Administrative Censorship of the Independent Student Press--Demise of the Double Standard?

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Suppose a municipal ordinance routinely required newspapers to submit every issue they published to the mayor prior to distribution. The mayor was to determine whether that issue contained libel, obscenity, or illegal incitement—prime examples of unprotected speech—each suitably defined to conform to existing constitutional standards. In the event it did, he was to ban distribution. Once a ban was ordered, a right of appeal to the city council would arise. That body would hear any appeal within twenty-four hours of the time it was filed and decide the matter within another twenty-four hours. From an adverse decision, the publisher would be free to appeal to the courts. Until and unless the mayor’s ban was set aside by court order, however, it would remain in effect.

Constitutional?

A law school graduate confronted with such a question on a bar exam would probably experience paroxysms of pleasure upon encountering a question where the issues and results appeared so clear.

First, the examinee might note, the scheme is irreparably defective in conferring the power to censor upon an administra-
tive official rather than upon a court, contrary to the requirements of *Freedman v. Maryland.* That case held that the power to impose prior restraints, assuming this power exists at all, must reside with the courts; it must be exercised only after an adversary hearing; and the burden of initiating that hearing must rest

2. 380 U.S. 51, 58 (1965) (movie censorship); accord, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54-55 (1973) (where the Court approved the use of public nuisance actions to enjoin the exhibition of obscene materials and justified that result in part on the basis that no restraint was imposed "until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of [prior decisions] were met." Id. at 55.); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69-71 (1963); Kingsley Books, Inc. v. Brown, 354 U.S. 496, 442-45 (1957); Letwin, *Regulation of Underground Newspapers on Public School Campuses in California,* 22 U.C.L.A. L. Rev. 141, 161-63 (1974).

Under *Freedman,* a valid censorship scheme might permit administrative restraints to remain in effect pending judicial determination of an application for a temporary restraining order brought by the censor. This is perhaps not a serious issue in connection with movies, the medium involved in *Freedman,* since instant distribution of movies is, in any event, impossible. It follows that, whether or not the movie censor is granted a power of temporary administrative restraint to preserve the status quo until the court hears the application for temporary restraints, it is the court, not the censor, that effectively determines whether distribution is to be restrained.

With respect to newspapers, however, any delay in distribution, however short, is tantamount to a total ban since newspapers do presuppose near-instant dissemination. If an administrative censor effectively could bar distribution of a newspaper until a court looked at the matter, even if only for a matter of hours, the administrative decision for all practical purposes would be the final one. The issue of whether an administrative censor should have a temporary power of restraint does not appear to have arisen in connection with the press because the very idea of administrative review, restraints, or licensing of the press is anathema in our society. It will be remembered, for example, that in *New York Times Co. v. United States,* 403 U.S. 713 (1971), the United States did not even claim any administrative power to restrain the press. It invoked the equitable power of the court, based on its claim of compelling national interest, and lost.

3. In the case of newspapers, the holdings do not offer much support for a power of prior restraint even at the hands of the judiciary. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976) (gag order directed against the press in order to insure fair criminal trial held unconstitutional); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (Pentagon Papers case); *Near v. Minnesota,* 283 U.S. 697 (1930) (statute authorizing permanent injunction against the future publication of "a malicious, scandalous and defamatory newspaper" held unconstitutional). There is, to be sure, dictum supporting such a power, e.g., *Nebraska Press Ass'n v. Stuart,* 427 U.S. at 569-70; *Near v. Minnesota,* 283 U.S. at 716. Compare the concurring opinion in *Nebraska Press Ass'n of Justice White at 570 with that of Justice Powell at 571 and Justice Brennan (joined by Justices Stewart and Marshall) at 572, each of which at least leans strongly toward an outright prohibition against prior restraints of the sort involved in that case. Justice Brennan, in fact, argues for the narrowest possible scope for prior restraint of the press, short of the absolute prohibition of such restraints.

upon the official seeking to impose such restraints and not upon the publisher seeking to have the administrative restraints lifted. Second, warming to the task, the bar examinee might note that the requirement of prior submission of the newspaper, even if only to permit the mayor to decide whether to seek judicial restraints, would probably be intolerable. Such a requirement would invite a form of Parkinson’s law that would expand the quantity of material censored, whether directly at the hands of the censor or indirectly through self-censorship.\(^5\)

Third, even if the power to censor were exercised solely by the courts, there would be grave doubts as to whether certain forms of unprotected speech, libel for example, could ever be constitutionally censored.\(^6\) To say that speech is unprotected is to acknowledge that some form of official displeasure will greet its dissemination: damages, a fine, or even imprisonment. But the prior restraint of speech is a heavyhanded and dangerous remedy, and its employment requires extraordinary justification.\(^7\)

Fourth, the bar examinee might stress the crucial role of a free press and point out that efforts to restrain it would appropriately trigger the most inhospiable judicial review, whatever the substantive grounds offered in justification.\(^8\)

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5. A system suffering the defect of coerced self-censorship was condemned in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). There the practice of the Rhode Island morality commission was to attempt to dissuade book dealers from selling books that the commission had determined objectionable for minors. It did not formally suppress the books. The Court however looked through form to substance and found that the booksellers' self-censorship in reality was coerced and therefore unconstitutional. Id. at 67-72.

The author is aware of no cases involving a governmental attempt to require the publisher of a commercial newspaper to submit its issues to advance administrative inspection. Once it is recognized that administrative review has the potential for producing a coerced form of self-censorship, then the unconstitutionality of a requirement for routine submission for administrative review follows a fortiori from such cases as Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); and Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

6. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.


8. See note 3 supra.
All in all, our examinee could wrap up the essay with the black letter observation that prior censorship comes with a heavy, if not conclusive, presumption against its constitutionality,9 one that has scarcely been met in the hypothetical case.

Now pose the same question with the following changes. Substitute “school,” “principal” and “student distributor of an unofficial student newspaper” for “city,” “mayor” and “publisher.” In short, suppose a school regulation purports to empower a principal to review and censor all independent student newspapers prior to their distribution on school grounds. Would such a procedure be constitutional? Transposing the issue in this manner converts it, at least for many observers, into an altogether different and troublesome issue, one warranting markedly different answers than would be deemed acceptable in the society at large.

Courts confronting this issue have approached it from at least two different perspectives. Probably the majority of courts begin their analysis with the view that restraints are permissible in the school context which would be anathema in the society at large. Such a view commends itself to these courts because of the special circumstances, youth, and immaturity of the students which exist within the school context.10 Other courts appear to regard our society’s general hostility toward prior censorship as an appropriate stance even in the school setting.11


11. See Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972). In that case the court was called upon to review a scheme of school administrative restraints. In the course of its discussion, the court had occasion to assess the effect of Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969), which had affirmed the rights of school children to wear black armbands to school in protest against the war in Vietnam. Tinker had upheld the students’ right to engage in such a demonstration based, in part, on the reasoning that the school authorities had adduced no facts “which might reasonably have led [them] . . . to forecast substantial disruption of or material interference with school activities.” Id. at 514. In Fujishima, the court noted that some courts, e.g., Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807-08 (2d Cir. 1971), had interpreted the quoted language from Tinker as implying that, where such a forecast reasonably could be made,
This is not to say that courts holding the majority view have been indifferent to the evils of prepublication administrative restraints. Rather, they have sought to deal with such evils by means more moderate and equivocal than the flat prohibition of such systems. They have, instead, expressed their concerns by requiring the promulgation of various standards and procedures designed to reduce the inherent risks of administrative censorship.\footnote{See, e.g., Shanley v. Northeast Ind. School Dist., Bexar Cty. Tex., 462 F.2d 960.}

School authorities would be permitted to restrain student newspapers in appropriate cases. In rejecting this interpretation of 

\textit{Tinker}, the court said:

\textit{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.

\ldots

The \textit{Tinker} forecast rule is properly a formula for determining when the requirements of school discipline justify \textit{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 \textit{prevent} the exercise of First-Amendment rights.

\textit{Fujishima v. Board of Educ.}, 460 F.2d at 1358.

\textit{See also} Riseman v. School Comm. of Quincy, 439 F.2d 148 (1st Cir. 1971), where the court permitted time, place, and manner rules for leaflet distribution on school grounds to remain in force, “provided that no advance approval shall be required of the content of any such paper.” \textit{Id.} at 149 n.2; Antonelli v. Hammond, 308 F. Supp. 1329, 1335-36 n.6 (D. Mass. 1970) (college case); Rowe v. Campbell Union High School Dist., No. 51060 (N.D. Cal., Sept. 4, 1970 and Feb. 4, 1971) (three-judge court) (\textit{Rowe I} [Sept. 4, 1970] and \textit{Rowe II} [Feb. 4, 1971]), which struck down two sections of the California law banning partisan and propaganda publications from school campuses. The \textit{Rowe} court also rejected a system of prior restraints subsequently proposed by school authorities as “too encompassing and potentially devastating to withstand constitutional scrutiny,” stating that “[i]t may be that no system of prior restraint in the area of student publications can be devised which imposes a restraint sufficiently short-lived and procedurally protected to be constitutional. What may well be best, although not constitutionally compelled, is a simple prohibition against the distribution of certain categories of material [without any requirement of prior approval].” \textit{Rowe II}, quoted in \textit{Bright v. Los Angeles Unified School Dist.}, 18 Cal. 3d 450, 457-60, 556 P.2d 1080, 1094-96, 134 Cal. Rptr. 639, 643-45 (1976) (discussing the decisions in both \textit{Rowe I} and \textit{Rowe II}); Foxon v. Board of Educ., 341 F. Supp. 256 (E.D. Cal. 1971) (the court barred a prior censorship scheme because of the absence of a showing that “less offensive alternatives to a prior restraint system are unavailable.” \textit{Id.} at 257).
The Supreme Court has yet to address this conflict as to whether routine administrative restraints, which would be impermissible elsewhere, are rendered constitutionally tolerable due to the special conditions extant in the school context. 13 However, of the numerous circuit courts of appeal that have considered this issue, whether their initial disposition was to support or condemn a double standard, "none . . . [has] actually upheld a system of prior restraint." 14 Even the courts committed to the constitutionality of school restraints have yet to find valid an actual censorship scheme presented to them by school authorities. It has, apparently, proved a good deal easier to endorse prior administrative restraints in principle than to find an acceptable system.

13. The constitutionality of prior restraints in the school situation might have been resolved by the Supreme Court in Board of School Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128 (1975), but the Court dismissed the case as moot, having learned at oral argument that the student publisher had graduated from high school following the grant of certiorari.

14. Bright v. Los Angeles Unified School Dist., 18 Cal. 3d 450, 463, 556 P.2d 1090, 1098, 134 Cal. Rptr. 639, 647 (1976) (analyzing the existing authority in the federal circuit courts of appeals). The court continued:

Some courts have focused upon the need for clear, precise standards of review and have found the standards proposed unacceptable [e.g., Jacobs, Baughman, and Shanley] while other courts have focused upon the need for procedural safeguards, such as prompt review within a definite time limit, as well as provision for appeal, either judicial or administrative [e.g., Eisner, Quarterman, and Baughman].

Sullivan v. Houston Ind. School Dist., 475 F.2d 1071 (6th Cir.), cert. denied, 414 U.S. 1032 (1973), might be offered as a case which contradicts the generalization in the text, because the court did uphold the punishment of a student for violation of a school prior censorship scheme. However, the reason the punishment was upheld was that the student had conducted himself in "flagrant disregard of established school regulations." Id. at 1077. This, in the court's view, constituted sufficient grounds for disciplining the students irrespective of the constitutionality of the underlying censorship scheme. The court observed with approval that other courts had "declined to reach the student's constitutional arguments . . . because he [the student] had failed to challenge the principal in an orderly manner," id. at 1076, and implied that it, the Sullivan court, was doing likewise.

Today we merely recognize the right of school authorities to punish students for the flagrant disregard of established school regulations; we ask only that the student seeking equitable relief from allegedly unconstitutional actions by school officials come into court with clean hands.

Id. at 1077. Sullivan, then, did not validate the censorship scheme before it; it rather refused to decide the issue, essentially on a theory of waiver because the student had failed to come to court with clean hands.

There is dictum in the opinion tending to approve the constitutionality of the standards employed. Id. at 1076. However, there is also dictum tending to disapprove the procedures employed. Id. at 1076 n.4.
Nowhere has the effort to fashion an acceptable compromise, one which would tolerate administrative restraints but also protect against excesses in its use, proved more determined and extensive than in the federal courts of the Fourth Circuit. These courts have sought, in a succession of three cases15 over a five year period, to find a constitutional censorship scheme. One has yet to be found. More important, the experience of the Court of Appeals for the Fourth Circuit suggests that one cannot be found and that an acceptable, "sanitized" censorship scheme based on a diluted version of student first amendment rights is an unattainable goal. An anticensorship principle appears to be lurking within its decisions waiting to be born, notwithstanding that court's commitment to rhetoric affirming the validity of prior restraints. The experience of the Fourth Circuit argues that the failure to find a constitutional censorship scheme is not accidental, the product of incompetence, or the result of lack of effort, but rather, is inevitable, given the intrinsic risks of prior censorship. It is time for the common law to perform its classic task of extracting a new principle from the inchoate teachings of accumulated decisions. That principle is that prior, routine administrative restraints are an unsalvageable evil when applied against independent student newspapers just as such restraints would be if applied to the press at large.

Such a principle could rest on either of two bases: 1) on the broad view that even public school students presumptively are entitled to the same constitutional rights as others;16 or alternatively, 2) on the narrower view that whatever tolerance the constitution may exhibit for treating school children differently, that tolerance does not extend to the area of prior censorship because of the special dangers associated with that technique.17 Either of the above attitudes, a generic view about student constitutional rights or a special view about the dangers of prior censorship, would amply support a judicial rejection of prior censorship in the school context. Under either view, the Fourth Circuit experience suggests a constitutionally tolerable prior censorship scheme is unlikely to be found.

In the Fourth Circuit’s most recent confrontation with the issue in *Nitzberg v. Parks*, Justice Tom Clark, sitting by designation, noted that this was the third occasion that circuit had had to reject proposed school censorship regulations. The first of the cases to which he referred, *Quarterman v. Byrd*, was decided in 1971. It involved a student who had distributed an independent paper on school grounds which contained, among other things, the words:

IF WE HAVE TO—WE’LL BURN THE BUILDINGS OF OUR SCHOOLS DOWN TO SHOW THESE PIGS THAT WE WANT AN EDUCATION THAT WON’T BRAINWASH US INTO BEING RACIST.

For this she was expelled. The expulsion was premised on a school rule whose crowning glory was its stark simplicity: it prohibited distribution of material “without the express permission of the principal.” It provided neither the most rudimentary standards nor procedures to control the principal’s discretion. On these grounds, the Fourth Circuit declared the regulation unconstitutional. This conclusion was not a difficult one. It required only that the court reject carte blanche control by school authorities over student expression. The court, that is, had only to assume that students enjoyed some first amendment rights to conclude that a totally discretionary power would leave school administrators “adrift upon a boundless sea,” free to exercise censorial powers on an ad hoc, subjective, and therefore constitutionally impermissible basis.

That students shared in the protections of the first amendment was an uncontestable proposition after the Supreme Court’s landmark decision in *Tinker v. Des Moines Independent School District*. Students, it proclaimed, did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” However, “the Court has repeatedly emphasized the need

18. 525 F.2d 378 (4th Cir. 1975).
19. Note 15 *supra*.
20. 453 F.2d 54 (4th Cir. 1971).
21. *Id.* at 56.
22. *Id.* at 55.
25. *Id.* at 506.
for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” Tinker resolved the conflict between these rights in favor of the students’ right of speech unless it could be shown that such speech activity “would materially and substantially disrupt the work and discipline of the school.”

Tinker did not, however, reach the issue of prior press restraints. It did not address, much less specifically answer, the question of whether the school context somehow warranted censorship of published student material that would be unthinkable elsewhere. Tinker’s strict holding was that students had the right to express opposition to the war in Vietnam by wearing black armbands on school grounds. That, in itself, represented a historic advance in the constitutional rights of school children. However, as might be expected in a case expressing such a fundamental change in attitude toward young people and toward school authority, the Court’s decision can be read broadly or narrowly. Snippets of language can be culled from the opinion pushing in either direction, and both those who support and those who oppose prior restraints in the school context have been able to draw some comfort from the Tinker decision.

The Fourth Circuit in Quarterman was prepared to strike down the particular censorship scheme it confronted on the basis of its reading of Tinker, but not merely because it employed prior censorship. The rights of school children, it held, were not coextensive with those of adults. The fact that the censorship scheme was of a kind that would be unthinkable in the external society was not its “basic vice.” Its vice, rather, was that it failed to limit the discretion of the administrators with appropriate cri-

26. Id. at 507.
27. Id. at 513. The Court, in short, adopted something akin to a clear-and-present danger test but without specifying how clear, present, or dangerous the danger would have to be to warrant sanctions in the school context. Compare Brandenburg v. Ohio, 395 U.S. 444 (1969).
28. Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969), constitutes a significant advance from prior decisions, notwithstanding the attempt by Justice Fortas to characterize the holding as a virtually foreordained consequence of the Court’s prior decisions. Id. at 507.
29. Notes 25 and 26 and accompanying text supra. For a discussion of the different approaches courts have taken in applying the Tinker forecast rule to the issue of the constitutionality of prior restraints, see notes 10 and 11 and accompanying text supra.
30. 453 F.2d at 57.
Specifically, 

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teria and procedural safeguards. Censorship was permissible, but only if criteria were established by which the authorities could reasonably "forecast substantial disruption of, or material interference with, school activities" and if expeditious review procedures were provided to test their censorship decisions. It said little else on the subject of standards or procedures.

A fair reading of Quarterman would have been that administrative censorship, though unacceptable in the society at large, was permissible in the school context so long as appropriately limited by standards and procedures designed to mitigate the danger of suppressing protected speech. School authorities turning to the task might have been excused for believing the goal was within easy reach.

The Fourth Circuit's second encounter with the issue came in Baughman v. Freienmuth. The dramatis personae had changed: a different student, school system, and panel of judges were involved. The issues, however, were much the same. Litigation was triggered by a warning letter from the principal to students who had distributed a pamphlet criticizing the prior restraint regulations then in effect. The court did not assess the content of the pamphlet since its concern was only with the validity of the regulations on their face. As in Quarterman, the court's starting point was to reject any flat prohibition of school administrative censorship. Public school students properly could be subjected to rules which would be unthinkable in the society at large.

\[\text{Id. at 58 (quoting Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 514 (1969)).}\]

\[\text{32. First Amendment rights of children are not "co-extensive with those of adults." . . . Specifically, school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "reasonably forecast substantial disruption of or material interference with school activities" on account of the distribution of such printed material.}\]

Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971). However, the court continued:

\[\text{What is lacking in the present regulation, and what renders its attempt at prior restraint invalid, is the absence both of any criteria to be followed by the school authorities in determining whether to grant or deny permission, and of any procedural safeguards in the form of "an expeditious review procedure."}\]

\[\text{Id. at 59.}\]

\[\text{33. 478 F.2d 1345 (1973).}\]

\[\text{34. The judges in Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971), were Haynsworth, C.J., Winter, and Russell; the judges in Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973), were Winter and Craven, Circuit Judges, and Bryan, District Judge.}\]

\[\text{35. 478 F.2d at 1348.}\]
As to the appropriate contours of a school censorship scheme, the court's answer was more interesting. The school authorities here had attempted to promulgate specific standards. They claimed no total, ad hoc power. In fact their standards tracked vaguely the usual definitions of unprotected speech, including speech which "contains libelous or obscene language, advocates illegal actions or is grossly insulting to any group or individual . . . ."36 To be sure, this formula suffered from numerous defects judged by existing constitutional standards applicable to the society at large.37 However, it was not at all clear that non-school standards provided the test (any more than they had on the issue of school censorship).

The court, however, rejected the scheme, holding that prior censorship was presumptively unconstitutional, even in the school context.38 The prohibitions against illegal advocacy and against "grossly insulting" language failed for overbreadth in going "beyond the . . . permissible standard . . . of forecasting substantial disruption."39

As to unprivileged libel or material that was obscene if read by children, the court agreed, in theory, that such materials properly were banned from the school grounds; but the court found that the particular censorship procedure under consideration in Baughman suffered from the problem of intolerable vagueness. Proscriptions against "obscene or libelous material"40 might provide a permissible measure for post-publication sanctions,41 but not for purposes of prior administrative restraints. "[W]e think letting students write first and be judged later is far less inhibiting than vice-versa."42 In a noteworthy insight into the dangers

36. Id. at 1347.
37. In addition to the court's objections to these standards set forth in the ensuing text, the following may be noted: the libel and advocacy provisions are not suitably narrowed to conform to constitutional requirements embodied in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Brandenburg v. Ohio, 395 U.S. 444 (1969), respectively. As to the obscenity provision, there is no such thing as obscene language, only obscene materials or works judged as a whole. See Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). Absent the requisite prurient appeal, the most vulgar words are incapable of being obscene. See Cohen v. California, 403 U.S. 15, 19-20 (1971).
38. 478 F.2d at 1348.
40. 478 F.2d at 1349.
42. 478 F.2d at 1350.
of censorship in the school context, the court continued:

The use of terms of art such as “libelous” and “obscene” are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria. Indeed, such terms are troublesome to lawyers and judges . . . . [A] Justice of the Supreme Court has confessed that obscenity “may be indefinable.” . . . “Libelous” is another legal term of art which is quite difficult to apply to a given set of words . . . .

Thus, while school authorities may ban obscenity and unprivileged libelous material there is an intolerable danger, in the context of prior restraints, that under the guise of such vague labels they may unconstitutionally choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive. That they may not do. 43

In order for a prior restraint system to be valid, the court concluded, it must consist of standards which contain “precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write.” 44 Thus, after Quarterman and Baughman, a valid prior restraint system must provide standards which enable students to understand their rights and duties and enable school officials to determine what constitutes substantial disruption of or a material interference with school activities.

School authorities were left with the unenviable task of defining difficult terms with precision, and with defining one of these terms, obscenity, with a degree of precision that no one ever has been able to achieve. 45

Turning to the procedures in the rules before it, the court found them wanting. Not only was there no “expeditious review procedure,” but the rules failed to provide a “specified and reasonably short period of time in which the principal must act.” 46 The court did not specify what period of time would be permissible, but observed that: “[W]hatever period is allowed, the regulation may not lawfully be used to choke off spontaneous expres-

43. Id. at 1350-51.
44. Id. at 1351.
45. Id. at 1350.
46. Id. at 1348. A further defect, the court observed, was that the regulation failed to specify what would happen if the principal neither expressly granted nor expressly denied permission to distribute during the short time in which the principal had to act. Would this mean a student could or could not distribute the paper?
sion in reaction to events of great public importance and impact.”

The case thus marked a notable advance over Quarterman in the required level of protections. If the court still was committed in principle to upholding school censorship, the gap between first amendment protections in the society at large and on school grounds had shrunk considerably. The substantive standards for protected speech were quite similar in the school context to those that pertained elsewhere, and such standards had to be defined with extraordinary precision if they were to serve as a basis for prior restraints rather than mere after-the-fact punishment.

To this unfulfilled task the school authorities returned in Nitzberg v. Parks, the third chapter of this saga. That case involved yet another plaintiff and another school system. The panel included one judge who had sat on the Quarterman panel, one judge who had sat on the Baughman panel, and retired Supreme Court Justice Tom Clark, sitting by designation, who authored the opinion.

Two independent student newspapers had been banned at a Baltimore high school, one because of an article about cheerleaders which apparently described them as sex objects. School administrators saw this as obscene and demeaning to the school and threatened the students with suspension if they put out another issue.

Of particular significance was the fact that the regulations here had conferred no blanket or unguided discretion upon school authorities, as in Quarterman. Nor had they employed unelaborated standards such as libel and obscenity as in Baughman. The school authorities had attempted instead to promulgate adequate guidelines for both the students and the school officials by fash-

47. Id. at 1348-49. Since the regulation appears to have required the principal to act within three days, id. at 1347, the court’s language casts doubt on this time period as being a brief enough interval for the initial administrative decision. See Rowe v. Campbell Union High School Dist., No. 51060 (N.D. Cal., Sept. 4, 1970 and Feb. 4, 1971) (three-judge court).

48. The only clear exception noted by the court was that a reduced standard for obscenity was permissible in respect to children under Ginsberg v. New York, 390 U.S. 629 (1968). 478 F.2d at 1349.

49. 525 F.2d 378 (4th Cir. 1975).

50. Id. at 380 n.1.

51. How extraordinary a remedy this was will be seen when one notes that this did not bar merely the offending issue but all future issues, whatever their content. See id. Cf. Near v. Minnesota, 283 U.S. 697, 711-15 (1931) (commercial newspaper).
ioning precise definitions. These attempts were made at the insistent prompting of the trial court, which had required no less than three rewrites of the rule before approving the version that ultimately came before the court on appeal.52 That version barred “obscene or libelous”53 material and material that would “reasonably lead the principal to forecast substantial disruption of or material interference with school activity.”54 Each category was defined with considerable particularity.55 Nonetheless, Justice Clark found such definitions to be vague and overbroad and, thus, found the regulation to be unconstitutional. The substantial disruption standard was fatally flawed because it did not provide specific criteria as to what would constitute such disruption. Equally fatal was the absence of criteria by which an administrator might reasonably forecast that the disruption, however it was defined, would occur.56 It was, in short, insufficient merely to employ the substantial disruption test of Tinker v. Des Moines Independent School District57 in the hope that its contours would be fleshed out properly by administrative discretion.

The libel definition fared no better. That definition purported to set forth the libel privilege of New York Times v. Sullivan.58 However, the court observed that it had failed to apply the standards of that case “and its progeny.”59 Whether the court meant that the rule did not adequately reflect the teaching of New York Times or that it failed to incorporate the refinements of “its progeny,” or both, was left unanswered.

52. 525 F.2d 378, 380-81 (4th Cir. 1975).
53. Id. at 381.
54. Id.
55. Id. at 381 n.3.
56. 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.

Id. at 383. The court’s concern, of course, was with limiting the suppression of speech to circumstances where the risk was both serious and imminent, an approach paralleling closely the clear-and-present danger test.
57. 393 U.S. 503, 513 (1969). The Nitzberg court observed that, though the “substantial disruption” and “material interference” language came directly from Tinker, 393 U.S. at 514, it did not follow that such phrases were sufficiently precise when they were employed in a regulation without further amplification. 525 F.2d at 383.
At best, from the point of view of the school authorities, the attempted definition of obscenity may have been sufficient, though even this seems doubtful.\textsuperscript{60} In any event, the court reversed and remanded the case.\textsuperscript{61}

Consequently, the Fourth Circuit, after its third encounter with a school censorship scheme, found itself still committed, in theory, to the proposition that school authorities possess extraordinary censorship powers. In the application of this principle, however, the court has been unable to endorse any of the schemes which the school authorities had been able to fashion over the course of three lawsuits and five years. Nor did the court offer any detailed guidelines to help the school authorities out of the morass. Instead, it contented itself with noting the defects before it without suggesting alternatives. This was of course consistent with a classic common law notion of the proper role of a court. It was also a form of cruel or unusual punishment if the court did have a solution in mind, given the tortured course of this litigation.

**The Impact and Effect of the Fourth Circuit View**

One conclusion which might be drawn from this experience is that, with renewed effort, school authorities will yet be able to fashion a censorship scheme that can survive close scrutiny. A more realistic view, however, is that any form of school censorship will create intolerable and incurable dangers of "unconstitutionally chok[ing] off criticism of [school authorities] or of school policies which they found disrespectful, tactless or offensive."\textsuperscript{62} Despite what the Fourth Circuit has said, what it has done tends to demonstrate its awareness that these dangers infect any scheme which permits school authorities to review

\textsuperscript{60} The definition seems to have incorporated essentially the terms of the Maryland obscenity statute, Md. CRIM. LAW CODE ANN. § 417 (1967), which in turn appears to be patterned after the requirements of Miller v. California, 413 U.S. 15 (1973). Whether the court thought this definition adequate is unclear. The only reference to it is at 525 F.2d at 383 n.4, where the court cryptically states that it could find no clear purpose for including Maryland's obscenity statute in the regulation.

\textsuperscript{61} The regulations were also found defective in failing to meet the procedural requirements of Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973). In particular, the regulations did not specify how quickly the principal was required to render a decision on a proposed publication nor did the regulation provide an adequate and prompt review procedure within the school hierarchy. Nitzberg v. Parks, 525 F.2d 378, 383-84 (4th Cir. 1975).

\textsuperscript{62} Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973).
speech in advance of distribution, to ban that of which they disapprove, and to enforce that ban until and unless student litigation secures eventual relief from the courts. Neither administrative procedures nor substantive standards, the safeguards repeatedly invoked by the court, can be fashioned to give reasonable assurance that protected speech will not fall victim to "arbitrary action and unfair treatment" by school administrators. The reasons why this is true are not difficult to state.

The task of formulating acceptable standards is a formidable one. First, the substantive grounds for restraint apparently must be defined so as to reach substantially only that speech which is unprotected under existing constitutional standards. This excludes the use of such categories as speech which is embarrassing to school authorities, objectionable to parents or community figures, disrespectful, controversial, vulgar, and the like.

Second, the standards must be defined with sufficient precision so that both school authorities and students are given clear notice of what is prohibited. This excludes the bare and unilluminating use of such categories as obscenity or incitement, requiring, rather, detailed elaboration and perhaps even particularized illustrations of what those terms embrace.

Third, though the point has yet to be considered in any of


64. The Fourth Circuit cases support this proposition in various ways. First, they repeatedly invoke the test provided by Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969), which protects student expression except in those "special circumstances" where school authorities can "reasonably forecast substantial disruption of or material interference with school activities." Quarterman v. Byrd, 453 F.2d 53, 58 (4th Cir. 1971). This rationale expressed in Quarterman was cited approvingly in Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975), as expressing the "controlling constitutional principles." Id. at 382. This test would preclude routine interference with the categories of speech described in the text and would permit interference only in those special circumstances where such speech was likely to disrupt school activities. Furthermore, any such finding would require specific factual proof; interference could not be based simply on an administrator's "undifferentiated fear or apprehension." Tinker v. Des Moines Ind. School Dist., 393 U.S. at 508.

Secondly, the court in Nitzberg, upon reviewing the school's efforts to proscribe disruption, libel or obscenity, did not accord the scope of such labels much greater breadth than would be allowed in the non-school society. See notes 49-55 and accompanying text supra. Therefore, these categories do not appear to be permissible vehicles for free-wheeling speech restrictions in the school setting anymore than elsewhere.

The biggest area of uncertainty in the relative rights of students as compared to others results from uncertainty in the breadth of the substantial disruption test of Tinker compared to the clear-and-present danger test. See generally Letwin, Regulation of Underground Newspapers on Public School Campuses in California, 22 U.C.L.A. L. Rev. 141, 173-90, 197-205 (1974).
the Fourth Circuit opinions, not all unprotected speech is properly subject to prior restraints, as opposed to mere post hoc remedies.65

However, even if the standards drawn were sufficiently narrow and precise, the danger that speech suppression will spill over beyond its theoretical confines remains great.

First, the very requirement of routine, prior submission to school authorities for content approval has a chilling potential that belies the theoretical standards. Any institutionalized review system tends to foster informal but, nevertheless, coerced self-censorship.66 This is true irrespective of the intentions of the censors.

There is good reason to be wary of those intentions as well. If prior restraints are permitted, it is simple practicality for courts to recognize what school officials themselves will recognize: that school censorship is immune from review except in the unusual circumstance that a student is willing and able to challenge it in court. School authorities inevitably then will be tempted to restrict speech with less self-restraint than if judicial review were a routine and inescapable precondition to a ban on distribution.67

There is, additionally, reason for concern about the disinterest and impartiality of the school censors. It is not mere student paranoia to fear that the authorities will utilize the inevitable play in such terms as “obscenity” and “disruption” to suppress speech that criticizes them. The desire to do so is a natural tendency of all governmental officials, and, for that reason, our society displays little inclination to permit them the opportunity. There is no reason to suppose school officials are immune from this tendency.

If one places trust not simply in carefully drafted standards, but in appropriate procedures for reviewing administrative censorship decisions, no procedures are fast or efficient enough to keep those decisions from interfering with students’ constitutional rights.

65. Libel is one such form of unprotected speech which is subject to punishment after publication but not subject to prior restraint. See note 6 and accompanying text supra. See also Letwin, note 64 supra, at 169-70, 184-90 (1974).
66. See note 5 and accompanying text supra.
67. To be sure, there is a damage remedy presently available against school authorities who knowingly deprive students of their rights, Wood v. Strickland, 420 U.S. 308, 322, rehearing denied, 421 U.S. 921 (1975). However, this remedy is inadequate because, among other reasons, it may take years to obtain, during which time the restraints imposed may remain in effect.
Even if no more than a day or two each were allowed for the principal to make the initial censorship decision and for review by higher school authorities, this would often be intolerably long.\textsuperscript{69} If the material is attuned to events of the moment, delay is tantamount to suppression. Even if the student emerges at the end of the review period with a right to distribute material, it may no longer be timely.\textsuperscript{69}

From another viewpoint, a four day period for both the hearing and the administrative review to take place is far too short, for the student has a due process right to present evidence and arguments.\textsuperscript{70} Assume, for example, that a newspaper's criticism of a principal is objected to as libelous. Due process undoubtedly requires that the student be given a fair opportunity to show that the statements were true, or that the speaker had not spoken with "actual malice."\textsuperscript{71} Similar factual issues are, of course, generated if the student is accused of disruption or dissemination of obscene materials. To deny such opportunity is to deny due process. To accord it is often to insure that the speech will be moot by the time the deliberative process is concluded. To make the student choose whether he wants a fair hearing or a speedy decision is to make him elect between his fourteenth amendment and his first amendment rights. The point to be stressed is that this is not an

\textsuperscript{69} Nitzberg v. Parks, 525 F.2d 378, 383-84 (4th Cir. 1975). See note 46 and accompanying text supra.

\textsuperscript{69} See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560-61 (1976); A. Bickel, The Morality of Consent 61 (1975); note 46 and accompanying text supra.

\textsuperscript{70} One would expect that [the mandatory submission of student material for the principal's review] would include the right of the student to appear and present his case . . . . Since [distribution following a principal's] . . . "negative decision, shall be sufficient grounds for confiscation of such material and suspension of the student by the principal," elementary due process requires confrontation and a hearing of some type before a step as drastic as suspension is taken.

\textsuperscript{71} The definition of actual malice, supplied by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), is applicable if one assumes that the principal is properly classified a public official or figure. The assumption appears well founded. See Baughman v. Frei- nath, 478 F.2d 1345, 1351 (1973); Reaves v. Foster, 200 So.2d 453, 459 (Miss. 1967); Letwin, Regulation of Underground Newspapers on Public School Campuses in California, 22 U.C.L.A. L. Rev. 141, 185-86 (1974).
accidental or avoidable consequence. It is an inherent dilemma in any scheme of administrative licensing of the press.\(^{72}\)

Further, realistically speaking, the pertinent time period is not the two to four days it might take to exhaust administrative remedies but the months or years it would take to obtain judicial review, and even that review would come only if the would-be distributor had the will and the capacity to litigate tenaciously over a school-imposed ban. Here, again, the inertia of a system which permits school-imposed censorship weighs heavily on the side of restricting speech irrespective of the ultimate merits.

A possible response is that the nature of the school setting requires that the students’ rights yield to the need for school discipline and that this justifies school censorship of the sort which would not be countenanced in other environments. It might then be said that a system of prior restraints is required to deal with the danger of illegal incitement by students which might endanger other students and imperil the school’s academic program. However, this danger is easily exaggerated. In the large number of public school newspaper cases thus far litigated, few, if any, have arisen for this reason. The case has yet to be made that this anticipated danger warrants the draconic measure of systematic prior restraints.

The risk that school authorities will be tempted to use any censorship powers they possess to suppress pointed or disrespectful criticism is a near certainty.\(^{73}\) Experience suggests that the

\(^{72}\) In the non-school world that dilemma is resolved in favor of free speech rather than in favor of suppression: administrative restraints are prohibited and no material is banned until a judicial determination following a contested hearing. See, e.g., People ex rel Busch v. Projection Room Theatre, 17 Cal. 3d 42, 57-58, 550 P.2d 600, 608-09, 130 Cal. Rptr. 328, 336-38 (1976); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71 (1963); note 2 supra.

\(^{73}\) See, e.g., Bright v. Los Angeles Unified School Dist., 18 Cal. 3d 450, 556 P.2d 1090, 134 Cal. Rptr. 639 (1976) (newspaper banned at Los Angeles High School because it called the principal of another Los Angeles high school a liar in respect to certain statements he had made); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. en banc), cert. denied, 400 U.S. 826 (1970) (student expelled for distributing an underground newspaper pungently criticizing school authorities, describing an official school pamphlet as “ridiculous,” describing school attendant procedures as “idiotic and asinine.”); Dickey v. Alabama, 273 F. Supp. 613 (N. D. Ala. 1967) (publication of editorial prohibited by college authorities under rule prohibiting editorials in school papers critical of the governor or of the state legislature). This tradition of preventing student criticism of school officials has an extensive historical background, see, e.g., Wooster v. Sunderland, 27 Cal. App. 51, 148 P. 959 (1st Dist. 1915) (student expelled from school for delivering an address to student body in which he denounced the Board of Education for maintaining the school buildings as firetraps and belittled it for doing nothing to improve the safety of the school).
power to prevent illegal speech is far more likely to be used against protected speech by school authorities operating under unrefined and expansive notions of disruption, obscenity, or libel. In balancing these risks, the prudent course is to reject ex parte restraints by school authorities, that is, to reject the very premise of the Fourth Circuit decisions to date: that a double standard in respect to the press rights of students is feasible and necessary in the school context.74

Such a resolution would scarcely leave school authorities helpless to deal with legally prohibited speech. They have the power to subject their students to school disciplinary proceedings. If necessary, they can draw upon the police powers of the state to deal with unlawful disruption. Finally, in extraordinary circumstances, the school even can seek injunctive relief from the courts against illegal student activity.76 These devices provide adequate remedies in the school context, even as they do in society at large.

The Fourth Circuit thus far has energetically striven to find a way to protect students' right of speech within a framework that upholds the administrative licensing of speech. Its experience

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74. The rejection of such a premise rests on the distinction between the power to punish an individual student for violation of laws and the power to prevent the exercise of such first amendment rights. Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1969) (college authorities were held to have acted properly in suspending students for distributing material "calculated to cause a disturbance and disruption of school activities and to bring about ridicule and contempt for the school authorities"). One may question, as Judge Celebrezze in dissent did, whether this decision comports with current constitutional standards as to the scope of protected speech. Id. at 204-13.

75. To say that the school officials can seek injunctive relief is not to concede that they are entitled to it. Assuming the approach suggested in the text were adopted, the court would have to determine whether this was one of those rare occasions when press censorship was permissible. See note 3 supra.

In Bright v. Los Angeles Unified School Dist., 18 Cal. 3d 450, 556 F.2d 1090, 134 Cal. Rptr. 636 (1976), the court struck down the school's scheme of prior restraint, finding prior restraints impermissible under state law. In the event prohibitable material were distributed, the court said, "school authorities would be authorized to stop distribution of the offensive material and discipline those responsible." Id. at 464, 556 F.2d at 1099, 134 Cal. Rptr. at 648. Presumably, however, except in case of a genuine emergency, a search warrant adequate to support seizure of presumptively protected material would have to be obtained first. Roaden v. Kentucky, 413 U.S. 496, 502-04 (1973).
suggests that students cannot, at an acceptable cost, be denied these protections, which are taken for granted in society at large, against administrative restraints. The appropriate accommodation of first amendment rights and school disciplinary needs is to reject that constitutionally abhorrent form of governmental power, affirm the vitality of the first amendment in the educational system, and rely on traditionally favored remedies to deal with any serious abuses that may arise.