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PRIOR RESTRAINT OF STUDENT NEWSPAPER QUESTIONNAIRE PERMITTED
TO PREVENT SIGNIFICANT PSYCHOLOGICAL HARM

Trachtman v. Anker

The broad authority of public school officials to supervise and control the conduct of students during the course of their formal education has been long recognized by the courts.¹ Until recently, many courts have been willing to defer to action by school officials which could be said to have a "reasonable educational basis."² A dramatic departure from such judicial self-restraint, however, was signaled by *Tinker v. Des Moines Independent School District*,³ in which the Supreme Court for the first time explicitly recognized the right of students to freedom of expression.⁴ *Tinker* held that teach-

¹ See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507 (1969).

² The deference with which courts traditionally reviewed the judgment of school officials can be traced largely to the doctrine of *in loco parentis*. Under this doctrine the school was viewed as a means to inculcate in children the social mores and values of society. School officials were given great latitude in effectuating this goal. See, e.g., *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1924) (school authorities stand *in loco parentis* and may take any action relating to the mental training, moral and physical discipline, and welfare of the pupils that a parent could take); 55 Tex. L. Rev. 511, 513 (1977). As long as there was some reasonable educational basis for the school's actions, courts deferred to the school officials' judgment. E. REUTTER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 108 (1973). School authorities also have a valid interest in the physical and social development of students. See Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 389 (1969). Accordingly, in *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 P. 433, *appeal dismissed*, 278 U.S. 661 (1928), the dismissal of a college student because her husband had served liquor to other students was upheld. In *Hughes v. Caddo Parish School Bd.*, 57 F. Supp. 508 (W.D. La. 1944), school authorities were allowed to prevent students from joining fraternities and sororities. Additionally, exclusion of married persons from extracurricular activities was held to be reasonable in *Board of Directors v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967).

³ 393 U.S. 503 (1969). In *Tinker* the petitioners were high school students who were suspended from school for wearing black armbands in school as a symbol of their opposition to the Vietnam War. The Supreme Court, in reversing the lower court's dismissal of the suit brought by the students against the board of education, held that such expression was akin to pure speech and thus protected by the first amendment. For the first time, the Court specifically held that students possessed first amendment rights which could only be abridged when there were facts which could "reasonably have led school authorities to forecast substantial disruption of or a material interference with school activities," or which intruded upon the rights of other students. *Id.* at 514.

⁴ Prior to *Tinker* most cases implicating the individual rights of students, except for cases alleging violations of the equal protection or free exercise clauses, involved college students. See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (due process requires notice and hearing before school authorities can expel students for misconduct at tax-supported college); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967) (rule requiring prior approval of college authorities for all public demonstrations violated students' first amendment rights). See generally Gyory,

ers and students have first amendment rights, even within the unique confines of the school environment, which cannot be restricted absent a showing by school authorities that the exercise of those rights would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or conflict with the rights of others.⁵ Recently, however, the Second Circuit, in *Trachtman v. Anker*,⁶ held that the refusal of school authorities to permit the distribution of a sex questionnaire by students was not an unconstitutional abridgement of the students' first amendment rights.⁷ The court upheld the acknowledged prior restraint on the ground that the school authorities had shown a "substantial basis" for believing that the questionnaire might have an adverse psychological effect on other students.⁸

Jeff Trachtman, editor-in-chief of the *Voice*, the student newspaper of Stuyvesant High School in Manhattan, had drafted a questionnaire in preparation for an article in the *Voice* concerning the sexual attitudes of Stuyvesant students.⁹ The questionnaire was to be distributed randomly to ninth through twelfth grade students in the school and was to be accompanied by a cover letter assuring participants of their anonymity and cautioning them that it was unnecessary to answer any questions which made them feel uncomfortable.¹⁰ Jeff Trachtman and another student unsuccessfully sought permission from the school principal to conduct the survey. The Chancellor of the New York City schools and the board of education refused to reverse this decision¹¹ in view of the psycholgi-

The Constitutional Rights of Public School Pupils, 40 *FORDHAM L. REV.* 201 (1971) [hereinafter cited as Gyory].

⁵ 393 U.S. at 509, 513 (1969).

⁶ 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 1491 (1978), *rev'g in part & aff'g in part* 426 F. Supp. 198 (S.D.N.Y. 1976).

⁷ 563 F.2d at 519-20.

⁸ *Id.* One commentator has suggested that the uniqueness of the school setting may require the psychological, as well as the physical, protection of students. For example, racial epithets and verbal abuse which might be psychologically harmful to a child could justifiably be prohibited by school officials. See Gyory, *supra* note 4, at 219. *Trachtman*, however, appears to be the first case which has found psychological disturbance of students to be the kind of injury or harm which would justify restrictions on freedom of speech under the *Tinker* guidelines.

⁹ 563 F.2d at 514. The questionnaire contained 25 questions on topics ranging from the student's feelings about traditional dating patterns and the institution of marriage, to questions inquiring into the student's views toward abortion, homosexuality, and contraception. The student was also questioned about the extent of his own sexual experience. 426 F. Supp. at 205-07.

¹⁰ 426 F. Supp. at 205.

¹¹ 563 F.2d at 514-15. The issue of unlawful prior restraint was never raised by the plaintiffs when challenging the school's action within the educational system. Although the

cal harm many students might suffer if subjected to the questionnaire.¹² Trachtman and his father then commenced an action in federal district court under section 1983 of the Civil Rights Act of 1871.¹³ They sought declaratory and injunctive relief on the ground that the actions of the school officials violated the students' first amendment rights.¹⁴ The district court held that the defendants had failed to show that significant harm would result to the eleventh and twelfth graders and thus enjoined the school authorities from prohibiting distribution of the questionnaire to these students. The prohibition on distribution was allowed to stand, however, with respect to the ninth and tenth graders.¹⁵

Second Circuit held that prior restraint of student expression is not unconstitutional per se, it has placed strict procedural due process safeguards on any system of prior approval which public schools establish. *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971). Included among these safeguards is an expeditious review procedure. *Id.* at 810. In *Trachtman*, the students' first appeal of the principal's decision not to allow the questionnaire to be distributed was made on December 4, 1975 and a response was not received until December 17. Their next appeal, to Chancellor Anker, made on December 24, was never answered. On January 13, 1976 they appealed to the board of education, and they received a reply on February 27, 1976. Thus, almost 3 months elapsed between the time plaintiffs first sought prior approval and when they received a final review of the initial decision. Although such a delay would appear to violate the procedural due process requirements of *Eisner*, plaintiffs chose not to challenge it, evidently preferring to focus on the substantive issue whether the Board was justified in prohibiting the distribution of the questionnaire.

In addition to an expeditious review procedure specifying the time period in which school officials must decide whether to permit distribution, *Eisner* also requires that a school regulation specify to whom, and how, material is to be submitted for clearance. 440 F.2d at 811. Moreover, a prior approval system must prescribe some criteria by which school officials may determine if distribution of the printed material should be prohibited. *Id.* at 809. In the *Trachtman* case, Stuyvesant High School had no formal system for determining what materials could be prohibited or any system of reviewing the decision of the principal. The plaintiff established his own review procedure by submitting his request for permission to distribute the questionnaire upward through the hierarchy of the New York City school system. Telephone conversation with Mr. Martin Berger, counsel for plaintiffs, Oct. 15, 1977.

¹² 426 F. Supp. at 200. The school authorities also argued that research on a sensitive topic such as sexuality could only be conducted by qualified experts in compliance with the standards contained in a school board handbook for research applicants. *Id.* This handbook was interpreted by the district court to apply only to teachers, college students, and certain agencies. *Id.* at 203. The school authorities did not raise this issue on appeal. 563 F.2d at 518, n.7.

¹³ 42 U.S.C. § 1983 (1970). Section 1983 provides:

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

¹⁴ 563 F.2d at 515. Jeff Trachtman sued not only as an individual student, but also in a representative capacity on behalf of the student newspaper and its staff. *Id.* at 514 n.1. As a result, the case was not declared moot after Trachtman's graduation in June 1977.

¹⁵ *Id.* at 515.

On appeal, a divided Second Circuit panel reversed that part of the district court's holding that enjoined the school authorities from prohibiting distribution to the eleventh and twelfth graders.¹⁶ Judge Lumbard, writing for the majority,¹⁷ initially recognized that the plaintiff's first amendment rights had been adversely affected by the school's actions and that the decision in *Tinker* was controlling on the question whether the defendants had met their burden of proof in justifying the prior restraint.¹⁸ The majority accepted without discussion the premise that school authorities have a legitimate interest in protecting the "psychological well being of students" and sought to determine whether the school had a substantial basis for believing that the distribution would cause significant psychological harm to some Stuyvesant students.¹⁹ In disposing of this issue, the majority relied heavily on the defendants' expert witnesses' affidavits, which supported the contention that some students might be rendered anxious and tense to the point of "serious emotional difficulties" if confronted with the questionnaire.²⁰ On the basis of these affidavits, the majority concluded that the school

¹⁶ *Id.* at 520.

¹⁷ Judge Gurfein concurred in Judge Lumbard's opinion while Judge Mansfield dissented.

¹⁸ 563 F.2d at 516. The *Tinker* Court held that high school students were entitled to the protection of the first amendment. In order to justify a prohibition on the exercise of student first amendment rights, school officials had to show that they had reason to anticipate material and substantial interference with school activities or with the rights of others. 393 U.S. at 509. While not stipulating the precise extent of this burden of proof, the Court did say that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. See note 3 *supra*.

¹⁹ 563 F.2d at 517.

²⁰ *Id.* at 517-18. The Second Circuit is apparently the first court to hold that the possibility of psychological disturbance is a sufficient justification for restricting free speech rights. Aside from the fact that it is questionable whether the Supreme Court intended this type of injury to be included within the parameters of the guidelines laid down in *Tinker*, the recognition of psychological harm as a substantive evil justifying prior restraint poses significant practical difficulties. As Judge Mansfield pointed out in his dissent, psychological harm is a very vague and nebulous concept which gives school authorities extremely broad latitude in determining what speech to censor. *Id.* at 521 (Mansfield, J., dissenting). It is difficult to imagine controversial or unpopular opinions which would not disturb at least some people psychologically. Yet, it is exactly this type of speech which the first amendment apparently was meant to protect.

There is, moreover, the problem of measuring the degree of psychological impact in order to determine whether it is of a material and substantial nature. Such a determination would be difficult enough if the psychic injury had already occurred, but to attempt to measure the potential trauma which certain expressions might have on a class of people with widely differing psychic makeups would be difficult. This would either entangle courts in a fruitless weighing of the conflicting opinions of psychologists, or force them to defer, as the *Trachtman* court did, to the judgment of school authorities, as long as it can be supported by at least some expert opinion.

officials had carried their burden of justifying the prior restraint on distribution.²¹

Judge Mansfield, in his dissent, disagreed with the majority's conclusion that psychological injury to students was the type of substantial evil which would justify a prohibition of speech. Noting that this kind of injury is far too "vague and nebulous" to support an extension of the rights-of-others concept alluded to in *Tinker*,²² Judge Mansfield maintained that only activities leading to a disruption of school functions or a breach of the peace would justify a prior restraint of the plaintiff's first amendment rights.²³ Assuming for the sake of argument that the rights of others included the students' right to be free of emotional distress, Judge Mansfield nevertheless concluded that the school authorities had failed to sustain their burden of showing that the risk of such injury was substantial enough to outweigh the plaintiff's free speech interests.²⁴ The speculative and conclusory opinions of a few psychologists were not, in Judge Mansfield's view, sufficient to sustain this burden, particularly in view of the conflicting expert opinions offered by the plaintiff.²⁵

It is submitted that the *Trachtman* holding misinterprets the rights-of-others concept alluded to in *Tinker*²⁶ and indicates a fur-

²¹ *Id.* at 520. Both parties in *Trachtman* submitted affidavits from psychological experts in support of their respective positions. All of the affidavits were based on hypothetical opinions rather than any specific factual information about the students themselves. *Id.* at 522 (Mansfield, J., dissenting). The conclusion of the defendants' four experts was that confrontation with the explicitly sexual questions in the questionnaire might cause anxiety and tension in some students. One of the experts believed it was possible that some students might be induced into a state of panic or even psychosis. *Id.* at 517. The conclusions of plaintiffs' five experts, on the other hand, included one opinion that there was no basis for expecting resultant emotional harm to students. Another psychologist stated that while there was a possibility of anxiety among some students, such possibility was minimal compared to the overall benefits to be derived from allowing students to share information with respect to a subject of great concern to them. The credentials of plaintiffs' experts were found by Judge Mansfield to be more impressive than those of defendants' experts. *Id.* at 522 (Mansfield, J., dissenting). Judge Gurfein, in a concurring opinion, also acknowledged that plaintiffs' experts exhibited credentials which might be considered "more impressive." *Id.* at 520 (Gurfein, J., concurring).

²² *Id.* at 520-21 (Mansfield, J., dissenting).

²³ *Id.* at 520-21. (Mansfield, J., dissenting).

²⁴ *Id.* at 520 (Mansfield, J., dissenting).

²⁵ *Id.* at 522 (Mansfield, J., dissenting).

²⁶ 393 U.S. at 508-09. It would appear that the *Tinker* Court was concerned with the physical intrusion into the rights of others, since it cited *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), in support of its statement concerning interference with the rights of others. 393 U.S. at 513. In *Blackwell*, the court of appeals upheld the suspension of students for wearing freedom buttons where their conduct had been boisterous and disorderly and they had harassed students who did not wear the buttons. 363 F.2d at 754.

ther narrowing by the Second Circuit of student first amendment rights.²⁷ In upholding the prior restraint on the distribution of the sex questionnaire, the *Trachtman* court accepted the argument made by school authorities that there existed a potential for significant psychological harm to some students.²⁸ This ratification of the school board's fear of potential harm as a basis for prior restraint seems contrary to the *Tinker* holding and its application by other courts.²⁹

It is clear that the first amendment is a preferred right which students possess to the greatest extent practicable within the school environment.³⁰ In *Tinker* the Supreme Court held that students may

²⁷ See *Presidents Council v. Community School Bd.*, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); notes 43-53 and accompanying text *infra*.

²⁸ 563 F.2d at 517.

²⁹ *Tinker* is usually interpreted to require school authorities to demonstrate that the abridgement of student first amendment activity is necessary to prevent a material and substantial interference with the orderly operation of the school. See, e.g., *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Riseman v. School Comm.* 439 F.2d 148 (1st Cir. 1971) (per curiam); *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970) (en banc); *Cintron v. State Bd. of Educ.*, 384 F. Supp. 674 (D. P.R. 1974). In *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972), the court held that the suspension of five high school students for distributing an underground newspaper containing controversial articles on marijuana laws and birth control was unconstitutional. The *Shanley* court stated that the test for determining if the school was justified in its actions is whether the expression materially and substantially interferes with the activities or discipline of the school. The court found that there was no evidence of any disturbance or disruption. *Id.* at 969. In *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970), two high school students had been expelled for distributing, on school premises, material critical of school policies and school authorities. The court of appeals reversed the district court's dismissal of the students' suit, noting that there was no evidence that the school board could have reasonably forecast that the distribution would substantially disrupt or materially interfere with school procedures. *Id.* In a similar situation, wherein two high school students were expelled for distributing a newspaper which criticized school officials, a district court held that a student had a right to express himself in a nondisruptive manner, subject only to reasonable limitations concerning time, place, manner, and duration. *Sullivan v. Houston Indep. School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969).

In *Trachtman* there were indications that disapproval of the content of the questionnaire, and the planned newspaper article interpreting its results, was foremost among the school authorities' reasons for acting. The majority in *Trachtman* alluded to the fact that the school officials felt the topic of sexuality required special treatment because of its sensitive nature and therefore should only be taught by teachers with special qualifications. 563 F.2d at 518. In other words, school officials did not find the topic of sexuality itself to be psychologically harmful to students as long as it was presented in the light and manner the school officials deemed proper. The *Trachtman* court appears to have accepted this position as legitimate, stating that school officials could be justifiably concerned that the proposed newspaper article might draw misleading conclusions about the sexuality of Stuyvesant students. *Id.* at 516 n.2.

³⁰ *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969); accord, *Healy v. James*, 408 U.S. 169, 180 (1972); cf. *Procunier v. Martinez*, 416 U.S. 396, 422 (1974) (Marshall, J., concurring) (prisoners retain first amendment rights unless the state has a substantial government interest in restricting).

exercise their first amendment freedoms absent a finding of conduct which would "materially and substantially interfere with the requirements of appropriate discipline" in the school, or conflict with the rights of others.³¹ Since a restriction of these first amendment rights is permissible only in "narrow and well-defined circumstances,"³² the burden is on the school authorities to justify any such restraint. Thus, it has been stated that "the burden of justification for school censorship actions approaches, in practice if not in rhetoric, a 'clear and present danger to educational objectives' standard."³³ Prior to *Trachtman*, a district court within the Second Circuit implicitly approved this standard when it rejected an attempt by school officials to suppress distribution of a student newspaper.³⁴

The expansion of the *Tinker* standard by the *Trachtman* court to encompass potential psychological harm contrasts with a recent district court decision in Virginia. In *Gambino v. Fairfax County School Board*,³⁵ a school board prohibited students from publishing a school newspaper article containing birth control information and the results of a survey of student attitudes toward birth control.³⁶ Noting that the school paper was a conduit for student expression on a wide variety of subjects and was therefore protected by the first amendment,³⁷ the court rejected school board arguments that the paper could be suppressed pursuant to the board's general authority over school curriculum.³⁸ Of particular significance was the *Gambino* court's rejection of the school board's attempts to justify censorship of the newspaper on the ground that its dissemination

³¹ 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

³² 393 U.S. at 508; cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (only in narrow circumstances may the state bar dissemination of constitutionally protected materials to minors).

³³ 55 TEX. L. REV. 511, 522 (1977). One commentator has stated that the *Tinker* standard, and subsequent cases applying it to student press and hairstyle controversies, signals "the emergence of a 'first amendment theory of education . . .'" Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032, 1061 (1971).

³⁴ In *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974) (mem.), *aff'd*, 515 F.2d 504 (2d Cir. 1975), seizure of a supplement to the high school newspaper containing information on sex education was found to violate the first and fourteenth amendment rights of students. 383 F. Supp. at 1166. Since potential interference with schoolwork and discipline was "extremely unlikely," the school board could not proscribe distribution consistent with the protections of the first amendment. *Id.* at 1165.

³⁵ 429 F. Supp. 731 (E.D. Va. 1977).

³⁶ *Id.* at 733.

³⁷ *Id.* at 735.

³⁸ *Id.* at 736.

implicated the rights of students who might be offended by its contents.³⁹ The court reasoned that since students had to affirmatively pick up their copies of the paper, there was no need to further protect the rights of such students.⁴⁰

The *Gambino* decision appears more consistent with the spirit of *Tinker* and its progeny and illustrates a more progressive view of students' first amendment rights. *Tinker's* reference to the rights of other students should be read in light of the facts of that case, where the concern was with possible *physical* disturbance resulting from the wearing of black armbands.⁴¹ To interpret *Tinker* as supporting the prior restraint of a nonobscene student publication based upon potential *psychological* harm seems questionable. The *Tinker* Court stressed the educational significance of communication among students and stated that such communication could be restricted only if it invaded the rights of others.⁴² The *Trachtman* decision broadens the permissible grounds upon which school officials can restrict student first amendment activities to include potential psychological harm to other students. Thus, this holding limits the extent to which students may be exposed to controversial ideas and topics that might not be discussed in the classroom.

Twice previously, the Second Circuit has upheld the authority of school officials to preclude student access to controversial subjects. In *Eisner v. Stamford Board of Education*,⁴³ the authority of school officials to exercise prior restraint over printed matter distributed on school grounds was upheld. The court stated that the state has a legitimate interest in maintaining the effectiveness of the educational process.⁴⁴ Prior restraint is constitutionally permissible, according to the *Eisner* court, if distribution of the material would disrupt the educational process and if the school officials observe adequate procedural safeguards in reviewing the student publications.⁴⁵ *Eisner*, which is recognized as the leading case supporting

³⁹ *Id.* The *Gambino* court likened the paper to the school library where material containing more extensive and explicit birth control information was present. *Id.*

⁴⁰ *Id.* The school board argued that the circumstances, in effect, compelled student exposure to the paper's contents, and therefore was a proper situation for application of the "captive audience" doctrine. *Id.* See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). The court rejected this argument reasoning that the situation did not involve a lack of free choice in the captive audience sense. *Id.* at 736. See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cohen v. California*, 403 U.S. 15 (1971).

⁴¹ See note 3 *supra*.

⁴² 393 U.S. at 512-13.

⁴³ 440 F.2d 803 (2d Cir. 1971).

⁴⁴ *Id.* at 807-08.

⁴⁵ *Id.* at 810.

the right of school authorities to regulate the content of student publications,⁴⁶ has been followed by most circuits.⁴⁷ It represents, however, a significant narrowing of the first amendment rights recognized in *Tinker* and consequently has been subjected to sharp criticism.⁴⁸

The Second Circuit's restrictive view of student rights is also evidenced by *Presidents Council v. Community School Board*,⁴⁹ wherein the court held that the removal of a controversial book from a school library did not impinge upon the constitutional rights of students.⁵⁰ As in *Trachtman*, the *Presidents Council* court urged

⁴⁶ Note, *Prior Restraints in Public High Schools*, 82 YALE L.J. 1325, 1330 (1973).

⁴⁷ Of those circuits which have considered the prior restraint issue, the majority view is that prior restraint in high schools is permissible if there are adequate procedural safeguards. See *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (prior restraint is permissible if it contains narrow, objective, and reasonable standards); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972) (prior approval of student distribution of materials not per se unconstitutional, but regulation must not operate to stifle content or be unreasonable or too complex); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971) (prior restraint system in schools permissible if accompanied by specific procedural safeguards); cf. *Riseman v. School Comm.*, 439 F.2d 148 (1st Cir. 1971) (school's denial of permission to distribute anti-war leaflets under a regulation prohibiting the promotion of any nonschool organization without prior approval held unconstitutional as being vague, overbroad, and not reflecting any effort to minimize adverse effect of prior restraint). Only the Seventh Circuit has held that requiring prior approval of publications in school is unconstitutional per se as a prior restraint. The Seventh Circuit would allow school officials to regulate only the time, manner, and place of distribution of written materials. See *Fujishima v. Board of Educ.*, 460 F.2d 1355, 1358 (7th Cir. 1972). See generally E. REUTTER, *THE COURTS AND STUDENT CONDUCT* 27-35 (1975).

The acceptance of prior restraint within the school environment is not in accord with the "heavy presumption" against the validity of prior restraint invoked by courts in nonschool contexts. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"). Courts view systems of prior restraint with disfavor and have subjected them to a stricter standard of review than situations where sanctions are challenged subsequent to the expression at issue. *Near v. Minnesota*, 283 U.S. 697 (1931), was the first case in which the Supreme Court specifically enunciated the prior restraint doctrine. The Court articulated the general principle that one of the primary purposes of the first amendment is to provide immunity from censorship. Only in very limited circumstances will exceptions be made to this principle. The exceptions listed in dictum by the *Near* Court were, *inter alia*, speech which would hinder the nation in wartime, or incite violence or forceful overthrow of the government. *Id.* at 716. The most recent statement by the Supreme Court on the doctrine is found in *New York Times v. United States*, 403 U.S. 713 (1971), the Pentagon Papers case, in which the Court reiterated its dislike of prior restraint and stated that "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *Id.* at 725-27. See Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROB. 648, 656-58 (1955). For a discussion of how the doctrine of prior restraint applies in a school context, see 22 BUFFALO L. REV. 611 (1973).

⁴⁸ See, e.g., *Fujishima v. Board of Educ.*, 460 F.2d 1355, 1358-59 (7th Cir. 1972); Note, *Prior Restraints in Public High Schools*, 82 YALE L.J. 1325, 1336 (1973).

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

⁵⁰ 457 F.2d at 291. The book in question, *Down These Mean Streets* by Piri Thomas, is an autobiographical account of growing up in Spanish Harlem. *Id.*

judicial restraint in educational disputes.⁵¹ Since some parents had claimed that possible adverse moral and psychological effects would result if students read the book, the court concluded that the school board had sufficient grounds upon which to remove it from the library.⁵² This questionable analysis of the breadth of student first amendment protection has been subjected to opprobrium stemming from the judiciary and commentators alike.⁵³

By emphasizing the rights-of-others concept and accepting the affidavits of experts retained by school officials as a sufficient basis for determining that significant psychological harm to other students is likely, the *Trachtman* court has expanded the power of school officials to exercise prior restraints in the educational setting. Thus, in the future, claims by officials that significant psychological harm is likely to result from distribution of student publications will apparently satisfy the burden imposed on school authorities to justify limitations on the exercise of first amendment rights. Such a result does not bode well for the right of students to distribute student written material on school grounds and is a regrettable extension of the holdings of *Eisner* and *Presidents Council*. As suggested in Judge Mansfield's dissent in *Trachtman*, a rule permitting prior restraint in the interest of protecting students' psychological well-being is one that readily lends itself to abuse by school authorities.⁵⁴ It is hoped that, in the future, the Second Circuit will heed Judge Mansfield's warning and carefully scrutinize efforts of school authorities to censor student publications.

Suzanne B. Albani

⁵¹ *Id.*

⁵² *Id.* at 293.

⁵³ See, e.g., *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); 55 TEX. L. REV. 511 (1977); 30 VAND. L. REV. 85 (1977).

⁵⁴ 563 F.2d at 521 (Mansfield, J., dissenting). Judge Mansfield stated that "[t]he possibilities for harmful censorship under the guise of 'protecting' the rights of students against emotional strain are sufficiently numerous to be frightening." *Id.* (Mansfield, J., dissenting).