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ABSTRACT

The Supreme Court of the United States has issued three significant rulings on the question of prior restraint by government officials of material to be published in print media. Each time it ruled that only in exceptional circumstances will prior restraint be permitted. Lower federal courst have not taken the same view regarding prior restraint in public high schools. Several have held that school officials may censor material before publication in high school student newspapers or periodicals, whether school-sponsored or not. However, one Circuit Court of Appeals has taken a strong stance in opposition to high school precensorship, holding that while punishment may be imposed after publication of material that is not otherwise protected, prior restraint is permitted on the secondary level only under highly unusual conditions. While school officials may establish reasonable rules regarding time, place, and manner of distribution of student publications, a reading of the Tinker case indicates that prior censorship may not be permissible in the high school. The conflict among the Circuit Courts of Appeals, however, seemingly can only be resolved by the Supreme Court. (Author/TO)

PRIOR RESTRAINT IN HIGH SCHOOL: DOES IT VIOLATE STUDENTS' FIRST AMENDMENT RIGHTS?

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DOES IT VIOLATE STUDENTS' FIRST AMENDMENT RIGHTS?

The popular motion picture "American Graffiti" and recent television programs echoing a similar theme serve as a reminder that high school students were once quite different than they are today. Before the Vietnam war, and prior to adolescents' deep involvement with the media, protests, ethnic consciousness, and the awareness that they too have constitutional rights, secondary school students were a relatively quiet group. But the 1950's have surely passed. During the 1960's, many high school students became aware of and involved in issues of public concern, including some events far from the high school campus. They refused to quiescently submit to what they considered unreasonable demands of parents, and particularly, school officials and teachers. Due in great part to the mass media and interchanges of information among themselves, adolescents were more knowledgeable about current affairs than were their earlier counterparts. Whether this knowledge convinced them information they received from teachers and administrators was incorrect or whether it simply made them "cocky", it was one element in a syndrome of what some consider disrespect for their elders and others consider a realization that all their legal rights were not being granted them.

As more students became concerned with public issues and were increasingly articulate about such matters, they desired to convey their feelings to their peers. While lunchroom and out-of-school conversations were valuable to this end, high school students were sufficiently media-wise to realize that putting their thoughts on paper, duplicating them, and distributing them was a far more efficient and effective method.

Thus, "underground" newspapers were born, both off campus[1] and on the school grounds.[2] While some school administrators were appalled by these and attempted to stop their distribution, usually by suspending the students who had written and were circulating them, other students began to pull the school-sponsored paper away from the bulletin-board era of discussing only on-campus issues, and then only in a positive light, toward making them newspapers concerned with matters of broad public interest. Administrators again balked.

It was inevitable then, that "claims of First Amendment protection on the one hand and the interests of school boards in maintaining an atmosphere in the public schools condusive to learning on the other"[3] would clash and the courts, which had traditionally left hands-off most school officials' decisions, would be forced to rule on the difficult question of secondary school students' freedom of expression. The result "has been a shift from a judicial attitude which vested virtually absolute control in school authorities to one concerned with the rights of students as citizens."[4]

But in one important area--prior restraint--even the courts are clashing with one another. The question of whether prior restraint is constitutionally acceptable has been at the root of four cases reaching Circuit Courts of Appeals and has been touched on in several others. The courts are in disagreement, although a majority clearly would allow prior submission providing it were accompanied by proper procedural safeguards.

First amendment scholar Thomas I. Emerson has suggested that the framers of the Bill of Rights abhored the censorship and licensing laws in England and assumed that the first amendment incorporated the common law ban on prior restraints.[5] It was thought that governments should not have the power to require material to be submitted to them and accepted before allowing distribution.

The Supreme Court in Near v. Minnesota[6] stated that generally only in exceptional circumstances would prior restraint be permitted--for expression which would incite violent or forceful overthrow of the government, and for obscence expression. Forty years after that decision, the Court again ruled against prior restraint in the Pentagon papers case, holding that the government "carries a heavy burden of showing justification for the imposition of such a restraint."[7] Only for motion pictures has the Court allowed a system of prior restraint, even then requiring safeguards against discriminatory imposition of censorship.[8]

However, high school student publications do not seem to have the protection against prior restraint granted other print media. For instance, in Eisner v. Stamford Board of Education,[9] students distributed off school grounds three issues of an underground paper, which they had written and published at their own expense. When they attempted to distribute the fourth issue on their high school campus, administrators warned that they would be suspended for violating a rule requiring prior submission of all material before dissemination.[10] The students' challenge to the policy reached the Second Circuit Court of Appeals which found it devoid of guidelines which would require a prompt administrative decision. However, the court refused to adopt the position of the District Court and rule that prior restraint would never be allowable in public high schools, ruling only that the specific regulation in question was not sufficient.

The Eisner court had several suggestions to help administrators write a valid regulation which would allow them to properly control student publications without being required to go to court each time disruption was anticipated.

The policy should prescribe a definite brief time within which an initial decision must be made, describe the kinds of disruptions which would justify censorship, and indicate the areas within the school where distribution of material would be considered appropriate. In all cases, the burden of proof would be on school officials to show their actions comported with the Tinker guidelines and the court would not consider a "bare allegation" of facts to be sufficient. The court assumed that the school board would not write a policy giving itself more power over student publications than the Tinker decision allowed, that it would not suppress printed material that "would create only an immaterial disruption," and that the prior submission rule would be invoked only when a substantial distribution of material is anticipated.

In Quarterman v. Byrd,[11] a tenth grade student was twice suspended for distributing underground newspapers in violation of a prior submission rule.[12] As in Eisner, the court held the rule invalid, but only because it did not contain criteria to be followed by school officials in determining which publications should be granted or denied permission and did not contain procedures for prompt review of such decisions. The court contended that school officials may exercise prior restraint over materials to be distributed by students during school hours on school grounds if they can reasonably forecast "substantial disruption of or material interference with school activities."[13]

In Shanley v. Northeast Independent School District,[14] the Fifth Circuit declared administrators had little control over students off school grounds and during non-school hours, which is where and when the underground paper in question was distributed. Despite also noting the mild content of the paper, the court agreed that there is "nothing unconstitutional per se in a requirement that

students submit materials to the school administration prior to distribution."[15] The court saw the purpose of prior submission as preventing disruption, not stiffling expression. Thus, given that public high schools must maintain discipline and on orderly educational process, the requirement of prior approval becomes more "simply a regulation of speech and not a prior restraint."[16] This change in terminology, however, does not alter the reality of the regulation. Additionally, the court would not limit the prior restraint rule to obscene, libelous , or inflammatory material, although it held that the burden of demonstrating reasonableness becomes "geometrically heavier" on school officials when other types of publications are involved. Finally, for such a policy to be valid, the court insisted on procedural safeguards, including specifying how students were to submit material for review, requiring a prompt decision, and allowing students to appeal adverse administrative decisions.

Decided earlier than Eisner, Riseman v. School Committee[17] apparently took the same stance. A student was prevented from distributing in school an anti-war leaflet and " A High School Bill of Rights" on the basis of a rule forbidding students and others connected with the school from being used "in any manner for advertising or promoting the interests of any community or non-school agency or organization without the approval of the School Committee."[18] Although upholding administrators' responsibility to prevent school disruption and their right to reasonably and equitably regulate the time, manner, and place of distribution, the First Circuit called the regulation vague and noted that it was undoubtedly originally meant for purposes other than controlling student-produced literature. Importantly, however, the court stated that the rule "does not reflect any effort to minimize the adverse effect of prior restraint.

Freedman v. Maryland, 389 U.S. 51 (1965)."[19] In citing the Freedman case, which allowed prior censorship of films as long as stringent procedural guidelines were applied, it seems the First Circuit would allow prior restraint in high school if rules for prompt review and an appeals procedure were part of the regulation.[20]

In Koppell v. Levine,[21] high school students asked a District Court to decide on the constitutionality of a system of prior restraints. Because the case did not involve a specific student-administration confrontation, the court would only indicate that it accepted the Eisner ruling permitting prior submission if adequate procedural guidelines were available. The court also indicated that a reasonable time period within which an initial decision concerning acceptability would vary considering the type of material involved--from a poem to a book.

Baughman v. Freienmuth,[22] involved students who received a warning letter from their principal after they distributed pamphlets on school grounds. While acknowledging that pamphleteering is a protected activity under the first amendment, and that a system of prior restraint may allow vague rules to suppress protected criticism of school regulations and officials, the Fourth Circuit ruled that prior restraint is permissible in public high schools if there are strict procedural safeguards. The court held that the specific rule in question was invalid because it did not specify what would happen if school officials made no decision at all. However, a precisely drawn regulation would be permitted, said the court, if it 1) specified what material would be forbidden so that a "reasonably intelligent" student would know what is and is not acceptable, 2) carefully defined "distribution," 3) provided for prompt approval or disapproval of submitted material, 4) specified what would happen in the event of administrative inaction, and 5) provided an appeals procedure.

In Vail v. Board of Education,[23] school officials prohibited distribution of an underground paper on the grounds that it "could substantially disrupt normal educational activities" and "might incite lawless action."[24] A District Court held this to be an unconstitutional imposition of prior restraint because of the vagueness and overbreadth of the board's reason. The court, however, said that prior restraint in public high schools would be permissible with adequate procedural guidelines if officials could reasonably forecast substantial disruption or if the material were obscene or libelous. The court emphasized that where such a forecast exists, administrators could act immediately to prevent disruption. The court gave as examples a publication which is "pornographic or advocates destruction of school property or urges 'physical violence' against teachers or fellow students."[25]

The District Court in Poxon v. Board of Education[26] was unclear as to its stance on prior restraint. The case involved students who had applied for and been denied permission to circulate an underground paper. They asked the court to rule on the constitutionality of the prior submission rule. The court said that the school officials had not presented facts which would either justify a system of prior restraint or show that methods less offensive to the first amendment were not practical alternative solutions. The implication is that given those facts, the court might uphold prior restraint for high school students.

In the face of these decisions, however, the Seventh Circuit clearly stated that prior restraint is no more permissible in public high schools than it is for citizens in general. In Fujishima v. Board of Education,[27] two students were suspended for having distributed copies of "The Cosmic Frog," an underground paper they had published. A third student was suspended once for circulating

an anti-war petition and a second time for distributing anti-war leaflets while students were outside for a fire drill. All three sued to test the validity of the Chicago Board of Education's prior submission rule.[28] Reaching the Court of Appeals, the school board argued that the rule was constitutional since it did not require approval of content, but only of the act of distribution. The court disagreed, holding that the content would indeed be a consideration, thus making the rule invalid as an unconstitutional prior restraint in violation of the first amendment. The court specifically contended that the Eisner decision was bad law and combined the approaches in the Tinker and Near decisions in making its ruling. The school board could make reasonable regulations regarding time, place, and manner of distribution, said the court, and students could be punished after distribution for violations of those rules or for other abuses of their first amendment freedoms (distributing obscene or libelous publications, for instance), but regulation of student publications may not take the form of prior restraint.

Which approach is correct? Does Tinker allow prior restraint in high school despite the Supreme Court's rulings in Near and the Pentagon papers cases? Do the special circumstances of public high schools---the need for order and the proper functioning of the educational system--permit administrators to determine what printed material may be disseminated solely on the basis of that material's contents and the school situation as seen by those administrators?

An article in the Yale Law Journal[29] effectively disputes the rulings that prior restraint in high schools is constitutionally permitted. Reading the Tinker test of "material and substantial disruption" as similar in kind (though not in degree, since it allows discipline at a lower level of disturbance) to the "clear and present danger" and "fighting words" tests, the author contends

that not even the latter tests have been interpreted by the courts as allowing prior restraints and, therefore, neither should the Tinker test. In the Tinker decision, the Court's stress on facts seems to be the element distinguishing a valid prediction of disturbance from the "undifferentiated fear or apprehension" of disruption which the Court would not allow as a basis for discipline. Nor can the special circumstances of a public school be considered sufficient to allow prior restraint. Schools are not jails, as the Tinker Court points out, but are places to train students to function in a democracy. The Yale author does not deny that reasonable regulation of time, place, and manner of distribution is permissible, and sees more stringent regulation of these elements in a tense school atmosphere, but contends that such rules must be for all printed material and imposed without first reviewing content. While outside the school context, courts have allowed prior restraint of obscene material, no high school case has thus far involved provably obscene matter and the author of the Yale Law Journal article does not consider the possibility of obscenity to be an adequate rationale for permitting a prior restraint system.

It would seem that the Eisner court used a different logic, holding that since prior distribution would be imposed only if school officials foresaw a danger of disruption, the Tinker guideline would be met. The Yale author does not see the Tinker test as allowing such prior restraint any more than previous first amendment tests allow it, except in extreme circumstances. The Fujishima court agreed with this, though emphasizing that discipline after publication was permissible if disruption could be proved or if the material was otherwise not constitutionally protected.

The weight of court decisions is heavily on the side of allowing narrowly drawn systems of prior restraint for public high school students, provided that procedural guidelines are included. However, the Seventh Circuit has taken a strong stand in opposition. Final resultion must come from the Supreme Court.

NOTE: The "Tinker rule," as stated in Tinker v. Des Moines Independent School District, 393 U.S. 503, 509 (1969), and originally formulated in Burnside v. Byars, 393 F.2d 744, 749 (5th Cir. 1966), is as follows: "(School administrators) cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights . . . (does) not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

NOTES

[1] See M. L. Johnson, The New Journalism 1971; E. L. Dennis and W. L. Rivers, Other Voices: The New Journalism in America 1974.

[2] The term "underground newspapers" refers to periodicals "written and published by students at their own expense and off school premises," and not officially sanctioned by school authorities. S. Nahmod, "Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools," 51 Chicago Bar Record 144, 152 (1969). See also R. Trager, "The Legal Status of Underground Newspapers in Public Secondary Schools," 20 Kansas Law Review 239 (1972).

[3] Sullivan v. Houston Independent School District, 475 F.2dd 1071, 1072 (5th Cir. 1973), cert. denied, 94 S.Ct. 461 (1973).

[4] Nahmod, supra, at 145

[5] See T. I. Emerson, "The Doctrine of Prior Restraints," 20 Law and Contemporary Problems 648, 651-652 (1955).

[6] 283 U.S. 697, 716 (1931).

[7] New York Times Co. v. United States, 403 U.S. 713, 714 (1971). See also Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

[8] Freedman v. Maryland, 380 U.S. 51 (1965).

[9] 440 F.2d 803 (2d Cir. 1971).

[10] The rule stated: "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." 314 F.Supp. 832, 833 (D. Conn. 1970). Guidelines for such approval were states as: "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." Id. at 834.

[11] 453 F.2d 54 (4th Cir. 1971).

[12] The rule stated: "Each pupil is specifically prohibited from distributing, while under school jurisdiction, any advertisements, pamphlets, printed material, announcements or other paraphernalia without the express permission of the principal of the school." 453 F.2d at 55.

[13] Id at 58.

[14] 462 F.2d 960 (5th Cir. 1972). The rule in Shanley stated: " . . . (A)ny attempt to avoid the school's established procedure for administrative approval of activities such as the . . . distribution of petitions or printed documents of any kind, sort, or type without the specific approval of the principal shall be cause for suspension." Id. at 965, n.1.

[15] Id. at 989.

[16] Id.

[17] 439 F.2d 148 (1st Cir. 1971).

[18] Id.

[19] Id. at 149-150.

[20] "Constitutional Law--Freedom of Expression--First Amendment Prohibits Prior Restraint of Distribution of Underground Newspaper," 6 Indiana Law Review 583, 587 (1973).

[21] 347 F. Supp. 456 (E.D.N.Y. 1972).

[22] 478 F.2d 1345 (4th Cir. 1973).

[23] 354 F. Supp. 592 (D.N.H. 1973).

[24] Id. at 599.

[25] Id. at 600.

[26] 341 F. Supp. 256 (E.D. Cal. 1971).

[27] 460 F.2d . 1355 (7th Cir. 1972).

[28] The rule stated: "No person shall be permitted . . . to distribute on the school premises any books, tracts, or other publications, . . . unless the same shall have been approved by the General Superintendent of Schools," Id. at 1356.

[29] "Note, Prior Restraints in Public High Schools," 82 Yale Law Journal 1325 (1973).