Buffalo Law Review

Volume 31 | Number 2 Article 7

4-1-1982

The Constitutional Rights of Students at Center Stage: Freedom of Speech in School-Sponsored Plays

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THE CONSTITUTIONAL RIGHTS OF STUDENTS AT CENTER STAGE: FREEDOM OF SPEECH IN SCHOOL-SPONSORED PLAYS

INTRODUCTION

In *Seyfried v. Walton*,[1] the United States Court of Appeals for the Third Circuit affirmed a decision of the District Court of Delaware, which held that the first amendment rights of students involved in a high school production of the Broadway musical *Pippin* were not violated when the school superintendent cancelled the play in mid-rehearsal. The most significant aspect of the two opinions is the use of a broad "course curriculum" theory to avoid reliance on the substantial precedent available in library book removal and student press cases.[2] Content regulation of a school-sponsored play could potentially be seen as both an unwarranted deviation from current students' rights case law and as an omen of further judicial encroachment on the rights of this group in the years to come. Indeed, in the months following the district court's decision, controversies similar to that in *Seyfried* emerged in several communities, with such varied works as *Inherit the Wind*, *One Flew Over the Cuckoo's Nest*, *Godspell*, and *Grease* falling prey to the discretion of school officials.[3]

The *Seyfried* case arose in the setting of a Delaware high

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1. 512 F. Supp. 235 (D. Del. 1981), *aff'd*, 668 F.2d 214 (3d Cir. 1982).

2. The significance of *Seyfried* has been recognized in the entertainment world. Variety, the trade newspaper, reported in a front page article that "[*Seyfried*] may establish a precedent, because while District Court records list many student freedom-of-speech cases which concerned the choice of school books and curriculum, to date no reported decision has been found in which the choice of a play was at issue." Variety, Apr. 8, 1981, at 1, col. 1. A follow-up story on January 27, 1982 included the prediction that "[f]or now, the 'Pippin' case will serve as the benchmark for what is expected to be an increasing number of play-selection controversies." Variety, Jan. 27, 1982, at 94, col. 5.

3. In its coverage of the Third Circuit ruling in *Seyfried*, Variety noted that "[t]he issue of whether a public school play can be cancelled without infringing on the First Amendment rights of students, teachers and the community has erupted in several communities even as Federal courts ruled on the first such case ever to come before them." Variety, Jan. 27, 1982, at 87, col. 4. The article goes on to describe cancellations of an eighth-grade production of *Inherit the Wind* in Maryland, and high school productions of *One Flew Over the Cuckoo's Nest*, *Godspell*, and *Grease*, in Maryland, Delaware and Iowa, respectively. Lawsuits are contemplated in the two Maryland situations. *See infra* notes 170-71.

school which, each year, sponsored a theatrical production. The school district had no set policy regarding selection of the play to be performed, and had always left the choice to the director of theater. For the spring 1981 production, the director selected *Pippin*, feeling that it could be edited and staged in a way that would make it appropriate for presentation on a high school stage.[4] Before modifications had been made, a parent read the script and complained to the school board president that portions of the work mocked God and prayer.[5] The president relayed this complaint to the district superintendent, who, after reading the unmodified script and conferring with two staff members who had seen other productions of *Pippin*, decided to cancel the school production. The superintendent asserted that he objected, not to the play's references to religion, but to its sexual suggestiveness.[6] At a meeting where the school board heard the views of interested parents, four spoke in favor of presenting *Pippin*, one against, and the board declined to intervene in the matter. Several students and their parents then filed suit against the superintendent, members of the board, and the school district itself, alleging abridgement of the plaintiffs' first amendment rights and seeking injunctive, declaratory and monetary relief.[7]

In order to gain proper perspective on the issue at hand in *Seyfried*, reference must be made to federal court decisions both within and outside the school context. Part I of this Comment examines "adult" first amendment and prior restraint law as applied to theatrical productions. Part II reviews the concept of "academic

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4. The director thought that *Pippin*, as originally and ordinarily produced, would not be appropriate for a high school production. *Seyfried*, 512 F. Supp. at 236.

5. When the superintendent reviewed the play, "he did not find that it mocked God or prayer; but rather that it mocked people who were 'hypocritical' about their religion." *Id.*

6. Specifically, two scenes bothered the superintendent. The first was scene four where Pippin's grandmother sings of the joys of the flesh (in the most innocuous manner possible-*ed.*). The song is followed by a dance sequence where, according to the stage directions, all the boys and girls became involved and begin to show Pippin every possible form of sexual activity. The director's version retained scene four, but toned down the dance sequence. Her annotated script indicated that the dancers will "entice" Pippin, but in a "tasteful" manner. *See id.* at 237.

The second was scene seven where, in the director's version, Pippin and the widow Catherine embrace and then walk offstage holding hands. The superintendent's objection was that "in the context of the remainder of the play, it is implicit that they have experienced physical intimacy." *Id.*

7. *Id.* at 235-36.

freedom," and the application of this concept to cases addressing the removal of library books and restraints on student press. Finally, Part III discusses the approach actually followed by the courts in *Seyfried*; the exercise of deference to school board judgment in matters purportedly involving course curriculum. The principal conclusion arising from this analysis is that the *Seyfried* courts, by applying the curriculum rationale in a conclusory and shortsighted fashion, improperly skirted important freedom of speech considerations.[8]

I. Adult Law Precedent—Seyfried Considered Outside the School Context

First amendment rights within the school context do not stand in total isolation from first amendment rights in general. On the contrary, numerous courts adjudicating disputes arising in an academic environment have directed their attention to constitutional principles developed in non-educational situations.[9] Therefore, it is appropriate here to initially set forth the status of adult law regarding restraints placed on theatrical productions.

A. *The First Amendment*

The United States Supreme Court has recently reiterated the well-established constitutional tenet that "entertainment as well as political and ideological speech" is protected by the first amendment.[10] Thus, the guarantee of free speech extends to such diverse art forms as motion pictures,[11] music,[12] and sculpture.[13] When the government imposes a restraint upon protected artistic expression, the regulation "may not be affected by sympathy or hostility for the point of view being expressed by the communicator."[14]

Nearly three decades ago, Justice Douglas, in a concurring

8. This Comment does not address the issue of the presentation of religious pageants and the like in public schools. For a full discussion of that issue, *see* Jackson, *Christmas Carols in School Assemblies May Be Constitutional*, 31 Mercer L. Rev. 627 (1980); Swanson, *Accommodating Religion in the Public Schools*, 59 Neb. L. Rev. 425 (1980).

9. *See infra* note 175.

10. Schad v. Borough of Mount Ephraim, 452 U.S. 97 (1981).

11. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

12. Goldstein v. Town of Nantucket, 477 F. Supp. 606 (D. Mass. 1979).

13. Sefick v. City of Chicago, 485 F. Supp. 644 (N.D. Ill. 1979).

14. Young v. American Mini Theatres, Inc., 427 U.S. 50, 67, *reh'g denied*, 429 U.S. 873 (1976).

opinion, declared that every writer, actor or producer in the nation, regardless of his medium of expression, "should be freed from the censor."[15] As to live theater, this notion achieved full recognition in the 1970's with a series of cases concerning the denial of the use of municipal auditorium facilities to the promoters of the rock musical *Hair*.[16] The series culminated in the Supreme Court's decision in *Southeastern Promotions, Ltd. v. Conrad*,[17] the chief adult law precedent relied upon by the plaintiffs in *Seyfried*. Implicit in all of the *Hair* cases is the concept that a musical production is entitled to first amendment protection.[18] The rationale behind this concept is clear—"live theatrical productions . . . are media and organs for the expression of public opinion and the propagation of ideas and critical comments."[19]

It has been suggested that the alleged "non-speech" elements of plays—for example, in *Hair*, the appearance of nude actors and the use of an American flag to wrap around an actor—are not protected by the first amendment.[20] The basis for this allegation is the warning extended by the Supreme Court in *United States v. O'Brien*[21] that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on first amendment freedoms."[22] Courts have refused to apply this analysis to theatrical productions, holding instead that a musical play must be treated as "a unitary form of constitutionally protected expression."[23]

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15. Superior Films, Inc. v. Department of Educ., 346 U.S. 587, 589 (1954). *See also* Schact v. United States, 398 U.S. 58 (1970). *Schact* held unconstitutional a statute which allowed an actor to wear a military uniform only if "the portrayal does not tend to discredit that armed force." *Id.* at 63. The Court noted, "[a]n actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance." *Id.* at 69.

16. *See, e.g.*, Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972); Southeastern Promotions, Ltd. v. City of Mobile, 457 F.2d 340 (5th Cir. 1972); Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971); Southeastern Promotions, Ltd. v. City of Charlotte, 333 F. Supp. 345 (W.D.N.C. 1971).

17. 420 U.S. 546 (1975).

18. *See* Southeastern Promotions, Ltd. v. City of Mobile, 457 F.2d at 341.

19. Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. at 638.

20. *Id.* The City of Atlanta set forth this argument but it failed to persuade the Georgia District Court.

21. 391 U.S. 367 (1968).

22. *Id.* at 376.

23. Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. at 639.

Although the right to freedom of speech clearly encompasses stage presentations, the first amendment is not without limitations; reasonable regulations as to the time, place and manner of speech are permissible.[24] In addition, libel,[25] obscenity,[26] incitement,[27] and expression directed at a "captive audience"[28] are unprotected. Of these four exceptions, obscenity stands out as the charge most likely to be levelled against a theatrical production.[29] In *Miller v. California*,[30] the Supreme Court declared that material is obscene when it appeals to prurient interests, depicts sexual conduct in a patently offensive manner, and lacks serious literary, artistic, political or scientific value.[31] This test creates a formidable barrier to finding that any given stage play is obscene, and, indeed, a survey of post-*Miller* federal case law reveals no instance where a court so branded a play.[32] In *Conrad* the majority refused to even

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24. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

25. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

26. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

27. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

28. *E.g.*, Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 735 (E.D. Va. 1977) (quoting Brandeis, J., in Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)) (communication constantly before observers on the streets and in street cars is seen without their choice or volition).

29. The rigid proof requirements in libel cases, particularly those involving public officials or public figures, render it extremely difficult to establish the libelous nature of a play. Likewise, while Diaghliev's production of "The Rites of Spring" may have sparked riots in early twentieth century Russia, it is hardly likely that a theatrical presentation could incite violent activity in the more sedate atmosphere of late twentieth century America. The captive audience exception is, of course, inapplicable to a play, for which people knowingly purchase tickets and attend voluntarily.

30. 413 U.S. 15 (1973).

31. The *Miller* obscenity test fully stated is:

> (a) whether 'the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interests . . .;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
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> (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. at 24 (citations omitted).

32. Even where vehement charges of obscenity have been levelled against particular films, the strong judicial bias against prior restraint remains. Thus, in United States v. Tupler, 564 F.2d 1294, 1297 (1977), the Ninth Circuit stated, "First Amendment protection of allegedly obscene material includes the requirement that no seizure warrant be issued without a procedure 'designed to focus searchingly upon the question of obscenity.' " For a recent Supreme Court opinion indicating the impropriety of prior restraint of allegedly obscene films, see Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980).

address the obscenity issue.[33]

B. *Prior Restraint*

The Supreme Court in *Conrad* not only recognized the attachment of first amendment rights to participants in theatrical productions, but took a significant further step and labelled the defendants' rejection of the plaintiffs' application to perform *Hair* a "prior restraint."[34] As the Court noted, the perils of allowing public officials to deny use of a forum in advance of actual expressions are particularly frightening in the context of a play.[35] Until the play is performed, these officials cannot possibly know what the method of presentation will be, let alone judge the propriety thereof. The nonverbal element in drama—precisely what distinguishes this form of art from literature[36]—renders it difficult to predict the nature and tone of the production, and therefore dangerous to base a restraint upon such prediction.

The theoretical underpinnings of the law of prior restraint may be found in the strong American aversion to censorship.[37] While the phrase may not serve as a "talismanic test,"[38] automati-

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33. We need not decide whether the standard of obscenity applied by respondents or the court below was sufficiently precise or substantially correct, or whether the production is in fact obscene. . . . The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances.

420 U.S. at 562 (citations omitted).

34. *Id.* at 552. According to the facts relied on by the Court, members of the Chattanooga municipal board charged with managing a city auditorium and a city-leased theater rejected a promoter's application to perform *Hair* on the basis of outside reports from which it was concluded that the production would not be in "the best interest of the community." None of the board members had seen the play or read the script, but they understood that the work involved nudity and obscenity on the stage. *Id.* at 548.

35. "The perils of prior restraint are well-illustrated by this case, where neither the Board nor the lower courts could have known precisely the extent of nudity or simulated sex in the musical, or even that either would appear, before the play was actually performed." *Id.* at 561.

36. Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. at 639.

37. [A] theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 559 (emphasis in original).

38. Times Film Corp. v. City of Chicago, 365 U.S. 43, 49 (1961).

cally signalling a first amendment violation,[39] courts acknowledge that "[a]ny system of prior restraints comes . . . bearing a heavy presumption against its constitutional validity."[40] The restraint cannot be upheld if there are reasonable alternatives available which entail less infringement on first amendment freedoms.[41] Moreover, a system of prior restraints will be struck down unless "it takes place under procedural safeguards designed to obviate the dangers of a censorship system."[42]

This procedural requirement emerged as the central concern in *Conrad*. There, the Supreme Court announced that a system of prior restraints is permissible only where it shifts the burden of instituting judicial proceedings and the burden of proof to the censor, specifies a brief period for which the restraint may be imposed, and assures a final judicial determination.[43] *Conrad* strongly implied that a system incorporating "narrow, objective and definite standards,"[44] along with the appropriate procedural safeguards, might justify prior restraint of a dramatic production. However, the dearth of prior restraint cases in the theatrical context subsequent to *Conrad* suggests that public officials have, in recent years, carefully avoided allowing their feelings about a play's content to enter into the decision to deny use of municipal auditorium facilities.

C. *Application of Adult Law to Seyfried*

There can be little doubt that if *Seyfried* had been decided under adult first amendment and prior restraint law, the defen-

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39. The Court has not held that prior restraints are unconstitutional per se. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1964). *But cf.* Freedman v. Maryland, 380 U.S. 51, 61-62 (1964) (Douglas, J., concurring in the result) (no censorship—no matter how speedy or prolonged it may be—is acceptable).

40. *Bantam Books*, 372 U.S. at 70.

41. *See, e.g.*, Rosen v. Port of Portland, 641 F.2d 1243, 1250 (9th Cir. 1981) (any prior restraint should be held unconstitutional unless no other choice exists).

42. *Freedman*, 380 U.S. at 58.

43. [A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, 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. *Third*, a prompt final judicial determination must be assured.

420 U.S. at 560.

44. Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d at 1020.

dants would have been enjoined from halting production of the play. The superintendent might have met the demands of this body of law had he acted under the authority of a written policy which shifted the burden of initiating judicial proceedings and the burden of proof to the school officials, stipulated a strict time limit for the duration of the restraint, and guaranteed a prompt final judicial determination. Instead, he did not act pursuant to a policy, written or otherwise, and exercised the kind of "unfettered discretion to regulate . . . the bill of fare"[45] which the courts found repugnant in the *Southeastern Promotions, Ltd.* line of cases.

II. Student Law Precedent—Seyfried Considered Within the School Context

While it is permissible for a court to consider adult law precedent in deciding a case involving the constitutional rights of students, such precedent certainly cannot serve as the sole basis for any decision reached. Public education systems have traditionally received distinct treatment in American law.[46] Consequently, any case arising in the school context must be examined in light of prior holdings in this specialized area of the law. This section evaluates the results of students' rights litigation and applies these results to the issue in *Seyfried.*

A. *The First Amendment and Academic Freedom*

Although the applicability of the first amendment to secondary school students had been recognized as early as 1943,[47] the concept of "academic freedom" did not fully surface until the late 1960's. In *Keyishian v. Board of Regents,*[48] Justice Brennan introduced the notion of the classroom as a "marketplace of ideas."[49]

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45. *Id.*

46. In fact, the notion of students' rights did not become a widely acknowledged element of school law until the "academic freedom" line of cases in the mid-1960's. Thus, in the 1955 edition of his book, *The Courts and the Public Schools,* Newton Edwards omitted any overt reference to the existence of such rights. In the 1971 edition of this book, however, there is an entire section on students' rights. N. Edwards, The Courts and the Public Schools 640-64 (3d ed. 1971).

47. *See* West Virginia State Bd. of Educ. v. Burnette, 319 U.S. 624 (1943).

48. 385 U.S. 589 (1966).

49. *Id.* at 603. Justice Brennan continued: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers 'truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Id.* (ci-

Three years later, in the watershed decision of *Tinker v. Des Moines Independent Community School District*,[50] the Court decisively furthered that notion. *Tinker* firmly established that the first amendment rights of secondary school students could not be abridged without a showing of constitutionally valid reasons for regulating their speech.[51]

The precise contours of the "academic freedom" fostered by *Keyishian* and *Tinker* have proven less than clear.[52] In *Tinker*, the Court recognized the need for upholding the comprehensive authority of public school officials to prescribe and control conduct in the schools, so long as such authority is exercised consistently with fundamental constitutional safeguards.[53] The oft-repeated standard for determining the necessity of judicial intervention has been defined as whether "basic constitutional values are sharply implicated."[54] One circuit has interpreted these principles to mean

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tation omitted). It should be noted that *Keyishian* arose in the context of a state university, not a public high school. The case, however, has served as a major reference point in many cases concerning high school academic freedom. *See* Pico v. Board of Educ., Island Trees Union Free School Dist., No. 26, 638 F.2d 404, 416-17 (2d Cir. 1980), *aff'd*, 102 S.Ct. 2799 (1982); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1306 (7th Cir. 1980).

50. 393 U.S. 503 (1969).

51. *Id.* at 506. The *Tinker* opinion initially established what has become a well-known principle in students' rights law, *i.e.*, that students do not "shed their constitutional rights of freedom of speech and expression at the schoolhouse gate." *Id.* The Court later elaborated that "[s]chool officials do not possess absolute authority over their students. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511.

52. In Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980), the Court of Appeals for the Seventh Circuit stated: "Less clear are the precise contours of this constitutionally protected academic freedom, and particularly its appropriate role when the concern is not the rarified atmosphere of the college or university, but rather the heartier environment of the secondary school." *Id.* at 1304. *Zykan* involved removal of certain books from English courses and the library of a high school, elimination of certain courses from the curriculum, and failure to rehire a number of teachers. As to the claimed unconstitutionality of removing the book *Go Ask Alice* from the school library, as well as the other claims, the court found no first amendment violation, noting "[t]he amended complaint nowhere suggests that in taking these actions defendants have been guided by an interest in imposing some religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally." *Id.* at 1306. However, plaintiffs were allowed to amend their complaint to allege a legally cognizable claim.

53. 393 U.S. at 507.

54. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *But see* Appellants' Opening Brief at 31, Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981), *aff'd*, 668 F.2d 414 (3d Cir. 1982) [hereinafter cited as Appellants' Opening Brief] (quoting Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 570 (1971)) (challenging the *Epperson* viewpoint). Both the appellants and Professor Buss believe:

that a school board "will be permitted to make even ill-advised and imprudent decisions without the risk of judicial interference."[55]

The two most frequently cited bases for deference towards the judgment of local school officials are the students' lack of full intellectual development,[56] and the "indoctrination theory," which emphasizes the broad discretion given school officials "in shaping young minds to accomplish the goals of socialization and academic achievement."[57] In view of the continued viability of these theories in many jurisdictions,[58] it is not surprising to find general endorsement of *Tinker*'s admonition that the first amendment must be "applied in the light of the special characteristics of the school environment."[59] However, courts and commentators have offered varying opinions on the extent to which adult and student first

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> Although . . . arguments for judicial nonintervention are understandable and valid up to a point, they do not justify the exaggerated deference that often results. Fundamental educational policy for public schools in the United States is uniformly made by *lay* boards of education, entitled to no more judicial respect—on grounds of expertise—than any other subordinate political body.

Appellants' Opening Brief, *supra*, at 31; Buss, *supra*, at 570-71.

55. *Zykan*, 631 F.2d at 1306.

56. [T]he student's right to and need for such (academic) freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices.

Id. at 1304.

57. Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know*, 57 U. DET. J. URB. L. 523, 529 (1980) [hereinafter cited as *School Library Censorship*]. The district court in *Seyfried* stated that "[a] principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community." 512 F. Supp. at 238 (quoting James v. Board of Educ., 461 F.2d 566, 573 (2d Cir. 1972)).

58. *See, e.g.*, Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980). In *Zykan*, the Court of Appeals for the Seventh Circuit stated: "[T]he importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community." *Id.* at 1301.

59. 393 U.S. at 506. *See* Baughmann v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973). In *Baughmann*, the Court of Appeals for the Fourth Circuit declared that "[s]econdary school children are within the protection of the first amendment, although their rights are not coextensive with those of adults." *Id.* at 1351. *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 515 (Stewart, J., concurring).

amendment rights should diverge.[60]

In examining students' rights cases, one must keep in mind that the exceptions to freedom of speech protection mentioned in Part I of this Comment are also operative within the school context. In *Seyfried*, neither the defendants nor the reviewing courts forcefully contended that *Pippin* fell within any of these exceptions.[61] However, it is not inconceivable that a particular play might be found to contain "that degree of sexual explicitness that renders material inappropriate for availability in a school attended by young children,"[62] the lessened standard of obscenity utilized by one circuit in high school situations.[63] For example, one would not expect the first amendment to protect the right of high school thespians to perform *Oh, Calcutta!* or, ironically, even *Hair*, as the school-sponsored play.[64]

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60. The Seventh Circuit, in student press cases such as Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972), suggested that student first amendment rights are nearly coextensive with those of adults. *Compare* the Second Circuit's position in this realm (*see* Trachtman v. Anker, 563 F.2d 512 (1977) where student first amendment rights are severely circumscribed in comparison with those of adults. *Compare also* the liberal position of Stern, *Challenging Ideological Exclusion of Curriculum*, 14 HARV. C.R.-C.L. L. REV. 485 (1980) *with* the far more conservative stance of Orleans, *What Johnny Can't Read: "First Amendment Rights" in the Classroom*, 10 J. L. & EDUC. 1 (1981).

61. Ambiguity surrounded the superintendent's charges against the play:

> At trial, it was asserted by the . . . Superintendent that the excised version of "Pippin" to be presented offended the District's Student Rights Policy regarding "obscene, vulgar, and inflammatory statements." The superintendent clarified this assertion by subsequently acknowledging that the material to be presented was probably not inflammatory. Thus, the remaining implication is that even the excised version of "Pippin" to be presented in this instance was "obscene" or "vulgar."

Appellants' Opening Brief, *supra* note 54, at 21. Whatever the motivations of the superintendent were when he cancelled the production, obscenity or incitement were not raised as a defense of the school officials' actions at trial.

62. Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438, 441 n.3 (2d Cir. 1980).

63. Meanwhile, one commentator, combining the holdings of *Miller* and Ginsberg v. New York, 340 U.S. 629 (1968), proposed a more rigid test as to whether material available to minors is obscene. This test provides that material is obscene if it:

> 1) appeals to the prurient interest of the average minor, applying contemporary community standards;
>
> 2) depicts or describes in a patently offensive way, sexual conduct defined by the applicable local law; and
>
> 3) lacks serious literary, artistic, political, or scientific value for minors.

Comment, *Obscenity, Profanity and the High School Press*, 15 WILLIAMETTE L.J. 507, 515 (1979).

64. "Whether or not a production [of *Hair*] as described by the District Court is ob-

The specific student activity in question in the seminal *Tinker* case was the wearing of black armbands to protest the Vietnam War.[65] The spirit of the decision, though, has hovered over all of the student rights conflicts which have subsequently reached the courts.[66] Two of the most significant and frequently-litigated issues in this area are whether local school officials may constitutionally remove a controversial book from school libraries,[67] or impose prior restraints upon student publications.

The district court in *Seyfried* stated that "the role of a school sponsored theatrical production in the life of the school is quite different from that of the library or of non-program related expressions of student opinion [in which category it apparently included student publications]."[68] By so declaring, the court apparently felt justified in ignoring important developments in other circuits regarding the First Amendment rights of students. The remainder of this Comment will summarize these developments, and will suggest that it was error to dismiss them so readily.

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scene and may be forbidden to adult audiences, it is apparent to me that the state of Tennessee could constitutionally forbid exhibition of the musical to children. . . ." *Conrad*, 420 U.S. at 69 (White, J., dissenting).

In 1980, a high school speech and drama teacher in Maryland proposed to put on *Hair* as the annual school production, but administrators refused to approve the play. The teacher then submitted *One Flew Over the Cuckoo's Nest* as an alternate choice, but that work was also rejected. *See infra* note 163.

65. 393 U.S. at 503. In Reply Brief for Plaintiffs-Appellants at 3-4, Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981), *aff'd*, 668 F.2d 414 (3d Cir. 1982) [hereinafter cited as Reply Brief], the plaintiffs-appellants in *Seyfried* expended some effort in developing an analogy between the student protest and *Pippin*:

> The facts of the Tinker decision are particularly poignant here because the destruction and futility of war is one of the many aspects of life that is satirized in the production of 'Pippin'. . . .[T]he satirizing of certain viewpoints in the context of a dramatic production is really a much gentler form of protest than the wearing of black armbands as occurred in the Tinker confrontation.

Id.

66. Both *Seyfried* courts cited *Tinker*. *See* 668 F.2d at 216; 512 F. Supp. at 237.

67. Two recent articles indicate that the removal of books from school libraries is rising. *See* N.Y. Times, Oct. 27, 1981, at C5, col. 1 (newly resurgent conservative groups have greatly increased the attacks on books in public schools in recent years); Press, *Can Schools Ban Books?*, NEWSWEEK, Mar. 15, 1982, at 82 (about 1,000 incidents each year involving putative censors in schools and public libraries).

68. 512 F. Supp. at 238. The court of appeals accepted this finding without question: "We believe that the district court properly distinguished student newspapers and other 'non-program related expressions of student opinion' from school-sponsored theatrical productions." 668 F.2d at 216.

B. *Library Book Removal Cases*

1. *Pre-Seyfried cases.* The Sixth Circuit, in *Minarcini v. Strongville City School District*,[69] relied on the fledgling first amendment principle of an individual's right to know and receive information,[70] and held the banning of three books by school authorities to be violative of the freedom of speech clause.[71] The court stressed that once a school board has created a privilege for students by providing a library and filling its shelves with certain books, the board cannot condition such privilege on grounds "related solely to the social or political tastes of . . . [its] members."[72] Several courts have adhered to this proposition,[73] while others have explicitly rejected it.[74]

It is well-settled that "bare allegations that books have been removed from . . . secondary school libraries by responsible officials do not make out a *prima facie* First Amendment violation."[75] However, courts in cases decided prior to *Seyfried* failed to enunciate precise standards as to the elements of a violation. This uncertain state of the law was nowhere more apparent than in the Second Circuit, which, in 1972, decided the first school library case, *President's Council, District 25 v. Community School Board No.*

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69. 541 F.2d 577 (6th Cir. 1976).

70. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748 (1976). In *Virginia State Bd. of Pharmacy*, the Court explained, "[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source, and to its recipients both." *Id.* at 756. *See also School Library Censorship, supra* note 54, at 535-37 for a fuller discussion of the law of this area.

71. In *Minarcini*, the school board had refused to approve Heller's *Catch*-22 and Vonnegut's *God Bless You, Mr. Rosewater* as texts or library books, ordered Vonnegut's *Cat's Cradle* and *Catch*-22 removed from the school library, and issued resolutions which served to prohibit teacher and student discussion of these books in class or their use as supplemental reading. *See* 541 F.2d at 579.

72. *Id.* at 582.

73. *See* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Comm. of Chelsea v. School Comm. of Chelsea, 454 F. Supp. 703 (D. Mass. 1978).

74. *See* Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980); President's Council Dist. 25 v. Community School Bd., 457 F.2d 289 (2d Cir. 1972). *See also Zykan*, 631 F.2d at 1308.

75. Pico v. Board. of Educ., Island Trees Union Free School Dist., No. 26, 638 F.2d 404, 414 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982). A prima facie case is not established, "even if the books have a controversial reputation so that one available inference is that they were removed to prohibit the expression of ideas they contain." *Id.* This latter proposition is currently not clearly settled.

25.[76] This decision firmly repudiated the argument that the first amendment rights of junior high school students were infringed when the school board revoked free library access to a controversial book.[77] Subsequent cases in the Second Circuit involving similar facts produced erratic results.[78]

Addressing the *Minarcini* and *President's Council* holdings, one commentator suggested that the emerging test in determining the propriety of removing books from school libraries was to examine the motivations of the officials involved.[79] This prediction appears to be borne out by later cases. In *Right to Read Defense Committee of Chelsea v. Community School Board*,[80] the Massa-

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76. 457 F.2d 289 (2d Cir.) *cert. denied*, 409 U.S. 998 (1972).

77. The defendant school board in this action had voted to remove from all junior high school libraries in the District all copies of *Down These Mean Streets* by Piri Thomas, the same book at issue in the late *Pico* case. After the book was initially removed, the board passed a resolution permitting the book to be kept at those libraries, but making it available only on a direct loan basis to the parents of children attending these schools. Several students, parents, teachers and others, finding even this lesser restraint objectionable, filed suit for violation of the first amendment. The court, emphasizing the concept of judicial deference towards school board decisions, concluded: "After a careful review of the record before us and the precedents we find no impingement upon any basic constitutional values." *Id.* at 291.

78. *Compare* Pico v. Board. of Educ., Island Trees Union Free School Dist., No. 26, 638 F.2d 404 (2d Cir. 1980) (removal of school library books offended Constitution) *with* Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980) (a less complicated and drawn-out removal scheme passed constitutional challenge).

In *Bicknell*, the Second Circuit further explained that the complaint and supporting affidavits, unlike those in *Pico*, failed to present a triable issue "as to whether the book removal had created a sufficient risk of suppressing ideas within the community to constitute a First Amendment violation." 638 F.2d at 440.

79. In Note, *First Amendment-Free Speech: Right to Know—Limit of School Board's Discretion in Curricular Choice—Public School Library as Marketplace of Ideas*, 27 CASE W. RES. L. REV. 1034 (1977), the commentator suggests:

> In *President's Council*, unlike *Minarcini*, where it was clear that the board was motivated by personal value judgments, the board's motivation in removing the books was unclear . . . . Assuming courts reconcile the Sixth and Second Circuit opinions based upon factual difference, then it is likely that in future cases dealing with removal of books from a public school library the school board's motivation will be the essential issue. This will require a case-by-case factual analysis.

Id. at 1053-54.

80. 454 F. Supp. 703 (D. Mass. 1978). The defendant school board removed an anthology of writings by adolescents from a high school library on the grounds that the language and theme of a poem in the anthology might have a damaging impact on the students. The district court held that this action did not serve a substantial governmental interest and infringed on the first amendment rights of students and teachers. In support of its decision, the court stressed evidence that the anthology was relevant to a number of courses taught at

chusetts District Court announced that the constitutionality of book removal may hinge on "the reasons underlying the actions of school officials."[81] The Second Circuit relied on similar reasoning in *Pico v. Board of Education, Island Trees Union Free School District*, where it found that first amendment values were implicated when several books were taken and banned from the shelves of a senior high school library in an "erratic, arbitrary, and free-wheeling manner."[82] There, the court indicated that the deciding factor was the strong inference supplied by the facts of the case that political views and personal taste were being dictated not for the welfare of the children, but for the purpose of establishing those views as correct and orthodox.[83] The Seventh Circuit has expressed analogous concerns, warning that a school administrator may not "remove a book from the library as part of a purge of all material offensive to a single, exclusive perception of the way of the world."[84]

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the school, and that the implicated school officials failed to contend that the book was obscene, improperly selected, or a cause of any space problem.

81. *Id.* at 712. In making this determination, the Massachusetts District Court relied on the Supreme Court's reasoning in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), which involved an untenured teacher's claim that his contract was not renewed in violation of his first amendment rights. The Supreme Court stated that "he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.* at 283-84.

82. 638 F.2d at 416.

83. The Second Circuit explained:

> Clearly, mere reference by a defendant to personal standards of taste or political philosophy as one factor in a decision involving first amendment values cannot, in and of itself, provide a basis for rationally inferring an intent to suppress the different views of others . . . . Where, however, as in this case, evidence that the decisions made were made based on defendants' moral or political beliefs appears together with evidence of procedural and substantive irregularities sufficient to suggest an unwillingness on the part of school officials to subject their political and personal judgments to the same sort of scrutiny as that accorded other decisions relating to the education of their charges, an inference emerges that political views and personal taste are being asserted not in the interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community.

Id. at 417.

84. *Zykan*, 631 F.2d at 1308. While the *Zykan* court did not find a constitutional violation in the defendant school board's decision to permanently remove *Go Ask Alice* from a high school library, as described in the pleadings, "the articulation of the principles at issue here is sufficiently novel and important that plaintiffs should be given leave to amend their complaint again, if they can, to allege the kind of interference with academic freedom, that has been found to be cognizable." *Id.* at 1308-09.

2. *Post-Seyfried developments.* Although one early 1982 district court decision appeared to introduce an "effects" test in school library book removal situations,[85] the Supreme Court several months later indicated that intent remained the primary consideration. Justice Brennan, in a plurality opinion affirming the judgment in *Pico*,[86] wrote:

> Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.[87]

Admittedly, as noted by the dissent, the opinion produced "no binding holding . . . on the critical constitutional issue presented."[88] Nevertheless, the language utilized by Justice Brennan clearly suggests that the current preferred approach in library book cases is to inquire into the motivations of the school officials

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85. Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982). At one point, the court stated, "[h]ow anomalous and dangerous then to *presume* that state action banning an entire book, where the social value of its content is roundly praised and stands unchallenged by the state, does not directly and sharply implicate first amendment rights because the ban was not *intended* to suppress ideas." *Id.* at 687. The case involved removal of *365 Days*, Ronald J. Glasser's compilation of nonfictional Vietnam War accounts by American combat soldiers.

86. 102 S. Ct. 2799 (1982). In holding for students-respondents, the Court was careful to point out the narrow bounds of its decision. Justice Brennan took pains to distinguish the removal of library books from the initial acquisition of such books, and stated that the *Pico* holding applied only to the former activity. *Id.* at 2805-06. In addition, he stressed the procedural stance of the case—since summary judgment was involved, all that needed to be found was any "genuine issue as to any material fact." *Id.* at 2806.

The volatile nature of the library book removal issue is evidenced by the forcefully-worded dissenting opinions filed in *Pico* by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor. *Id.* at 2817, 2822, 2827, 2835.

87. *Id.* at 2810. The passage continued:

> On the other hand, respondents implicitly concede that an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. . . . And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible.". . . In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

Id.

88. *Id.* at 2818 n.2 (Burger, C.J., dissenting).

involved.

The formulation of a test centering on a subjective value such as intent is an open invitation to ambiguity. What often emerges is an elusive and very fine line separating permissible from impermissible regulation. In a footnote in *Pico*, the Second Circuit implied that a key to ascertaining proper/improper intent is the existence of "sufficiently regular procedure for applying . . . criteria."[89] Justice Brennan adopts this reasoning, strongly linking "irregular and ad hoc removal procedures" with impermissible motivations.[90] This approach alleviates the vagueness of the intent test, allowing inquiry into more "tangible" procedural matters.

3. *Application of the intent test to Seyfried.* Although the *Seyfried* decision preceded the Supreme Court's ruling in *Pico*, the latter case is not irrelevant here. As already seen, Justice Brennan's opinion simply marked the culmination of a trend towards examining the motivations of school officials who remove library books. If one considers the concept of intent in its broadest form, analysis of *Seyfried* produces uncertain results.[91] It could be argued that cancellation of the play by the superintendent, without

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89. What is required in order to avoid the effect of governing school affairs simply by a vague and indefinite pall of orthodoxy is the development of a set of sufficiently objective criteria for the identification of speech which will be objected to and a sufficiently regular procedure for applying these criteria in concrete cases to permit students to determine with a reasonable degree of certainty what speech will be prohibited and when.

638 F.2d at 418 n.13. While the word "effect" is employed here, other portions of the *Pico* opinion make it clear that the court feels that such "effect" is inextricably tied to improper intent on the part of school officials. Logical extension of the above-quoted proposition would require a finding of improper intent on the part of school officials when they do not act pursuant to a set procedure in regulating students' first amendment rights.

90. This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case . . . suggests the exact opposite. In sum, respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations.

102 S. Ct. at 2811-12.

91. On appeal, the plaintiffs-appellants in *Seyfried* failed to specifically advance the "intent" argument. They did, however, spend considerable effort in pointing out that the school officials' actions imposed a "pall of orthodoxy" on the district. In other words, the appellants focused not on the superintendent's intent, but on the chilling effect of his decision. As seen above, the "intent" test is intertwined to a certain degree with the "effects" test. *See supra* note 89 and accompanying text.

his having attended a single rehearsal,[92] manifested a desire to suppress the ideas contained in the play, and to create a "pall of orthodoxy"[93] over the district. On the other hand, one might accept at face value the superintendent's assertion that he halted production of *Pippin* solely because of its alleged "explicit sexual overtones."[94] If, however, the intent test is applied with primary emphasis on the adequacy of the procedures afforded, matters are greatly simplified. The conduct of the superintendent in acting under the vague and insubstantial authority of the district's student rights policy forbidding "obscene, vulgar and inflammatory statements,"[95] could not survive this more rigid test.

C. *The Student Press Cases*

Unlike the removal of library books, student press regulations usually involve the concept of prior restraint. This distinction constitutes one of the reasons why a separate body of rules has been developed in this second important group of students' rights cases. Just as the first amendment in general is applied differently in the school context, the specialized doctrine of prior restraint also generally receives disparate treatment in adult and student cases. For example, the Second Circuit, confronting a school board policy which prohibited the distribution of any written matter within the school without the prior approval of administrators, has commented, "In the adult world, of course, this policy would have succumbed to our heavy presumption against prior restraints. . . . Yet, because we recognized the unique requirements of the educational process, we declined to hold that a system of prior restraint is presumptively unconstitutional."[96] Clearly, the underlying bases for judicial deference towards the judgment of school officials[97] are still operative in situations involving prior restraints.

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92. The brother of the school board president complained on Friday about the content of *Pippin*. The following Monday, the school board president met with the superintendent, and on the following day the superintendent decided to cancel the production. 668 F.2d at 215.

93. *Keyishian*, 385 U.S. at 603.

94. 668 F.2d at 220.

95. Appellants' Opening Brief, *supra* note 54, at 10.

96. Thomas v. Board of Educ. of Granville Cent. School Dist., 607 F.2d 1043, 1049 (2d Cir. 1979) (addressing the Second Circuit's earlier decision in Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971)).

97. *See supra* notes 56-58 and accompanying text.

Notwithstanding the above considerations, the heavy presumption against prior restraints in adult law does mean that the balance will be weighted more heavily against school officials in these cases than in general first amendment cases, such as those dealing with the removal of library books. While the majority of circuits have declined to recognize the per se unconstitutionality of prior restraints on the student press, only one appellate case has expressly upheld such a restraint.[98] Conflicting attitudes abound, though, towards the proper judicial stance in these cases.

In *Tinker*, the Supreme Court held that in order for school authorities to prohibit a student's expression of opinion, they must show that the prohibited conduct would "materially and substantially interfere with the requirements of appropriate discipline in the school."[99] This rule applies to all forms of expression, including the student press.[100] However, since the Supreme Court has offered only the most general leadership in this area, some courts confronting regulation of school newspapers have chosen to formulate their own tests rather than use that set forth in *Tinker*.[101]

1. *The majority position.* Both the Seventh and Fourth Circuits have repeatedly condemned prior restraints of student publications. In fact, the Seventh Circuit originally stated, in *Fujishima v. Board of Education*,[102] that such restraints were unconstitu-

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98. Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (plaintiff high school students submitted to various school officials a plan to survey the sexual attitudes of students, including such issues as homosexuality and premarital sex). *See also* Comment, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 DE PAUL L. REV. 387, 416-17 (1979).

99. 393 U.S. at 509.

100. Comment, *supra* note 63, at 510.

101. *See, e.g.*, Pico v. Board. of Educ., Island Trees Union Free School Dist., No. 26, 638 F.2d 404 (2d Cir. 1980). As stated by one commentator:

> The Supreme Court, by virtue of its uncertain stance regarding the level of scrutiny to be applied in this area, has provided the lower courts with a wealth of theories, tests and justifications from which to choose when deciding children's rights cases. In the absence of strong leadership from the Supreme Court each circuit has developed a separate and somewhat unique body of law concerning the issue of student prior restraints. Although the results have been admirable in that student First Amendment rights are almost uniformly protected, the diversity of theories applied to achieve this protection has resulted in the confusing and chaotic development of the law.

Comment, *supra* note 98, at 417.

102. 460 F.2d 1355 (7th Cir. 1972). Plaintiff high school students were suspended for distributing on school grounds an "underground" newspaper and a petition calling for "teach-ins" concerning the Vietnam War. The suit was filed in challenge to the constitutionality of a Chicago Board of Education rule which stated: "No person shall be permitted . . .

tional per se.[103] The *Tinker* substantial disruption/material interference test was held to govern only the constitutionality of post-publication penalties.[104] In the next student press case,[105] however, the court appeared to alter its approach significantly. It relied on objections as to vagueness and overbreadth, rather than on the *Fujishima* per se rule, to strike down several rules which authorized prior restraints. The opinion indicated that the *Tinker* test was not irrelevant to prior restraint cases.[106] Nevertheless, it remained clear that school officials had to meet a high standard in order to justify regulations forbidding distribution of a student publication.

While the Fourth Circuit has never espoused a rule recognizing prior restraint of student publications as unconstitutional per se, it has imposed stringent requirements on school officials in this realm. In order to avoid constitutional infirmity, a system of prior restraints must precisely describe forbidden behavior, define "distribution," provide for prompt approval/disapproval of submitted material, specify the effect of failure to act promptly, and offer an adequate and prompt appeals procedure.[107] These requirements

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to distribute on the school premises any books, tracts, or other publications . . . unless the same have been approved by the General Superintendent of Schools." *Id.* at 1356.

103. The Seventh Circuit reasoned that "[b]ecause Section 6-19 requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment. . . . This conclusion is compelled by combining the holdings of Near v. Minnesota and Tinker." *Id.* at 1357.

104. "The *Tinker* forecast rule is properly a formula for determining when the requirements of school discipline justify punishment of students for exercise of their First Amendment rights. It is not a basis for establishing a system of censorship and licensing designed to prevent the exercise of First Amendment rights." *Id.* at 1358.

105. Jacobs v. Board of School Comm'rs, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975) (unofficial student newspaper contained "a few earthy words relating to bodily functions and sexual intercourse," and a cartoon depicting "a sequence of incidents in a bathroom."). *Id.* at 610.

106. Addressing a provision which stated that "literature shall not be distributed by any student in any school while classes are being conducted in the school in which distribution is to be made," the *Jacobs* court said: "We conclude that the defendants have not satisfied their burden of demonstrating that the regulation banning distribution at all these times is narrowly drawn to further the state's legitimate interest in preventing material disruption of classwork." *Id.* at 609.

107. In Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973), the Court of Appeals for the Fourth Circuit explained:

> Such prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write. . . . A prior restraint system, even though precisely defining what may not be written, is nevertheless invalid unless it pro-

have proven difficult to meet. In one case,[108] a school board regulation which allowed the distribution of literature which "does not reasonably lead the principal to forecast substantial disruption of or material interference with school activities"[109] was held too imprecise to afford the necessary safeguards against invasion of first amendment rights.[110] While at first glance such a holding may seem to indicate a rejection of the *Tinker* standard, in actuality it only means that a regulation must "detail the criteria by which an administrator might reasonably predict the occurrence of a disruption."[111] This case reveals the willingness of the Fourth Circuit to question the judgment of school officials in situations involving prior restraint of student publications; the court is taking the "must be able to show" language of the *Tinker* rule quite literally.[112]

A recent decision in this jurisdiction suggests a possible retreat from the rigid earlier position. In *Williams v. Spencer*,[113] the Fourth Circuit upheld a school regulation which authorized restraints, after initial distribution, of publications encouraging actions "which endanger the health or safety of students."[114] While the regulation and the facts at issue in *Williams* are sufficiently

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vides for: 1) A definition of Distribution and its application to different kinds of material; 2) Prompt approval or disapproval of what is submitted; 3) Specification of the effect of failure to act promptly; and 4) An adequate and prompt appeals procedure.

Id. at 1351.

108. Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

109. *Id.* at 381.

110. *See* Comment, *supra* note 98, at 409. The court took special note of the fact that the regulation lacked guidelines for determining what would constitute a "substantial disruption of or a material interference with school activities," as well as for what would be the appropriate criteria an administrator might use to reasonably predict the occurrence of such a disruption. *Id.*

111. 525 F.2d at 383.

112. *See* Comment, *supra* note 98, at 409.

113. 622 F.2d 1200 (4th Cir. 1980).

114. *Id.* at 1205. The *Williams* court continued: "The regulation read in full, 'Distribution may be halted, and disciplinary action taken by the principal after the distribution has begun if the publication. . . 5) Encourages actions which endanger the health or safety of students.' " *Id.*

The student newspaper in *Williams* contained an advertisement for a "headshop" specializing in the sale of drug paraphernalia. The ad primarily promoted the sale of a waterpipe used to smoke marijuana and hashish. There was also an ad for devices used in connection with cocaine. *Id.* at 1205.

distinguishable from those in prior cases[115] so as not to signal a marked deviation from the earlier holdings, the court may have opened new doors in stating that the *Tinker* rule "is merely one justification for school authorities to restrain the distribution of a publication; nowhere has it been held to be the sole justification."[116] Future decisions should clarify whether *Williams* marks the inauguration of a more relaxed standard of scrutiny in the Fourth Circuit.

2. *Minority stance.* Second Circuit courts have refused to follow any consistent pattern in their adjudication of student press disputes. The regulation at issue in *Eisner v. Stamford Board of Education,*[117] the court's first case in this area, was found lacking in procedural safeguards and therefore unconstitutional, on the grounds that it did not precisely define the meaning of "distribution,"[118] it did not prescribe a definite brief period within which review of submitted material would be completed, and it failed to specify the individual(s) to whom material should be submitted as evidence.[119] While the *Eisner* holding did not impose an insurmountable burden on school officials,[120] a later decision appeared to increase this burden. In *Bayer v. Kinzler*[121] the District Court for the Eastern District of New York, finding that the expression in question was "at least [as] deserving of protection under the First and Fourteenth Amendments as the symbolic wearing of an armband,"[122] concluded that the school official's actions were not reasonably necessary to avoid material and substantial interference

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115. The Court of Appeals for the Fourth Circuit explained:

> The nature of the restraint in this case is far less burdensome than was true in *Quarterman, Baughman,* and *Nitzberg.* In those cases the relevant regulations required that the publication be submitted to the principal *prior* to distribution, whereas here the students were not required to acquire approval before beginning distribution of the paper. Indeed, those cases could be read to apply only to those situations where prior approval from the appropriate school official is required before any distribution may occur.

Id. at 1206.

116. *Id.*

117. 440 F.2d 803 (2d Cir. 1971).

118. *Id.* at 811.

119. *Id.* at 810-11.

120. Comment, *supra* note 98, at 416.

121. 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd,* 515 F.2d 504 (2d Cir. 1975) (student newspaper contained a sex information supplement including articles on contraception and abortion).

122. 383 F. Supp. at 1165.

with school work or discipline.[123] In essence, the court was directly infusing the *Tinker* standard into the student press area. This particular approach had previously been utilized by the Fifth Circuit.[124]

Rather than following this example of straightforward application of the *Tinker* test, the Second Circuit, in its next case, cut an entirely new path. In *Trachtman v. Anker,*[125] the court upheld the decision of school officials to deny students permission to distribute and publish the results of a questionnaire exploring sexual attitudes of pupils of a New York City high school. The court relied on what dissenting Judge Mansfield characterized as "dicta in *Tinker* . . . to the effect that school authorities may prohibit speech that 'intrudes upon . . . the rights of other students,' or 'involves . . . an invasion of the rights of others.' "[126] *Trachtman* introduced the novel theory that prior restraint of student publications is justified where it is "likely"[127] that the particular expression involved will inflict "emotional disturbance" or "psychological harm" on some students.[128] The Second Circuit based its finding of "likely" psychological harm on dubious grounds,[129] thus displaying a great reluctance to tamper with the authority of school officials.

While Second Circuit courts had undeniably sent out conflicting signals in earlier student press cases, the confidence displayed by the *Trachtman* court in setting forth its unprecedented theory seemed a portent of future exaggerated deference to the actions of school officials. Fears of such deference were not dispelled by a New York district court's next foray into this area. In *Frasca v. Andrews,*[130] where a high school principal had refused to allow dis-

123. *Id.*

124. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972).

125. 563 F.2d 512 (2d Cir. 1977).

126. *Id.* at 520-21 (quoting *Tinker*, 393 U.S. at 513).

127. 563 F.2d at 517.

128. *Id.* at 519.

129. The court relied on the affidavits of "four experts in the fields of psychology and psychiatry," procured by the defendants, ignoring the fact that the plaintiffs produced five equally qualified experts who not only denied that the questionnaire would create emotional disturbance, but asserted it would be psychologically beneficial to students. *Id.* at 517, 525.

130. 463 F. Supp. 1043 (E.D.N.Y. 1979). The material complained of in *Frasca* included a letter from the lacrosse team to the official school newspaper questioning the lack of lacrosse articles and closing, "We would like a formal apology in public or else we will kick your greasy ass." *Id.* at 1046. The letter was signed "Pissed Off" Lacrosse Team. Another example is an article characterizing the vice-president of the student body as "a total failure

tribution of a newspaper, the court sought only "a substantial and reasonable basis for the action taken."[131]

Although *Frasca* involved, not a "psychological harm" theory, but a more traditional *Tinker* "potential disruption" situation, the decision clearly embodied the spirit of *Trachtman*. Current Second Circuit law, then, allows school officials wide parameters in which to act regarding student publications. Courts in this jurisdiction appear willing to conduct only a limited inquiry into such prior restraints.

3. *Application of the student press case tests to Seyfried.* The actions taken by the superintendent to prohibit the production of *Pippin* would obviously be overturned if the per se rule of *Fujishima* were applied. His actions also would not survive application of the modified Seventh Circuit test or the Fourth Circuit's approach, both of which require specific and elaborate procedural safeguards to prevent regulation of speech on the basis of unjustified forecasts of substantial disruption/material interference with school discipline.[132] The superintendent cancelled the production based on a reading of the play's script, conferral with several other school officials, and pursuant to no established policy.[133] Dissatis-

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in performing his duties," and "a total disgrace to the school." *Id.*

131. *Id.* at 1052. Language in support of this position was also called from *Eisner*, 440 F.2d at 810.

132. In the Appellants' answering brief, defendants-appellees in *Seyfried* unconsciously admit the lack of a set procedure:

> In discussing the administrative functions in the school district, [the superintendent] stated that it should be standard operating procedure for a high school principal to have administrative control over what goes on in the school, including the presentation of theatrical productions by the school. In the context of the situation at issue, [the superintendent] stated that he expected the principal in question to be aware of what play was being presented in the high school and to be knowledgeable about the play itself. Further, [the superintendent] indicated that he would expect the drama coach to also be accountable in that, particularly when dealing with a borderline play such as "Pippin," some discussion concerning the play with administrative staff should have occurred. Since this procedure had not occurred when [the superintendent's] attention was directed to the play, he was obliged to take action in the matter.

Brief for Appellees at 10, Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981), *aff'd*, 668 F.2d 414 (3d Cir. 1982) [hereinafter cited as Brief for Appellees]. Ironically, as crucial as the question of procedural due process is to their case, plaintiffs inexplicably failed to raise the issue in district court.

133. On March 10, 1981, the superintendent met with his central office staff and questioned another official about *Pippin*. At the conclusion of the meeting, without speaking with any of the teachers or students involved, he decided to cancel the play. On the following day, he met with the drama director, after having informed her of his decision. He re-

fied students were not offered an administrative route by which they could appeal the decision, and the complaints of parents at a school board meeting went unheeded.

While the justices deciding the *Seyfried* case did not utilize the *Trachtman* psychological harm test, they did follow the Second Circuit trend of seeking merely a rational or reasonable basis for the regulation of student speech by a school official. In fact, the district court, whose reasoning was fully adopted by the court of appeals, applied a more relaxed standard of scrutiny than the Second Circuit, casually announcing that "[t]his case involves nothing more than differing judgments on the extent to which certain aspects of human sexuality should be represented on stage by high school students."[134] Although *Trachtman* and *Frasca* arguably provide indirect support for the Third Circuit's decision in *Seyfried,* it must be remembered that the Second Circuit position represents not only a minority view but also a marked deviation from the Supreme Court's guidance in this area. Therefore, Fourth and Seventh Circuit cases possess far greater precedential value.

D. *Overview—Library Book Removal and Student Press Cases Viewed Together*

Although both directly involve students' rights, the school library book and student publication cases, for all practical purposes, have each been treated in a vacuum. Despite the fundamental differences between the traditional right to free expression and the recently-developed right to know, it is somewhat surprising that there is not a more extensive overlap in the legal principles espoused in the two sets of cases.[135] Even more surprising, however, is that the lack of overlap amounts to outright conflict in at least two jurisdictions. The Seventh Circuit, which promulgated the harsh "per se unconstitutionality of prior restraints" rule re-

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fused to accede to her request that he attend a rehearsal of the production. Appellants' Opening Brief, *supra* note 54, at 11.

134. 512 F. Supp. at 239.

135. One of the relatively rare examples of such overlap may be found in *Pico*, where the court warned that a policy must not "unduly [restrict] protected speech, to an extent greater than is essential 'to the furtherance of the [social] interests [that justify it].'" *See* 638 F.2d at 416 (relying on a passage in Eisner v. Board of Educ., 440 F.2d 803, 806 (2d Cir. 1971)).

garding student publications,[136] later declared that school officials could make unwise and improvident decisions regarding the removal of school library books and still not risk judicial intervention.[137] The same Second Circuit that applied minimal scrutiny to the prior restraint of a student questionnaire and news article,[138] proved, at least in one case, considerably more probing in its examination of the banning of library books by school authorities.[139]

Given these apparent inconsistencies, one can only conclude that the development of a generalized test to determine violations of students' first amendment rights will not occur in the near future. Indeed, conflicts between (and even within) the various circuits as to the tests to be applied in a single situation, *e.g.*, removal of a book from the school library, are rampant. The Second Circuit has conceded that "[i]n circumstances in which so many interests and public policies converge, relatively minor changes in the pattern of facts presented often deprive precedents of reliability and cast us more than we would choose upon our own judgment."[140] Accordingly, the court cannot consider "just the general outlines, but [must also look to] the specific facts of the case."[141] Such a loosely-defined approach provides little solace to the student who

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136. *See* Fujishima v. Board of Educ., 460 F.2d 1335 (7th Cir. 1972).

137. *See* Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980).

138. *See* Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1971).

139. *See* Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404 (2d Cir. 1980). *See also supra* note 78. A look at the dissents of Judge Mansfield in *Pico* and *Trachtman* increases the irony. In the former, he is aghast at the "indecent matter, vulgarities, profanities, explicit sexual perversion, or disparaging remarks about Blacks, Jews or Christ." 638 F.2d at 419 (Mansfield, Cir. J., dissenting), found in library books in a Long Island school. In *Trachtman*, however, he adopts the following fatalistic attitude:

> In this day and age, when children in New York City are literally bombarded with explicit sex materials on public newsstands on the way to and from school, when they are encouraged openly and frankly to discuss sex topics and problems in "rap sessions" sponsored by their schools . . . when the children actually do discuss sex with their peers at school, when the number of teenage pregnancies in New York City's public high schools . . . is so high that the City has opened a special high school for pregnant high school girls, . . . when adolescent sexuality is openly discussed in New York newspapers, I believe the defendants have failed completely to demonstrate any . . . substantial harm to any appreciable number of high school students [by distribution of a sex questionnaire].

563 F.2d at 526 (Mansfield, Cir. J., dissenting). Community standards are apparently important to Judge Mansfield—what is shocking in Long Island may be routine in New York City.

140. *Pico*, 638 F.2d at 413 (quoting West Virginia State Bd. of Educ. v. Burnette, 319 U.S. 624, 640 (1942)).

141. 638 F.2d at 413.

seeks notice of what kind of activity and/or materials will or will not be prohibited. While a generalized students' first amendment rights test may not be feasible, it is essential that the courts give students more specific and consistent guidance than presently exists.

III. THE SEYFRIED COURTS' RELIANCE ON A COURSE CURRICULUM THEORY

Without citing a single authority, the *Seyfried* courts asserted that a school-sponsored theatrical production plays a role distinguishable from that of a library book or student publication.[142] By refusing to explore any of the potential analogies, the courts ignored the legal theories and tests described in the preceding two sections of this Comment.[143] Instead both tribunals rested their decisions on the reasoning that "the selection of the artistic work to be given in the spring production does not differ in principle from the selection of course curriculum, a process which courts have traditionally left to the expertise of educators."[144]

The state admittedly has a compelling interest in the choice of and adherence to a suitable curriculum for the benefit of young people.[145] Courts have consistently acknowledged the right of school boards "to establish and apply their curriculum in such a way as to transmit community values."[146] This right incorporates the goals of socialization and indoctrination.[147]

Notwithstanding the validity of the above principles, the cur-

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142. 512 F. Supp. at 238. *See also* 668 F.2d at 216.

143. Even defendants-appellees in *Seyfried* begged the analogies, relying on *Zykan* and *Williams* as precedent. *See* Brief for Appellees, *supra* note 132, at 14.

144. 512 F. Supp. at 238-39; 668 F.2d at 216.

145. *See* Palmer v. Board of Educ. of the City of Chicago, 603 F.2d 1271, 1274 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

This interest is often incorporated into state statutes. *See, e.g.*, DEL. CODE ANN. tit.14, § 1043 (1981) (extending to school officials the authority to determine the educational policy of the district, to prescribe rules and regulations for the conduct and management of the schools, and to select text books and other instructional materials). *See also* Brief for Appellees, *supra* note 132, at 13.

Even pro-students' rights jurisdictions have not questioned the authority of a school board to determine course content within reasonable bounds. *See, e.g., Gambino*, 429 F. Supp. at 736.

146. *Pico*, 102 S. Ct. at 2806.

147. *See* Stern, *supra* note 60, at 493; Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1424 (1976).

riculum argument set forth by the *Seyfried* courts proceeded on two erroneous assumptions. First, the courts incorrectly implied that the authority of school officials in this realm is unqualified.[148] This stance ignores the well-established principle that discretion over curriculum is subject to constitutional limitations.[149] For example, in a series of cases involving teacher dismissal over the use of controversial classroom materials,[150] courts advanced the proposition that judicial deference to school board curricular determinations should not serve as a "euphemism . . . for 'infringement upon' and 'deprivations of' constitutional rights."[151] While the facts in *Seyfried* are partially distinguishable from those in the teacher dismissal cases, one passage found in the latter line of cases is especially pertinent here: "[H]aving granted both teachers and students the freedom to explore contemporary literature in these high school classes [elective courses], the school board may not impose its value judgments on the literature they choose to consider."[152] This statement can readily be applied to the privilege of students and teachers to choose and perform a school play.

A recent Eighth Circuit decision[153] has further established that even where school authorities take action against a work which is undeniably a part of the school's curriculum, such as a

148. Both the district court and the court of appeals invoked the principle established in Epperson v. Arkansas, 393 U.S. 97, 104 (1968), that courts "cannot intervene in the resolution of conflicts which arise in the daily operation of school systems." 668 F.2d at 217, 512 F. Supp. at 236. By characterizing the controversy surrounding a severe infringement upon pure speech as "nothing more than differing judgments on the extent to which certain aspects of human sexuality should be represented on stage by high school students," (512 F. Supp. at 239, reasoning implicitly adopted by court of appeals), the district court introduced an exceedingly broad concept of what constitutes an "everyday conflict." Under such an approach, the actions of school boards would almost never be reviewable by courts.

149. *See* Epperson v. Arkansas, 343 U.S. 97, 107 (1968).

150. Cory v. Board of Educ., 427 F. Supp. 945 (D. Colo. 1977); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970); 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). In *Cory*, the court held for the school board, but solely on the basis of a collective bargaining agreement wherein the teachers "voluntarily submitted themselves to the employer-employee mode of the teacher's relation to the school board." The court stated, "[b]ut for the bargained agreement, the plaintiffs would prevail here. The selection of the subject books as material for these elective courses . . . is clearly within the protected area recognized as of academic freedom." 427 F. Supp. at 955.

151. *Parducci*, 316 F. Supp. at 357.

152. *Cory*, 427 F. Supp. at 953.

153. Pratt v. Independent School Dist. No. 831, Forest Lake, Minn., 670 F.2d 771 (8th Cir. 1982).

film shown in class, courts should not be totally unwilling to explore the validity of the authorities' explanation for their actions. In that particular case, a Minnesota school board had banned from the classroom a short motion picture, purportedly because of its violent content. While recognizing the power of the board to make such a decision, the court examined both the film itself and the circumstances surrounding its removal, and concluded that the "violence" justification was simply a cover for the board members' desire to prevent dissemination of the ideological and religious themes contained in the work.[154]

In *Seyfried*, the superintendent similarly offered a superficially legitimate reason for his suppression of *Pippin*, *i.e.*, the play's "sexual theme."[155] Neither the district court nor the court of appeals felt it necessary to seriously question or explore the factual validity of the proffered defense. This casual acceptance of the defendant's explanation is disturbing, in light of the relative tameness of the theater director's modified version of the musical, and also in light of evidence that at least one other school official had objected to the work's religious themes.[156]

Even were it found that *Pippin* was cancelled solely on the grounds of its sexual content, a principal inquiry remains whether a school play actually constitutes curriculum.[157] Scrutiny of relevant authority strongly indicates that the *Seyfried* courts erred significantly in so characterizing the production. One court has explicitly identified a school theatrical production as "an extracurricular activity."[158] On appeal, the *Seyfried* plaintiffs-appellants ve-

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154. *Id.* at 778-79.

155. 668 F.2d at 215.

156. *Id. Pippin*, with its dark humor and general cynical view of human nature, also contains ideological themes which conservative school officials may have been eager to suppress.

157. In WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 348 (2d Coll. Ed. 1970), "curriculum" is defined as:

> 1) a fixed series of studies required, as in a college, for graduation, qualification in a major field of study. . .; 2) all of the courses collectively, offered in a school, college . . . or in a particular subject."

Id.

While the fact that a school theatrical production does not fit comfortably into either of these descriptions is not determinative of the issue, the dictionary definition may carry some weight when read in conjunction with cases which characterize activities such as school plays as extracurricular.

158. Playcrafters v. Teaneck Township Bd. of Educ., 177 N.J. Super. 66, 76, *aff'd*, 88 N.J. 74 (1981). *But see* Webb v. Lake Mills Community School Dist., 344 F. Supp. 791 (N.D.

hemently argued with the lower court's analogy of the production of *Pippin* to course material,[159] emphasizing that the district officials delegated the authority for selection and staging of a play to the drama director by contract, unlike the procedure for curriculum development.[160]

The curriculum issue may be clarified by comparing the school play situation to the library book and student publication examples, an approach which the Third Circuit unwisely failed to pursue. In general, a school play has much in common with a school newspaper, which is universally deemed an extracurricular activity.[161] Both are essentially designed as forums for the expression of the student. The *Seyfried* district court's dismissal of student publications as "non-program related expressions of student opinion"[162] provides several mythical distinctions. For example, particular emphasis was placed upon the play's role in the school's educational program:

> Like elective courses, the spring production is designed to provide an educational experience for those who choose to participate. . . . [T]here is, in addition, a direct tie to course curriculum. [The drama director] teaches a course

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Iowa 1972) (however this case involved an Iowa statute which characterized drama coaching as a classroom activity).

159. The appellants protested that "[i]t was a misconstruction of the facts in this case to assert that the high school play at issue here was really a question very similar to curriculum selection." Reply Brief, *supra* note 65, at 6.

160. Specifically, the appellants asserted:

> [N]ot only had the decision been made by the school district to sponsor high school theatrical productions, but a faculty member was given a written contract to undertake that responsibility. In this manner the . . . District officials did delegate their authority for the selection and production of a dramatic work to an employee of the district. Such a circumstance is much different from the determination of appropriate curriculum for a high school. The reason for this is that the decision has already been made to sponsor theatrical productions and the final choice of the exact production to be presented is delegated to a faculty member.

Id. at 11. The appellants further argued: "When the District officials consciously chose to delegate their responsibility, then the authority for the selection of the dramatic production has, thereafter, been vested in the delegee. This is a very different situation from where the District authorities have maintained control at each point in the selection process." *Id.* at 12.

Compare the library book situation, where a certain amount of discretion is often delegated to the school librarian as to choice of books.

161. *See Gambino*, 429 F. Supp. at 736. In *Gambino*, the court noted that "the newspaper cannot be construed objectively as an integral part of the curriculum." *Id.* at 734. The court then refused to characterize the paper as an "in-house organ of the school system." *Id.*

162. 512 F. Supp. at 238.

> in theatre arts and students in that course are given credit for participation in one of the two dramatic productions of the year.[163]

One may easily draw analogies to the student press cases from this passage, although the *Seyfried* courts declined to do so. Certainly, few would deny that a student newspaper is also intended to provide an educational experience for the individuals who work on it. Moreover, the fact that some students may receive course credit does not strip an activity of its extracurricular nature. One court examined a school newspaper whose staff included credit-earning members of a journalism class and explicitly found the paper to be "not . . . part of the curriculum."[164] Finally, the "opinion" distinction suggested in *Seyfried* is also not especially viable. Many articles and features which school officials have found objectionable cannot validly be classified as student opinion.[165]

Invocation of the "curriculum control" theory has generally been confined to cases involving materials and activities within the classroom walls.[166] If, as the *Seyfried* courts asserted, the purpose of regulating curriculum is "to best . . . achieve the goals of edu-

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163. *Id.*

164. *Gambino*, 429 F. Supp. at 736. The Virginia District Court elaborated that, "[t]he [newspaper] is a student activity. Some staff members are enrolled in Journalism and receive academic credit for their work on the paper. . . . Other staff members work on the paper as an extracurricular activity." *Id.* at 733.

165. *E.g.*, in *Jacobs*, school authorities attempted to restrain distribution of the student Corn Cob Curtain newspaper because it included "[a] few earthy words relating to bodily functions and sexual intercourse," and "[a] cartoon [which] depicts a sequence of incidents in a bathroom." 490 F.2d at 610.

166. Most of these cases have involved either constitutional challenges to a school board's choice of materials to be used in the classroom, *see, e.g.*, *Pico*, 638 F.2d 404; Palmer v. Board of Educ. of City of Chicago, 603 F.2d 1271, 1274 (7th Cir. 1979); *see also* Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974); or teacher discussions of controversial topics or use/encouragement of obscenity in the classroom. *See, e.g.*, Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Sterzing v. Fort Bend Indep. School Dist., 376 F. Supp. 657 (S.D. Tex. 1972), *vacated and remanded*, 496 F.2d 92 (5th Cir. 1974). *See generally* Stern, *supra* note 60, at 489.

While several courts and commentators have classified library books as curriculum, *see, e.g.*, *Pico*, 638 F.2d at 419; *Zykan*, 631 F.2d at 1302; Note, *supra* note 79, at 1052, this position was expressly rejected by Justice Brennan in the Supreme Court's *Pico* decision:

> Respondents do not seek in this Court to impose limitations upon their school board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there.

102 S. Ct. at 2805.

cating and socializing . . . students" given limited resources,[167] it is difficult to perceive how this purpose would be furthered by banning a volunteer student activity. In his *Pico* plurality opinion, Justice Brennan emphasized this mandatory/optional distinction:

> Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.[168]

Extracurricular activities are often designed to provide an alternative educational experience, allowing a student the opportunity to escape the restrictive atmosphere of the classroom. Therefore, it defies logic to apply a broad "curricular control" theory to such activities.

CONCLUSION

The district court and court of appeals unquestionably faced a dilemma in *Seyfried*, where, supplied with an arsenal of broad, contradictory, and not entirely on-point case law, they faced a novel students' rights issue. Such circumstances, however, do not justify their ill-advised reliance on a "course curriculum" theory to decide the case,[169] which not only enabled them to reason out the

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167. 512 F. Supp. at 237. *See* 668 F.2d at 216-17.

168. 102 S. Ct. at 2809. Justice Brennan stressed "the unique role of the school library," stating, "[i]t appears from the record that use of the . . . school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional." *Id.*

169. As a corollary to its "curriculum" argument, the *Seyfried* courts make one valid point when they reason:

> [The play] is an activity sponsored by the school for the viewing of the school community. For this reason, there is a far greater risk than in the area of student protest or library bibliography that the point of view or expression found in the play will be viewed as sanctioned or endorsed by the school as an institution. This fact is important because "a school has an important educational interest in avoiding the impression that it has authorized a particular expression" which is not characteristic of its educational program.

Thomas v. Board of Educ., Granville Centennial School Dist., 607 F.2d 1043, 1049 (2d Cir. 1979). While this argument has some logical force, the "endorsement" theory alone cannot justify the severe interference with student expression found in *Seyfried*. 512 F. Supp. at 239 (reasoning accepted by court of appeals in Seyfried v. Walton, 668 F.2d 214, 216 (3d Cir. 1981)).

conflict with relative ease, but also established a dangerous precedent. Consistent with the spirit of *Seyfried*, school officials in several communities have summarily cancelled student productions, offering such defenses as the fear of upsetting Fundamentalist groups,[170] and the need for providing an "uplifting, cheerful, happy entertainment experience."[171] It is not difficult to imagine numerous other situations where student expression might be suppressed under this rule. For example, the *Seyfried* rationale would undoubtedly authorize a school official to prohibit display of a student's controversial sculpture[172] at a school art show held at night, or to deny a student chorus permission to perform a mild anti-nuclear song at an evening concert. Unfettered discretion of this sort is not conducive to educational development.[173] If "course cur-

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170. This defense was asserted by school administrators in Pylesville, Md. as justification for cancelling a spring 1982 production of *Inherit the Wind*, by an accelerated class of eighth-graders. The play is a dramatization of the 1925 trial of John T. Scopes, a biology teacher who broke a Tennessee law prohibiting the teaching of evolution. In explaining their decision to block the production, the school officials offered the following comments:

> "We feel some concern about the appropriateness of the play for this age group (13-14). . . . [O]ur district is called the Bible Belt of Hartford County and the Mason-Dixon line runs right through here."
>
> "Fundamentalist groups . . . have told us about their concerns before, and while no group has protested about this play yet, our motto is that we do not want any community ill-will from any program."
>
> "In the play *Inherit*, the evolutionists win in the end, and some parents and children in the community could object to that."

See Variety, Jan. 27, 1982, at 92, col. 4.

171. In March, 1980, an Anne Arundel County, Md., principal cancelled a production of *One Flew Over the Cuckoo's Nest*, claiming the play was "not in keeping with the purposes of a high school production to be providing wholesomeness and unoffensive entertainment to the community." *Id.* at 92, col. 5.

172. *See* Sefick v. City of Chicago, 485 F. Supp. 644 (N.D. Ill. 1979) (for the adult law counterpart to this situation).

173. Instead it greatly infringes upon the free exchange of ideas. The continued presence of an unedited copy of *Pippin* in the school library, a fact heavily stressed by both the district court and the court of appeals, does not alleviate the infringement. In Pratt v. Independent School Dist. No. 831, Forest Lake, Minn., 670 F.2d 771 (8th Cir. 1982), the Court of Appeals for the Eighth Circuit responded to a similar situation as follows:

> The board seeks to justify its action (banning a film from use in the classroom) by pointing out that the short story (upon which the film is based) remains available to teachers and students in the library in printed form and a photographic recording. This fact is not decisive. Restraint on protected speech generally cannot be justified by the fact that there may be other times, places or circumstances for such expression. . . .The symbolic effect of removing the films from the curriculum is more significant than the resulting limitation of access to the story. The board has used its official power to perform an act clearly indicating that the ideas contained in the films are unacceptable and should not be

riculum" is allowed to envelop all school-related activities and shield administrative judgment from scrutiny, students will be left with no educational forums primarily devoted to their own expression.

Although the library book removal cases are factually distinguishable from the student play situation, this circumstance did not justify the *Seyfried* courts' failure to consider these cases. The "pure speech" embodied in theatrical presentations is, if anything, entitled to greater first amendment protection than the tangential "right to know" involved in *Minarcini* and *Pico*. In addition, the significant dichotomy between mandatory classroom activity and optional pursuits outside class[174] should have been addressed by the *Seyfried* courts. This dichotomy, though not expressly or extensively commented upon prior to Justice Brennan's opinion in *Pico*, was implicit in many of the earlier cases.

Even more applicable to *Seyfried* were the decisions in other circuits regarding student publications. Curriculum distinctions aside, the most important similarity between *Seyfried* and the student press cases is that they both involve prior restraints, a concept against which there exists a strong judicial bias. Since courts deciding students' rights cases have freely drawn support for their arguments from adult law decisions,[175] the *Seyfried* courts had solid precedent for relying upon the *Conrad* case, where the Supreme Court, viewing a situation broadly analogous to that in *Seyfried*, observed, "[t]he board's judgment effectively kept the musical off stage. . . . [T]hey denied the application in anticipation that the production would violate the law."[176] Yet not only did the courts fail to address *Conrad*, they declined to even mention

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discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious.

Id. at 779 (citations omitted). As Justice Douglas, noted in *Conrad*, the ribald and trenchant commentary of a play "is undoubtedly offensive to some, but its contribution to social consciousness and intellectual ferment is a positive one." 420 U.S. at 564 (Douglas, J., concurring and dissenting). Such educational benefits are at the heart of the "academic freedom" espoused by the Court in *Keyishian* and *Tinker*.

174. *See supra* note 168 and accompanying text.

175. *See* Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973), which invokes such adult prior restraint cases as *Burstyn*, *Near*, and *Bantam Books* to bolster its argument. *Id.* at 1349, 1350.

176. *Conrad*, 420 U.S. at 555. In *Seyfried*, the superintendent's judgment effectively kept *Pippin* off the stage, cancelling the production in anticipation that it would violate a school district policy or offend the community.

the phrase "prior restraint." Such an omission is unaccountable. The strength of prior restraint doctrine in both the adult and student realms compels a court facing the *Seyfried* facts to consider both the *Conrad* opinion and the student press cases.

The better-reasoned approach to cases such as *Seyfried*, involving extracurricular activities, is to apply three narrow tests, the first being strict application of the substantial disruption/material interference test. The *Tinker* test, when carefully applied, produces valid and concrete results.[177] Therefore courts, in evaluating restraints placed on extracurricular activities, should closely examine the regulation in question to determine whether it was promulgated in response to a reasonable prediction of the occurrence of a disruption. Primary focus would be on the adequacy of the procedures under which a restraint was issued. If these procedures are not regular and systematic, and if they fail to provide sufficient notice as to prohibited behavior, or fail to provide a prompt appeals process, then the test would not be satisfied.

The second test is the health and safety test. If any particular expression is found to seriously endanger the health and safety of students, such as the drug advertisements/endorsements in *Williams*, it may be validly restrained. The defendant school officials, however, must meet a heavy burden of proof in establishing the actual physical threat posed by such expression.

The third test is the modified emotional harm test. The use of the "psychological harm" criteria by the *Trachtman* court was wholly inadequate. However, this author agrees with Circuit Judge Gurfein, who, in his concurrence, asserted that "a blow to the psyche may do more permanent damage than a blow to the chin."[178] Consequently, formation of a substantially modified emotional harm test may be appropriate. Under this modified approach, there would be a heavy presumption of unconstitutionality attached to the school officials' regulation, since mental injury is by

177. *See Baughman*, 478 F.2d 1345. The wisdom of using the *Tinker* test in school play cases has been recognized by the hearing examiner for the Maryland State Board of Education. Reviewing the cancellation of a high school production of *One Flew Over the Cuckoo's Nest*, he held that while the play could be constitutionally banned if a production would "substantially disrupt or materially interfere with school activities," the procedure used by the county school board did not meet constitutional standards since there were no clear criteria for reviewing plays and the resulting imposition of private notions of taste were therefore constitutionally suspect. Variety, Jan. 27, 1982, at 94, col. 4.

178. 563 F.2d at 520.

nature extremely difficult to predict. This presumption, though, may be overcome by overwhelming evidence and the unanimous or near-unanimous conclusion of experts that the expression in question will indeed inflict emotional harm on students.[179]

These three tests would provide both school officials and students with sufficiently tangible criteria to judge the permissible limits of student expression. It is to be hoped that courts soon recognize the need for such criteria; otherwise, the unjustified result in *Seyfried* may signal the beginning of a trend towards further administrative and judicial limitations on the first amendment rights of students in the 1980's.

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179. This burden clearly would not have been met in *Trachtman*, where five of nine expert witnesses denied that any psychological harm would result from distribution of the questionnaire.