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A Legal Framework for Academic Freedom In Public Secondary Schools

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I. Introduction

Roger A. Mailloux was a teacher at Lawrence High School in Lawrence, Massachusetts.[1] He assigned to his 11th grade English class certain chapters in Jesse Stuart's novel, *The Thread That Runs So True*.. As a part of the discussion, he introduced the concept of taboo words.[2] One of the students informed her parent of the discussion and the parent brought the discussion to the attention of school officials. After an investigation, a seven-day suspension, and a hearing, Mailloux was dismissed for "conduct unbecoming a teacher."[3]

Mailloux brought suit in federal court seeking reinstatement, lost wages and expungement of school records. He alleged deprivation of rights under the first and fourteenth amendments of the United States Constitution.[4] The district court found for Mailloux; school officials were ordered to reinstate him, pay lost wages, and expunge school records of the suspension and discharge.[5]

In deciding the case of *Mailloux*, District Judge Wyzanski held that the fourteenth amendment protects a public school teacher's interest in a "measure of academic freedom as to his in-classroom

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[1] Mailloux v. Kiley, 323 F. Supp. 1387, 1388 (D. Mass. 1971).

[2] Mailloux wrote the words "goo" and "fuck" on the blackboard. The latter, he said, was an example of a taboo word. *Id.*

[3] *Id.* at 1389.

[4] *Id.* at 1387, 1389.

[5] *Id.* at 1393.

teaching."[6] "The Constitution," the Court stated, "recognizes that freedom in order to foster open minds, creative imaginations, and adventurous spirits."[7] This "measure of academic freedom" gives a teacher a due process right to receive fair notice that such conduct is objectionable before the conduct occurs.[8]

There are other cases which are often cited for the view that academic freedom is a constitutional freedom. For example, *Keefe v. Geanakos*[9] involved a public school teacher in Ipswich, Massachusetts, who gave each student in his 12th grade English class a copy of the *Atlantic Monthly* magazine. The assigned article contained a word which is "a vulgar term for an incestuous son."[10] The article and the word were discussed in class. Plaintiff was asked by school officials to defend the use of the word. After a meeting and a suspension, officials expressed their intent to discharge plaintiff. Plaintiff brought suit to enjoin the meeting in which his dismissal was to be approved. The district court denied a temporary injunction from which plaintiff appealed.[11] In reversing the district court, the First Circuit held that dismissal would violate the plaintiff's due process right in that he did not have prior notice that a discussion of the word was forbidden conduct.[12] Both parties and te court recognized the existence of academic freedom.[13] While the case does not hold that academic freedom enjoys constitutional status, its overall treatment of the subject does give aid and comfort to those who would so argue.

In *Parducci v. Rutland*[14] an 11th grade teacher in a public school in Montgomery, Alabama, assigned as outside reading a story entitled "Welcome to the Monkey House," by Kurt Vonnegut, Jr. School officials objected to the use of the story becuase, as they saw it, the story

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[6] The precise holding of the case is that Mailloux was denied fair notice (which is required by the fourteenth amendment) that the word or teaching method should not have been used. *Id.* at 1392. While the court of appeals thought that Judge Wyzanski's efforts to devise guidelines for determining violations of academic freedom would "introduce more problems than it would resolve," the holding was nonetheless affirmed. Mailloux had been denied fair notice that his conduct was objectionable. Mailloux v. Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971). Both courts thought it important that Mailloux had acted in good faith, and while his method or conduct did not have the universal approval of educators, it was not the type of outrageous conduct that any person of good will would recognize as being proscribed. 323 F. Supp. at 1393; 448 F.2d at 1243.

[7] 323 F. Supp. at 1391.

[8] *Id.* at 1392.

[9] 418 F.2d 359 (1st Cir. 1969).

[10] *Id.* at 361.

[11] *Id.* at 360.

[12] *Id.* at 362.

[13] *Id.* at 361, 362, 363.

[14] 316 F. Supp. 352 (M.D. Ala. 1970).

advocated "killing off of elderly people and free sex."[15] Complaints had been received from several parents. After a hearing, the school board dismissed Parducci for assigning the "disruptive" materials, for refusing "the counselling and advice of the school principal" (after the assignment was made, he advised her not to use the story), and for insubordination.[16] District Judge Johnson ordered the school board to reinstate the plaintiff with backpay and to expunge her record. The story was found to be appropriate for high school students.[17] Moreover, since the use of the story did not cause a significant disruption of the educational process,[18] the court held that the dismissal violated Parducci's "First Amendment right to academic freedom."[19] While not entirely clear, the case also seems to hold that Parducci was denied due process of law in that no fair prior notice that the materials were objectionable had been given.[20]

The notion that academic freedom[21] may enjoy constitutional status is supported by other cases[22] and by commentators.[23] This alleged

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[15] *Id.* at 353.

[16] *Id.* at 356.

[17] *Id.*

[18] *See* Tinker v. Des Moines Ind. Community Sch. Dist. 393 U.S. 503, 509 (1969).

[19] Parducci v. Rutland, 316 F. Supp. 352, 356 (M.D. Ala. 1970).

[20] *Id.* at 357.

[21] While the concept of academic freedom will be fully developed later in this article, a working definition might be useful at this point. As used in this article, academic freedom is the privilege of a teacher in an approved and assigned course to use any method, symbol or material which is (1) relevant to the subject matter, (2) not violative of valid laws, (3) compatible with contemporary standards of decency, (4) reasonable in light of the level of maturity (age, grade, experience and ability) of the pupils and objectives of this course, (5) calculated to serve and does serve a legitimate purpose, and (6) not likely to result in substantial and material disruption of school activities.

[22] It should be noted that most, if not all, of the hereinafter cited cases were in fact decided on other grounds. No doubt the due process requirement of fair notice could have provided sufficient grounds for reversing the dismissals of the teachers without any reference to academic freedom. Additionally, some cases recognize the right of fair notice as a part of academic freedom. *E.g.*, 323 F. Supp. at 1392. However, all of these cases suggest that the presence of a teacher provided an element of academic freedom and, therefore, a heightened interest in freedom of speech.

One of the leading cases is Keyishian v. Board of Regents of N.Y., 385 U.S. 589 (1967). Faculty members of the State University of New York challenged a New York plan (formulated partly in statute and partly in administrative regulations) which was being used by the State to prevent the appointment or retention of subversives in state employment. The plan was found to be unconstitutionally vague, *id.* at 604 and, to violate the teacher's freedom of association. *Id.* at 608.

In *Keyishian*, the Court spoke glowingly of academic freedom. It said that the nation is deeply committed to safeguarding academic freedom which is of "transcendant value" to all; that that freedom is a "special concern" of the first amendment and that the future of the country depends on people who are trained to seek truth through a "multitude of tongues" rather than through "authoritative selection." *Id.* at 603.

constitutional freedom includes both the substantive right of a teacher to use certain teaching methods and materials which serve an educational purpose; it also includes the procedural right of not having disciplinary measures taken against him for the use of those methods or materials without fair prior notice that they are objectionable.[24] There are differences of opinion as to which specific provision of the Constitution includes academic freedom.[25] They share, however, the perceived need to accord it constitutional status.

Developing a constitutional doctrine of academic freedom has proven to be difficult.[26] Not only has it proven to be difficult to find

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In Sweezy v. New Hamphire, 354 U.S. 234 (1957), Sweezy was held in contempt for refusing to answer questions regarding a college lecture and various groups. The Court held that Sweezy was denied due process of law under the fourteenth amendment. Justice Warren, in speaking for a plurality, stated that by questioning Sweezy regarding his lecture, his "liberty" of academic freedom (safeguarded by the Bill of Rights and the fourteenth amendment) had been invaded. *Id.* at 250. "The essentiality of freedom in the community of American universities is almost self-evident . . . Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.* at 250. *See also* Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter concurring); Cary v. Board of Ed. of Adams-Arapahoe Sch. Dist., 598 F.2d 535, 539, 543 (10th Cir. 1979).

[23] Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression,* 39 GEO. WASH. L. REV. 1032 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 DUKE L.J. 841. It has been suggested that Professor Van Alstyne's article should not be read as supporting a teacher's constitutional right of academic freedom when the teacher is challenged by school officials. *See* Goldstein, *The Asserted Constitutional Right of Public School Teachers To Determine What They Teach,* 124 U. PA. L. REV. 1293, 1346-49 (1976).

One commentator suggested that by 1959, all the justices then sitting had at one time or another recognized academic freedom as a constitutionally protected area. Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 LAW AND CONTEMPORARY PROB. 447, 457 (1963).

[24] *See* cases cited note 22, *supra,* and accompanying text.

[25] In Meyer v. Nebraska, 262 U.S. 390 (1923), a parochial school teacher had been convicted under a statute which probibited the teaching of the German language to students below the eighth grade. In reversing the conviction on substantive due process grounds, the Court emphasized that "his right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [fourteenth] amendment." *Id.* at 400; *accord,* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). Academic freedom is protected by the due process clause of the fourteenth amendment: Mailoux v. Kiley, 323 F. Supp. 1387, 1390 (D. Mass. 1971), *aff'd,* 448 F.2d 1242 (1st Cir. 1971); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969). Academic freedom is protected by the first amendment: Keyishian v. Board of Regents of N.Y., 385 U.S. 589, 603 (1967); Parducci v. Rutland, 316 F. Supp. 352, 356 (M.D. Ala. 1970); Cary v. Board of Adams-Arapahoe Sch. Dst., 598 F.2d 535, 539, 543 (10th Cir. 1979).

See generally Developments in the Law—Academic Freedom, 81 HARV. L. REV. 1045, 1065 (1968); Murphy, *Academic Freedom—An Emerging Constitutional Right* in THE CONSTITUTIONAL STATUS OF ACADEMIC FREEDOM 447, 453-56 (W.P. Metzger ed. 1977) [hereinafter cited as CONSTITUTIONAL STATUS OF ACADEMIC FREEDOM].

[26] In 1937, it was said that the status and meaning of academic freedom was quite unclear. Comment, *Academic Freedom and the Law,* 46 YALE L.J. 670, 671 (1937). A quarter of a cen-

agreement as to which specific provision of the Constitution protects academic freedom, developing appropriate constitutional standards has been equally elusive. For example, in *Mailloux v. Kiley*,[27] Judge Wyzanski made a valiant effort to develop standards. He thought the standard should be whether the material is relevant, used in good faith and regarded by experts of significant standing as serving a serious educational purpose.[28] Yet, in reviewing the case on appeal, the United States Court of Appeals for the First Circuit stated: ". . .[W]e suspect that any such formulation would introduce more problems than it would resolve."[29] The First Circuit thought that the standards should be ". . . whether the legitimate interest of the authorities are demonstrably sufficient to circumscribe a teacher's speech."[30] In *Keefe v. Geanakos*,[31] the court stated "[h]ence the question in this case is whether a teacher may, for demonstrated educational purposes, quote a 'dirty' word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand."[32] In *Parducci v. Rutland*, the court thought the proper inquiry to be whether the story was appropriate reading for high school juniors and whether the use of the story in question would materially and substantially interfere with proper discipline in the school.[33]

It is understandable why judges and writers have been concerned about free speech in the classroom.[34] The free flow of information in the classroom is important for at least three reasons. First, our educational system has been largely entrusted with the responsibility of developing the capacity for and the maintenance of intellectual freedom in the citizenry. Intellectual freedom is vital to our concept of

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tury later Professor Fellman surveyed the area and found it essentially unchanged; very few cases addressed the concept of academic freedom and those few cases demonstrated little appreciation for its importance. The decisional law was described as "formless and rudimentary." Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3, 17.

As we enter the decade of the 1980's, the concept of academic freedom remains ill-defined. *See* President's Council v. Community School Bd., 457 F.2d 289, 293-94 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); Ahern v. Board of Educ., 456 F.2d 399 (8th Cir. 1972); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 611-16 (1970); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968).

[27] 323 F. Supp. 1387 (D. Mass. 1971). *See* discussion in text at note 1.

[28] *Id.* at 1391, 1392.

[29] Mailloux v. Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971).

[30] *Id.*

[31] 418 F.2d 359 (1st Cir. 1969).

[32] *Id.* at 361-62.

[33] 316 F. Supp. 352, 356 (M.D. Ala. 1970).

[34] *See* cases and articles cited in notes 22 and 23.

humanity and our system of government. It is believed that the free flow of information in the classroom is essential for these ends. Secondly, the educational system has been likewise entrusted with the responsibility of cultivating the facility for formulating sound public opinion in the citizenry. Again it is believed that the free flow of information in the classroom is important if this goal is to be accomplished. And thirdly, the free flow of information in the classroom is related to our epistemology and the very nature of education.[35]

While the above mentioned concerns are understandable and important, it is this writer's opinion that many problems stem from the alleged constitutional character of the concept which has been selected to further those concerns. To find that a teacher has a constitutionl right to free speech in the classroom is misleading and productive of unnecessary complexities. First, to cast the issue in terms of the first amendment right of the teacher is to obscure what appears to be the real issue—namely, who should decide what is taught in the classroom? Second, developing a constitutional standard by which to measure the first amendment right in the classroom has proven to be elusive and it requires federal judges to oversee the day-to-day selection of classroom materials.[36] Third, in the process of constitutional review of classroom materials, it is this writer's contention that judges are being called upon to decide under the Constitution issues which simply do not rise to a constitutional level.[36.1] And fourth, it is misleading to cast the issue in terms of the first amendment right of the teacher. It is really the flow of information to the pupils that is the center of our concern. A constitutional standard which balances all relevant educational factors would be unduly cumbersome and would usurp state functions.[37]

This article shall propose a legal framework for applying the concept of academic freedom in public secondary schools. It will argue that viewing academic freedom in public secondary schools as a constitutional freedom, right or doctrine is inappropriate. The true issues at stake are who shall decide what is to be taught in the classroom, and how do we ensure the free flow of information in public schools? Secondary education is essentially a state function, and academic freedom is one of its vitals. We shall develop the view that academic freedom in public secondary schools should be treated as a state protected right or privilege. This does not suggest that aca-

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[35] *See* discussion of these concerns in text following note 57.

[36] For example, see Mailloux v. Kiley, 232 F. Supp. 1387 (D. Mass. 1971).

[36.1] *See* discussion in text at note 84 *infra*.

[37] *See* discussion in text at notes 71 & 74.

demic freedom is unimportant, nor in any way diminishes its importance. States are responsible for the protection of many important rights. Besides, whether a given right, conduct or activity is constitutionally protected does not turn on its degree of importance. Whether a right or conduct is regarded of constitutional dimension turns on whether it is explicitly or implicitly guaranteed by the Constitution.[38] When viewed in the proper prospective, a state protected right or privilege of academic freedom provides adequate safeguards for the identified interests at stake.

Some readers will no doubt argue that if academic freedom is not given constitutional status, states might be too provincial in their treatment of speech in the classroom. Several responses are in order. First, the states have been responsible for what is taught in the classroom from the very first day of public education in America.[39] Secondly, the notion that academic freedom has constitutional status is of very recent origin and has no historical support. The concept of academic freedom was the creation of higher education for its own internal regulation; its enforcement was entirely within the university.[40] Thirdly, the due process clause of the United States Constitution prevents a state from disciplining a teacher for his speech in the classroom unless he has been given fair warning prior to the conduct in question.[41] This means in effect that the decision not to permit the use of certain words or materials will have been decided in some antecedent deliberative process. That fact provides an important degree of protection against arbitrary or silly limitations on speech in the classroom. And there are other constitutional provisions (for example, the freedom of religion) apart from the right to free speech that will limit what the state can do in the classroom.[42] Beyond these considerations, this country can tolerate some diversity in classrooms across the nation. There is no need to standardize the classrooms. As in the area of obscenity,[43] we should give the state and local boards more leeway in determining just what children are taught. It is diversity, with its varying degrees of sophistication, that gives character and richness to our way of life.

To understand the novel approach to academic freedom proposed herein, one must understand its history and more importantly, the

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[38] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

[39] *See* notes and text at note 70 *infra*.

[40] *See* text at notes 46 & 51 *infra*.

[41] *See* text at note 151 *infra*.

[42] *See* text at notes 154-62 *infra*.

[43] *See* discussion in text at note 74 *infra*.

purposes served by it. Therefore, considerable attention will be given to both. Additionally, the concept of a privilege of academic freedom will be developed as fully as possible.

II. Foundation

Academic freedom had its birth in antiquity. The struggle for freedom in teaching can be traced at least as far back as Socrates' defense of himself against charges of corrupting the youth of Athens. Our European educational heritage includes universities of considerable self-government and autonomy;[44] the influence of German educational history was undoubtedly great. There were, no doubt, gaps between theory and reality;[45] yet German professors boasted a concept of academic freedom which included complementary elements: *Lernfreiheit* and *Lehrfreiheit*—freedom of learning and freedom of teaching.[46] The objective of these twin freedoms was the prevention of administrative coercion in the academic life of the university. Teachers were free to teach whatever and however they thought best. They were free to engage in research—freedom of inquiry. This was thought to follow from the notion that knowledge was not fixed, final or static. As Paulsen put it, knowledge knows no "statute of limitation," no authoritative "law of prescription," no absolute "property right."[47] Students, on the other hand, were free "to roam from place to place, sampling academic wares; that wherever they lighted they were free to determine the choice and sequence of courses, and were responsible to no one for regular attendance; that they were exempted from all tests save the final examination; that they lived in private quarters and controlled their private lives."[48] Moreover, *Lernfreiheit* was deemed essential in furthering research and training researchers.[49]

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[44] R. HOFSTADTER AND W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, 1-75 (1955); [hereinafter cited as HOFSTADTER AND METZGER]; Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, in ACADEMIC FREEDOM, THE SCHOLAR'S PLACE IN MODERN SOCIETY 1 (H.W. Baade ed. 1964) [hereinafter cited as BAADE]; Jones, *The American Concept of Academic Freedom*, in ACADEMIC FREEDOM AND TENURE 224 (L. Joughin ed. 1967) [hereinafter cited as JOUGHIN].

[45] HOFSTADTER AND METZGER, *supra* note 44, at 383.

[46] ID. at 383; JOUGHIN, *supra* note 44, at 225. It was in nineteenth century Germany that the modern concept of academic freedom came to be formulated. *Id.*; BAADE, *supra* note 44, at 5. American professors and students studying in Germany brought the concept back to the United States. Katner, *The Freedom of Academic Freedom: A Legal Dilemma*, 48 CHIC.-KENT L. REV. 168, 178 (1971).

[47] F. PAULSEN, THE GERMAN UNIVERSITIES AND UNIVERSITY STUDY 228 (1906).

[48] HOFSTADTER AND METZGER, *supra* note 44, at 386.

[49] *Id.*

The Atlantic crossing wrought significant changes in the concept of academic freedom.[50] It required pruning and engrafting before it could be fruitfully transplanted into American schools. The American notions of a democratic society, a federal constitutional scheme, the state as *loco parentis* and the primary purveyor of education, and a different role and concept of education all conjoined to produce our hybrid. It is of this matrix that must inform our concept of academic freedom.

It is of primary importance that we remember that the concept of academic freedom had its genesis within the university. Most of the universities which midwived the concept were not operated by the government. Most were sponsored by religious groups and all enjoyed the prerogative of self-government.[51] They were autonomous corporations—their respective faculties elected their officials and set the rules.[52] The mischief at which the concept of academic freedom was directed was entirely intramural. "Dissident professors were the victims, trustees and administrators were the culprits, the power of dismissal was the weapon, the loss of employment was the wound."[53] Throughout most of the early history of higher education, the protection of academic freedom was the exclusive domain of the University.[54] The concept of tenure, along with faculty participatio in university governance and congenial internal procedures have been the principle devices used for its protection.[55] Judicial intervention into the province of the university for the purpose of protecting academic freedom is of very recent origin.[56] History gives no support to the

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[50] One of the major changes that occurred was the development of the concept that a college or university professor is protected by academic freedom from sanctions by his university or by external agencies not only for conduct connected with his professional roles as teacher and scholar, but also for his activities as a private citizen. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach,* 124 U. PA. L. REV. 1293, 1299 (1976).

[51] This is especially true with respect to English and American Universities. R. HOFSTADTER AND W.P. METZGER, *supra* note 44, at 6 & 115. German universities were state institutions. Nonetheless, they enjoyed "considerable corporate autonomy." *Id.* at 385.

[52] *Id.* W.P. METZGER, ACADEMIC FREEDOM IN DELOCALIZED ACADEMIC INSTITUTIONS, IN DIMENSIONS OF ACADEMIC FREEDOM 6 (1969) [hereinafter cited as METZGER, DELOCALIZED ACADEMIC INSTITUTIONS].

[53] METZGER, DELOCALIZED ACADEMIC INSTITUTIONS, *supra* note 52, at 2.

[54] *Id.* at 6-12. *See also* materials cited in note 51.

[55] *Developments In the Law of Academic Freedom,* 81 HARV. L. REV. 1049 (1968): "Tenure, . . . is the bulwark of academic freedom." H.M. Jones, *The American Concept of Academic Freedom,* in ACADEMIC FREEDOM AND TENURE (AAUP HANDBOOK) 231 (L. Joughin ed. 1967); *See generally* ACADEMIC FREEDOM AND TENURE (AAUP HANDBOOK) (L. Joughin ed. 1967).

[56] *Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1050-51 (1968); Murphy, *Educational Freedom in the Courts,* 49 AAUP BULL. 309, 312 (1963); Finkin, *Toward a Law of Academic Status,* in THE CONSTITUTIONAL STATUS OF ACADEMIC TENURE 575, 576 (Metzger ed.

view that academic freedom is a constitutional right.

III. Academic Freedom—Its Matrix

The need for academic freedom in secondary schools is to be found in the purposes of education and in the nature of the educational process. More specifically, through academic freedom we lay the foundation for intellectual freedom and sound public opinion. Also, it is an essential ingredient of the educational process. We turn then, to a closer examination of these sustentacular relationships.

Educational freedom[57] is an important feature of our educational system and our political scheme. Our system of education—public and private, lower and higher—reflects this view.[58] Schools are designed to help develop the capacity or faculty which each person needs in order to realize his potential and to be a productive member of society.[59] Each member of society should have the capacity to pursue truth and happiness and dream great dreams. In short, each person should enjoy intellectual freedom.[60]

We attempt to foster intellectual freedom through a diversified eduational system. But in the end, because we know that each person is different and responds in varying ways to varying stimuli, educational freedom must be promoted throughout the system—indeed in

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[57] By educational freedom we mean the unrestricted opportunity for educational institutions and teachers to pursue truth and knowledge and to disseminate them to students. *See* Murphy, *Academic Freedom—An Emerging Constitutional Right,* in THE CONSTITUTIONAL STATUS OF ACADEMIC FREEDOM 447, 451-53 (W.P. Metzger ed. 1977).

[58] For an excellent discussion of the diversity within our educational system see J.B. CONANT, THE AMERICAN HIGH SCHOOL TODAY, 1-9 (1959). This need for diversity is clearly reflected in the "comprehensive high school," which is a school with programs to meet the educational needs of all youths of the community. For full discussion, *see* CONANT, *id.*, Section II: A Unique Feature: The Comprehensive High School.

[59] "The function of education is to help the growing of a helpless young animal into a happy, moral and efficient human being. J. DEWEY: DICTIONARY OF EDUCATION 28 (R.B. Winn ed. 1959). "The educative process is a continuous process of growth, having as its aim at every stage an added capacity of growth." *Id.*

[60] Much of our thinking regarding intellectual freedom is derived from the "great secular trinity of Johns: Milton, Locke, and Mill." Freund, *The Great Disorder of Speech,* 44 AM. SCHOLAR 541, 542 (1975). In more modern times the great theologian Reinhold Niebuhr reminded us of the importance of free debate as a protection against historical corruption, misappropriation and fragmentary formulation of moral truths: "This alone would justify the ultimate freedom of a democratic society in which not even the moral presuppositions upon which the society rests are withdrawn from constant scrutiny and examination. Only through such freedom can the premature arrest of new vitalities in history be prevented. . . . A society which exempts ultimate prinicples from criticism will find difficulty in dealing with the historical forces which have appropriated these truths as their special possession." NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS, 74, 75 (1945).

each classroom. Because no one person or group has a monopoly on truth or wisdom, the judgment and the methods of each teacher should be respected. Each should be permitted to find his own way to liberate the minds of the students. Thus our great societal interest in intellectual freedom can be furthered by providing a measure of academic freedom in each classroom.

Intellectual freedom is also the foundation of a disciplined and responsible public opinion.[61] For better or for worse, we have placed our faith in and the responsibility for cultivating and maintaining intellectual freedom primarily on our educational system. The educational system, therefore, must lay the foundation for responsible public opinion.[62] If the school is to develop the student's capacity for responsible public opinion, it must reject the mistaken belief that avoidance of criticism in dealing with history, politics and economics will produce a loyal patriot, a well-equipped good citizen.[63] Such "artificial innocence" is likely to perpetuate "confusion, ignorance, prejudice, and credulity" and produce "gullible" citizens.[64] The objective of the system must be to cultivate a discriminating mind which relies on information and reason, and not merely emotions, in forming an opinion. Thus, in the process of laying the foundation for responsible public opinion the teacher must deal with life. He must deal with politics, economics, values, prejudices, fears, expectations—the whole of life. In performing this most sensitive task, academic freedom is essential. If a measure of protection is not provided the job simply cannot be done.

Academic freedom in the classroom is also essential because of the nature of knowledge and the educational process. We begin with the understanding that two of the functions of the secondary school are

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[61] Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurther, J., concurring). The teacher's role is "to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion." *Id.*

[62] In calling for the establishment of schools, in Virginia, Jefferson noted that the "general objects" of schools are to "provide an education adapted to the years, to the capacity . . . [of] everyone, and directed to their freedom and happiness"; that "every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree." JEFFERSON, NOTES ON VIRGINIA, in 4 WORKS OF THOMAS JEFFERSON, 60-65 (Federal ed. 1904) (Jefferson's explanation of his Bill for the More General Diffusion of Knowledge).

"We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." West Va. State Board of Education v. Barnette, 319 U.S. 624, 641 (1943).

[63] J. DEWEY, DICTIONARY OF EDUCATION 103 (R.B. Winn ed. 1959).

[64] *Id.*

to advance and disseminate knowledge.[65] While the concern for the dissemination of knowledge may predominate over the concern for the advancement of knowledge, the secondary school is nonetheless concerned with both.[66] The duty of advancing and disseminating knowledge is coupled with the student's right to learn— *Lernfreiheit*.[67] The epistemology which underlies our educational system is that knowledge is best understood and advanced by an inquiry into the methodological and rationalistic assumptions upon which a fact, concept, or theory rests. Moreover, knowledge can only be validated as knowledge (in contradistinction to dogma or speculation), by being subjected to the test of free inquiry.[68] Thus, no proposition is so sacred as to be immune from this test; rather, a proposition derives its validity from surviving the test.[69] If the secondary school is to perform its function of disseminating and advancing knowledge, a certain measure of free inquiry must be permitted as a method of teaching knowledge and for advancing it. The function of academic freedom is to provide the needed leeway.

All of this leads to the conclusion that the need for academic freedom in secondary schools is derived from our epistemology and from our concept of education and our ideas on how best to achieve its objectives. It is derived from special notions regarding an educational institution and the conditions necessary for its proper functioning. Most importantly, we believe that the quality of instruction depends to an important degree on a measure of freedom in the classroom and the intellectual integrity of the teacher. It is this prophetic matrix and its nexus to our society that give form and content to the concept of academic freedom.

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[65] F.R. Smith and C.B. Cox, Secondary Schools in a Changing Society 23 (1976).

[66] By "advancement of knowledge" we mean extending the frontiers of knowledge. It is important to instill in secondary pupils the spirit of creativity and inventiveness; those who go on to college and those who end their formal education at the secondary level will benefit from that spirit.

What Professors Emerson and Haber said about the nature of the university also applies to the secondary school. They see the "main functions" of a university in a democratic society as the transmission of existing knowledge and values and the critical reexamination of such knowledge and values with a view to facilitating orderly change in society. T.I. Emerson and D. Haber, Academic Freedom of the Faculty Member As Citizen in Academic Freedom—The Scholar's Place in Modern Society 95, 117 (H.W. Baade ed. 1964).

[67] *See* text at note 46 *supra*.

[68] J.R. Searles, *Two Concepts of Academic Freedom*, in The Concept of Academic Freedom 86, 88 (E.L. Pincoff ed. 1975).

[69] *Id.*

IV. The Nature of Academic Freedom

A. *Its Constitutional Status*

In the previous section, we have seen that there is an important nexus between academic freedom and our way of life. That nexus, however, is no more important than the nexus between education itself and our way of life. If education can be entrusted to the state, then so may academic freedom. Indeed, academic freedom is really an integral part of education and the educational process. Since secondary education is essentially a state function,[70] and since academic freedom is one of its vitals, it too would appear to be a state matter. The recommended approach simply recognizes the fact that under our system, the state, rather than federal judges, has the primary responsibility for determining what is taught in public schools.

The failure to view academic freedom as essentially a state privilege results in a misconception of the educational process. When academic freedom is treated as a federal constitutional right, rather than an integral part of the educational process, it diverts attention from the proper development of the content of academic freedom; it becomes exceedingly difficult to consider all factors which should be considered. In the *Mailloux* case,[71] for example, the basic issue was not whether the teacher had a constitutional right to use Jesse Stuart's novel or discuss taboo words in that 11th grade English class. Rather, the issue in that case was whether the book should have been used or whether the taboo words should have been discussed. If we are faithful to the purposes of education, several factors must be considered in order to answer this question: what was the scope and nature of the course; was the material relevant; did it serve an educational purpose; was the use of the material compatible with contemporary standards of decency; was the use reasonable in light of the level of maturity (grade, age, experience and ability) of the pupils; was there a likelihood that the use of the material would result in a disruption of classroom activities, and would the use have violated any laws?[72]

If the constitutional question is answered without a consideration

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[70] There is no explicit or implicit constitutional right to education. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34, 49 (1973). "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts . . . which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Brown v. Board of Educ., 347 U.S. 483, 493 (1954); E.E. REUTTER, JR. & R.R. HAMILTON, THE LAW OF PUBLIC EDUCATION, 109 (1970).

[71] Mailloux v. Kiley, 232 F. Supp. 1387 (D. Mass. 1971).

[72] These considerations are fully discussed in the text at note 112 *infra*.

of all the above factors, the educational process is being short-changed. This is so because masked within the alleged constitutional question there is also the educational question of whether the material should be used. This is a question of educational policy. On the other hand, if in answering the alleged constitutional question these factors are considered, then the process of constitutional adjudication becomes laden with local, as opposed to national or federal concerns. The result is the usurpation of authority which should be exercised by local school officials on the basis of local standards.[73]

The uniquely local character of the above factors should be stressed. Each one requires an assessment of the peculiar circumstances of the local educational system. Local officials are in a much better position to make the assessment—they live with these concerns every day. Equally important, thse would not appear to be the type of factors that would require a national perspective. A local perspective—an approach fostering diversity, would appear entirely adequate.

The need for local application of the several factors mentioned above is illustrated by the current treatment of obscenity laws. Consider the requirement in our definition of academic freedom that the material be compatible with contemporary standards of decency. Indeed most of the secondary school cases we have reviewed involved this factor. The contemporary standards of decency requirement is closely akin to the contemporary community standards[74] under obscenity laws. After a long history of trying to define what is obscene material which the state is free to prohibit,[75] the Supreme Court concluded in *Miller v. California*[76] that whether materials are obscene is "essentially [a] question of fact. . . ."[77] ". . . [O]ur nation is simply too big and too diverse for this court to reasonably expect that . . . standards could be articulated for all 50 states in a single formulation. . . . The adversary system, with lay jurors as the usual ultimate

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[73] *See* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293, 1335-57 (1976). Goldstein concludes that "neither sound constitutional analysis nor authoritative precedent support a federal constitutional right of teachers to determine what they teach contrary to the desire of the school authorities . . . ." *Id.* at 1355.

[74] The test for obscenity (which is not constitutionally protected) is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957). A jury must also determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

[75] *See generally*, L.H. Tribe, American Constitutional Law, §§ 12-16 (1978).

[76] 413 U.S. 15 (1973).

[77] *Id.* at 30.

factfinders . . . has historically permitted triers of fact to draw on the standards of community, guided always by limiting instructions on the law."[78] Finally, the Court stated that the "[p]eople in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[79]

It is true that the question as to whether materials are obscene remains a federal question to be determined by a jury under the guidance of federal law.[80] Perhaps this is made necessary by its historical treatment and more importantly the explicit terms of the first amendment. But let us not forget the price we have paid in attempting to incorporate local standards into a national law. The "tortured history"[81] of obscenity decisions has "produced a variety of views among the members of the [S]upreme Court unmatched in any other course of constitutional adjudication."[82] Such a frustrating search appears unwarranted and unnecessary in protecting academic freedom. Of necessity, the academic freedom standards will be local.

Similarly, if the issue is cast in terms of the first amendment right of the teacher, there is the danger of losing sight of the fact that it is not the free speech right of the teacher which is the center of our concern. Our concern is the free flow of information within the school and within society. A measure of academic freedom is granted the teacher because we believe that it will significantly aid in accomplishing the purposes of education.[83] Whether conduct should be protected under the concept of academic freedom can only be determined by a consideration of the purposes served by that concept. A process of adjudication which focuses on the free speech right of the teacher is likely to obscure the goals at stake.

There is another undesirable consequence which flows from treating academic freedom as a constitutional matter. Simply put, many of the issues raised in academic freedom cases do not rise to a constitutional level. And yet, they are treated as such.[84] To quote Chief

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[78] *Id.*

[79] *Id.* at 33. *Accord*, Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

[80] *See* TRIBE, note 74 *supra.*

[81] Miller v. California, 413 U.S. 15, 20 (1973).

[82] Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-05 (1968) (Separate opinion of Harlan, J.). *See also* TRIBE, *supra* note 75.

[83] The practice of protecting the speech of a speaker primarily for the benefit of others—the public, has been recognized in other areas. *See* First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Consolidated Edison of N.Y., Inc. v. Public Service Commission of N.Y., 447 U.S. 530, 541 (1980).

[84] In Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600 (3d Cir. 1975), an *en banc* ruling, the court concluded, after years of considering the matter, that the issue of the authority of school boards to regulate the length of students' hair "does not rise to the digniy of a pro-

Justice Marshall, "we must never forget that it is a constitution we are expounding."[85] That great document does not state "rules for the passing hour, but principles for an expanding future."[86] It contains "fundamental rules of right."[87] Unless every important issue is to be treated as a constitutional one, we must retain certain basic distinctions between local and federal matters. Therefore, academic freedom should be viewed in its more normal and natural context—as an essential ingredient of education.

There is yet another reason why the teacher does not have a free speech right in the classroom. It is true that teachers do not "shed their constitutional right to freedom of speech and freedom of expression at the schoolhouse gate."[88] This does not mean, however, that teachers enjoy free speech everywhere on campus. There are, of course, "streets and parks" which have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens

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tectable constitutional right." *Id.* at 606. *Accord*, Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974).

In prior cases, the Third Circuit had recognized a constitutional right in hair-length cases: "[w]e hold that the governance of the length and style of one's hair is implicit in the liberty assurance of the due process clause of the fourteenth amendment." Stull v. School Bd., 459 F.2d 339, 347 (3d Cir. 1972); *accord*, Gere v. Stanley, 453 F.2d 205 (3d Cir. 1971). The *Zeller* court noted the fact that hair-length had received constitutional protection in other circuits: Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970); Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973); Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972); Holsapple v. Woods, 500 F.2d 49, 51-52 (7th Cir.) (per curiam), *cert. denied*, 419 U.S. 901 (1974); Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971). Notwithstanding this impressive array of decisions, the *Zeller* court concluded that the plaintiff's hair claim "does not rise to the dignity of a protectable constitutional right." *Zeller*, 517 F.2d at 606.

The same would appear true in many of the academic freedom cases. Of course, if the school officials oppose the book on grounds that would offend a specific provision of the federal constitution, that would be a different case. *See* Epperson v. Arkansas, 393 U.S. 97 (1969) (the Court held unconstitutional as violating the first amendment freedom of religion an Arkansas statute which prohibited the teaching (in public schools) of the theory that man evolved from other species of life); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[85] McCullough v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819).

[86] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 83 (1921); McCullock v. Maryland, 17 U.S. (4 Wheat) 316, 409 (1819).

[87] Zeller v. Donegal School Dist. Bd. of Educ., 417 F.2d 600, 605 (3d Cir. 1975).

A constitutional ruling should be a "principled" decision. "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of the state, those choices, must, of course, survive. Otherwise, as Holmes said . . ., 'a constitution, instead of embodying only relatively fundamental rules of right, . . . would become the partisan of a particular set of ethical or economical opinions . . .'" Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

[88] Tinker v. Des Moines Inc. Community Sch. Dist., 393 U.S. 503, 506 (1969).

and discussing public questions."[89] In order to constitutionally restrict free speech in those areas "compelling", "weighty" reasons are required.[90] But it should be noted that even in those public forums speech may be regulated.[91]

In addition to the so-called "public forums" there are what might be called semi-public forums such as public schools and libraries.[92] Because such places were established for specific governmental purposes, speech which is incompatible with those purposes may be regulated or proscribed. A case in point is *Grayned v. City of Rockford*.[93] The Court held that "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[94] The City of Rockford was constitutionally permitted to proscribe "expressive activities" which were "incompatible" with normal school activities—including some peaceful picketing.[95]

Likewise, in *Greer v. Spock*,[96] notwithstanding the fact that civilian speakers, clergymen and theatrical productions were permitted on Fort Dix Military Reservation, the Supreme Court held that partisan political speeches could be constitutionally banned.[97] The Court thought that " '[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' "[98] The same would apply to the federal government.

Therefore, if I am incorrect in suggesting that a teacher does not enjoy the right of free speech in the classroom, he can, nevertheless, be restricted. It is reasonable to conclude that first amendment rights may be circumscribed in order to further a sufficiently strong public interest. "Some basic incompatibility must be discerned between the communication and the primary activity of an area."[99] The strong

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[89] Hague v. CIO, 307 U.S. 496, 515 (1939); Kunz v. New York, 340 U.S. 290, 293 (1951); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Mt. Healthy City Sch. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[90] *Id. See generally* L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-21 (1978).

[91] *Id.*

[92] *Id.*

[93] 408 U.S. 104 (1972).

[94] *Id.* at 116.

[95] *Id.* at 120, 121.

[96] 424 U.S. 828 (1976).

[97] *Id.* at 836.

[98] *Id.*, quoting Adderly v. Florida, 386 U.S. 39, 47 (1966).

[99] Green v. Spock, 424 U.S. 828, 843 (1976) (Powell, J., concurring). The Supreme Court has

state interest in public education is free from doubt.[100] As the Court said in *Shelton v. Tucker,*[101] "[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds towards the society in which they live. In this, the State has a vital concern."[102] The incompatibility seems clear: how can the state control the curriculum if teachers enjoy a federally defined right of free speech in the classroom?

It seems fair to conclude that the teacher does not enjoy a right of free speech in the classroom. This view is supported by several federal circuit courts.[103] Likewise, it is supported by the notion that when a government acts as an employer, it can define the employee's job and impose reasonable employment regulations.[104] The rights of the teacher are adequately protected by a state privilege of academic freedom. The interest of students and the public in the free flow of information can be protected by the first amendment as herein indicated in a later section.

B. *A State Privilege*

The privilege[105] of academic freedom is the doctrine by which we

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also noted alternative means for communicating views or ideas; for example, to students before or after school. *See* Grayned v. City of Rockford, 408 U.S. 104, 120 (1972); Pell v. Procunier, 417 U.S. 817, 827-28 (1974).

[100] Public education is "perhaps the most important function of the state and local governments." Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[101] 364 U.S. 479 (1960).

[102] *Id.* at 485.

[103] "There is nothing in the first amendment that gives a person employed to teach the Constitutional right to teach beyond the scope of the established curriculum." Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974). "There is a compelling state interest in the choice and adherence to a suitable curriculum. . . . It cannot be left to individual teachers to teach what they please." Palmer v. Board of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). For a summary of cases supporting this viewpoint see Kemerer & Hirsh, *The Developing Law Involving The Teacher's Right to Teach*, 84 W. VA. L. REV. 31, 71-83 (1981).

[104] *See generally* Bennett v. Thomson, 116 N.H. 453, 363 A.2d 187, 191 (1976), *appeal dismissed*, 429 U.S. 1082 (1977); Coven, *The First Amendment Rights of Policymaking Public Employees*, 12 HARV. C.R.-C.L.L. REV. 559 (1977); Goldstein, *The Asserted Constitutional Right of Public School Teachers To Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976).

If the objective is to strike a balance between the interest of the teacher as a citizen, and the interest of the state as an employer (*See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)), then the teacher's interest within the classroom is extremely limited.

[105] The word "privilege" stems from the Latin phrase "privata lex," a prerogative given to a particular person or class of persons. Slovenko, *Psychiatry and a Second Look at Medical Privilege*, 6 WAYNE L. REV. 175, 181 (1960). A privilege is an immunity granted by law to further an interest of social importance. The actor is granted protection or freedom of action because his own interests, or those of the public are best served thereby. PROSSER, LAW OF TORTS, §16 (4th

accommodate and effectuate the sometimes competing concerns of the nature and goals of our society and the purposes of education. It is a part of the common law of education. Reflecting a profound faith in the free flow of information, the privilege is compounded of our educational purposes, past practices, notions and dreams, and a stout confidence in our eclectic epistemology. Because education, like life itself, is dynamic, the privilege of academic freedom must of necessity derive much of its content and meaning from the era in which it is raised. However, its contours and content must always reflect its historic office.

Because our educational system is largely teacher-centered, academic freedom is often viewed as a privilege of the teacher. When so viewed, it is important to keep in mind the full scope of the privilege. Like the special immunity or privilege claimed by the lawmaker, the judge, the lawyer, the clergyman or the doctor,[106] the teacher claims academic freedom not merely for his protection. At bottom, it reflects a judgment that protection from intimidation and undue interference must be afforded to professional individuals in order to implement important societal interests.[107] Like the lawmaker, the judge and the lawyer, the teacher's work consists of his thoughts and speech. It is by granting immunity from unreasonable interference to these servants that we further the objectives of their offices.

Since the *raison d'etre* of academic freedom is the furtherance of the goals of education, it is proper, in the first instance, to look to the educational community in determining the parameters of the privilege. In such fields as medicine, pharmacy, engineering, accounting and lawyering, courts often look to the custom and practice within those communities in determining the standard of care to which their members are to be held.[108] This seems proper; they are the experts and the very concept of professionalism denotes a good faith and continuing commitment to translating the ideals and best judgment

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ed. 1971); CLEARLY, *et al.*, MCCORMICK ON EVIDENCE, § 72 (2d ed. 1972).

The concept of privilege is used in its historical sense; it denotes a right or prerogative enjoyed by a class or group, in contradistinction to a right which is enjoyed by all in common. C.J.S. *Privilege* (1951).

The privilege of academic freedom will often be raised in a school administrative proceeding, and secondarily in a court. "Such a privilege as that of attorney and client, theoretically founded upon special considerations or social policy, should be entitled to the same respect, no more no less, in an administrative proceeding as in a judicial proceeding." DAVIS, ADMINISTRATIVE LAW TREATISE §14.08 (1958). This reasoning would apply with equal force to the privilege of academic freedom.

[106] PROSSER, THE LAW OF TORTS, §§16 and 132 (4th ed. 1971).

[107] *Id.*

[108] PROSSER, *supra* note 106, at §§32, 33.

of the profession into reality. Professionalism also includes acceptable methods of experimentation for furthering the objectives and goals of the field and for advancing its state-of-the-art and knowledge. So when the custom and practice of the profession reflect a carefully considered judgment, it is entitled to considerable weight.[109] Likewise, in education, the considered judgments of educators (teachers and administrators), are entitled to considerable weight.

While we should carefully weigh the views of the educational community in determining the content of academic freedom, it is no mere platitude to say that education is too important to be left entirely to educators. There may be times when a lack of foresight or self-interest or mere "mindlessness"[110] may cause teachers and administrators to adopt inadequate standards of conduct. When this occurs, the common law courts will no doubt continue to play that vital role of providing a check on school officials.[111]

C. *Its Scope*

The scope of academic freedom in the classroom has been a most troublesome issue; for that reason, we focus on the classroom. We turn therefore, to a more specific definition of academic freedom. Academic freedom is the privilege of a teacher in an approved and assigned course to use any method, symbol or material which is (1) relevant to the subject matter, (2) not violative of valid laws, (3) compatible with contemporary standards of decency, (4) reasonable in light of the level of maturity (age, grade, experience and ability) of the pupils and objectives of the course, (5) calculated to serve and does serve a legitimate educational purpose, and (6) not likely to result in substantial and material disruption of school activities.[112]

Approved and Assigned Courses: It is the responsibility of the state and its subdivisions to determine the courses that will be in-

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[109]. *Id.*

[110] "[W]hat is mostly wrong with the public schools is not due to venality or indifference or stupidity, but to mindlessness. . . ." which is the failure "to think seriously or deeply about the purposes or consequences of education." C. SILBERMAN, CRISIS IN THE CLASSROOM, at 10-11 (1971).

[111] It is clear that courts have established a higher standard of care where an entire industry has followed an inadequate standard in order to save money, or time or has been slow to adopt new technology which would promote safety. Shafer v. H.B. Thomas Co., 53 N.J. Super. 19, 146 A.2d 483 (1958); Grant v. Graham Chero-Cola Bottling Co., 176 N.C. 256, 97 S.E. 27 (1918); The T.J. Hooper, 60 F.2d 737 (2d Cir.) *cert. denied*, 287 U.S. 662 (1932).

[112] The comments which follow are intended to clarify the stated definition of academic freedom.

cluded in the curriculum.[113] This must, of course, be done within constitutional restraints. Further, the teacher must have been assigned to teach the course by the proper official or board. An assignment represents an official judgment that the teacher is qualified and competent to teach the course. In a real sense, it is the ability and judgment of the teacher that is being bought.

The Use of Any Method, Symbol or Material: The plenary authority of state and local officials over the curriculum of schools is clear. And there is no question as to the legal right of the State to prescribe textbooks.[114] The prescribed textbook material must be used, but may be viewed as the minimum requirement. It is common knowledge that over the years, teachers have enjoyed considerable discretion in using supplementary materials.[115] Some diversity within the classroom must be permitted if the teacher is to challenge the varying ability levels therein and provide that variety and enrichment which can excite the learning process. It is simply in the best interest of the goals of education if leeway is permitted and encouraged in supplementing textbooks.

The selection of methodologies and symbols (including words) is peculiarly within the bailiwick of the teacher.[116] The effectiveness of methods and symbols for getting across the course material must be reviewed constantly; there may be a need to change methods from day to day—indeed from hour to hour. What is effective is determined by a host of considerations that only the teacher "on the firing line" can evaluate. Undoubtedly there are times when the "medium is the message." A four-letter word may be just what is needed at a given time. Moreover, the teacher brings a certain educational expertise to this area because of his training and experience in methods, psychology, educational philosophy, etc.

Relevant to Subject Matter: In a world where there is so much knowledge to pass on, time is precious. At the heart of the education system is the notion that for various reasons, students should be

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[113] Pierce v. Society of Sisters, 268 U.S. 520, 534 (1925); Meyer v. State of Nebraska, 262 U.S. 390, 402 (1923); *see generally* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach,* 124 U. PA. L. REV. 1293 (1976).

[114] Presidents Council, Dist. 25 v. Community School Bd., 457 F.2d 289 (2d Cir. 1972); Leeper v. State of Tenn., 103 Tenn. 500 (1899); E.E. REUTTER, JR. AND R.R. HAMILTON, THE LAW OF PUBLIC EDUCATION 112 (1970).

[115] Cary v. Board of Educ. of Adams-Arapahoe, 427 F. Supp. 945, 955 (D. Colo. 1976); Keefe v. Geanakos, 418 F.2d 359, 360 (1st Cir. 1969); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 593-94 (1970);.

[116] Mailloux v. Kiley, 232 F. Supp. at 1390; Sterzing v. Fort Bend Independent School District, 376 F. Supp. 657, 662 (S.D. Tex. 1972).

taught or exposed to certain subjects. Once school officials have identified those subjects and allocated a given number of hours of instruction in them, a teacher should confine himself to the subject matter for the designated period of time. This pedagogical responsibility must be considered primary. It is a duty owed to pupils, their parents, and indeed to society. For example, the privilege of academic freedom does not give the teacher a license to teach politics in a course in mathematics. Besides, a teacher is certified and hired to teach specific courses; his competency in only those areas is assured.

On the other hand, the teacher must be given reasonable latitude. Materials are not irrelevant merely because they are controversial.[117] Moreover, while the pursuit of truth is not the primary goal of secondary education, students should be taught to pursue truth. Students have a right to learn and there would appear to be no genuine public interest in the preservation of false concepts.

Like many great divides in life, the line between what is or is not relevant is not clear and bright. There can be no hard and fast rule. What is needed is a dynamic definition capable of accommodating competing interests in kaleidoscopic situations. There are interests in complete coverage of the assigned subject and of granting the teachers leeway in deciding how best to do so. If the method, symbol or material sheds light on the subject matter and is done in good taste and not for propagandistic purposes,[118] perhaps it should be viewed as relevant.[119] The more remote the nexus between the course and the method, symbol or material in constroversy, the greater will be the need for justification, and conversely, the closer the nexus, the lesser the need for justification. The central issue is whether it aids the students in understanding the subject. A somewhat liberal standard would seem to help in avoiding the "standardization" of children.

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[117] "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." West Va. Bd. of Educ. v. Barnett, 319 U.S. 624, 642 (1943).

[118] West Va. Bd. of Educ. v. Barnette is properly read as holding that the public school classroom may not be used for purposes of propaganda. 319 U.S. at 642. *See* note 117 *supra*.

[119] In Keefe v. Geanakos, 418 F.2d 359, 361 (1st Cir. 1969), the court found that the use of a "vulgar term for an incestuous son" in a senior English class was not "artificially introduced, but, on the contrary is important to the development of the thesis and the conclusion of the author." In Mailloux v. Kiley, 232 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971), the court found that the taboo word "fuck" was relevant in the discussion of a novel in an eleventh grade English class because it served a "serious educational purpose." *See also* Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032, 1044 (1971).

Not Violative of Valid Laws: While education is important, there are also other important societal values. Some of them may take priority over educational interests. Precepts which are included in the United States Constitution,[120] and other valid laws[121] must be respected by teachers.

Compatible with Contemporary Standards of Decency: Parents, taxpayers, and the state have a right to insist that the teacher observe standards of decency in the classroom. This is entirely consistent with the purposes of education. Indeed, the extent to which the school observes standards of decency will have a direct bearing on the quality of life in society both today and tomorrow; a failure to observe appropriate standards can prevent the school from accomplishing some of its important purposes, to wit, socialization and the maintenance of civilization through community values.

Contemporary standards of decency are diverse and elusive. Nonetheless we start with the understanding that what is decent must be determined in light of the age, maturity, experience and sophistication of the pupils.[122] The mere fact that materials may be constitutionally possessed or sold to adults[123] does not give the teacher the right to use them in classroom. Even in the area of criminal law, the "variable obscenity" approach has been recognized.[124] The obscenity and decency standards are not the same; the decency standard is higher. That we are dealing with impressionable minds is an important consideration. And yet, the school must operate within the world as it is and prepare young people for life. If the shock, for example, of one occasional "dirty" word is too great for high school seniors, then one wonders about their future. In other words, too much protection can be as harmful as too much exposure.

In determining contemporary community standards of decency, the following factors should be considered: the opinions of educators;[125]

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[120] *E.g.*, the first amendment prohibition against laws respecting an establishment of religion and prohibiting the free exercise thereof, applies to teachers in the classroom. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Epperson v. Arkansas, 393 U.S. 97 (1969).

[121] For example, valid state laws against pornography must be respected by teachers. Miller v. California, 413 U.S. 15 (1973); Ginsberg v. N.Y., 390 U.S. 629 (1968).

[122] Nahmod, *supra* note 119 at 1049; Ginsberg v. N.Y., 390 U.S. 629 (1968); Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala. 1970).

[123] Miller v. California, 413 U.S. 15 (1973).

[124] Ginsberg v. N.Y., 390 U.S. 629 (1968). Any material which is obscene under the Ginsberg test would of course offend contemporary standards of decency and could not be used in the classroom. Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969); Parducci v. Rutland, 316 F. Supp. 352, 355-56 (M.D. Ala. 1970); Nahmod, *supra* note 119, at 1050.

[125] Mailloux v. Kiley, 323 F. Supp. 1387, 1390 (D. Mass.) *aff'd*, 448 F.2d 1242 (1st Cir. 1971); Oakland Unified School Dist. v. Olicher, 24 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972).

the use of the same or similar materials, methods or symbols in literature, programs, etc., generally available to children of the particular age involved;[126] the implied approval of the state, for example, where the school's library contains the same or similar books or materials;[127] the uncontested use by other teachers of similar materials and symbols;[128] and the fact that the material or symbol is within the common knowledge of the students.[129] The survey should include not merely the school in question, but also the city or county—the school district or system. A broader survey is more likely to yield informed and contemporary standards.

Reasonable in Light of the Level of Maturity (Grade, Age, Experience, Ability) of the Pupils and Objectives of the Course: A consideration of the maturity level of students will aid in determining whether given materials, methods or symbols will be comprehensible and meaningful. It should also aid in determining just how time-consuming the presentation will be and its likelihood of being too shocking and/or diverting. While a teacher is not required to avoid controversies,[130] the usefulness of the presentation should be assessed in light of the overall objectives and constraints of the course. Moreover, whether the presentation of a particular school of thought or a teacher's individual opinion is reasonable may depend upon whether the presentation is balanced.[131] Lastly, a method or the use of specific material or symbols is unreasonable if its use will prevent or signficiantly interfere with accomplishing the primary objectives of the assigned course.[132]

Calculated to Serve and Does Serve a Legitimate Educational Purpose: In the classroom, a teacher has no right to pursue a course of action or presentation, or use any method, material or symbol

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[126] Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Parducci v. Rutland, 316 F. Supp. 352, 356 (M.D. Ala. 1970).

[127] Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969); Parducci v. Rutland, 316 F. Supp. at 357-58; Mailloux v. Kiley, 232 F. Supp. at 1389.

[128] Webb v. Lake Mills Community School Dist., 344 F. Supp. 791, 803 (N.D. Iowa 1972).

[129] *See* Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir.) *cert. denied*, 400 U.S. 826 (1970); Keefe v. Geanakos, 418 F.2d at 361; Parducci v. Rutland, 316 F. Supp. at 357-58. *See generally* Nahmod, *supra* note 119 at 1049.

[130] Epperson v. Arkansas, 393 U.S. 97 (1969); Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. Rev. 1176, 1193 (1973).

[131] A teacher is not required to remain neutral. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969); James v. Board of Educ. 461 F.2d 566, 573-74 (2d Cir.) *cert. denied*, 409 U.S. 1042 (1972). But a teacher has no right to proselytize, or propagandize in the classroom. *James, id,*. Parducci v. Rutland, 316 F. Supp. at 355; Knarr v. Board of School Trustees, 317 F. Supp. 832, 836 (N.D. Ind.); *aff'd* 452 F.2d 649 (7th Cir. 1971). Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke L.J. 841, 856.

[132] Ahern v. Board of Educ. of School Dist. of Grand Island, 456 F.2d 399 (8th Cir. 1972).

which does not serve a legitimate educational purpose. It is not enough that the material or symbol is relevant. It must serve the educational purpose of the course. This requirement should discourage or prevent improper uses of the classroom by the teacher—such as proselytizing or propagandizing.[133] Presentations designed or materials selected for improper purposes should receive no protection. Because we are dealing with a captive audience, this limitation is needed to avoid abuses or the appearance thereof and to protect the credibility of the institution. Where a presentation or material is used for a proper educational purpose and does serve an educational purpose, but nonetheless has undesirable aspects, it should be evaluated in light of the whole definition of academic freedom—bearing in mind that life has both good and bad ideas and all of the bad ones simply cannot be excluded from the classroom.

Not Likely to Result in Substantial and Material Disruption of School Activities: Proper decorum must be maintained in the school if its purposes are to be accomplished. If a presentation or symbol will materially or substantially interfere with necessary order, then it may be prohibited.[134] Such presentation or material is counterproductive. This is not to suggest that any "undifferentiated fear or apprehension of disturbance" is enough to overcome the privilege; nor is adverse parental reaction sufficient.[135] "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."[136] This is the nature of our way of life.

V. Courts and Privilege

The role of the judiciary in the development and protection of the privilege of academic freedom will no doubt be central. We put to one side those situations in which a state authorizes its courts to ex-

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[133] *Id.* "When a teacher is only content if he persuades his students that his values and only his values ought to be their values, then it is not unreasonable to expect the state to protect impressionable children from such dogmatism." James v. Board of Educ., 461 F.2d 566, 573-74 (2d Cir.) *cert. denied*, 409 U.S. 1042 (1972); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Cary v. Board of Educ. of Adams-Arapahoe, 427 F. Supp. 945, 955 (D. Colo. 1976).

[134] Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969); James v. Board of Educ., 461 F.2d at 571-72. While these two cases deal with nonacademic conduct, the same principle seems to apply to academic conduct. Parducci v. Rutland, 316 F. Supp. at 355; Birdwell v. Hazelwood School Dist., 491 F.2d 490, 493-94 (8th Cir. 1974).

[135] Tinker v. Des Moines School Dist., 393 U.S. at 508; Keefe v. Geanakos, 418 F.2d at 361-62.

[136] Tinker v. Des Moines School Dist., 393 U.S. at 508-09.

ercise legislative and/or executive functions with respect to the operation of public schools.[137] Such courts of course have much greater authority than those which are vested solely with traditional judicial powers. Our concern is the role of courts in exercising the latter.

"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint."[138] In a sense, it may very well be that judges "are not particularly equipped" for assessing educational issues.[139] Indeed, it should be freely admitted that considerable deference should be given to the views and positions of educators.[140] And yet, Mr. Justice Jackson was right: "[w]e act in these matters not by authority of our competence but by force of our commissions."[141] The courts have, and will continue to play, a major role in the operation of public schools.[142] They are well-suited for fashioning rights and are likely to have the final word on the content and contours of the privilege.[143] It follows therefore, that under the proposal advanced here, courts are simply being asked to continue their historic roles.

Because the proposed privilege is to be developed as a state privilege, state courts will be required to lead in its development.[144] It should be borne in mind, however, that in a diversity of citizenship case,[145] and in a federal question case in which there is a pendent state question,[146] the federal court should be viewed essentially as just "another court of the State,"[147] insofar as the state question is

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[137] We assume that the United States Constitution does not prevent a state from assigning executive and legislative functions to its courts. Prentis v. Atlantic Coast Line Col., 211 U.S. 210, 225 (1908); Dreyer v. Ill., 187 U.S. 71, 83-84 (1902).

[138] Epperson v. Arkansas, 393 U.S. 97, 104 (1969); Goss v. Lopez, 419 U.S. 565, 578 (1975).

[139] Goodman. *De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 CALIF. L. REV. 275, 361 (1972).

[140] *See* text at note 108, *supra.*

[141] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

[142] *E.g.,* in State *ex rel.* Kelley v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914), the court stated the issue to be "can the parent of a child in a city grade school decide the question as to whether or not such child shall be required to carry any particular study which has been prescribed by the board of education; or does the power to make such decision rest entirely in such board?" *See also* State *ex. rel.* Andrews v. Webber, 108 Ind. 31, 8 N.E. 708 (1886); Valent v. New Jersey State Bd. of Educ., 114 N.J. Super. 63, 274 A.2d 832 (Superior Ct. 1971) (a challenge to a "human sexuality" program in the public schools).

[143] Privileges have been created by the judiciary. *E.g.,* attorney-client privilege. *See* 8 WIGMORE, EVIDENCE §§2290, 2292 (McNaughton, rev. ed., 1961); MCCORMICK ON EVIDENCE HANDBOOK §§ 87, 92 (E. Cleary, *et al.* ed., 1972).

[144] The highest court of a State is the final arbiter of state laws. Erie Railroad v. Tompkins, 304 U.S. 64 (1938); Hanna v. Plumer, 380 U.S. 460 (1965).

[145] *See* 28 U.S.C. §1332.

[146] *See* United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

[147] Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945). While the *York* "outcome deter-

concerned. Federal courts, therefore, can share in the development of the privilege in appropriate cases.[148]

When a suit is brought alleging violation of the privilege of academic freedom, the court's role would be to determine whether the plaintiff's conduct falls within the scope of that privilege and is therefore protected. This will require an examination of the conduct and the privilege.

In determining the content and contours of the privilege, the process of adjudication is one of weighing competing interests. There would seem to be no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe the interest of the teacher and society in academic freedom. It is the tradition of academic freedom, the interests to be served by it, and the legitimate interests and concerns of the authorities that must inform the process of adjudication. If the alleged restriction on the teacher's conduct reflects a considered judgment resulting from a fair process which provided sufficient opportunity for meaningful participation by teachers, students, parents and administrators, that judgment is entitled to considerable weight and should be set aside only for compelling reasons. To the extent that certain interested parties are excluded from the decisional process, and to the extent the process is unfair or does not reflect a considered judgment, much closer judicial scrutiny will be required. Notwithstanding the fact that a position was fully and fairly considered by school authorities, judicial review of it remains vital. Because of its tradition of weighing competing interests, its relative political detachment, and its appreciation of educational goals which are bound up in the very nature of our society, a court is especially suited for preserving academic freedom inviolate. Moreover, when there is a dispute between a teacher and school officials as to whether the privilege protects the conduct, an impartial third party is needed for its resolution. Dispute resolution is perhaps the oldest and most impor-

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minative" test has been tempered by subsequent cases (*see* Byrd v. Blue Ridge Electric Coop., Inc., 356 U.S. 525 (1958) and Hanna v. Plumer, 380 U.S. 460 (1965)) it remains true that federal courts must observe state laws regarding matters not covered by federal laws.

[148] Where a state has not recognized the privilege of academic freedom, in a proper case, a federal court can take the lead in its development. The federal court must, however, derive its guidance from the courts and laws of the state. *See* Meredith v. Winter Haven, 320 U.S. 228 (1943); Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456 (1967); Mason v. American Emory Wheel Works, 241 F.2d 906 (1st Cir. 1957). It should be noted, however, that in some cases, a federal judge may wish to seek guidance from the state where there is a certification procedure. Lehman Bros. v. Schein, 416 U.S. 386 (1974). *See generally* WRIGHT, LAW OF FEDERAL COURTS §58 (3d ed. 1976); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954).

tant function of the judiciary.

VI. The First Amendment and the Privilege of Academic Freedom

Some conduct, activities and materials will clearly fall within the privilege, others will fall outside of it. Yet others will fall within the "gray" penumbra of the privilege. Where a matter falls within the penumbra of the privilege, perhaps the whole spirit of academic freedom would suggest that we presume the matter to be within the privilege—recognizing, of course, that it is ultimately a question of educational policy as to whether it is found to be within or outside of the privilege.

If cases can be decided on non-constitutional grounds they should be.[149] However, where the privilege has been defined and the challenged conduct falls outside of the privilege, then allegations of unconstitutionality may require consideration. Like many other state-created rights which enjoy constitutional protection,[150] this privilege likewise enjoys a measure of protection.

If it is determined that the conduct or material falls outside of the privilege of academic freedom, the teacher, nonetheless, must be accorded due process before he can be disciplined for his conduct.[151] This due process right includes the right to fair notice that the conduct is objectionable or outside of the privilege; notice must be given prior to the time he engages in the conduct. And, of course, there is the right to a hearing.[152]

Elsewhere in this article, it has been argued that as a general matter, the prohibition against the use of a particular word or book does not rise to a first amendment level.[153] Such decisions are merely necessary judgments in the day-to-day operations of the public schools. Societal interests are adequately protected by the privilege of academic freedom.

On the other hand, if conduct or materials are required or barred on religious grounds, then there is a constitutional question. School

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[149] Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

[150] Such as property, state employment rights, and public education. See others listed and discussed in Goss v. Lopez, 419 U.S. 565, 573, 581 (1975); Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969).

[151] *Id.*; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951).

[152] *Id.*; Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[153] *See* discussion in text at note 84.

officials may not take action or promulgate rules respecting the establishment of religion, or prohibiting the free exercise thereof.[154] School rules and regulations are subject to the overbreadth[155] and vagueness[156] doctrines. Beyond these, we have argued that there is a first amendment speech interest in the classroom and we now look to see how that interest can be protected.

To repeat, as a general matter, the prohibition against the use of particular materials or words does not rise to a constitutional level. However, as has been stated, there is a first amendment interest in the free flow of information in the public school.[157] This free speech interest may be sufficiently strong to warrant finding a first amendment violation where school officials pursue a pattern or practice of suppressing or promoting a particular idea or point of view—political, ideological or otherwise.[158] Where a pattern or practice[159] of promoting or suppressing a given idea or viewpoint is shown, a threat to the free flow of information is present. This raises the kind of concern which gave birth to the first amendment and can undermine a free society. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[160] To be sure, the free flow of information is as much the right of the recipient of information as it is a right of the speaker.[161] Indeed, it is a right of the people *en masse*. Where a pattern or practice is in fact proved, whether there is a constitutional violation will depend upon application of the appropriate first amendment standard.[161.1]

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[154] Epperson v. Arkansas, 393 U.S. 97 (1969); Wisconsin v. Yoder, 406 U.S. 205 (1972); School District of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[155] Cantwell v. Conn., 310 U.S. 296, 304 (1940); NAACP v. Button, 371 U.S. 415, 432 (1963); Wieman v. Updegraff, 344 U.S. 183 (1952).

[156] Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); Sweeny v. New Hampshire, 354 U.S. 234 (1957).

[157] *See* discussion in text following note 57.

[158] West Virginia v. Barnette, 319 U.S. 624, 642 (1943); Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969); Smith v. St. Tammany Parish School Bd., 316 F. Supp. 1174 (E.D. La. 1970), *aff'd* 448 F.2d 414 (5th Cir. 1971); Board of Educ., Island Trees v. Pico, 102 S. Ct. 2799, 2808 (1982).

[159] A pattern or practice is present where the conduct or action is something more than an isolated or sporadic incident; the conduct or action must be repeated, routine or of a generalized nature. *See* Teamsters v. United States, 431 U.S. 324, 336 (1977); United States v. Jacksonville Terminal Co., 451 F.2d 418, 438 (1971).

[160] Board of Educ., Island Trees v. Pico, 102 S. Ct. 2799, 2808 (1982), quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[161] *Id.*; First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

[161.1] Where a pattern or practice of suppressing or promoting a particular idea or viewpoint is shown school officials should be required to show substantial need or justification for the action. *See* Califano v. Webster, 430 U.S. 313, 316 (1977), Trachtimar v. Anker, 563 F.2d 512 (2d

The requirements for establishing a *prima facie* pattern or practice case have been developed in other areas of the law. The plaintiff must prove more than the mere occurrence of an isolated or "accidental" act. Rather, the plaintiff must establish by a preponderance of the evidence that it is the intentional policy of school officials—the standard operating procedure, to suppress or promote a given idea or viewpoint.[162] It would appear that the requirements for a pattern or practice suit can be adapted from those other areas of the law. If school law requires different considerations, they can be identified on a case-by-case basis.

VII. Conclusion

The recognition of a state privilege of academic freedom has been recommended. Much of the difficulty experienced by courts in deciding cases in which a violation of academic freedom is alleged results from the view that teachers enjoy a constitutional right to free speech

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Cir. 1977); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). This requires a stronger showing than the rational basis test, (*see* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938); Dandridge v. Williams, 397 U.S. 471, 485 (1970)) but less than the strict scrutiny test (*see In re* Griffiths, 413 U.S. 717, 721 (1973); First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)). The "substantial basis" test strikes the proper balance. It reflects the high value which the free flow of information enjoys. On the other hand, it recognizes the legitimate needs of the educational system.

While the "substantial basis" test has been used principally in equal protection cases, there should be little difficulty in adapting it to the area of academic freedom and the first amendment.

[162] Teamsters v. United States, 431 U.S. 324, 336 (1977). The promulgation of a rule will, of course, establish a pattern or practice. A single action will normally not establish a pattern or practice unless it can be shown that the official intends to continuously promote or suppress that idea or viewpoint. A pattern or practice was established in West Virginia v. Barnette, 319 U.S. 624 (1943) and Board of Educ., Island Trees v. Pico, 102 S. Ct. 2799 (1982). In the latter case, the withdrawal of each book from the library by the school board was a separate act. When viewed together, a factfinder could find that the School Board intended to suppress a particular viewpoint. In Smith v. St. Tammany Parish School Bd., 316 F. Supp. 1174 (E.D. La. 1970), the continuous display of a Confederate battle flag (which had come to symbolize white racism and resistance to integration) in the office of the high school principal established a pattern or practice of promoting that viewpoint.

Perhaps the key to establishing a *prima facie* case of pattern or practice is the motivation behind the action: was the intent to promote or suppress a particular idea or viewpoint a substantial factor in the decision. *See* Board of Educ., Island Trees v. Pico, 102 S. Ct. 2799, 2810 (1982).

If "intent" is to be a substantial part of the plaintiff's *prima facie* case, then a pattern or practice case is similar to a "disparate treatment" case under Title VII of the Civil Rights Act of 1964. Additionally, "[a] disparate impact case is, by its very nature, a pattern or practice situation." Smalls, *The Burden of Proof in Title VII Cases*, 25 How. L.J. 247, 248 n.9 (1982); *see also* Belton, *Burden of Pleading and Proof in Discrimination Cases: Towards a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

in the classroom. It has been argued that teachers do not enjoy such a right. The "interest" which the first amendment has in the classroom is the national interest in the free flow of information. That interest can be protected by means other than holding that teachers have a free speech right in the classroom. It can be protected by the privilege of academic freedom and other constitutional doctrines.

Academic freedom is one of the vitals of education, and education is primarily a state function. Academic freedom should not be removed from its natural habitat. A privilege that shows a healthy respect for the first amendment should protect the legitimate interests of education, our society, school authorities and our constitutional scheme. In those cases where it does not (few we hope), then the heretofore indicated constitutional doctrines will be available. A vibrant privilege should eliminate much of the awkwardness we have seen in some cases.

We have also suggested that those who interpret and apply the privilege of academic freedom should appreciate fully its historic office and its societal implications. Toward that end, the scope of the privilege has been reviewed. Taken to heart, the suggested framework and these notions should provide all of the protection and leeway our educational system deserves.