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ABSTRACT

The purpose of this study was to investigate and explain the censorship of written curricular and library materials in public schools over the past 20 years. Analysis of the 15 cases decided between 1972 and 1992, only one of which was decided by the Supreme Court, indicates that: (1) in every case except one, a school board or employees of the school district took the initial steps to remove formally the written curricular or library materials in question; (2) every approach to censorship focused on removing entire books or magazines, not just sections of them; and (3) about half the cases centered both on how and why decisions to censor were made, with the remaining cases focusing primarily on just one of these two aspects. Overall, with nine of the cases heard on appeal and six not, seven-and-a-half rulings prohibited censorship and six-and-a-half allowed it. Findings suggest that no unified body of precedents has been developed and consistently relied upon. Legal scholars commenting on the only case decided by the Supreme Court ("Board of Education v. Pico") provide insight into the future of public school censorship. The legal parameters of censorship to date indicate that until teachers, librarians, and other educators develop on their own an effective way to act instead of reacting to attempts at censorship, the search for truth and its free expression in public schools will remain at risk, higher courts notwithstanding. (Contains 37 references.) (RS)

Censorship of Written Curricular Materials in Public Schools: An Historical Investigation of Legal Parameters

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Mr. Justice Brennan once affirmed that "'one of the liberties we Americans prize most highly is our freedom to read what we wish and when we wish'" (Bosmajian, 1983, p. xi). No doubt public school teachers would concur, for, while teachers recognize that anyone charged with defining curricula cannot possibly include all written materials ever produced within any given discipline, it is difficult to imagine implementing that curricula with restricted written materials for reading purposes. As soon as limits are placed on reading "what we wish," whether "we" refers to faculty or students, a liberty has been infringed upon. Or has it? Mr. Justice Brennan next noted the curiosity that "'nothing in the body of the Constitution or the Bill of Rights says anything in terms about a freedom to read . . . Yet we know that such liberties are there just as surely as if they were expressly written into the First Amendment'" (p. xi). For good or ill, by the nature of their profession, public school teachers, librarians, and other educators can expect to find themselves at some time in their careers in the midst of an issue of censorship of written curricular materials. It is the purpose of this paper to investigate the historical legal parameters of censorship in general and the past twenty years of cases of censorship in the highest levels of federal and state courts in particular in order to inform educators of who attempts censorship in these precedent setting cases, how and why it is attempted, and with what degrees of success.

That an investigation and explanation of the processes

of censorship of written curricular and library materials in public schools is important is made clear within the Statement and Principles on Academic Freedom and Tenure of the American Association of University Professors. "'Institutions of higher education are conducted for the common good. . . . The common good depends upon the free search for truth and its free expression'" (Emerson, 1971, p. 594). Although this principle is stated within the context of higher education, at all levels of education there is necessarily a relationship between searches for truth and written materials. Restricting or eliminating access to written materials reduces the likelihood of finding truth.

Before proceeding with the investigation, however, it is important both to define the term "censorship" and to specify limitations of this particular investigation. The Bill of Rights states that "Congress shall make no law . . . abridging the freedom of speech . . ." (Alexander & Alexander, 1985, p. 785), and Orin's Dictionary of the Law defines censorship, in part, as "the denial of freedom of speech" (1983, p. 72), but, as this investigation will show, several cases of censorship before the higher courts have dealt with the abridgment of written, not spoken, words in public schools. Accordingly, a narrower denotation is required. Haney defines censorship as "the imposition of legal restraints upon the production, publication, sale, or distribution of any book, pamphlet, magazine, newspaper, photograph, or art object, in order to make it unavailable to most people . . ." (1960, p. 7). This study will utilize Haney's

definition, to the extent that it will focus on the distribution aspect of censorship on occasions when the aforementioned written materials have been deemed appropriate public school curricular materials by any teachers, administrators, school boards, or students. Such an operational definition necessarily places limitations on the study, such as excluding cases which deal with the censorship of student newspapers, except as they may be referred to within cases relevant to this study.

Another limitation of this investigation concerns a teacher's or student's oral use of possibly objectionable words contained in written materials. To the extent that a legal challenge is primarily focused on what is said as opposed to what is read, said cases, such as Keefe v. Geanakos (1969), which involved a teacher who would not agree with a school committee's request to refrain from saying a vulgar term contained in a magazine article which he had assigned as reading homework, will not be considered.

A final limitation is the exclusion of cases in which written materials are not added to a curriculum in the first place. A court ruled in Minarcini v. Strongsville City School District (1974) and had its decision upheld two years later that censorship does not occur when a book has never been added to a curriculum.

Although it has been only in the twenty years from 1972 to 1992 that federal and state higher courts have specifically addressed the issue of censorship of public school written curricular materials, there are several earlier key Supreme

Court decisions involving schools which provided the foundation for the parameters which exist today. According to Mr. Justice Fortas, "as early as 1923, the Court did not hesitate to condemn under the Due Process Clause 'arbitrary' restrictions upon the freedom of teachers to teach and of students to learn" (Bosmajian, 1983, p. 168). He was referring to the case of Meyer v. Nebraska (1923), in which an Act of the State of Nebraska "making it a crime to teach any subject in any language other than English to pupils who had not passed the eighth grade" (p. 168) was held unconstitutional.

In 1943, Mr. Justice Jackson delivered the opinion of the Court in West Virginia State Bd. of Education v. Barnette that the State of West Virginia could not compel students of the Jehovah's Witnesses faith to salute the flag at school, in part, because "the Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures--Boards of Education not excepted" (Bosmajian, 1983, p. 137).

Mr. Chief Justice Warren maintained that "scholarship cannot flourish in an atmosphere of suspicion and distrust" and "teachers and students must always remain free to inquire, to study and to evaluate . . ." in Sweezy v. New Hampshire (1957) (Alexander & Alexander, 1985, p. 250). Three years later, Mr. Justice Stewart quoted Mr. Chief Justice Warren's words and added that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" in Shelton v. Tucker (1960) (Bosmajian, 1983, p. 155).

In 1967, the Supreme Court declared in Keyishian v. Bd.

of Regents of the University of the State of New York that the State of New York's teacher loyalty oath was unconstitutional, and Mr. Justice Brennan stated that "our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned" (Alexander & Alexander, 1985, p. 587). He interpreted the First Amendment as not tolerating "laws that cast a pall of orthodoxy over the classroom" (p. 587).

Finally, in 1969, Mr. Justice Fortas delivered the opinion of the Court in Tinker v. Des Moines Independent Community School District that students, in the absence of actual or potentially disruptive conduct, may wear black armbands in school as a symbolic act. He wrote that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (Alexander & Alexander, 1985, p. 327). He summarized all of the aforementioned opinions by adding that "this has been the unmistakable holding of this Court for almost fifty years" (p. 327).

It was not, however, until 1972 that a major court case centered on a specific objection to a specific written curricular material. Todd v. Rochester Community Schools (1972) concerned a public high school student's parent who objected to the inclusion of Slaughterhouse-Five by Kurt Vonnegut, Jr. in the curriculum of an English course in which the student was enrolled. The parent argued that because the novel "'contains and makes reference to religious matters . . . the use of such

book as a part or in connection with any course of instruction by a public school district or system is illegal and contrary to . . . the First and Fourteenth Amendments of the United States Constitution'" (p. 91). Presiding Judge Bronson, noting that "some of the legal questions suggested by these proceedings have apparently never been squarely passed upon by any other court in this country" (p. 92), stated that "we have been cited no authority, nor has our own research uncovered any, which holds that any portion of any constitution is violated simply because a novel, utilized in a public school 'contains and makes reference to religious matters'" (p. 93). The judge sought and found no evidence that the book was taught subjectively by any teacher who either espoused or refuted the religious views contained in the book. Accordingly, the original course curriculum remained intact.

Another 1972 case, Presidents Council, District 25 v. Community School Board No. 25, concerned a school board's decision "to remove from all junior high school libraries in the District all copies of Down These Mean Streets, a novel by Piri Thomas" (p. 290). The board's decision resulted from parental objection to the book on the grounds that the book "would have an adverse moral and psychological effect on 11 to 15 year old children, principally because of the obscenities and explicit sexual interludes" (p. 291). A group of parents, guardians, teachers, and administrators sought to have the board's decision overturned, claiming that "the Board transgressed the first amendment rights of the plaintiff[s]"

(p. 291). Circuit Judge Mulligan rejected this argument, noting firstly that:

> It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions (p. 292),

secondly that:

> Here, patently we have no religious establishment or free exercise question, and neither do we have the banning of the teaching of any theory or doctrine. . . . A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing Down These Mean Streets in class or from assigning it for outside reading (p. 292),

and thirdly that:

> The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept (p. 293).

Mulligan was satisfied both that the board had the authority to remove the book and that the resolution to do so was adopted in the proper manner.

Four years later, a tenured high school English teacher challenged his board of education's termination of his employment, in part, on the grounds that restoring a censored

novel, namely The Catcher in the Rye by J. D. Salinger, to the curriculum was protected by the First Amendment and so could not constitute insubordination (Harris v. Mechanicville Central School District, 1976). Justice Graves examined both how and why the book was removed from the curriculum in the first place and how and why the tenured teacher's employment was terminated. To begin, in 1973, a conference was held by the school principal, the school superintendent, and the teacher in order to review parental allegations that The Catcher in the Rye, an otherwise acceptable book, was being "misused" in class through emphasis on a particular word contained therein. Although "allegedly all parties to the conference agreed that the book would not be used in the curriculum again," the teacher, "allegedly without the knowledge and consent of the school administration, restored the book in question to the English curriculum" (p. 253). The school board subsequently met and found the teacher guilty of the charge of insubordination. Although Graves stated that "the record indicates the school administration followed a formal procedure throughout the matter" (p. 254):

> The procedural forms of due process were followed with one major omission: There was no allegation or evidence that the board ever adopted regulations or produced a valid directive for teachers' guidance concerning the teaching of "Catcher in the Rye" or similar books suitable for substitution if possible. Before a charge of insubordination could be properly presented and sustained it would appear the aforesaid action would be essential (pp. 254-255).

Graves added that:

> Whether it was out of consideration for matters of good taste or because of certain parental pressures, the school administration nevertheless reacted and

> . . . apparently attempted to solve the problem by, on the one hand, stating it was not the book itself but its misuse, and on the other, acting to ban the book entirely from the curriculum. It is small wonder, then, that the obvious ambiguity therein might lead to some confusion on the part of teachers and the administration (p. 256).

Therefore, the matter was referred back to the board for consideration of a penalty other than dismissal, provided by statute. It seems, then, that, in the view of the court, under certain circumstances, a book may be removed from a curriculum, if an acceptable substitute book is located for it.

In a second case in 1976 (Minarcini v. Strongsville City School District), the United States Court of Appeals, Sixth Circuit, affirmed a lower court's 1974 ruling that no censorship results when a book is not added to a curriculum for the first time, but reversed that court's ruling that the school board had constitutionally removed books from the library. The books in question were Cat's Cradle by Kurt Vonnegut, Jr. and Catch 22 by Joseph Heller. Circuit Judge Edwards found nothing inappropriate about how the board's censorship motions were made and passed during its meetings; rather, he remarked that "the Board's silence is extraordinary" (p. 582) as to why the books were voted to be removed. He concluded that "in the absence of any explanation of the Board's action which is neutral in First Amendment terms, we must conclude that the School Board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful" (p. 582). He then

explained that, although there is no constitutional requirement for a school to have a library, once a library is established, conditions cannot be placed on its use in regard to "the social or political tastes of school board members" (p. 582). Accordingly, the two novels were ordered reinstated.

The next case to come before a higher court was similar to the aforementioned Minarcini v. Strongsville City School District, a similarity that went not unnoticed by the district judge. In Right to Read Defense Committee v. School Committee (1978), a majority of the Chelsea School Committee, a committee directed by state statute "to purchase textbooks and other supplies for the schools" (p. 710), voted to remove an anthology titled Male & Female from a high school library, after receiving a complaint from a parent. At issue was one poem in the collection, described as filthy, obscene, and disgusting. In seeking to keep the book removed from the library, committee members suggested that District Judge Tauro review Presidents Council from 1972. He did and found that the "defendants' heavy reliance" on the case "presumes incorrectly that the holding there would afford a school committee the absolute right to remove a disfavored book from a library, without any concern for the First Amendment rights of students and faculty" (p. 711). Unlike the school board's removal of Down These Mean Streets, the committee's removal of Male & Female was based neither on the criterion that the title was obsolete nor on the criterion that the space occupied by the book was needed for other books. Tauro stated that "the record leaves this

court with no doubt that the reason the Committee banned Male & Female was because it considered the theme and language of [a poem] to be offensive" (p. 711), and, drawing a parallel to Minarcini, he added that:

> The Committee was under no obligation to purchase Male & Female for the High School Library, but it did. It is a familiar constitutional principle that a state, though having acted when not compelled, may consequently create a constitutionally protected interest (p. 712).

He then explained that the constitutionally protected interest is "the right to read and be exposed to controversial thoughts and language -- a valuable right subject to First Amendment protection" (p. 714).

One year later, in Salvail v. Nashua Board of Education (1979), a school board was challenged for removing not a book but a magazine from a high school library. Objections to Ms. magazine focused on sexual and political advertisements. District Judge Devine reviewed both why and how the action was taken by the board and determined that the board had erred in both respects. First, he cited Minarcini, as well as the more recent Right to Read Defense Committee, stating that once having created a library, a board cannot "place conditions on the use of the library related solely to the social or political tastes of Board members" (p. 1272). He then focused on the procedure by which the magazine was removed and found and ruled that having adopted the New Hampshire State Department of Education's guidelines for review of any challenge to instructional materials, "the Board was required to follow them in its attempts

at removal of MS magazine from the shelves of the high school library" (p. 1273). The board had not, in fact, followed these guidelines and had simply passed a motion at one board meeting to cancel the subscription and remove all issues from the library, as was subsequently done. Devine ordered all back issues to be replaced, the subscription to be renewed, and the board "to follow the current guidelines relative to any complaints about any publication . . . whether said complaints are generated by a member of the Board or by any other Nashua resident" (p. 1276).

The United States District Court, D. Vermont, decided Bicknell v. Vergennes Union High School Board of Directors (1979) three months after the United States District Court, D. New Hampshire, decided the above case of Salvail. Just as District Judge Devine had done, District Judge Coffrin reviewed Minarcini and Right to Read Defense Committee in determining whether or not a school board could remove The Wanderers by Richard Price and Dog Day Afternoon by Patrick Mann from a high school library, after it had deemed the books obscene and vulgar. Coffrin acknowledged that "those cases hold that although a school board can determine what books will go into a library, and may even determine whether to create a library at all, it may not exercise the same wide discretion in removing works from the shelves after they are purchased" (p. 620). He then rejected the applicability of either case, finding that "whatever merit there may be in such constitutional analysis, it is not the rule we are bound to follow in this circuit" (p. 620). He instead looked

to the earlier case of Presidents Council and quoted the Second Circuit Court of Appeals' reasoning that "'some authorized person or body has to make a determination as to what the library collection will be'" (p. 619) and that the "'concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover'" (p. 620). Coffrin was satisfied that the school board had the authority to remove the two books and that the board followed proper procedure. The issue of why the books were removed, although brought to light during the proceedings, was held to be irrelevant.

A third case decided in 1979 was Cary v. Board of Education of the Adams-Arapahoe School District. At issue was whether or not high school teachers could continue to teach from ten textbooks which had been removed from the curricula of elective courses by a school board. Circuit Judge Logan ruled that, yes, they could, but only within the written guidelines of the school board, guidelines which specified that "'a teacher is free to comment upon, or to recommend that any student read any of the ten books'" and that "'no student is prohibited from reading any book, except in class or otherwise for course credit'" (p. 543). He reasoned that "if the board may decide that Contemporary Poetry may not be offered; if it may select the major text of the course; why may it not go further and exclude certain books from being assigned for instruction in the course?" (p. 544). He further concluded that "the board was acting within its right in omitting the books, even though

the decision was a political one influenced by the personal views of the members" (p. 544).

One year later, in Zykan v. Warsaw Community School Corporation (1980), at issue was a school board authorized removal, for no stated reason, and subsequent destruction in a public book burning of a textbook titled Values Clarification. There is no indication given in the case whether the book was removed from a classroom or the school library. Of the book burning, Circuit Judge Cummings commented that "no self-respecting citizen with a knowledge of history can look upon this incident with equanimity, but its relationship to the legal issues in this case is tenuous at best" (p. 1302). Considering solely the removal of the book from the school, Cummings stated that "it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views" (p. 1305). He further explained:

> Noticeably absent from the amended complaint is any hint that the decisions of these administrators flow from some rigid and uniform view of the sort the Constitution makes unacceptable as a basis for educational decision-making or from some systematic effort to exclude a particular type of thought, or even from some identifiable ideological preference (p. 1306).

Accordingly, the circuit judge ruled in the board's favor, being additionally satisfied that the board had followed proper procedures.

An entirely different approach to examining the constitutionality of banning a book from a high school library

was taken by District Judge Cyr in Sheck v. Baileyville School Committee (1982). Rather than focusing on the merits of prior cases supporting either "tenure" for books on the shelf or broad discretionary powers for local school boards, Cyr examined in more detail the Fourteenth Amendment's prohibition of states' depriving anyone of life, liberty, or property, without due process of law. He reviewed Tinker v. Des Moines Independent Community School District (1969), which held that the protections of the Fourteenth Amendment extend to secondary school students. He also reviewed West Virginia State Bd. of Education v. Barnette (1943), which held that the Fourteenth Amendment constrains even boards of education, as agents of the state. He noted that "nothing that has yet been brought to the attention of the court would warrant relaxation of these procedural standards in library book-removal cases" (p. 691). Therefore, when presented with undisputed evidence that the Baileyville School Committee not only voted to ban 365 Days by Ronald J. Glasser for obscene language before adopting the Baileyville School Department Challenged Material Policy but also voted to retain the ban and not follow the policy after the policy's adoption, Cyr concluded that how the book was banned was unconstitutional. His lengthy analysis of many aspects of the case also prompted him to add that "there is no evidence that the Committee has accorded appropriate consideration" (p. 692) to the criteria contained in Mailloux v. Kiley (1971) that "'the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid

educational objective, and the context and manner of presentation'" (p. 692) must be considered "in advance of state action restricting student access to 'objectionable' language" (p. 692). Interim injunctive relief was granted, requiring the book to be returned to the library shelf, for "the important principles of federalism, soundly approached, do not require that federal courts cede their constitutional role to local school boards" (p. 693).

It was not until 1982 that the Justices of the United States Supreme Court decided in a 5-4 decision the Court's first, and as yet only, case "dealing directly with . . . the right to read" in public schools (Bosmajian, 1983, p. xi). In Board of Education, Island Trees Union Free School District No. 26 v. Pico (1982) "the Court declared that while school boards can remove books from school libraries for vulgarity or educational unsuitability, 'our Constitution does not permit the official suppression of ideas'" (Bosmajian, 1983, p. vii). Members of the board of education had "unofficially" directed that ten "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy" (p. 2803) books be removed from school libraries. Later, the board appointed a Book Review Committee to read the ten books and make recommendations about their future status in the libraries, but "the Board substantially rejected the Committee's report" and "gave no reasons for rejecting the recommendations of the Committee that it had appointed" (p. 2803).

The board's actions had been challenged before the District

Court, which noted "'that statutes, history, and precedent had vested local school boards with a broad discretion to formulate educational policy'" and had concluded that "'while removal of such books from a school library may . . . reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right'" (p. 2804). The removal of the books had been thus allowed.

The United States Court of Appeals for the Second Circuit disagreed, stating both that the board was "'obliged to demonstrate a reasonable basis for interfering with students' First Amendment Rights'" (p. 2804) and that there was a need to determine whether the board's "'removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas'" (p. 2805).

The case, having been appealed to the Supreme Court, resulted in a plurality opinion. Justice Brennan, writing for the plurality, affirmed that "the only action challenged in this case is the removal from school libraries of books originally placed there by the school authorities, or without objection from them" (pp. 2805-2806) and then went on to say:

> In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, does the First Amendment impose any limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to

> respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations? (p. 2806).

In answer to the first question, Justice Brennan noted that, according to the records, library use by students is voluntary. Because "the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional," the attempt of the board members "to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry" (p. 2809) may not be supported by the First Amendment, which "'protects the right to receive information and ideas. Stanley v. Georgia . . . (1969)'" (p. 2808).

Although most of the citations in Pico were from prior Supreme Court cases, the Court included a reference to Right to Read Defense Committee, prefaced with the words "as one District Court has well put it . . . [a] 'student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom'" (p. 2809). Nevertheless, the Court did not state that a board cannot remove library books. The key factor is why the books are removed. "We hold that local school boards may not remove books from school libraries simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'" (p. 2810). If, on the other hand, books are removed "based solely upon the 'educational suitability' of the books in question, then their removal would be 'perfectly permissible'"

(p. 2810).

In answer to the second question, namely, did the board exceed First Amendment limitations, Justice Brennan wrote that "this would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite" (p. 2811). He maintained that "the evidence plainly does not foreclose the possibility that petitioners' decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books" (p. 2812), so the judgment of the Court of Appeals was affirmed.

While the above case of Pico marked the first time that the Supreme Court directly addressed an instance of censorship of books in a public school, the ruling concerned only instances of school boards' removing books from school libraries. Six years later, in Virgil v. School Board of Columbia County, Florida (1988), the four plaintiffs argued that the judicial reasoning behind Pico should be applied to the School Board of Columbia County's removal of a textbook titled The Humanities: Cultural Roots and Continuities (Volume I) for passages in Lysistrata by Aristophanes and "The Miller's Tale" by Geoffrey Chaucer deemed immoral, vulgar, sexual, and "inappropriate to the age, maturity, and development of the students in question" (p. 1549). District Judge Black, however, held that "this Court need not decide whether the plurality decision in Pico may logically be extended to optional curriculum materials.

Kuhlmeier resolves any doubts as to the appropriate standard to be applied whenever a curriculum decision is subject to first amendment review" (p. 1551). Black here referred to another case not otherwise relevant to this study, namely Hazelwood School District v. Kuhlmeier (1988), which concerned censorship of student writing in a school newspaper. Nevertheless, she cited the Supreme Court's opinion in Kuhlmeier "'that educators may limit both the style and content of curricular materials if their action is reasonably related to legitimate pedagogical concerns'" (p. 1552). She ruled that "the School Board's removal of Volume I of Humanities was reasonably related to its pedagogical goal of keeping vulgarity and certain matters of sexuality out of its curriculum" (pp. 1553-1554).

Two additional cases were decided in the following year. First, Wexner v. Anderson Union High School District Board of Trustees (1989) continued the focus on why a board removed books, but solely in a dissenting opinion. At issue were books removed from a library for use in an elective developmental reading course with no assigned reading list. The board examined and removed five of seven books by Richard Brautigan selected for possible use in the course, objecting to obscenities and sexual references contained therein. Writing for the majority, Associate Justice Blease was not interested in whether or not the board disagreed with the ideas contained in the books or sought to impose ideas of its own. Rather, after determining that "no reasonable trier of fact could find the books, judged as a whole" (p. 32) harmful to students, he focused on the

question of whether or not a board can "remove books from the high school library which are not obscene" (p. 32) and cited a section of California's Education Code in ruling that the board did not have such authority. Presiding Justice Puglia dissented on the grounds that the court should have followed the guidelines of Pico and investigated "whether school authorities, absent sufficiently compelling reasons, were engaged in an attempt to suppress ideas for the sole purpose of suppressing those ideas" (p. 42).

Second, McCarthy v. Fletcher (1989) returned in part to the original 1972 focus on religious content, with Pico now held to be relevant. Presiding Justice Franson inquired into "the possibility that the board's decision to remove the books [in this case, Grendel by John Gardner and One Hundred Years of Solitude by Gabriel Garcia Marquez] rested either upon disagreement with constitutionally protected ideas contained in the books or upon the board's desire to impose upon the students a religious orthodoxy to which the board and its constituents adhered" (p. 718). However, inasmuch as the school's superintendent/principal took it upon himself to delete the two books from the curriculum, "rather than submitting the evaluations and his recommendation concerning the books to the board, [he] essentially usurped the board's authority . . . contrary to the board's owr policy . . . which requires the superintendent to make his recommendations to the board for decision" (p. 720). Accordingly, the trial court was directed to reexamine the facts of the case and determine, for the record

and for the basis of making a decision as to the constitutionality of the board's action, why the board voted its acceptance of the revised curriculum.

The final major court case of public school written curricular or library material censorship from 1972 through 1992 was decided in 1990. Roberts v. Madigan was markedly different from the previous cases, inasmuch as all four books in question were entirely of a religious orientation. At issue were both Berkeley Gardens Elementary School's principal's various directives to fifth grade teacher Roberts to remove The Bible in Pictures and The Life of Jesus from his classroom and to keep his personal Bible "off his desk between 8:00 a.m. and 3:30 p.m." and "in his desk" (p. 1050), and the disappearance of the school's library copy of the Bible. The objection to the teacher's Bible originated with the principal, while the objection to The Bible in Pictures and The Life of Jesus originated with a parent who had attended the school's open house and saw the copies in the teacher's classroom. The principal denied removing the library's Bible from the school but "agreed at the hearing that the Bible should be in the library" and "stipulated to remedial steps" (p. 1053).

Circuit Judge McKay affirmed the district court's decision to remove the classroom books in question but to require the return of the Bible to the library, stating that "[t]he removal of materials from the classroom is acceptable when it is determined that the materials are being used in a manner that violates Establishment Clause guarantees" (p. 1055); that is,

"Congress shall make no law respecting an Establishment of religion, or prohibiting the free exercise thereof . . ." (Alexander and Alexander, 1985, p. 785). McKay quoted the district court judge's point that "there is a 'difference between teaching about religion, which is acceptable, and teaching religion, which is not'" (p. 1055) and agreed that "in the balance between Mr. Roberts' rights to freedom of expression and academic freedom on the one hand, and the students' rights to be free from religious indoctrination on the other, the students' interests must prevail" (p. 1050). In a dissenting opinion, Circuit Judge Barrett maintained that "[t]here is no basis, other than mere speculation, for implying, as does the majority opinion, that the practices in Mr. Roberts' classroom constituted religious indoctrination" (p. 1060), inasmuch as "[t]he maintenance of the two challenged books in Mr. Roberts' classroom library was entirely passive in character, just as was Mr. Roberts' practice of reading his Bible during the class' 15-minute silent reading period" (p. 1062).

A review of the above fifteen cases which have come before the higher courts since 1972 reveals that 1) in every case except the first, a school board or employees of the school district took the initial steps to remove formally the written curricular or library materials in question, 2) every approach to censorship focused on removing entire books or magazines, not just sections of them, and 3) about half the cases centered on both how and why the decisions to censor were made, with the remaining cases focusing primarily on just one of these two aspects. Overall,

with nine cases heard on appeal and six not, seven and a half rulings prohibited censorship and six and a half allowed it, with one case directed to trial court to determine why a board of education approved two instances of censorship, before finally ruling at that lower court level on the constitutionality of the censorship.

Clearly, the courts have yet to begin reacting uniformly in these cases when school officials have authorized the removal of written curricular materials from classrooms or libraries of public schools, and equally clearly, there has been since 1973 no legal activity initiated by parents, students, or tax paying community members in general to seek court directives at the highest levels to censor said materials in public schools. One must necessarily conclude that through 1992, no unified body of precedents has been developed and consistently relied upon. Wexner demonstrates that even the Supreme Court's one ruling is not necessarily being applied to the process of determining the legal parameters of censorship, and the most recent major case which "bordered on attempts at censorship" of Cujo by Stephen King in a public high school library (Moore v. Terwilliger and Berryville Public Schools, 1991, p. 5) has not even been authorized for publication in the South Western Reporter, 2nd Series, even though the case was heard by the Court of Appeals of Arkansas, Division II, on appeal from the Arkansas Board of Review. Instead, this most recent case is "authorized for educational use only" (p. 1) through Westlaw computer access and West Publishing Company's printed

publications. It is necessary to turn to the expertise of legal scholars for insight into the future of public school censorship and recommendations based on Pico in particular and the other fourteen "official" cases in general.

Inasmuch as Board of Education v. Pico (1982) is as yet the only case heard and decided by the Supreme Court on the topic of public school censorship of written albeit library materials, any meaningful review of legal commentaries in an effort to ascertain what legal scholars expect in the way of censorship and the courts' rulings in the near future needs to begin with legal opinions written in light of Pico. Jane L. Wexton in the Spring 1984 issue of the Hofstra Law Review interprets the plurality's position, in part, as "a concerted effort to limit the nature of the substantive question before the Court, presumably wishing to limit the significance of the case as future precedent" (p. 571). Specifically, she finds the Court not being concerned with "curriculum decisions, textbook acquisitions or removals, or required reading materials . . . [or] decisions of school boards regarding library book acquisitions" (p. 571). Be that as it may, on the basis of this case, she finds a major recommendation to make to "all local school boards around the nation," namely, "that library book removals must avoid the substantive effect of suppressing ideas" (p. 576), because, according to the plurality, the removal of a library book by a school board "violates the first amendment rights of students when the removal is motivated by the school board members' disapproval of the ideas" (p. 576) contained

in the book. In summary, Wexton maintains that:

> The plurality intimated . . . that in making a removal decision, a school board should seek the advice of literary experts, librarians, teachers, and publications that rate books for schools. A board should also adhere to the book review policy, if any, adopted in the school district. Finally, a board should explicitly articulate its reasons for the removal decision (p. 578).

Donald J. Dunn, on the other hand, finds no such intimation on the part of the court. In his article in the 1984/85 issue of the Law Library Journal, he predicts that "further litigation is a virtual certainty" because "the Court neither defined the parameters of this newly recognized right of access to information nor provided detailed quidelines [sic] for the standard review for such cases" (p. 460). Nevertheless, he offers his own recommendations, based on his interpretation of Pico and the other court cases which "go no further in describing the removal policy" (pp. 460-461) the courts could be expected to allow. He holds that "the policy would have to state who may lodge a complaint against a particular title and who is to receive the complaint" (p. 461). He goes on to explain that:

> A mechanism for evaluation needs to be established. This mechanism could be a committee similar to the one used in Pico; however, the committee must be established prior to the time a title is called into question and should have developed some specific criteria for evaluating the suitability of the book. . . . An informal or formal election of the membership from among the community is one possible approach. Another is to choose some members by election and some

> by board appointment. A librarian and at least one student in the school should serve on the committee, either as voting members or ex officio. Because of their training, law librarians could prove particularly helpful on such committees (p. 461).

Finally, he suggests that:

> Actual decisions about a challenged title can be handled in at least two ways. The committee can make the final determination as to whether to retain a title or remove it, or in a less favored alternative, the board can overrule the committee only by a super majority. The reasons for the removal must be articulated in writing. Such structures give at least the appearance of objectivity and help to protect the board from later challenges of narrow-mindedness (p. 461).

Norman B. Lichtenstein in the Winter 1985 issue of the University of San Francisco Law Review builds on Wexton and Dunn's recommendations that schools should have preestablished, formal procedures for dealing with censorship efforts. He turns his attention to a rationale for responding to efforts at censorship. Acknowledging that in the 1970s and 1980s the "constitutional umbrella" (p. 97) was finally extended to children, he stresses that "children are treated differently when courts perceive that they lack judgment or capacity to act in their own best interests" (p. 98), so that "the age, maturity level, and mental ability of a child may affect the extent to which constitutional rights will be applied" (pp. 98-99). He explains that books dealing with sexual issues may very well be appropriate for high school students and inappropriate for elementary school students. Equally plausible

is the proposed use of a book which may require a certain minimum level of cognitive development. Barring such circumstances, however, Lichtenstein proposes an approach that requires:

> . . . that students challenging a censorship decision introduce some evidence tending to show that the action is not educationally supportable, but rather is ideological in character. At that point, the burden would shift to the school board to demonstrate that its action was supported by a "substantial and legitimate" educational interest and will not burden the learning process. Such an interest might encompass the absence of any educational value in the book, the obsolescence of the material or the age and deterioration of the volume (p. 132).

James C. O'Brien, in the July 1988 issue of The Yale Law Journal, prefaced his article with the observation that "Justice Brennan's opinion for the plurality in Board of Education v. Pico has confounded commentators" (p. 1805). His concern for the future is not so much that school boards will not establish sound procedures and rationales for handling challenges to books, but rather that "officials might mask prejudices behind legitimate administrative or educational rationales" (p. 1814), or that some "members might refuse to articulate any rationale, leaving courts to rely on the crafted opinions of a few school board members" (pp. 1814-1815). Lichtenstein would seem to agree with this possibility when he says that "the difficulty is that intent is often complex and not easily established" (1985, p. 131).

Finally, Malcolm Stewart, in the Winter 1989 issue of the Journal of Law & Education takes a completely different approach to the possibility of censorship of written curricular or library

materials in public schools. Insisting that "the assertion that school board decisions are more likely to be ideologically motivated--even if it is true--does not establish a presumptive constitutional violation" (p. 56), he proposes that because "our nation's educational system presumes the desirability of community control over public education" (p. 56), the appropriate response to future instances of censorship should be more citizen involvement in the political process, presumably by teachers, librarians, and other concerned educators nominating and helping to elect school board members who support the freedom to read, and by attempting to influence those school board members who do not support this freedom. Stewart does not seem to support anyone's seeking redress through the courts.

All questions aside as to the specific actions which Stewart would recommend that classroom teachers take in concert with librarians in anticipation of the need to protect and maintain curricula, it seems clear that the higher courts have promoted the possibility of an increasingly active censorship role for boards of education and school district administrators by specifying why and how they may legally censor written materials, while teachers and librarians are relegated to the passive role of waiting for certain circumstances under which they could seek legal redress and have some expectation that the courts might side with them. Of course, nothing would then prevent a board or administrator from censoring a title all over again by following a proscribed procedure and designating a different reason.

Given the infrequency which cases centering on censorship have reached the higher courts in the most recent twenty year period, not even averaging one case per year, and given the conflicting court opinions both among courts and within courts, including the Supreme Court in its only such case, it is apparent that a unified body of precedents cannot be developed before the turn of the century, even if this were a goal of the courts. The legal parameters of censorship to date indicate that until teachers, librarians, and other educators develop on their own an effective way to act instead of react to attempts at censorship, the "free search for truth and its free expression" (Emerson, 1971, p. 594) in public schools will remain at risk, higher courts notwithstanding.

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