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Administrative Regulation of the High School Press

You are a high school student with a complaint about the election procedures for student government. You know the student newspaper refuses to print such controversial material, so you decide to distribute a handbill in the halls. But first, ever prudent, you check your copy of the Code of Student Regulations. Buried amidst the fine print is the following section:

No person shall distribute any printed or written matter on the grounds of any school or in any school 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.1

The regulation mandates swift review of material submitted for approval and permits appeal to the Board of Education. Another section of the regulations authorizes the school administration to suspend students who violate the rules.

You read the regulation with dismay. The criteria look vague enough to justify denying approval to almost anything, and the only appeal is to the principal's bosses. But without prior administrative approval you could be suspended for making your point. Finally you submit your handbill to the principal for review; he denies permission to distribute the handbill on school property, saying that your criticism will undermine authority, hamper discipline, and interfere with the orderly operation of the school and its elections. The principal reminds you that you can appeal his decision, but not until the next monthly meeting of the Board of Education.2 The election will have passed by then, so you regretfully tear up your diatribe and resign yourself to suffering in silence.

This Note examines the constitutional limits on administrative regulation of publications by and for public high school students.3 Part I

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1. This language is quoted from the regulation challenged in Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 805 (2d Cir. 1971). Eisner upheld the regulation against challenges for vagueness and overbreadth, despite reservations about the exact language used. 440 F.2d at 808-09.


3. This Note does not address the right of private schools to regulate student publications. In
discusses the widely divergent standards adopted by different circuits. Part II describes the hard line the Supreme Court has taken against restraints on free expression in the adult context and the different circumstances that justify limiting freedom of expression in high schools. Part III discusses the timing of administrative regulation of student speech. This Part argues that prior restraint is constitutionally acceptable and, in fact, preferable to subsequent punishment so long as its use is governed by proper criteria. Part IV analyzes the justifications advanced by schools to support the regulation of student publications, concluding that the Supreme Court’s guidelines must be read strictly to minimize encroachment on students’ first amendment rights. Part V describes the need for judicial review of suppression of student speech, but concludes that the student should have the burden of challenging the regulation by filing suit.

I. STATUS OF AUTHORITY

The starting point for any discussion of the first amendment rights of high school students is Tinker v. Des Moines Independent Community School District. In Tinker, the Supreme Court for the first time squarely recognized students’ right to freedom of expression in the schools. The Court, however, went on to add:

But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Because courts have found a compelling state interest in ensuring orderly schools, they have permitted regulation of some student speech that in the adult context would be inviolable.

Since promulgating these standards in 1969, the Supreme Court has refused to apply them to other student speech cases. Five cases raising the issue of high school students’ first amendment rights have been brought to the Court on petitions for certiorari: four times the writ has been denied, and the Court dismissed the fifth case as moot.

Rendell-Baker v. Kohn, 457 U.S. 830 (1982), the Supreme Court held that the actions of a private school that received over 90% of its funds from the state were not covered by the state-action doctrine, under which the first amendment is applied to the states via the fourteenth amendment. The opinion emphasized that a state function is one reserved exclusively to the state, whereas education has traditionally been shared by the public and private sectors.

5. 393 U.S. at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).
6. 393 U.S. at 513.
7. See Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966).
8. See notes 23-35 infra and accompanying text.
9. Thomas v. Board of Educ., 607 F.2d 1043 (2d Cir. 1979) (forbidding school from disciplining students for off-campus distribution of a satire on student life), cert. denied, 444 U.S. 1081
after learning at oral argument that the plaintiff had graduated from high school.\textsuperscript{10} Each circuit has thus been left to its own interpretation of the \textit{Tinker} standard, the result being inconsistency both within a given circuit\textsuperscript{11} and among the circuits.

The Seventh Circuit has taken the hardest line against administrative restrictions on the high school press. In reversing the suspension of students for distributing an unapproved underground newspaper in school, the court stated: "\textit{Tinker} . . . 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."\textsuperscript{12} However, the court went on to assert that school officials may establish "reasonable, specific regulations setting forth the time, manner and place in which distribution of written materials may occur,"\textsuperscript{13} and may punish students who violate these rules or who distribute obscene or libelous literature.\textsuperscript{14}

The Second Circuit has given high school officials much more power over the content of student publications. It reads \textit{Tinker} as permitting prior review of material distributed in schools\textsuperscript{15} and defers


\textsuperscript{11.} Compare Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975) (voiding guidelines for failure to define "substantial disruption"), \textit{with} Williams v. Spencer, 622 F.2d 1200, 1206 (4th Cir. 1980) (upholding a regulation banning an undefined class of "material which encourages actions which endanger the health and safety of students"); \textit{compare} Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972) (a school district's requiring prior approval of student expression held unconstitutional), \textit{with} Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 805 (2d Cir. 1971) ("responsible and fair regulations" for prior submission held not always unconstitutional). For a more comprehensive overview of the split in authority, see Huffman & Trauth, \textit{High School Students' Publication Rights and Prior Restraint}, 10 J. L. & EDUC. 485 (1981).

\textsuperscript{12.} Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1972) (emphasis in original).

\textsuperscript{13.} 460 F.2d at 1359. \textit{See} notes 145-49 infra and accompanying text.

\textsuperscript{14.} 460 F.2d at 1359.

\textsuperscript{15.} In invalidating a school prior-submission rule as procedurally unsound although substantively adequate, the court stated, "We do not agree . . . that reasonable and fair regulations which . . . required prior submission of material for approval, would in all circumstances be an unconstitutional 'prior restraint.'" Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 805 (2d Cir. 1971).
greatly to the judgment of school authorities in determining what can be suppressed.\(^16\) Schools in the Second Circuit may decide for themselves what constitutes a disruption, and the courts will not intervene except in extreme cases: "It is to everyone's advantage that decisions with respect to the operation of local schools be made by local officials."\(^17\)

The other circuits that have addressed this issue have taken an intermediate position. Most of these cases have arisen in the Fourth Circuit, which treats administrative prior restraints as presumptively unconstitutional\(^18\) but has permitted them when the standards to be applied are clear and understandable,\(^19\) and students are provided a prompt and adequate appeals procedure.\(^20\) The First, Fifth, and Ninth Circuits have generally accepted the Fourth Circuit's intermediate position,\(^21\) permitting prior submission rules but scrutinizing the judgment of school officials more closely than does the Second

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16. Trachtman v. Anker, 563 F.2d 512, 519 (2d Cir. 1977) ("[A] federal court ought not to impose its own views in such matters where there is a rational basis for the decisions and actions of the school authorities."). cert. denied, 435 U.S. 925 (1978).


18. See Baughman v. Freienmuth, 478 F.2d 1345, 1348-49 (4th Cir. 1973) (invalidating school prior-submission rule for vagueness, overbreadth, and failure to provide a prompt review and appeals procedure).

19. In Baughman v. Freienmuth, 478 F.2d 1345, 1350-51 (4th Cir. 1973), the court concluded that a definition including the terms "libelous" and "obscene" was not precise or understandable enough for high school students.

20. In practice, schools have had difficulty establishing standards that meet these criteria. See Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975) (rule drafted to comply with these criteria still held vague for failing to define the Supreme Court's substantial-disorder or material-disruption test more precisely and for defining "libelous" in a manner inconsistent with the constitutional definition). But in Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980), a case involving efforts to halt distribution after it had begun, the Fourth Circuit upheld a decision prohibiting continued on-campus distribution of an underground newspaper containing advertisements for drug paraphernalia under a rule prohibiting "material which encourages actions which endanger the health and safety of students." 622 F.2d at 1203. This language appears vaguer than language in a prior submission rule previously rejected by the Fourth Circuit. See note 19 supra. The Williams court noted with approval the limited nature of the restriction: no prior restraint was involved, the students were given back all confiscated copies the same day and permitted to distribute the newspaper anywhere except on campus, and no disciplinary action was taken against the students. 622 F.2d at 1207.

21. Nicholson v. Board of Educ., 682 F.2d 858, 863 (9th Cir. 1982) ("Writers on a high school newspaper do not have an unfettered constitutional right to be free from pre-publication review."). (dictum in suit brought by a teacher who alleged he was fired for permitting the school newspaper to publish controversial articles); Shanley v. Northeast Indep. School Dist. 462 F.2d 960, 970 (5th Cir. 1972) ("[E]fforts at expression by high school students may be subjected to prior screening under clear and reasonable regulations ... ."); Riseman v. School Comm., 439 F.2d 148, 149 (1st Cir. 1971) (prior restraint held not per se unconstitutional, but regulation prohibiting distribution of advertising or promotional literature on school property without any "effort to minimize the adverse effect of prior restraint" held invalid); see also Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977) (permitting prior approval only with appropriate safeguards and invalidating school board rules that ban all commercial speech regardless of potential for disruption).
In sum, the circuits are split on what type of student speech a school may constitutionally regulate, whether prior restraints on student speech are permissible, and ultimately on what criteria should be used to determine when administrative regulation of student speech is constitutionally permissible. The remainder of this Note will discuss these issues, proposing constitutionally sound criteria and procedures for the regulation of student speech.

II. CONSTITUTIONAL LIMITATIONS ON RESTRAINTS OF SPEECH

Before considering the first amendment rights of high school students, one must first understand the rules governing similar expression by adults. This Part will examine the Supreme Court's pronouncements on freedom of expression in the adult context and discuss circumstances that may permit greater control over the high school press.

A. Adult Speech

Few types of regulation have been criticized as sharply as prior restraints on adult expression. The Supreme Court has declared that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights," and the Court has never upheld a permanent restraint imposed without a final legal determination that the expression was unprotected. Under any circumstances, attempts at prior restraint must overcome a

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22. See Butts v. Dallas Indep. School Dist., 436 F.2d 728, 731 (5th Cir. 1971) (requiring the school to present facts supporting its fear of substantial disruption).
heavy presumption of invalidity.\textsuperscript{25}

Despite its otherwise rigid stance, the Court has held that certain narrowly defined classes of speech are not immunized by the first amendment and may be regulated or proscribed. These classes include obscene speech\textsuperscript{26} and speech endangering national security.\textsuperscript{27} Other speech, while not restrainable, may subject the speaker to sanctions. This category includes malicious defamatory speech\textsuperscript{28} and incitement to illegal action.\textsuperscript{29} An attempt to enlarge the list to include speech endangering the right of an accused to a fair trial has been rejected, and a majority of the Justices in that case suggested that such a restraint may never be constitutional.\textsuperscript{30}

Even if the speech in question falls under one of these exceptions to the first amendment, a government entity seeking a restraint must follow proper procedure. For example, the courts will not allow administrative panels to adjudicate cases involving allegedly obscene films, even temporarily, unless that panel follows procedures "designed to

\begin{itemize}
\item \textsuperscript{25} New York Times v. United States, 403 U.S. 713, 714 (1971).
\item \textsuperscript{27} See Near v. Minnesota, 283 U.S. 697, 716 (1931). This standard has been interpreted as permitting the prior restraint of information only if "disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people," New York Times v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring), or if "publication [would] inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea," New York Times v. United States, 403 U.S. at 726-27 (Brennan, J., concurring). See also United States v. Progressive, 467 F. Supp. 990, 992 (W.D. Wis.) (approving restraint on publication of atomic secrets as analogous to publication of troop movements during wartime), reconsidered, 486 F. Supp. 5 (W.D. Wis.), dismissed, 610 F.2d 819 (7th Cir. 1979).
\item \textsuperscript{28} New York Times v. Sullivan, 376 U.S. 254, 268 (1964). While allegedly defamatory statements cannot be enjoined, see, e.g., Oil Conservation Engg. Co. v. Brooks Engg. Co., 52 F.2d 783, 785-86 (6th Cir. 1931); N.Y. Times, Jan. 22, 1984, at A1, col. 6 (reporting government request to suppress criticism of prosecutors from published version of court opinion), those injured by the defamatory remark may sue in tort for damages. See RESTATEMENT (SECOND) OF TORTS § 568 (1977). Sullivan requires that a public figure seeking damages prove not only that the allegedly defamatory statement is false, but also that it was made with "actual malice." 376 U.S. at 279-80.
\item \textsuperscript{29} Near v. Minnesota, 283 U.S. 697, 716 (1931). See also note 112 infra and accompanying text.
\item \textsuperscript{30} Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976). "[T]here is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable." 427 U.S. at 570-71 (White, J., concurring). "[T]here are compelling reasons for not carrying out a new exception to the rule against prior censorship of publication." 427 U.S. at 594-95 (Brennan, J., joined by Stewart and Marshall, JJ., concurring in the judgment). "I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain." 427 U.S. at 617 (Stevens, J., concurring in the judgment).
\end{itemize}
obviate the dangers of a censorship system." The reviewing panel must either approve the work or go to court seeking a restraint. The panel has the burden of proof in court, and any restraints imposed by the panel prior to judicial review may last only a "specified brief period." Strict compliance with these procedural safeguards is necessary to prevent the curtailment of constitutionally protected expression.

The Supreme Court has twice indicated, however, that expression by adults but directed toward minors may sometimes be regulated even though the same expression is protected when aimed at adults. Both cases involved variable standards for obscenity. In *Ginsberg v. New York*, decided a year before *Tinker*, the Court upheld a statute forbidding the sale of soft-core pornography to minors. While the magazines were not obscene for adults, the Court held that a state could legally bar their sale to minors, citing the state's interests in protecting the welfare of minors and in supporting parents' authority to keep such publications from their children. A decade later, in *FCC v. Pacifica Foundation*, the Court justified banning a vulgar (but not obscene) George Carlin monologue from the airwaves by referring to...
among other reasons, to children's easy access to radio receivers.\textsuperscript{40} \textit{Ginsberg} has been cited for the proposition that the first amendment rights of minors are not coextensive with those of adults, thereby allowing regulation in the student context which would not otherwise be permitted.\textsuperscript{41}

\section*{B. Student Speech}

Several school systems have tried to justify restriction of student expression by claiming, \textit{Tinker} notwithstanding, that the first amendment does not apply to student expression on school property. Some schools have asserted that the school board's ownership of the building and grounds permits it to control what is distributed on school property or that the school retains absolute control over publications that receive school funds. The courts have rejected both of these assertions. As the Fourth Circuit stated in a case involving a college newspaper:

\begin{quote}
[I]f a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. This rule is but a simple extension of the precept that freedom of expression may not be infringed by denying a privilege. . . .

. . . Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse.\textsuperscript{42}
\end{quote}

Two cases have expressly adopted this analysis in the high school setting.\textsuperscript{43}

In other cases, school officials have contended that the newspaper is merely a part of the academic curriculum, subject to regulation in

\textsuperscript{40} 438 U.S. at 749-50. The court referred to the special pervasiveness of broadcasting that makes avoidance of the language difficult and to broadcasting's access into the home.


\textsuperscript{42} Joyner \textit{v. Whiting}, 477 F.2d 456, 460 (4th Cir. 1973) (discussing a college president's attempt to withdraw funding from student newspaper which advocated segregation) (citations and footnotes omitted); see also West Virginia State Bd. of Educ. \textit{v. Barnette}, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted."); Reineke \textit{v. Cobb County School Dist.}, 484 F. Supp. 1252, 1261 (N.D. Ga. 1980) (school cannot use a shortage of funds to justify closing a school newspaper when the shortage was caused by the school's improper confiscation of one issue). Of course, \textit{Tinker} itself specifically protected a form of student expression on school property — the wearing of armbands to protest the Vietnam war.

\textsuperscript{43} Gambino \textit{v. Fairfax County School Bd.}, 429 F. Supp. 731 (E.D. Va.), \textit{affd.}, 564 F.2d 157 (4th Cir. 1977); Pliscou \textit{v. Holtville Unified School Dist.}, 411 F. Supp. 842 (S.D. Cal. 1976) (school cannot arbitrarily select one of two student newspapers as authorized to solicit advertisements necessary to meet publication expenses).
the same manner as an English class. Courts have treated this claim as an issue of fact, reviewing the newspaper to determine whether it is a forum for student expression or a part of the curriculum designed only to teach the mechanics of writing and publishing. As a forum for student expression, the noncurricular press in public high schools enjoys the same first amendment rights as the adult press, except where limited by Tinker's substantial-disruption and invasion-of-rights standards and Ginsberg's variable obscenity standard. Even if the paper is adjudged part of the curriculum, Tinker recognizes students' first amendment rights to express their views on subjects covered by the curriculum so long as they do so in a nondisruptive manner, notwithstanding the school's authority to select the content of its curriculum. Thus, while the school may control the topics discussed in a curricular press, it may not limit the viewpoints to be expressed solely because of disagreement with the content of those views.

Schools do have two special concerns which may justify restraint of student speech under certain circumstances. First, they must maintain the orderly atmosphere necessary for effective education. Sec-

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45. See Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 735 (E.D. Va.) (student newspaper deemed not part of the curriculum despite school's offering a journalism course and paying most of the paper's expenses), affd., 564 F.2d 157 (4th Cir. 1977); Zucker v. Panitz, 299 F. Supp. 102, 103-04 (S.D.N.Y. 1969) (student newspaper deemed a forum for student expression despite a school policy limiting articles to school-related topics). See also Note, Religious Expression in the Public School Forum: The High School Student's Right to Free Speech, 72 GEO. L.J. 135, 140-49 (1983) (discussing when a public high school has established a public forum for student expression, and the consequences of creating such a forum).

46. See notes 4-6 supra and accompanying text.

47. See notes 36-41 supra and accompanying text.

48. See Kuhlmeier v. Hazelwood School Dist., 578 F. Supp. 1286, 1291 (E.D. Mo. 1984) ("Defendants are incorrect in stating that constitutional values are not implicated in curricular decisions."); Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 734 (E.D. Va.) (permitting the student newspaper to publish an article on contraception even though the school board had recently voted specifically not to include contraception in its proposed sex education course), affd., 564 F.2d 157 (5th Cir. 1977); Bayer v. Kinzler, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974) ("Social studies surely is part of the curriculum. Under defendants' theory, the petitioners in Tinker might well not be permitted to wear armbands to protest the Vietnam war since their symbolic protest dealt with an area of the curriculum."). affd. mem., 515 F.2d 504 (2d Cir. 1975). A school has the power to set its curriculum, but where that curriculum is designed only to teach students the mechanics of writing and editing, curricular control should be limited to sloppy or ungrammatical expression, not expression dealing with "inappropriate" topics. The school might be able to limit coverage of a curricular newspaper to certain issues, but it cannot prescribe the nature of this coverage.

ond, they should be able to protect themselves from tort liability. If an official school publication such as a school newspaper contains libelous material, the school that authorized the publication could be held liable for damages. Both the American Bar Association and the American Civil Liberties Union have recognized the right of high school officials to suppress libelous student expression.

III. THE TIMING OF ADMINISTRATIVE REGULATION

A key question left unanswered by Tinker is whether unprotected speech can actually be restrained, or whether relief is limited to post-publication punishment. Schools that require prior administrative review of student publications have adopted widely varying protections for students. Other school districts have tried to avoid the constitutional problems inherent in prior submission by halting distribution of the offending material after publication or by disciplining the students who created the challenged material.

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50. See N.Y. Times, Feb. 22, 1985, at A26 col. 1 (commenting on school district's being found liable for comments in student newspaper). The RESTATEMENT (SECOND) OF AGENCY § 228 (1958) states that "a principal is liable for the acts of his agent if the agent is acting within the scope of his duties," and if a school establishes a student newspaper, students who publish that newspaper are acting within the scope of their authority. See, e.g., Galvin v. New York, New Haven & Hartford R.R., 341 Mass. 293, 168 N.E.2d 262 (1960) (employer liable for slander when its security guard publicly accused plaintiff of theft). Of course, this justification exists only so long as the students are actually agents of the school. See notes 108-09 infra and accompanying text.

51. AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM IN THE SECONDARY SCHOOLS 12 (1971); JUVENILE JUSTICE STANDARDS PROJECT, INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSN., STANDARDS RELATING TO SCHOOLS AND EDUCATION 84 (1982) [hereinafter cited as PROJECT]. The ACLU recommends in the college setting that "[w]herever possible a [college] newspaper should be financially and physically separate from the college, existing as a legally independent corporation. The college would then be absolved from legal liability for the publication and bear no direct responsibility to the community for the views expressed." AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES 15 (1971) [hereinafter cited as COLLEGE CIVIL LIBERTIES].

52. Compare Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975) (regulation defining "libel," "obscenity," and "distribution"); providing for a two-pupil-day review period with written reasons for denying approval; and establishing a three-day appeal procedure invalidated for not defining terms and for not ensuring the student a full notice and hearing), with Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972) (regulation requiring prior approval before distribution of any written matter on school property with no guidelines for approval, time limit for review, or appeal procedures voided as an unconstitutional prior restraint), and Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) (similar regulation declared unconstitutional as a standardless prior restraint).


The circuits have split on whether prior restraint is constitutionally permissible. The Seventh Circuit has held that only postpublication punishment can pass constitutional scrutiny,\(^{55}\) while the Second, Fourth, and Fifth Circuits have held that prior restraints are constitutionally permissible.\(^{56}\) The relevant language in *Tinker* refers to "any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."\(^{57}\) This language implies that school authorities may prohibit expression before any disruption actually occurs, based solely on a reasonable forecast of disruption.\(^{58}\) This interpretation of the *Tinker* standard allows a system of prior screening so that a school can properly determine which expression is likely to cause disruption.

The Seventh Circuit approach, which limits schools to postpublication relief, neither provides students with increased protection from arbitrary decisions nor advances the interests of the school. A limitation on the timing of administrative sanction means that a school can take action only *after* substantial disruption has occurred. Although there is a substantial danger of abuse in a system that allows school officials to prescreen material criticizing them, the same danger exists when these same officials can impose discipline after publication. A school official can just as easily impose an arbitrary punishment as an arbitrary prior restraint. Nor can postpublication sanctions prevent substantial disruption of the classroom, because they lack the deterrence found in criminal penalties imposed for similar disruption.\(^{59}\) Postpublication review would be equally ineffective in preventing libel, for a damage remedy would not deter a high school student lacking

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55. Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972); see notes 12-14 supra and accompanying text.

56. Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); see also Nicholson v. Board of Educ., 682 F.2d 858, 863 (9th Cir. 1982); Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971); notes 15-21 supra and accompanying text.

57. 393 U.S. at 514.

58. See Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973) (school officials may act before disruption occurs and have a duty to prevent such disruption); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 970 (5th Cir. 1972) (school may prohibit expression "if the school administration can demonstrate reasonable cause to believe that the expression would engender . . . material and substantial interference"); Quarterman v. Byrd, 453 F.2d 54, 59 (4th Cir. 1971) ("The school authorities are not required to 'wait until the potential (for disorder) is realized before acting.'" (citation omitted)); Guzick v. Drebus, 431 F.2d 594, 598 (6th Cir. 1970) (school may outlaw all "message" buttons if it can demonstrate a reasonable fear of disruption from the wearing of such buttons, even though no disruption has actually resulted), cert. denied, 401 U.S. 948 (1971).

59. High school students are less mature than adults, and may be more willing to challenge authority without considering the consequences. Second, and more important, the threat of suspension from school is not a deterrent in the same sense that a criminal penalty is a deterrent. Depriving someone of liberty is quite different from forbidding him to do something he would otherwise be required to do, such as attending school. Many students would not regard the enforced vacation as much of a penalty.
resources to indemnify the school.60 Because a policy of prior restraint relies on prevention instead of deterrence, it is more likely to succeed.

Not only would prior submission of school publications more effectively serve the needs of the school administration, but it would also be less likely to discourage student speech. Postpublication review can have a "chilling effect": a student wishing to address a controversial topic might be unwilling to express herself if she thinks her expression might subject her to sanctions. This danger is especially acute when dealing with vague standards such as "substantial disruption," which provide considerable discretion to the reviewer and offer little guidance to the speaker. A properly functioning system of prior submission, unlike a properly functioning system of subsequent punishment, would allow school officials to pass on the potential disruptiveness of student expression before the student risked sanctions, approving the close cases in advance and thus encouraging the publication of protected expression that comes close to the borderline.61 The first amendment problems presented by regulation of student expression are best solved by proper criteria, clear standards, and close scrutiny of administrative decisions whenever made, not by limits on the timing of the decisions.

IV. CRITERIA FOR REGULATION OF THE STUDENT PRESS

School officials have relied on numerous criteria that they claim allow them to suppress student expression. The substantial-disruption and invasion-of-rights tests are derived from Tinker. Regulation of obscene speech and speech inciting lawless action is permissible under the same standards applied to speech addressed to adults. In addition, schools have claimed a variety of justifications not explicit in constitutional guidelines and have asserted a right to control the mode of distribution without regard for the content of the expression. This section analyzes the justifications and application of regulations limiting student expression and suggests constitutionally sound criteria for regulation of the student press.

A. Substantial Disruption

The first part of the Tinker standard permits school officials to regulate expression that "materially disrupts classwork or involves sub-

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60. Without prior submission, the damage liability of the school is dependent upon the judgment of the newspaper's editorial board — a situation which could lead to stricter supervision, curtailment, or abolition of sections of the student press. See also notes 92-95 infra and accompanying text.

stantial disorder." This test is taken from *Burnside v. Byars*, a Fifth Circuit case which arrived at the standard by "balancing . . . First Amendment rights with the duty of the state to further and protect the public school system." The compelling state interest in maintaining an orderly learning environment was held to justify reasonable regulations to ensure order. *Tinker* offers no definition of "material disruption" or "substantial disorder," except to say that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Most courts, however, have struck down as vague regulations that merely parrot the *Tinker* language: "It does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.

One short definition is found in *Pliscou v. Holtville Unified School District*, which defines "disruption" to mean "a physical disruption which constitutes a substantial material threat to the orderly operation of the campus." This definition would exclude, for instance, a newspaper editorial questioning the need for a new rule (no physical disruption) or an article profiling a controversial topic such as drug abuse or homosexuality (no physical disruption and no substantial threat to order). To satisfy the *Tinker* test, the fear of substantial disruption must be based on "substantial reliable information," not mere intuition. Additionally, the fear must be that the expression itself will be

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63. 363 F.2d 744 (5th Cir. 1966), cited in *Tinker*, 393 U.S. at 509.
64. 363 F.2d at 748.
65. 363 F.2d at 748. In *Burnside* a ban on the distribution and wearing of "freedom buttons" in a Mississippi public school was enjoined as an unreasonable restraint on expression because the school board could not demonstrate that any disruption had been caused by the buttons. 363 F.2d at 748.
67. Jacobs v. Board of School Commrs., 490 F.2d 601, 605 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975); accord Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975); Pliscou v. Holtville Unified School Dist., 411 F. Supp. 842, 850 (E.D. Cal. 1976). *But see Elsner v. Stanford Bd. of Educ.*, 440 F.2d 803, 808-09 (2d Cir. 1971) (upholding a regulation which refers to "disorder" (without the modifier) as constitutionally sound, although "greater specificity in the statement would be highly desirable"). The *Elsner* court was willing to "assume that the Board would never contemplate the futile as well as unconstitutional suppression of matter that would create only an immaterial disturbance." 440 F.2d at 808 (emphasis in original). This assumption has proved overly optimistic. See, e.g., Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969) (student body president suspended for 10 days and stripped of his office for off-campus distribution of an underground newspaper containing the word "bullshit" in an advertisement, with no showing of disturbance caused by the newspaper).
68. 411 F. Supp. at 850. This definition was taken from Braxton v. Municipal Court, 10 Cal. 3d 138, 150, 514 F.2d 697, 704, 109 Cal. Rptr. 897, 904 (1973).
disruptive, not that those holding contrary views will act disruptively. The harm alleged to result from the expression must be the likely result of the expression — not necessarily a certain consequence, but more than a mere possibility.

Several cases illustrate this standard. School officials have been held justified in fearing substantial disruption when, the day after a widespread student walkout resulting in several suspensions, other students distributed leaflets in the halls calling for another walkout the next day. Similarly, officials have been permitted to halt distribution of a student newspaper that contained an inflammatory letter to the editor after an investigation revealed that it had not been written by its purported author, because the letter was likely to incite both its purported creator and its ostensible target. The restraints in these cases were justified because the school officials could point to specific forms of disruption likely to result from the student expression.

The substantial-disruption standard has been overextended on several occasions when school officials have attempted to restrain off-campus expression or to discipline students for off-campus distribution of material alleged to violate school standards. One court has upheld sanctions against students for off-campus distribution of an underground newspaper based on reports of classes disrupted by students reading the paper and the principal’s testimony that an “underground newspaper” would “diminish control and discipline,” although the
principal had only a generalized, undifferentiated fear that his author-
ity would be diminished. But questioning the authority of school offi-
cials is often a primary purpose of underground student newspapers,
and any effective criticism may diminish official authority. 76 School
officials may not use their supervising power over students to silence
all views contrary to their own; the substantial-disruption standard
justifies only actions to prevent disruption of classrooms, not an attack
on the newspaper itself. A proper response to the threat of classroom
disruption would have been to confiscate copies read during class.
This less restrictive alternative would permit circulation of the news-
paper with no likelihood of classroom disruption. 77

The special power over the student press given to school officials
reflects the officials' duty to preserve order in the schools, not any re-
duced protection for juvenile speech as such. 78 When the justification
disappears, so does the power. 79 The power to control students' off-
campus activities not affecting the orderly operation of the school rests
with the parents and the state, 80 not with school authorities.

B. Invasion of the Rights of Others

The second part of the Tinker test indicates that student expression
constituting an "invasion of the rights of others" is not protected by
the first amendment. 81 This test is taken from Blackwell v. Issaquena
County Board of Education, 82 where students distributing buttons sim-
court cited a provision of the school board policy that required students “to maintain high stan-
dards of personal conduct” and a section of the California Code that required students to “re-
frain entirely from the use of profane or vulgar language.”

conduct does not lose its constitutional protection merely because it is effective criticism and
hence diminishes . . . official reputations”).

77. Cf. Schneider v. State (Town of Irvington), 308 U.S. 147 (1939) (invalidating ordinance
forbidding distribution of literature in public places though ordinance had been advanced as
necessary to prevent littering; a less restrictive alternative would be to punish the litterers
directly).

78. Thomas v. Board of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979) (“[B]ecause school offi-
cials have ventured out of the school yard and into the general community where the freedom
accorded expression is at its zenith, their actions must be evaluated by the principles that bind
government officials in the public arena.”), cert. denied, 444 U.S. 1081 (1980); see also Shanley v.
Northeast Indep. School Dist., 462 F.2d 960, 974-75 (5th Cir. 1972) (refusing to adopt a blanket
rule against punishment for off-campus activities, but suggesting such punishment should be left
to other authorities).

79. If off-campus distribution results in substantial disruption of school activities, then the
school may discipline the distributors under the Tinker standard, but may not restrain the distri-
bution. Any claim of substantial disruption resulting from off-campus distribution must be ana-
yzed closely to determine whether the disruption was actually caused by the distributors or by
those who brought the material onto campus.

(1980).

81. 393 U.S. at 513.

82. 363 F.2d 749 (5th Cir. 1966).
ilar to those protected in *Burnside v. Byars* did so in part by accosting their peers in the halls and pinning buttons to their clothing. Because the right to express oneself includes the right not to express the opinions of others, students who pin buttons on unwilling passersby are invading the rights of those individuals and can thus be stopped.

The Second Circuit has grossly distorted the meaning of the invasion-of-rights test. In *Trachtman v. Anker*, the court held, over a vigorous dissent, that a student newspaper’s distributing to New York City high school students a questionnaire on sexual attitudes and experiences and then publishing the results would “invade the rights of other students by subjecting them to psychological pressures which may engender significant emotional harm.” This is precisely the kind of undifferentiated fear or apprehension of disturbance that, under *Tinker*, cannot justify any regulation at all, especially when, as here, the surveys were to be both anonymous and voluntary, ensuring that students who did not wish to participate need not have done so. Because of this potential abuse of the invasion-of-rights standard, it is crucial that the standard be strictly circumscribed.

“No invasion of the rights of others” must refer only to a tortious act,

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83. 363 F.2d 744 (5th Cir. 1966). See notes 63-65 *supra* and accompanying text.

84. *Blackwell*, 363 F.2d at 752 (1966). The court approved a total ban on the buttons rather than direct punishment for disruption because “the reprehensible conduct . . . was so inexorably tied to the wearing of the buttons that the two are not separable.” 363 F.2d at 754.


86. The passersby also have a cause of action in tort for the unauthorized contact with their persons. *See W. PROSSER & W. KEETON, THE LAW OF TORTS 40 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 19 (1965).*


88. 563 F.2d at 516. The court accorded great deference to the members of the school board, looking to see only if they “had demonstrated a substantial basis for their conclusion,” 563 F.2d at 519, rather than balancing the conflicting testimony from both sides’ experts. It distinguished other cases which had held that information about student sexuality was protected, saying that those cases involved the dissemination, not the compilation, of information. 563 F.2d at 516 n.2. The dissent reminded the majority that a cover letter attached to the survey assured students their answers would be anonymous and that no one had to respond, 563 F.2d at 522, and that the local daily newspapers regularly published information on the “forbidden topics,” 563 F.2d at 521. The dissent also protested the lack of weight accorded plaintiff’s experts, and objected that “a general undifferentiated fear of emotional disturbance . . . 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.” 563 F.2d at 521. For a discussion of the proper deference to be accorded the judgment of school officials, see notes 161-75 *infra* and accompanying text.

89. *Tinker*, 393 U.S. at 513.

90. *Trachtman*, 563 F.2d at 515. Many school districts routinely administer a battery of tests to their pupils with no such safeguards. For a good discussion of the problems presented by schools’ information-gathering and testing, see Comment, *Access to Student Records in Wisconsin: A Comparative Analysis of the Family Educational Rights and Privacy Act of 1974 and Wisconsin Statute Section 118.25*, 1976 Wis. L. Rev. 975, 975-84.
such as the accosting in Blackwell, or in the context of student publications, to libel or personal abuse. Tort standards define when an act "invades the rights of another" to such an extent that the person wronged should recover damages. Limiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression. Moreover, limiting "invasion of rights" to tortious behavior fulfills the primary function of this justification for restraint — allowing the school to protect itself from tort liability for its students' actions.\textsuperscript{91}

Libel is the most obvious potential tort resulting from the activities of the student press. For example, in Frasca v. Andrews,\textsuperscript{92} the school newspaper planned to print an anonymous letter to the editor critical of a student government official.\textsuperscript{93} The principal investigated and determined that the article was substantially untrue, but the newspaper editor stood by the letter while refusing to document its charges. The principal, fearing possible legal action against the school, confiscated all copies of the newspaper.\textsuperscript{94} The court correctly permitted the seizure under the invasion-of-rights standard.\textsuperscript{95}

Schools should have a similar right to prevent publication of matter that could result in other forms of tort liability for the school. While mere personal abuse or vituperative language directed at a specific individual is not tortious,\textsuperscript{96} the Second Restatement of Torts considers "conduct intended to cause emotional distress" to be a separate cause of action.\textsuperscript{97} The American Bar Association's Juvenile Justice Standards Project would permit restriction of student expression that "advocates racial, religious, or ethnic prejudice or discrimination or

\begin{footnotes}
\item[91] See notes 94-95 infra and accompanying text.
\item[93] The letter called the student "a total disgrace to the school" and said he maintained a low academic average, had been suspended from school, and had falsified his grades on the school computer. 463 F. Supp. at 1046.
\item[94] The principal concluded that "several of [the letter's] statements were false and, in his opinion, libelous; that its publication would have a devastating impact on [the subject of the statements], and that there would be no reasonable opportunity to reply," for the issue was to be distributed on the last day of school. 463 F. Supp. at 1047-48.
\item[95] 463 F. Supp. at 1052. The court followed the Trachtman standard criticized above, see note 88 supra and accompanying text, but a narrower reading of the invasion-of-rights test still supports the result. The allegation of grade changing is libelous if untrue, and the school system would be liable for damages. See note 50 supra.
\item[97] RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). This tort requires "conduct . . . so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," provided the conduct actually does cause severe emotional distress to the victim. \textit{Id}. Comment d.
\end{footnotes}
seriously disparages particular racial, religious, or ethnic groups." The Project cautions that to fall under this rule, material must actually advocate discrimination or seriously disparage particular groups. This limiting language is designed to protect both scholarly works with controversial theses and the use of emotion-laden terms for dramatic effect. The Project’s definition of student expression likely to cause emotional distress, when coupled with subsequent expert review, presents another constitutionally permissible standard for prior restraint of student expression.

Publication of truthful information can, in certain circumstances, also be tortious. Some details of a person’s life may not be published without the person’s consent. Unauthorized publication of this information constitutes the publicity or public disclosure of private facts, one aspect of the tort of invasion of privacy. The Project’s guidelines, following the Restatement, permit restriction of expression that “is violative of another person’s right of privacy by publicly exposing details of such person’s life, the exposure of which would be offensive and objectionable to a reasonable person of ordinary sensibilities. . . ." Thus, a student newspaper can be penalized for disclosing intimate details of named students’ sex lives or prevented from disclosing the contents of school discipline records. As with the tort of libel or inducing emotional distress, if student expression constitutes an invasion of privacy under the legal standard, a school board may legitimately restrain its publication.

Even a regulation based on an invasion-of-rights standard may

98. PROJECT, supra note 51, at 84. According to the Project, the greater susceptibility of youth to negative influences can justify regulation in schools: “It has long been recognized that moral indoctrination and socialization are valid and important parts of the educative function of schools.” Id. at 86.

99. PROJECT, supra note 51, at 90 (emphasis in original).

100. For examples of works that should be protected, see Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969) (challenging article entitled “The Student as Nigger,” comparing the status of students to that of slaves); A. JENSEN, BIAS IN MENTAL TESTING (1980) (arguing that I.Q. tests are not biased against English-speaking minorities who typically perform worse than whites); cf MIKOLINSKI v. BURT REYNOLDS PRODUCTION CO., 10 Mass. App. Ct. 895, 409 N.E.2d 1324 (1980) (dismissing suit by Polish-Americans who claimed they were defamed by ethnic jokes in a movie).


102. PROJECT, supra note 51, at 84. Cf MEETZE v. ASSOCIATED PRESS, 230 S.C. 330, 95 S.E.2d 606, 610 (1956) (news dispatch that 12-year-old married woman gave birth to a normal, healthy child not reasonably calculated to embarrass or humiliate plaintiffs or cause mental distress).

103. In 1977 an alternative campus newspaper at the Massachusetts Institute of Technology published a “Consumer Guide to M.I.T. Men,” naming and rating the sexual prowess of 36 students with whom the authors claimed to have had sexual relations. The editor who originated the idea was suspended from school for three months, and the authors were placed on probation. See SEX RATINGS SET OFF M.I.T. FUROR, N.Y. Times, May 19, 1977, at A18, col. 2; STUDENTS ARE DISCIPLINED FOR M.I.T. SEX RATINGS, N.Y. Times, May 27, 1977, at A9, col. 6.

104. See FRASCANZA v. ANDREWS, 463 F. Supp. 1043 (E.D.N.Y. 1978) (letter charging student had been suspended from school held an unprotected disclosure).
pose a constitutional problem if phrased in tort language. One court has held that the word "libelous" is a term of art and impermissibly vague when used in a regulation designed for laymen and students, especially because some forms of libel are constitutionally protected.105 Thus, although tort language may properly define when a school may constitutionally restrain student expression, the technical terms do not give enough information to the potential victims of a restraint — the students. The standard that governs prior restraint of allegedly obscene material suggests a method to reconcile the need for standards phrased in tort language with the potential of abuse that stems from the vagueness of legal terminology: permit limited prior restraint, but only until an outside, expert opinion can be obtained.106 This procedural safeguard of review by legal counsel should apply to any prior restraint by a school board under the invasion-of-rights standard. It would allow school boards to protect themselves from tort suits, while quick legal review of a decision to restrain would deter — and ultimately prevent — unconstitutional abuse of the standard.

Another constitutional protection for the student press is the limit of school authority. School administrators must remember that the invasion-of-rights doctrine is designed to allow the school to keep tortious expression out of its publications, not otherwise to limit the first amendment rights of students.107 Under this standard, a school can only restrict student expression where the school would be liable for the consequences of that expression. An underground newspaper that receives no money or official recognition from the school does not become the school’s responsibility simply because students prepare the newspaper on school premises108 or because the newspaper is distrib-

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106. See note 26 supra. Unlike obscenity, where the challenged work is itself the most material evidence, libel may present many difficult proof problems and is unsuited for summary judicial resolution. Given the need for a swift decision concerning the nature of the alleged libel so as not to prejudice the student’s rights, the best solution is to permit suppression of allegedly libelous material only until competent, independent legal advice can be obtained. The student would have the same right to review of this opinion as he would have of an adverse determination by the school board. See notes 157-75 infra and accompanying text. This approach would protect the student from the decisions of school officials acting beyond their field of expertise and would also protect the school from liability for damages. It was endorsed in Reineke v. Cobb County School Dist., 484 F. Supp. 1252, 1258 (N.D. Ga. 1980). See also COLLEGE CIVIL LIBERTIES, supra note 51, at 15 (if college newspaper not legally independent from the school, school should only veto an article after “a specific finding of potential libel as determined by an impartial legal authority”).

107. See notes 91-106 supra and accompanying text.

108. Thomas v. Board of Educ., 607 F.2d 1043 (2d Cir. 1979), cert. denied, 444 U.S. 1081 (1980). The students in Thomas had produced a satire of their school. School officials ordered them to keep it away from campus, so the students sold the paper at a nearby store, but purchas-
uted on school grounds. For these unofficial newspapers, the invasion-of-rights ground for prior restraint by the school does not apply; *Tinker* permits administrative regulation only under the substantial disruption standard.

C. Subversive Incitement, Obscenity, and Vulgarity

The *Tinker* test is not the only standard for measuring the protection to be accorded student speech. Anything not protected for adults is not protected for students. While student speech is unlikely to endanger national security, it may be obscene or incite illegal action. Therefore, school officials have often attempted to apply these limitations on adult speech to student publications.

The illegal-incitement doctrine permits the punishment only of “advocacy [that] is directed to inciting or promoting imminent lawless action and is likely to incite or produce such action.” Because any expression meeting this standard would also meet the substantial-disruption test, the illegal-incitement standard is superfluous in the context of the student press. Nevertheless, school boards have tried to use the illegal-incitement test to go beyond the limits of the substantial-disruption standard. Under the illegal-incitement test, school boards have attempted to justify, for example, a one-semester suspension for an editorial urging students to throw away school handouts intended for their parents or the confiscation of a sex-information supplement aimed at senior high school students. But these examples of student expression do not meet that portion of the illegal-incitement

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109. The students are not agents of the school, but independent actors using school grounds as they might use a sidewalk to distribute literature. School officials may therefore discipline them for disruptive distribution or distribution that violates content-neutral distribution policies, but may not use content-based standards to judge their expression. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981). Nor can the school be held liable for any defamation contained in such a newspaper. See, e.g., Milliner v. Turner, 436 So. 2d 1300 (La. App. 1983).

110. See notes 74-80 supra and accompanying text.

111. See notes 26-29 supra and accompanying text.


113. See Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.), cert. denied, 400 U.S. 826 (1970). The school board charged the students with “an immediate advocacy of, and incitement to, disregard of school administrative procedures.” 425 F.2d at 12. The court held that no discipline could be permitted without a showing that disruption was in fact likely to result from the expression. 425 F.2d at 15. See also Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973) (invalidating prohibition of material advocating illegal actions when no fear of substantial disruption).

114. See Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), affd. mem., 515 F.2d 504 (2d Cir. 1975). School officials claimed that publication of the supplement would be a "clear and present danger" to students. The court disagreed, finding it "ironic that defendants view the dissemination of knowledge here as presenting a 'danger' which will bring about 'evils.'" 383 F. Supp. at 1165-66.
test that requires a likelihood of "imminent lawless action"; restraints on these types of expression therefore require justification under some other standard. The illegal-incitement test adds nothing to the proper criteria for regulation of student expression, but dangerously increases the potential for regulatory abuse.

The constitutional standard for obscenity exempts from first amendment protection only "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Student expression that meets this standard is not protected from regulation under the first amendment. But, as with the illegal-incitement standard, school boards have attempted to use the obscenity standard to justify constitutionally dubious restraints of student expression. For example, school boards have often equated obscenity and vulgarity, disciplining students for four-letter words uttered in nonsexual contexts.

While Ginsberg v. New York and FCC v. Pacifica Foundation provide a lower standard of protection for expression directed at minors, a realistic appraisal of the sensibilities of high school students indicates that four-letter words per se are not obscene for high schoolers. These same vulgarisms can be heard daily on the


117. See notes 36-41 supra and accompanying text.

118. "Realistically, high school students are beyond the point of being sheltered from the
streets and can be found on the shelves of the high school library. Any seventeen-year-old — the age of a typical high school junior or senior — may attend R-rated movies containing virtually every form of spoken vulgarity without parental consent. Concern for adolescent sensibilities does not warrant restricting expression freely available to students in other contexts, especially where the restriction would keep students from reading their own words. Under Tinker, the school is free to restrict any expression, without recourse to obscenity law, that is likely to cause substantial disruption or invade the rights of others. Any further extension of the obscenity standard threatens to chill student expression properly protected by the first amendment.

D. Other Content-Based Justifications

While the three categories above encompass the majority of challenges to student speech, several other categories merit discussion. In Williams v. Spencer, the Fourth Circuit upheld the confiscation of an underground student newspaper containing an advertisement for drug paraphernalia, as violating a regulation against material that "[e]ncourages actions which endanger the health or safety of students." The court said that the regulation was not void for vagueness, because it was impractical to define each of "the infinite variety of materials that might be found to encourage actions which endanger the health or safety of students," and because "a reasonably intelligent high school student would . . . know" that an advertisement for drug paraphernalia violated the rule.

This decision appears inconsistent with the Fourth Circuit's earlier holdings that the terms "substantial disruption," "libel," and "obscenity," taken from the relevant Supreme Court standards, were imper

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121. Ginsberg v. New York, 390 U.S. 629 (1968), expressly authorizes states to prohibit the sale of soft-core pornography to those of high school age, but Ginsberg involves pictorial, not written, expression. Kaplan v. California, 413 U.S. 115, 119 (1973), implies that verbal expression enjoys a greater degree of protection than does pictorial expression, a distinction which should limit Ginsberg to vulgar pictures.

122. Occasional profanity is not disruptive per se for high school students, but if used in a disruptive manner the language can be regulated.

123. 622 F.2d 1200 (4th Cir. 1980).

124. 622 F.2d at 1205.

125. 622 F.2d at 1205.
missibly vague.\textsuperscript{126} While the school board is within its rights to ban
advertisements for marijuana pipes and cocaine-related paraphernalia,\textsuperscript{127} the literal application of a standard that allows suppression of
expression that may “endanger the health or safety of students” would
also outlaw cigarette advertising, thus permitting the confiscation of
almost every national periodical. Such a standard lends itself too readily
to capricious application. In contrast to tort standards, which are
inherently vague when addressed to high school students and thus
should be coupled with subsequent review to ensure proper application
of the legal standard,\textsuperscript{128} standards that do not depend on legal or tech­
nical usage can be more explicitly defined. The school board must
give the “reasonably intelligent high school student” more explicit
guidance as to the grounds for regulation.

Other school districts have tried to suppress student-sponsored dis­
cussions of sexuality.\textsuperscript{129} In the absence of any clear-cut rationale for
such censorship, the schools have contended that the dissemination of
information about sex would create substantial disruption,\textsuperscript{130} invade
the rights of others,\textsuperscript{131} or intrude into the curriculum.\textsuperscript{132} None of
these claims distinguishes the discussion of sexuality from the “discur­
sion” of the Vietnam War permitted in \textit{Tinker},\textsuperscript{133} and all should be
rejected. However a school chooses to discuss — or ignore — sexual
issues in its curriculum, it cannot assert that all outside discussion of
sexual topics is disruptive or violative of others’ rights.

A different form of content-based regulation addresses the form
rather than the substance of student expression. Almost all high
schools appoint a faculty advisor to oversee the student newspaper and
exert some influence over its content. The advisor adds to the educa-
tional experience of working on a school paper by editing grammar, spelling, and style; suggesting a format; and often commenting on the suitability of a particular article. A few school boards have attempted to impose a similar control on underground newspapers. One district enacted a regulation requiring all unsanctioned newspapers to "conform to the journalistic standards of accuracy, taste, and decency maintained by the newspapers of general circulation in Arlington." It was summarily voided as a standardless "monument to vagueness." Thus, it seems clear that "expression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content." Nor can officials prohibit or restrict expression solely because they believe it inaccurate or ungrammatical; neither flaw supports a forecast of substantial disruption or any of the other justifications for suppression.

Other schools have barred distribution of commercial literature or prevented the sale, or distribution for donation, of newspapers on campus. These regulations, which have been defended as necessary to prevent the schoolyard from becoming a commercial marketplace, are overbroad. They prevent reader-supported publications from taking root without any showing that such publications are disruptive. The school can effect its legitimate end — preventing students from being deluged with commercial material — through regulations restricting not content, but the time, place, and manner of distribution on campus. It must therefore use this less restrictive alternative.

134. The advisor should remember that he is in fact the first line of censorship. He is free to criticize an article or a topic as unsuitable for the paper, but except for the circumstances that permit administrative restraint, all final decisions pertaining to the content of the paper should be made by the student editorial staff. With a "curricular newspaper" the advisor has more control over content. See notes 44-48 supra and accompanying text. The presence of an advisor should also eliminate any additional administrative review over the paper unless the advisor contends that a given article should be suppressed.


137. Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 970 (5th Cir. 1972). School sponsorship of a newspaper established as a forum for student opinion does not offer any basis for additional authority over the content of the newspaper: "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." Widmar v. Vincent, 454 U.S. 263, 267-68 (1981).


140. See, e.g., text at note 49-51 supra.


A final form of content-based regulation concerns anonymity. School officials have claimed that unless the authors of all material distributed in the schools are known to them, the school will be unable to discipline those responsible for libelous or obscene material. But such a regulation is so broad that the "chilling effect" it would have on free speech far outweighs its benefits. Students would be deterred from any criticism of school officials if they knew that they had to reveal their names to those same officials. The identity of a student who brings libelous or obscene matter to campus can be discovered through the ordinary disciplinary procedures, in the same way the school identifies students who bring drugs to campus, without encouraging students with legitimate grievances to remain silent for fear of administrative reprisals.

E. Restrictions on Distribution

Another form of regulation addresses the manner of distribution, not its content. Reasonable rules governing the time, place, and manner of on-campus distribution of literature support the legitimate interest of school officials in maintaining order and should be permitted. However, the burden should still rest on the school to justify such regulations. Because time, place, and manner rules permit only subsequent punishment for violators, they are constitutionally preferable to rules requiring prior submission; indeed, a court which barred prior submission entirely specifically authorized time, place, and manner rules. Non-content-based regulation presents clear-cut issues and can be easily handled: reasonable time, place, and

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144. Jacobs, 490 F.2d at 607. Cf. Talley v. California, 362 U.S. 60, 64-65 (1960) (invalidating a city ordinance requiring the identification of all pamphleteers, noting the "important role in the progress of mankind" played by anonymous authors such as the creators of the Federalist Papers).
145. The first amendment does not grant speakers an absolute right to say what they want, when they want. Governments may impose restrictions on speech in the interest of preserving order, so long as those regulations are narrowly drawn and are not based on the content of the speech to be regulated. See, e.g., Heffron v. International Socy. for Krishna Consciousness, 452 U.S. 640 (1981); Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972); Peterson v. Board of Educ., 370 F. Supp. 1208 (D. Neb. 1973).
146. Three circuits have explicitly authorized time, place, and manner rules in schools. See Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972); Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972); Riseman v. School Comm., 439 F.2d 148, 149 (1st Cir. 1971).
147. Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 (5th Cir. 1972); see also Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972).
149. Fujishima v. Board of Educ., 460 F.2d 1355, 1357, 1359 (7th Cir. 1972).
manner regulations are valid so long as they are narrowly drafted to achieve the school's legitimate end of maintaining order.

To summarize, the Constitution does not protect all forms of expression. School officials may restrain or halt distribution of any material that the officials have reasonable cause to believe will: (1) produce a substantial physical disruption of the orderly operation of the school (including incitement to illegal actions);\(^\text{150}\) (2) constitute a tortious invasion of the rights of others, whether by content or by manner of distribution;\(^\text{151}\) or (3) satisfy the legal definition of obscenity.\(^\text{152}\) These definitions should be strictly construed to avoid infringement of students' first amendment rights. All other student expression should receive the same protection as adult expression, yet, like adult expression, still be subject to reasonable, nondiscriminatory restrictions on the time, place, and manner of its distribution.\(^\text{153}\) To ensure that student speech is adequately protected, school regulations should be subject to judicial review especially tailored to the school setting.

V. JUDICIAL REVIEW OF REGULATIONS RESTRICTING SPEECH

Restraints of student speech must be viewed against the backdrop of the hard line the Supreme Court has taken against prior restraints on speech promulgated by administrative agencies. On five occasions the Court has insisted that "any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo,"\(^\text{154}\) that is, "for the shortest fixed period compatible with sound judicial resolution."\(^\text{155}\) The burden of instituting legal proceedings and proving the unprotected nature of the material must rest with the agency.\(^\text{156}\) Because a system of prior submission of student publications to a school official risks becoming a forbidden censorship system, it appears to warrant the same safeguards mandated by the Supreme Court in other contexts.

\(^{150}\) See notes 62-80 supra and accompanying text.

\(^{151}\) See notes 81-110 supra and accompanying text.

\(^{152}\) See notes 115-22 supra and accompanying text.

\(^{153}\) See notes 145-49 supra and accompanying text.


Lower courts have uniformly upheld the right of students to a prompt and appealable decision,\footnote{157. See, e.g., Nitzberg v. Parks, 525 F.2d 378, 383-84 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345, 1348-49 (4th Cir. 1973); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971).} one which relies on clearly defined procedures and substantive criteria.\footnote{158. See, e.g., Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 811 (2d Cir. 1971) (proscription against “distributing” written or printed material: without prior consent held unconstitutionally vague); accord Baughman v. Freienmuth, 478 F.2d 1345, 1349 (4th Cir. 1973) (“libelous” and “obscene” imprecise); see also Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975) (“substantial disruption” imprecise).} But while they have been willing to grant students the right to appeal through the school system, the courts have been unwilling to mandate judicial review of school board decisions. In the leading case, \textit{Eisner v. Stamford Board of Education}, the Second Circuit declared:

[I]t would be highly disruptive to the educational process if a secondary school principal were required to take a school newspaper editor to court every time the principal reasonably anticipated disruption and sought to restrain its cause. Thus, we will not require school officials to seek a judicial decree before they may enforce the Board’s policy.\footnote{159. 440 F.2d 803, 810 (2d Cir. 1971).}

The \textit{Eisner} court’s argument is not entirely persuasive. While the special situation of the school can justify some restraints on otherwise protected speech,\footnote{160. See, e.g., notes 62-110 supra and accompanying text.} the school’s interest in an orderly learning environment is not compelling enough to justify prior restraint of student expression with no review by a disinterested body.

Such review is necessary for several reasons. Most obviously, the officials who will be reviewing student expression are likely also to be the targets of that expression, making objective evaluation difficult. Furthermore, school officials have no special grounding in the constitutional questions or legal definitions relevant to a restraint decision, making it inappropriate for them to render ultimate decisions on matters of free speech. \textit{Eisner} reflects much more confidence in the judgment of school officials than the facts warrant:\footnote{161. See, e.g., notes 54, 129, 135, 141 supra and accompanying text.} among cases that reached the federal courts, students prevailed in three out of every four challenges to regulations or disciplinary actions.\footnote{162. Twenty-six out of thirty-four regulations or disciplinary measures were invalidated.} Other student challengers were doubtless dissuaded by the time and expense necessary to bring a case to court.\footnote{163. Cf. Freedman v. Maryland, 380 U.S. 51, 59 (1965) (striking a statute requiring prior approval of motion pictures as lacking adequate procedural safeguards. The Court held: “Without these safeguards, it may prove too burdensome to seek review of the censor’s determination. . . . The . . . stake . . . may be insufficient to warrant a protracted and onerous course of litigation.”).}

Yet the \textit{Eisner} court correctly suggests that the school setting is different from settings frequently dealt with by the Supreme Court.
The Court has required putative censors to obtain judicial review before suppressing books deemed unfit for minors, or movies or stage productions considered obscene. In both instances the state interest is the same: to protect the community, or a part of it, from unsuitable material. This interest also exists in the school setting, but other interests are unique to the schools. Schools are charged with maintaining order and are concerned with protecting themselves from tort liability. These interests might lead the school to prefer no official student press to an uncontrollable student press or to one that could only be controlled through a cumbersome judicial mechanism. A certain degree of review is provided by the appeals process within the educational system, a protection not always found in the procedures limiting adult speech condemned by the Supreme Court.

The best solution, taking into account both the presumption of unconstitutionality attached to all forms of press censorship and the special circumstances of the academic setting, is an intermediate level of judicial involvement. In contrast to the adult context, a school should not need to seek judicial approval before enforcing its regulations, but the student faced with a restraint should have the right to turn to the courts for review of the decision. If the student does so, the school should then have the burden of justifying its regulations.

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167. There is no requirement that a school fund a student newspaper, but any restrictions on distribution of underground newspapers must conform to constitutional standards. See notes 74-80, 108-09 supra and accompanying text.

168. Compare Trachtman v. Anker, 563 F.2d 512, 514-15 (2d Cir. 1977) (review of principal's decision first by the Administrator of Student Affairs, then by the Chancellor, and finally by the Secretary of the Board of Education), with Southeastern Promotions v. Conrad, 420 U.S. 546, 548 (1975) (directors of a municipal theater decided, without further review, what was "in the best interest of the community"), and Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963) (no review).


170. This is essentially the approach adopted by the Fourth and Fifth Circuits. See Bahnman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 n.7 (5th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54, 60 n.11 (4th Cir. 1971) (a public school need not seek judicial review before disciplining students for violating prior-submission rules or suppressing material which violates the rules). But see Trachtman v. Anker, 563 F.2d 512, 519 (2d Cir. 1977) ("[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" — once the school board has presented enough evidence to justify its decision, contradictory testimony of student's experts is irrelevant).
school board . . . first, since it is the school board that asserts the right
to curtail presumptively protected activity, the board should bear the
burden of establishing why; and second, the school board presumably
has the essential information that led it to conclude that the activity had
to be curtailed.171

This proposed procedure for review provides the best balance be­
tween a school’s interest in efficient, orderly operation and the stu­
dent’s first amendment rights. A school system may be less likely to
abuse its power and more reluctant to challenge student expression in
marginal cases if it knows it will face the task of justifying its regula­
tion before a court than if it thinks its decision will be final. When it
does seek to restrain an article, the school may be more forthright and
conciliatory toward the student whose expression is affected, in an ef­
tort to convince the student of the correctness of the decision and
thereby avert a time-consuming and expensive court battle. This pro­
posed procedure will also encourage out-of-court agreements between
administration and student, promoting the laudable sentiment of Eis­
ner that “decisions with respect to the operation of local schools be
made by local officials.”172

Even with a system that allows prior restraint, if a student chooses
to challenge a restraint, the path of litigation would not be signifi­
cantly more onerous than in the adult context. First, any restraint
challenged in court would be limited, as in the adult setting, to “the
shortest fixed period compatible with sound judicial resolution,”173 a
period which remains the same whichever party must appeal to the
courts. Furthermore, the “protracted and onerous course of litiga­
tion”174 feared by the Supreme Court if an individual is forced to bring
suit to vindicate her first amendment rights should not deter a student,
since she knows that she can make out a prima facie case by showing
the existence of a restraint.175 Finally, the student incurs the same
costs in defending her rights as if the burden of appeal were on the
school; in either situation she must hire legal counsel. The balance of
burdens in proceeding with a suit thus discourages both parties from
engaging in frivolous litigation.

The fact that a school board lacks a published review policy should
not prohibit it from restraining student speech in the proper circum­

175. Any prior-submission regulation should clearly and explicitly inform the student of her
right to appeal to the courts and the presumption in favor of permitting publication. Otherwise
the school could create an illusion of finality by remaining silent about the appeals process, a
finality which would indeed have a chilling effect.
stances.\textsuperscript{176} The power to regulate is derived from the power to preserve order, an authority which does not depend on the language of the regulations. Schools should not be encouraged to establish burdensome, constitutionally suspect review procedures merely on the chance that one of their students might write something disruptive or libelous;\textsuperscript{177} rather, the school's actions should be evaluated in light of the constitutional standard even if there is no written policy to guide the court. But because the absence of written standards increases the risk of post hoc rationalizations, courts should scrutinize the actions of school officials especially carefully in such cases.\textsuperscript{178}

Many student prior-submission rules are litigated only when a student is disciplined for violating them. As a practical matter, students — and their parents — are more concerned about a suspension than about the suppression. If the rule is valid, then so is the punishment for violating it,\textsuperscript{179} so long as due process is followed. But some courts have upheld discipline against violators without examining the validity of the underlying rule;\textsuperscript{180} these cases pose serious constitutional problems.

Most of the cases upholding discipline rely on the questionable premise that however invalid the restraint, the student commits an independent breach of the regulations by relying on self-help. "[T]he student has a legal way to test the validity of a school regulation and there is accordingly no reason for him to disregard the school regulation or to flaunt [sic] school discipline."\textsuperscript{181} The only permissible way to challenge a prior-submission rule, according to these courts, is to request permission to distribute, have it denied, and then appeal through the school system before turning to the courts — even if the student has a right to judicial review of the restraint in any case, remains accountable for his deed, and may be punished if he is found to

\begin{itemize}
\item \textsuperscript{176} See Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979) (school authorities justified in seizing disruptive and libelous material despite having no written policies for review).
\item \textsuperscript{177} "Indeed, it is arguable that, as a practical matter, expression is more likely to be inhibited than encouraged if courts were to require schools to adopt regulations limiting speech." Thomas v. Board of Educ., 607 F.2d 1043, 1050 n.13 (2d Cir. 1979).
\item \textsuperscript{179} Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972) (violation of time, place, and manner rules) (dictum); Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981) (distribution of literature adjudged substantially disruptive).
have violated a valid rule. This interpretation permits schools to erect a formidable wall of administrative obstacles to overcome before a student can receive any independent review — in effect, a complete censorship for the duration of the prescribed procedures, no matter how unreasonable or unconstitutional they might be. This practical "chilling effect" indicates that discipline should be permitted only when the challenge to the rule involves independently unprotected conduct, 182 or when the rule is upheld as applied to the student's conduct. Substantive review of the regulation is needed to prevent school discipline for student expression from becoming a roundabout way to punish students for exercising their first amendment rights without exhausting administrative procedures.

In short, regulations and restraints on the student press must give the student an opportunity for judicial review of the regulation. While the burden of filing suit is on the student, the school bears the burden of justifying its regulation. Any restrictions on student expression not based on a written policy are subject to closer scrutiny, but the constitutional preference against any form of prior submission renders such restrictions palatable. School officials may discipline students for violating valid prior-submission rules, but may not impose sanctions on students for violating invalid rules or for any form of off-campus expression.

CONCLUSION

High school students do not enjoy the same first amendment protections as adults. However, the differences in protection may only be justified by the special circumstances of the school setting. The need to maintain order allows school authorities to restrain material that disrupts the school. Concern for its own liability allows the school to restrain material that tortiously invades the rights of others so long as the school would be liable for the content of that material. Any expression not protected for adults is not protected for minors. Schools may also minimize disruption through reasonable, content-neutral regulations governing the time, place, and manner of distribution.

Any regulation governing the prior submission of student material to school officials must clearly and precisely set out the criteria for

182. See, e.g., Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir. 1973). In Sullivan, a student who had been suspended for disobeying an order to stop distributing an underground newspaper visited campus several times during his suspension and repeatedly shouted profanity at the principal. By contrast, in Karp v. Becken, 477 F.2d 171 (9th Cir. 1973), the Ninth Circuit voided the suspension of a student for actions likely to cause substantial disruption because his actions did not violate any school rule, and in Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.), cert. denied, 400 U.S. 826 (1970), the Seventh Circuit invalidated a suspension based solely on distribution of an underground newspaper on school premises in violation of the school's prior-submission rule, where the rule was overbroad and the newspaper was protected expression.
restraint and should inform the student of his right to seek judicial review of any restrictions, a review in which the burden will be on the school to justify its restrictions. Given the constitutional bias against such restraints, the courts must strictly construe the regulations. The school system may not use its disciplinary authority to inhibit the protected expression of students: it may not punish students for failing to challenge the rules in the prescribed manner, unless their disobedience is independently disruptive, and it may not discipline students for any off-campus expression.