative approval of even time, manner, or place of distribution of any particular publication and that the board had the burden of informing students when, where, and how publications could be distributed. The court pointed out that the board could punish students who violated these regulations as well as punish students who published and distributed obscene or libelous literature on school grounds. In the Seventh Circuit Court of Appeals, student expression is provided the most protection. Students' first amendment rights are treated co-extensively with adult rights, as far as the power with which school officials may deal with student expression.

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[94] *Id.* at 1357.

[95] *Id.* at 1358-59.

Conclusion

It is obvious that the United States Courts of Appeals are not in agreement concerning the power of prior restraint against student publications. Different courts are giving different interpretations to the standards outlined by the Supreme Court in *Tinker*. Thus, the decisions range from approval of broad powers of prior restraint to denial of any power. Until such time as the Supreme Court considers issues of prior restraint in the school context, there is unlikely to be any uniform standard developed concerning the power of school authorities to so limit the most fundamental right of free expression.