Tinker to Fraser to Hazelwood - Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights: Hazelwood School Dist. v. Kuhlmeier

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TINKER TO FRASER TO HAZELWOOD—SUPREME COURT'S DOUBLE PLAY COMBINATION DEFEATS HIGH SCHOOL STUDENTS' RALLY FOR FIRST AMENDMENT RIGHTS: HAZELWOOD SCHOOL DIST. v. KUHLMEIER

INTRODUCTION

The first amendment guarantee of freedom of speech¹ is not an absolute right.² Persons responsible for publishing materials which are obscene,³ libelous,⁴

1. The first amendment provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend. I.

2. Commentators frequently debate the question of whether first amendment freedoms are absolute or if courts may balance them with compelling governmental interests. See generally R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure § 20.7, at 17 (1986) (providing overview of debate and listing extensive sources for further reading).

3. See, e.g., Miller v. California, 413 U.S. 15, 24 (1973). In Miller, the Court set out a three part test to determine whether materials are obscene. The trier of fact must ascertain:
   a. whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,
   b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
   c. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

   Id. Courts are more likely to find materials obscene when those materials are directed to minors. See Ginsberg v. New York, 390 U.S. 629, 637 (1968) (upheld state statute barring distribution to children of materials not legally obscene in adult context). Cf. Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 750 (1978) (holding, in part, that the FCC may restrict radio broadcasts which contain indecent but not legally obscene language to times when children are not expected to be in audience).

4. One must distinguish factual statements from opinions when determining whether or not a statement is libelous. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (“Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges . . . but on the competition of other ideas.”) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). In Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985), the court developed a four part test to determine whether a statement is fact or opinion. The first step is to determine whether the statement has a precise meaning. Id. at 979. The next step involves ascertaining whether the statement can be proven by objective evidence. Id. The third step involves examining the statement in relation to the column or article in which it appears. Id. Finally, one should examine the statement in light of the broader context in which the column appears. Id. See also Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) (following the Ollman approach), cert. denied, 479 U.S. 883 (1986).

In order to maintain a libel suit, a public official must show that the statement was factual and false, and that the statement was made with actual malice. Compare Sullivan, 376 U.S. at
inflammatory,\(^6\) or which constitute an invasion of privacy,\(^6\) may be subject to liability or punishment. In addition, news gathering activities must not involve fraudulent conduct\(^7\) or amount to an abuse of process.\(^8\) Moreover, sanctions may be imposed for false advertising and for advertising products and activities which are illegal.\(^9\) Finally, published materials must not violate the copyright laws.\(^10\)

279-80 (statement must be made with knowledge of its falsity or with reckless disregard concerning its truth or falsity); with Gertz, 441 U.S. at 347 (states may define for themselves the appropriate standard of liability for defamation of private individuals).

Libel cases tend to be very costly. In 1987, a University of Iowa College of Law professor, in conjunction with the American Arbitration Association, began an innovative binding arbitration program as an alternative to costly and time consuming libel suits. See Adams, Does ADR Work With Libel Suits? Iowa Program Hopes to Find Out, Nat’l. L. J., Mar. 21, 1988, at 4. As of the time this Casenote was written, parties to 10 lawsuits had begun negotiations. The program is scheduled to continue for three years and, if successful, will run indefinitely. Id. See also R. Beanzon, G. Cranberg & J. Soloski, LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987) (discussing conclusions from 10 year study of libel cases which led to arbitration project). See generally R. Smolla, SUING THE PRESS: LIBEL, MEDIA & POWER (1986) (analyzing case studies of libel actions); SPEAKING & WRITING TRUTH: COMMUNITY FORUMS ON THE FIRST AMENDMENT 41-51 (R. Peck, M. Manemenn eds. 1985) (concise memorandum on libel issues).

5. The government may punish those responsible for material which advocates unlawful action if the material is intended and likely to produce such action. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).


7. See Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (upheld damage action against reporters who posed as patients in order to gain access to premises).


Limitations on the professional press apply with greater force to the high school press. Courts have upheld school officials' censorship of publications which materially interfere with school operations, or invade the rights of other students. Recently, the Supreme Court, in Hazelwood School Dist. v. Kuhlmeier, imposed an additional restriction on the high school press. In Hazelwood, the Court held that school officials may censor school sponsored student publications, as long as the actions are reasonably related to a legitimate pedagogical concern.

The Hazelwood decision marks the first Supreme Court decision involving censorship of the high school press. This Casenote outlines the major developments in the lower courts pertaining to censorship of the high school press, analyzes the Hazelwood decision, and focuses on the decision's potential impact on the lower courts, high school officials and high school student publications.

I. BACKGROUND


The starting point for first amendment analysis of student expression lies in the 1969 Supreme Court decision of Tinker v. Des Moines Indep. Community School Dist., in which the Court struck a balance between high school students' right to free expression and school officials' need to maintain order in furtherance of their educational mission. In Tinker, school officials suspended five high school students who wore black armbands to demonstrate their opposition to the Vietnam War. The district court upheld the school officials' action as a reasonable measure designed to promote school discipline. On appeal, the Eighth Circuit affirmed the district court's decision, without providing an opinion. The Supreme Court began its analysis of

12. See Trachtman v. Anker, 563 F.2d 512, 519-20 (2d Cir. 1977) (upheld school official's decision to confiscate school newspaper on grounds that sex questionnaire would invade rights of other students by causing them possible emotional harm), cert. denied, 435 U.S. 925 (1978). See infra notes 40-43 and accompanying text.
14. Id. at 570-71.
16. Id. at 504. When school officials learned of the students' plan to wear the armbands they promptly adopted a policy under which students who refused to remove them would be suspended. Id.
the case by identifying the competing rights of the students and school officials. The Court stated that students are "persons" under the Constitution and, as such, do not lose their constitutional rights in school. On the other hand, the Court explained that school officials necessarily have the right and power to maintain order and control in schools. The Court relied on language from two Fifth Circuit opinions to formulate the proper standard to apply when these rights of students and school officials are in conflict. According to the Court, school officials may not suppress student expression without demonstrating that such action is necessary to avoid a material disruption of classwork, a substantial disorder in the school, or an

19. Tinker, 393 U.S. at 511. In his concurring opinion, Justice Stewart stated that children's first amendment rights are not co-extensive with those of adults. Id. at 516. In subsequent cases, the Supreme Court has qualified the Tinker majority finding that children do have constitutional rights, with Justice Stewart's view, when balancing school authorities' need for control with students' constitutional rights. As a result, students' constitutional rights have undergone a gradual erosion. For example, in New Jersey v. T.L.O., 469 U.S. 325 (1985), the Supreme Court cut back on students' fourth amendment rights. In T.L.O., a teacher saw two female students smoking cigarettes in the school restroom and took them to the principal's office because smoking was an infraction of the school's rules. Id. at 328. When one of the girls denied smoking, the principal opened her purse and found a pack of cigarettes. Id. The principal also saw a pack of cigarette rolling papers which led him to believe that the purse might contain further evidence of drug use. Id. The principal continued to examine the contents of the purse and found marijuana, a pipe, and other relevant evidence. Id. The Court upheld the principal's action. Id. at 333. While the Court acknowledged that students do have a legitimate expectation of privacy on school premises, guaranteed by the fourth amendment, school officials have an equally legitimate need to maintain order and control. Id. at 339-40. After balancing the two interests, the Court held that school officials could constitutionally conduct a search based upon a mere reasonable suspicion and would not have to justify such a search with a finding of probable cause. Id. at 341. Moreover, the Court held that requiring school officials to obtain a search warrant prior to conducting a student search "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Id. at 340. One year later, in Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), the Supreme Court cut back on students' first amendment rights. In Fraser, school officials disciplined a student who delivered a speech at a school sponsored assembly for violating a school rule which prohibited the use of obscene language. Id. at 678. The Court upheld the school officials' decision to discipline the student for his "vulgar and lewd speech," which was outside the protection of the first amendment. Id. at 685. The Court stated that adult standards of obscene speech do not apply to students in schools due to school officials' duty to "teach by example the shared values of a civilized social order." Id. at 683. Finally, the Court held that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." Id.

21. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966). The Fifth Circuit decided these cases on the same day. Both cases involved school regulations which prohibited students from wearing particular buttons. In Burnside, the court enjoined school officials from enforcing the regulation because there was no evidence that there would be a disruption of the school environment. 363 F.2d at 749. However, in Blackwell, the court refused to enjoin school officials from enforcing the regulation because the students wearing the buttons harassed other students and caused disturbances at the school. 363 F.2d at 754.
invasion of the rights of others. The Court then pointed out that the school officials did not present any evidence that they suspended the students out of fear of disruption of the school premises. Instead, the Court characterized the students' activity as a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance ..." The Court concluded that the disciplinary measure was impermissibly directed at the suppression of a particular viewpoint because school officials had not banned students from wearing other symbols.

B. The Tinker Aftermath

Although the Tinker holding focused on the issue of school punishment of students' private expression on school grounds, lower courts have extended the Tinker standard and applied it to disputes between school officials and students involving prior restraints on student newspapers. In order to

22. Tinker, 393 U.S. at 512-13. While it is not clear from the decision exactly what a school official must demonstrate in order to satisfy the "invasion of the rights of others" prong, the Court made it clear that an "undifferentiated fear or apprehension of disturbance" is not enough to justify a school official's decision to prohibit students' personal expression. Id. at 508. Similarly, the Court held that a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," also fails to justify such a prohibition. Id. at 509.

23. Id. at 508-10.
24. Id. at 508.
25. Id. at 510-11.

26. A prior restraint is a form of censorship in which the government prohibits expression prior to its dissemination. Near v. Minnesota, 283 U.S. 697, 714 (1931). In Near, the Court struck down a statute which allowed a court to enjoin the publication of materials which the court itself found to be malicious, scandalous, or defamatory. Id. at 721-23. Although the Court did not hold that prior restraint systems were per se unconstitutional, it held that such systems would be valid only in "exceptional cases." Id. at 716. See also New York Times v. United States, 403 U.S. 713, 714 (1971) (per curiam) (heavy presumption that prior restraint system is unconstitutional and that the government has correspondingly heavy burden to justify such a system); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-70 (1976) (government did not satisfy heavy burden of justifying prior restraint on press when evidence showed mere possibility that information would have adverse effect and other less restrictive measures were available). For background and a critique of the prior restraint doctrine, see Arenson, Prior Restraint: A Rational Doctrine or an Elusive Compendium of Hackneyed Cliches?, 36 Drake L. Rev. 265 (1986-87).

27. Most lower court student press decisions begin their analysis by citing the Tinker premise that students do not lose their constitutional rights in school, that these rights are not coextensive with those of adults, and that school authorities have wide latitude in making curricular decisions and maintaining order and control. See Quarterman v. Byrd, 453 F.2d 54, 56-58 (4th Cir. 1971) (underground newspaper case); Reineke v. Cobb County School Dist., 484 F. Supp. 1252, 1256-57 (N.D. Ga. 1980) (school sponsored newspaper). Even in those cases in which a court does not expressly apply the Tinker "material or substantial disruption of the school environment" or "invasion of the rights of others" tests, it will usually rely on the Tinker premise initially. See Nicholson v. Board of Educ. Torrance Unified School Dist., 682 F.2d 858, 863-64 (9th Cir. 1982) (high school journalism teacher alleging violation of first amendment rights as a result of principal's prior review of student newspaper was not wrongfully discharged; principal's prepublication review of school sponsored newspaper for accuracy was "substantially related to educational process").
justify censorship actions under the Tinker “material disruption of class-
work” or “substantial disruption of the school” standards, school officials
must demonstrate facts which lead them to reasonably forecast a substantial
disturbance.\footnote{28} Courts have held that neither an unarticulated fear of distur-
bance,\footnote{29} nor official dislike of the subject matter,\footnote{30} will be sufficient to satisfy
the Tinker standards.

Courts differ, though, on the proper burden of proof required by the
“invasion of the rights of others” prong of the Tinker standard. In Frasca
v. Andrews,\footnote{31} a New York district court upheld a high school principal's
decision to confiscate the school newspaper; the principal's decision was
based, in part, on his objection to an article criticizing the student body
vice-president.\footnote{32} The principal believed the article contained false information
and would have an adverse effect on the student.\footnote{33} The principal was also
concerned that the student would have no opportunity to respond to the
article because the newspaper was to be distributed on the final day of the
school year.\footnote{34} The court did not find the plaintiffs’ offer to prove the truth
of the article to be relevant because the principal had satisfied his burden
when he demonstrated a substantial and reasonable belief that the article

\footnote{28}{See Trachtman v. Anker, 563 F.2d 512, 517 (2d Cir. 1977) (“[S]chool officials must
bear the burden of demonstrating ‘a reasonable basis for interference with student speech, and
. . . courts will not rest content with officials’ bare allegation that such a basis existed.’")
(quoting Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971)), cert. denied, 435
(school officials cannot rely on “ipse dixit” to demonstrate a possible material and substantial
disruption); Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971) (school officials do not
have to wait for disturbance to occur, but may take action if facts reasonably support the
likelihood of disruption); Butts v. Dallas Indep. School Dist., 436 F.2d 728, 732 (5th Cir. 1971)
(“[T]here must be some inquiry, and establishment of substantial fact, to buttress the deter-
mination.”).}

\footnote{29}{See, e.g., San Diego Comm. Against Registration and the Draft v. Governing Bd., 790
F.2d 1471, 1479 (9th Cir. 1986) (school board’s contention that anti-draft advertisement would
cause students to engage in unlawful conduct dismissed as mere speculation); Gambino v.
Fairfax County School Bd., 429 F. Supp. 731, 735 (E.D. Va.) (school officials' fear of
irresponsible journalism when there was no evidence of past, present, or future likelihood of
such action, disregarded as speculative), aff’d, 564 F.2d 157 (4th Cir. 1977). Cf. Guzick v.
Drebus, 431 F.2d 594, 598-600 (6th Cir. 1970) (school officials justified in forbidding wearing
of all buttons in light of recent racial unrest and gang violence at school), cert. denied, 410
U.S. 948 (1971). See supra note 22 (discussion of the Tinker view on this issue).}

\footnote{30}{See Shanley, 462 F.2d at 970 (school officials may not suppress student expression
merely because they disagree with content); Bayer v. Kinzler, 383 F. Supp. 1164, 1166 (E.D.N.Y.
1974) (“[Responsible presentation of information about birth control to high school students
is not to be dreaded” by school officials), aff’d mem., 515 F.2d 504 (2d Cir. 1975). Cf. Board
(plurality opinion) (school officials cannot remove books from school library merely because
they disapprove of the content). See also supra note 22.}

\footnote{31}{463 F. Supp. 1043 (E.D.N.Y. 1979).}
\footnote{32}{Id. at 1051-52.}
\footnote{33}{Id. at 1047.}
\footnote{34}{Id.}
would have an adverse effect on the student. In essence, the principal did not have to justify his action by demonstrating an actual fear of potential libel liability.

On the other hand, in Reineke v. Cobb County School Dist., a Georgia district court refused to credit a high school principal’s testimony that he found an article potentially libelous. After examining the article, the court found that while the article might have been written in “poor taste,” it was not “actionable libel.” The court suggested that in questionable cases the principal has a duty to consult legal counsel and delay production of the newspaper, rather than to confiscate the entire issue.

In Trachtman v. Anker, the Second Circuit added a new twist to the “invasion of the rights of others” prong of the Tinker standard. In Trachtman, the high school principal refused to allow the student newspaper staff to distribute a sex questionnaire to the student body with the results to be published in the school sponsored newspaper. The principal based his action on the fear that the questionnaires would invade the rights of students by subjecting them to “significant emotional harm.” The court found that the principal had satisfied the Tinker “invasion of the rights of others” prong by showing that the questionnaire would have caused significant psychological harm to some of the students, and noted that such a forecast was within school officials’ knowledge and expertise.

C. Public Forum Analysis

Some courts have based the degree of first amendment protection a school sponsored newspaper, or other activity, enjoys on whether the newspaper or activity is an integral part of the school curriculum, or a public forum for

35. Id. at 1052.
36. Id.
38. Id. at 1258. Cf. Leeb v. DeLong, 198 Cal. App. 3d 47, 58, 243 Cal. Rptr. 494, 502 (1988) (“A school district in [California] may censor expression from official school publications which it reasonably believes to contain actionable defamation, but not as a matter of taste or pedagogy.”).
39. Reineke v. Cobb County School Dist, 484 F. Supp. 1252, 1258 (N.D. Ga. 1980). The principal also alleged that he confiscated the issue because he feared certain photographs published in the issue could lead to a copyright infringement suit. Id. at 1258. The court reiterated that the principal had a duty to consult legal counsel and merely delay publication of the newspaper. Id.
41. 563 F.2d at 514-15.
42. Id. at 519.
43. Id. Compare Judge Mansfield’s dissent, in which he stated that “a general undifferentiated fear of emotional disturbance . . . strikes me as too nebulous and as posing too dangerous a potential for unjustifiable destruction of constitutionally protected free speech rights to support a prior restraint.” Id. at 521 (Mansfield, J., dissenting).
44. See, e.g., Seyfried v. Walton, 512 F. Supp. 235, 239 (D. Del. 1981) (even though participation in school play was voluntary, court upheld censorship of school play as curricular decision where school officials viewed play as “integral part of school’s curriculum”), aff’d, 668 F.2d 214 (3d Cir. 1982).
student expression. Courts using this analysis acknowledge that school officials deserve great deference in curricular decisions. However, these courts also recognize that school officials, either by their practice or intent, may have endorsed the school newspaper or activity as a public forum for student expression. If a court finds the newspaper or activity to be a public

45. Prior to 1983, when the Supreme Court clarified the public forum doctrine, see infra note 47, lower courts used various terms to convey the idea of a limited public forum for student expression. See Gambino v. Fairfax County School Bd., 564 F.2d 157, 158 (4th Cir. 1977) (school sponsored newspaper was a "public forum" for student expression), aff'd, 564 F.2d 157 (4th Cir. 1977); Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969) (school sponsored newspaper was a "forum" for student expression); San Diego Comm. Against Registration and the Draft v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986) (school sponsored newspaper was a limited public forum for student expression).

46. See Gambino, 429 F. Supp. at 736 ("[T]he Court does not question the authority of the School Board to prescribe course content."); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 (5th Cir. 1972) ("That courts should not interfere with the day-to-day operations of schools is a platitudeous but eminently sound maxim which this court has reaffirmed on many occasions."). While school officials enjoy wide latitude in curricular matters, the Supreme Court has made it clear that curricular decisions are not free from judicial review. The Court will not hesitate to intervene when these decisions run astray of constitutional guarantees. See Board of Educ., Island Trees Union Free School Dist. No 26 v. Pico, 457 U.S. 853, 864, 872 (1982) (plurality opinion) ("discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendant imperatives of the First Amendment"); school officials cannot remove books from school library solely because they disagree with content. See also Edwards v. Aguillard, 482 U.S. 578 (1987) (struck down state statute forbidding teaching of evolution unless school also provided instruction on theory of creation science); Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968) (struck down law prohibiting teaching of Darwinian theory of evolution); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (school officials cannot compel students to salute American flag); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (state cannot forbid teaching of foreign language). Accord Bartels v. Iowa, 262 U.S. 404 (1923).

47. The Supreme Court attempted to clarify the public forum doctrine in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) and Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985). Public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate," such as parks and streets. Perry, 460 U.S. at 45. In this type of forum, the government may make a content-based exclusion only if it is narrowly drawn and serves a necessary and compelling governmental interest. Id. In addition, any time, place, and manner restrictions must be content-neutral, serve a significant governmental interest, and ensure that there are alternative means of communication. Id. A second type of forum is a "limited public forum," which is "public property which the state has opened for use by the public as a place for expressive activity." Id. Although a state is not obliged to keep a limited public forum open indefinitely, as long as it is open, the same standards that apply to public forums are in effect. Id. at 46. A third type of forum is a "non-public forum," which is public property that is not "by tradition or designation a forum for communication." Id. In a non-public forum, time, place, and manner restrictions are permissible if they are reasonable. However, "[t]he existence of reasonable grounds for limiting access to a non-public forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." Cornelius, 473 U.S. at 811. In order to characterize a particular forum, a court should ascertain the government's intent by examining relevant government policies and practices. Id. at 802. In addition, the court should examine "the nature of the property and its compatibility with expressive activity." Id. It follows from the Court's analysis that a newspaper cannot be classified as a traditional public forum because a newspaper is not akin to a "park or street."
forum for student expression, a strict standard will be applied to scrutinize school officials' actions. For example, in *Gambino v. Fairfax County School Bd.*, a high school principal prohibited student staff members from printing an article on birth control in the school newspaper. The principal alleged that the newspaper was an "in house organ of the school system," and, therefore, was subject to reasonable regulation. The Virginia district court proceeded to examine the relevant characteristics of the newspaper. The court noted that the school district funded and sponsored the newspaper, and that students who were enrolled in a journalism course received course credit for their work on the newspaper. However, after reviewing past issues of the newspaper and examining the relevant school board regulations, the court found that the newspaper was "conceived, established, and operated as a conduit for student expression on a wide variety of topics." The court concluded that the newspaper was a public forum for student expression which enjoyed comprehensive first amendment protection. The court also

49. 429 F. Supp. at 734.

Likewise, at the university level, courts reject the argument that university officials may censor school sponsored publications based on state funding. See *Stanley v. MaGrath*, 719 F.2d 279, 284-85 (8th Cir. 1983) (refund system for student newspaper unconstitutional); *Joyner v. Whiting*, 477 F.2d 456, 560 (4th Cir. 1973) ("Censorship of constitutionally protected expression cannot be imposed by . . . withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse."); *Bazaar v. Fortune*, 476 F.2d 570, 573-75 (5th Cir.) (university as arm of state cannot rely on funding of student literary magazine in order to exercise same censorship rights as private publisher), *modified*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337-38 (D. Mass. 1970) (university officials may not justify censorship of student newspaper on state funding).

51. *Gambino*, 429 F. Supp. at 733. Some courts hold that if students produce a school newspaper as part of their journalism course work, then school faculty and officials may justifiably review articles for accuracy prior to publication. See *Nicholson v. Board of Educ.*, 682 F.2d 858, 863-64 (9th Cir. 1982) (upheld school officials' review of "sensitive" articles for accuracy since school possessed "substantial educational interest in teaching young, student writers journalistic skills which stressed accuracy and fairness"). But see *Bayer v. Kinzler*, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974) (that publication of school newspaper was extracurricular activity was "buttressed by the fact" that staff did not receive course credit for work on newspaper; even if newspaper was curricular, however, school officials could not interfere with newspaper), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975).
53. *Id.* at 734-35.
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rejected the principal's argument that since the school board did not include birth control in its sex education curriculum, then the students should not be allowed to contravene this school board policy by printing the birth control article. While the court acknowledged that school officials had the authority to control school curriculum, it reiterated that since the school newspaper was not an integral part of the curriculum, the publication did not fall within the school officials' editorial power.

D. Underground Newspapers

Newspapers produced by students off of school premises are commonly known as "underground" newspapers. Unlike school sponsored newspapers, underground newspapers are neither financed nor sponsored by the school, nor is their production supervised by faculty members. Since underground newspapers are independent publications, schools cannot be held liable for possible libel, invasion of privacy, or copyright claims.

As a result of their independent nature, underground newspapers enjoy more comprehensive first amendment protection than do their school sponsored counterparts. While school officials may impose reasonable time, place, and manner restrictions on the distribution of underground newspapers, in

54. Id. at 736.
55. Id. The court analogized the newspaper to the school library and stated that "[i]n either place, the material is not suppressible by reason of its objectionability to the sensibilities of the School Board or its constituents." Id. at 736. See also Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (plurality opinion) (students have right to receive information and school officials cannot remove books from school library merely because they disapprove of content). See generally Yudof, Library Book Selection and Public Schools: The Quest for the Archimedean Point, 59 IND. L.J. 527 (1984) (discusses present structure of decision making in public schools and analyzes the Pico case); Note, Schoolbooks, School Boards, and the Constitution, 80 COLUM. L. REV. 1092 (1980) (discussion of lower court library book removal cases).
56. Id. Cf. Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd mem., 515 F.2d 504 (2d Cir. 1975). In Bayer, the principal seized undistributed copies of the school sponsored newspaper because he objected to a sex information supplement. 383 F. Supp. at 1165. The principal alleged that the supplement intruded into a curricular area, and, therefore, he only needed to demonstrate that his actions were reasonable. Id. at 1165-66. The New York district court rejected this argument. Id. at 1165. According to the court, the Tinker standard, rather than a reasonableness standard, applied in reviewing the principal's actions. Id. at 1165. The court explained that the student staff members' attempt to educate their fellow students on birth control deserved as much first amendment protection as the students' activity in Tinker. Id. The court concluded that the staff prepared the supplement in a responsible manner and that the seizure was not necessary to avoid a material and substantial disruption of the school. Id.
58. See, e.g., Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 (5th Cir. 1972) (reasonable time, place, and manner restrictions for distributing material on school premises during school hours are not unconstitutional).
order to impose a prior restraint system, most courts, with the exception of the Seventh Circuit, hold that such systems must be accompanied by clear and detailed written guidelines, as well as effective appeals procedures. In contrast, courts do not require the same written guidelines for prior restraints on school sponsored publications. At best, guidelines governing school sponsored publications may be relevant to the issue of whether school officials created a public forum for student expression, and the absence of guidelines may lead only to a more careful scrutiny of school officials’ censorship actions.

Most courts agree on the criteria that must be satisfied for school officials to impose prior restraints on the distribution of underground newspapers. Clear and detailed written guidelines are one such requirement. However, there has been disagreement both within and among the circuits on the degree of clarity and precision required of guidelines which govern underground newspapers. The Fourth Circuit provides an example of the inter-circuit conflict. In Nitzberg v. Parks, the Fourth Circuit struck down a guideline which failed to define a "substantial disruption or material interference with

59. Fujishima v. Board of Educ., 460 F.2d 1355, 1357 (7th Cir. 1972) (prior restraints are unconstitutional per se; Tinker applies to punishment of student expression and does not afford a basis for establishing a system of censorship). See also Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.) (student who failed to acquire approval of material prior to distribution could not be disciplined when school authorities relied on content of material to justify punishment, instead of time, place, or manner of distribution), cert. denied, 400 U.S. 826 (1970).

60. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810-11 (2d Cir. 1971) (regulations were unconstitutional because they failed to provide for a definite short period of review and failed to specify how and to whom one must submit material for review). In Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975), the court found that the distribution regulations were vague, overbroad, and failed to delineate what constituted a "substantial disruption or material interference with school activities." Id. at 383-84. Furthermore, the regulations failed to provide a detailed and prompt appeals procedure. Id. at 384. See also Baughman v. Freienmuth, 478 F.2d 1345, 1348-49 (4th Cir. 1973) (time, place, and manner restrictions are valid, however, regulations lacked precise standards by which materials would be judged and lacked specified time period for decision); Shanley, 462 F.2d at 969, 977-78 (prior restraints are not unconstitutional per se, however, they must contain clear criteria and adequate appeals procedures); Burch v. Barker, 651 F. Supp. 1149, 1155 (W.D. Wash. 1987) (school officials may require prior approval only if time, place, and manner regulations are inadequate; "school officials should follow this maxim: 'When in doubt, do not censor.'").

61. See Reineke v. Cobb County School Dist., 484 F. Supp. 1252, 1263 (N.D. Ga. 1980) (court pointed out that no prior restraint guidelines governed school sponsored newspaper and expressed no opinion as to whether school officials should promulgate guidelines).

62. See Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 736-37 (E.D. Va.) (vague Board policy evinced intent of school officials to create forum for student expression, but court should not rewrite policy where there is a lack of detailed criteria), aff'd, 564 F.2d 157 (4th Cir. 1977).

63. See Frasca v. Andrews, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979) (while written guidelines are desirable, they are not constitutionally required and a total lack of guidelines suggests that court should scrutinize a school official's actions more closely).

64. 525 F.2d 378 (4th Cir. 1975).
school activities."\(^6\) In a later case,\(^6\) however, the Fourth Circuit found a guideline that prohibited material "which encourages actions which endanger the health and safety of students" to be valid, even though it did not contain any specific definitions.\(^7\)

The conflict among the circuits is illustrated by comparing the Fourth Circuit's ruling in *Nitzberg* with the Second Circuit's ruling in *Eisner v. Stamford Board of Educ.*\(^6\) In *Eisner*, a school board guideline prohibited the distribution of materials on school grounds which would "interfere with the proper and orderly operation and discipline of the school . . . ."\(^7\) The Second Circuit refused to hold that the policy was overbroad for lack of specific criteria and stated that, "[a]lthough the policy does not specify that the foreseeable disruption must be either 'material' or 'substantial' as *Tinker* requires, we assume that the Board would never contemplate the futile as well as the unconstitutional suppression of matter that would create only an immaterial disturbance."\(^7\)

Another issue that the courts have encountered is the question of whether school officials may regulate the off-campus distribution of underground newspapers. Courts agree that school officials may not rely on guidelines which govern the on-campus distribution of underground materials in order to regulate the off-campus distribution of these materials.\(^7\) Generally, school officials are limited to post-distribution punishment actions and sanctions may be imposed only if the off-campus distribution substantially disrupted the school environment.\(^7\)

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65. *Id.* at 383.
67. *Id.* at 1206.
68. 440 F.2d 803 (2d Cir. 1971).
69. *Id.* at 805.
70. *Id.* at 808 (emphasis in original).
72. See, e.g., Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 975 (5th Cir. 1972) (discipline of students for off-campus distribution of underground newspaper which did not cause a substantial and material disruption of school activities was unconstitutional). The material and substantial disruption standard also governs school officials' punishment and prior restraint actions concerning the on-campus distribution of underground newspapers. See, e.g., Jacobs v. Board of School Comm'rs, 490 F.2d 601, 610 (7th Cir. 1973) (on-campus distribution of material which contained "earthy words" would not substantially disrupt school environment), *cert. granted*, 417 U.S. 929 (1974), *vacated as moot*, 420 U.S. 128 (1975); Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973) (unless school officials can reasonably forecast that on-campus distribution would result in substantial interference or material disruption of school environment, presumption arises that prior restraints are unconstitutional).
II. THE HAZELWOOD SCHOOL DIST. v. KUHLMEIER DECISION

A. Facts and Procedure

Spectrum, the official school newspaper of Hazelwood East High School in St. Louis County, Missouri, was produced by students in the Journalism II class. While student staff members exercised some control over the contents of the newspaper, Robert Stergos, the Journalism teacher, had the authority to make final decisions. Spectrum was also subject to school board regulations, an official Curriculum Guide description of Journalism II, and a January, 1983 oral directive that each issue be approved by the

74. Id. at 1452-53.
75. Board Policy 348.5, "Student Publications," provided in pertinent part:
   a. Students are entitled to express in writing their personal opinions. The distribution of such material . . . may not interfere with or disrupt the educational process.
607 F. Supp. at 1455.
76. Id. at 1456.
high school principal, Robert Reynolds. A policy statement was also published each year in the premier issue of the newspaper.

On April 29, 1983, Stergos resigned his position and was replaced by Howard Emerson on May 1. Although Emerson replaced Stergos nearly two weeks before the May 13 issue was slated to be published, the issue was essentially completed under the direction of Stergos.

Per the oral directive, Emerson submitted the issue to Principal Reynolds for his approval on May 10. Emerson phoned Principal Reynolds the following afternoon and stayed on the line as Principal Reynolds reviewed the issue. Twenty minutes later, Reynolds ordered Emerson to direct the printer to excise pages four and five of the issue because he objected to two articles—an article on the impact of divorce on children, and an article on the personal accounts of three pregnant Hazelwood East students. The Spectrum staff did not learn of the deletion until the final May 13th edition was returned from the printer. When seven Spectrum staff members immediately confronted Reynolds with the deletion, he explained that the excised stories were "too sensitive" for 'our immature audience of readers.'

The staff voted and decided to go ahead with the sale of the revised newspapers. On Monday, May 16, Reynolds met with the Spectrum staff and again explained that the excised stories were "inappropriate, personal, sensitive and unsuitable." Reynolds and the School District Superintendent made similar comments to the press.

77. Id. at 1453-54.
78. The following "Statement of Policy" appeared in the September 14, 1982 edition of Spectrum:

Spectrum is a school funded newspaper; written, edited and designed by members of the Journalism II class with assistance of advisor Mr. Robert Stergos. Spectrum, as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution which states that: 'Congress shall make no law restricting . . . or abridging the freedom of speech or the press. . . . ' That this right extends to high school students was clarified in the Tinker v. Des Moines Community School District case in 1969 [citation omitted]. The Supreme Court of the United States ruled that neither 'students nor teachers shed their constitutional rights to freedom of speech or expression at the school house gate.' Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited.
607 F. Supp. at 1454-55.
79. 607 F. Supp. at 1458.
80. Id.
81. Id.
82. Id. at 1458-59.
83. Id. at 1459. Pages four and five of the issue also contained articles on teenage marriage, runaways and juvenile delinquents, birth control, and another article on teenage pregnancy. Id. at 1457.
84. Id. at 1459.
85. Id.
86. Id.
87. Id.
88. Id. at 1458-59.
The plaintiffs, staff members of Spectrum, brought an action in federal court seeking a declaratory judgment that their first amendment rights had been violated by the censorship, and requesting monetary damages. The case was tried without a jury. The district court held that Spectrum was an integral part of the school's curriculum, and that the Tinker standard was thus not applicable; Tinker applied to situations in which student conduct was private and outside the realm of school curriculum. Therefore, in order to validate the present action, the district court stated that school officials needed to demonstrate only that there was a reasonable basis for the action, based on the facts before them at the time they made the decision.

The court accepted as true Principal Reynolds' testimony that he excised the articles because he thought there was no time to make changes before printing, and that any delay could have resulted in the May 13 edition of the Spectrum not being printed. Reynolds testified that he had invasion of privacy concerns with the pregnancy article because the anonymous students might still be identified due to the small number of pregnant students at the high school. He also feared that the article invaded the privacy rights of not only the three girls interviewed, but also those of their parents and boyfriends. Reynolds also felt that a discussion of the girls' sexual histories and birth control use, although not sexually explicit, would be inappropriate for the younger students. He was also troubled by invasion of privacy concerns regarding the divorce article because the parents of a quoted student were not given a chance to respond to the student's allegations. Reynolds did not know at the time that Mr. Emerson had replaced the actual name of the student in the article with a pseudonym.

89. The plaintiffs were three Spectrum staff members, and the defendants included the school district, the district superintendent, the assistant superintendent for secondary education, the chief executive officer, the principal of Hazelwood East High School, Robert Reynolds, and faculty member Howard Emerson. Id. at 1451.
90. Id. at 1450. The plaintiffs' original complaint also sought injunctive relief, but the court dismissed this claim as moot since the plaintiffs had graduated from high school. Kuhlmeier v. Hazelwood School Dist., 596 F. Supp. 1422 (E.D. Mo. 1984).
91. Id. at 1450-51.
92. The court relied on the fact that students enrolled in the Journalism II class produced the major part of Spectrum, and that these students received course credit and a grade for their work on the newspaper. Id. at 1465. The court also pointed out that the curriculum guide referred to Journalism II as a "laboratory situation," and, therefore, according to the court, Spectrum was a "laboratory exercise." Id. In addition, the court noted that Board Policy 348.51 stated that school sponsored publications were "developed within the adopted curriculum." Id. See supra note 75. The court was also influenced by Stergos' control over publication of Spectrum, and the school officials' prior review of the paper in the past. Id. at 1465-66. These factors led the court to conclude that production of Spectrum "did involve the compulsory environment of the classroom." Id. at 1465.
94. Id. at 1463.
95. Id. at 1459, 1466.
96. Id. at 1460, 1466.
97. Id. at 1466.
98. Id.
99. Id. at 1460, 1466-67. Principal Reynolds did not know at the time that Mr. Emerson had replaced the actual name of the student in the article with a pseudonym. Id. at 1458.
testified that he did not object to the other articles that appeared on the
deleted pages. The district court found that Reynolds acted reasonably
and that the deletions were justified. Finally, the court held that precise
School Board regulations governing the operation of Spectrum were not
necessary because school officials are accorded wide latitude and deserve
great deference in curricular matters.

On appeal, the Eighth Circuit agreed with the district court that Tinker
would not apply to a newspaper which was an integral part of the school
curriculum. However, the appellate court found that Spectrum was a public forum and that the Tinker standard would thus apply to the court’s scrutiny of Reynolds’ actions. The court found that Reynolds could not have reasonably forecast a material disruption in classrooms or substantial disorder in the school if the deleted articles were published. According to the appellate court, the “heart of the case” was whether Tinker’s “invasion of the rights of others” prong justified Reynolds’ action. The court construed that prong to require potential tort liability and held that the articles could not feasibly have lead to tortious invasion of privacy claims. The court also held that the School Board regulations and Reynolds’ prior review were valid, and that the court should not engage in rewriting School Board regulations. Nonetheless, the court directed school officials to adjust their policies in light of the opinion. Specifically, if school officials are to exercise censorship powers under the Tinker standard, students must be given

100. Id. at 1460, 1466.
101. Id. at 1466-67.
102. Id. at 1467.
103. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986). The students appealed the district court’s findings and also alleged that the district court’s denial of a jury trial was error. Id. at 1371. Since the appellate court held in favor of the appellants, it did not consider the allegation that the district court erred in not granting a jury trial because it would amount to an advisory opinion. Id. at 1377-78.
104. Id. at 1371.
105. The appellate court relied on the facts that the student staff chose the content of the articles to be published in Spectrum, Stergos testified that Spectrum was a student paper and he was available mainly to help students with legal and ethical questions, and the staff distributed the newspaper to the school and also to the public. Id. at 1372. In addition, the court cited the policy statement of Spectrum, see supra note 78, a provision of Board Policy 348.5 that “[s]tudents are entitled to express in writing their personal opinions,” see supra note 75, a provision of Board Policy 348.51 that “[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism,” see supra note 75, and Board Policy 341.5, “Controversial Issues,” see supra note 75. Id. at 1373. The court concluded that Spectrum was “a forum in which the school encouraged students to express their views to the entire student body freely, and students commonly did so.” Id.
106. Id. at 1374.
107. Id. at 1375.
108. Id.
109. Id. at 1375-76.
110. Id. at 1377.
111. Id.
an opportunity to correct their articles, and if students challenge such a
decision, the burden falls on the school to justify the action as one which
complies with Tinker.\textsuperscript{112}

\textsection{B. The Majority Opinion}

The United States Supreme Court reversed the appellate court's finding
that \textit{Spectrum} was a public forum governed by the \textit{Tinker} standard.\textsuperscript{113} The
majority distinguished private student expression which fortuitously occurs
on school premises from student expression which the community could
perceive as bearing the school's imprimatur; while the stricter \textit{Tinker} standard
would apply to the former, the latter would require a lesser standard of
review.\textsuperscript{114} According to the Court, \textit{Spectrum} fell into the latter category,\textsuperscript{115}
and in order to satisfy this lesser standard, the Court held that school
authorities need only demonstrate that a legitimate pedagogical concern
prompted a regulation of student expression which might occur in school
activities.\textsuperscript{116} These activities would include those occurring in or out of the
classroom, supervised by faculty members, and "designed to impart partic-
ular knowledge or skills to student participants and audiences."\textsuperscript{117} In its
analysis, the Court afforded great weight to the interests of the school:
avoiding the exposure of immature students to materials which may be
inappropriate; avoiding attribution of immoral views to the school; allowing
schools to remain neutral on political matters; and needing school officials
to decide curricular matters.\textsuperscript{118} In applying this standard to the facts of the
case, the Court concluded that Principal Reynolds' action was prompted by
such legitimate pedagogical concerns.\textsuperscript{119}

\textfootnote{112. Id.}

delivered the opinion of the Court in which Chief Justice Rehnquist, and Justices Stevens, O'Connor,
and Scalia joined. Justice Brennan wrote a dissent joined by Justices Marshall and Blackmun.

\textfootnote{114. Id. at 569-70. The majority held that a court should apply the \textit{Tinker} standard when
school officials seek to \textit{punish} students for expression, and not when school officials seek to
\textit{regulate} student expression. \textit{Id.} at 570.

\textfootnote{115. Unlike the Eighth Circuit, the Supreme Court found that the school officials did not
intend \textit{Spectrum} to operate as a public forum. \textit{Id.} at 569. The Court relied on Hazelwood
School Board Policy 348.51, the curriculum guide description of Journalism II, the fact that
Journalism II students received course credit and grades, Robert Stergos' control over the
production of \textit{Spectrum}, and other district court findings of fact. \textit{Id.} at 568-69. \textit{See also}
court findings of fact). \textit{See supra} notes 73-78 and accompanying text (school board and \textit{Spectrum}
policies). The Court characterized the evidence the appellate court relied on as "equivocal at
best." 108 S. Ct. at 568.

\textfootnote{116. 108 S. Ct. at 570-71.}

\textfootnote{117. \textit{Id.} at 570. These activities include school sponsored publications and theatrical produ-
cutions. \textit{Id.}

\textfootnote{118. \textit{Id.} at 570.}

\textfootnote{119. \textit{Id.} at 571-72. The Court credited Reynolds' testimony. \textit{See supra} notes 95-100 and
accompanying text.}
C. Justice Brennan’s Dissent

Justice Brennan accused the majority of creating a “taxonomy of school censorship” by holding that the Tinker standard was not applicable. He pointed out that the Tinker majority applied the same standard whether the students wore their black arm bands in or out of the classroom. Moreover, he believed that to allow school officials to shield students from sensitive topics or diverse viewpoints amounted to unconstitutional “thought control.” While Justice Brennan agreed that school officials may be justified in regulating student speech which appears to bear the school’s imprimatur, he stated that if such action is to be taken, school officials must use the least restrictive means possible.

In applying the Tinker standard to the case at bar, Justice Brennan found that the articles would not lead to material disruption and that the alleged privacy concerns would not violate the “invasion of the rights of others” prong. In addition, the fact that Reynolds objected to only two articles, while he excised six, combined with the fact that he overlooked obvious less restrictive alternatives, amounted to what Justice Brennan termed “brutal censorship.”

III. Analysis

By declining to follow the Tinker standard, the Hazelwood majority not only broke with applicable precedent, but also failed to give any weight to high school students’ constitutional right to freedom of expression. The majority attempted to distinguish Tinker from Hazelwood by pointing out that while Tinker related to punishment, Hazelwood related to prior restraints on student expression. However, the majority conveniently evaded

120. Id. at 575 (Brennan, J., dissenting). While the majority stated that Tinker only applied to punishment and not to regulation of student expression, Hazelwood, 108 S. Ct. at 570, the lower Hazelwood courts also distinguished Tinker, but did so on other grounds. These courts agreed that Tinker would not apply if a school sponsored newspaper is essentially curricular in nature, but that Tinker would apply if a school sponsored newspaper is a public forum for student expression. Kuhlmeier v. Hazelwood School Dist. 607 F. Supp. 1450, 1462-65 (D.C. Mo. 1985); Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1371 (8th Cir. 1986).
122. Id. at 577-78 (Brennan, J., dissenting). Justice Brennan acknowledged that school officials deserve great deference for curricular decisions, but pointed out that, in the past, the Court found several curricular decisions unconstitutional. Id. at 573-74 (Brennan, J., dissenting) (citing such cases as Epperson v. Arkansas, 393 U.S. 97 (1968) (struck down state law prohibiting teaching Darwinian theory of evolution) and Meyer v. Nebraska, 262 U.S. 390 (1923) (state cannot prohibit teaching of foreign language)).
123. Id. at 579 (Brennan, J., dissenting).
124. Id.
125. Id. at 580 (Brennan, J., dissenting).
the fact that in *Tinker* the Court struck the appropriate balance between students' highly valued first amendment rights and the need for school officials to maintain order and inculcate basic community values in students.128

In his dissent, Justice Brennan argued that the majority did not follow precedent. Justice Brennan asserted that the Court had recently applied the *Tinker* standard in *Bethel School Dist. No. 403 v. Fraser*,129 and accordingly should have applied *Tinker* to *Hazelwood*. Brennan's argument, however, is incorrect. *Fraser* involved "vulgar and offensive" student speech and the Court based its holding on the fact that this type of speech was not protected by the first amendment.130 While *Tinker* was cited by the *Fraser* Court for the proposition that students do not lose their first amendment rights in school, the Court also distinguished *Tinker* as applying to "nondisruptive, passive expression of a political viewpoint," and not to speech which is lewd or obscene in the school setting.131 Moreover, Justice Brennan referred to *Tinker* in his concurring opinion in the *Fraser* case, but did not explicitly apply the *Tinker* standard to the case, or comment on the *Fraser* majority's characterization of *Tinker*.132 Therefore, the fact that the Court did not apply the *Tinker* standard to *Fraser* has no bearing on the Court's failure to apply the *Tinker* standard to *Hazelwood*. Instead, the *Hazelwood* Court could have easily followed *Tinker* and afforded student expression more comprehensive first amendment protection.

While it would have been surprising if the Court held that students have the absolute right to print whatever they want, the new standard is equally surprising. Many lower court decisions followed *Tinker* and put the burden on school officials to demonstrate that student expression in school sponsored activities would substantially and materially interfere with the operation of the school or invade the rights of others.133 Under this stricter standard, students felt secure in voicing their ideas and opinions, knowing that their expression could be regulated only when an important need existed for such action. In lowering the standard, the Supreme Court effectively decided that school authorities may regulate any student expression in school activities which does not parallel the mind-set of the school.134

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130. *Fraser*, 478 U.S. at 685.

131. *Id.* at 680. It is interesting to note that the Court cited *Tinker* in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), *supra* note 19, for the proposition that states and school officials have "comprehensive authority . . . consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 342 n.9. The Court did not cite *Tinker* in the *T.L.O.* opinion for the proposition that courts should afford students' constitutional rights comprehensive protection.

132. 478 U.S. at 688-89 (Brennan, J., concurring).

133. *See supra* notes 23-43 and accompanying text.

134. For example, the majority in *Hazelwood* stated that "a school must be able to take
The Court pointed out that the school district-publisher has the same complete and final authority on content matters as does a private publisher. The entity which bankrolls a publication also has complete censorship or editing power. Since the Hazelwood School District provided financing, Principal Reynolds was merely exercising his legal censorship powers. While some commentators advocate this position, this reasoning is flawed. The first amendment mandate is directed at government action, and not at the managing editors and publishers of private newspapers. Assuming, arguendo, that this position has merit, the Court could have stopped its analysis into account the emotional maturity of the intended audience in determining whether to disseminate student speech of potentially sensitive topics." 108 S. Ct. at 570. However, Justice Brennan, in his dissent, pointed out that "'potential topic sensitivity' is a vaporous nonstandard . . . that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which the school officials might not object." Id. at 578 (Brennan, J., dissenting) (citations omitted). This is precisely what occurred in Hazelwood. Principal Reynolds explained to the students and press that he objected to the articles because of topic sensitivity, Kuhlmeier, 607 F. Supp. at 1459-60. At trial, however, Principal Reynolds testified that he objected to the article concerning pregnant Hazelwood students on invasion of privacy grounds. Id. at 1460. Because the Principal approved of the other articles that were to appear on the excised pages, including another article on pregnancy, Justice Brennan concluded that "[i]t is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate 'irresponsible sex.'" 108 S. Ct. at 579 (Brennan, J., dissenting).

135. The majority stated that:

[A] school may in its capacity as publisher of a school newspaper . . . 'disassociate itself,' not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences . . . A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers . . . in the 'real' world—and may refuse to disseminate student speech that does not meet those standards.

108 S. Ct. at 570 (citations omitted).

136. The school financed Spectrum through money from the Hazelwood School Board and issue sales, Kuhlmeier, 607 F. Supp. at 1452.

137. See, e.g., Lazarus, Be Judges Not Editors, Nat'l. L. J., Feb. 15, 1988, at 13-14. Lazarus believes that "'the point is that someone ultimately must decide what will run in a [school] newspaper,' and the most practical person to stand in the shoes of the public as publisher of a student newspaper is the school principal. Id. at 14.

138. See, e.g., Bailey v. Loggins, 32 Cal. 3d 907, 654 P.2d 758 (1982). In Bailey, a case involving the censorship of a prison newspaper, the Supreme Court of California stated:

We . . . reject the claim that the state as publisher enjoys the same total control over the content of the newspaper as a private publisher. That contention overlooks the critical distinction between a government as publisher and a private publisher. When identical claims based on the state's right as publisher have been asserted to justify censorship of high school and college newspapers, the courts have emphatically rejected those claims. . . . [T]he state, having established an activity which has the elements of free expression, must take account of First Amendment considerations in restricting that expression.

Id. at 918-19, 654 P.2d at 766 (footnotes and citations omitted).
at this point. Instead, the Court discussed school imprimatur and the need to shield immature students from sensitive topics, and determined that Principal Reynolds acted reasonably. Unfortunately, by trying to legitimatize its broad ruling, the Court by-passed a simple holding of legal censorship powers in order to extend the ruling to all school related activities.

The Court also relied on the need for schools to remain politically neutral and to avoid the public perception that a school has placed its imprimatur on morally objectionable subjects. However, as Justice Brennan pointed out in his dissent, these concerns can easily be allayed by simple disclaimers and rebuttals. Unfortunately, the majority failed to examine these easily implemented alternatives which would have allowed the Court to endorse the Tinker standard for student expression in school sponsored activities.

Moreover, although subjecting school officials' censorship powers to "legitimate pedagogical concerns" may appear to be a valid legal limitation, its application is merely a cloak for affording school officials complete discretion. The case involved a journalism class production, yet the holding extends beyond that setting to all school sponsored activities, curricular or extracurricular. The decision would be more understandable, although not

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139. 108 S. Ct. at 571-72.
140. See Lazarus, supra note 137. Lazarus suggests that the Hazelwood Court overstepped its bounds in determining that Principal Reynolds acted reasonably. He finds that a school principal can legally exercise censorship powers over a school sponsored newspaper, as opposed to "a judge wielding the Constitution as an editor's blue pencil." Id. at 14.
141. 108 S. Ct. at 570.
142. Id. at 579 (Brennan, J., dissenting).
143. The Supreme Court denied certiorari to four high school press cases before it granted certiorari to the Hazelwood case. See Thomas v. Board of Educ., 607 F.2d 1043 (2d Cir. 1979) (school officials may not punish student for off-campus distribution of material), cert. denied, 444 U.S. 1081 (1980); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (upheld school officials' prohibition on distribution of school newspaper sex supplement because of potential emotional harm to some students), cert. denied, 435 U.S. 925 (1978); Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir.) (upheld school officials' decision to punish student who distributed materials adjacent to school when student was insolent and blatantly disregarded school distribution guidelines), cert. denied, 414 U.S. 1032 (1973); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.) (school officials may not justify ban on distribution of materials based on content), cert. denied, 400 U.S. 826 (1970). The Court did grant certiorari in a fifth case, in which the Seventh Circuit held that school officials could not prohibit a student from distributing an underground newspaper containing "earthly words" on school grounds, but dismissed it as moot because the plaintiff had already graduated from high school. Jacobs v. Board of School Comm'r's, 490 F.2d 601 (7th Cir. 1973), cert. granted, 417 U.S. 929 (1974), vacated as moot, 420 U.S. 128 (1975). The Court was waiting for the "right" fact pattern. The unusual circumstances of the Hazelwood case supplied the necessary ingredients to legitimate the broad holding the Court sought. The school officials in Hazelwood had recently replaced the newspaper's advisor, and the interim advisor, who was unfamiliar with the operation of Spectrum, failed to inform the principal of the fact that he had replaced the named student in the divorce article with a pseudonym, or of available alternatives. Kuhlmeier, 607 F. Supp. at 1451, 1458-59. In addition, the reasons Reynolds cited for his actions were facially legitimate. These factors, as well as the fact that Spectrum was a journalism course production, and that the board policies and practices were ambiguous, made the case particularly appealing.
palatable, had the Court limited its holding to the factual setting of the case. While school officials do deserve wide latitude with regard to curricular decisions, it is questionable whether the same degree of discretion should be afforded decisions pertaining to extracurricular matters.\textsuperscript{144} Several lower courts have been unwilling to accord school officials' decisions concerning extracurricular matters the same degree of deference allowed to curricular matters.\textsuperscript{145}

If one could accept the premise that a curricular school newspaper is akin to any other school sponsored activity, the decision might be more acceptable. Unlike other school activities, however, a newspaper is \textit{inherently} a vehicle for student expression. Everything that appears in a school newspaper is expression.\textsuperscript{146} If the purpose of a school newspaper was merely to teach student staff members journalistic ethics, writing skills, and newspaper production, there would be no reason to sell or distribute the newspaper to the school community.\textsuperscript{147} The fact that this type of student expression serves a valid educational purpose in and of itself\textsuperscript{148} should justify more comprehensive first amendment protection to school sponsored newspapers than to other school sponsored activities.\textsuperscript{149}

In addition to granting school officials almost unlimited discretion in monitoring student expression in school sponsored activities, the Court's public forum analysis illustrates that the Court gave no weight to students'
first amendment rights. The public forum analysis is totally dependent on school officials' intent and practice and gives little or no weight to the speaker's interests. In addition, there are no set guidelines to apply in order to determine the existence of a public forum. These faults are amply illustrated by the two conflicting lower court holdings in Hazelwood.

This amorphous analysis is not appropriate when construing students' first amendment rights.

In light of the Court's broad holding, the public forum analysis was essentially excess verbiage. The Court held that school officials need only demonstrate that a legitimate pedagogical concern prompted a restriction of student speech occurring in activities "characterized as part of the school curriculum." According to the Court, an activity is curricular so long as it takes place in or out of the classroom, is supervised by a faculty member, and is intended to impart knowledge to the participants. These factors implicate virtually all student activities of any substantive importance. Since public forum analysis consists of examining school officials' intent and practice, and since the Court stated that the presence of the above factors defines an activity as curricular, it is unlikely that a "curricular" activity could ever be deemed to be a public forum.

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Our objection to public forum analysis is not that it invariably yields wrong results (although it sometimes does), but that it distracts attention from the first amendment values at stake in a given case. It almost certainly will hinder lower court judges from focusing on those values or from making sense of Supreme Court precedent. See supra note 47.

152. See R. Rotunda, J. Nowak & J. Young, supra note 2, at 246 (although it is important to characterize the type of forum, the Supreme Court has not made it clear which tests a court should use to make characterization); Note, Public Forum Analysis and State Owned Publications: Beyond Kuhlmeier v. Hazelwood School District, 55 Fordham L. Rev. 241, 248-49 (1986) (discussing inconsistent applications of public forum doctrine to high school newspapers). The Hazelwood majority added to this confusion by completely ignoring the possibility that Spectrum was a "limited public forum" for student expression. See supra note 47.

153. See supra notes 92 and 105 and accompanying text. Like the Hazelwood majority, the lower Hazelwood courts also took the all-or-nothing position that if Spectrum was not a public forum, then it was an integral part of the school's curriculum. Both courts disregarded the limited public forum concept. Kuhlmeier, 607 F. Supp. at 1463-66; Kuhlmeier, 795 F.2d at 1371-74. But see San Diego Comm. Against Registration and the Draft v. Governing Bd., 790 F.2d 1471, 1476 (9th Cir. 1986) ("Thus, under the test enumerated in Cornelious, [see supra note 47] the Board's newspapers, like most other school papers, constitute, at a minimum, a limited public forum . . . .")

155. Id. at 570.
Even if the majority correctly construed *Spectrum* as a non-public forum, Principal Reynolds' actions must still be reasonable and not merely a facade for a judicially abhorred viewpoint or content discrimination. The majority refused to consider the fact that Principal Reynolds' testimony contained elements of viewpoint discrimination. In addition, the majority credited Reynolds' testimony that he had invasion of privacy concerns with the pregnancy article, even though the subject students had consented to the article and pseudonyms were used. Moreover, while Reynolds did not know that the newspaper advisor had replaced the named student in the divorce article with a pseudonym, the Principal unilaterally excised the two pages and made no attempt to inquire if changes could be made, or if publication could be delayed. As Justice Brennan pointed out in his dissent, "[w]here 'the separation of legitimate from illegitimate speech calls for more sensitive tools,' the principal used a paper shredder." In light of the Principal's unreasonable actions, and the possibility of viewpoint discrimination, his actions should not have been upheld.

IV. IMPACT

The obvious impact of this decision is on student newspaper staff members, student authors, and readers of school sponsored newspapers. Staff mem-

156. See supra note 47.
158. See supra note 134.
159. 108 S. Ct. at 571.
160. Id. at 566.
161. Id. at 580 (Brennan, J., dissenting) (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).
162. The *Hazelwood* ruling has had no effect on high school decisionmaking in California. In 1983, the State of California enacted a statute to deal with many of the issues which confront courts deciding student press cases. *CAL. EDUC. CODE* § 48907 (West Supp. 1988) (effective July 28, 1983). The statute provides that students in the state's public schools have broad freedom of expression and press rights, and that these rights can be abridged only if the expression is obscene, libelous, slanderous, creates a clear and present danger, or substantially disrupts the operation of the school. *Id.* The statute is clear that these rights extend not only to underground publications, but also to both curricular and extracurricular student publications. *Id.* Shortly after the Supreme Court's *Hazelwood* decision, a California court of appeal decided...
bers will be resigned to covering topics which reflect the viewpoint and concerns of the school authorities. The appeal of journalism courses will surely dwindle. In fact, the actual immediate reactions to the decision are probably a reliable forecast of the future of high school journalism. Within one hour after the Supreme Court's decision was announced on the radio, a high school principal censored an article on AIDS. That same day, at another high school, all student staff members quit their positions at the school sponsored newspaper, in protest of the Hazelwood decision, and began working on an underground newspaper. This reaction is particularly harmful because now these student journalists will not enjoy the valuable benefit of professional guidance which the staffs of official school newspapers ordinarily receive. Because the Supreme Court failed to consider an increase in underground newspapers, the holding could in fact backfire. The majority's justifications for the broad Hazelwood ruling, including the need for school officials to avoid school imprimatur and remain politically neutral, will not be applicable to underground newspapers, because a high school would have no tie with producing or financing such a publication.

Readers of school sponsored newspapers will also suffer if school officials choose to exercise the broad powers the Court granted them in the decision. Students look to their peers to obtain information on the pressing issues of the day and students in restricted schools will be denied the right to receive such information through the only voice the students can officially utilize. 

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a case involving the censorship of an official school newspaper. Leeb v. DeLong, 198 Cal. App. 3d. 47, 24 Cal. Rptr. 494 (Ct. App. 1988). The court noted that the factual settings of Hazelwood and DeLong were virtually identical and that "If Kuhlmeier were specifically applicable in California, little more would have to be said. But it is not. . . . The broad power to censor expression in school sponsored publications for pedagogical purposes recognized in Kuhlmeier is not available to this state's educators." Id. at 497-98.

163. The Spectrum editor at the time of the Hazelwood ruling acknowledged that the staff has "stayed away from subjects like AIDS, drugs, anything to do with sex. . . . Most of our papers just center around school activities." Court Ruling Could Produce Robots, Associated Press, Jan. 13, 1988 (wire report).

164. The decision could also undermine the teaching of journalism courses. Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969). In Zucker, school officials alleged that the student newspaper was merely an educational device and not an "organ for the dissemination of news and views unrelated to the high school." Id. at 103. The court noted that such a newspaper would "indeed be a sterile publication," and that "the teaching of journalism includes dissemination of . . . ideas [about controversial topics]. Such a school paper is truly an educational device." Id.


167. 108 S. Ct. at 570.

168. See Bayer v. Kinzler, 383 F. Supp. 1164, 1165-66 (E.D.N.Y. 1974), aff'd mem., 515 F.2d 504 (2d Cir. 1975). In Bayer, one plaintiff was the editor of the school newspaper and the other was a student who wanted to receive the school newspaper's sex supplement which dealt with contraception and abortion. Id. at 1165. The school board seized the school newspaper and supplement and the court enjoined its action. The court found that the staff members of the newspaper were attempting to educate the other students and that "[i]t is ironic that defendants view the dissemination of knowledge here as presenting a 'danger' which will bring
Most importantly, the decision will have the effect of undermining the schools' duty to inculcate democratic values and teach students about constitutional rights. It will be difficult to teach students about their constitutional rights in civics and journalism courses now that the Supreme Court has afforded students' first amendment rights such inadequate protection.

There is no doubt that many school officials across the country applauded the Hazelwood decision. However, the ruling could have an adverse impact on schools which afford more protection to students' first amendment rights than does the Supreme Court. Prior to Hazelwood, these school officials could defend their decisions to refrain from censoring student expression on the basis of the Tinker standard. These same officials may now be subject to pressure from the community and other school officials to censor student expression that merely comes close to conflicting with any of a multitude of "legitimate pedagogical concerns."

Moreover, the Hazelwood holding could be extended to public university campuses, where school sponsored newspapers have enjoyed broad press

about 'evils'. Id. at 1165-66. Cf. Wash. Post, Oct. 23, 1986, at A13. ("[O]ur youth—are not receiving information that is vital to their future health and well-being because of our reticence in dealing with subjects of sex, sexual practices, and homosexuality. . . .[t]his silence must end.") (quoting Surgeon General Dr. C. Everett Koop).

169. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969) ("[T]hat [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.") (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

170. Justice Brennan began his dissent by stating, "[w]hen the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson." 108 S. Ct. at 573 (Brennan, J., dissenting). After analyzing the majority opinion, Justice Brennan concluded:

Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system" and that "our Constitution is a living reality, not parchment preserved under glass," the Court today "teaches youth to discount important principles of our government as mere platitudes." The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

Id. at 580 (Brennan, J., dissenting) (citations omitted). See also N. HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA, 22 (1980) ("If freedom of expression becomes merely an empty slogan in the minds of enough children, it will be dead by the time they are adults.") (quoting Ben Bagdikian, journalist and press historian); Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 YALE L. J. 1647, 1654 (1986) (students learn democratic values both in the classroom and by direct example; students can learn unacceptable values when their actual experiences and observations differ from classroom instruction). Cf. New Jersey v. T.L.O., 469 U.S. 325, 386 (1985) (Stevens, J., concurring in part and dissenting in part) (majority decision to permit search of students without warrant or probable cause is "a curious moral for the Nation's youth"); Board of Educ., Island Trees Union Free School Dist. No 26 v. Pico, 457 U.S. 853, 880 (1982) (plurality opinion) (Blackmun, J., concurring) (suppressing information by banning school library books "hardly teaches children to respect the diversity of ideas that is fundamental to the American system").
Although the majority expressly reserved comment on the appropriate standard for the university level, it is more than likely that university newspapers will eventually be subject to the same fate. Although the majority's justification that school officials have the duty to shield immature students from certain topics will not be applicable, the majority's reference to the "principal as publisher" analogy could allow courts to reason that university funding, and concerns about university endorsement of student viewpoints, justify censorship.

The Hazelwood decision will probably lead to confusion among the circuits. Courts faced with cases involving the suppression of student expression in school sponsored activities will now have to conduct the confusing public forum analysis.

Courts will also have to grapple with the vague and broad "legitimate pedagogical concern" standard. In addition, although Justice Brennan attempted to provide guidance on the Tinker decision's "invasion of the rights of others" prong in his dissent, the majority, in declining to apply Tinker, left the lower courts in need of guidance in this area.


172. 108 S. Ct. at 571 n.7.

173. Id. at 570. See supra notes 135-38.

174. Several lower courts have held that public university and high school officials may not justify censorship actions by relying on the institution's power of the purse. See supra note 50.

175. See supra notes 151-53 and accompanying text.

176. Difficulties will also arise if a court finds that the "legitimate pedagogical standard" is not applicable because a school sponsored newspaper or activity is a forum for student expression. The Hazelwood majority explicitly stated that the Tinker standard applies to the punishment of student expression that just happens to occur on school premises. 108 S. Ct. at 569. Moreover, the Tinker decision did not contain public forum language. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). So now, if a school sponsored newspaper or activity constitutes a public forum, the standard a court should apply when scrutinizing a school official's censorship action is unclear, since the Hazelwood and Tinker standards are not applicable.


178. The majority expressly declined to rule on the propriety of a tort limit to the "invasion of the rights of others" prong. 108 S. Ct. at 570-71 n.5.

179. See supra notes 31-43 and accompanying text.
Finally, while the majority made it clear that specific written guidelines are not necessary before school officials exercise censorship powers over school sponsored activities,\(^8\) it expressly declined to rule on the question of whether such guidelines are necessary for underground newspapers.\(^1\) This is another area in which the lower courts need guidance,\(^2\) and, since there likely will be a resurgence of underground newspapers, the holding could lead to additional conflicts within and among the circuits.

V. Conclusion

The Hazelwood decision marks the third step in the Supreme Court's obliteration of students' first amendment rights. In the 1969 landmark decision of Tinker v. Des Moines Indep. Community School Dist.,\(^1\) the Court acknowledged that students are entitled to constitutional rights in school, including broad rights for personal expression. However, in its 1985 decision of New Jersey v. T.L.O.,\(^2\) the Court ruled that school officials need only demonstrate that a search of students was reasonable and need not obtain a search warrant or demonstrate probable cause before searching a student.\(^3\) Then, in 1986, the Court ruled in Bethel School Dist. No. 403 v. Fraser\(^4\) that school officials could discipline students for language the officials deemed offensive in the school setting. Finally, in 1988, the Court ruled in Hazelwood that school officials may abridge student expression in school activities, so long as the action is reasonably related to a legitimate pedagogical concern.\(^5\) The Court has essentially nullified the broad constitutional rights of students which were delineated in Tinker.\(^6\)

Prior to the Hazelwood decision, many lower court decisions followed Tinker and balanced students' first amendment rights with school officials' need to maintain order and control in the schools. The Tinker analysis could have been applied in Hazelwood. Instead, the Supreme Court rejected this approach and endorsed the confusing and one-sided public forum analysis. In practice, however, the public forum analysis will be an empty formality, given the Court's broad holding.

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180. 108 S. Ct. at 571 n.6. The majority stated that ""[t]o require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate."" Id.
181. Id.
182. See supra notes 64-70 and accompanying text.
188. The Court has paid and will continue to pay lip service to Tinker by quoting phrases from the decision in related opinions. For a thorough and often humorous critique of the Court's use of the phrases, see Bosmajian, The Judiciary's Use of Metaphors, Metonyms and other Tropes to Give First Amendment Protection to Students and Teachers, 15 J. L. & Educ. 439 (1986).
High school students immediately felt the adverse effects of the *Hazelwood* decision. College and high school students responsible for the distribution of underground newspapers escaped the broad ruling since the Court did not comment on the application of the holding to these areas. It is more than likely, however, that when the Court has the opportunity, it will extend the *Hazelwood* standard into these areas given the Court’s trend towards minimizing students' constitutional rights.

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