THE EIGHTH CIRCUIT EXTENDS FIRST AMENDMENT PROTECTIONS FOR HIGH SCHOOL STUDENTS WORKING ON SCHOOL-SPONSORED NEWSPAPERS

Kuhlmeier v. Hazelwood School District 795 F.2d 1368 (8th Cir. 1986)

In *Kuhlmeier v. Hazelwood School District*,[1] the Eighth Circuit Court of Appeals imposed a heavy burden on school authorities by holding that the first amendment prohibits them from preventing publication of articles in a school-sponsored newspaper unless publication would create tort liability for the school.

Three student staff members of a high school journalism class newspaper[2] sued[3] school authorities.[4] The students claimed that the authorities violated their first amendment rights[5] by editing articles from the news-

1. 795 F.2d 1368, *cert. granted* (8th Cir. 1986).

2. The three plaintiffs attended Hazelwood East High School in St. Louis, Missouri. They were members of the school's journalism class. In conjunction with this class, they served as staff members for the Hazelwood East student newspaper, *Spectrum*. Kuhlmier v. Hazelwood Dist., 578 F. Supp. 1286, 1289 (E.D. Mo. 1984).

3. The students brought the action pursuant to 42 U.S.C. 1983. This statute provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The students sought injunctive relief, monetary damages, and a declaration that the school violated their first amendment rights. 795 F.2d 1368, 1371 (8th Cir. 1986).

4. The defendants included the Hazelwood School District and the following, individually and in their official capacities: the members of the Board of Education of the Hazelwood School District, the superintendent, the assistant superintendent, and the principal. *Id.* at 1370.

5. More specifically, they alleged:

> a) *Spectrum* was a free speech forum fully protected by the first amendment; b) defendants' prior restraint of the May 13, 1983 issue of *Spectrum* denied plaintiffs' rights secured by the first and fourteenth amendments; and c) defendants' policies, practices, customs, rules and regulations governing publication of *Spectrum* failed to compart with constitutionally-mandated standards.

Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450 (E.D. Mo. 1985).

In relevant part, the first amendment provides: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. In Gitlow v. New York, 268 U.S. 652 (1925), the Supreme Court made the first amendment applicable to the states through the fourteenth amendment. The fourteenth amendment provides that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1.

paper.[6] The district court held that the school could edit the newspaper because the paper formed part of the school's curriculum.[7] The Eighth Circuit reversed and *held*: the first amendment protects school newspapers that serve as public forums for student expression unless a school can reasonably forecast that publication would substantially disrupt school activities or interfere with the rights of others.[8]

Traditionally, state and local authorities control public education policies.[9] Unless a school policy violates constitutional rights,[10] the courts

6. The *Journalism II* class published *Spectrum* eight to ten times a year. The class staff members received credit for determining the content and layout of the paper, and for writing and editing the articles. Before the class could publish any edition, the class had to submit the paper for approval to the teacher who taught the class and to the principal.

When the teacher took the May 13 edition to the principal for approval, the principal directed the teacher to delete two articles that he found objectionable. Deletion of the two objectionable articles required deletion of three other articles that were unobjectionable because they were located on the same two pages. One article detailed three Hazelwood East students' experiences with pregnancy. Although the article did not disclose the girls' names, the principal feared that the article revealed their identity.

The other article discussed how divorce affected children. The article included an interview with an unnamed student who gave reasons for her parents' divorce. The principal objected to this article because the parents had not consented to the article and did not have an opportunity to respond. 795 F.2d at 1370-71. (8th Cir. 1986).

7. The district court held that the school did not violate the students' first amendment rights. The court found that the newspaper was an integral part of the school's curriculum, rather than a public forum for students' free expression. The court held that the school officials reasonably believed that the two articles would invade the privacy of others. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450 (E.D. Mo. 1985).

8. 795 F.2d at 1370. (8th Cir. 1986).

9. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *See also* Goss v. Lopez, 419 U.S. 565 (1975).

School boards generally rely upon their state's broad school board enabling act rather than specific statutory provisions to sustain these policies. These policies include regulation of curriculum. *See* Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982) (school could prevent publication of newspaper that journalism class produced); Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981) (school could prevent performance of school-sponsored theatrical production); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) (school could prevent distribution of sex questionnaire in school newspaper because of fear that it would cause harm); Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986) (school could prevent production of play because it believed that the play was inappropriate for high school students); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979) (school could prevent publication of letter in official school newspaper that would substantially disrupt school); Parker v. Board of Educ., 237 F. Supp. 222 (D. Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966) (school did not violate teacher's constitutional rights when school fired teacher for assigning an obscene book, *Brave New World*).

But see Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977); Stanton v. Brunswick School Dep't, 577 F. Supp. 1560 (D.Ma. 1984); Reineke v. Cobb County School Dist., 484 F.

rarely intervene. Courts reason that professional educators, not judges, best effectuate the educational function of schools.[11] Courts also have acknowledged that public education should promote the values of the local community.[12] Public educators will promote local values if communities can politically influence those who make educational decisions.[13]

When school policies are challenged as violating the first amendment,

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Supp. 1252 (N.D. Ga. 1980); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D. N.Y. 1974) *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975); and Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

Public educators historically have been responsible for regulating much more than curriculum. For example, one of the primary purposes of education includes inculcating societal values. Noah Webster wrote the following:

> [S]ociety requires that the education of youth should be watched with the most scrupulous attention. Education, in a great measure, forms the moral characters of men, and morals are the basis of government. Education should therefore be the first care of a legislature, not merely the institution of schools but the furnishing of them with the best men for teachers.

WEBSTER, *On the Education of Youth in America* in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 41, 64 (F. Rudolph ed. 1965) (footnote omitted).

In more recent times, schools have imposed numerous restrictions based on societal values. These restrictions arguably interfere with student rights, including their rights of speech, privacy, freedom of association and due process. Yet the courts usually defer to the judgments of the school boards in cases challenging these restrictions. *See* Bethel School Dist. v. Fraser, 106 S.Ct. 3159 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1981) (Burger, C.J., dissenting); Ambach v. Norwick, 441 U.S. 68 (1979); Waugh v. Board of Trustees, 237 U.S 589 (1915); King v. Suddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1972), *cert. denied*, 404 U.S. 1042 (1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir. 1968); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965); Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923). *See generally* Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 501-505 (1981); Goldstein, *The Scope and Sources of School Board Authority to Regulate Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969). *But see* Comment, *Personal Appearances of Students—The Abuse of a Protected Freedom*, 20 ALA. L. REV. 104 (1967).

10. *See* Board of Educ. v. Pico, 457 U.S. 853 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bartels v. Iowa, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923). *See generally Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1051-1055 (1968).

11. Educators are better equipped to discern which policies will maximize an educational experience. *See* Board of Education v. Pico, 457 U.S. 858, 891 (1981) (Burger, C.J., dissenting); *see also Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 506-507, n. 130 (1981).

12. *See supra* note 9.

13. "[L]ocal control of education involves democracy in a microcosm." Board of Education v. Pico, 457 U.S. 853, 891 (1981) (Burger, C.J., dissenting). Local educators, unlike judges, are more likely to respond to a community's educational goals. Communities can, therefore, politically influence school boards and teachers. *Id.*

the courts have not automatically deferred to school authorities.[14] In *Tinker v. Des Moines Independent School District*,[15] the Supreme Court enunciated a test that the courts have applied to determine the boundaries of students' first amendment rights.[16] The *Tinker* Court held that a school could not prohibit student symbolic conduct unless the school could reasonably forecast that the students' expression either substantially interfered with the work of the school or interfered with the rights of others.[17] The Court concluded that students retain first amendment rights in school.[18] The Court, however, limited these rights by noting "the special characteristics of the school environment."[19]

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14. *See* Epperson v. Arkansas, 393 U.S. 97 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); West Virginia v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923); and Bartels v. Iowa, 262 U.S. 404 (1923).

15. 393 U.S. 503 (1968). In *Tinker*, the Supreme Court held that school officials violated the first amendment rights of students. The school had briefly suspended students who violated a school rule by wearing an armband to protest the Vietnam War.

16. In the past eighteen years, any discussion of student's first amendment rights has begun with *Tinker*. The courts usually begin by talismanically quoting the following passage:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech of expression at the schoolhouse gate.

393 U.S. 503, 506 (1968).

17. *Id.* at 514. *See generally* Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970); Note, *Constitutional Law—Symbolic Speech—Wearing of Arm Bands to School to Protest Viet Nam War*, 20 MERCER L. REV. 505 (1969); and Note, *Symbolic Speech, High School Protest and the First Amendment*, 9 J. FAMILY L. 119 (1969).

18. *See supra* note 16. The Supreme Court, however, has held consistently that children's constitutional rights are not coextensive with those of adults. *See* Bethel School District v. Fraser, 106 S.Ct. 3159 (1986) (school could punish student for making sexually suggestive speech even though it was not obscene); New Jersey v. T.L.O., 469 U.S. 325 (1985) (school may conduct search and seizure of student property based only on reasonable grounds, as opposed to probable cause, that students violated law); Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 515 (1969) (Stewart, concurring) (students first amendment rights not "co-extensive with those of adults"); Ginsberg v. New York, 390 U.S. 629 (1967) (state law permitting adults, but not minors, to buy nonobscene "girlie" magazines sustained); Prince v. Massachusetts, 321 U.S. 158 (1944) (state law prohibiting minors from selling literature in public sustained).

These cases illustrate the strong governmental interest in protecting youth, not in depriving them of rights. *See* FCC v. Pacifica, 438 U.S. 726 (1978) (indecent radio program banned to protect children). *See generally* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979); and Gyory, *The Constitutional Rights of Public School Pupils*, 40 FORDHAM L. REV. 201, 223-24 (1971).

19. *Tinker* at 507. The special characteristics that justify limiting students' rights include the interest of states and school authorities in maintaining comprehensive authority "to prescribe and control conduct in the schools." *Id. See also*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

Additionally, the Court asserted that protecting students' first amendment rights furthers the pedagogical function of schools. The Court equated public schools with public forums[20] that provide a place for individuals to exchange ideas.[21] The Court believed that schools must similarly provide a place for students to communicate. According to the Court, schools exemplify the ideal place for "[t]he vigilant protection of constitutional freedoms"[22] because "wide exposure to . . . robust exchange of ideas . . . discovers truth."[23] This discovery process furthers "an important part of . . . [education]."[24]

Although *Tinker* only addressed symbolic expression by students, the courts have applied the "*Tinker* test" to cases concerning school supervision of student publications.[25] The Supreme Court has not verified the suitability of applying the test to these cases. Consequently, the federal

20. The Supreme Court has identified a first amendment right for individuals to use public property such as parks and streets for communicative purposes. The Court has not clarified the extent of this privilege. Some argue that this privilege is absolute, and that government *must* make some public places available for the expression of ideas. *See* Hague v. CIO, 307 U.S. 496 (1939). Others argue that this privilege only obligates government to provide equal access to public property. *See* Massachusetts v. Davis, 162 Mass. 510, 39 N.E. 113 (1895), *affirmed*, 167 U.S. 43 (1897).

The Court has adjudicated whether this privilege extends to non-traditional fora such as libraries, jails, buses, and schools. The first amendment does not obligate government to provide a public forum in these places. When government does create an open forum for free expression, the first amendment protects the expression.

21. The Supreme Court has held that Government does not create a public forum merely because individuals use the public property in question to communicate. *See e.g.* United States Postal Service v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114 (1981) (letterboxes not a public forum); Greer v. Spock, 424 U.S. 828 (1976) (bulletin board in cafeteria of military base not a public forum); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space on city's buses not a public forum). *See generally* Harning, *The First Amendment Right to a Public Forum*, 1969 DUKE L. J. 931; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Note, *The Public School as Public Forum*, 54 TEX. L. REV. 90 (1975).

22. *Tinker*, 393 U.S. at 512, *quoting* Shelton v. Tucker, 364 U.S. 479, 487 (1960).

23. *Tinker*, 393 U.S. at 512, *quoting* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

24. *Tinker*, 393 U.S. at 512. The Court argued that schools must prepare students to live in a democratic society. Confining student speech to officially approved beliefs does not teach democracy because it "foster[s] . . . homogeneous people." *Id.* at 511. Therefore, schools must promote divergent views by permitting students to freely communicate "[w]hen [they] are in the cafeteria, or on the playing field, or on the campus during authorized hours. . . ." *Id.* at 512-13.

25. Cases involving school regulation of student publications fall into two distinct categories. One category involves schools regulating non-school student publications. The other category involves school-sponsored student publications. Students' first amendment rights generally prevail when the publication is non-school sponsored. *See e.g.* Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Fujishima v. Bd. of Educ., 460 F.2d 1355 (7th Cir. 1972); 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.

courts have used the test frequently and inconsistently.[26] The Seventh, Fourth, and Second Courts of Appeals have developed three distinct approaches.

The Seventh Circuit completely prohibits schools from requiring teachers or administrators to give prior approval[27] to student publications.[28] In *Fujishima v. Board of Education*[29] the court[30] argued[31] that

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1971); Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977); and Poxon v. Bd. of Educ., 341 F. Supp. 256 (E.D. Ca. 1971).

When determining the scope of students' first amendment rights within the context of a school-sponsored publication, courts usually analyze whether the publication is an open public forum for free expression or an integral part of the school curriculum. If the publication is curriculum, the courts apply a very deferential review and usually sustain the school's regulation. The court in Fraska v. Andrews, 463 F. Supp. 1043 (E.D. N.Y. 1979) provided a helpful test:

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

Id. at 1052 (emphasis added). *See also* Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982); Trachtmann v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). *But see* Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D. N.Y. 1974), *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975); Zucker v. Panitz, 299 F. Supp. 102 (S.D. N.Y. 1969).

The first amendment does not obligate schools to provide students a public forum for free expression. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3rd Cir. 1984). When school officials do create an open forum for student expression, the first amendment does provide limited protection. *Id. Compare* Widmar v. Vincent, 454 U.S. 263 (1981).

26. Compare the Seventh Circuit's prohibition against all prior restraints with the Second Circuit's highly deferential rational basis approach.

27. The Supreme Court has held that government may rarely restrict any type of speech prior to expression because of the risk that government will suppress protected speech. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); *See also* Southeastern Promotions v. Conrad, 420 U.S. 546 (1975); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). *See generally* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955); and Note, *Prior Restraints in Public High Schools*, 82 YALE L. J. 1325 (1973).

28. These cases all involve schools imposing restraints on non-school student newspapers. The court has not addressed whether it would allow schools to impose prior restraints on school-sponsored publications. *See* Jacobs v. Board of School Comm'rs, 490 F.2d 601 (7th Cir. 1973); Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970); Spartacus v. Board of Trustees, 502 F. Supp. 789 (N.D. Ill. 1980).

29. 460 F.2d 1355 (7th Cir. 1972).

30. The Seventh Circuit also limits the ability of schools to subsequently punish students. In Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), school authorities expelled students for distributing in school a student written publication.

The paper ridiculed school policies and authorities. In light of the publication's immature audience, the district court found that the criticism "amounted to an immediate advocacy of, and incite-

literally applying the *Tinker* test means that "schools may not restrain the *full* First-Amendment rights of their students."[32] These rights, according to the court, include the freedom to distribute written material without prior approval.[33]

Other circuits,[34] including the Fourth Circuit,[35] permit prior approval of student publications. Nevertheless, the Fourth Circuit contends that rules providing for approval[36] "come to the court with a presumption against their constitutionality."[37] To draft permissible rules, school authorities must establish criteria and review procedures conforming to the *Tinker* test.[38]

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ment to, disregard of school administrative procedures." *Id.* at 12. Therefore, the school did not violate the students' rights in expelling them.

The Seventh Circuit reversed the lower court. The court prefaced its argument by noting that "[h]igh school students are persons entitled to [constitutional protection]." The court then criticized the lower court for implicitly using the clear and present danger test instead of the *Tinker* test. *Id.* at 12. The court held that the school did not reasonably forecast substantial disruption of school activity. *Id.* at 13.

31. *Fujishima* restricted school authorities even more than *Scoville*. *See supra* note 30. In *Fujishima*, authorities disciplined students for violating a school rule that prohibited distributing on school premises any publications without prior approval. The court held that any prior restraint of student publications is unconstitutional.

32. 460 F.2d 1355, 1357 (1972) (emphasis provided).

33. The court combined the holdings of Near v. Minnesota, 283 U.S. 697 (1932), and *Tinker* to reach its conclusion. *See supra* footnotes 27 & 28 for discussion of *Near* and prior restraints.

The court argued that the "reasonable forecast" part of the *Tinker* test did not authorize schools to prevent distribution of material. The test meant that a school may only subsequently punish students if the school reasonably forecasts that *continued* distribution would interfere with school discipline. 460 F.2d at 1358.

The court cited other courts that had invalidated prior restraints imposed on college students. The court did not address the differences between high school and college students and the possible reasons for treating their publications differently. Some courts and commentators sensibly argue that students of different ages should be treated differently. *See* Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971) ("difference . . . between the rights of free speech attaching to publications distributed in a secondary school and those in a college"); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1052-53 (1969) ("tolerable limit for student expression in high school should be narrower than at college or university level"); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1130 (1968) ("responsible student criticism of university officials is socially valuable").

34. Another circuit following the Fourth Circuit's approach includes the Fifth, *see* Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972) and Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980).

35. *See* Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980); Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977); Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); and Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).

36. *See supra* note 27.

37. Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973).

38. To satisfy the criteria requirement, the rule must state that officials can impose prior restraints only in those special circumstances when they can "reasonably forecast substantial disrup-

In *Gambino v. Fairfax County School Board*,[39] the school urged that these requirements did not apply because the school-sponsored newspaper formed part of the school's journalism curriculum.[40] As curriculum, the school argued, the paper was subject to the "same administrative controls as other educational programs."[41] The *Gambino* court rejected this argument and found that the newspaper was a public forum[42] for student expression.[43] The first amendment, according to the court, protects a school-funded, teacher-supervised newspaper that communicates opinions.[44] The court then held that the prior approval requirement vio-

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tion of or material interference with school activities." *Id.* at 1348, *quoting* Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971).

Schools must also satisfy procedural requirements. They must set up an "expeditious review procedure" for the appeal of any prior restraint decision. Further, they must provide for a "specified and reasonably short period of time in which the principal must act." Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973). *See* Quarterman v. Byrd, 453 F.2d 54, 59-60 (4th Cir. 1971) (schools failed to satisfy both criteria and procedural requirements).

In Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975), a case following *Baughman* and *Quarterman*, the court placed a heavier burden on schools, requiring them to use much ingenuity in drafting a permissible rule. In *Nitzberg*, the school used a prior restraint rule to order two private student newspapers to cease distribution at school. The school had obviously attempted to write the rule in conformity with the court's criteria and procedural requirements. *Id.* at 381.

Nevertheless, the court invalidated the rule because it did not clearly define what constituted a "substantial disruption" of school activities. Moreover, it did not detail what factors an administrator would consider in predicting a substantial disruption. *Id.* at 383.

39. 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977). In *Gambino*, the principal prohibited the publication of articles containing information and student attitudes about contraceptives. The school board affirmed the principal's decision, arguing that the articles violated a school board rule. The rule prohibited the schools from offering information about contraceptives. *Id.* at 733.

When the students challenged the constitutionality of the school's action, the board argued that the school could control the school paper because the paper functioned as a student activity. As a student activity, the paper must "relate . . . to the school program and not interfere with school operation." *Id.* at 733. The school board reasoned that publication of the articles would interfere with the school's operations because the articles contravened the school board's resolution not to offer information about contraceptives. *Id.* at 734.

40. The school offered the following as evidence that the paper was curriculum: 1) staff members were enrolled in a journalism class and received academic credit; 2) the school paid a teacher a supplemental salary to supervise the students' work; 3) the students worked on the paper at school during school hours; and 4) the school partially funded the paper. *Id.* at 734.

41. *Id.*

42. *See supra* note 20 for discussion of public forum.

43. 429 F. Supp. at 734. The court rejected the school's curriculum argument by noting that the extent of state involvement in providing funds and facilities does not determine the applicability of first amendment protection. Moreover, the court found first amendment protection for this publication because the school "conceived, established, and operated [the paper] as a conduit for student expression on a wide variety of topics." *Id.* at 735.

44. *Id.*

lated the students' first amendment rights because it failed to comply with "the detailed criteria required by the . . . Fourth Circuit. . . ."[45]

The Second Circuit affords schools the most latitude to supervise student publications.[46] As in the Fourth Circuit, the court permits schools to impose administrative prior approval.[47] The Second Circuit's analysis of *Tinker*, however, differs in two ways. First, the Second Circuit imposes no criteria and procedural requirements.[48] Second, the Second Circuit only requires school officials to demonstrate a *rational basis* for interfering with student speech.[49] This rational basis requirement means that schools may restrict expression if facts exist from which a court could possibly conclude that distribution of the material would substantially disrupt school activities or interfere with the rights of others.[50]

Trachtman v. Anker,[51] the court's most recent school publication case, illustrates this deferential rational basis interpretation of *Tinker*. In *Trachtman*, school administrators denied approval of a student proposal

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45. 429 F. Supp. at 736. *See supra* note 38 for discussion of the Fourth Circuit's criteria and procedural requirements.

46. The following quote illustrates the court's deferential attitude: "It is to everyone's advantage that decisions with respect to the operation of local schools be made by local officials." Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971).

See also Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied* 98 U.S. 925 (1978); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1978); Koppell v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972). *But see* Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

47. In Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971), the court noted that Near v. Minnesota, 283 U.S. 697 (1931), and the cases that followed *Near* mentioned several exceptions to the usual rule against prior restraints. According to the court, *Tinker* establishes that the schools are one of the "exceptional cases" where prior restraints are permissible. *Id.* at 807.

48. The court has expressly relied upon the good faith of school administrators to protect expression that would not create material disturbances.

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

440 F.2d 803, 808 (4th Cir. 1971).

49. The court has said that "school authorities need only demonstrate that the basis of their belief in a potential disruption is *reasonable* and not based on speculation." 563 F.2d 512, 517 n. 5 (2d Cir. 1977), *cert. denied* 98 U.S. 503 (1978).

50. The court reasons that this deferential standard of review is appropriate because

> school authorities are sufficiently experienced and knowledgeable concerning these matters, which have been entrusted to them by the community; a federal court ought not impose its own views in such matters where there is a rational basis for the decisions and actions of the school authorities.

Id. at 519.

51. 563 F.2d 512 (2d Cir. 1977), *cert. denied* 98 U.S. 503 (1978).

to survey and publish[52] students' sexual attitudes and experiences.[53] The students contested the constitutionality of the school's denial. The school argued that denying the survey was constitutional because it satisfied the second prong of the *Tinker* test. Permitting the survey would cause interference with the rights of others.[54]

To buttress this argument, the school presented evidence[55] that the survey "would result in significant psychological harm to members of [the high school]."[56] The district court found that the survey would psychologically harm freshmen and sophomores but not older students.[57] The Second Circuit reversed that part of the district court's judgment which permitted surveying the older students.[58] The court admonished the lower court by emphasizing that courts should not reevaluate the wisdom of school officials' actions when such actions have a rational basis.[59]

In *Kuhlmeier v. Hazelwood School District*,[60] the Eighth Circuit Court of Appeals followed the Fourth Circuit's holding in *Gambino*.[61] The court held that school officials desiring to regulate a school publication that conveys student opinion must reasonably forecast that an article would substantially interfere with school activities or the rights of others.[62] According to the court, "interference with the rights of others" refers only to a tortious act.[63]

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52. The students wished to publish the results in the high school newspaper in an article entitled "Sexuality in Stuyvesant". *Id.* at 515.

53. The students had prepared a questionnaire that contained questions requiring "frank information about the student's sexual experience," and covered such topics as premarital sex, contraception, homosexuality, masturbation and the extent of students' "sexual experience." *Id.* at 515.

54. 563 F.2d at 519. *See generally* Diamond, *Interference with the Rights of Others: Authority to Restrict Students' First Amendment Rights*, 8 J.L. & EDUC. 347 (1979).

55. The school presented four expert witnesses who testified that distributing the questionnaires was a "potentially dangerous" act that was "likely to result in serious injury to at least some of the students." *Id.* at 517.

56. *Id.* at 520.

57. *Id.* at 515.

58. *Id.* at 519.

59. *Id.* The court emphasized that the

> [school's] action . . . is not so much a curtailment of any First Amendment rights; it is principally a measure to protect the students committed to their care . . . from peer contacts and pressures which may result in emotional disturbance to some of those students whose responses are sought.

Id. at 519.

60. 795 F.2d 1368 (8th Cir. 1986).

61. *See supra* note 43 for discussion of the *Gambino* holding.

62. 795 F.2d at 1374.

63. *Id.* at 1376.

The district court did not apply the *Tinker* test because it found that the paper was an integral part of the school curriculum.[64] The Eighth Circuit rejected this factual finding and held that the paper "was intended to be and operated as a conduit for student viewpoint."[65]

The school failed, according to the court, to satisfy the first part of the *Tinker* test because the school did not reasonably forecast that the deleted articles would have substantially disrupted school activities.[66] In applying the second part of the test, the court interpreted "invasion of the rights of others" to mean a tortious act.[67] The court, however, did not rely on precedent for its interpretation.[68] Instead, the court relied upon a law review article.[69]

> [S]chool officials are justified in limiting student speech . . . only when publication of that speech could result in tort liability for the school. Any yardstick less exacting . . . could result in school officials curtailing speech at the slightest fear of disturbance.

Id.

64. The district court cited the following as evidence that the newspaper was curriculum: [1] *Journalism II* class produced *Spectrum* and a teacher taught the class. [2] Students used a textbook and received academic credit. [3] The curriculum guide of Hazelwood East described the *Journalism II* class as a "laboratory situation", and *Spectrum* as the laboratory exercise. [5] *Spectrum* was "developed within the adopted curriculum". [6] The teacher's salary did not indicate that his supervision was extracurricular. [7] The teacher exercised control over the publication process. 795 F.2d at 1371-72.

65. *Id.* at 1372. The court noted factors that made the paper, in the court's judgment, "a 'student publication' in every sense." *Id.* The students chose the staff members, determined the content of the paper, and wrote the articles. Moreover, the paper presented topics of interest to students from a student viewpoint.

The paper published a statement of policy stating that the first amendment protected the paper. The statement also provided that the paper would follow the journalism guidelines in the journalism class textbook. This textbook said that schools could not impose prior restraints based on the *Tinker* test. Further, the textbook said that the student press has "essentially the same rights and responsibilities as the mass media." *Id.* at 1372-73.

The court cited several cases to support its conclusion. *See* Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985); Gambino v. Fairfax County School Bd., 429 F. Suppp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D. N.Y.), *aff'd without opinion*, 515 F.2d 503 (2nd Cir. 1975); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980). The Supreme Court reversed *Fraser* after the court decided *Kuhlmeier.*

66. The school did not claim that the articles would have substantially disrupted school activities. 795 F.2d at 1375.

67. *Id.* at 1376. The court reasoned that the tortious act interpretation made schools use preestablished legal standards in deciding whether an article invaded another's rights.

68. The only other court that has interpreted the second part of the *Tinker* test is Trachtman v. Anker, 563 F.2d 512 (2nd Cir. 1977). That court found that psychological harm would satisfy the test. *See supra* note 54. The *Kuhlmeier* court did not address the *Trachtman* court's reasoning.

69. The court said, "We are persuaded by [the article's] analysis. . . . Any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance." 795 F.2d 1368, 1376 (8th Cir. 1986). *See* Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 640 (1984).

The school also failed, according to the court, to satisfy the second part of the test.[70] The court considered that invasion of privacy was the only tort that the student article could have caused.[71] After quoting several established definitions of the tort,[72] the court concluded that the article would not create liability.[73]

A dissenting opinion vigorously argued that the newspaper formed an integral part of the school curriculum.[74] The dissent observed that courts traditionally give schools broad authority to make curriculum decisions.[75] *Tinker* did not, according to the dissent, change this tradition.[76] Treating the school newspaper as a public forum undermines the ability of schools to educate by forcing schools to allocate resources in litigation.[77]

The *Kuhlmeier* court erred by characterizing the school-sponsored newspaper as a public forum.[78] The court should have affirmed the district court's finding that the school created the paper primarily as a class exercise.[79] The school's policies and operation of the newspaper provide ample evidence of the paper's curricular purpose.

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70. The court summarily dismissed the possibility of the divorce action creating tort liability. The court found that the article was "nothing more than an anecedotal treatment of the subject of divorce" because the article did not reveal the names of the interviewed students. 795 F.2d at 1376.

71. *Id.*

72. *See* W. PROSSER & W. KEATON, THE LAW OF TORTS 809 (4th Ed. 1971); and American Bar Assn., *Standards Relating to Schools and Education* 84 (1982).

73. According to the court, the article on pregnancy did not invade the privacy of anyone. The article did not name the pregnant girls. Even if the article identified them, the girls could not maintain an action because they consented to the interview. Moreover, the article did not disclose the identity of the boyfriends, and the article did not reveal any details of the parents' lives. 795 F.2d at 1376.

74. The dissenting judge based his argument on the district court's findings. *See supra* note 64.

75. *See* Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 869 (1982); and Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981).

76. The dissent argued,

> *Tinker* . . . should not be held to give rise to a collective first amendment right to publish a school-sponsored, faculty-supervised newspaper with the same lack of constraints enjoyed by the commercial press or, for that matter, a solely student-sponsored extracurricular paper totally removed from the aegis of the school.

795 F.2d at 1378.

77. The dissent observed that the majority's decision placed the school in a precarious position that forced the school to "chart a course between the Scylla of a student-led first amendment suit and the Charybdis of a tort action by those claiming to have been injured by the publication of student-written material." *Id.* at 1378-79. Schools, unlike the commercial press, cannot pay an attorney to give daily advice concerning potential tort liability. *Id.* at 1379.

78. 795 F.2d at 1372.

79. *See supra* note 65.

The school board's enunciated policies concerning the student newspaper clearly illustrated the curricular purpose of the newspaper. The statement provided publication guidelines for the journalism students by stating that students could express opinions "within the rule of *responsible* journalism."[80] School authorities established these rules because the "publications [were] developed within the *adopted curriculum and its educational implications in regular classroom activities.*"[81] Moreover, the statement explicitly stated that students could not publish material that the *board* considered inappropriate, including material that would interrupt the educational process.[82]

The school's operation of the paper also illustrates the curricular purpose of the paper. Students did not operate the paper as an extracurricular activity.[83] Instead, the school operated the paper as an integral part of the school system.[84] The newspaper's informational function did not negate the paper's primary educational purpose. The Supreme Court has held consistently that public property, e.g. a public school's newspaper, does not become a public forum merely because individuals use it to communicate information and ideas.[85]

In addition, ignoring the school's curricular purpose defeats policies favoring local school control.[86] Courts usually respect the professional decisions of educators, recognizing that educators better understand the variables that maximize an educational experience.[87] The school authorities intended to provide a "real life" journalistic experience for the students with all the "rights and responsibilities of the mass media."[88]

The *Kuhlmeier* court should have deferred to the school's decision to make the journalism students' experience realistic. In the commercial

80. 795 F.2d at 1377 n. 7. The statement also provided publication guidelines for non-journalism students. These students, like the journalism students, did not have an absolute right to express opinions. A committee composed of the principal, three faculty members, and two journalism students decided what material to publish. *Id.*

81. *Id.* (emphasis added).

82. *Id.*

83. *Id.* The school provided a teacher to instruct the journalism students and to oversee every aspect of the publication process. The teacher's salary for overseeing publication was not commensurate with the nature of an extracurricular activity. 795 F.2d at 1372.

84. The students produced the paper to fulfill journalism class requirements and to receive academic credit. The school's curriculum guide described the journalism class as a "laboratory situation" and the newspaper as the laboratory exercise. *Id.*

85. *See supra* note 21.

86. *See supra* notes 9-13 and accompanying text.

87. *See supra* note 50.

88. 795 F.2d at 1373 n. 4.

world, editors can choose freely which articles not to print.[89] Similarly, school authorities, acting as proprietors of the public schools, can discern which articles will detract from the newspaper's educational purpose.

Courts also defer to the decisions of school authorities because courts wish to promote local educational goals. The courts reason that local communities will use the political process to affect changes if the school's decisions contravene local goals.[90] The *Kuhlmeier* court has circumscribed the Hazelwood community's ability to influence the school curriculum by replacing the school's judgment with the court's.

Moreover, the court unjustifiably limited the second part of the *Tinker* test.[91] The court's unprecedented interpretation[92] undermines the ability of schools to educate in several ways. First, the court's interpretation, "pits students against school officials."[93] The court's rationale for requiring tort liability was that it would make school officials follow "previously defined legal standards."[94] The court's reasoning implicitly reinforces what many students believe, that school officials generally abuse their authority and oppress students.[95]

Second, the court's interpretation drains the schools' resources. Schools will spend more time and money in court because students will be more likely to litigate.[96] Additionally, the court's interpretation forces schools to spend money for legal advice to avoid litigation.[97]

The Eighth Circuit's characterization of the paper as a public forum is unsound. The policy statement and operation of the Hazelwood school newspaper clearly illustrate its curricular function. Ignoring the curricular purpose of the paper frustrates policies favoring local control of education. The court's holding supersedes the professional judgments of

89. *See* Passaic Daily News v. NLRB, 10 Med. L. Rptr. 1905 (1984).

90. *See supra* notes 12-13 and accompanying text.

91. *See supra* notes 67-69 and accompanying text for discussion of the second part of the *Tinker* test.

92. *See supra* note 68.

93. 795 F.2d at 1378.

94. *See supra* notes 67-69 and accompanying text.

95. The Hazelwood school, however, did not oversee the student newspaper to oppress students. The school retained control to protect students from their own inexperience and immaturity. Therefore, part of the students' education included learning what articles were inappropriate and damaging in a given publication. *See supra* note 18 for governmental interest in protecting youth. *See also Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968).

96. Students will be more likely to litigate to ensure that school authorities correctly anticipated tort liability.

97. *See supra* note 77.

educators and circumvents the ability of the Hazelwood community to influence politically the educational goals of the school. Finally, the court's potential tort requirement impairs the capacity of schools to educate. The holding encourages more students to challenge the decisions of school officials. Increased litigation will detract from an atmosphere that is conducive to education, and reallocates the resources of schools to avoid and defend unnecessary lawsuits.

J.C.R.