DOCUMENT RESUME

ED 188 220 CS 205 647

AUTHOR Huffman, John L.; Trauth, Denise M.
TITLE Freedom of Expression in Public High Schools Since "Ginsberg" & "Tinker."
PUB DATE Aug 80
NOTE 35p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (63rd, Boston, MA, August 9-13, 1980).

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Censorship; Constitutional Law; *Court Litigation; *Freedom of Speech; Literature Reviews; School Newspapers; Secondary Education; *Secondary Schools; *Student Publications; *Student Rights

ABSTRACT

A review of the related cases that have been adjudicated in the United States Circuit Courts of Appeals in the decade since "Ginsberg v. New York" and "Tinker v. Des Moines Independent School District" reveals that the courts are not in agreement in delineating the First Amendment publication rights of high school students. Different circuit courts are moving in different judicial directions, each relying on its own interpretation of the standards proposed by the United States Supreme Court in "Ginsberg" and "Tinker." As a result, there exists a wide spectrum of constitutional interpretation in this area, ranging from sharply limited rights to virtually full First Amendment rights for students. Until such time as the Supreme Court sees fit to clarify its stand and explicate the area of students' First Amendment rights, the power of school authorities in regard to the rights of students will depend to a large extent on the developed law in each individual court. (FL)

FREEDOM OF EXPRESSION IN PUBLIC HIGH SCHOOLS

SINCE GINSBERG & TINKER

by

John L. Huffman
Associate Professor
School of Journalism
Bowling Green State University

and

Denise M. Trauth
Assistant Professor
School of Speech Communication
Bowling Green State University

Presented to the Law Division, Association for Education in Journalism Annual Convention, Boston, Mass., August, 1980.

FREEDOM OF EXPRESSION IN PUBLIC HIGH SCHOOLS SINCE GINSBERG & TINKER

Introduction. Over a decade has passed since the U.S. Supreme Court dealt with the issue of the First Amendment rights of children in the cases Ginsberg v. New York[1] and Tinker v. Des Moines Independent School District.[2] During that period U.S. Circuit Courts of Appeals have had to fashion their own theories of First Amendment rights of children without further Supreme Court guidance.

The legacy of the Supreme Court decisions and the current lack of any unified approach in the four U.S. Circuit Courts of Appeals that have dealt with high school students' freedom of expression in the last ten years[3] have given rise to a situation in which the First Amendment rights of high school students vary dramatically from circuit to circuit. This paper analyzes the Ginsberg-Tinker legacy and all of the high school students' publications cases that have been adjudicated in the past decade in U.S. Circuit Courts of Appeals and explores the differences in judicial interpretation that emerge across the circuits.

The Ginsberg-Tinker Legacy

Ginsberg v. New York tested the constitutionality of a state law which prohibited the sale to minors under 17 years of age material defined to be obscene on the basis of its appeal to children. At the outset of the case, New York determined that the "girlie" magazines sold to a minor in this case would not be considered obscene for adults. Thus, the issue that the U.S. Supreme Court

faced was not whether such material could be sold to adults, but rather if a state could apply different standards for determining what is obscene fo children.

In determining that the state does have the power to adopt what h been termed "variable obscenity" standards,[4] the Court pointed out the gene authority of legislatures:

> That the State has power to make that adjustment [i.e., differing standards for obscenity] seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond its authority over adults."[5]

This authority derives from two interests. The first is the right of parents to control their children:

> [C]onstitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. . . . . The legislature could properly conclude that parents and others, teachers, for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . . .Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.[6]

The second interest promoted by this law is the concern of the state itself for the well-being of its youth:

> [T]he knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards. . .[7]

Finally, the Court pointed out that since "obscenity is not within the area of protected speech and press,"[8] this statute does not invade constitutional

rights. For this reason, the Court rejected the assertion by New York that the sale of such material to minors poses "a clear and present danger to the people of the state,"[9] and noted that such a test is not required where unprotected speech is at issue.

Application of the "clear and present danger doctrine"[10] would compel the state to demonstrate a showing of circumstances which could lead to turbulence. The Court was sceptical about this link and registered doubt that "this finding by New York expressed an accepted scientific fact."[11] Nevertheless, the law is upheld because the test is not required and because the law promotes the legitimate interest of the State in its youth.

In his concurring opinion, Mr. Justice Stewart sums up the underlying philosophy of the majority:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child. . . is not possessed of that full capacity for individual choice . . . which is the presupposition of First Amendment guarantees. . . . It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[12]

In contemplating the implications of Ginsberg, two factors must be kept in mind. The first is that in using obscenity doctrine to hold the statute valid, and not some other ground, such as the Fourth Amendment, the Court was in a sense, since obscenity is not protected speech, making this a non-First Amendment issue; and therefore, the ability of the states to regulate the reading matter of minors is a limited one. "Ginsberg should not be read to support broad state restrictions on the access of minors to nonobscene material such as violent films even if the state reasonably judges them to be injurious to minors."[13]

The second factor is that the New York statute was very narrowly drawn. It only restricted visual material of a specific nature and said nothing whatever about the publication of ideas.[14]

The next case under review dealt with communication which was very clearly within the ambit of the First Amendment.

Tinker v. Des Moines Independent School District[15] grew out of a ruling by public school officials that prohibited students from wearing black armbands as symbols of their sentiments against the Vietnam war. In its adjudication of the case, three facts were emphasized by the Supreme Court: first, only seven out of 18,000 Des Moines school children chose to wear the arm bands; second, the administrators' contention that a disturbance that would interfere with school discipline would result from the display was not realized; and third, students in the schools prior to this incident had been allowed to wear political symbols such as the Nazi Iron Cross and national political campaign buttons.

In its opinion, which held unconstitutional the ruling of the school administrators, the Court took the opportunity to emphasize the First Amendment rights of children:

> First Amendment rights, applied in light of the special character of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.16

The Court displayed its respect for the authority the states and school officials have to control conduct in the schools, but pointed out that this case deals not with conduct "that intrudes upon the work of the school or

the rights of other students,"[17] but rather with "direct, primary First Amendment rights akin to 'pure speech.'"[18] A simple fear on the part of school officials that a disturbance may erupt is not sufficient ground to deny First Amendment rights:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. . . . But our constitution says we must take this risk. . .[19]

The Court went on to reinforce the full constitutional rights of children:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to free expression of their views.[20]

This reference to an "absence of a specific showing of constitutionally valid reasons to regulate their speech" suggests that in Tinker the Court was applying the clear and present danger doctrine. There was no showing by officials that the speech in question might lead to violence or serious disruption of school discipline. In fact, the officials' position was based on the feeling that "schools are no place for demonstrations."[21] Since there was no danger of serious disruption, under the clear and present danger test the speech could not be proscribed.

It should be noted that in this case the Court made no attempt to differentiate between the First Amendment rights of adults and minors as Justice Stewart did in his concurring opinion in Ginsberg. Since the Court chose not to qualify its opinion, it "appears to have concluded either that

minors do in fact possess the necessary capacity for claiming and exercising First Amendment rights or that the level of capacity is not crucial to making the threshold determination whether such rights are applicable to minors."[22]

The apparent differences in the holdings of Ginsberg and Tinker, which were decided within a year of each other, can be explained in terms of the nature of the expression involved; one dealt with obscenity (a form of communication not protected by the First Amendment) and the other with political speech (the very type of communication some commentators believe the First Amendment was expressly written to protect).[23]

However, at least one member of the Court was confused enough by the difference between the two holdings to remark: "I cannot share the Court's uncritical assumption that . . . the First Amendment rights of children are co-extensive with those of adults. Indeed, I had though the Court decided otherwise just last term in Ginsberg . . ."[24] This judicial confusion over what Ginsberg and Tinker did mean about the First Amendment rights of minors is the real legacy of these cases. As will be demonstrated, different U.S. Circuit Courts of Appeals have used the language of Ginsberg and, more often, Tinker to arrive at widely varying positions on what First Amendment rights public high school students enjoy in the area of producing and distributing publications.

U.S. Court of Appeals -- Fourth Circuit

The Fourth Circuit U.S. Court of Appeals has developed in a line of post-Tinker cases a clear, unwavering philosophy as to the

rights of high school students in the area of student publications. Essentially, this philosophy assigns a relatively high priority to the First Amendment rights of high school students and assumes that any prior restraints on high school publications "come to the court with a presumption against their constitutionality."[25]

This philosophy was first enunciated in Quarterman v. Byrd, 1971.[26] The plaintiff in this case was a tenth-grade high school student at Pine Forest High School near Southern Pines, North Carolina. He was briefly suspended from school for violating a school rule that specifically forbade any pupil from distributing, while under school jurisdiction, "any advertisements, pamplets, printed material, announcements or other paraphernalia without the express permission of the principal of the school."[27]

Circuit Judge Donald Russell clearly indicated in the decision his feeling that in normal circumstances the federal judiciary should not interfere with the operation of public schools. He said:

> 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." 28 (citations omitted)

However, Judge Russell also stated clearly that interference with student expression was not to be considered in the same light as other rules imposed by a school system. He said:

> 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.29

In Quarterman v. Byrd, as in all other student publication cases arising in the Fourth Circuit, the court is careful to make the point that it does not totally equate the First Amendment rights of juveniles with the First Amendment rights of adults. Judge Russell notes that:

> 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 (Ginsberg v. New York citation), 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.30

However, in Quarterman the court interprets Tinker in such a way that high school authorities must apply a stern test if they are to exercise prior restraint constitutionally. 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" because of the distribution of the material.[31] The court also demanded that before any prior restraint be exercised, a set of criteria must be established and followed by school authorities and an "expeditious review procedure" be set up to question any prior restraint decision by any school official.[32] Thus, the court in Quarterman found the school rule constitutionally invalid in view of the fact that none of the preceding conditions were met.

The second in the series of cases establishing the judicial philosophy of the Fourth Circuit was Baughman v. Feinmuth in 1973.[33]

This case arose out of a complaint by a group of parents, acting on behalf of their high school age children, against the Maryland State Board of Education and the Montgomery County Board of Education. The complaint attacked certain regulations contained in a policy statement as an unlawful prior restraint on the distribution of non-school sponsored literature in violation of the First Amendment. The regulations in question called for student publications produced without school sponsorship to 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.[34]

Writing for the court, Circuit Judge Craven found that the rule in questio was a direct prior restraint on expression. He noted again, as Judge ussell had in Quarterman, that in a secondary school setting First Amendment rights are not co-extensive with those of adults, and that in certain circumstances prior restraints may be valid, although he emphasized that prior restraints come to court with a presumption of their unconstitutionality. He reiterated 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" because of the distribution of the material in question.[35]

The court found the regulations in Baughman, like those in Quarterman, impermissible. The court pointed out that the rules did not provide for a "specified and reasonably short time period in which the principal must act."[36] Likewise, the court noted that the

regulations 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 prohibition of material which "advocates illegal actions, or is grossly insulting to any group or individual" was unconstitutionally vague and went beyond the standard of forecasting substantial disruption.[37] The court expressed its feeling that only material which, in the constitutional sense, was unprivileged libel or obscenity for children (i.e., as in Ginsberg v. New York) could be banned by school officials.[38]

The court favored a system that would allow students to "write first and be judged later."[39] 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."[40] Further, the court said that:

> 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.41

In summary, then, growing out of Baughman and Quarterman was a standard which provided that secondary school children clearly had First Amendment rights (although they were not co-extensive with such adult rights), that these rights could be violated by prior restraint only when the material under question was not constitutionally protected, that any such prior restraint imposed had to be according to precise criteria that clearly spelled out what was prohibited, that approval or disapproval of material had to be prompt, and that a prompt and complete appeals procedure had to be provided.

The third case in the Fourth Circuit series, Nitzburg v. Parks (1975),[42] concerned a rule created by the Baltimore County Board of Education under which school officials of the Woodlawn Senior High School ordered two private student newspapers to cease publication in November of 1973. Maryland Supreme Court Justice Clark, sitting by designation, delivered the opinion of the court that the rule was constitutionally invalid.

The rule in question, 5130.1(b), contained the Board's policies regarding student publications and stated in relevant part:

> Literature may be distributed and posted by the student of the subject school in designated areas on school property as long as it is not obscene or libelous (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.[43]

The rule then goes on to set up a policy whereby the principal must render a decision within two days, a policy whereby an appeals procedure to an assistant superintendent must be completed within three additional days if so desired by the student, and also a policy whereby, in the face of administrative inaction within the stated time limits, a student may go ahead and distribute the literature. Also contained in the rule are lengthy definitions of libelous material and obscene material, both attempting to incorporate the latest constitutional reasoning by the U.S. Supreme Court.

Quite obviously, the rule was drafted as an attempt to comply with the mandate previously issued by the Fourth Circuit judges in Baughman and Quarterman. Since the rule was still found to be

constitutionally infirm, it is instructive to examine Mr. Justice Clark's reasoning. He found that:

> 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.44

Mr. Justice Clark is saying that simply using the Tinker language is not enough; instead, any set of rules that is going to be found constitutionally acceptable in the Fourth Circuit is going to first have to clearly spell out what a "substantial disruption" of school activities really is, and what criteria an administrator plans to use to predict such a disruption. The difficulty of school administrators complying with this mandate is evidenced by the fact that, to date, no set of criteria in the Fourth Circuit has been found to be constitutionally acceptable.

The last case in the Fourth Circuit Court of Appeals series concerning student publications was adjudicated in 1977. In the case, Gambino v. Fairfax County School Board,[45] the court affirmed a district court decision that a student high school newspaper published by journalism students at the Hayfield, Virginia, Secondary School could not be considered part of the curriculum and was instead a public forum for student expression and therefore subject to the First Amendment protection outlined in Quarterman, Baughman, and Nitzburg. The court further ruled that the general power of the school board to regulate course content does not apply to school newspaper content.

The appeals court stated that it was affirming the federal district court decision because that decision was "substantially supported by both the evidence and the law."[46] In the lower court decision, Judge

J. Brynat 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,"[47] violated the First Amendment.

School board officials relied on the contention 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 in Hayfield are a 'captive audience,' rendering the publication subject to reasonable regulation."[48]

Judge Brynat dismissed both of these contentions. He noted that the extent of state funding and state facilities for the paper were not relevant factors in determining whether or nor the state could control the content of student newspapers, citing numerous precedents that "the state is not necessarily the unrestrained master of what it creates and fosters." He ruled that the student newspaper was indeed a public forum subject to First Amendment protection and 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."[49]

In summary, the U.S. Court of Appeals for the Fourth Circuit has taken the position that publications by high school students, whether they are produced in school under teacher guidance or produced out of school and brought to school for distribution, are protected by the First Amendment. Because of this protection, censorship and prior

restraint can only occur in very limited circumstances, and the criteria determining these circumstances must pass a rigid test imposed by the courts, with the presumption that any rules imposed by a high school authority come before the courts as unconstitutional.

U.S. Court of Appeals -- Second Circuit

Contrary to the Fourth Circuit U.S. Court of Appeals, the Second Circuit U.S. Court of Appeals, citing essentially the same cases as precedent (Tinker and Ginsberg), has adopted a judicial philosophy that mandates that high school students' First Amendment rights must give way to the duty of school administrators to protect the students under their care. It is the Second Circuit's position that, "It is to everyone's advantage that decisions with respect to the operation of local schools be made by local officials," and that, "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."[51]

The post Tinker-Ginsberg philosophy of the Second Circuit had its genesis in the 1971 decision of Eisner v. Stamford Board of Education.[52] The case focused on a policy adopted by the Board of Education of the city of Stamford, Connecticut, in 1969. The policy concerned distribution of printed or written matter and said in relevant part:

> 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.[53]

The plaintiffs, students at Rippowam High School in Stamford, 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 Second Circuit Appeals Court 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."

The Circuit Court began its reasoning with a discussion of Near v. Minnesota[55] 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."[56]

The Circuit Court then said that it must address itself to two major questions: First, was the Board's policy justified because it was one of those "exceptional cases" where prior restraints are permissible? Second, was the policy as narrowly drawn as "may be reasonably be expected so as to advance the social interests that justify it"[57] or does it unduly restrict protected speech?

From the ou set, the Circuit Court 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 student expression was indeed one of those "exceptional cases" where permissible prior restraints could be used:

> Moreover, we cannot ignore the oft-stressed and carefully worded dictum in the leading precedent, Tinker v. Des Moines School District (citations omitted), that protected speech in public secondary schools may be forbidden if school authorities reasonably "forecast substantial disruption of or material interference with school activities."58

The court also found support for limiting the expression of students in the Chaplinsky v. New Hampshire doctrine that the state can suppress words "which by their very utterance inflict injury or tend to incite breach of peace,"[59] and even in the clear and present danger doctrine enunciated in Schenck v. United States in 1919:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.60

The Circuit Court used these decisions in coming to the conclusion that:

> . . . 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.61

Earlier in this article, during the discussion of the Fourth Circuit Court of Appeals philosophy, it was noted that the Fourth Circuit had taken at face value the Tinker mandate that free expression could be restrained in schools only when "a substantial disruption of or material interference with" school activities was possible, and that

that court had required that any set of rules in the Fourth Circuit would have to clearly spell out what a "substantial disruption" of or "material interference" with school activities actually was, and what criteria an administrator was going to use to predict such a disruption or interference. Only them, according to the Fourth Circuit, could any prior restraints on student expression be even considered. In vivid contrast to this approach, the Second Circuit simply assumes that school administrators would not suppress expression that would create only minor disturbances, and indeed does not even require that the words "material" or "substantial" be part of the rules. The court is Eisner said:

> 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.[62]

This faith in the wisdom of school authorities in the Second Circuit forms a crucial difference between it and the Fourth Circuit, and accounts in large part for much of the divergency of the two circuits in the area of freedom of student expression. The court said in Eisner, "It is to everyone's advantage that decisions with repect to the operation of local schools be made by local officials."[63] This is in marked contrast to the philosophy developed in the Fourth Circuit 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."[64]

In Eisner, the Second Circuit 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, a federal district judge in 1972 found in Koppell v. Levine[65] 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.

However, in the same district in 1974 in a case involving the seizing of a sex education supplement to a student newspaper, both the district court judge and the Second Circuit Court of Appeals, which affirmed the lower court decision without comment,[66] seemed to suffer a change of judicial heart. As will be pointed out, though, this case, Bayer v. Kinzler,[67] was an aberration in the line of judicial philosophy concerning student expression in the Second Circuit.

The case was an action on behalf of two minors by their parents against the Superintendent of Schools of the Union Free School District No. 22, the principal of Farmingdale High School, and the Board of Education. An issue of the Farmingdale High School student newspaper contained a sex information supplement. One of the plaintiffs was the editor of the newspaper, while the other was a student who stated that she wished to receive the supplement. The supplement was 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 district court judge began his reasoning with a reference to Tinker and its requirement that First and Fourteenth Amendment

abridgement can only occur in schools when the action "is necessary to avoid material and substantial interference with school work or discipline." The judge equated the newspaper staff's attempt to educate their fellow students with the symbolic action of the Tinker children, saying that the articles were "at least equally deserving of protection under the First and Fourteenth Amendments as the symbolic wearing of an armband, the protected activity in Tinker."[68]

He found 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, and he enjoined school authorities from preventing distribution of the seized copies. As was noted earlier, the Second Circuit affirmed this decision without comment.

In 1977, though, the Second Circuit returned to the line of reasoning it had begun in Eisner and again took the position that students' First Amendment rights must give way to the duty of school administrators to protect the students under their care. The case, Trachtman v. Anker,[69] focused on the attempts of two high school students at Stuyvesant High School in New York City to survey the sexual attitudes of Stuyvesant students and publish the results in the Voice, 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"[70] including such topics as "pre-marital sex, contraception, homosexuality, masturbation and the

extent of students' sexual experience."[71] 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."[72] 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 lower court judge found that permission to distribute the questionnaire could be denied only if the school authorities could prove that "there is a strong possibility the distribution of the questionnaire would result in significant psychological harm to members of Stuyvesant High School."[73] She felt that this was proved with regard to thirteen- and fourteen-year-old students, but not with regard to older students. Therefore, she held that the students could distribute the questionnaire to eleventh- and twelfth-grade students only.

Once again, the Second Circuit Appeals Court began its reasoning with a consideration of Tinker and the familiar Tinker standard that student speech can be restrained if it materially and substantially interferes with the requirements of appropriate discipline in the school. The court said:

> 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.)[74]

The court stated in a footnote that:

> 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.)[75]

When, then, will the Second Circuit uphold the right of school authorities to supress student expression? The court said:

> 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.)[76]

Likewise, the court said:

> 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 matters where there is a rational basis for the decisions and actions of the school authorities.77

The Circuit Court reversed the judgement of the district court in sofar as it restrained the school authorities from prohibiting the distribution of the questionnaire to eleventh and twelfth graders; according to the court is 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 it feels ther is a "reasonable" chance of disruption, and that 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.

The majority decision in Trachtman, endorsed by two judges, appeared to the third judge of the three-judge panel as a misreading of Tinker. He said in his dissent:

> 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.78

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.79

The dissenting judge also noted that the Second Circuit was not following a uniform line of reasoning:

> 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. (Emphasis added.)80

The legacy of the majority opinion in Trachtman is apparent in the 1978 case of Frasca v. Andrews.[81] A federal district judge 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 preventing publication.[82] This was despite the fact that the material under question was admittedly not obscene, not defamatory, and not inciteful to violence. Indeed, the judge noted that under the Second Circuit doctrine, truth itself was irrelevant. He said:

> ... . 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.[83]

In summary, the U.S. Court of Appeals for the Second Circuit has taken the position that the First Amendment rights of high school students are extremely limited, and that they must give way to a "reasonable" decision by school officials that expression in a publication may cause disruption or harm to some people. No written policies are required to specify when prior restraint may occur, and the benefit of the doubt will be given to school officials 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."[84]

U.S. Court of Appeals -- Fifth Circuit

The law surrounding high school students' First Amendment rights in the Fifth Circuit is, relatively, judicially undeveloped. The court has spoken only once in the area, in the 1972 case Shanley v. Northeast Independent School District.[85] At issue was the distribution by several high school students of an "underground" newspaper before and after school hours entirely off-campus and a school policy which forbade any distribution of materials without administrative approval. The court took the opportunity to attempt to set up a judicial philosophy for the Fifth Circuit that would guide the actions of school administrators in making future decisions about student publications produced and distributed both on- and off-campus.

Essentially, it appears that the standards endorsed by the Fifth Circuit in Shanley are at leas respectful of student rights of free expression and fall somewhere between the student-oriented standards endorsed by the Fourth Circuit and the administration-oriented standards endorsed by the Second Circuit.

The court in Shanley approvingly cites Eisner v. Stamford Board of Education (the controlling case in the Second Circuit) in coming to the conclusion that "there is nothing unconstitutional per se in a requirement that students submit materials to the school administration prior to distribution[86] (a conclusion that, as will be seen, is completely rejected by the Seventh Circuit Court of Appeals). However, the court notes that "the test for curtailing in-school exercise of expression is whether or not the expression of its method of exercise 'materially and substantially' interferes with the activities of discipline of the school."[87] The Fifth Circuit Court comes to the conclusion that:

> (1) expression by high school students may 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.[88]

The above reference to "reasonable cause" is the same phrase used by the Second Circuit Court in Trachtman; however, the confidence that the Second Circuit displayed in the wisdom of school authorities and the reluctance of the Second Circuit to impose its opinions on school

authorities are both missing in the Fifth Circuit Shanley decision. The court admits that "reasonableness" is, in the court's words, a "neutral corner,"[89] but it admonishes 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.[90]

Likewise, the Shanley court notes that "even reasonably forecast disruption is not per se justification for prior restraint or subsequent punishment of expression afforded to students by the First Amendment,"[91] and that "disturbances themselves can be wholly without reasonable or rational basis."[92] The court says it has "great respect for the intuitive abilities of administrators," but it cautions that "such paramount freedoms as speech and expression cannot be stifled on the sole ground of intuition."[93] In addition to the above cautions, the court in Shanley mandates that any school-imposed rules must clearly outline submission requirements, state a brief time in which an administrator must respond, set up an appeals process, and state a brief time in which the appeal must be decided.

In summary, the U.S. Court of Appeals for the Fifth Circuit has taken the position that high school students have First Amendment rights but that prior submission requirements do not violate these rights if they are correctly imposed, and that these rights can be abridged if a substantial disruption is likely to occur as a result of the student expression; however, school authorities have the burden of proving the imminence and gravity of a disruption and they must take a close look at whether the disruption itself has a rational basis.

U.S. Court of Appeals -- Seventh Circuit

The judicial interpretation of high school students' rights of freedom of expression in the Seventh Circuit Court of Appeals came in two cases early in the 1970's. In these two case, Scoville v. Board of Education[94] and Fujishima v. Board of Education,[95] the Seventh Circuit articulated a philosophy that goes even further than that developed by the Fourth Circuit in supporting students' First Amendment rights. The Seventh Circuit is unequivocally against any prior submission standards and insists on a literal reading of Tinker. The court rejects both Quarterman in the Fourth Circuit and Eisner in the Second Circuit as being too restrictive and violative of students' First Amendment rights. The Seventh Circuit Court says:

> We believe that the court erred in Eisner in interpreting Tinker to allow prior restraint--long a constitutionally prohibited power--as a tool of school officials in "forecasting" substantial disruption of school activities.[96]

And about Quarterman, the court says in a footnote:

> 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.)[97]

The Seventh Circuit would allow 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, who were minors, 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.

The Seventh Circuit Court cited Tinker as the authority for the case. According to the court:

> 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."98

The Court goes on to note that "Tinker announces the principles which underlie our holding: High school students are persons entitled to First and Fourteenth Amendment protections."[99] The court said 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 the next case decided by the Seventh Circuit Court, Fujishima v. Board of Education (1972), the court went much further in developing and refining its philosophy concerning students' rights of free expression. The case centered around the constitutionality of section 6-19 of the rules of the Chicago Board of Education:

> 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.100

The plaintiffs were three high school students who were disciplined for violation of section 6-19. 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. The other student was suspended for giving another student an unsigned copy of a petition calling for teach-ins about the war in Vietnam.

The Seventh Circuit found that because section 6-19 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.)101

This finding isolates the Seventh Circuit from all other circuit courts deciding cases in this area, as all other courts have found some kind of prior approval process constitutional, differing only on the nature and focus of the process. The Seventh Circuit reads Tinker as allowing only post-publication punishment:

> 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.102

Saying that "we believe Eisner is unsound constitutional law," the Seventh Circuit declared 6-19 unconstitutional and remanded the case for entry of an injunction against its enforcement. The court said that the injunction would not prevent school authorities from promulgating reasonable regulations concerning time, manner, and place of distribution. However, the court emphasized that no student had to obtain administrative approval of even time, manner, or place of distribution of any particular publication; the board had the burden of telling students when, how, and where publications in general 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 on school grounds legally obscene or libelous literature.

The Seventh Circuit Court of Appeals provides the greatest freedom for student expression of any circuit court. It assigns students full First Amendment rights and treats these rights as virtually co-extensive with adult rights. This means that any prior approval process in this circuit is constitutionally repugnant, and that students may publish and circulate their works without fear of administrative interference because of content.

Conclusion.

It is obvious that the U.S. Circuit Courts of Appeals are not in agreement in the area of delineating the First Amendment publication rights of public high school students. Different circuit courts are moving in different judicial directions, each relying on its own interpretation of the standards proposed by the Supreme Court in Ginsberg and Tinker. As a result, there exists a wide spectrum of constitutional interpretation in this area, ranging from sharply limited student rights all the way to virtually full First Amendment rights for students. Until such time as the U.S. Supreme Court sees fit to clarify its stand and explicate the area of students' First Amendment rights, the power of school authorities vis a vis the rights of students will depend to a large extent on the developed law in each individual circuit.

Footnotes

1. Ginsberg v. New York, 390 U.S. 629 (1968).

2. Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

3. Second Circuit Court of Appeals, Fourth Circuit Court of Appeals, Fifth Circuit Court of Appeals, Seventh Circuit Court of Appeals.

4. "Variable obscenity" is the name given to laws such as that of New York.

5. 390 U.S. 629, 638 (1968).

6. Id. at 639.

7. Id. at 640.

8. Id. at 635.

9. Id. at 641.

10. Mr. Justice Holmes authored the clear and present danger doctrine in Schenck v. United States, 249 U.S. 47 (1919) as a guide to the boundaries of protected speech. Under the doctrine, political expression can be punished when the circumstances are such that they "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

11. 390 U.S. 629, 641 (1968).

12. Id. at 649-50.

13. "The Supreme Court: 1967 Term," 82 Harvard Law Review 63, 127 (1968).

14. Id. at 127-28.

15. 393 U.S. 503 (1969).

16. Id. at 506.

17. Id. at 508.

18. Id.

19. Id.

20. Id. The notion that children have obligations to the state adds emphasis to the Court's determination that children have constitutional rights. To have responsibilities to the state suggests that one is a participating, respected citizen. See Karst, K.L., "The Supreme Court: 1976 Term," 91 Harvard Law Review 1, 8-11 (1977).

21. Id. at 509 note 3.

22. "Parental Consent Requirements," at 1009.

23. See, generally, Meiklejohn, A., Political Freedom (New York: Harper and Row, 1948).

24. 393 U.S. 503 (1969).

25. Baughman v. Feinmuth, 478 F. 2d 1345 at 1347 (1973).

26. Quarterman v. Byrd, 453 F. 2d 54 (1971).

27. Id. at 55.

28. Id. at 56.

29. Id. at 57.

30. Id. at 58.

31. Id.

32. Id. at 59, 60.

33. 478 F. 2d 1345 (1973).

34. Id. at 1347.

35. Id. at 1348.

36. Id.

37. Id. at 1349.

38. Id.

39. Id. at 1350.

40. Id.

41. Id.

42. Nitzburg v. Parks, 525 F. 2d 378 (1975).

43. Id. at 381.

44. Id. at 383.

45. Gambino v. Fairfax County School Board, 3 Med. L. Rptr. 1238 (1977).

46. Id.

47. Gambino v. Fairfax County School Board, 2 Med. L. Rptr. 1442 (1977).

48. Id. at 1443.

49. Id. at 1444-45.

50. Eisner v. Stamford Board of Education, 440 F. 2d 803-10 (1971).

51. Trachtman v. Anker, 3 Med. L. Rptr. 1046 (1977).

52. Eisner v. Stamford Board of Education, 440 F. 2d 803 (1971).

53. Id. at 805.

54. Id.

55. 283 U.S. 713 (1934).

56. 440 F. 2d 803, 806 (1971).

57. Id.

58. Id. at 807.

59. 311 U.S. 568 (1942).

60. 249 U.S. 47, 52 (1919).

61. 440 F. 2d 803 (1971).

62. Id.

63. 440 F. 2d 803, 810 (1971).

64. Quarterman v. Byrd, 453 F. 2d 54 (1971).

65. Koppell v. Levine, 347 F. Supp. 456 (1972).

66. 515 F. 2d 504 (1975).

67. 383 F. Supp. 1164 (1974).

68. Id. at 1165.

69. 3 Med. L. Rptr. 1042 (1977).

70. Id. at 1043.

71. Id.

72. Id.

73. Id.

74. Id. at 1045.

75. Id.

76. Id. at 1046.

77. Id. at 1047.

78. Id. at 1048.

79. Id. at 1053.

80. Id.

81. 4 Med. L. Rptr. 2173 (1978).

82. Id. at 2179.

83. Id.

84. 3 Med. L. Rptr. 1046 (1977) at 519.

85. 462 F. 2d 960 (1972).

86. Id. at 969.

87. Id.

88. Id. at 970.

89. Id. at 977.

90. Id.

91. Id. at 973.

92. Id. at 974.

93. Id.

94. 425 F. 2d 1355 (1972).

95. 460 F. 2d 1355 (1972).

96. Id. at 1358.

97. Id.

98. Scoville v. Board of Education, 425 F. 2d 10, 12 (1970).

99. Id. at 13.

100. Fujishima v. Board of Education, 460 F. 2d 1355, 1356 (1972).

101. Id. at 1357.

102. Id. at 1358-59.