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Introduction

Student protest is not a modern phenomenon. As early as the Twelfth and Thirteenth Centuries successful student movements were organized at the University of Bologna, and student demonstrations were endemic to the medieval university.[1] In America, too, students have often waged war with school authorities, first in the colleges and then in high schools.[2] Mirroring the conscience of America, students have been leaders and active participants in the pervasive protest movements of the past decade.

While student demonstrations have touched upon diverse subjects, such as the Indochina war, ecology and racism, much of the protest has been engendered by the educational system itself. One example of what is being argued is Charles Silberman's indictment:

> The public schools are the kind of institution one cannot really dislike until one gets to know them well. Because adults take schools for granted, they fail to appreciate what grim, joyless places most American schools are, how oppressive and petty are the rules by which they are governed, how intellectually sterile and esthetically barren the atmosphere, what an appalling lack of civility obtains on the part of teachers and principals, what contempt they unconsciously display for children as children.[3]

The structure, course content, and administration of public schools required enlightened reform. The need for discipline and order often leads to curtailment of liberty. Public education, and private, too, tends to cultivate Ortega y Gasset's mass-man.[4] Often lacking in creativity and imagination, the curriculum trains the student to be a docile, obedient cog in the

* Articles Editor, Kansas Law Review.

[1] *See* C. Silberman, Crisis in the Classroom. New York: Random House (1970), p. 24.

[2] *Id.*

[3] *Id.* at 10.

[4] J. Ortega y Gasset, The Revolt of the Masses. New York: W. W. Norton (1957), p. 18.

social machine. It promulgates money as the standard of success, even though it is frequently said that education should prepare people, not just to earn a living, but to enjoy a meaningful life.

In all parts of the country and at every level of education the traditional manner of teaching is being questioned. Perhaps the English informal school will become the norm;[5] in any case, student protest focuses attention on present inequities as new models are being tested. Learning how to create and maintain a humane environment in our school is of paramount importance, for student protest is not the cause of our biggest problems, but results from them. Whatever system is adopted, one fact remains clear—the students who are the object of the educational system are seeking their constitutional rights.

The Constitutional Framework

Substantive Rights

In recent years student protest has precipitated numerous legal confrontations and students have won many court battles. The most important of these was *Tinker* v. *Des Moines Independent School District,*[6] where the United States Supreme Court held, for the first time, that the constitutional guarantee of free speech limits state authority to proscribe student political protest in secondary schools. A group of adults and students had decided to protest United States participation in the Vietnam war. To publicize these beliefs, Mary Beth Tinker, age thirteen, and Christopher Eckhardt, sixteen, wore black armbands to school. The next day, John Tinker, fifteen, did the same. In compliance with a ban on armbands, which the Des Moines school principals had adopted two days before in anticipation of the protest, the three were suspended until they would return without armbands.

Contending that these actions constituted an abridgement of their right to free speech,[7] the petitioners filed suit in Federal district court to enjoin further discipline and to recover nominal compensatory damages.[8]

[5] *See* C. Silberman, *op. cit.*, 221–62.

[6] 393 U.S. 503 (1969), *noted in* 83 Harv. L. Rev. 154 (1969), *and* Denno, Mary Beth Tinker Takes the Constitution to School, 38 Fordham L. Rev. 35 (1969).

[7] The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

[8] This suit, as well as most cases filed in the federal courts which involve students' constitutional rights, are brought under 42 U.S.C. § 1983 (1964), which 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 persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

After an evidentiary hearing, the district court dismissed the complaint on the ground that the action of the school authorities was reasonable in order to prevent disturbance of school discipline.[9] The Eighth Circuit, being equally divided, affirmed without opinion.[10] In a 7–2 decision, the Supreme Court reversed. The Court, speaking through Mr. Justice Fortas, held that school officials cannot prohibit expression of opinion, even on such controversial subjects as the war in Vietnam, unless there is a showing that engaging in the forbidden conduct "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' " [11]

The Court decided that the wearing of an armband "involved direct, primary First Amendment rights *akin* to 'pure speech,' " [12] and that first amendment rights were *available* to students and teachers. The opinion noted that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate." [13] Students, the Court held, are "persons" [14] under the Constitution, in school as well as out of school, and they are possessed of fundamental rights which the State must respect. The decision charged, "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." [15] Another vital element in *Tinker* was the assertion that "a student's rights . . . do not embrace merely the classroom hours." [16] When he is on the campus or in the cafeteria a student may express his opinions if his conduct does not materially disrupt classwork or invade the rights of others.

Mere speculation or fear that disruption will follow the exercise of constitutional rights does not, the Court made clear, justify curtailing students' expression of opinion. The Court instructed:

> In our system undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any de-

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the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

School authorities sometimes raise the defense of non-exhaustion of administrative remedies. It has repeatedly been held that the exhaustion of state remedies, usually an appeal to the school board, is not necessary to sustain federal court jurisdiction where an action is brought under 42 U.S.C. § 1983, even though injunctive relief is sought. *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961); *Westley* v. *Rossi*, 305 F. Supp. 706, 712 (D. Minn. 1969).

[9] *Tinker* v. *Des Moines Independent School Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966).

[10] *Tinker* v. *Des Moines Independent School Dist.*, 383 F.2d 988 (8th Cir. 1967) (en banc).

[11] 393 U.S. at 509, *quoting Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

[12] 393 U.S. at 508 (emphasis added).

[13] *Id.* at 506.

[14] *Id.* at 511.

[15] *Id.*

[16] *Id.* at 512.

> parture from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[17]

The *Tinker* holding, striking down the prohibition of armbands because school officials could not reasonably forecast substantial distraction or disruption, was a narrow one, for the facts indicated unequal treatment and little evidence to support the principals' fears. The school authorities did not purport to forbid the wearing of all symbols of political or controversial significance. Instead, black armbands worn to protest United States involvement in Vietnam were singled out for prohibition. Nevertheless, *Tinker* firmly established that high school students have a positive constitutional right to voice their opinions both on the campus and in the classroom. School officials must tolerate nondistracting expression in the classroom and nondisruptive expression outside of class, and presumably, they must also tolerate a certain amount of disorder which normally accompanies the expression of controversial ideas.

Procedural Due Process

Without procedural safeguards substantive rights would be virtually meaningless.[18] If a school administrator were permitted to make an ex parte and unreviewable decision that certain conduct was disruptive and that a particular student had participated in it, the Constitution would become platitudes. Denying students recourse to the due process clause of the Fourteenth Amendment as a basis for asserting procedural rights prompted this clarion in the late 1950's:

> At this time when... we proudly contrast the full hearings before our courts with those in benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of normal safeguards. It is shocking that officials of a state educational institution, which can function properly only if our

[17] *Id.* at 508–09.

[18] *See generally* Abbott, Due Process and Secondary School Dismissals, 20 Case W. Res. L. Rev. 378 (1969); Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1059–82 (1969); Note, Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1134–43 (1968).

> freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection afforded to a pickpocket.[19]

More and more courts now recognize what the Supreme Court said so pointedly in *In re Gault,* describing the procedural rights which must be accorded juvenile defendants, noting that "whatever may be their precise impact neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [20] As long as this country's political philosophy is based on individual liberty, it is essential that substantive rules be applied through procedures designed to be fair to the student involved and to lead to a reliable determination of the issues. In short, "the touchstones in this area are fairness and reasonableness." [21]

Student disciplinary hearings should balance the competing interests of the student and the school. The student has a vital interest in continuing his education free of capricious expulsion, particularly where his permanent record will reflect the adverse decision. Not only does our society demand a certain level of education for most employment, but the effect of an arbitrary expulsion is compounded by personal loss and the social stigma associated with it. The school generally asserts a broad interest in maintaining internal order and discipline. This is proper only insofar as the denial of minimum procedural requirements dangerously overburdens or unnecessarily delays the school's decision-making process. Even then it may be questioned, since procedural protections can enhance a school's reputation among its students and, thus, provide a positive benefit.

The landmark decision of *Dixon* v. *Albama State Board of Education*[22] established the minimum procedural requirements of due process of law which school authorities must comply with when taking disciplinary actions. The kernel of the *Dixon* opinion was that "whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." [23]

There is general agreement that in every disciplinary proceeding which may have serious consequences, three fundamental safeguards are required. The student must be apprised of the specific charges, he must be informed of the evidence against him, and he must be given an opportunity to present his own defense.[24] Whether the student is entitled to con-

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[19] Seavey, Dismissal of Students: "Due Process", 70 Harv. L. Rev. 1406, 1407 (1957).

[20] *In re* Gault, 387 U.S. 1, 13 (1967).

[21] *Due* v. *Florida A and M Univ.,* 233 F. Supp. 396, 403 (N.D. Fla. 1963).

[22] 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961).

[23] 294 F.2d at 155.

[24] *See, e.g., Woods* v. *Wright,* 334 F.2d 369 (5th Cir. 1964); *Pyle* v. *Blews,* Civ. No. 70-1829. (S.D. Fla. March 29, 1971); *Sullivan* v. *Houston Independent School Dist.,* 307 F. Supp. 1328 (S.D. Tex. 1969).

front the witnesses against him is a more difficult question. The requirement of *Dixon,* that the student must be given "the names of the witnesses against him and an oral and written report on the facts to which each witness testifies," [25] seems the minimum that will pass muster.

The rules of evidence can serve as a paragon but need not always be followed.[26] This holding seems correct, except where deviation from the rules would clearly put evidence in a prejudiced light. The due process clause does not impose, even on the states, the whole common-law system of evidence, but only the obligation to conduct a fair hearing. Though some universities employ attorneys full time, the cost and inconvenience of requiring all schools to retain counsel to rule on evidence would be excessive. Similarly, it would be desirable for all students confronted with a disciplinary hearing to be represented by counsel.[27]

Some students have challenged the regulations which were the basis of their disciplinary hearings as being violative of the due process clause because of unconstitutionally vague standards.[28] The doctrines of vagueness and overbreadth, already applied in academic contexts,[29] presuppose the existence of rules whose coherence and boundaries may be questioned. One view on the issue was expressed by the judges of the Western District of Missouri in their General Order on Student Discipline:

> Outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education.... The legal doctrine that a prohibitory statute is void if it is overly broad does not, in the absence of exceptional circumstances, apply to standards of student conduct.[30]

In *Soglin* v. *Kauffman*[31] the court expressly rejected this position. There, ten plaintiffs, members of Students for a Democratic Society, were protesting the presence of recruiting representatives of the Dow Chemical Corporation. Charged with "misconduct," the plaintiffs were suspended pending a hearing. The Seventh Circuit, affirming the lower court, held that the standard of misconduct was violative of the due process clause of the Fourteenth Amendment because of vagueness.[32] While school codes of

[25] *Dixon* v. *Alabama State Bd. of Educ.,* 294 F.2d 150, 159 (5th Cir. 1961).

[26] *See Goldberg* v. *Regents of Univ. of Calif.,* 248 Cal., App. 2d 867, 57 Cal. Rptr. 463 (Dist. Ct. App. 1967).

[27] *Id.*

[28] *Soglin* v. *Kauffman,* 418 F.2d 163 (7th Cir. 1969); *Sullivan* v. *Houston Independent School Dist.,* 307 F. Supp. 1328 (S.D. Tex. 1969).

[29] *Cf. Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967).

[30] 45 F.R.D. 133, 146–47 (W.D. Mo. 1968); *accord, Esteban* v. *Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969).

[31] 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd,* 418 F.2d 163 (7th Cir. 1969).

[32] 418 F.2d at 168.

conduct need not satisfy the same rigorous standards as criminal statutes,[33] expulsion or prolonged suspension may not be imposed on students by school officials without reference to any pre-existing rule which supplies an adequate guide.[34]

Thus, in spite of a split of opinion among judges, the Constitution would seem to require guidelines more specific than "in the best interest of the school." Students must have clear standards by which to measure their conduct.

The preservation of freedom and trust within the educational system can best be achieved by adhering to the principles of fair play. While the due process clause of the Fourteenth Amendment does not impose any particular procedural model on the schools, all disciplinary hearings should be fundamentally just. Some school administrators persist in excluding the benefits and guarantees of the Constitution from their students.[35] A wise public school system ought to give its students greater freedom, or more procedural protections, than the Constitution demands.[36]

Freedom of Speech

Buttons, Armbands, and Other Badges of Symbolic Expression

Students can wear or display buttons, armbands, and other symbolic badges, unless the manner of expression materially and substantially interferes with the orderly process of the school or the rights of others.[37] The core of the issue is a factual determination of whether the conduct does constitute a material disruption of classwork, involve substantial disorder, or invade the rights of others? If school administrators can make such a showing, the students' actions are not immunized by the constitutional guarantee of freedom of speech.

The *Tinker* opinion draws heavily from two cases decided by a panel of the Fifth Circuit on the same day in 1966. These decisions present perhaps the best example of the dichotomy between that which school of-

[33] *Id.; Esteban* v. *Central Missouri State College,* 415 F.2d 1077, 1090 (8th Cir. 1969).

[34] In the similar case of *Sullivan* v. *Houston Independent School District,* 307 F. Supp. 1328 (S.D. Tex. 1969), the only written rule concerning the publication and distribution of non-sponsored school newspapers provided that: "The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests." Holding the standard grossly vague and overbroad, the court observed that "basic notions of justice and fair play require that no person shall be made to suffer for a breach unless standards of behavior have first been announced, for who is to decide what has been breached?" *Id* at 1344–45.

[35] *See* Hentoff, Why Students Want Their Constitutional Rights Now, Saturday Review, May 22, 1971, at 60; C. Silberman, *op. cit.* 338–40.

[36] General Order on Student Discipline, 45 F.R.D. 133, 148 (W.D. Mo. 1968).

[37] *Tinker* v. *Des Moines Independent School Dist.,* 393 U.S. 503, 513 (1969).

ficials must permit and that which they may prohibit. In both cases[38] students were seeking to wear buttons bearing the message "one man one vote" around the perimeter with "SNCC" inscribed in the center. Principals of two Mississippi high schools prohibited them from wearing these buttons and suspended a number of students for refusing to remove them. In *Burnside* v. *Byars,* the Fifth Circuit ordered the students reinstated, and invalidated the regulation on the grounds that it was "arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression." [39] The decision focused on the fact that there was no showing that the buttons had caused any disturbance or had interfered with the educational process.

The companion case of *Blackwell* v. *Isaquena Board of Education* allowed the suspensions to stand. Here the buttons had occasioned disruptive conduct, and the court in its opinion accepted as true a statement in an affidavit from the school board that the buttons "created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline." [40] The Court held that the regulation in question was reasonable. Citing its opinion in *Burnside,* it defined a reasonable regulation as "one which is 'essential in maintaining order and discipline on school property' and 'which measurably contributes to the maintenance of order and decorum within the educational system.' " [41]

In *Blackwell* the court found that the prohibition against buttons was reasonably related to the prevention of disruptive conduct, and however doubtful the application of the principle was in that case, it was fully accepted by the Supreme Court in *Tinker.*[42]

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[38] *Burnside* v. *Byars,* 363 F.2d 744 (5th Cir. 1966); *Blackwell* v. *Isaquena Board of Education,* 363 F.2d 749 (5th Cir. 1966).

[39] 363 F.2d at 748–49.

[40] 363 F.2d at 751. Students who passed out the "freedom buttons" in the corridors of the school attempted to pin them on others who did not want them.

[41] One legal commentator noted that the court might have been too hasty in accepting the conclusory statement of the school board about the consequences of the "freedom buttons." Wright, note 18 *supra,* at 1054.

Also, one has to share the wonder later expressed by Judge Tuttle about why the school authorities did not discipline the small number of button-wearers who caused the disturbances rather than proscribing the wearing of buttons. *See Ferrell* v. *Dallas Independent School Dist.,* 392 F.2d 697, 705 n. 1 (5th Cir. 1968) (dissenting opinion).

[42] A more recent button case is *Guznick* v. *Drebus,* 431 F.2d 594 (6th Cir. 1970). The plaintiff, a seventeen-year-old high school student, was ordered to remove a button that he wore to school. Upon his refusal to take the button off, which solicited participation in an antiwar demonstration that was to take place in Chicago, the principal suspended the plaintiff until such time as he returned to school without the button. The high school had an informal rule, never published, that students would not be permitted to wear buttons, emblems, or other insignia on school property during school hours unless they were related to a school activity. The district court denied the plaintiff's claim for injunctive relief and damages, 305 F. Supp. 472 (N.D. Ohio 1969), and in a 2–1 decision, the Sixth Circuit affirmed, 431 F.2d 594 (6th Cir. 1970).

No matter how the facts are interpreted, the question of whether the prior restraint of all symbolic protest in schools should ever be permitted in a free country is open. Part of the district court's opinion in *Guznick* v. *Drebus* was overly emotional and indicative of its philosophical position. The decision noted that some of the buttons worn by students in the school system were "controversial and provocative," others were "downright immoral and sinister," [43] and that "these buttons find their way into the school system by way of adult groups or organizations of all types seeking to promote their cause by overpowering the tender minds of our youth." [44] Today, in less than a year, the seventeen-year-old plaintiff in *Guznick* would have been eligible not only to fight in the Indochina war, but also to vote on its merits.[45] It is a strange standard that seeks to protect the "tender minds of our youth" when in such short time they will exercise the full pains and privileges of citizenship.

The right to wear black armbands in high school to protest the Vietnam war was the heart of the controversy in *Butts* v. *Dallas Independent School District.*[46] In a case reminiscent of *Tinker,* school officials refused to allow students to wear black armbands in school on October 15, 1969. Reversing the district court judgment,[47] the Fifth Circuit held that the school board's expectation of disruption did not suffice to justify suspending the exercise of the constitutional right to wear armbands without some inquiry to buttress the determination that the circumstances would allow no practical alternative. The uncontroverted record showed, in fact, that no substantial disruption had occurred in the defendants' schools on the Vietnam Moratorium of October 15, 1969. Far from denigrating black armbands, the court pointed out that "the use of the ancient symbol of mourn-

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The circuit court recognized that *Tinker* controlled, but it determined that the factual situation in question could be distinguished. The regulation in *Guznick* had been universally applied over a long period of time; none of the overtones of selective enforcement, present in *Tinker,* confronted the court. Perhaps most important, the wearing of buttons and other emblems in the past had occasioned substantial disruptive conduct at the high school. The school authorities contended that the buttons would arouse the students' emotions, distract them from their educational pursuits, and exacerbate an "incendiary" type of racial tension which, they claimed, was peculiar to that particular high school. After an independent examination of the material from which the district court decision was made, the Sixth Circuit held that the school officials had a factual basis upon which to forecast substantial disruption of, or material interference with, school activities if the wearing of buttons was not regulated. Dissenting, Judge McAllister felt that there was no indication that the wearing of the button would disrupt the work and discipline of the school, and opined that the district court should be reversed on the authority of *Tinker. Id.* at 601.

[43] 305 F. Supp. at 483.

[44] *Id.*

[45] U.S. Const. amend. XXVI.

[46] 436 F.2d 728 (5th Cir. 1971).

[47] *Butts* v. *Dallas Independent School Dist.,* 305 F. Supp. 488 (N.D. Tex. 1969).

ing as a propagandistic device is clever precisely for the reason that it should put others differently minded on their best behavior." [48]

Thus, by virtue of *Tinker,* students can wear or display buttons, armbands, and other badges of symbolic expression, unless that expression "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." [49] The *Williams* case, however, should stand as a beacon, warning that courts and school administrators may only grudgingly recognize the constitutional rights of students.

Pledge of Allegiance, National Anthem, and Other Ceremonies

Some school officials feel that inculcation of patriotism is one of their primary educative roles. Nearly thirty years ago, however, the United States Supreme Court in *West Virginia State Board of Education* v. *Barnette*[50] established the right of students to refrain from taking part in a legislatively mandated flag ceremony. Rejecting compulsory participation as a proper vehicle for instilling patriotism, Mr. Justice Jackson

[48] 436 F.2d at 731. *Williams* v. *Eaton,* 443 F.2d 422 (10th Cir. 1971), involved a black armband controversy of a different nature. Fourteen black members of the University of Wyoming football team insisted that they be permitted to wear black armbands during an intercollegiate football game between the University of Wyoming and Brigham Young University to protest against the claimed religious beliefs of the Church of Jesus Christ of Latter Day Saints, which owns and operates Brigham Young University.

Negroes are permitted to become members of the Mormon Church, but they cannot become church officers. More important, a Negro is not eligible to become a priest, a position open to all other male members. *See* Church of Jesus Christ of The Latter Day Saints, Doctrines and Covenants § 116 (1960). After hearing the arguments of the affected parties, the Board of Trustees of the University of Wyoming ordered the players' dismissal from the football team on the ground that if the University of Wyoming or its governing officials allowed them to protest as they so desired, the State of Wyoming would violate the principle of separation of church and state. The black athletes then brought a civil rights suit, which the district court dismissed after an evidentiary hearing. *Williams* v. *Eaton,* 310 F. Supp. 1342 (D. Wyo. 1970), noted in 19 Kan. L. Rev. 316 (1971).

The Tenth Circuit remanded the cause for further proceedings. *Williams v. Eaton,* 443 F.2d 422 (10th Cir. 1971). Although the State of Wyoming was immune from suit, the court held that the Eleventh Amendment did not afford the other defendants the shield of sovereign immunity in an action for declaratory relief in which it is alleged that those defendants had deprived the plaintiffs of rights secured to them by the Constitution of the United States. Strangely, the district court opinion had not even mentioned the right of free speech nor recognized the controlling significance of the *Tinker* case. The Tenth Circuit, however, noted that there was no showing before the district court of the plaintiffs' conduct producing, or that it would likely produce, any disturbance interfering with school discipline or the interests which the authorities were entitled to protect, under the principles of *Tinker.* Likewise, the Tenth Circuit felt that the delicate constitutional questions involving freedom of religion should only be decided when the facts were fully developed at trial. In short, the court rejected the contention that the complaint failed to state a claim on which relief could be granted or that summary judgment was proper.

[49] 393 U.S. at 509, *quoting Burnside* v. *Byars,* 363 F.2d 744, 749 (5th Cir. 1966).

[50] 319 U.S. 624 (1943).

stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [51]

In *Barnette* several children of Jehovah's Witnesses challenged a West Virginia State Board of Education resolution which required them, as a prerequisite to their continued attendance at public school, to salute the flag and recite the Pledge of Allegiance to the Flag.[52] The Jehovah's Witnesses, teaching that the obligation imposed by law of God is superior to that of laws enacted by secular government, considered that the flag was an image within the command of the Bible.[53] For this reason they refused to salute the flag and recite the pledge. Overruling *Minersville School District* v. *Gobitis*,[54] the Court held that the resolution was unconstitutional, since it denied freedom of speech and freedom of religion to the dissenting students.[55]

The tenor of *Barnette* was negative. It prohibited the state from compelling individuals to act in a certain manner; in a sense, it was not a recogtion of student rights. Only after *Tinker* were those rights affirmatively established. Even so, *Barnette* philosophically seemed to lay the groundwork for the *Tinker* decision. Referring to educational administrators, Mr. Justice Jackson trenchantly observed: "That they 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." [56] The doctrine announced in *Barnette* has persisted to the present.[57]

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[51] *Id.* at 642.

[52] The Pledge of Allegiance was written by Frances Bellamy, a Baptist minister, to be used at the Chicago World's Fair Grounds in October, 1892, on the 400th anniversary of the discovery of America. Its present form, as set forth in 36 U.S.C. § 172 (1964), is: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

[53] "You shall not make for yourself a graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; you shall not bow down to them or serve them...." *Exodus* 20:4–5.

[54] 310 U.S. 586 (1940).

[55] While Mr. Jackson made clear that the issue did not turn on one's possession of particular religious views or the sincerity with which they were held, two of the six majority justices concurred on that basis. In holding that the state could not compel obedience to its symbol at the expense of First Amendment rights, except for "grave and immediate danger to interests which the State may lawfully protect," the Court observed: "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the exising order." 319 U.S. 637, 642.

[56] *Id.* at 637.

[57] Twenty years after *Barnette* Jehovah's Witnesses were involved in a similar case, but

Neither *Barnette* nor subsequent decisions involved the alternative of waiting outside the classroom to taking part in the Pledge of Allegiance or singing of the National Anthem; the choice was participation or exclusion from school. New York City schools, however, do permit students to stand silently during the Pledge of Allegiance or leave and stand outside their rooms until the conclusion of the ceremony. Twelve year old Mary Frain refused to recite the Pledge, because of a belief that the words "with liberty and justice for all" were not true in America today. She declined to stand during the ceremony, because that would constitute participation in what she considered a lie, and she also refused to go outside the classroom because she considered exclusion from the room to be punishment for her constitutional rights. The plaintiff was suspended for her conduct, even though it did not cause any disorder in the classroom. Six months prior to her suspension, the Superintendent of Schools had stated: "I believe that no pupil should be permitted to sit during such a ceremony since to do so might create disorder." [58]

with a different twist. The plaintiffs in *Sheldon* v. *Fannin,* 221 F. Supp. 766 (D. Ariz. 1963), were suspended from elementary school for insubordination, because of their refusal to stand for the singing of the National Anthem. This refusal to participate, even to the extent of standing without singing, was predicated upon their religious beliefs as Jehovah's Witnesses. Accepting the plaintiffs' characterization of their conduct as religiously inspired, the court relied heavily upon *Barnette* and decided to issue a permanent injunction restraining the state board of education from excluding the plaintiffs from attendance at the school solely because they silently refused to stand for the playing or singing of the National Anthem.

The court recognized that the First Amendment guarantee protects even expression of beliefs which appear to be ludicrous and unfounded. Foreshadowing the *Tinker* opinion, the decision was reached in part because the conduct of the pupils was not disorderly and did not materially disrupt the normal proceedings of the school. In fact, the court noted that "there is much to be said for the view that, rather than creating a disciplinary problem, acceptance of the refusal of a few pupils to stand while the remainder stand and sing their devotion to flag and country might well be turned into a fine lesson in American government for the entire class." 221 F. Supp. at 775.

Officials in some school jurisdictions have nonetheless dismissed students who insist on sitting during the Pledge of Allegiance. Andrew Banks was suspended from high school for his refusal to stand in accordance with a school board regulation during the flag salute ceremony conducted each morning in the homeroom period. *Banks* v. *Board of Public Instruction,* 314 F. Supp. 295 (S.D. Fla. 1970). The regulation stated that "students who for religious or other deep personal conviction, do not participate in the salute and pledge of allegiance to the flag will stand quietly." Dade County School Bd. Resolution 6122. 314 F. Supp. at 303. The court held that the school regulation was clearly unconstitutional, reasoning that "the right to differ and express one's opinions, to fully vent his First Amendment rights, even to the extent of exhibiting disrespect for our flag and country by refusing to stand and participate in the pledge of allegiance, cannot be suppressed by the imposition of suspensions." *Id.* at 296. Comparing the plaintiff's conduct to that of wearing black armbands, the court decided that his actions constituted an expression of his religious and political beliefs and that he was exercising a right akin to pure speech. In addition, the refuted testimony established that the plaintiff's refusal to stand did not disrupt the educational process. After examining *Barnette* and *Tinker,* and recognizing *Sheldon* as a persuasive precedent, since the facts were virtually identical to those in the instant case, the court felt compelled to enjoin the school board from enforcing its regulation pertaining to the Pledge of Allegiance.

[58] *Frain* v. *Baron,* 307 F. Supp. 27, 30 (E.D.N.Y. 1969).

The court, noting that pedagogical opinions were inadequate grounds for coercive responses to First Amendment expressions, issued a temporary injunction, enjoining the administrators of the school system from excluding the plaintiff from their classrooms. Distinguishing *Barnette* because no alternative to taking part in the Pledge was available, the court held that Tinker unequivocally controlled the facts of *Frain* v. *Baron*[59] and that school authorities bore the burden of justifying a restriction on student expression. The New York City Board of Education cited fear of disorder to justify its policy, but the court held that the Constitution does not recognize fear of a disorderly reaction as a reason for restricting peaceful expression of views. Since the school officials could not convince the court that the particular expression of protest chosen by Mary Frain, remaining seated, materially infringed on the rights of other students or caused disruption, the inquiry went no further.

Cases involving participation in school patriotic exercises pit popular ideas of patriotism against the students' right of free expression. *Barnette* clearly established the right of students to refrain from taking part in a compulsory flag ceremony. In *Frain* the court held that students have not only the right of non-participation but also a right of silent protest by remaining seated, so long as they do not materially infringe on the rights of other students or disrupt school activities. Surely *Frain* is decided correctly in the light of *Tinker*. Permitting peaceful expression of disagreement buttresses the paramount cause of freedom.

Freedom of Appearance

In recent years hair styles have changed markedly, and long hair has become commonplace. These changes may be only part of mod dress or they may be a form of symbolic protest against those in control of our society. *Hair* is the title of a popular musical of the past decade, and the subject matter has engendered popular and poetic protest music. Another facet of this divisive issue is the regulation by public school administrators of the length and style of students' hair.[60] Though a similar coiffure prevailed among their own grandfathers, many school officials look upon long hair with great distaste and perceive it as a genuine threat to their

[59] 307 F. Supp. 27 (E.D.N.Y. 1969).

[60] The following are examples of typical hair regulations for high school boys: "Sensible, conventional haircuits are in order. Extreme haircuts will not be allowed. No mustaches of beards are allowed. Sideburns may extend to the earlobe." *Martin* v. *Davson,* 322 F. Supp. 318, 326 (W.D. Pa. 1971). "Haircuts acceptable for school will be as follows: sideburns neatly trimmed—no longer than the lobe of the ear; back of the neck must be seen and the hair must be short enough on the forehead for the eyebrows to be seen. Ears must be entirely exposed." *Davson* v. *Hillsborough County,* 322 F. Supp. 286, 289 (M.D. Fla. 1971). Representative of many others, one rule tersely required that hair must be "above the collar, above the ears, and out of the eyes." *Crews* v. *Cloncs,* 432 F.2d 1259, 1262 (7th Cir. 1970).

own authority and to quality education. In a thicket of recent cases, these regulations have been challenged in the courts.[61] Although these rules are of questionable validity for nonconstitutional reasons,[62] the thrust of recent litigation has been concerned with constitutional issues.

While there is no doubt that local school boards have general power to regulate student conduct, it is questionable whether that power extends to imposing restrictions on students' hair modes. The validity of public school regulation of hair fashions is subject to constitutional attack upon at least four grounds. Such regulations may violate substantive due process of law under the Fourteenth Amendment; they may constitute a denial of equal protection of the laws under the Fourteenth Amendment; they may infringe on freedom of speech guaranteed by the First Amendment; or they may violate the Ninth Amendment's assertion of rights retained by the people. In addition, such prescripts may conflict with a combination of the above enumerated rights, culminating in Justice Douglas' now famous "penumbras, formed by emanations" from a number of constitutional amendments, which, taken as a whole, form a zone of privacy.[63]

All four constitutional theories require much the same analysis. Once it has been determined that a personal liberty is involved, the interests of the student in selecting his own hair style and in obtaining an education must be balanced against the state's interests of protecting the health and welfare of all students in the public schools and ensuring the effective operation of the educational system. Thus, the examination is two pronged: does the student have a constitutional right to wear his hair in any manner he desires, and if so, is there an outweighing state interest justifying an intrusion?

One theory is that the due process clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual.[64] It is clear that the Bill of Rights has not been construed by the United States Supreme Court to preclude the existence of other substantive rights implicit in the liberty assurance of the due process clause.[65] In the field of educa-

[61] *See, e.g., Gfell* v. *Rickelman,* 441 F.2d 444 (6th Cir. 1971); *Crew* v. *Cloncs,* 432 F.2d 1259 (7th Cir. 1970); *Richards* v. *Thurston,* 424 F.2d 1281 (1st Cir. 1970); *Turley* v. *Adel Community School Dist.,* 322 F. Supp. 402 (S.D. Iowa 1971); *Lambert* v. *Marushi,* 322 F. Supp. 326 (S.D. W. Va. 1971); *Martin* v. *Davison,* 322 F. Supp. 318 (W.D. Pa. 1971). *See generally* Note, 4 Valpo. L. Rev. 400 (1970); Plasco, School Student Dress and Appearance Regulations, 18 Clev.-Mar. L. Rev. 143 (1969).

[62] *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, 400 (1969).

[63] *Griswold* v. *Connecticut,* 381 U.S. 479, 484 (1965).

[64] *Martin* v. *Davison,* 322 F. Supp. 318, 322 (W.D. Pa. 1971); *Sims* v. *Colfax Community School Dist.,* 307 F. Supp. 485, 488 (S.D. Iowa 1970).

[65] *Apetheker* v. *Secretary of State,* 378 U.S. 500, 505–06 (1964); *Kent* v. *Dulles,* 357 U.S. 116, 125 (1958) (right to travel to a foreign country); *Shapiro* v. *Thompson,* 394 U.S. 618, 929–31 (1969); *United States* v. *Guest,* 383 U.S. 745, 757, 759 (1966) (right to travel interstate).

tion, the Court has held that such liberty includes the right of parents to send their children to private schools as well as public schools[66] and to have their children taught the German language.[67]

Under the due process clause the question becomes whether an individual's choice of hair style is a fundamental right, requiring a compelling showing by the state before it may be impaired,[68] or whether it should be subject to limitation if there is any rational basis for the regulation.[69] As the First Circuit has noted,[70] citing *Union Pacific Railway Company* v. *Botsford*:[71]

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right to complete immunity: to be let alone."

More recently, the Court has recognized that the special right of an individual to control his physical person weighs heavily against arbitrary state intrusions.[72]

Indeed, a narrower view of liberty in a free society might allow a state to attack its opponents by requiring a conventional coiffure of all its citizens. When the Manchus seized Peking in 1644, for example, all Chinese were ordered to give up their traditional appearance, braid their hair in a queue, and shave the rest of their heads, like the Manchus.[73] In much the same manner, Peter the Great, on returning from his tour abroad in 1698, outraged Russian sentiment by requiring that all his male subjects shave their beards and adopt Western European dress.[74]

Some courts have assumed that students have a constitutionally protected right to wear their hair long, but have held that the state presented sufficient evidentiary justification to infringe on that right.[75] For example, in the frequently cited case of *Ferrell* v. *Dallas Independent School District*[76] the court found that the wearing of long hair by students created

[66] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

[67] *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

[68] *Dawson* v. *Hillsborough County*, 322 F. Supp. 286, 288 (M.D. Fla. 1971).

[69] *Turley* v. *Adel Community School Dist.*, 322 F. Supp. 402, 404 (S.D. Iowa 1971).

[70] *Richards* v. *Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970).

[71] 141 U.S. 250, 251 (1891).

[72] *Rochin* v. *California*, 342 U.S. 165, 172 (1952); *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957).

[73] E. Reischauer & J. Fairbank, East Asia: The Great Tradition. Boston: Houghton-Mifflin (1960), p. 363.

[74] S. Harcave, Russia: A History. New York: J. B. Lippincott (1968), p. 111.

[75] *See, e.g., Stevenson* v. *Board of Educ.*, 426 F.2d 1154 (5th Cir. 1970); *Davis* v. *Firment*, 408 F.2d 1085 (5th Cir. 1969); *Farrell* v. *Smith*, 310 F. Supp. 732 (D. Me. 1970).

[76] 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 508 (1968).

disturbances during school hours, and that a hair regulation was reasonable. Judge Tuttle, dissenting, pointed out that courts are often too prone to curtail the constitutional right of a dissenter, because of the likelihood that it will bring disorder and resistance by those supporting the status quo. The improper acts of the students should be prohibited, not the expressions of individuality by the suspended students.[77]

If the student's choice of hair style is regarded as an interest entitled to protection under the due process clause, the state must present a reasonable subordinating interest[78] and bear a substantial burden of justification to enjoin the student from wearing his hair as he desires.[79] It is arguable that long hair, if it were dirty and unsanitary, might constitute a threat to the health and safety of other students, and it might present a physical danger if it were worn in a chemistry lab or a machine shop. An adequate regulation would be for a student to wash or bind his hair, or take other precautionary measures; if he failed to do so, then he could be refused admission to the classroom, lab, or shop until the safety requirements were complied with. These arguments as a justification for the imposition of hair cut rules seem all the more ludicrous when compared with the treatment of female hair.[80] Male students can persuasively assert that school officials seem to cope with the length of female hair and still provide for the health and safety of students.

Another proferred justification for the imposition of an appearance regulation is based upon the disruption of the educative process by distracting students from their work. It seems clear that courts should be chary to permit the curtailment of a student's choice of hair style because other students are unduly distracted or attempt to force their stylistic

[77] *Ferrell* v. *Dallas Independent School Dist.*, 392 F.2d 697, 706 (5th Cir. 1968) (Tuttle, J. dissenting). Along the same lines as *Ferrell, Wood* v. *Alamo Heights Independent School District,* 433 F.2d 355 (5th Cir. 1970) (per curiam) concerned hair and grooming regulations which embraced in large part the recommendations of the student committee. Where evidence was adduced that extreme hair styles would probably be a disruptive influence on the student body, a panel of the Fifth Circuit held that the rules were sufficiently related to alleviating interference with the educative process. Likewise, in *Leonard* v. *School Committee* 349 Mass. 704, 212 N.E.2d 468 (1965), noted in Portia L.J. 258 (1966), the court found a reasonable basis for a regulation which did not allow extravagant hairstyles in the possibility that disturbances *might* occur. The court opined that any conspicuous departure from accepted customs in the matter of haircuts could result in the distraction of other pupils and impede the maintenance of a proper classroom atmosphere. As a result, the expulsion of the seventeen year old professional musician for his refusal to have his hair cut was upheld.

[78] *Sims* v. *Colfax Community School Dist.*, 307 F. Supp. 485, 488 (S.D. Iowa 1970).

[79] *Breen* v. *Kahl,* 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); *Martin* v. *Davison,* 322 F. Supp. 318, 323 (W.D. Pa. 1971).

[80] *See Crews* v. *Cloncs,* 432 F.2d 1259, 1266 (7th Cir. 1970); *Westley* v. *Rossi,* 305 F. Supp. 706, 711 (D. Minn. 1969). Although classification on the basis of sex has been held constitutional in certain circumstances. *Goesaert* v. *Clearly,* 335 U.S. 464 (1948); *Miskunas* v. *Union Carbide Corp.,* 399 F.2d 847 (7th Cir. 1968), school administrators have offered no reasons why health and safety objections are not equally applicable to high school girls.

preferences upon him. The state fails to prove a substantial burden of justification if the disruption is only minor or fantasy; to justify regulation, the disturbance should have seriously impaired the educational process.[81] Hair regulations are also no more palatable because they were promulgated by students. If a majority vote could alter the Constitution, the document would have little significance.

In addition to fulfilling the due process standards, public school hair regulations must comply with equal protection standards of the Fourteenth Amendment. An equal protection analysis focuses upon whether classifications of students according to hair length constitutes a reasonable basis for granting or denying the right to a public school education. Hair length rules should be carefully scrutinized because students who are suspended or expelled from school because of them suffer a loss or diminution of educational opportunity. Education is a necessary concomitant to a fulfilling life, and any regulation which blocks assess to such a vital benefit should be subject to searching judicial review.

As in the due process analysis, there must be a balancing of interests to ascertain the validity of such a classification. In *Griffin v. Tatum*[82] the court weighed the state interest in a public school education to determine the properiety of a high school haircut regulation.[83] The district court found that the rule violated the equal protection clause of the Fourteenth Amendment by imposing an unreasonable condition on the continuation of the student's education in the public school system.[84] Modifying the lower court opinion, the Fifth Circuit held that the regulation, interpreted to require that hair should be tapered in the back as opposed to blocked, constituted an arbitrary and unreasonable classification to the extent that it violated equal protection and due process, but that the district court erred in striking the entire hair style rule.[85] Justifications advanced by educators regarding decency and decorum are no more adequate in satisfying an equal protection claim than they were found to be under the due process analysis.[86]

A third constitutional challenge to the validity of haircut regulations is that the wearing of long hair is a form of symbolic conduct,[87] entitled to

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[81] *Lambert* v. *Marushi,* 322 F. Supp. 326, 330 (S.D. W. Va. 1971); *Breen* v. *Kahl,* 296 F. Supp. 702, (W.D. Wis. 1969), *aff'd,* 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

[82] 300 F. Supp. 60 (M.D. Ala. 1969), *modified,* 425 F.2d 201 (5th Cir. 1970).

[83] The regulation provided: "Hair must be trimmed and well cut. No Beatle haircuts, long sideburns, ducktails, etc., will be permitted." 425 F.2d at 202.

[84] 300 F. Supp. at 62.

[85] *Griffin* v. *Tatum,* 425 F.2d 201, 203 (5th Cir. 1970).

[86] See text accompanying notes 79–81, *supra.*

[87] *See generally* Note, Symbolic Conduct, 68 Colum. L. Rev. 1091 (1968). Symbolic conduct is an exceptionally vivid means of communication. It is more intensely emotional than the

First Amendment protection. Long hair may not be easily assimilated to more traditional forms of symbolic conduct,[88] and some courts have rejected the notion that hair length is of sufficient communicative character to warrant full First Amendment immunity.[89] Discussing the symbolic nature of black armbands in *Tinker,* the Court began: "The problem posed in the present case does not relate to the regulation of the length of skirts or the type of clothing, to hair style, or deportment." [90] Nevertheless, if it is assumed that in some instances an element of expression is involved in one's choice of hair length and style,[91] the question presented is whether a haircut regulation can be imposed in light of the student's right to symbolic expression.

If school administrators attempt to justify a haircut regulation in terms of the health and welfare of its students, *United States* v. *O'Brien*[92] would seem to apply. Under the *O'Brien* test[93] a haircut rule infringes upon the student's First Amendment freedoms to a greater degree than necessary because there are equally feasible regulatory alternatives available.[94] If school officials try to impose haircut rules on the ground that long hair has a disruptive effect on the educational process, *Tinker* would seem to control. Thus, to prohibit the expression of an opinion through the wearing of long hair, there must be a finding that the exercise of the forbidden right would materially interfere with the requirement of appropriate discipline in the operation of the school.[95]

Under an extension of *Tinker,* when hair styles involve expression of individuality and philosophical attitudes the First Amendment could be relied upon the protect that form of "speech." The problem with this approach, however, is that the test of waht is "expression" becomes subjective rather than objective, and future cases would have a hazy standard to follow. In addition, reflecting on how far the First Amendment should

spoken or written word or the cool art forms. Its dramatic effect is a substitute for the protester's lack of access to more conventional media. *Id.*

[88] *Id.* at 1112.

[89] *Richards* v. *Thurston,* 424 F.2d 1281, 1283 (1st Cir. 1970).

[90] *Tinker* v. *Des Moines Independent School Dist.,* 393 U.S. 503, 507–08 (1969).

[91] *See Murphy* v. *Pocatello School Dist.* #25, 480 P.2d 878, 883 (Id. 1971).

[92] 391 U.S. 367 (1968).

[93] In *O'Brien* the Court explained that when speech and nonspeech elements are combined in the same course of conduct, incidental limitations on First Amendment freedoms are justified only if the government has a sufficiently important interest in the regulation of the nonspeech element. To define a sufficient governmental interest the Court set out a four part test. The government action must be within the government's constitutional power; it must further an important governmental interest; the governmental interest must be unrelated to the suppression of free expression; and the incidental restriction on the alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest. *Id.* at 376–77.

[94] See text accompanying notes 79–81, *supra.*

[95] *Tinker* v. *Des Moines Independent School Dist.,* 393 U.S. 503, 509 (1969).

be stretched to immunize modes of expression, "as the non-verbal message becomes less distinct, the justification for substantial protections of the First Amendment becomes less remote.[96]

Hair style regulations can also be constitutionally attacked on the premise that they are violative of the Ninth Amendment.[97] Neither from the words themselves nor from the records and other contemporaneous material apposite to the creation of the Ninth Amendment is it exactly clear what "rights" are retained by the people. The absence of a specific constitutional provision dealing with the rights of privacy, personal appearance, and the like, does not require the conclusion that no such rights exist. On the contrary, the Ninth Amendment was proffered to calm fears that the specific mention of certain rights would be interpreted as a denial that others were protected.[98] Thus, in *Murphy* v. *Pocatello School District #25*[99] the court decided that the Ninth Amendment, made applicable to the states by the Fourteenth Amendment,[100] was the most relevant constitutional basis for holding "the right to wear one's hair in a manner of his choice to be a protected right of personal taste." [101]

The constitutional labyrinth engulfing the long hair controversy perhaps unduly befogs the issue. Put simply, do students have a constitutional right to wear their hair as they please? Only the Sixth Circuit appears completely to reject the proposition that students have a constitutionally protected right to wear their hair at any length or in any manner.[102] That position seems to be plainly wrong. The overwhelming conclusion of the cases, in one form or another, is "that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes." [103]

Any hair restriction is an attempt to impose taste or preference as a standard, and unlike limiting the length of skirts, hair regulations intrude on an individual's privacy beyond the schoolhouse gate. Some students are barred from the public schools because school administrators or other students dislike those who do not conform to society's norms as perceived by them. Good grooming calls for a qualitative judgment. One need but read an opinion penned by Judge Wyzanski for an historical reference to

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[96] *Richards* v. *Thurston*, 414 F.2d 1281, 1283 (1st Cir. 1970).

[97] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

[98] *Griswold* v. *Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring).

[99] 480 P.2d 878 (Id. 1971).

[100] *Griswold* v. *Connecticut*, 381 U.S. 479, 487 (1965).

[101] 480 P.2d at 884.

[102] *Gfell* v. *Rickelman*, 441 F.2d 444 (6th Cir. 1971); *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir. 1970).

[103] *Richards* v. *Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970).

wigs worn by many of our founding fathers.[104] As one court incisively observed:

> The standards of appearance and dress of last year are not those of today nor will they be those of tomorrow. Regulation of conduct by school authorities must bear a reasonable basis to the ordinary conduct of the school curriculum or to carry out the responsibility of the school. No moral or social ill consequences will result to other students due to the presence or absence of long hair nor should it have any bearing on the wearer or other students to learn or to be taught.[105]

To sustain the validity of a hair style regulation, the state must establish a substantial burden of justification.[106] Before the state may intervene the record must reflect that there was a substantial health, safety, academic, or disciplinary problem created by the wearing of long hair. Students should have a right to the exercise of personal taste, as manifested by personal appearance, unless some important societal interest is markedly impaired.

Freedom of the Press

To express their grievances, students have often turned to conventional, nondisruptive media, such as school newspapers or makeshift pamphlets. Legal controversies have arisen over the content and the right of where and when to distribute such literature. Though school officials have a patent interest in preventing the publication of articles critical of school policies, it would seem incongruous to preclude student comment on matters intimately related to them, particularly now that the young have gained a political voice.

Though the First Amendment is clearly operative in the school environment,[107] reasonable regulations concerning time, place, and manner of distribution are a practical necessity. School authorities have sometimes challenged the right of students to pass out literature within their schools. In *Riseman* v. *School Committee,*[108] a junior high school student, after being prevented by school officials from distributing anti-war leaflets and a "high school bill of rights" within the school, sought permission to hand out leaflets relating to our country's involvement in Southeast Asia on school property during school hours. A Federal district court temporarily restrained the school authorities from interfering with the orderly dis-

[104] *Richards* v. *Thurston,* 304 F. Supp. 449, 451 (D. Mass. 1969), *aff'd,* 424 F.2d 1281 (1st Cir. 1970).

[105] *Westley* v. *Rossi,* 305 F. Supp. 706, 714 (D. Minn. 1969).

[106] *Crews* v. *Cloncs,* 432 F.2d 1259, 1265 (7th Cir. 1970); *Martin* v. *Davison,* 322 F. Supp. 318, 323 (W.D. Pa. 1971); *Murphy* v. *Pocatello School Dist.* #25, 480 P.2d 878, 884, (Id. 1971).

[107] *Tinker* v. *Des Moines Independent School Dist.,* 393 U.S. 503, 506 (1969).

[108] 439 F.2d 148 (1st Cir. 1971).

tribution of political materials on school premises outside the buildings. Considering this relief "less than half a loaf,"[109] the plaintiff sought a broadening of the interlocutory relief on appeal. For the purpose of determining plaintiff's right to preliminary injunctive relief, the First Circuit held that the school officials could not absolutely prohibit the distribution of leaflets, brochures, or other written forms of expression within the school. The administrators were left free to devise "sensible" rules governing the time, place, and manner of handing out the literature, provided that advance approval of the substance could not be required.[110]

High school students in Stamford, Connecticut, wanted to distribute a newspaper of their own creation, free of the controls implemented by a Board of Education rule.[111] A Federal district court reasoned that the pol-

[109] *Id.* at 149.

[110] *Id.* at 149–50. Similarly in *Scoville* v. *Board of Education* 425 F.2d 10 (7th Cir. 1970) (en banc), *cert. denied 400* U.S. 826 (1970), the content of the literature, not the matter of distribution, was the heart of the dispute. Two high school students were expelled after writing a publication which was sold in school and which contained, among other items, an editorial critical of school authorities. Uncontroverted evidence established that the pamphlet did not cause any commotion or disruption of classes. Recognizing *Tinker* as dispositive of the instant case, the Seventh Circuit *en banc* held that while school officials have comprehensive authority to perscribe and control conduct in the schools, where rules infringe upon freedom of expression, school administrators have the burden of showing that the action was taken upon a reasonable forecast of a substantial disruption of school activity. The court concluded that the School Board could not have reasonably anticipated that the publication and disruption of the pamphlet to students would materially interfere with school procedures, and that, therefore, the strictures should not have been enjoined. The opinion further noted that prudent student criticism can be a worthwhile influence on school administration. Students are often intimately knowledgeable of campus issues and express a unique viewpoint on school policy. See Note, Developments in the Law-Academic Freedom, 81 Harv. L. Rev. 1045, 1130 (1968).

Much the same type of question was presented in *Sullivan* v. *Houston Independent School District,* 307 F. Supp. 1328 (S.D. Tex. 1969). In *Sullivan* two high school seniors were expelled because it appeared that school officials disliked the substance of a "newspaper" they produced. Distribution of the publication took place off campus during non-school hours. Relying on *Tinker,* the court held that the educative process had not been substantially impaired, and suggested in *dictum* that even if a disturbance had occurred the dissemination of newspapers should not be curtailed; rather, the disruptive students should be disciplined. Though the underground newspaper lampooned school authorities, the court opined that the language did not even approach the "fighting words" standard of *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), and thus was "speech" fully protected by the First Amendment. In short, the court sanctioned broad criticism of school officials, as long as the publication is neither libelous nor obscene. In *Vought* v. *Van Buren Public Schools,* 306 F. Supp. 1388 (E.D. Mich. 1969), the court overturned a student's expulsion for possession of "obscene" materials, since the same forbidden four letter words appeared in magazines and books in the school library.

[111] *Eisner* v. *Stamford Bd. of Educ.,* 440 F.2d 793 (2nd Cir. 1971). The Stamford Board of Education policy provided: "Distribution of Printed or Written Matter—The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitations: No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration. In granting or denying such approval, the following guidelines shall apply. No material shall be distributed which, either by its con-

icy imposed a prior restraint on student speech and press, and enjoined the Board of Education from enforcing any requirement that students obtain acceptance before publishing or handing out literature within the Stamford public schools.[112] While affirming the lower court's decision, the Second Circuit found the Board's policy fatally defective for lack of procedural safeguards, but nevertheless held that reasonable regulations which corrected the procedural defects could constitutionally require prior submission of the material for approval.[113] The court placed the burden on school authorities to prove that unfettered freedom of expression would lead to substantial disorder in the school, but the decision did not compel school officials to seek a judicial decree before enforcing the Board's censorship policy.[114] By subjectively predicting disturbances, administrators can effectively bridle student protest through litigation. Apprising a student that he can distribute a newspaper several months after his initial attempt only exacerbates student sentiment and thwarts peaceful protest.

Although the *Eisner* court felt inclined to permit regulation of speech in high school, it noted that the same policy might not be justifiable on a college campus.[115] Though Charles Wright appears to agree,[116] it seems tenuous to differentiate between an eighteen-year-old high school student and a nineteen-year-old college student. The general First Amendment principles should apply in both high school and college.[117]

Thus, while school officials may establish reasonable guidelines governing the time and place of distribution of newspapers and leaflets within the school, students may not be encumbered when handing out literature

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tent or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others." *Id.* at 805.

[112] *Eisner* v. *Stamford Bd. of Educ.*, 314 F. Supp. 832 (D. Conn. 1970).

[113] *Eisner* v. *Stamford Bd. of Educ.*, 440 F.2d 793, 805 (2nd Cir. 1971).

[114] *Id.* at 810.

[115] *Id.* at 808 n.5.

[116] "It is likely that the tolerable limit for student expression in high school should be narrower than at college or university level." Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1052, 1053 (1969).

[117] *Cf. Scoville* v. *Board of Educ.*, 425 F.2d 10, 13 n.5 (7th Cir. 1970). Highlighting another facet of freedom of the press, in *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), high school students sought to include in their school newspaper a paid advertisement opposing the Vietnam war. The principal of the school directed that the advertisement not be published, asserting a policy which limited news items and editorials in the newspaper to matters pertaining to the high school and its activities. The gravamen of the dispute concerned the content and function of the school newspaper. Though school authorities depicted the publication as flaccid, the court found the newspaper commendable, and noted that some issues had contained articles germane to the Vietnam war. Determining that the war was a school-related subject, the court held that there was no logical reason to permit news stories on the war and yet preclude student advertising regarding it. See also *Dixon* v. *Alabama State Board of Education* 273 F. Supp. 613 (M.D. Ala. 1967).

adjacent to school property. Permitting school authorities to bowdlerize the content of literature to be passed out in the school, even when such a policy purports to be safeguarded by proper procedures, circumscribes free discussion of important student issues. School-sponsored publications should reflect the judgment of the student editors and they should be as free as other newspapers in the community to report the news and to editorialize. Student newspapers provide a peaceful channel of dissent which should be encouraged, not suppressed. Non-school-sponsored papers and other publications, including an "underground press," should not be prohibited, assuming that the publication does not cause undue disturbance. Anything less would discourage responsible deliberation of student-related issues. Campuses should provide a free marketplace of ideas; self-serving institutional censorship of responsible criticism serves no democratic objective.

Freedom of Assembly

Student protest on high school and university campuses has become frequent, and workable constitutional guidelines regulating such demonstrations have slowly emerged. Although few cases have reached the courts, the basic framework of university power to curtail demonstrations appears to have been established. In *Hammond v. South Carolina State College*[118] the three plaintiffs with approximately three hundred other students assembled on the school's campus to express their grievances regarding some of the college's policies. The Faculty Discipline Committee suspended the three for violating a rule requiring prior approval of all campus demonstrations.[119] A Federal district court reversed the decision, holding that the rule on its face was a prior restraint on the right to freedom of speech and the right to assemble.[120] The court recognized that students have the right to petition the college for redress of their grievances similar to citizens demonstrating at the locus of government,[121] and further held that a college campus does not fall within the ambit of the rule announced by the Supreme Court in *Adderley* v. *Florida*.[122] There, the Court had sustained trespass convictions of demonstrators at a county jail on the ground that the "lawfully dedicated use" of the property did not include protest assemblies. Unlike jail entrances, a college campus is an acknowledged focal point of inquiry and discussion; hence, under the *Adderley* rationale dem-

[118] 272 F. Supp. 947 (D.S.C. 1967).

[119] Rule 1, page 49 of the Student Handbook read: "The student body or any part of the student body is not to celebrate, parade, or demonstrate on the campus at any time without the approval of the Office of the President." *Id.* at 948.

[120] *Id.* at 950.

[121] *Cf. Edwards* v. *South Carolina*, 372 U.S. 229 (1963).

[122] 385 U.S. 39 (1966).

onstrations over matters of either political or social concern may not be flatly prohibited at public universities.

It is just as clear, however, that students do not have an unbridled right to demonstrate on campuses. Like other public facilities, an educational institution may place reasonable restrictions on demonstrations to protect safety and property, maintain normal activities, and facilitate campus traffic.[123] In short, the academic community should have the power to preserve an atmosphere conducive to furthering its educational goals. This point was illustrated by *Goldberg* v. *Regents of the University of California,*[124] in which a California state court affirmed the dismissal of several students who took part in a "Filthy Speech" rally at Berkeley. The court examined whether the interest of the university in disciplining the plaintiffs was "appropriate and necessary to the maintenance of order and propriety, considering the accepted norms of social behavior in the community." [125] Noting that the rally was bawdy, raucous, and involved the destruction of property, the court held that in such instances the university's disciplinary action was proper. Although a standard which depends upon the level of disruption is at best difficult to apply, substantial improvement becomes knotty if the university is to perpetuate an "educational environment." [126]

The state may be able to impose greater restrictions on demonstration activity at the high school level conducted during school hours, because of its responsibility to use limited student time most efficiently. Some judges feel that stricter regulations may be permissible in high school than in college due to the different characteristics of the educational institutions and the variance in the range of activities subject to discipline.[127] Nevertheless, *Tinker's* thrust would seem to affirm even high school students' right to assemble peaceably on campus during hours when class attendance is not mandatory. If the First Amendment is interpreted to protect orderly demonstrations on political and campus issues, students are at least assured of an outlet for their grievances.

Conclusion

In the choppy waters left by *Tinker,* the battle for student rights moves on. On March 29th of this year, a Federal district court judge astounded school officials in Miami by ordering the principal of Douglas MacArthur

[123] *Cf. Cox* v. *Louisiana,* 379 U.S. 536, 554 (1965).

[124] 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (Dist. Ct. App. 1967).

[125] *Id.* at ____, 57 Cal. Rptr. at 472.

[126] See also *Sword* v. *Fox,* 446 F.2d. 1091 (4th Cir. 1971). The court held that a regulation prescribing demonstrations inside of college buildings was reasonable, since the college had permitted demonstrations without any restriction of purpose in other areas of the campus.

[127] *Whitfield* v. *Simpson,* 312 F. Supp. 889, 898 (E.D. Ill. 1970) (dissenting opinion).

Junior-Senior High School to pay seventeen-year-old Timothy Pyle $100 for compensatory damages and $182 for court costs.[128] The principal had expelled Pyle because of the length of his hair. The court held that the failure of the school authorities to give Pyle prior written notice of the meeting which produced his expulsion, the failure to apprise him of the specific charges, and the failure to give him an opportunity to present his own defense constituted a violation of the due process clause of the Fourteenth Amendment. The principal was ordered to reinstate Pyle and help him "in remedying or alleviating lost school time." Further, all deleterious statements were to be expunged from the student's record. The awarding of compensatory damages, as well as equitable relief, signals a breakthrough in student rights. If school authorities are apt to be sued for damages, they may not be so prone to deprive students of their constitutional rights.

Morally dissatisfied, youth will continue the quest for a proper way to live. It is no answer to quash peaceful student protest. High schools and universities are a logical forum for student expression. School authorities must recognize that students have a positive constitutional right to voice their opinions in the classroom and on the campus, unless engaging in such conduct would substantially interfere with the normal activities of public education.

[128] *Pyle* v. *Blews*, No. 70-1829-Civ. (S.D. Fla. March 29, 1971).