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ABSTRACT

This monograph analyzes and summarizes judicial decisions relevant to the control of student conduct by school officials. It is an expansion and revision of a monograph published by the same author in 1970. Extensive revision of the earlier work was necessary because the number of appellate court decisions involving student conduct has grown rapidly in recent years as a result of increased reliance on the courts as the means to resolve conflicts between students and school authorities. The author first describes the general legal framework that applies to student discipline and then examines court decisions relevant to various specific areas of student conduct, including dress and appearance, insignias and emblems, publications, secret societies, and marriage and parenthood. (Author)

The Courts and Student Conduct

EA 006 406

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The Courts and Student Conduct

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Besides processing documents and journal articles, the Clearinghouse prepares bibliographies, literature reviews, monographs, and other interpretive research studies on topics in its educational area.

FOREWORD

This monograph by E. Edmund Reutter, Jr., is an expansion and revision of Dr. Reutter's earlier monograph published by NOLPE in 1970 in a series on student control and student rights in the public schools.

The paper was prepared through a cooperative arrangement between NOLPE and the ERIC Clearinghouse on Educational Management. Under this arrangement, the Clearinghouse provided the guidelines for the organization of the paper, commissioned the author, and edited the paper for style. NOLPE selected the topic for the paper and published it as part of a monograph series.

Dr. Reutter's substantial revision of his earlier work bears witness to the many changes continuing to characterize the legal aspects of student conduct. During the past four years the courts have received a steady volume of cases raising old and new issues pertaining to control of student activities by public school authorities. After setting the legal framework for control of student conduct, Dr. Reutter discusses judicial decisions relevant to insignia and emblems, publications, dress and appearance, secret societies, marriage and/or parenthood, and other areas of conduct.

Dr. Reutter is a professor of education in the Division of Educational Institutions and Programs at Teachers College, Columbia University. He holds a bachelor's degree from Johns Hopkins University and received his master's and doctor's degrees from Teachers College, Columbia University.

A nationally recognized scholar in the field of school law, Dr. Reutter is past-president of NOLPE, regional editor of the *NOLPE School Law Reporter*, and the author of numerous books and articles on school law. He is coauthor with R. R. Hamilton of *The Law of Public Education* (1970), including *The 1973 Supplement*. Other recent books include *Schools and the Law* and the 1970 edition of *The Yearbook of School Law*, with Lee O. Garber.

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THE COURTS AND STUDENT CONDUCT

By E. Edmund Reutter, Jr.

INTRODUCTION

The purpose of this monograph is to analyze and synthesize judicial decisions relevant to control of student conduct by public school authorities.[1] Value judgments, both educational and legal, will be avoided, except in the final section. The presentation is an analysis, not an advocacy.

The number of appellate court decisions involving student conduct has grown rapidly in recent years. Increased reliance on the judiciary to resolve conflicts between students (or parents) and school authorities has been a salient characteristic of the past decade. Old issues and questions have been raised again in modern trappings, and many new queries have been put to the courts regarding the perennial conflict between rights and duties of students and rights and duties of school authorities.

Because each case arises in a context of facts, careful examination of the facts that form the setting of a specific judicial holding is essential. If the facts in a subsequent case are substantially different, the holding does not serve as precedent. Frequently many issues are interwoven in a given case, making imperative a clear understanding of the basic legal question(s) answered by the court. For example, two cases substantively concerned with the regulation of secret societies may differ legally from each other far more than do a particular secret society case and a particular student marriage case. If a case is decided on a procedural point, guidance on substantive points may be completely lacking for educators. Further, it must be emphasized that the long-range consequences of a decision derive from its central rationale, not from the drama of whether plaintiff or defendant prevailed or from the presence of quotable and appealing phraseology.

Before examining specifics it seems appropriate to explicate

1. The analysis covers published decisions through the January 1975 *General Digest*. Portions of the material were published in the author's earlier ERIC/NOLPE Monograph, *Legal Aspects of Control of Student Activities by Public School Authorities*, 1970.

briefly some general legal principles and understandings as a setting for the major portion of the treatise.

LEGAL FRAMEWORK FOR STUDENT DISCIPLINE

Bases of Control

School boards in all states have express or implied powers to adopt rules and regulations relating to student conduct. Typically, statutes grant to boards of education broad powers and also some specific powers related to student control. Among the more concrete statutes, some restate the common-law authority of school personnel, some expand or contract the common law, some set up procedures to be used in meting out punishments, and some prohibit specific punishments.

It is well settled that the state has the power to require its young to submit to instruction in those subjects "plainly essential to good citizenship."[2] Of necessity, therefore, those in charge of the schools (state boards of education, chief state school officers, local boards of education, and professional staffs of local school systems) must be empowered to establish reasonable rules and regulations for school operation. Although local rules and regulations may not supersede statutes or regulations of state-level educational authorities, they may implement and supplement them. Of course, neither state nor federal constitutional rights of students may be abridged by any rule.

Because it is impossible to promulgate rules and regulations to cover all situations, rules need not be in writing to be enforceable. Furthermore, out of concern for practicality and reality, the courts recognize that school administrators and teachers must possess implied powers to control pupil conduct on matters and with methods not in conflict with local board policy or higher legal authority. It should be observed that because the enforcement of a regulation involves sanctioning the violator, often in cases of pupil discipline the rule and the punishment are inextricably interwoven in a judicial proceeding. Also, particularly in some recent cases, the issue of procedural due process has overshadowed both the rule and the penalty. Thus, if procedural due process is not granted by school authorities, a court will decide in favor of the student without reaching the question of the validity of the rule.

Scope of Control

The control school authorities may exercise over the activities of

2. Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925).

students is circumscribed by the nature of the relationship between public schools and pupils. Rules and regulations must have as their objective the proper functioning of the school. They must reasonably relate to the purposes for which schools are established. Thus, conduct that can reasonably be deemed contrary to the educational mission of the school can be proscribed.

The courts recognize the need for a proper atmosphere so that learning can take place. Therefore, activities disruptive of the general decorum of the school are punishable. Disruption of the climate of learning affects the rights of other children to receive an education. Interference with the rights of others may be specific, such as physically barring access to facilities, or it may be general, such as acting to undermine the authority of school personnel over students.

Even conduct off school premises can be controlled by school authorities if it can be shown to be deleterious to the efficient operation of the school. The crucial issue is the effect of the conduct on the operation of the school, rather than the time or place of the offense. However, of course, it is much more difficult for school authorities to justify the reasonableness of control exercised over out-of-school activities of pupils.

The In Loco Parentis *Doctrine*

The common-law measure of the rights and duties of school authorities relative to pupils attending school is the *in loco parentis* concept. This doctrine holds that school authorities stand in the place of the parent while the child is at school. As applied to discipline the inference is that school personnel may establish rules for the educational welfare of the child and the operation of the school and may inflict punishments for disobedience. Obviously, however, a school employee legally cannot go as far as a parent can in enforcement of matters of taste, extent of punishment, or disregard of procedural due process. School rules that are contrary to expressed wishes of a parent generally will be subject to more careful judicial scrutiny than other rules.

The Presumption of Validity

The law presumes that those having authority will exercise it properly. Generally, therefore, in claims of improper application of authority, the burden of proof is on the person making the claim. Thus, a parent who objects to a rule or to a punishment generally has the burden of establishing unreasonableness. However, the board must have some basis for its actions other than the assertion that it is acting in the best interests of the pupil or school.

Of great importance is the fact that the more closely a rule comes to infringing a basic constitutional right of a student, the more justification school authorities must have for the rule. As more and more rules are being challenged on constitutional grounds, courts are looking much more closely at the rationales offered by school authorities to support challenged rules. If the regulation involves a restriction on freedom of speech, for example, the school authorities may have to show "substantial justification" or a "compelling interest."

The Test of Reasonableness

The ultimate determination of reasonableness is a function of the courts. Reasonable means that the action could be accepted by persons of normal intelligence and experience as rationally appropriate to the (legitimate) end in view. To declare invalid a rule controlling student activities in public schools, it must be shown to be unreasonable. Obviously, it is not reasonable to fail to comply with a provision of a constitution or statute properly enacted thereunder. However, relatively few invalid rules are disposed of under the rubric of contrariness to statute because most conduct rules involve implied powers of school authorities, rather than express powers. If a rule is found to be unconstitutional, an examination of reasonableness is precluded.

For the test of reasonableness, a rule of student conduct must be assessed in terms of the educational goal to be achieved and the likelihood the rule will help achieve that goal. That reasonableness does not exist in the abstract will be amply illustrated in the following pages. A rule may be declared unreasonable per se, or only in its particular application. This distinction is important legally.

The Role of the Courts

The Principle of Noninterference. Of crucial importance in understanding the relation of the courts to control of student conduct by public school authorities is the paramount principle that the courts will not interfere with an act of the legislative or the administrative branch unless the branch has exceeded its powers or has abused its discretion in wielding its powers. It must be emphasized that the question before a court is not whether the court approves the rule as one it would have made, had it been in control of the administrative or legislative situation. Nor is the question whether the rule is essential to the proper operation of the school. As noted previously, the burden of proof of improper action by school authorities is generally on the complainant. But if a

rule restricts a so-called "fundamental" right—one explicitly or implicitly guaranteed by the Constitution—the burden of proof of an overriding need is placed on school authorities.

Courts theoretically may not pass on the wisdom of legislative or administrative acts. Thus, disagreement with the desirability or efficacy of a regulation cannot form the basis of a complaint to be handled by the judiciary. The subject matter of a school regulation may be attacked in court if it is alleged that the domain of the rule is not a proper one for intrusion by school authorities, that the regulation violates a prescription of the federal or state constitution or a statute, or that the rule is unreasonable in the sense previously discussed.

"*Section 1983.*" The rediscovery, almost a century after its enactment, of a provision of the Civil Rights Act of 1871—and the liberal interpretation given it in recent years by most federal courts—have opened the federal judiciary to a wide range of student discipline cases. The provision, popularly known as "Section 1983," specifies:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.[3]

On the basis of this provision, a student who claims the deprivation of a constitutional right by operation of a conduct regulation often can invoke federal jurisdiction. In effect the student can have the federal courts pass on the regulation in the process of adjudicating his complaint against school officials in situations where federal jurisdiction might be difficult to establish otherwise. However, Section 1983 does not require "that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist 'not in mere form, but in substance, and not in mere assertion, but in essence and effect.'"[4]

RULES OF CONDUCT, IN GENERAL

Operation of the public schools without rules and regulations would be impossible. Those regulations that pertain to conduct

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3. Civil Rights Act, 42 U.S.C. § 1983 (1970).
4. Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971), *cert. denied*, 92 S. Ct. 1292 (1972).

obviously restrict the rights of students and parents. Although technically the rights of pupils and the rights of parents are separable, in this monograph these rights are treated together as on one side of the balance, with the rights of school authorities (the state) on the other side. Because most public school students are minors, suits involving school regulations generally are brought by parents or guardians either on their own behalf or on behalf of the students affected.

Minimum Essentials of Enforceable Rules

From analysis of many hundreds of cases decided in federal and appellate state courts, many of which will be discussed subsequently, may be distilled the following minimum essentials for an enforceable rule of student conduct.

1. The rule must be publicized to students. Whether it is issued orally or in writing, school authorities must take reasonable steps to bring the rule to the attention of students. A major exception is where the act for which a student is to be disciplined is obviously destructive of school property or disruptive of school operation.
2. The rule must have a legitimate educational purpose. The rule may affect an individual student's learning situation or the rights of other students in the education setting.
3. The rule must have a rational relationship to the achievement of the stated educational purpose.
4. The meaning of the rule must be reasonably clear. Although a rule of student conduct need not meet the strict requirements of a criminal statute, it must not be so vague as to be almost completely subject to the interpretation of the school authority invoking it.
5. The rule must be sufficiently narrow in scope so as not to encompass constitutionally protected activities along with those which constitutionally may be proscribed in the school setting.
6. If the rule infringes a fundamental constitutional right of students, a compelling interest of the school (state) in the enforcement of the rule must be shown.

Supreme Court Pronouncements

The United States Supreme Court in 1925 discussed the rights of parents in a case where it held that the compulsory-education requirement need not be met in a public school, but could be met in a private school.[5] In this case a private sectarian school and a private nonsectarian school had contended they were being deprived of their constitutional right to engage in a useful business by an Oregon statute that required children of certain ages to attend public schools only. Although the Court decided the case on

5. Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925).

the basis of Fourteenth Amendment property rights of the schools, it discussed parents' rights as follows: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[6]

The Court further stated that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."[7] It commented that the challenged statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[8]

In 1969, in its first opinion directly on regulation of student conduct per se, the Supreme Court said, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students. It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] However, it further commented that it "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[10]

In a 1968 case in which it invalidated a statute that barred teaching the theory of evolution in public institutions, the Supreme Court stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. 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 arise in the daily operation of school systems which do not directly and sharply implicate basic constitutional values. On the other hand, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools. . . . "[11]

Over a half-century before, in upholding the right of Mississippi to prohibit secret fraternities and sororities in the educational in-

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6. *Id.* at 573.
7. *Id.*
8. *Id.*
9. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 736 (1969).
10. *Id.* at 737.
11. Epperson v. State of Arkansas, 393 U.S. 97, 89 S. Ct. 266, 270 (1968).

stitutions of the state, the Court said, "It is not for us to entertain conjectures in opposition to the views of the State, and annul its regulations upon disputable considerations of their wisdom or necessity."[12]

INSIGNIA AND EMBLEMS

The "Twin Button-Cases"

The basic modern judicial position regarding political rights of students in public schools was enunciated first by a panel of the United States Court of Appeals for the Fifth Circuit in 1966. In two decisions announced the same day, the court ruled for the students in one and for the board in the other. Each case involved the wearing of "political" buttons by students. These opinions were cited with approval by the United States Supreme Court, which used their rationale in the *Tinker* armband case.

In the first case, a number of students appeared at school wearing buttons containing the words "One Man One Vote" around the perimeter with "SNCC" inscribed in the center.[13] The principal announced that students were not permitted to wear such buttons in the school. He justified this as a disciplinary regulation promulgated because the buttons "didn't have any bearing on their education," "would cause commotion," and would disturb the school program. When 30 to 40 children continued to display the buttons, the principal gave them the choice of removing them or being sent home. Most elected to go home, and the principal suspended them for one week.

The court of appeals invalidated the rule. The appellate bench noted that on former occasions students had worn "Beatle buttons" and buttons containing the initials of students, and these had not been proscribed. The court held that school children have a right to communicate an idea silently and to encourage the members of their community to exercise their civil rights. It observed:

> The right to communicate a matter of vital public concern is embraced in the First Amendment right to freedom of speech and therefore is clearly protected against infringement by state officials. . . . Particularly, the Fourteenth Amendment protects the First Amendment rights of school children against unreasonable rules and regulations imposed by school authorities.[14]

The court recognized that the establishment of an educational

12. Waugh v. Board of Trustees of the University of Mississippi, 237 U.S. 589, 35 S. Ct. 720, 723 (1915).
13. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
14. *Id.* at 747-48.

program requires the formulation of rules and regulations necessary for the maintenance of an orderly climate, and further recognized that school officials must be granted a wide latitude of discretion. But it noted that in this case no situation requiring discipline had arisen. The principal admitted that the children were expelled not for disrupting classes, but for violating the school regulation. The court stated:

> Wearing buttons on collars or shirt fronts is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speechmaking, all of which have no place in an orderly classroom. If the decorum had been so disturbed by the presence of the "freedom buttons," the principal would have been acting within his authority and the regulation forbidding the presence of buttons on school grounds would have been reasonable. But the affidavits and testimony before the District Court reveal no interference with educational activity and do *not* support a conclusion that there was a commotion or that the buttons tended to distract the minds of the students away from their teachers. Nor do we think that the mere presence of "freedom buttons" is calculated to cause a disturbance sufficient to warrant their exclusion from school premises unless there is some student misconduct involved. Therefore, we conclude after carefully examining all the evidence presented that the regulation forbidding the wearing of "freedom buttons" on school grounds is arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression in the circumstances revealed by the record.[15]

In the second case, school authorities were upheld in banning buttons where the record showed an unusual degree of commotion, boisterous conduct, collision with rights of others, and undermining of authority.[16] The buttons were similar to those of the previous case.

The principal in this case had banned the buttons following a disturbance by students noisily talking about the buttons in the hall when they were scheduled to be in class. Shortly thereafter, approximately 150 pupils came to school wearing buttons. These students distributed the buttons to other students in the corridors of the building and pinned buttons on some even though they did not want them. One of the students tried to put a button on a younger child who began crying.

The principal called all the students to the cafeteria and informed them once again they were forbidden to wear the buttons

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15. *Id.* at 748-49.
16. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966).

at school. Several students conducted themselves discourteously during this time and displayed an attitude of hostility.

The next day about 200 students appeared wearing buttons. They were assembled and told if they returned to school again wearing the buttons they would be suspended. This they did the next day, and suspension resulted. As the suspended students gathered their books to go home, school activities were generally disrupted. The students interfered with other students still in class and urged other students to leave with them.

The court indicated that the issue presented on this appeal was identical to that in the previous case. The difference in the decision was based on the fact that in this case there was evidence of a disturbance the school authorities had a right, if not a duty, to quell.

The Tinker Case

Not until 1969 did the United States Supreme Court issue its first opinion involving pupil discipline per se in the *Tinker* case.[17] The case concerned a school board's prohibition of the wearing of black armbands by students desiring to protest hostilities in Vietnam and to support a truce. The Court ruled against the board by a vote of seven to two. (Two of the seven justices added brief concurring opinions.)

Aware that certain students were planning to wear armbands, the principals of the Des Moines, Iowa, schools adopted a policy that any student wearing an armband would be asked to remove it, and if he refused he would be suspended until he returned without the armband. The Supreme Court stated:

> . . . [T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. . . .
> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[18]

But the Court added this counterbalancing point:

> On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school

17. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969).
18. *Id.* at 736.

authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.[19]

The Court also discussed what it was *not* deciding:

> The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. Compare *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1968) [discussed in this paper *infra*]; *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923) [discussed in this paper *infra*]. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."
>
> The school officials banned and sought to punish petitioners for a silent, passive, expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students.[20]

The Supreme Court concluded that the "record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." It observed that "no disturbances or disorders on the school premises in fact occurred." It further noted that the principals did not ban "the wearing of all symbols of political or controversial significance," but only "a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam." Such a prohibition on "one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible."

The Court established the bounds of its holding as follows:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. . . .

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19. *Id.* at 737.
20. *Id.*

> . . . But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech.[21]

Two of the seven judges composing the majority wrote short concurring opinions. Justice Stewart could not "share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."[22] Justice White "deem[ed] it appropriate to note" that "the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinge on some valid state interest" and that he did not "subscribe to everything the [Fifth Circuit] Court of Appeals said about free speech in its opinion" referred to by the Court.[23] Justices Black and Harlan dissented.

*Post-*Tinker *Cases*

A number of "symbol" cases have arisen since the *Tinker* decision. As reasonably would be anticipated, some decisions have been in favor of school officials, and in others students have prevailed. Primarily the courts have examined the bases on which school officials have predicated their forecasts of disorder in banning emblems.

Decided for school authorities. The first case after *Tinker* supported a ban by school authorities. The setting was an Ohio school in which there had been severe racial tensions.[24] Although not in writing, the rule against emblems and other insignia not related to school activities had been applied uniformly in the school for at least 40 years. Originally the rule was intended to reduce undesirable divisions created within the student body by fraternities and sororities. However, the rule had acquired, in the words of the trial court, "a particular importance in recent years. Students have attempted to wear buttons and badges expressing inflammatory messages, which, if permitted, and as the evidence indicates, would lead to substantial racial disorders at [the school]."[25]

Buttons some pupils sought to wear included "White is Right," "Black Power," and "Happy Easter, Dr. King." When a student wore the latter button, a fight resulted in the cafeteria. On another occasion, students from another school in the district entered the

21. *Id.* at 738-740.
22. *Id.* at 741.
23. *Id.*
24. Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 91 S. Ct. 941 (1971).
25. Guzick v. Drebus, 305 F. Supp. 472, 476 (N.D. Ohio 1969).

corridor wearing distinctive headdress. As they proceeded down the corridor, they struck and attacked other students whom they had expected to join them in wearing the headdress, but who had not done so.

In the case at bar a student was suspended for refusing to remove a button with the legend:

> April 5 Chicago
> G.I.—Civilian
> Anti-War
> Demonstration
> Student Mobilization Committee

The case was distinguished from *Tinker* on several grounds. Here, all non-school-related indicia were banned. The rule in this case was long-standing and had been consistently applied. Further, the present situation warranted the continuance of the rule because of "potential racial collisions" in a school which had changed from a student racial composition of all-white to 70 percent black. "In our view," said the court of appeals, "school authorities should not be faulted for adhering to a relatively non-oppressive rule that will indeed serve our ultimate goal of meaningful integration of our public schools."[26] The court addressed itself to the question of abridgment of free speech as follows:

> . . . [W]e doubt the propriety of protecting in a high school classroom such aggressive and colorful use of free speech [as would be protected at open public protest meetings]. We must be aware in these contentious times that America's classrooms and their environs will lose their usefulness as places in which to educate our young people if pupils come to school wearing the badges of their respective disagreements, and provoke confrontations with their fellows and their teachers. The buttons are claimed to be a form of free speech. Unless they have some relevance to what is being considered or taught, a school classroom is no place for the untrammeled exercise of such right.[27]

The Supreme Court, with only one negative vote, denied certiorari.

Additional cases involving symbols decided in favor of school authorities include three in federal district courts in North Carolina, Colorado, and Pennsylvania. In the North Carolina case there were several groups of protesters in a series of controversies related to the Vietnam War.[28] Three types of armbands and some other symbols were utilized by differing factions. There had been inci-

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26. Guzick v. Drebus, 431 F.2d 594, 600-601 (6th Cir. 1970), *cert. denied*, 91 S. Ct. 941 (1971).
27. *Id.* at 597.
28. Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971).

dents, and tensions were mounting when the principal acted to suspend those who were wearing armbands.

The district court denied a preliminary injunction sought to restrain the principal. The court found that the *Tinker* holding was "not applicable" because of the differing facts. The evidence showed that there had been "marching in the hallways, recruitment of other students to join the several groups, chanting, belligerent and disrespectful attitude towards teachers, incidents of flag disrespect, and threats of violence." A material fact was that more than one-third of the students were children of military personnel from a nearby base and "it was reasonable to assume that many of them supported the national war effort as the result of personal family interests," whereas others were "war protesters." The differing armbands "symbolize[d] the divergent factions." The court found "reasonable apprehension of disruption and violence."

In the Colorado case the court sustained the suspension of students of Mexican descent for wearing black berets.[29] The purposes of the berets on students were said to be to show a "symbol of their Mexican culture," to "show unity among Mexicans," to be "a symbol of their dissatisfaction with society's treatment of their race, and their desire to improve that treatment." For a while the wearing of the berets was permitted, but eventually wearers became arrogant and boisterous and engaged in intentionally disruptive conduct, including blocking hallways, refusing to give their names to teachers and to explain why they were in the hallways, and making disrespectful and somewhat threatening remarks to teachers. The court found their suspension not to be in violation of their constitutional rights in that "the evidence [was] without dispute that the beret was used by the plaintiffs as a symbol of their power to disrupt the conduct of the school and the exercise of control over the student body."[30]

The Pennsylvania case developed from a tense situation in a high school following the involvement of United States troops in Cambodia and the killing of four students by the National Guard troops at Kent State University. Students were being urged by some classmates to attend protest rallies. Thirty to fifty students came to school wearing armbands, many having on them "strike," "rally," or "stop the killing." School officials decided that armbands urging violation of attendance laws must not be worn, but the armbands not carrying "strike" or "rally" would be permitted. This

29. Hernandez v. School District Number One, Denver, Colorado, 315 F. Supp. 289 (D. Colo. 1970).
30. *Id.* at 291.

rule was upheld by a federal district court, which reasoned as follows:

> The temporary restriction by the school against the wearing of the armbands with the words "strike," "rally," and "stop the killing" was not related to the suppression of "pure speech," or to the popularity or unpopularity of the ideas sought to be expressed thereby, or the administrator's view of the same. The restriction was related to the potentially disruptive situation at the school at that time. [School authorities] were interested in and had the responsibility to insure the continuing education and safety of all students. This Court will not now second guess their judgment. We feel that the limited restrictions imposed upon the students were reasonable and necessary. The refusal of a student to obey the reasonable requests in this case was insubordinate and unprotected activity.[31]

Decided against school authorities. Two insignia cases were decided in favor of students in a federal district court in Texas and in the Fifth Circuit Court of Appeals. One was an action to enjoin a school district from enforcing against wearers of brown armbands a new regulation against wearing "apparel decoration that is disruptive, distracting, or provocative."[32] The wearers of the armbands were of Mexican descent and the armbands were "in expression and support of their view that the substance of their grievances [over certain educational policies] was justified and worthy of corrective action by school officials."

The court found that the dress rule, though not specifically mentioning armbands or being limited thereto, was "precipitated by and directed at" the armbands. Some disruptions alleged by the school officials were not supported by the evidence. "The facts as here found put this case on all fours with that decided by the United States Supreme Court in [*Tinker*]," the court concluded.[33]

In the other case the court of appeals reversed the trial court and found that alleged disruptions and threats of disruption by wearers of black armbands were not sufficient under the facts to justify the exclusion of the wearers.[34] The focal point was the "Vietnam Moratorium of October 15, 1969." On learning of a plan to wear black armbands in school, the superintendent "decided, as he testified, that it was disruptive and contrary to long standing school policy." But, in the words of the court, "In support of the long standing of this policy . . . he proffered [a regulation], which . . . fails to show it. . . . If it makes any difference,

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31. Wise v. Sauers, 345 F. Supp. 90, 93 (E.D. Pa. 1972).
32. Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (N.D. Tex. 1970).
33. *Id.* at 666.
34. Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir. 1971).

it would seem the policy was improvised ad hoc for the occasion."[35] The court cited the facts that other "peace symbols" previously had been allowed and that on the moratorium date the principals of some schools were slow in getting the word, with the result that black armbands were in fact worn for several hours in some schools, and all day in one school.

The court rejected in strong words the "guilt by association" argument that the black armband wearers by that act subscribed to the entire program of the nationwide Moratorium Committee including its proposals for interruption of school work. It observed that the school authorities had reason to believe that disruption on October 15 was a likely contingency, but disagreed that "this expectation sufficed per se to justify suspending the exercise of what we are taught by *Tinker* is a constitutional right." The court stated in summary:

> Our difference with the trial court therefore is that we do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative. As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some inquiry, and establishment of substantial fact, to buttress the determination.[36]

Racial Symbols

Insignia have figured in several cases related to desegregation. (See also *Guzick, supra.)* One developed in a Tennessee school that recently had been integrated.[37] Prior to integration the Confederate flag was used as the school flag. Disruptions, however, had caused the school to change its symbol. A student who insisted on wearing the Confederate flag as an arm patch was eventually suspended. The Court of Appeals, Sixth Circuit, upheld the suspension, indicating that under the circumstances the use of the flag was not protected by the First Amendment. School officials were justified in anticipating that a tense racial situation would be aggravated by the student using the Confederate flag in this fashion.

On the other hand the Court of Appeals, Seventh Circuit, found there was not an illegal discrimination against black students in a

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35. *Id.* at 730.
36. *Id.* at 732.
37. Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 93 S. Ct. 1926 (1973).

particular school that used symbols some blacks found offensive: the school flag resembled the flag of the Confederacy, the name "Rebels" was used for athletic teams, "Southern Aires" for the glee club, and "Southern Belle" for the homecoming queen.[38] Although it did offer the view that use of such symbols was not a good policy, the court found no connection between these symbols and any discrimination alleged by the black students.

In a school desegregation proceeding, a federal court in Louisiana ordered that symbols or indicia expressing desire of the school board or its employees to maintain segregated schools be removed.[39] As part of the order the judge expressly barred the Confederate flag, but added, "This shall not prevent individual students from wearing or displaying buttons, signs, or symbols."[40] In a brief per curiam opinion the Court of Appeals, Fifth Circuit, affirmed.[41] As to banning symbols or indicia, the appellate court said that the lower court was fully warranted in "banning symbols or indicia *expressing the school board's or its employees'* desire to maintain segregated schools and requiring that they 'shall be removed from the schools and shall not be officially displayed.'"[42] The court made no reference to individual students.

A Florida high school had used the name "Rebels" as its official team name and the Confederate flag as the school emblem since its opening in 1958. Beginning in 1966-67 a few black students attended. In 1972-73 about 8 percent of the enrollees were black. Suit was brought to enjoin the use of these symbols.[43] The board took the position that the student body had the First Amendment right to choose the school symbols. Early in 1973 the student body had voted by a large majority to retain them.

At the trial the court found that the symbols were racially irritating to a substantial number of black students, that the symbols were a significant contributing cause of the racial tension at the school, and that the use of the symbols was an obstacle to the effective operation of a racially unitary school. Citing *Smith* and *Melton*, and both distinguishing and rejecting *Banks*, the court ordered use of the symbols in the school halted. Official use was barred primarily on the conclusion that maintenance of the symbols adversely affected the operation of a unitary school system. Private use was barred primarily on the conclusion that presence of the symbols

38. Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970).
39. Smith v. St. Tammany Parish School Board, 316 F. Supp. 1174 (E.D. La. 1970).
40. *Id.* at 1177.
41. Smith v. St. Tammany Parish School Board, 448 F.2d 414 (5th Cir. 1971).
42. *Id.* at 415.
43. Augustus v. School Board of Escambia County, 361 F. Supp. 383 (N.D. Fla. 1973).

had caused disruption that was likely to increase if individuals were to continue using the symbols after the court had forbidden their use as school emblems. Such private use could only be viewed as "provocation to anger black students."

PUBLICATIONS

Since 1968 there has been a procession of cases involving questions about the extent of the power of public school authorities to control student publications. Litigation has involved both publications sponsored by schools and so-called "underground" materials. Some items have been distributed free of charge; others have been sold or have solicited contributions. Some have been lengthy; others have been limited to one sheet. Some have treated controversial topics; some have invoked charges of vulgarity or obscenity; some have directly criticized school authorities.

The common legal thread throughout the cases is that school authorities have attempted to restrict in some manner written communications received by students on school premises. Clearly any restraint must be tested against the First Amendment's protection of freedom of speech and/or press.

Time, Place, and Manner Restraints

The general proposition that school authorities can control the "time, place, and manner" of expressive activity is well settled.[44] Such regulations, if they are not deceptively used as a guise for restricting production and distribution of literature deemed undesirable by school authorities, are inherently necessary for a proper educational atmosphere. The purpose, of course, "is to prevent disruption and not to stifle expression."[45] The regulations may not require that a student obtain approval for the time, place, and manner of each proposed distribution; they should be promulgated by school authorities.[46] If those receiving the papers act in an irresponsible manner it is they, and not the writers of the papers, who should be disciplined.[47]

Several courts have indicated judicial approval of specific elements of time, place, and manner restraints. The Court of Appeals, Second Circuit, has said that "it would be wise for the Board to consider [and specify] the areas of school property where it would be

44. Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294 (1972).
45. Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960, 969 (5th Cir. 1972).
46. Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972).
47. Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1342 (S.D. Tex. 1969).

appropriate to distribute approved material."[48] A ban on distribution of any literature during a fire drill would be upheld.[49] "The Board may provide that all leafletting is to take place outside of the school building or in the student lounge and in such a manner that regular classroom and other school activities are not interfered with."[50] But a prohibition against any distribution "while classes are being conducted" is too broad where there are periods when substantial numbers of students are on the premises and are not engaged in classroom activity.[51]

Involvement in Discipline Cases

Sometimes production or distribution of publications has constituted only one of several factors involved in student discipline situations. In a New York case a federal district court held that a student was not entitled to a preliminary injunction against his transfer to another school for having distributed an article containing numerous vulgarities.[52] The article had been published in a paper on which was forged the official masthead of the school newspaper. Prior to this incident the student had engaged in several disruptive activities including one in which a fellow student was injured. After conferences with school authorities at that time, he had voluntarily signed an agreement to obey school rules and to avoid activities "not conducive to a proper school atmosphere."

In another New York case with a complex set of facts, partly concerning the content of publications produced off school property, the suspension of a high school student was judicially approved.[53] The student had been involved in a number of incidents amounting to "a pattern of open and flagrant defiance of school discipline, aided and abetted by his parents' encouragement."[54] Part of the basis for the student's suspension was the disorderly distribution during a period of student strikes of a publication containing "four-letter words, filthy references, abusive and disgusting language and nihilistic propaganda."[55] The court observed:

> . . . While there is a certain aura of sacredness attached to the First Amendment, nevertheless these First Amendment rights must be bal-

48. Eisner v. Stamford Board of Education, 440 F.2d 803, 809 (2d Cir. 1971).
49. Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972).
50. Vail v. Board of Education of Portsmouth School District, 354 F. Supp. 592, 598 (D.N.H. 1973).
51. Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).
52. Segall v. Jacobson, 295 F. Supp. 1121 (S.D.N.Y. 1969).
53. Schwartz v. Schucker, 298 F. Supp. 238 (E.D.N.Y. 1969).
54. *Id.* at 241.
55. *Id.* at 240.

anced against the duty and obligation of the state to educate students in an orderly and decent manner to protect the rights not of a few but of all of the students in the school system. The line of reason must be drawn somewhere in this area of ever expanding permissibility. Gross disrespect and contempt for the officials of an educational institution may be justification not only for suspension but also for expulsion of a student.[56]

The Court of Appeals, Fifth Circuit, in a case that developed over a period of time into one involving general discipline because of actions of students originally concerned with distribution of publications, ruled that a "student seeking equitable relief from allegedly unconstitutional actions by school officials [must] come into court with clean hands."[57] In the court's view the student's "conduct in the instant case outweighs his claim for First Amendment protection, and gave school officials sufficient grounds for disciplining him."[58] The court refused to apply the material-and-substantial-disruption test to a student selling a newspaper in violation of a prior submission rule where it found that the student's "flagrant disregard of established school regulations, his open and repeated defiance of the principal's request, and his resort to profane epithet"[59] warranted the disciplinary action. The court cited a United States Supreme Court decision in which it was held that a student group's announced refusal to abide by campus regulations would be a proper reason for denying university recognition to the group.[60]

Content Restraints

Most decided cases concerning student publications have involved the content of the publications. In this section three categories are discussed: criticism of school authorities, controversial issues, and obscenity and vulgarity. "Prior restraints" on contents are treated in the next section.

Criticism of school authorities. The first modern "pure" publications decision was decided in favor of the school board prior to *Tinker* and subsequently reversed on the basis of *Tinker* principles.[61] After a three-judge panel had upheld the district court by a vote of two to one, on a rehearing en banc the Court of Ap-

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56. *Id.* at 242.
57. Sullivan v. Houston Independent School District, 475 F.2d 1071, 1077 (5th Cir. 1973), *cert. denied*, 94 S. Ct. 461 (1973).
58. *Id.* at 1075.
59. *Id.* at 1076.
60. Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972).
61. Scoville v. Board of Education of Joliet Township High School District 204, 286 F. Supp. 988 (N.D. Ill. 1968), *rev'd.* 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 91 S. Ct. 51 (1970).

peals, Seventh Circuit, by a vote of five to one, set aside the panel's decision. The court ruled that the students who had distributed a publication including some material found offensive by the school administration could not be expelled.

The basic error of the district court was that it had ruled solely on the basis of some contents of the mimeographed "literary journal." Particular emphasis had been placed on an editorial that, in criticizing a school pamphlet sent to parents, urged "all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes," and a comment that a statement made by the dean was "the product of a sick mind." Sixty copies were distributed to faculty and students at a price of fifteen cents per copy. That there had been no disruption was undisputed.

The court of appeals stated that "the *Tinker* rule narrows the question before us to whether the writing of 'Grass High' and its sale in school to sixty students and faculty members could 'reasonably have led [the Board] to *forecast* substantial disruption of or material interference with school activities . . . or intru[sion] into the school affairs or the lives of others.' "[62] The court held that the complaint, which had merely alleged that the items were in the publication, did not disclose a clear and present danger justifying a forecast of the harmful consequences referred to in the *Tinker* rule. The court observed:

> No evidence was taken, for example, to show whether the classroom sales were approved by the teachers, as alleged; of the number of students in the school; of the ages of those to whom "Grass High" was sold; of what the impact was on those who bought "Grass High"; or of the range of modern reading material available to or required of the students in the school library. That plaintiffs may have intended their criticism to substantially disrupt or materially interfere with the enforcement of school policies is of no significance *per se* under the *Tinker* test.[63]

The court commented that the statement "imputing a 'sick mind' to the dean reflects a disrespectful and tasteless attitude toward authority,"[64] but would not justify a forecast of substantial disruption.

A United States district court in Texas rendered judgment for students who had been expelled because of their involvement with a "newspaper" that had criticized school officials.[65] The court

62. *Id.* at 13.
63. *Id.* at 14.
64. *Id.*
65. Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (S.D. Tex. 1969).

found the criticism of school policies and administrators' attitudes to be "on a mature and intelligent level."[66] Evidence presented as to disturbances created by distribution of the paper was deemed inadequate to support suppression of the paper. The court also observed that the boys had carefully distributed the paper and that they were not responsible for movement of copies by "unknown persons." The court gave short shrift to the school authorities' argument that there was an organized student movement attempting to "overthrow" the Houston school system and that elimination of the paper and expulsion of the students were necessary to prevent further "infiltration."

Occasionally, to amplify their reasoning, courts have set forth possible judicial responses to hypothetical situations. A federal district court has suggested that "if on the basis of substantial reliable information, the school authorities believe that a given publication . . . advocates destruction of school property or urges 'physical violence' against teachers or fellow students,"[67] they would be justified in suppressing it during school hours and on school grounds. But, according to the Seventh Circuit Court of Appeals, in the absence of "extraordinary circumstances" school authorities could not penalize a student who "distributed a controversial pamphlet in a lunchroom resulting in robust arguments or who distributed a newspaper including derogatory but not defamatory remarks about a teacher."[68]

Controversial issues. The First Circuit Court of Appeals ruled in favor of students desiring to distribute within the school building controversial literature disapproved by school officials.[69] One item was an antiwar leaflet, the other "A High School Bill of Rights." The authorities were unsuccessful in their attempt to invoke a rule aimed at controlling inschool advertising or promotional efforts of nonschool organizations.

Another court has ruled that the Constitution does not require "a specific rule regarding every permutation of student conduct before a school administration may act reasonably to prevent disruption. . . . We do not here delimit the categories of materials for which a high school administration may exercise a reasonable prior restraint of content to only those materials obscene, libelous, or inflammatory, for we realize that specific problems will require in-

66. *Id.* at 1341.
67. Vail v. Board of Education of Portsmouth School District, 354 F. Supp. 592, 600 (D.N.H. 1973).
68. Jacobs v. Board of School Commissioners, 490 F.2d 601, 606 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).
69. Riseman v. School Committee of City of Quincy, 439 F.2d 148 (1st Cir. 1971).

dividual and specific judgments."[70] These words of the Court of Appeals, Fifth Circuit, were written in a case where appearance of "controversial" subjects in a publication was offered as a reason for disciplining students.

The controversial points were an advocacy of review of the laws regarding marijuana and the offering of information on birth control. The court, in disapproving the position of the school officials, said, "It appears odd to us that an educational institution would boggle at 'controversy' to such an extent that the mere representation that students should become informed of two widely-publicized, widely-discussed, and significant issues that face the citizenry should prompt the board to stifle the content of a student publication."[71]

That the author of a publication may be "controversial" is not relevant to First Amendment rights of those who distribute the material. Thus a blanket bar against distribution by students of materials "not written by a student, teacher, or other school employee" cannot be put into effect.[72]

In a New York case the right of high school students to publish in the school newspaper a paid advertisement opposing the war in Vietnam was judicially upheld.[73] The advertisement read: "The United States government is pursuing a policy in Vietnam which is both repugnant to moral and international law and dangerous to the future of humanity. We can stop it. We must stop it."[74] When the principal of the school directed that the advertisement not be published, the students claimed an abridgement of their freedom of speech.

School authorities maintained that the publication "is not a newspaper in the usual sense" but is "a 'beneficial educational device' developed as part of the curriculum and intended to inure primarily to the benefit of those who compile, edit and publish it."[75] They said the policy is that only purely commercial advertising is accepted for the paper and that news items and editorials are restricted to matters pertaining to the high school and its activities.

After examining back issues of the paper, however, the court noted that "the newspaper is being used as a communications media

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70. Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960, 970-71 (5th Cir. 1972).
71. *Id.* at 972.
72. Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).
73. Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).
74. *Id.* at 103.
75. *Id.*

regarding controversial topics and that the teaching of journalism includes dissemination of such ideas. . . . The presence of articles concerning the draft and student opinion of United States participation in the war shows that the war is considered to be a school-related subject. This being the case, there is no logical reason to permit news stories on the subject and preclude student advertising."[76]

Despite the school authorities' argument that the *Tinker* decision was not relevant, the court referred to the Supreme Court's statement in *Tinker* that "personal intercommunication among the students" is protected not only in the classroom. The court concluded:

> Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas.[77]

Obscenity and vulgarity. That school authorities can ban obscene materials from school premises is unquestioned. Questions exist, however, about what is obscene as a matter of law. Discussion of the latter is beyond the scope of this treatise. However, it may be authoritatively said that school authorities can suppress materials that could not be banned from public streets. Involved are the needs of the school environment and the fact that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.' "[78]

Very relevant to the school situation is the important distinction between obscene materials and materials containing vulgarities. The key element in obscenity is appeal to prurient sexual interests.[79] Thus in a given context it has been held that the use of the word "fuck" in the declaration "High Skool is Fucked" had no reference to sex, but rather meant that the high school was "in bad shape."[80]

At the trial of this case, when it had been pointed out that similar expressions were to be found in the libraries of the school system, the principal suggested that the library works had "educational merit." He testified that such language in books and magazines in the library was to be tolerated because it described "things as

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76. *Id.* at 103-04.
77. *Id.* at 105.
78. Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 1280 (1967).
79. Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972).
80. Sullivan v. Houston Independent School District, 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated on other grounds*, 475 F.2d 1071 (5th Cir. 1973), *cert. denied*, 94 S. Ct. 461 (1973).

they were at the time" in books "about the war, about the poor people, the underprivileged. Many times this is the way they speak and this, to them, is not obscene. It's just a matter of their own conversation."[81]

The court said it was "unable to comprehend such a distinction and consequently [was] constrained to find that respondents [had] failed to demonstrate a basis for discrimination between the use of vulgarity in [the student publication] and its use in school-approved publications."[82] In an earlier decision involving the same litigants the court had ruled that objected-to items in a publication were "no more obscene than [a] sign hanging in the office of the school athletic coaches."[83]

82. *Id.* at 1166-67.

A federal district court in California upheld a ten-day suspension of two students for having violated a rule against use of "profanity or vulgarity" in an off-campus newspaper distributed immediately adjacent to school grounds.[84] The plaintiff students contended that the *Tinker* test protected them because the issue of the paper "did not cause disruption or interference with the normal educational program at [the school] and . . . they were merely expressing their views and opinions, which they had every right to do although such expression might be unpopular with some."[85]

The court found that there had been some disruption, and further, that the case presented an issue different from freedom of speech on political matters. It referred to testimony by the principal and the assistant principal that 25 to 30 teachers had told them of interruption of their classes and of inattention by students due to their reading of, and talking about, the publication. (A few teachers testified there were disruptions, and some testified to the contrary.)

The court emphasized that the issue here was not what was said, but how it was said. Although neither pornography nor obscenity as defined by law was involved, the court was satisfied that there were vulgarities in the text as well as in some pictures, and that the rule, reasonable under California statutes, was thus broken. The court concluded that "plaintiffs were not disciplined for the criticism of the school administrators and the faculty, or of the Vietnam war, but because of the profane and vulgar *manner* in

81. *Id.* at 1166.

83. Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1341 (S.D. Tex. 1969).

84. Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D. Cal. 1969).

85. *Id.* at 521.

which they expressed their views and ideas."[86] The court noted that prior issues of the publication had criticized the school authorities, but no action was taken until the "vulgar" issue was distributed.

That obscene literature per se in public schools is not protected by general considerations of free speech was observed by a United States district court in Michigan.[87] The court stated school authorities have the power to promulgate "rules concerning the extent to which and the conditions under which obscene materials may or may not be properly on the school premises. . . . Without belaboring the First Amendment issue unnecessarily we are constrained to conclude that the type of regulation here [barring possession of obscene materials on school grounds] cannot be considered violative of this plaintiff's First Amendment rights."[88] However, the court ruled that a student could not be expelled merely for possession of a magazine containing some words that were also found in a magazine in the library and in a book that was on the reading list for students.

Because vulgarities are a form of expression, courts will not permit disciplinary action against students for minor infractions of good taste. Thus, where a statement about sex was an "attempt to amuse," it was held permissible.[89] So was the use of "earthy words relating to bodily functions and sexual intercourse" that appeared as "expletives or at some similar level."[90] In this case, the contested material amounted only to a very small part of the newspapers and was not "in any significant way erotic, sexually explicit, or . . . [plausibly appealing] to the prurient interests of adult or minor."[91]

In holding that a publication was not obscene, a federal district court in New York commented that the magazine contained "no extended narrative tending to excite sexual desires or constituting a predominant appeal to prurient interest. The dialogue was the kind heard repeatedly by those who walk the streets of our cities, use public conveyances and deal with youth in an open manner."[92] This court declined to examine in detail the prior-review policies that were being developed by the school board because that was not necessary in order to decide the issue before it. "Premature

86. *Id.* at 527.
87. Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).
88. *Id.* at 1392.
89. Scoville v. Board of Education of Joliet Township High School District 204, 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 91 S. Ct. 51 (1970).
90. Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).
91. *Id.* at 610.
92. Koppell v. Levine, 347 F. Supp. 456, 459 (E.D.N.Y. 1972).

straight-jacketing by the courts may abort sound and imaginative methods of dealing with the problem."[93]

This reasoning was applied by another federal court to examination of an obscenity standard in a situation where the decision of a principal had not been appealed in accordance with a specified procedure.[94]

The Court of Appeals, Fourth Circuit, has stated that a prior restraint upon obscene material where the principal was to make the determination was invalid because as a prior restraint "obscene" is not sufficiently precise and understandable by high school students and administrators to be an acceptable criterion.[95] The court commented that obscene material could be banned by a post publication sanction, which it said did not have to be as precise as a regulation imposing prepublication restraints.

Prior Restraints

Four United States courts of appeals have issued opinions primarily focusing on the question of prior restraints on publications distributed on public school premises. The Second,[96] Fourth,[97], and Fifth[98] Circuits have held that prior restraints are possible under restricted conditions. The Seventh Circuit has held that although the "*Tinker* forecast rule is properly a formula for determining when the requirements of school discipline justify *punishment* of students for exercise of their First-Amendment rights, . . . [it] is not a basis for establishing a system of censorship and licensing designed to *prevent* the exercise of First Amendment rights."[99] The First Circuit has made tangential reference to the issue.[100]

The Second Circuit issued its opinion to modify a district court decision that had disapproved on its face a board rule providing that literature to be distributed "shall have prior approval by the school administration."[101] The lower court had enjoined not only the board's policy but any requirement that students obtain prior approval before distributing literature within the Stamford, Connecticut, public schools. The court of appeals said that it did "not

93. *Id.* at 465.
94. Caplin v. Oak, 356 F. Supp. 1250 (S.D.N.Y. 1973).
95. Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).
96. Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971).
97. Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).
98. Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972).
99. Fujishima v. Board of Education, 460 F.2d 1355, 1358 (7th Cir. 1972), *accord*, Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).
100. Riseman v. School Committee of City of Quincy, 439 F.2d 148 (1st Cir. 1971).
101. Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971).

agree with the district court . . . that reasonable and fair regulations which corrected [certain] defects but nevertheless required prior submission of material for approval, would in all circumstances be an unconstitutional 'prior restraint.'"[102] The appellate court observed that the United State Supreme Court had upheld film censorship provided certain procedural safeguards were observed. The court said that "it would be highly disruptive to the educational process if a secondary school principal were required to take a school newspaper editor to court every time the principal reasonably anticipated disruption and sought to restrain its cause. Thus, we will not require school officials to seek a judicial decree before they may enforce the Board's policy."[103]

Further, the court did not "find any basis for holding, as the district court suggested, that the school officials must in every instance conduct an adversary proceeding before they may act to prevent disruptions, although the thoroughness of any official investigation may in a particular case influence a court's retrospective perception of the reliability and rationality of officials' fear of disruption."[104] The court suggested:

> . . . [G]reater specificity [in the regulation pertaining to materials which are to barred] might reduce the likelihood of future litigation and thus forestall the possibility that federal courts will be called upon again to intervene in the operation of Stamford's public schools. It is to everyone's advantage that decisions with respect to the operation of local schools be made by local officials. The greater the generosity of the Board in fostering—not merely tolerating—students' free exercise of their constitutional rights, the less likely it will be that local officials will find their rulings subjected to unwieldy constitutional litigation.[105]

In finding the board regulation constitutionally defective because of a lack of procedure for prior submission by students of material for school administration approval, the court stated:

> To be valid, the regulation [requiring prior submission] must prescribe a definite brief period within which review of submitted material will be completed.
>
> The policy [at bar] is also deficient in failing to specify to whom and how material may be submitted for clearance. Absent such specifications, students are unreasonably proscribed by the terms of the policy statement from distributing any written material on school property, since the statement leaves them ignorant of clearance procedures. Nor does it provide that the prohibition against distribution without

102. *Id.* at 805.
103. *Id.* at 810.
104. *Id.*
105. *Id.*

prior approval is to be inoperative until each school has established a screening procedure.

Finally, we believe that the proscription against "distributing" written or printed material without prior consent is unconstitutionally vague. We assume that by "distributing" the Board intends something more than one student passing to a fellow student his copy of a general newspaper or magazine.[106]

The Second Circuit's reasoning in this case, *Eisner*, was followed by the Fourth Circuit in a case in which a student was disciplined because she had violated a regulation prohibiting the distribution of written or printed material without the express permission of the principal of the school.[107] Here the court found the regulation invalid on its face. It said:

Its basic vice does not lie in the requirement of prior permission for the distribution of printed material, though such requirement is manifestly a form of prior restraint or censorship. Free speech under the First Amendment, though available to juveniles and high school students, as well as to adults, is not absolute and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed. Thus, publications may be protected when directed to adults but not when made available to minors. . . . Similarly, a difference may exist between the rights of free speech attached to publications distributed in a secondary school and those in a college or a university. It is generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations "reasonably designed to adjust these rights to the needs of the school environment." . . . Specifically, school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "reasonably 'forecast substantial disruption of or material interference with school activities'" on account of the distribution of such printed material. If a reasonable basis for such a forecast exists, it is not necessary that the school stay its hand in exercising a power of prior restraint "until disruption actually occurred." . . .

What is lacking in the present regulation, and what renders its attempt at prior restraint invalid, is the absence both of any criteria to be followed by the school authorities in determining whether to grant or deny permission, and of any procedural safeguards in the form of "an expeditious review procedure" of the decision of the school authorities.[108]

A year and a half later the same court was asked to extend this decision, *Quarterman*, to prohibit *any* prior restraint based on content from being exercised by school officials over written material

106. *Id.* at 810-11.
107. Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).
108. *Id.* at 57-59.

to be distributed on school grounds.[109] The court expressly declined to do so, but it applied *Quarterman* so as to grant the plaintiff students more relief than had the trial court. A pamphlet had been distributed criticizing a prior-restraint regulation, which barred items the principal believed to contain libelous or obscene language, to advocate illegal actions, or to be "grossly insulting" to any individual or group. The court observed that the rule did not deal with such expression in neutral terms of time, place, and manner of distribution, but rather imposed restraints on a publication because of its content.

As in *Quarterman* the court found to be fatal the absence of the procedural safeguard of a specified and reasonably short period of time in which the principal must act. Moreover, the regulations failed to provide for the contingency of the principal's failure to act within the specified brief time. Although the court emphasized it was not in its province to suggest a time limit, it cautioned that "whatever period is allowed, the regulation may not lawfully be used to choke off spontaneous expression in reaction to events of great public importance and impact."[110]

The court further found, as had the *Eisner* court, that a proscription against "distribution" was unconstitutionally vague. It amplified its view as follows:

> With respect to some communicative material there may be no prior restraint unless there is "a *substantial* distribution of written material, so that it can reasonably be anticipated that in a significant number of instances there would be a likelihood that the distribution would disrupt school operations." . . . With respect to other types of material, *e.g.*, pornography, one copy, indeed, the *only* copy may be the subject of what is legitimate prior restraint if what is forbidden is precisely defined. The prohibition of material which "advocates illegal actions, or is grossly insulting to any group or individual" seems to belong in the first category and thus goes beyond the permissible standard (for that type of material) of forecasting substantial disruption.[111]

In this case the court also dealt with the question of prior restraints upon obscene or libelous material:

> We agree that material which is, in the constitutional sense, unprivileged libel or obscenity if read by children can be banned from school property by school authorities. . . . If there were no contemplated prior restraint but instead merely post-publication sanction, the problem of vagueness would not be intolerable. Put affirmatively, we think that a regulation imposing prior restraint must be

109. Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).
110. *Id.* at 1348-49.
111. *Id.* at 1349.

much more precise than a regulation imposing post-publication sanctions.[112]

The court observed that "letting students write first and be judged later is far less inhibiting than vice versa. For that reason vagueness that is intolerable in a prior-restraint context may be permissible as part of a post-publication sanction."[113] The court emphasized that "terms of art" such as "libelous" and "obscene" are not sufficiently precise and understandable by high school students and administrators to be acceptable criteria. In the words of the court:

> Thus, while school authorities may ban obscenity and unprivileged libelous material there is an intolerable danger, in the context of prior restraint, that under the guise of such vague labels they may unconstitutionally choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive. That they may not do.[114]

In a sharply worded rebuke of school authorities the Fifth Circuit Court of Appeals declared unconstitutional a policy applied to punish students for off-campus publication and distribution of printed materials.[115] The court said:

> This case is anomalous in several respects, a sort of judicial believe-it-or-not. Essentially, the school board has submitted a constitutional fossil, exhumed and respired to stalk the First Amendment once again long after its substance has been laid to rest. Counsel for the school board insists vigorously that education is constitutionally embraced solely by the Tenth Amendment, leaving education entirely without the protective perimeters of the rest of the Constitution. We find this a rather quaint approach to the constitutional setting of education in light of [a long list of Supreme Court decisions]. . . .
> There is nothing unconstitutional per se in a requirement that students submit materials to the school administration prior to distribution. . . . Given the necessity for discipline and orderly processes in the high schools, it is not at all unreasonable to require that materials destined for distribution to students be submitted to the school administration prior to distribution. As long as the regulation for prior approval does not operate to stifle the content of any student publication in an unconstitutional manner and is not unreasonably complex or onerous, the requirement of prior approval would more closely approximate simply a regulation of speech and not a prior restraint. Nor is there anything unconstitutional per se in a reasonable administrative ordering of the time, place, and manner of distributing materials on school premises and during school hours.[116]

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112. *Id.*
113. *Id.* at 1350.
114. *Id.* at 1351.
115. Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972).
116. *Id.* at 967-69.

The court pointed out it was not saying that every attempt by school districts to regulate conduct off school grounds and outside school hours would fail constitutional muster. It was holding that "the exercise of disciplinary authority by the school board under the aegis of [the policy] was unconstitutionally applied to prohibit and punish presumptively-protected First Amendment expression that took place entirely off-campus and without 'substantial and material' disruption of school activities, either actual or reasonably-foreseeable."[117]

The court accepted the *Eisner* criteria for procedural arrangements before prior restraint and added that there should be provision for an appeal from the decision of the school principal specifying the time period during which the appellate board must make a decision. One member of the three-judge panel disassociated himself from the view that the Constitution requires an administrative appeal procedure. (It should be noted here that the Fourth Circuit included "an adequate and prompt appeals procedure" as one of its conditions for prior restraint set out in *Baughman.)*

The Court of Appeals, Seventh Circuit, has adopted an entirely different approach to prior restraint of student publications. Expressly taking exception to the *Eisner* view, this court has said:

> *Tinker* in no way suggests that students may be required to announce their intentions of engaging in certain conduct beforehand so school authorities may decide whether to prohibit the conduct. Such a concept of prior restraint is even more offensive when applied to the long-protected area of publication. . . .
> The *Tinker* forecast rule is properly a formula for determining when the requirements of school discipline justify *punishment* of students for exercise of their First-Amendment rights. It is not a basis for establishing a system of censorship and licensing designed to *prevent* the exercise of First-Amendment rights.[118]

The court also said that the board has the burden of telling students when, how, and where they may distribute materials, rather than requiring a student to obtain administrative approval of the time, place, and manner of the distribution he proposes. "The board may then punish students who violate those regulations. Of course, the board may also establish a rule punishing students who publish and distribute on school grounds obscene or libelous literature."[119]

In a subsequent case the Seventh Circuit held void for vagueness and overbreadth a provision that "no student shall distribute in any school literature that is . . . either by its content or by the manner

117. *Id.* at 975.
118. Fujishima v. Board of Education, 460 F.2d 1355, 1358 (7th Cir. 1972).
119. *Id.* at 1359.

of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others."[120] The proviso "at least threatens a penalty for a student who distributed a controversial pamphlet in a lunchroom resulting in robust arguments or who distributed a newspaper including derogatory but not defamatory remarks about a teacher. Absent extraordinary circumstances, the school authorities could not reasonably forecast substantial disruption of or material interference with school discipline or activities arising from such incidents."[121]

One member of the three-judge panel dissented on the preceding point. All three judges agreed, however, that school officials could not restrict literature to be distributed to that authored by persons connected with the school and containing "the name of every person or organization that shall have participated in the publication."

A First Circuit case arose when the board of education of Quincy, Massachusetts, attempted to prevent the distribution within the school of an antiwar leaflet and "A High School Bill of Rights." The board invoked a rule that barred use of the facilities "in any manner for advertising or promoting the interests of any community or non-school agency or organization without the approval" of the school board. The Court of Appeals, First Circuit, held that "the rule was obviously devised for the quite different purposes of controlling in-school advertising or promotional efforts of organizations. More importantly, as sought to be applied to First Amendment activities, it is vague . . . and does not reflect any effort to minimize the adverse effect of prior restraint."[122]

Ruling on the question of preliminary injunctive relief, the court issued an order (without offering explanation for the various provisions of the order) that included a condition that "no advance approval shall be required of the content of any . . . paper. However, the principal may require that no paper be distributed unless, at the time the distribution commences, a copy thereof, with notice of where it is being and/or is to be distributed, be furnished him, in hand if possible."[123]

Almost two years later a federal district court in the First Circuit, citing the reasoning of the Second Circuit in *Eisner* and the Fifth Circuit in *Shanley*, expressly held that school authorities may

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120. Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).
121. *Id.* at 606.
122. Riseman v. School Committee of City of Quincy, 439 F.2d 148, 149 (1st Cir. 1971).
123. *Id.* at 149.

exercise a reasonable prior restraint on the content of publications.[124] The court struck down a rule prohibiting the distribution of non-school-sponsored written materials in school buildings and on school grounds within 200 feet of school entrances. It said the rule in the instant case did not "facially lend itself to any limitation in terms of intent, time, place, and manner of distribution of literature . . . [and did] not reflect any effort on the part of the School Board to minimize the adverse effect of prior restraint."[125]

Solicitations and Sales

The context for this aspect of the area of publications has been set forth by the Court of Appeals, Seventh Circuit, as follows:

> We have little question of the legitimacy of the interest of the school authorities in limiting or prohibiting commercial activity on school premises by persons not connected with the school, either acting directly or through students as agents. But because students have First Amendment rights within the school, as recognized in *Tinker*, we think that the propriety of regulation of their conduct involving the exercise of protected rights must be independently justified. It is not enough to say that such activity by students is similar to commercial activity by others. Sale of [a] newspaper, or other communicative material within a school, is conduct mixing both speech and non-speech elements.[126]

In this case the court declared invalid a blanket rule against "exchange for money" of literature on school premises except for the benefit of the school. Students argued that the rule was adopted as an indirect means of suppressing their newspaper because they would not be able to publish without contributions received on school grounds. The court did not make a finding on the point, but held that, even assuming the rule was not so intended, it could not be squared with the Constitution because the goals of "good order and an educational atmosphere" could be achieved by rules governing time, place, and manner of distribution.

The same conclusion was reached by a federal district court in Nebraska.[127] School authorities in Lincoln attempted to bar a "counter-culture" newspaper distributed on a "free-or-donation" basis by unpaid volunteers, some of whom were not students. The board of education cited regulations about publications and commercialism (because the newspaper contained some advertisements

124. Vail v. Board of Education of Portsmouth School District, 354 F. Supp. 592 (D.N.H. 1973).

125. *Id.* at 598.

126. Jacobs v. Board of School Commissioners, 490 F.2d 601, 608 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).

127. Peterson v. Board of Education of School District No. 1 of Lincoln, Nebraska, 370 F. Supp. 1208 (D. Neb. 1973).

for profit-making establishments and because the plea for donations was itself a commercial undertaking). The court pointed out that the school board permitted school newspapers to carry "at least three or four times" as much commercial advertising as the objected-to paper and that the board allowed direct solicitation of students for the Community Chest, March of Dimes, and Junior Red Cross. These inconsistencies displayed not only a failure of the board to be "even-handed," but suggested that the board was aware that commercialism and solicitations per se were not likely to interfere with educational endeavors.

Under different facts and proof, the Second Circuit Court of Appeals sustained a half-century-old statewide regulation in New York barring "all solicitations of public school pupils."[128] The court accepted the reason for the rule—pressures upon students (75 to 100 requests for solicitations in 12 years in the defendant school district). The instant application of the rule was to forbid distribution of a leaflet asking for contributions to pay for the defense of the "Chicago Eight" (antiwar activists). A dissenting judge believed that the collection in this situation was integrally connected to the expression of opinion.

In North Carolina a policy against sales (except of supplies and student newspapers) was invoked to prevent the establishment of a club to sell newspapers of all viewpoints on public school property. A federal district court found that "the regulation complained of involves a commercial transaction rather than a constitutionally protected free expression"; therefore, the board had the power to enforce the ban.[129] There had been no attempt by school officials to prevent distribution of any papers on a free basis. (This decision was subsequently vacated by the Fourth Circuit Court of Appeals because the student had moved from the school district before the trial court's decision.)

DRESS AND APPEARANCE

Legal issues related to dress and appearance of students have mushroomed in recent years, with students and parents challenging attempts by school officials to regulate certain modes of dress or appearance. The overwhelming majority of cases have dealt with attempts to prohibit styles of dress or appearance, especially male hairstyles and beards.

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128. Katz v. McAulay, 438 F.2d 1058 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 930 (1972).
129. Cloak v. Cody, 326 F. Supp. 391, 396 (M.D.N.C. 1971), *vacated* 449 F.2d 781 (4th Cir. 1971).

Prescribed Dress and Appearance

Rarely has the prescribing of specific dress been involved in appellate courts. However, one case met squarely the issue of the enforceability of a school board regulation that required boys attending a county agricultural high school to wear khaki uniforms on campus and in public places within five miles of the school.[130] Some students boarded at the school; others were day pupils.

The Supreme Court of Mississippi upheld the rule as applicable to the students who were boarding at the school because they were under the care and custody of the authorities for the term. However, the rule could be applied to day pupils only when they were actually in school or going to or from school. The board had argued that, because of local conditions, the regulation was necessary for the maintenance of discipline. This appears to be the only appellate case decided on substantive grounds on the point of prescribed dress for school attendance.

A more recent case involved a California school board's order that required female students at one high school to wear, four days a week, prescribed clothing as follows: "middy blouse with collar and tie, and a blue, black, or white skirt."[131] A girl ignored this rule and appeared at school "neatly and modestly dressed in a non-uniform blouse and skirt." She stated she would not wear the uniform because the regulation was "unreasonable and a violation of her constitutional rights." She did not claim religious or cost grounds. School officials suspended her. Suit was brought to prohibit the enforcement of the requirement and to reinstate the girl. The trial court ruled against the board, but on appeal that decision was reversed on procedural grounds. However, the appellate court noted that no evidence had been presented by the board as to conditions that might support the rule.

Prescription of elements of dress on specific occasions in the school must meet the test of reasonableness, with the burden of proof on the complainant. For example, a school board in Iowa required the wearing of a gown at graduation. Three girls who refused to wear the gown were prohibited by the board from participating in the ceremony and receiving their diplomas. The Supreme Court of Iowa ruled that the wearing of the cap and gown had no relation to educational values and that the diplomas, which had been withheld, must be awarded.[132] However, the court

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130. Jones v. Day, 127 Miss. 136, 89 So. 906 (1921).
131. Noonan v. Green, 276 Cal. App. 2d 25, 80 Cal. Rptr. 513 (1969).
132. Valentine v. Independent School District of Casey, 191 Iowa 1100, 183 N.W. 434 (1921).

emphasized it was not questioning the practice of wearing caps and gowns. It was stated that the board may deny the right of a graduate to participate in the public ceremony of graduation unless a cap and gown is worn.

Prescriptions of student clothing for bona fide safety or health reasons can be enforced. Safety considerations clearly would cover the requirement of such items as goggles for welding and helmets for football. Caps or nets on long hair in swimming pools or cooking classes may be justified as health measures.

The Supreme Court of Alabama dealt at length with the matter of prescribed clothing in physical education in a case where a girl was suspended from high school because she refused to participate in the required physical education class.[133] Her refusal was directed against the uniform to be worn for the exercises, which she contended was "immodest and sinful." She was supported by her father, who did not wish her even to be in the presence of the teacher and other pupils wearing the outfit.

The school officials stated they would permit the girl to dress in a manner she considered suitable and would allow her not to partake in any exercise that required clothing she or her parents thought immodest. However, her father did not want her to attend the class at all.

The court ruled that the girl must participate in the physical education class under the modified circumstances allowed by the school officials. The court believed appropriate concessions had been made by the school authorities. It rejected the parent's claim that, out of respect for the girl's religious beliefs, she should be placed in a special class for students who shared her beliefs so she would not stand out as a "speckled bird" in the regular class.

Some school "dress codes" are worded positively (prescriptions) and some negatively (proscriptions). Regardless of the grammar of these codes, cases that have reached the level of court cited in this treatise have involved the key question whether a student may be punished, usually by exclusion, if his appearance does not conform to the code. These cases are treated in sections immediately following.

Prohibited Dress and Appearance

For well over three decades before 1965 no case reached a federal or an appellate state court in which the decided issue was the right of a school board to restrict the dress of a student as a con-

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133. Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962).

dition for attending school. Beginning in 1965, however, a continuing rash of cases on this point has appeared. Indeed, there are very few, if any, areas in school law in which so many cases dealing with the same subject have been handled by so many courts in so short a period of time.

A frequently cited "old" case is a 1923 decision of the Supreme Court of Arkansas.[134] At issue was this board rule: "The wearing of transparent hosiery, low-necked dresses, or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics, is prohibited." A girl who failed to obey the rule was denied admission.

In upholding the board's power to establish the rule, the court said it "must uphold the rule unless we find that the directors have clearly abused their discretion, and that the rule is not one reasonably calculated to effect the purpose intended, that is, of promoting discipline in the school."[135] The court commented that whether it would have made the rule were it in control of the district was not the question. Nor did the court find it necessary to determine that the rule was "essential to the maintenance of discipline."

The court stated that it had more important functions to perform than that of hearing the "complaints of disaffected pupils" of the public schools against rules and regulations promulgated by the school boards for the government of the schools. Nevertheless, the court recognized that the reasonableness of such a rule is a judicial question. It also noted, however, that "the directors are elected by the patrons of the schools over which they preside . . . [and] are in close and intimate touch with the affairs of their respective districts, and know the conditions with which they have to deal."[136] The court added:

> In the discharge of the duty here imposed upon us it is proper for us to consider whether the rule involves any element of oppression or humiliation to the pupil, and what consumption of time or expenditure of money is required to comply with it. It does not appear unreasonable in any of these respects. Upon the contrary, we have a rule which imposes no affirmative duty, and no showing was made, or attempted, that the talcum powder possessed any medicinal properties, or was used otherwise than as a cosmetic.[137]

This case was cited by the United States Supreme Court in 1969 in

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131. Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).
135. *Id.* at 539.
136. *Id.*
137. *Id.* at 539-40.

the *Tinker* armband case. The Court noted that *Tinker* was not a case involving this type of school board regulation.

In 1931 the Supreme Court of North Dakota held that a board of education had the power to forbid pupils from wearing metal heel plates in school.[138] The justification for the rule was that the floors were being damaged and a disturbance created by the noise of the heel plates. The parents' claim of the right to determine the clothing to be worn to school by their children was held to have to give way to the public interest in "the conservation of school property" and the maintenance of good order and discipline in the school.

In 1934 the Supreme Judicial Court of Massachusetts sustained a school board's enforcement of a rule that, though aimed primarily at membership in secret societies, barred the wearing of insignia and apparel of such societies on school premises.[139]

The first published decision specifically on the wearing of slacks by girls was one decided by a New York trial court in 1969.[140] Contested was a regulation prohibiting slacks except if permitted by the principal between December 1 and March 31 on petition by the student council when warranted by cold or inclement weather. A girl pupil who had been punished by detention for wearing slacks sought an injunction against enforcing the entire dress code, including the section on slacks. Although the court refused to annul the whole dress code, it ruled that the board had no power to enforce the specific rule. It reasoned:

> The simple facts that [the rule] applies only to female students and makes no differentiation as to the kind of slacks . . . make evident that what is being enforced is style or taste and not safety, order, or discipline. A regulation against the wearing of bell-bottomed slacks by students, male or female, who ride bicycles to school can probably be justified in the interest of safety, as can, in the interest of discipline, a regulation against slacks that are so skintight and, therefore, revealing as to provoke or distract students of the opposite sex, and, in the interest of order, a regulation against slacks to the bottoms of which small bells have been attached.[141]

A federal district court in New Hampshire has held that a blanket prohibition against the wearing of dungarees is unconstitutional.[142] Taking heed of the position of the First Circuit in *Richards (infra)* in regard to student hairstyles, the court said that the Circuit's rea-

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138. Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).
139. Antell v. Stokes, 287 Mass. 103, 191 N.E. 407 (1934).
140. Scott v. Board of Education, 61 Misc. 2d 333, 305 N.Y.S.2d 601 (1969).
141. *Id.* at 606.
142. Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970).

soning should encompass a person's right to wear clothes of his own choosing. One parent had testified that she had sent her son to school in blue jeans because she could not afford to buy him a pair of dress pants; however, the plaintiff in the case did not raise the question of financial means. The court noted that, "on the scale of values of constitutional liberties, the right to wear clean blue jeans to school is not very high." Nevertheless, the court stated it had "considerable difficulty accepting" the view of the principal and the chairman of the board that wearing work or play clothes undermines the education process because students tend to become "lax and indifferent."

The court particularly noted that no evidence was presented as to the type of dress worn by pupils in other schools and that the only expert testimony to the deleterious effect of the proscribed clothing was offered by the principal. The court declined to consider the president of the board qualified as an expert in the field of education and teaching. (He was an airline pilot who had expressed the view that the type of school dress worn by students in California was sloppy and that California high school students had poor academic records.) The court commented:

> We realize that a school board can, and must, for its own preservation exclude persons who are unsanitary, obscenely or scantily clad. Good hygiene and the health of the other pupils require that dirty clothes of any nature, whether they be dress clothes or dungarees, should be prohibited. Nor does the Court see anything unconstitutional in a school board prohibiting scantily clad students because it is obvious that the lack of proper covering, particularly with female students, might tend to distract other pupils and be disruptive of the educational process and school discipline.[143]

In a federal case in Texas, ultimately not decided on the merits under the doctrine of abstention, the court found "not invalid on its face" a rule forbidding girls to wear "any type trouser garment."[144] In this case the girl involved had worn a pantsuit and had participated in a "walk out" to convey opposition to and disapproval of the school dress code. More recently the highest court of Kentucky said that a dress code provision prohibiting girls from wearing jeans raised "no issue of constitutional dimensions."[145]

A rather detailed examination of some elements of a dress code was made by a United States district court in Arkansas.[146] The court said it thought the standard of review prescribed for hair-

143. *Id.* at 188-89.
144. Press v. Pasadena Independent School District, 326 F. Supp. 550 (S.D. Tex. 1971).
145. Dunkerson v. Russell, 502 S.W.2d 64 (Ky. 1973).
146. Wallace v. Ford, 346 F. Supp. 156 (E.D. Ark. 1972).

styles by the Eighth Circuit Court of Appeals *(infra)* was applicable to "dress" provisions as well. "It is, therefore, concluded that students have a constitutional right to govern their personal appearance, with respect to their clothing or apparel, subject to the right of the school authorities to establish those regulations which are necessary in order to carry out the educational mission of the school."[147] But "the restriction upon one's freedom is not as great or obvious or dramatic, overall, as a result of dress regulations as it is as a result of hair regulations."[148]

The court found unnecessary to carry out the educational mission of the school "such a rigidly drawn, arbitrary, and, in part, overly broad regulation" as the following:

> Dresses, skirts and blouses, dress slacks and blouses or pant suits may be worn. No divided skirts or dresses; no jeans or shorts may be worn. Blouses that are straight around the bottom may be worn outside the skirt or slacks. We will allow jeans that are made for girls to be worn providing: If the jeans open in front, a tunic or square-tailed blouse must be worn to conceal the opening. If the jeans open on the side, then an ordinary length blouse may be worn.[149]

On the question of length of skirts or dresses, the court found that a fixed length above the knee was sustainable (in relation to the legitimate objective of prohibiting immodest clothing in the school), whereas a fixed length beneath the knee was not. One factor in reaching the latter conclusion was that the restriction on length below the knee was not placed on coats. A second was that testimony indicated the primary reason for adopting the regulation was prohibition of what the school officials termed "bizarre" or unusual clothing. On another point, the court found that a rule prohibiting "excessively tight skirts or pants" was valid because it was related to the legitimate objective of prohibiting "immodest or suggestive clothing" and was not too vague or indefinite in the school context.

Held invalid were regulations that "shirt tails, unless the tail is straight and hemmed, will be worn inside the pants," "no frayed trousers or jeans will be allowed," "no tie-dyed clothing will be worn," and "socks are required at all times." The last-mentioned rule had applied only to boys.

The Supreme Court of Idaho, which previously had decided by a vote of three-to-two that school boards could not enforce general regulations regarding student hairstyles,[150] extended that holding

147. *Id.* at 161-62.
148. *Id.* at 162.
149. *Id.* at 163.
150. Murphy v. Pocatello School District No. 25, 94 Idaho 32, 480 P.2d 878 (1971).

to invalidate a dress code requiring female students to wear dresses or skirts not more than two inches above the knee.[151] Some students who wore "well tailored and neat" slacks or pantsuits were not permitted to remain in school in that garb.

The trial court, after hearing numerous witnesses who gave conflicting testimony as to the effects of girls wearing culottes, pantsuits, or slacks in school, ruled for the plaintiffs. It determined that such apparel was "not necessarily disruptive of school discipline or the instructional effectiveness of the school, and had no detrimental effect on the safety or morals of the students attending the school."[152] The appellate court held that, although the evidence was conflicting, there was enough competent evidence to support the lower court's findings and that therefore the judgment would be upheld.

Hairstyles

By mid-1974 the number of officially reported cases involving male hairstyles (on the head and/or face) in public schools reached the magnitude of 150. A substantial majority of the cases have been decided in federal courts. Many have sought injunctive relief under "Section 1983," and a substantial percentage of the preliminary injunction cases were not decided on the merits.

No reliable trend in decisions for or against school boards is discernible over the period. It is very important to observe, however, that courts during this period have accepted jurisdiction and have inquired into the reasons for the rules. The closeness of the scrutiny of the rules by the courts as a whole has markedly increased, clearly as part of the evolution affecting all governmental activities impinging on individual rights. The Supreme Court, however, has consistently declined to review cases involving hairstyles despite the fact that the circuits are in disagreement on the constitutional aspects of some of the cases.

The Supreme Court's attitude was presaged in 1969 in *Tinker*, where the Court expressly pointed out that "the problem presented by [*Tinker*] does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment."[153] The Court then cited two cases, a Fifth Circuit hairstyle case on which the Court had denied certiorari a few months earlier[154] and a 1923 de-

151. Johnson v. Joint School District No. 60, Bingham County, 508 P.2d 547 (Idaho 1973).

152. *Id.* at 548.

153. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 737 (1969).

154. Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 89 S.Ct. 98 (1968).

cision in a dress case by the Supreme Court of Arkansas.[155] Both cases had been decided against the students.

At this writing the circuits continue to be in basic disagreement regarding the disposition of hairstyle cases. The Fifth, Sixth, Ninth, and Tenth Circuits have supported the validity of such rules in general, whereas the First, Fourth, Seventh, and Eighth Circuits have not.[156] The Third Circuit seems to have moved to the latter position.[157] Several of the decisions were by votes of two to one.

The first cases. The first appellate court decision on the question of control of student hairstyle was rendered by the highest state court of Massachusetts in 1965.[158] There the court took the traditional view that it needed "only to perceive some rational basis for the rule requiring acceptable haircuts in order to sustain its validity. Conversely, only if convinced that the regulation of pupils' hair styles and lengths could have no reasonable connection with the successful operation of a public school could we hold otherwise."[159] The court stated that "conspicuous departures from accepted customs in the matter of haircuts could result in distraction of other pupils."[160] The court rejected the claim that the domain of family privacy was improperly invaded and was unimpressed by evidence that the student had been a "professional musician" and had performed at the Newport Jazz Festival, the New York World's Fair, and other places.

The first case dealing with hairstyles to be decided by a United States court of appeals arose in Texas.[161] A group of high school students had formed a musical group, signed a contract with an agent, and insisted that they were under contract with the agent to maintain their dress and personal appearance, including a so-called "Beatle" type hairstyle. On the opening day of school the students were denied admission to the school because of their hairstyle.

The principal testified the boys' long hair caused trouble and

155. Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).

156. The leading cases are: (supporting the regulations) Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); King v. Saddleback Junior College District, 445 F.2d 932 (9th Cir. 1971); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971); (striking down the regulations) Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).

157. *Cf.* Stull v. School Board of Western Beaver Junior-Senior High School, 459 F.2d 339 (3d Cir. 1972), and Gere v. Stanley, 453 F.2d 205 (3d Cir. 1971).

158. Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965).

159. *Id.* at 472.

160. *Id.*

161. Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), *cert.* denied, 89 S. Ct. 98 (1968).

commotion, led to obscene remarks, attracted attention, and disrupted the classroom. He stated that, though he had not ruled out long hair completely, he did not accept the extreme "Beatle" style. He further testified that the agent of the boys had called him at home, inquired whether the boys would be admitted, and indicated he had $4,000 invested in them and was willing to invest another $1,000. Additional testimony revealed that immediately after being refused admittance the boys had gone to a local recording studio and recorded a song that contained lyrics referring to the incident of being refused admission by the principal. Copies of the record were produced and distributed by the agent to various radio stations in the area, and the record was played on the air.

The Court of Appeals for the Fifth Circuit upheld the school board by a two-to-one vote. The Supreme Court denied certiorari a few months before it decided *Tinker*, in which it expressly distinguished the case from *Tinker*. The opinion of the court of appeals included the following:

> In view of the testimony of [the principal] as to the various problems which arise in the school due to the wearing of long hair by members of the student body and the testimony of certain students that their hair style had indeed created some problems during school hours, we cannot say that the requirement that appellants trim their hair as a prerequisite to enrollment is arbitrary, unreasonable or an abuse of discretion. Therefore, the school regulation as promulgated by the principal, banning long hair, is not violative of the state constitution or statutes. . . .
>
> The [United States] Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so. The compelling reason for the state infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.[162]

The first modern appellate state court decision against a school board's hairstyle policy was rendered in California.[163] A student had been excluded from school under a dress policy that provided "extremes of hair styles are not acceptable." In this case the student did not assert he had the right to disobey rules directed to his hair. The rule was attacked on the ground of unconstitutional

162. *Id.* at 702-03.

163. Meyers v. Arcata Union High School District, 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969).

vagueness because the expression "extremes of hair styles" was not clarified in the rules or in their application.

The court found substantial evidence that long hair on male students had had a disruptive effect at the high school and that the public had an obvious interest in an undistracted educational process at the school. However, the court observed that because the inhibition of hairstyles restrains freedom of expression "the standards of permissible statutory vagueness are strict and government may regulate 'only with narrow specificity.' . . . 'Extremes of hair styles' . . . are not facts: whether a given style is 'extreme' or not is a matter of opinion, and the definitive opinion here rested in the sole - and neither controlled nor guided - judgment of a single school official."[164]

The court pointed out that the importance of an education to a child is substantial; therefore, the state cannot condition the availability of education on the child's compliance with an unconstitutionally vague standard of conduct. However, the court stated that the governing board could exercise its statutory rule-making power to adopt clear rules covering aspects of student dress and appearance having an adverse effect on the educational process at the school. Thus the court was not in conflict with a prior California appellate decision upholding a ban on beards on the ground of their being a disruptive influence on the educational process.[165]

The first federal appellate court to rule against school authorities was the Court of Appeals, Seventh Circuit.[166] The vote was two to one to invalidate the following regulation:

> Hair should be washed, combed and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven: long sideburns are out.

The plaintiffs were two male high school students with long hair who were barred from attending school until their appearance conformed to the rule.

In the trial before the district court, the school board contended that the regulation was valid and that to allow students not to respect board regulations would be improper for a court. The board argued that failure to obey a regulation is a cause of disruption and that judicial interference with the board's authority would only intensify such disruption. Furthermore, it asserted that learning to respect authority is a part of students' education.

164. *Id.* at 74.

165. Akin v. Board of Education, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), *cert. denied*, 89 S. Ct. 668 (1969).

166. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 90 S. Ct. 1836 (1970).

The district court gave great weight to the lack of evidence in support of the school board's assertions:

> With respect to the "distraction" factor, the showing in this record consists of expressions of opinion by several educational administrators that an abnormal appearance of one student distracts others. There is no direct testimony that such distraction has occurred. There has been no offer of the results of any empirical studies on the subject by educators, psychologists, psychiatrists, or other experts. . . . From the testimony of the educational administrators, it appears that the absence of such amplification is not accidental; it arises from the absence of factual data which might provide the amplification.
>
> With respect to the "comparative performance" factor, this record is equally barren. . . . No hard facts are adduced even from a limited sample to demonstrate that the academic performance of male students with long hair is inferior to that of male students with short hair, or that the former are less active or less effective in extra-curricular activities.[167]

The court concluded that the school officials had "fallen far short" of bearing the "substantial burden of justification" required for a rule or statute "which rudely invades . . . a highly protected freedom." It ordered the students reinstated, with any notation of disciplinary action to be expunged from their records.

The opinion of the court of appeals stated, "The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution."[168] Without precisely clarifying the derivation of the right, the court said that it "clearly exists" and is applicable to the states through the due process clause of the Fourteenth Amendment. This being so, to limit or curtail the right, the state has a substantial burden of justification.

Avoiding a direct confrontation with the reasoning of the Fifth Circuit, the court said:

> The failure of [school authorities] to sustain any burden of substantial justification distinguishes the case at bar from the situation in [*Ferrell* (*supra*)] upon which the appellant School Board heavily relies. In *Ferrell*, the court in upholding the constitutionality of the school regulation found that wearing of long hair by students created disturbances and problems during school hours. . . . [I]n the case at bar there is no evidence of any disturbance created by the long hair of the students.[169]

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167. Breen v. Kahl, 296 F. Supp. 702, 709 (W.D. Wis. 1969).
168. Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 90 S. Ct. 1836 (1970).
169. *Id.* at 1037.

Regarding the possibility of its decision having a potential adverse effect on discipline, the court observed:

> To uphold arbitrary school rules which "sharply implicate basic constitutional values" for the sake of some nebulous concept of school discipline is contrary to the principle that we are a government of laws which are passed pursuant to the United States Constitution.[170]

Federal Circuits generally supporting boards. Beginning with *Ferrell (supra)*, the Court of Appeals, Fifth Circuit, has decided more hairstyle cases than any other circuit. The matter apparently was finally resolved for that circuit in 1972 by an en banc vote of eight-to-seven.[171] In this decision the court said, "We hold that no such right ['to wear one's hair in a public high school in the length and style that suits the wearer'] is to be found within the plain meaning of the Constitution."[172]

The court then rejected the frequently advanced claim that the wearing of long hair is "symbolic speech by which the wearer conveys his individuality, his rejection of conventional values, and the like." The court said it was doubtful that long hair had sufficient communicative content to entitle it to the protection of the First Amendment. It stated that the wearing of long hair generally was simply a matter of personal taste or the result of peer-group influence. The court observed that in *Tinker* the Supreme Court had expressly differentiated the armbands in that case (which were "closely akin to 'pure speech' ") from hairstyles.

Also rejected was an assertion that privacy of students was unconstitutionally invaded by hairstyle regulations. Concerning the contention that the right to wear hair at any length inheres in the liberty assurance of the due process clause of the Fourteenth Amendment, the court said, "It is our firm belief that this asserted freedom does not rise to the level of fundamental significance which would warrant our recognition of such a substantive constitutional right."[173]

As to the relationship of federal courts and schools, the court commented:

> Federal courts, and particularly those in this circuit, have unflinchingly intervened in the management of local school affairs where fundamental liberties, such as right to equal education, required vindication. At times that intervention has, of necessity, been on a

170. *Id.*
171. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 307 (1972).
172. *Id.* at 613.
173. *Id.* at 615.

> massive scale. But in the grey areas where fundamental rights are not implicated, we think the wiser course is one of restraint.[174]

The court concluded with the following summation:

> Given the very minimal standard of judicial review to which these regulations are properly subject in the federal forum, we think it proper to announce a per se rule that such regulations are constitutionally valid. Henceforth, district courts need not hold an evidentiary hearing in cases of this nature. Where a complaint merely alleges the constitutional invalidity of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted.
>
> In conclusion, we emphasize that our decision today evinces not the slightest indifference to the personal rights asserted by Chesley Karr and other young people. Rather, it reflects recognition of the inescapable fact that neither the Constitution nor the federal judiciary it created were conceived to be keepers of the national conscience in every matter great and small. The regulations which impinge on our daily affairs are legion. Many of them are more intrusive and tenuous than the one involved here. The federal judiciary has urgent tasks to perform, and to be able to perform them we must recognize the physical impossibility that less than a thousand of us could ever enjoin a uniform concept of equal protection or due process on every American in every facet of his daily life.[175]

The Sixth Circuit has expressly rejected the claim that the reasonableness of a grooming rule should be judged only in relation to the activities of a particular student. It has held that "reasonableness is to be assessed in the context of the general purposes of the school itself."[176] In the case containing the view, the court expressly stated that it was reaffirming the principles set forth in the first Sixth Circuit hairstyle case,[177] which the Supreme Court had declined to review. In the earlier case it was found that two boys had flouted a hairstyle rule with consequent disruption of "classroom atmosphere and decorum" and the causing of "disturbances and distractions among other students and [interferences] with the educational process." Teachers and students had testified to this effect.

A district court in the sixth circuit decided a case involving a Michigan student who grew his hair long to express convictions regarding intolerance of dissent in the community and particularly intolerance for dissent regarding the Vietnam war.[178] The student

174. *Id.* at 616.
175. *Id.* at 617-18.
176. Gfell v. Rickelman, 441 F.2d 444, 447 (6th Cir. 1971).
177. Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 91 S. Ct. 55 (1970).
178. Church v. Board of Education of Saline Area School District, Michigan, 339 F. Supp. 538 (E.D. Mich. 1972).

believed that the outward appearance of conformity was a visible sign of inward conformity of thought to which he desired to register disagreement. The symbolism was in fact perceived by those at whom it was directed. There was evidence that the student's father independently had decided to allow his hair to grow for parallel reasons, that the student had attended antiwar rallies, and that the boy and his family had suffered abuse for their views.

The court found that the long hair was not a "mere whim" or attempt to "keep in tune with current fashion trends." Rather, there was "clear communicative intent," which distinguished the case from the hairstyle cases decided by the Sixth Circuit Court of Appeals. For this reason the district court ruled for the student.

The Ninth Circuit Court of Appeals has discussed the weight to be given testimony of well-qualified and experienced professional personnel who believe a deleterious effect on the education process is introduced by the wearing of certain types of natural or artificial adornment.[179] On that point the court said:

> . . . [T]he school district . . . presented affidavits of eleven teachers and administrators in the high school district whose disclosed experience ranges from two and one-half years to seventeen years. Each of these officials voices an opinion based upon his or her professional experience that extreme hair lengths of male students interferes with the educational process. Each of the opinions might be debated to some extent as was done by the trial court. The fact remains, however, that the affidavits are from trained professionals who are in day to day observation of their classrooms. While lawyers and judges may disagree, none of the affidavits is so inherently improbable that it is lacking in value as evidence.[180]

On the question of absence of disruption in the case at bar, the court held that the fact no disruption had occurred due to the hairstyles "does not establish that long-haired males cannot be a distracting influence which would interfere with the educative process the same as any extreme in appearance, dress, or deportment."[181]

In ruling for school authorities the court observed:

> This is not a question of preference for or against certain male hair styles or the length to which persons desire to wear their hair. This court could not care less. It is a question of the right of school authorities to develop a code of dress and conduct best conducive to the fulfillment of their responsibility to educate, and to do it without

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179. King v. Saddleback Junior College District, 445 F.2d 932 (9th Cir. 1971), *cert. denied*. 92 S. Ct. 342 (1971).
180. *Id.* at 939.
181. *Id.* at 940.

unconstitutionally infringing upon the rights of those who must live under it. We do not believe that the plaintiffs have established the existence of any substantial constitutional right which is in these two instances being infringed. We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools.[182]

The Court of Appeals, Tenth Circuit, has held that "complaints which are based on nothing more than school regulations of the length of a male student's hair do not 'directly and sharply implicate basic constitutional values' and are not cognizable in federal courts."[183] Dealing with the "'liberty' assurance of the due process clause of the Fourteenth Amendment," which it considered to be "perhaps the strongest constitutional argument which can be made on behalf of the students," the court said that a regulation affecting this constitutional guarantee depends for validity on the reasonableness of the limitation placed on the regulated conduct. In the three cases that it had consolidated for the appeal, the court observed that "on surprisingly similar justifications" two federal district courts had upheld the regulation and one had held to the contrary. The court then stated:

> We doubt the applicability of the test of reasonableness in the determination of the nebulous constitutional rights here asserted. The issue should not turn on views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school . . .
> The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools.[184]

In a subsequent case the Tenth Circuit declined to find the assertion of a religious issue by three Pawnee Indians sufficient basis for distinguishing the case from *Freeman*.[185] There had been conflicting testimony as to the significance of braided hair, parted in the middle, as an essential part of the religious and cultural tradition of the Pawnees. The court observed:

> Although no precise formula has been developed, the Courts have held that the Fourteenth Amendment permits the states a wide scope

182. *Id.*
183. Freeman v. Flake, 448 F.2d 258, 262 (10th Cir. 1971), *cert. denied*, 92 S. Ct. 1292 (1972).
184. *Id.* at 261.
185. New Rider v. Board of Education of Independent School District No. 1, Oklahoma, 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 94 S. Ct. 733 (1973).

> of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the states' objectives. . . .
>
> . . . Common sense dictates that some uniform regulations are necessary in order to maintain order, spirit, scholarship, pride and discipline in the operation of such a school system.[186]

The court expressed the view that the judiciary would create a "veritable quagmire" for school authorities if it were to require that no regulation impinge at all on any sincere belief held by a student.

Federal Circuits generally supporting students. Of the United States courts of appeals ruling in favor of students in hairstyle cases, the Seventh Circuit has gone further than others in giving constitutional weight to the claim of students to a right to wear their hair as they desire.[187] In 1970 the court reaffirmed what it had said first in *Breen (supra)*, that "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution" and that school authorities must satisfy "a substantial burden of justification" in order to exclude a student for the sole reason of hair length.[188]

In this second hairstyle case to reach it, the court reversed a district court decision that the burden had been met by the school board. It found insufficient as evidence of disruption or interference with school activities the testimony of two teachers and an assistant superintendent. The teachers had claimed that the presence of the long-haired student had caused some commotion and strain in teacher-student relations and that the student experienced difficulty in obtaining a microscope partner because of the length of his hair. The assistant superintendent had testified that long hair worn by a male student is inherently distracting to other students. In the words of the court, "We think that opinion evidence such as that offered by [the assistant superintendent] often reflects only a personal view of the propriety of long hair and, in the absence of factual support, adds little in satisfying defendants' burden."[189] The court added the observation that long-haired students should not be punished for disruption unless the school offi-

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186. *Id.* at 699.

187. In 1974 this court seemed to believe it had overextended the "magnitude" of the right to appear as one pleases. *See* Miller v. School District Number 167, Cook County, Illinois, 495 F.2d 658, 663-64 (7th Cir. 1974). However, the holdings in *student* hairstyle cases were reaffirmed later in 1974 in Holsapple v. Woods, 500 F.2d 49 (7th Cir. 1974).

188. Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970).

189. *Id.* at 1265.

cials have actively tried and failed to silence those persons who actually engaged in disruptive conduct.

The board also had offered health and safety reasons to justify the rule. Testimony was given by the chairman of the physical education department that long hair may impair the vision of students engaged in certain sports, that long hair could "get caught" when students are using the trampoline, and that those with long hair would be forced to go to class with wet hair after a shower following gym class. Another teacher testified that long hair creates significant danger when bunsen burners are in use. The court responded that health and safety objectives could be achieved through narrower rules directed specifically at the problems created by long hair, for example, shower caps and hair nets in laboratories.

"Since fundamental rights are involved, we believe that defendants are required to employ narrow rules suggested by their testimony and to avoid infringement of plaintiff's rights to an extent greater than is required by health and safety objectives."[190] The court also held that since girls were not required to cut their hair in order to attend classes there was a denial of equal protection to male students. "Despite the rationalizations offered by defendants, we believe that their action in excluding plaintiff from [the school] resulted primarily from a distaste for persons like plaintiff who do not conform to society's norms as perceived by defendants."[191]

Subsequently, the Seventh Circuit invalidated part of a dress code regulating the length and style of hair for male students where the code had been developed by a committee of students, teachers, and administrators.[192] Student committee members were elected by the student body, and the code had been adopted by a majority of the students. The court expressly rejected the idea that the code gained validity merely by the method of its development. A consent provision in the challenged regulation authorized noncompliance if a parent appeared before the school principal and gave written consent for the exception of his child. This consent provision was held not to save the code's constitutionality because it was considered an attempt to discourage the exercise of the student's right.

The First Circuit Court of Appeals, in upholding a student's right to wear his hair "falling loosely about the shoulders," based its holding on the "liberty" assurance of the Fourteenth Amend-

190. *Id.* at 1266.
191. *Id.*
192. Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972).

ment.[193] It said that "'liberty' seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty."[194] The court found no "outweighing state interest justifying the intrusion" of forcing one to cut his hair in order to attend school. Since hairstyles affect students twenty-four hours a day, regulations affecting hairstyles require more justification than do most other parts of grooming codes. The court concluded:

> We do not believe that mere unattractiveness in the eyes of some parents, teachers or students, short of uncleanliness, can justify the proscription. Nor . . . does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process.[195]

The Eighth Circuit Court of Appeals, in the first case to reach it, held that the student plaintiff "possessed a constitutionally protected right to govern his personal appearance while attending public school."[196] Aligning itself with courts that had ruled for students on the question, it stated that "the common theme underlying decisions striking down hairstyle regulations is that the Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's personal appearance is one of those guaranteed rights."[197] (Interestingly, one of the three First Circuit judges in *Richards (supra)* was sitting by designation as one of the three judges in this case.)

The court found "virtually no evidence in this record to support the school board's contention that the hair regulations are necessary to prevent disruptions."[198] The court believed two instances of actual disruption cited in the record were isolated and only tenuously related to long hair. Justifications relating to swimming pool sanitation and shop class safety did bear a rational relation to hairstyle, but the administration failed to show why these particular problems could not be solved by imposing less restrictive rules, such as requiring students to wear caps.

Expressly following the reasoning of *Breen*, *Crews*, *Richards*, and *Bishop* (all, *supra*) the Fourth Circuit Court of Appeals adopted the view that a general regulation controlling student hairstyles was not constitutionally supportable and that considerations of

193. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).
194. *Id.* at 1284-85.
195. *Id.* at 1286.
196. Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).
197. *Id.*
198. *Id.* at 1076.

safety and health could be served with less restrictive measures aimed specifically at solving any hair problems unique to specific situations.[199] The court commented, "In short, we are inclined to think that faculty leadership in promoting and enforcing an attitude of tolerance rather than one of suppression or derision would obviate the relatively minor disruptions which have occurred."[200]

Despite its above holding, the Fourth Circuit was obliged more than a year later to vacate the judgment of a district court that had failed to apply the holding to a "sparsely populated local community."[201] At about the same time it also ruled that a high school football player could not be denied his "letter" because he violated the coach's hairstyle rule after the football season was over.[202] "The doctrine of *Massie* is equally applicable to all school-controlled activities."[203]

The Third Circuit sustained school authorities in its first hairstyle case in 1971. In 1972, however, the court distinguished a case from its earlier holding and struck down a general proscription against long hair. The first decision supported a finding of justification for the rule because "the educational process at [the school] was disrupted during the 1969-1970 school year when students refused to sit near [the student plaintiff] in class because of the dirtiness of his hair and in the cafeteria because they were afraid that his habit of leaning down over his food, apparently dipping his hair into the food, and then throwing his hair back, would result in their being annoyed by the consequences."[204] The court further observed that although other regulations—such as requiring clean hair at all times—might have alleviated the problem, it was constrained not to substitute its judgment for that of the school board.

In the second case the court rejected the claim that long hair was bad for the educational environment.[205] It held a general hairstyle rule to be unenforceable, except possibly in shop classes, a point on which the lower court had not made findings.

State courts. Subsequent to the cases from Massachusetts and California discussed previously, state courts deciding hairstyle cases have followed the same nonparallel lines of reasoning as have federal courts, and they too have been divided as to results. A

199. Massie v. Henry, 455 F.2d 779 (4th Cir. 1972).
200. *Id.* at 783.
201. Mick v. Sullivan, 476 F.2d 973 (4th Cir. 1973).
202. Long v. Zopp, 476 F.2d 180 (4th Cir. 1973).
203. *Id.* at 181.
204. Gere v. Stanley, 453 F.2d 205, 209-10 (3d Cir. 1971).
205. Stull v. School Board of Western Beaver Junior-Senior High School, 459 F.2d 339 (3d Cir. 1972).

sampling of some points of law made in state court decisions follows.

The Supreme Court of Kansas, in upholding a hairstyle rule, commented that the fact the regulation had been drafted by a committee of students, parents, teachers, administrators, and school board members and approved by the majority of all students did not make the regulation reasonable in a constitutional sense.[206] However, it did bear on the good faith of the board in adopting and enforcing the regulation.

The court further stated that learning "must be carried on in dignified and orderly surroundings if it is to be practiced satisfactorily. Obedience to duly constituted authority and respect for those in authority should be instilled in young people. . . . Careful recognition should be given to differences between what are reasonable restraints in the public classroom and what are reasonable restraints on a non-student on the public street corner."[207] The court added that "local problems in carrying out the educational mission may vary widely depending on the location of the district and the background of the people in that district."[208]

The Court of Appeals of Oregon expressly avoided any constitutional issue in deciding against school authorities who attempted to enforce a hair rule.[209] The court said that when the question is whether a school board has the power to adopt a rule in a certain area, the burden is on it to show that it has statutory authority to do so. The issue of burden of proof does not arise in this kind of situation as it does when validity of a rule in a legitimate area is questioned.

In the instant case the court found the board had no authority for the rule because it bore no reasonable relation to the proper operation of the schools. The court cited a similarly reasoned decision from an intermediate appellate court in Arizona. That approach, however, was subsequently vacated by the Supreme Court of Arizona, which found a contested dress code to be permissible on constitutional grounds. The supreme court stated that courts should not "attempt to decide in the first instance questions which have been delegated to duly elected and legally constituted local govern-

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206. Blaine v. Board of Education of Haysville Unified School District No. 261, 210 Kan. 560, 502 P.2d 693 (1972).
207. *Id.* at 701.
208. *Id.* at 702.
209. Neuhaus v. Frederico, 505 P.2d 939 (Ore. App. 1973).

mental officers . . . [unless there is] a clear violation of . . . constitutionally protected rights."[210]

It is not to be assumed that state courts will follow the lead of the federal court of appeals for the circuit in which they are located. After the Ninth Circuit held that hairstyles are not protected by the federal Constitution, the Supreme Court of Alaska ruled that control of one's hair was protected by the state constitution and that only a compelling state interest would sustain a school board rule on the subject.[211] It found the evidence offered for the rule to be inadequate to meet the state constitutional standard.

Expressly rejecting both the Eighth Circuit's reasoning regarding student hairstyles and its authority over Missouri courts, the Supreme Court of Missouri has stated that there is no substantial constitutional right involved in student hairstyle cases.[212] It said that a trial court had erred in considering itself bound by the Eighth Circuit's pronouncement to the contrary. The case at bar was moot, but the court said future cases should be decided in line with Missouri precedents as to the discretionary power of local school boards to control student conduct.

Rules for specific activities. Where school boards attempt to enforce a hairstyle rule as a prerequisite to participation in a specific activity, the courts examine closely the relationship of the long hair to that activity. If safety or health is truly a reason, the courts are in agreement that something may (in some cases *must*) be done by school authorities. However, whether long hair must be cut, or whether some less drastic alternative (for example, wearing a hair net or washing the hair) will suffice is a question resolved differently by different courts.

On the general question of short hair for athletes the divergence of judicial outcomes persists. One should note, however, that frequently differences in result are related to the wordings of rules, to the particular sports involved, and or to the quality of evidence presented by the school authorities to support the rules.

A United States district court in California upheld a board of education's enforcement of a grooming regulation including a provision that all "athletes" be clean-shaven and hair "be out of the eyes, trimmed above the ears and above the collar in the back."[213]

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210. Pendley v. Mingus Union High School District No. 4 of Yavapi County, 109 Ariz. 18, 504 P.2d 919, 926 (1972).
211. Breese v. Smith, 501 P.2d 159 (Alas. 1972).
212. Kraus v. Board of Education of City of Jennings, 492 S.W.2d 783 (Mo. 1973).
213. Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970).

The court found convincing the testimony offered by coaches and others to demonstrate not only that long hair could interfere with performance in certain sports, but "that athletic programs provide a unique form for the development of discipline, individual sacrifice and teamwork not available in other school programs."[214] On the question of morale as a basis for enforcing a dress code the court said that although there were divergent views, "the several coaches called by the defendants considered the enforcement of such regulations as legitimate means of building team morale, discipline and team spirit."[215]

The court stated it was "particularly important" to observe that the rule had long been in effect, that recently it had been reaffirmed by the school board after thorough consideration involving "the community, the educators, coaches, students, and administrators," and that it was not an instance of imposing discipline for the sake of discipline and conformity alone.

A United States district court in Vermont took a different view in regard to such a provision in an athletic code.[216] Plaintiff students desired to play on the tennis team. The court found:

> There is no credible evidence in this case that hair length affects the performance of the tennis players at any competitive level. The tennis coach himself indicated that headbands could be and are worn to keep hair and perspiration out of the competitor's eyes. The evidence made it clear that a long haired player with a headband was not at a competitive disadvantage vis-a-vis a player with close cropped hair. In short, the record is barren of any evidence that long hair is a handicap to performance in the sport of tennis.
>
> There is no credible evidence that long hair on an athletic team of any kind creates dissension among the team members. In fact, the evidence is that the tennis team involved in this case was free from dissension before the plaintiffs were excluded from participation.[217]

While observing that training and health rules must be obeyed, that conduct at practice sessions must be in "precise conformity with schedules and objectives," and that during competition the coach's instructions "must be accepted without question," the court rejected the argument that conformity and uniformity were essential elements in the maintenance of a high school athletic program.

Where hairstyle or other appearance deviations substantially interefere with the rights of others, school authorities can intervene.

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214. *Id.* at 194.
215. *Id.*
216. Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970).
217. *Id.* at 419.

Thus, beards and long hair on students at a vocational school could be barred in order to create a positive image of the school in the eyes of potential employers who came on campus to recruit.[218] Furthering job opportunities for graduates meets the test of a state interest sufficient to support the rule. Nothing was in the record to impugn the good faith of school authorities in promulgating the hair code. The court stated:

> . . . [T]he record amply supports the joint judgment of the students, the faculty and the administration that beards and long hair styles are prejudicial to effective job opportunities in industry and that the economic welfare of the students is best served by the restraints imposed by the code. . . . The necessity of this regulation is shown by the concrete and specific testimony of the Dean of Students as to the attitude of industry representatives with whom he had had wide contacts. . . .
>
> In summary, because of the school's interest in advancing the economic welfare of its students, because the hair regulations are reasonably calculated to further this interest, and because the regulations are grounded upon an adequate factual basis, the Court is satisfied that defendants have made a showing sufficient to sustain their substantial burden of justification.[219]

Where the facts were "very nearly similar to the facts of" this case, another case was similarly decided three years later.[220]

The authority of school boards to place some restrictions on hairstyles as a condition for participation in band activities has been judicially approved. In the words of a federal court in Arkansas:

> There is no evidence here that the school is trying to prevent plaintiff from protesting against the Vietnam war or against anything else, or that it is trying to punish him for his protest. The school authorities simply think that a member of the school band ought to conform to generally accepted norms as to hair length and styling and should be willing to make a choice between leaving the band, on the one hand, or conforming his or her hair to school requirements, on the other hand.[221]

It should be noted, however, that if long-haired females are allowed in the band, long-haired males cannot be excluded.[222]

A grooming regulation covering hairstyles that would be acceptable for participants in an optional postgradutation "diploma ceremony" has been sustained by the Tenth Circuit.[223] The trial court

218. Farrell v. Smith, 310 F. Supp. 732 (D. Me. 1970).
219. *Id.* at 738-39.
220. Bishop v. Cremenaro, 355 F. Supp. 1269 (D. Mass. 1973).
221. Corley v. Daunhauer, 312 F. Supp. 811, 815 (E.D. Ark. 1970).
222. Cordova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970).
223. Christmas v. El Reno Board of Education, Independent School District No. 34, 449 F.2d 153 (10th Cir. 1971).

said that the case involved only the "narrow" question of whether the student, who had received the official certificate of graduation, had a right to attend the elective postgraduation ceremony "without complying with the reasonable dress and grooming requirements established for that and other extra-curricular activities and ceremonies."[224]

In holding for school authorities the court found the case to be "more nearly akin to cases where a student claims a right to play football or participate in a parade of a school band in violation of rules or without the proper band uniform and required grooming."[225] In these situations the court apparently believed school authorities were clearly empowered to act.

In a federal case arising in Iowa a school board offered as partial justification for a hairstyle rule being applied to a female student that the typing instructor was unable to see the student's eyes during class. On this point the court said, "While the Court [did] not doubt the pedagogical importance of eye observation in typing, the Court, as trier of fact, was totally unconvinced that such a problem actually existed in this case."[226]

SECRET SOCIETIES

State Statutes

The first appellate case that involved a state statute regulating secret societies in public schools was decided in California in 1912.[227] The enactment provided:

> From and after the passage of this act, it shall be unlawful for any pupil, enrolled as such in any elementary or secondary school of this state, to join or become a member of any secret fraternity, sorority or club, wholly or partly formed from the membership of pupils attending such public schools, or to take part in the organization or formation of any such fraternity, sorority or secret club; provided that nothing in this section shall be construed to prevent anyone subject to the provisions of the section from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America or other kindred organizations not directly associated with the public schools of the state.[228]

Local boards were empowered to enforce the provisions of the act

224. Christmas v. El Reno Board of Education, Independent School District No. 34, 313 F. Supp. 618, 623 (W.D. Okla. 1970).
225. *Id.*
226. Sims v. Colfax Community School District, 307 F. Supp. 485, 489 (S.D. Iowa 1970).
227. Bradford v. Board of Education of City and County of San Francisco, 18 Cal. App. 19, 121 P. 929 (1912).
228. *Id.* at 930.

and were required to suspend or, if necessary, expel pupils who refused to comply.

The statute was first attacked on the ground that it created an improper "immunity to certain pupils in the public schools of the state, viz., those in the normal schools," because only elementary and secondary schools came under the provision of the act. It was further contended that the statute granted a privilege and immunity to the groups named in the statute and thus constituted an unequal application of law.

The court held the classification "elementary and secondary schools" to be valid. Further, the court upheld the exception of certain groups because these organizations were not "directly associated with the public schools of the state"; the distinction between groups directly associated with the public schools and those not was a constitutional one.

To the claim that the deprivation of a citizen's right to attend public school if he belonged to a barred society violated the Fourteenth Amendment, the court answered that those rights and privileges granted to citizens that depend solely on the laws of a state are not within this constitutional inhibition. The court said no person could lawfully demand to be admitted as a pupil to a public school merely because he is a citizen.

Although not directly involving the public schools, a decision by the United States Supreme Court three years later seemed to firmly establish the right of a state to prohibit membership in secret societies by students attending public educational institutions.[229] A rule forbidding membership in fraternities was unsuccessfully challenged by a student seeking admission to the University of Mississippi. The Court found that the control of the university was under the state of Mississippi and that "whether such membership makes against discipline was for the state of Mississippi to determine. . . . It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity."[230]

> It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the state of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the state considers

229. Waugh v. Board of Trustees of the University of Mississippi, 237 U.S. 589, 35 S. Ct. 720 (1915).
230. *Id.* at 723.

inimical to discipline, finds no prohibition in the 14th Amendment.[231]

Despite the *Waugh* decision, persistently through the years numerous cases have dealt with control of sororities and fraternities. All attacks on the validity of statutes have failed, even including a challenge to a Michigan statute that required suspension, expulsion, or withholding of credit and a diploma from anyone enrolled in a public school who was a member of a secret society.[232] In that case a high school senior who belonged to a fraternity was permitted by the board to remain in school but was denied credits essential to receiving a diploma. The student, aware of the penalty, elected to challenge the constitutionality of the statute. He was unsuccessful, the Supreme Court of Michigan following the *Waugh* reasoning as regards the Fourteenth Amendment, and, further, finding that because of his willful violation of the statute the penalty did not constitute a cruel or unusual punishment.

The United States Supreme Court in 1945 affirmed a lower court ruling that the State of Louisiana could enact a statute empowering local boards to suspend or expel members of secret societies.[233] In this case, however, the children involved were beyond the age of compulsory school attendance.

Some of the cases in this area warrant special attention because of judicial statements about particular contentions. The issue of the right of parental control was raised in a Florida case. However, the highest state court found the issue not relevant in its decision upholding the constitutionality of the statute.[234] It flatly stated, "We cannot see that the question of state versus parental control enters into the picture in any manner. The public school system has a very definite place in our scheme of things and the question in every case is whether or not the high school fraternity or sorority disrupts or materially interferes with that purpose."[235]

The Supreme Court of Oregon in 1952 discussed the issue of constitutional rights of pupils in a case involving a local board's rule established to implement a 1909 state statute.[236] The statute "declared unlawful" secret societies that may "exist among the pupils of any of the public schools" in the state, and made it "the duty of

231. *Id.*
232. Steele v. Sexton, 253 Mich. 32, 234 N.W. 436 (1931).
233. Hughes v. Caddo Parish School Board, 57 F. Supp. 508 (W.D. La. 1944), *aff'd*, 65 S. Ct. 562 (1945).
234. Satan Fraternity v. Board of Public Instruction for Dade County, 156 Fla. 222, 22 So. 2d 892 (1945).
235. *Id.* at 893.
236. Burkitt v. School District No. 1, Multnomah County, 195 Or. 471, 246 P.2d 566 (1952).

each school board" to "suppress all secret societies" of pupils. Boards were authorized to suspend or expel "all pupils who engage in the organization or maintenance of such societies."

After a period of loose enforcement, the local board adopted a series of rules to regulate the kinds of organizations that would be permitted to operate in the schools. One rule provided that any organization operating in a school must comprise only regularly enrolled students of that school. Thus, interschool clubs and those containing as members graduates or students who had dropped out of school would not be permitted. The validity of this rule was the principal question.

The court, in upholding school authorities, said:

> There is nothing in Rule 7, nor in any other of the rules adopted by the school board, which prevents the minor plaintiffs from assembling and associating freely at any time and place, outside of school hours, approved by their parents, with children from other high schools, public or private. This is their constitutional right. But they have no constitutional right to be members of clubs organized in the high schools, and composed of children attending different high schools, and which the school board may have substantial reason for believing to be inimical to the discipline and effective operation of the schools. . . . When they [the students] avail themselves of that opportunity [of public education] they must, in the nature of things, submit to the discipline of the schools and to regulations reasonably calculated to promote such discipline and the high purpose for which the schools are established—the education of youth, which is not limited to the imparting of knowledge, but includes as well the development of character and preparation for the assumption of the responsibilities of citizenship in a democracy. To attain these ends not the least in value of the lessons to be learned are the lessons of self-restraint, self-discipline, tolerance, and respect for duly constituted authority. In this regard parents and the schools have their respective rights and duties, which complement one another, and may be exercised and discharged in cooperation for the welfare of the child and the state.[237]

A similar point of view was taken a decade later by the Court of Appeals of Ohio.[238] At issue was a local board regulation that prohibited public school pupils who were members of secret societies from participating in "athletic, literary, military, musical, dramatic, service, scientific, scholastic, and other similar activities." Further, such students were not eligible for awards, student office, or the honor society. An anti-secret-society statute existed in the Ohio penal code, but the court commented that the statute was not necessary to the sustaining of the board's policy.

237. *Id.* at 578-79.
238. Holroyd v. Eibling, 116 Ohio App. 440, 188 N.E.2d 797 (1962).

The meetings of some clubs prohibited by the rule were held in the homes of parents, not on school property. However, the court stated boards of education could act as did this board against any organizations having a deleterious influence on school operation. The court heeded the assertion of school authorities that the clubs had a divisive effect and created administrative problems. The argument that the rule denied parents the right to select associates for their children off school premises was not persuasive to the court. No "natural" or constitutional rights of parents or pupils were deemed violated.

Some suits have contested the applicability of anti-secret-society statutes to particular groups. This issue appeared in the previous case. The clubs in that case had essentially the attributes of secret societies—"rushing," pledges, initiations, pins, secret words, and membership only on approval of club members.

Whether a club was "secret" figured prominently in a ruling by the Court of Appeal of California.[239] In reversing the trial court, the higher court observed that the bylaws of the organization in question permitted only 20 girls throughout the entire Sacramento school system to be rushed during a semester. Names were proposed by letters of recommendation and each candidate had to be sponsored by three members, the only qualifications being that the girl must have reached ninth grade, have a "C" average, have read two books not prescribed as compulsory reading, and "not have been a member of a club of the nature of . . . [the club in question] within four years." Candidates were then selected by an admission committee of 16 girls in a process "so secret that the general membership [was] never apprised of those who comprise its membership."[240] The court described the ritual of the club and concluded the activities were sufficient to justify legally characterizing the club as secret.

Acting under a Texas statute barring secret societies in public schools, the board of education of Fort Worth adopted a regulation requiring parents of students in junior and senior high schools to sign an application for enrollment that included a certification that the student was not a member and would not become a member of a secret society. The test contained in the statute for what constitutes a secret society was that additional members from the pupils in the school were selected by decision of the membership rather

239. Robinson v. Sacramento City Unified School District, 245 Cal. App. 2d 278, 53 Cal. Rptr. 781 (1966).
240. *Id.* at 786.

than by free choice of any pupil who was qualified by the rules of the school to fill the special aims of the organization.

Both the statute and the rule were challenged as applied to a certain type of organization, locally called "charity clubs," members of which were chosen by boards of sponsors consisting in part of mothers of active members. The suit was unsuccessful in state courts and the Supreme Court denied certiorari.[241] The statute was found not to infringe rights of association of students or rights of parents to control their children. The charity clubs were found to be properly classified as secret societies, not in the category of Boy Scouts, Girl Reserves, Hi-Y, or Pan-American Clubs.

Local Board Regulations

The Supreme Court of Washington in 1906 decided the first appellate case regarding control by public school authorities of secret societies of pupils in the absence of a pertinent state statute.[242] The board of education in Seattle had adopted a rule prohibiting members of "Greek-letter Fraternities" from participating in extracurricular activities. Arguments similar to those that have been directed against state statutes were also directed against this local rule. These included contentions that fraternity members were "entitled to all the privileges of said high school," that they were "unjustly prohibited from belonging to" extracurricular clubs and teams and deprived of the "customary honors attending graduation," that the rules were "in excess of lawful authority," that there was "nothing objectionable in said fraternity," and that, since its meetings were held in the evening at homes of the members with the parents' consent, the students were then "under parental control."

The court learned from the evidence that the fraternity in the school was "a branch or chapter of a general organization having other chapters in various high schools throughout the country [and] that it [was] subordinate to a general or parent governing body." Particular notice was taken of a magazine published by the fraternity that included the following editorial comment: "The principal of the Seattle high school does not know what a fraternity is, or he would not attempt to enforce his proposed futile plans. It is simply a case of all educators not educated. Imagine the monarch that could prohibit a man from wearing a fraternity pin. . . . We hope that others will learn and save us the trouble of summoning

241. Passel v. Fort Worth Independent School District, 453 S.W.2d 888 (Tex. Civ. App. 1970), *cert. denied*, 91 S. Ct. 1667 (1971).

242. Wayland v. Board of School Directors of School District No. 1, 43 Wash. 441, 86 P. 642 (1906).

our army of able attorneys, who are willing to defend us in the courts, and in doing so will make these uneducated beings feel their lack of knowledge with humiliation and chagrin at the expense of the poor unfortunates."[243] The court further observed that letters published in the magazine from members of the Seattle chapter and other chapters showed a "spirit of insubordination" against lawful school authority.

The court then addressed itself to the question whether the board of education had authority to adopt the rule. In answering affirmatively, the court held that the forfeiting of "certain privileges which are no necessary part of the curriculum or class work" may be imposed on continuing members of the fraternity. The court expressed the opinion that "the board has not invaded the homes of any pupils, nor have they sought to interfere with parental custody and control."[244] since the fraternities could continue to meet.

The court relied heavily on the testimony of the principal, who stated he had "found that membership in a fraternity has tended to lower the scholarship of the fraternity members." He also testified that "the general impression that one gets in dealing with them is one of less respect and obedience to teachers. It is found that there is a tendency toward the snobbish and patronizing air, not only toward the pupils, but toward the teachers; there is a certain contempt for school authority. . . . In dealing with these fraternity members, I have been assured more than once that they considered their obligation to their fraternity [and particularly the national aspect of it] greater than that to the school."[245]

One of the appellant's contentions was that the trial court had erred because the evidence did not sustain its finding that all active members of the fraternity were high school students. The present court, however, commented that the matter was immaterial.

Although the view that local boards have implied powers to regulate student membership in secret societies has been accepted to date by all courts, two cases require special attention.

The Court of Civil Appeals of Texas ruled on a point not involved in other cases.[246] It was that a rule barring fraternity members from participation in extracurricular activities may not be applied to such membership during vacation period.

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243. *Id.* at 643.
244. *Id.* at 644.
245. *Id.*
246. Wilson v. Abilene Independent School District, 190 S.W.2d 406 (Tex. Civ. App. 1945).

The only case in which school authorities were not upheld in their regulation of secret societies was decided against St. Louis school officials in 1922.[247] The Supreme Court of Missouri stated that the domain of the school ceased when the child reached his home unless his act was such as to affect the conduct and discipline of the school. The court found in this case that the evidence of the detrimental effect of fraternity membership on the operation of the school was not sufficient to sustain the rule.

MARRIAGE AND/OR PARENTHOOD

Many school boards have been involved in litigation arising from various types of rules and regulations related to married students, pregnant students, and students who have become parents. The basic question is, To what extent can school authorities deny or restrict the right to be instructed in the public schools that compulsory education statutes confer on persons of certain ages? Although some aspects of the area have long been judicially settled, new issues are being raised and the courts are reexamining some old positions.

Permanent Exclusion

The highest courts of Mississippi and Kansas in 1929 enunciated the rule that marriage is not an acceptable basis for permanently excluding from school an otherwise qualified person. No appellate court has disagreed with this fundamental proposition.

In the Mississippi case it was alleged that the rule excluding married pupils constituted an abuse of discretion by the board of education.[248] In defense of the rule the board argued that "the marriage relation brings about views of life which should not be known to unmarried children [and] that a married child in the public schools will make known to its associates in the schools such views, which will therefore be detrimental to the welfare of the schools."[249] The court, in invalidating the rule, commented, "We fail to appreciate the force of the argument. Marriage is a domestic relation highly favored by the law. When the relation is entered into with correct motives, the effect upon the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed."[250]

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247. Wright v. Board of Education of St. Louis, 295 Mo. 466, 246 S.W. 43 (1922).
248. McLeod v. State *ex rel.* Colmer, 154 Miss. 468, 122 So. 737 (1929).
249. *Id.* at 738.
250. *Id.*

The Kansas case concerned a girl who as a sophomore had left school at the end of the first semester, though she had been promoted to the second semester.[251] When she attempted to return to school the following fall, she was informed she would not be allowed to attend because she was married. The girl had borne a child "not prematurely" less than six months after her marriage, and had since separated from her husband. Evidence was offered that, though the girl was still married, she associated with other men, and had "persuaded another girl sixteen years of age to accompany her to a public dance."

On the other hand, affidavits showed that the girl was of good moral character, that she had attended the dance in the company of her mother, and that one of the males with whom she was seen was her cousin. The court by a four-to-three margin concluded the evidence was insufficient to warrant the board's excluding the girl from school. It noted, however, that "the constitutional and statutory right of every child to attend the public schools is subject always to reasonable regulation, and a child who is of a licentious or immoral character may be refused admission."[252] It further stated:

> . . . [W]hile great care should be taken to preserve order and proper discipline, it is proper also to see that no one within school age should be denied the privilege of attending school unless it is clear that the public interest demands [it]. . . . It is the policy of the state to encourage the student to equip himself with a good education. The fact that the plaintiff's daughter desired to attend school was of itself an indication of character warranting favorable consideration.[253]

In 1969 a United States district court in Mississippi considered a policy under which unwed mothers of school age were excluded from the public schools.[254] The action was brought on behalf of all unwed mothers of school age. The essence of the complaint was that the policy violated the equal protection clause of the Fourteenth Amendment. The court agreed and invalidated the rule.

The court spoke of the importance of education to a person living in modern society. The plaintiffs presented evidence that unwed mothers allowed to continue their education are less likely to have a second illegitimate child. "In effect the opportunity to pursue their education gives them a hope for the future so that they are less likely to fall into the snare of repeat illegitimate

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251. Nutt v. Board of Education of Goodland, 128 Kan. 507, 278 P. 1065 (1929).
252. *Id.* at 1066.
253. *Id.*
254. Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (N.D. Miss. 1969).

births."[255] However, the court stated it was "aware of the [school authorities'] fear that the presence of unwed mothers in the schools will be a bad influence on the other students vis-a-vis their presence indicating society's approval or acquiescence in the illegitimate births or vis-a-vis the association of the unwed mother with the other students."[256] The court then differentiated between the situation of an unwed pregnant girl and that of an unwed mother:

> The Court can understand and appreciate the effect which the presence of an unwed pregnant girl may have on other students in a school. Yet after the girl has the baby and has the opportunity to realize her wrong and rehabilitate herself, it seems patently unreasonable that she should not have the opportunity to go before some administrative body of the school and seek readmission on the basis of her changed moral and physical condition. . . .
> . . . But after the girl has the child, she should have the opportunity for applying for readmission and demonstrating to the school that she is qualified to continue her education. The continued exclusion of a girl without a hearing or some other opportunity to demonstrate her qualification for readmission serves no useful purpose and works an obvious hardship on the individual.[257]

The court emphasized that an inquiry should be made into each case and added that it "would like to make manifestly clear that lack of moral character is certainly a reason for excluding a child from public education."[258]

Over two and a half years later the same court restated the principle that a girl cannot be excluded from school for the sole reason that she is an unwed mother.[259] In this case the court awarded attorney's fees to the plaintiff student because of the "arbitrary" action of the board.

Exclusion with Alternative Opportunities

Sometimes when a student is excluded from regular public school, he may be provided with alternative facilities for obtaining education. In an Ohio case, for example, a board rule required that a girl withdraw from school because she was pregnant; however, she was allowed to continue school work at home.[260] The board successfully contended its regulation was in the interest of the physical well-being of the girl and not a punitive measure. The court found it to be within the board's discretion to determine that

255. *Id.* at 752.
256. *Id.*
257. *Id.* at 752-53.
258. *Id.* at 753.
259. Shull v. Columbus Municipal Separate School District, 338 F. Supp. 1376 (N.D. Miss. 1972).
260. State *ex rel.* Idle v. Chamberlain, 12 Ohio Misc. 44, 175 N.E.2d 539 (1961).

the presence of pregnant girls might adversely affect "the discipline and government of the students."

At issue in Texas courts was a rule that forbade admission of a married mother to the public schools.[261] The case was brought on behalf of a sixteen-year-old mother who was prevented from enrolling. She was married but had filed for divorce. The rule provided in part that if a married pupil wanted to start her family, she must withdraw from public school. Such a pupil, however, could continue her education in the local adult education program and correspondence courses.

The Court of Civil Appeals of Texas observed that the rule would forever prevent a mother from reentering public school. Furthermore, the adult education program in the Texas community would not accept her until she became twenty-one, and available correspondence courses would not provide her with the credits necessary to enter college. The court invalidated the rule, but stated, "This holding does not mean that rules disciplining the children may not be adopted, but any such rule may not result in suspension beyond the current term."[262]

A United States district court in Massachusetts granted a preliminary injunction against a plan through which a school board would in effect isolate from contact with other students an eighteen-year-old pregnant unmarried senior.[263] Under the proposed arrangement, the girl was to be allowed to make use of school facilities after the normal dismissal time, to attend school functions ("games, dances, plays, etc."), and to participate in senior class activities. Further, she could seek extra help from her teachers and would be tutored at no cost if necessary. Her name would remain on the register until graduation day, and her examination would be taken at a time agreed on by her and her teachers.

The school board had a written rule that whenever an unmarried girl "shall be known to be pregnant," her "membership in the school" would be immediately terminated. Observing the way in which the rule was being implemented in the case of the plaintiff, the court stated that although "it is clear that no attempt is being made to stigmatize or punish plaintiff . . . . it is equally clear that were plaintiff married, she would be allowed to remain in class during regular school hours despite her pregnancy."[264]

The school principal was unable to state any educational purpose

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261. Alvin Independent School District v. Cooper, 404 S.W.2d 76 (Tex. Civ. App. 1966).
262. *Id.* at 78.
263. Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971).
264. *Id.* at 1157.

to be served by excluding the student from regular class hours. Also he conceded that her pregnant condition had not occasioned any disruptive incident or otherwise interfered with school activities. The policy of the school board was keyed to a desire not to appear to condone conduct by unmarried students of a nature to cause pregnancy. The school enrolled both junior and senior high students. The principal testified that because the younger students were still flexible in their attitudes they might be led to believe the school authorities were condoning premarital relations if they allowed female students in the plaintiff's situation to remain in school. The court, however, observed that even if concerns of that nature were a valid ground for the regulation, the girl's being permitted to attend school functions and participate in senior activities "substantially undercut" such considerations. The court stated:

> In summary, no danger to petitioner's physical or mental health resultant from her attending classes during regular school hours has been shown; no likelihood that her presence will cause any disruption of or interference with school activities or pose a threat of harm to others has been shown; and no valid educational or other reason to justify her segregation and to require her to receive a type of educational treatment which is not the equal of that given to all others in her class has been shown.[265]

The plaintiff's case was handled by an organization devoted to asserting students' rights. This organization brought forth eight medical, psychiatric, social work, and educational authorities who testified that the student would not be harmed by regular attendance and that the student might be harmed by the rule of the school.

The assignment to night school of married students and students who are parents was upheld by a federal court in Georgia provided the education was equivalent to day school and there were no charges for either classroom instruction or textbooks.[266] (There were no fees for tuition or textbooks in the regular day classes.) Attacking the arrangement was an unmarried fifteen-year-old girl who had borne a child out of wedlock. The court found that the policy did not penalize the exercise of a student's fundamental right of procreation. Had it done so, the court said it would have been necessary to show a compelling governmental interest in order for the rule to meet constitutional standards.

Examining the school policy against the "rational basis" test, the court accepted the justification offered by the school authorities

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265. *Id.* at 1158.
266. Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973).

that students who marry or become parents are more precocious than other students and that the mixing of the two groups of students would lead to disruption of the school. The court found no dispute on the point that students who married or became parents were normally more precocious than the others. Therefore it was conceivable that their presence in a regular daytime school could result in disruption, and the plaintiff offered no evidence to the contrary.

Since an educational alternative was provided, there was no denial of equal protection of the laws. There would be a denial, however, if the student in this situation was required to pay tuition and provide textbooks as called for by the general policy covering night schools. The argument that the due process clause of the Fourteenth Amendment was violated by the conclusive presumption that a parent will disrupt the regular educational process was tersely rejected by the court, since it found no penalty to be involved in the application of the policy.

Temporary Exclusion

In a 1967 Texas case, relief was sought against the application of a rule that required students who married during the school term to withdraw from school for the remainder of the school year.[267] The appellate court struck down the rule, holding it was arbitrary because it made marriage, ipso facto, the basis for denial of a student's right to obtain an education. The school board tried unsuccessfully to distinguish the case from the preceding one by stating that the rule annulled in that case had the effect of permanently excluding the party from school, whereas the rule in the present case provided only for temporary exclusion. The Court of Civil Appeals stated succinctly: "If a student is entitled to admission, the question of the length of exclusion is not material."[268]

Later that year another marriage case reached the Texas Court of Civil Appeals.[269] The question was whether marriage alone constitutes sufficient ground to suspend a student from school for a definite period of three weeks, after which reapplication for admission could be made to the principal. The court enjoined the school board from enforcing this rule, which was not in writing on the date of marriage of the two students who had filed suit.

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267. Anderson v. Canyon Independent School District, 412 S.W.2d 387 (Tex. Civ. App. 1967).
268. *Id.* at 390.
269. Carrollton-Farmers Branch Independent School District v. Knight, 418 S.W.2d 535 (Tex. Civ. App. 1967).

The court ordered the board to allow the students to attend school for what the court emphasized as scholastic purposes only. Noting that the girl was an honor student who hoped to earn a college scholarship and that the boy was having such a difficult time that if he missed classes for three weeks he would probably fail, the court stated:

> The great preponderance of the evidence adduced at the trial established that the presence and attendance . . . [of the students under the trial court's injunction] did not cause turmoil, unrest and upheaval against education by fellow students. The appellees were not approached by other students regarding the subject of married life. The ability of appellees to study was not affected by marriage. The evidence also showed that the resolution suspending students from school for marriage had not been uniformly applied.[270]

The court quoted extensively from the two preceding Texas opinions, and summarized its holding as follows:

> We think the weight of authority in Texas and in the United States is to the effect that marriage alone is not a proper ground for a school district to suspend a student from attending school for scholastic purposes only.[271]

The Supreme Court of Tennessee in 1957 had taken a different stance when it sustained the temporary exclusion from school of pupils who married during the school year.[272] The resolution of the school board provided for the automatic exclusion of pupils who married during a term for the remainder of that term, and of pupils who married during the summer vacation for the fall semester. All school principals in the county had asked the board of education to adopt the rule because they felt student marriages had caused a deterioration of discipline and decorum in the schools.

In sustaining the rule the court stated the principals "should be regarded by reason of training, experience and observation as possessing particular knowledge as to the problem which they say is made by the marriage and uninterrupted attendance of students in their respective schools."[273] The court gave weight to the principals' testimony that most of the disorder occurred "immediately after the marriage and during the period of readjustment," and that the "influence of married students on the other students is also greatest at this time." The court commended:

> . . . [I]t is not a question of whether this or that individual judge or

270. *Id.* at 536.
271. *Id.* at 542.
272. State *ex rel.* Thompson v. Marion County Board of Education, 202 Tenn. 29, 302 S.W.2d 57 (1957).
273. *Id.* at 59.

> court considers a given regulation adopted by the Board as expedient. The Court's duty, regardless of its personal views, is to uphold the Board's regulation unless it is generally viewed as being arbitrary and unreasonable. Any other policy would result in confusion detrimental to the progress and efficiency of our public school system.[274]

Seven years later the validity of a similar regulation was considered by the highest court of Kentucky.[275] The substantive difference in the wording was that the length of withdrawal was to be for a full year, after which time a pupil could reenter school as a special student with permission of the principal. On reentry, however, homerooms, studyhalls, class activities, social events, and athletics were to be barred. The school board supported its policy on the same grounds as had the Tennessee board. The school superintendent had stated that marriages during the school term caused discussion and excitement, thereby disrupting school work. Moreover, some parents had requested that the rule be adopted.

The Court of Appeals of Kentucky struck down the regulation, finding "the fatal vice" to be "its sweeping, advance determination that every married student, regardless of the circumstances, must lose at least a year's schooling."[276] The court further noted that the principal was not provided with any guidelines to follow in granting a married student permission to resume school. In addition, it observed that the way school authorities enforced the regulation "accentuates the fact that the regulation is not realistically related to its purported purpose."

> It is asserted for the Board that the most intense disruptive impact of a student marriage occurs during the time just preceding and just following the marriage. Yet, under the uniformly followed pattern of administration of this regulation, the married student is permitted to remain in school during all of the time preceding the marriage, and may remain for a maximum of six weeks thereafter. Such procedure, even though premised on the Board's commendable desire to permit the student to complete the current term, effectively frustrates the prime purpose of the regulation.[277]

Restrictions on Extracurricular Activities

Until very recently the attitude of the courts toward marriage as a cause for exclusion from extracurricular activities had been markedly different from their attitude toward marriage as a cause for exclusion from school. Although there had been dissents from some opinions, all decisions until 1972 upheld the board's power to

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274. *Id.*
275. Board of Education of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. 1964).
276. *Id.* at 680.
277. *Id.* at 680-81.

limit the participation of married students in activities deemed extracurricular.

Restrictions upheld. The first case to deal specifically with the subject was decided by the Court of Civil Appeals of Texas in 1959.[278] The school board policy provided that "married students or previously married students be restricted wholly to classroom work; that they be barred from participating in athletics or other exhibitions, and that they not be permitted to hold class offices or other positions of honor."[279] Academic honors were excepted.

A sixteen-year-old male married a fifteen-year-old female with the result that he was barred from further participation in athletic activities. In challenging the rule, the student claimed he was hoping for an athletic scholarship to a college and that the rule deprived him of this opportunity. He also argued that the regulation was contrary to public policy in that it penalized persons because of marriage.

The school board's evidence, which satisfied the court, included the following: the parent-teacher association had made an extensive study of teenage marriages and had recommended the board resolution; this study had "included the ill effect of married students participating in extra-curricular activities with unmarried students"; a board member, who was a professional psychologist and former teacher, stated that a survey among parents of high school students "indicated a definite need for the resolution"; in the previous year 24 of a total of 62 married students had dropped out of school and at least one-half of the remainder had experienced a drop of at least 10 points in grades.

As to the boy's "right" to play football with the potential of achieving an athletic scholarship to college, the court said such was a "contingent or expectant" right rather than a "vested" right, despite the fact the boy had played football for the school and was married prior to the adoption of the rule.

Regarding the public policy argument, the court noted that teenage marriages were permitted only upon express consent of the parent or guardian and that below certain ages marriage was prohibited. It further commented that the principle of looking with favor on marriage applied to those of lawful age, whereas "the legislative policy is otherwise insofar as an underage marriage is concerned."[280] (See *Bell, infra.)*

278. Kissick v. Garland Independent School District, 330 S.W.2d 708 (Tex. Civ. App. 1959).
279. *Id.* at 709.
280. *Id.* at 711.

The following year the Supreme Court of Michigan, by an equally divided court, sustained a school board rule that married students "shall not be eligible to participate in any co-curricular activities: i.e., competitive sports, band, glee club, class and class officers, cheerleading, physical education, class plays and etc."[281] Two boys, each of whom was legally married, brought suit. The superintendent testified the boys were excellent students and had not created discipline problems since their marriages.

After the trial court sustained the board's action, an appeal was brought, with the Attorney General of Michigan on the side of the students. One judge voted to affirm on the ground the case was moot. The three judges who upheld the rule per se cited *Kissick (supra)*. The other four, ignoring this case, wrote they could not find a decision by any state's highest court dealing with the question. (*Kissick* was decided by an intermediate appellate court.) They believed that partial denial of opportunities to a student for the sole reason of marriage was not a reasonable exercise of authority by a school district.

The reasons the board had offered in support of the rule included "the possible bad influence when married students are forced to be closely associated with their unmarried peers in any way other than the more formal circumstances; that is, classrooms, under the immediate supervision of a teacher": and the possible bad effect if married students are "in a position of idolization," as on the football team, because students are inclined to emulate their peers.[282]

The highest courts of Utah and Iowa have also supported the power of school authorities to restrict extracurricular activities of married students. The Supreme Court of Utah unanimously stated that because extracurricular activities are supplemental to the regular classes of the academic curriculum and are supplied under the discretionary power of the board, the extent they are made available can be decided by the board.[283] In this case the board had not barred married students from band, speech, drama, and choir. Permitting married students to engage in these, but not other activities, was not considered an unconstitutional discrimination by the court because these activities were closely allied with regular classwork taken for credit. The court also found it proper for the board to

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281. Cochrane v. Board of Education of Mesick Consolidated School District, 360 Mich. 690, 103 N.W.2d 569 (1960).

282. *Id.* at 570-71.

283. Starkey v. Board of Education of Davis County School District, 14 Utah 2d 227, 381 P.2d 718 (1963).

permit students already married when the rule was adopted to continue in all activities.

The court discussed its role as follows:

> It is not for the courts to be concerned with the wisdom or propriety of the resolution as to its social desirability, nor whether it best serves the objectives of education, nor with the convenience or inconvenience of its application to the plaintiff in his particular circumstances. So long as a resolution is deemed by the Board of Education to serve the purpose of best promoting the objectives of the school and the standards of eligibility are based upon uniformly applied classifications which bear some reasonable relationship to the objectives, it cannot be said to be capricious, arbitrary or unjustly discriminatory.[284]

In 1967 the Supreme Court of Iowa, in upholding a rule that barred married students from extracurricular activities, discussed the power of school boards to regulate student conduct on matters outside the domain of the school.[285] The court stated it is not within a school board's power "to govern or control the individual conduct of students *wholly* outside the school room or playgrounds." However, "the conduct of pupils which directly relates to and affects management of the school and its efficiency is a matter within the sphere of regulations by school authorities."[286]

The action was brought by a student who, though aware of the board rule, had married. He had been a regular player on the basketball team and wished to continue during his senior year but was not permitted to do so under the rule. The board president, the superintendent, and several school officials testified that the number of high-school-age marriages had recently increased significantly, that marriages were ordinarily followed by lower grades, and that school dropouts increased in a proportion greater for married pupils than for those not married. Further testimony revealed that some married students at times discussed with other students some intimate details concerning their marriages and that this was particularly true during extracurricular activities where close supervision was more difficult.

The board presented the following eight policy considerations it said prompted the adoption of the regulation:

1. Married students assume new and serious responsibilities. Participation in extracurricular activities tends to interfere with discharging these responsibilities.
2. A basic education program is even more essential for married stu-

284. *Id.* at 720.
285. Board of Directors of Independent School District of Waterloo v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967).
286. *Id.* at 858.

dents. Therefore, full attention should be given to the school program in order that such students may achieve success.

3. Teenage marriages are on the increase. Marriage prior to the age set by law should be discouraged. Excluding married students from extracurricular activities may tend to discourage early marriages.
4. Married students need to spend time with their families in order that the marriage will have a better chance of being successful.
5. Married students are more likely to drop out of school. Hence, marriage should be discouraged among teenage students.
6. Married students are more likely to have undesirable influences on other students during the informal extracurricular activities.
7. The personal relationships of married students are different from those of non-married students. Non-married students can be unduly influenced as a result of relationships with married students.
8. Married students may create school moral and disciplinary problems, particularly in the informal extracurricular activities where supervision is more difficult.[287]

Restrictions invalidated. The first officially reported federal case dealing with restrictions on extracurricular activities of married students was decided in Tennessee in 1972.[288] A married female student challenged a rule forbidding participation of married students in certain activities and functions of the school. The rule specified an automatic five-day suspension for all newly married students, after which they could participate only in classes in subjects for which credit toward graduation was given. The court, without specification, did not find "to be persuasive authority" "several cases decided in the courts of various states, all of which would uphold the regulation herein in question," because they were "inapposite or they fail to apply the appropriate constitutional standard."[289]

The court stated that the regulation infringed on a fundamental right, that of marriage. Because a fundamental right was involved the board would have to show a compelling interest in order to enforce the rule. However, the board "failed to show that the regulation in question is even rationally related to—not to mention 'necessary' to promote—*any* legitimate state interest at all. Instead, it is apparent that the sole purpose and effect of the regulation is to discourage, by actually punishing, marriages which are perfectly legal under the laws of Tennessee and which are thus fully consonant with the public policy of that State."[290]

About two weeks later a similar conclusion that extracurricular

287. *Id.* at 858-59.
288. Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972).
289. *Id.* at 822.
290. *Id.* at 823.

activities could not be restricted for married students was reached by a federal district court in Ohio.[291] This court, in citing some state court cases that had uniformly held for the school boards, pointed out that often there had been vigorous dissents and that in one of the cases *(Cochrane, supra)* only a minority of judges believed the decision affirmed was correct upon the merits. It observed that a judge now of the Court of Appeals of the Sixth Circuit (in which Ohio is located) was one of those who did not agree with the substantive reasoning of the lower court in that case.

The court said, "What the [present] case resolves itself down to . . . is the question of whether the defendants may enforce against the plaintiff, who has violated no law, a rule which will in effect punish him by depriving him of a part of his education."[292] The plaintiff was a male senior honor student and an excellent baseball player who had been approached by college and major league recruiters. The court concluded that "the effect of the enforcement of the rule, which the defendants have promulgated under the color and authority of the state laws, is to put what may be an unendurable strain upon the plaintiff's marriage." For this reason the court could not "escape the obligation to protect from invasion by the power of the state that right to marital privacy . . . protected by the Constitution."[293]

The court expressed concern about such undesirable consequences of teenage marriages as the high rate of failure of the marriages and the high dropout rate of married high school students. However, said the court:

> Nevertheless, the fact remains that the plaintiff did legally get married, without in doing so violating any law of the state. He had thus attained a status where his marital privacy might not be invaded by the state, even for the laudable purpose of discouraging other children from doing what he did.[294]

The court expressed the view that the school authorities should not be faulted for trying to discourage early marriages and that its holding was reached "with real sorrow."

Some four months later a third federal district court, apparently unaware of the preceding two holdings, granted a preliminary injunction against the application of a rule that would have prevented a married male student from participating in varsity football.[295]

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291. Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972).
292. *Id.* at 302.
293. *Id.*
294. *Id.* at 300.
295. Moran v. School District No. 7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972).

The court stated that high school football is no less important a right than college football, thus extending a ruling by the Court of Appeals, Tenth Circuit, that an allegation regarding the loss of opportunity to play college football was a basis of a claim recognizable in federal courts.[296]

The reasons for the rule offered by the board were:

> (a) Married students assume new and serious responsibilities. Participation in extracurricular activities tends to interfere with discharging these responsibilities;
>
> (b) A basic education program is even more essential for married students. Therefore, full attention should be given to the school program in order that such students may achieve success;
>
> (c) Teenage marriages are on the increase. Marriages prior to the age set by law should be discouraged. Excluding married students from extracurricular activities may tend to discourage early marriages;
>
> (d) Married students need to spend time with their families in order that the marriage will have a better chance of being successful;
>
> (e) Married students are more likely to drop out of school. Hence, marriage should be discouraged among teenage students.[297]

The court found these reasons to be "unpersuasive" and held they "do not provide a basis under state law for the board's action. There is no legislative authority for school board action in the area of matrimony. What married persons do with their time outside of school and how they discharge their matrimonial responsibilities is outside the statutory authority of the school board."[298]

The court said that although it obviously is true that a basic education is important to married students, academic success beyond the high school may depend in part upon participation in extracurricular activities. The court observed that a simple requirement that those unable to keep up in academic work may not participate in extracurricular activities would have the same effect as limiting married students to academic work if the extra activities were the cause of academic failure.

So far as discouraging teenage marriages, the court stated that not only had the state not given over to the school board authority in the area, but that the effect of the board's rule was to punish those who had already married lawfully. The court suggested that the school board could try to discourage early marriages through premarital counselling in courses on family living.

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296. Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971).
297. Moran v. School District No. 7, Yellowstone County, 350 F. Supp. 1180, 1182-83 (D. Mont. 1972).
298. *Id.* at 1186.

It added that if, contrary to the facts in this case, there is "substantial evidence to support a school board's determination that married students' participation in extracurricular activities will result in a reasonable likelihood of moral pollution, disruption, or disciplinary problems within the student body then the school board's regulation may be upheld as a valid exercise of authority."[299]

Decided before the preceding three cases, but reported after them, was a Texas case in which school authorities attempted to bar from extracurricular activities a divorced student.[300] The rule covered students who presently were or had been married. The federal court abstained for a month from rendering a final judgment so as to allow relief to be granted within the framework of the school system. The court clearly indicated, however, that it was disposed to invalidate the rule as applied in this situation. At the time the court postponed its decision it concluded its remarks by saying:

> The professed purpose of the educational institution here is not to inflict punishment upon the young but to provide education and the best possible education to all of its students upon a nondiscriminatory basis. It should and will have its full opportunity to do so in this case before final action by this Court.[301]

The board came forth one month later with several reasons for the rule, none of which was adequately supported in the proof. Thus the court granted a permanent injunction.

Another federal court in Texas, electing to follow the "more acceptable view at this time" as expressed in the preceding federal case from Texas, granted a preliminary injunction against enforcing a rule that would bar from "any Interscholastic League activities" a student who had married during the basketball season.[302] This court recognized that the Texas state court decision in *Kissick (supra)* was authority to the contrary, and it invited an appeal because the order involved a controlling question of law as to which there is "a substantial ground for difference of opinion." Before the appeal was heard the student was graduated. The Court of Appeals, Fifth Circuit, vacated the preliminary injunction and terminated the case without deciding the merits.[303]

In 1974 a panel of the Texas Court of Civil Appeals by a two-to-one vote invalidated a regulation barring married students from ex-

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299. *Id.* at 1187.
300. Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1972).
301. *Id.* at 870.
302. Hollon v. Mathis Independent School District, 358 F. Supp. 1269 (S.D. Tex. 1973).
303. Hollon v. Mathis Independent School District, 491 F.2d 92 (5th Cir. 1974).

tracurricular activities.[304] The majority said it was following the federal cases of *Moran*, *Davis*, and *Holt* (all, *supra*). It recognized that "our holding is in direct opposition to *Kissick* [*supra*]."[305]

OTHER AREAS OF CONDUCT

Demonstrations

Some of the cases discussed in the earlier chapter *Insignia and Emblems* involved what might be termed demonstrations. This section treats group actions aimed at calling attention to points of view by use of media other than insignia.

The Court of Appeals, Eighth Circuit, decided that school officials could discipline twenty-nine black students who engaged in a "quiet procession" from a pep rally when the song "Dixie" was played.[306] A school rule expressly forbade disturbances in assemblies. The rally had been scheduled in advance, and it was known that "Dixie" was to be played. Those who did not wish to attend the rally in the gymnasium were instructed to report to the auditorium, and some twenty-five black students and five white students did so. The black students went to the gymnasium and when "Dixie" was played as the fourth number they arose and left the pep assembly.

The court supported the position of school authorities that this was a disruption and thus a violation of a reasonable rule rather than a constitutionally protected dissent. The court reviewed at length the history of the song "Dixie" and concluded that it was not racially abusive per se, nor was it being used in a racially offensive fashion that would warrant its prohibition by the judiciary.

In another race-connected case some black students in a recently integrated school were displeased over selection of cheerleaders in a four-to-two ratio of white-to-black, the ratio being a reflection of the student population. A series of incidents, including a walkout, took place. That participating students could be disciplined despite the lack of a regulation specifically covering the offense was held by the Fifth Circuit.[307] The court said:

> No student needs a regulation to be told he is expected and required to attend classes. State law requires attendance, in Texas as in almost all other states. The entire structure of compulsory attendance, written "excuses" for absences, taking of the roll in classrooms, and

304. Bell v. Lone Oak Independent School District, 507 S.W.2d 636 (Tex. Civ. App. 1974).
305. *Id.* at 638.
306. Tate v. Board of Education of Jonesboro, Arkansas, Special School District, 453 F.2d 975 (8th Cir. 1972).
307. Dunn v. Tyler Independent School District, 460 F.2d 137 (5th Cir. 1972).

penalties for truancy, is familiar to every child. There are grey areas of conduct for which the student needs the guidance of a regulation telling him what is allowable and what is not. But the basic requirement of attending classes does not fall in that area. Thus, wholly apart from the regulation, the school was authorized to act with regard to a mass refusal to attend classes.[308]

Also taking the view that control of demonstrations is not dependent on a written regulation was the Supreme Court of Virginia.[309] In this case students who should have been in class assembled on the school grounds outside the principal's office to protest the earlier suspension of eight students. The protesters shouted to students in classrooms, urging them to join the protest, which some did. Some furniture was removed from inside the building. The demonstration grew progressively noisier. Eventually, police were called to arrest those who would neither return to class nor leave the school grounds.

The court, in affirming convictions for unlawful trespass, emphasized the disruptive nature of the activity. It said that "when the protest demonstration became unduly disruptive of the educational process and of good order and discipline in the school, it became not only the right, but the duty, of the principal to take reasonable measures to restore order so that the educational process might continue."[310]

Refusal of the school board to renew the teaching contract of an English instructor was the cause of a demonstration which led to a case decided by the Ninth Circuit Court of Appeals.[311] Several students planned a chant and walkout at an athletic awards assembly to protest the board's action. News media were informed. Before the ceremony began school officials learned that if a walkout did take place the school athletes would likely attempt to prevent it. Fearing possible violence, school authorities cancelled the assembly, but some students did stage a walkout from classes.

During the lunch period students and newsmen gathered in one area of the school premises. Student Karp got from his car signs supporting the instructor and distributed them to other students. When the vice-principal ordered the students to surrender the signs, all complied except Karp, who asserted a constitutional right to have and distribute the signs. He did, however, acquiesce upon a second request by the vice-principal.

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308. *Id.* at 142.
309. Pleasants v. Commonwealth, 214 Va. 646, 203 S.E.2d 114 (1974).
310. *Id.* at 116.
311. Karp v. Becker, 477 F.2d 171 (9th Cir. 1973).

The student's subsequent suspension for the sign incident was voided by the court on the ground that the student by the sign activity was exercising First Amendment "pure speech" and no substantial disruption could properly be forecast after he surrendered the signs. The court expressly stated, however, that the school authorities were justified in taking away the signs because disruption resulting from their retention and use was a reasonable forecast.

It should be observed that reasonable time and place regulations of rallies and demonstrations are within the power of school authorities to enforce. Thus a student was held not to have a right to conduct a rally at a particular point on school premises during the lunch period when there were other facilities available for speech activities and there was evidence that such a rally would create a "substantial disorder or invasion of the rights of others."[312] The court said the Constitution does not require "the school system to guarantee to [a student] on the school grounds a captive audience at the specific times he elects to address them."[313]

The Fifth Circuit Court of Appeals has said the First Amendment "does not give individual students the right to disrupt openly the educational process in order to press their grievances."[314] Expressions such as "willful disobedience," "intentional disruption," and "disturbs the school" are not unconstitutionally vague. In this case the court sustained the use of these words in regulations used to punish students involved in a demonstration.

Similarly, a three-judge federal district court upheld the punishment for "gross disobedience" of a student who, "against regulations, . . . began singing and causing other students to sing and in addition thereto on the same day . . . talked improperly to a teacher or teachers."[315]

However, the Ninth Circuit Court of Appeals has ruled that a trial court cannot dismiss summarily a complaint alleging that a student was unconstitutionally reprimanded and threatened with suspension for wearing a tag on her dress during school hours with the words "boycott chocolates."[316] The purpose of the tag was to protest the school's dress code, and leaflets urging the boycott were also distributed. The "chocolate drive" was an administration-sanctioned activity to raise money to finance some student func-

312. Lipkis v. Caveney, 19 Cal. App. 3rd 383, 96 Cal. Rptr. 779 (1971).
313. *Id.* at 783.
314. Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 442 (5th Cir. 1973).
315. Whitfield v. Simpson, 312 F. Supp. 889, 892 (E.D. Ill. 1970).
316. Hatter v. Los Angeles City High School District, 452 F.2d 673 (9th Cir. 1971).

tions through the sale of candy. A "boycott" of classes to enforce student demands would, of course, be disruptive of the educational process.[317]

Drugs and Alcohol

The courts are agreed that rules barring possession, sale, or distribution of drugs to fellow students can be enforced by school authorities. In discussing not only the right, but the duty, of school officials to prevent use of drugs in schools, the Court of Appeals of New York has stated:

> The school authorities have an obligation to maintain discipline over the students. It is recognized that when large numbers of teenagers are gathered together . . . their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.
>
> It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age increases the danger.[318]

The Court of Appeals of Arizona has said it did "not doubt the reasonableness" of a regulation barring "unlawful use, possession, distribution or sale of drugs, alcohol, and other illegal contraband on school district property or at school-sponsored functions."[319] "The use of drugs by students, either on or off the high school premises, bears a reasonable relation to and may endanger the health, safety and morals of other students."[320] However, if the offense is committed off school grounds and school authorities did not themselves witness it, a student may not be excluded on the basis he was arrested and charged with criminal possession of a hypodermic instrument.[321]

In dealing with alcohol or drugs, school boards, of course, are bound to respect the constitutional rights of students. Thus rules must be reasonably related to the evil to be corrected. The Supreme Court of Iowa has discussed the point in invalidating a rule that made a student ineligible for interscholastic athletics if he, with knowledge of the fact, was found in a car containing beer.[322] The

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317. Boykins v. Fairfield Board of Education, 492 F.2d 697 (5th Cir. 1974).
318. People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 597 (1967).
319. Kelly v. Martin, 16 Ariz. App. 7, 490 P.2d 836, 838 (1971).
320. *Id.* at 840.
321. Howard v. Clark, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (1969).
322. Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555 (Iowa 1972).

court found the rule "too extreme" in its breadth. It stated, however:

> We have no doubt that school authorities may make a football player ineligible if he drinks beer during football season. No doubt such authorities may do likewise if the player drinks beer at other times during the school year, or if he then possesses, acquires, delivers, or transports beer.[323]

According to a federal district court in Massachusetts no written rule is required before students can be punished for "being on school premises with beer on their breaths."[324] The punishment involved restrictions on extracurricular activities for a year. The students, who were on athletic teams, were aware that "involvement with alcohol on or off school premises was wrong and would be punished by school authorities. . . . In addition, [the students] are presumed to know the strong public policy against alcohol use by minors as expressed in the pamphlets used in the health course and in the Massachusetts General Laws."[325]

The Court of Appeals, Eighth Circuit, has said that "regulations proscribing the possession or consumption of intoxicating beverages by students at school functions are reasonable."[326] In this case, however, the court reversed a lower court decision in favor of school authorities on the ground that there was no finding that the beverage brought to school by the students was actually intoxicating.

Off-Premises Conduct

Many of the cases analyzed in this monograph have involved to some extent acts committed by students off school grounds.

Perhaps the oldest appellate case dealing with control of school activities off school premises is one decided in 1859 in Vermont.[327] A high school pupil, in the presence of other pupils, but after school hours and after he had returned home, called the teacher "old Jack Seaver." The next morning Mr. Seaver whipped the boy. The boy's father brought suit.

The Supreme Court of Vermont held the punishment justified because the misbehavior had a "direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination."[328] The court distinguished between

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323. *Id.* at 564.
324. Hasson v. Boothby, 318 F. Supp. 1183 (D. Mass. 1970).
325. *Id.* at 1188.
326. Strickland v. Inlow, 485 F.2d 186, 189 (8th Cir. 1973), *cert. granted sub nom.* Wood v. Strickland, 94 S. Ct. 1932 (1974).
327. Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).
328. *Id.* at 160.

punishable and unpunishable off-school-premises conduct as follows:

> [Punishable conduct] is not misbehavior generally, or towards other persons, or even towards the master in matters in no ways connected with or affecting the school; for as to such misconduct, committed by the child after his return home from school, we think the parents, and they alone, have the power of punishment.
> But where the offense has a direct and immediate tendency to injure the school and bring the master's authority into contempt . . . we think he has the right to punish the scholar for such acts if he comes again to school.[329]

One of the most-quoted cases dealing with punishment of pupils for acts committed off school premises was decided by the Supreme Court of Errors of Connecticut in 1925.[330] The principal had received a complaint from the mother of two small girl pupils that they had been frequently abused by three boys while on their way home from school. The principal later received a note from the mother saying she had witnessed the same boys annoying two other small girls who were on their way home from school. The locality was the premises of the mother of one of the boys.

The principal summoned the boys to the office and told them of the offenses charged against them. When the boys admitted their guilt, the principal administered corporal punishment in a moderate manner. Suit for damages was brought by the boy who lived where the incident occurred. The question before the appellate court was whether a rule could be adopted "which attempts to control the conduct of pupils outside of school hours after they have reached their homes." In finding that the principal had the power to act as she did, the court said:

> Examination of the authorities clearly reveals the true test of the teacher's right and jurisdiction to punish for offenses not committed on the school property or going and returning therefrom, but after the return of the pupil to the parental abode, to be not the time or place of the offense, but its effect upon the morale and efficiency of the school, whether it in fact is detrimental to its good order, and to the welfare and advancement of pupils therein. If the conduct punished is detrimental to the best interests of the school, it is punishable, and in the instant case, under the rules of the school board, by corporal infliction.[331]

In answer to the argument that the proper resort of the principal in correcting the abuse was to the parents or to the public prosecutor, the court stated:

329. *Id.*
330. O'Rourke v. Walker, 102 Conn. 130, 128 A. 25 (1925).
331. *Id.* at 26.

> Some parents would dismiss the matter by saying that they give no attention to children's quarrels; many would champion their children as being all right in their conduct. The public authorities would very properly say, unless the offense resulted in quite serious injury, that such affrays were too trifling to deserve their attention. Yet the harm to the school has been done, and its proper conduct and operations seriously harmed, by such acts.[332]

The court pointed out that, although the plaintiff had reached his home after school, his victims had not.

The advent of school cafeterias has led some school boards to require that students who do not go home for lunch remain in school and either buy food in the cafeteria or eat there food brought from home. In effect, the patronizing of neighborhood eating establishments is barred. The power of school boards to establish such rules has been uniformly upheld. As justification for these rules, courts emphasize the health of the children and the disruption that would be caused by students coming and going from eating places off the premises. The fact some private businesses may be denied sales to pupils during the school day does not render the rules invalid. The most recent appellate court so to hold was the Court of Appeals of Kentucky in 1955.[333]

A related rule has been upheld by the Court of Civil Appeals of Texas.[334] The regulation provided that students driving automobiles to school must park them in the parking lot when they arrive at school in the morning and not move them until 3:45 p.m. unless by special permission. The case arose when a girl (with the encouragement of her father) insisted on parking her car at a private house one block from the school, going home to lunch in it each day, and reparking it at the same place until school was over for the day.

Before sustaining the power of the board to enforce the rule against the girl, the court received uncontroverted testimony that, prior to the rule, fifty or sixty automobiles driven to school by students would be driven away at the noon hour. The high school, the parking area, a grade school, and playgrounds were located in the immediate vicinity, and small children would be passing at the time the cars were leaving. The court found the regulation valid because it was "for the purpose of controlling the conduct of the students to the end that student pedestrians on the streets adjacent to the schools might be safe from student operated automobiles

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332. *Id.* at 27.
333. Casey County Board of Education v. Luster, 282 S.W.2d 333 (Ky. 1955).
334. McLean Independent School District v. Andrews, 333 S.W.2d 836 (Tex. Civ. App. 1960).

and that better order, decorum and discipline might prevail at the noon recess."[335]

Miscellaneous

It is self-evident that considerations of safety as well as of a proper educational atmosphere would enable school officials to discipline students who instigate fights with other students on school premises or on the way to and from school. A specific rule on the point would not be necessary except perhaps as a due process consideration before a severe penalty is placed on a student. Fighting is covered by a rule against "behavior which is inimicable to the welfare, safety, or morals of other pupils."[336] The Ninth Circuit Court of Appeals has held that the word "assault" in a school disciplinary rule is not unconstitutionally vague.[337]

If students from one school precipitate a fight on the campus of another school, school authorities can punish them.[338] Also clearly punishable is a threat by a student against a teacher[339] or administrator,[340] as is surly use of epithets directed at a teacher[341] or throwing a cup of coffee on a teacher.[342]

A student is bound to know that "repetitive skipping of classes, absences from school, and skipping of detention" might lead to disciplinary sanctions.[343] Turning in two false fire alarms necessitating evacuations of the building and bringing out fire department vehicles and personnel has been held to constitute "gross misconduct," which would support an involuntary transfer of the student to another school.[344]

Recognition of a student organization, required to obtain certain high school privileges, cannot be withheld under a policy that it not be granted to "student groups which advocate 'controversial' ideas or which 'stress one side' of issues."[345] In so ruling, a federal district court in Michigan relied solely on *Tinker*, ignoring a United States Supreme Court decision almost a year earlier directly in point except that the educational institution was a college.[346]

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335. *Id.* at 891.
336. People in Interest of K.P., 514 P.2d 1131 (Colo. 1973).
337. Black Coalition v. Portland School District No. 1, 484 F.2d 1040 (9th Cir. 1973).
338. Tucson Public Schools, District No. 1 of Pima County v. Green, 17 Ariz. App. 91, 495 P.2d 861 (1972).
339. Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973).
340. Brown v. Greer, 296 F. Supp. 595 (S.D. Miss. 1969).
341. Boykins v. Fairfield Board of Education, 492 F.2d 697 (5th Cir. 1974).
342. Greene v. Moore, 373 F. Supp. 1194 (N.D. Tex. 1974).
343. Fielder v. Board of Education of School District of Winnebago, Nebraska, 346 F. Supp. 722 (D. Neb. 1972).
344. Betts v. Board of Education of City of Chicago, 466 F.2d 629 (7th Cir. 1972).
345. Dixon v. Beresh, 361 F. Supp. 253 (E.D. Mich. 1973).
346. Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972).

The Tenth Circuit Court of Appeals has held that a student can be barred from running for copresident of the high school student council because the student wrote a letter using vulgar language and characterizing the principal as a "Nazi" and the student council as a "farce."[347] Student body bylaws provided that candidates display qualities of good citizenship and that the principal was to determine it. The court found no violation of the Constitution or federal statutes.

CONCLUDING COMMENTS

If there is one thing the field of education law does not need any more of, it is simplistic conclusions. Thus, the preceding record is left to speak for itself, for the reader to consider and utilize as he wishes.

Now, however, the author will offer a few observations of his own in the hope they may be of interest to some concerned with the increasingly significant legal issues involved in control of student conduct.

In analyzing the cases reported earlier, the question arises why some of them even went to court. In the answer to this question, one is led to suspect as a factor a rigid clinging by some school officials to prerogatives of authority more fitted to a military operation than to an educational endeavor. Even in some cases decided in favor of school boards, one may wonder what were the costs of the cases to the educational processes of the school districts.

Educational literature profusely contends that all matters under the aegis of the school should be considered important parts of the curriculum. If this contention is valid, what is the justification for restricting the extracurricular activities of students who have married in conformity with relevant statutes?[348]

When a school board must be forced by a court to open its doors to a girl who desires more education but who has committed the "offense" of bearing an out-of-wedlock child, what—and whose—values are applied?[349]

What is the goal of school authorities who try summarily to exclude a boy who brings on the premises a magazine in which one article contains "objectionable" words when those same words ap-

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347. Palacios v. Foltz, 441 F.2d 1196 (10th Cir. 1971).

348. *See* the section "Restrictions on Extracurricular Activities" in *Marriage and/or Parenthood, supra.*

349. Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (N.D. Miss. 1969).

pear in a book read in English class and in items in the school library?[350]

What virtue is displayed by school authorities who condone a "vulgar" sign on the wall of the athletic coaches' office and seek to exclude a student who puts similar words in a publication?[351]

How is one to evaluate a statement presented in court by counsel for the school board, in defending the banning of a student-paid advertisement critical of the Vietnam war, that a school newspaper "would be just as valuable an educational tool if it were compiled and then consigned to the files without publication?"[352]

How can a student or a citizen have confidence in school officials who tell a court they must bar all girls' slacks because they cannot be specific about types of slacks, when they have adopted detailed statements describing the kinds of jewelry and ornamentation that may not be worn in the school?[353]

What credibility accrues to a school board that tries to bar distribution of a publication because it includes commercial advertisements when school-sponsored papers have fifteen to twenty commercial advertisements in each edition whereas the objected-to publication carries four or five on the average?[354]

What degree of rationality is displayed by school authorities who, based on only one incident, offer as a reason for adhering to a rule barring married students from extracurricular activities that "a spouse is apt to be incited to violence against a teacher"?[355]

What attitude is communicated by a school board that, after having been judicially ordered to admit one unwed mother, has to be sued again in federal court a year later to bar its enforcement of the same policy against another unwed mother?[356]

What objectivity can be ascribed to a principal who testifies in court that "whenever I see a long-hair youngster he is usually leading a riot, he has gotten through committing a crime, he is a dope addict or some such thing"?[357]

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350. Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).
351. Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (S.D. Tex. 1969).
352. Zucker v. Panitz, 299 F. Supp. 102, 103 (S.D.N.Y. 1969).
353. Scott v. Board of Education, 61 Misc. 2d 333, 305 N.Y.S.2d 601 (1969).
354. Peterson v. Board of Education of School District No. 1 of Lincoln, Nebraska, 370 F. Supp. 1208 (D. Neb. 1973).
355. Romans v. Crenshaw, 354 F. Supp. 868, 871 (S.D. Tex. 1972).
356. Shull v. Columbus Municipal Separate School District, 338 F. Supp. 1376, 1378 (N.D. Miss. 1972).
357. Breen v. Kahl, 296 F. Supp. 702, 705 (W.D. Wis. 1969), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 90 S. Ct. 1836 (1970).

What lesson is learned when the principals of a school system, after hearing of a plan by some students to wear armbands supporting a truce in Vietnam, decide to bar this symbol though they have permitted the wearing of buttons relating to national political campaigns and other types of insignia, including the Iron Cross?[358]

How is one to assess an administrative bureaucracy that takes a full academic year to decide whether a publication may be distributed?[359]

"When school authorities complain variously that [certain] hair styles are inspired by a communist conspiracy, that they make boys look like girls, that they promote confusion as to the use of rest rooms and that they destroy the students' moral fiber, then it is little wonder even moderate students complain of 'getting up tight.'"[360]

A substantial proportion of the cases discussed in this paper involve forms of student expression. Educational writers and speakers, almost as a unified voice, say the prime function of the school is to develop effective citizens for our democracy. It is therefore disquieting to examine the types and extent of authority that some school officials will spend energy and tax money to attempt to justify in court.

Lest the foregoing incorrectly indicate that the writer sees only the faults of school authorities, it must be emphasized that a great number of actual and threatened "court cases" are encouraged or "manufactured" by individuals or groups whose motivations are as worthy of condemnation as are the previously mentioned actions of certain school personnel. Challenges to authority are not virtuous per se. Frivolous challenges are as unlikely to lead to a better society as is contentment with the status quo.

The last decade however, has been an era of questioning of authority in general. Not surprisingly, the attitude of resistance to authority is being focused increasingly on the schools. After all, the schools are the arm of government that most directly affects the daily existence of youths. How school personnel react to the challenge to their authority is therefore important not only for the function of the schools but for the development of youths' general attitudes toward their government.

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358. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969).

359. Koppell v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972).

360. Bishop v. Colaw, 450 F.2d 1069, 1078 (8th Cir. 1971) (concurring opinion of Circuit Judge Lay).

Misunderstandings about the legal rights of students must be corrected. Too frequently school officials involved in this issue approach it from one of two extremes, neither of which bodes well. One is a lack of awareness of what the courts are saying the rights of students are in certain types of heretofore unadjudicated situations. The other is a reluctance by school authorities to take reasonable stands and to gather evidence and muster appropriate constitutional arguments to support their needs in operating efficient and effective schools. If school boards and professional personnel are able to develop sound educational and legal arguments to support their actions in cases of discipline, they need not fear the courts. If they are unable to do so, they simply should not try to impose their whims, hunches, or tastes on the students.

Most challenges to school authority come from those who hold a minority point of view on a particular matter—those who question the authority of school officials either to speak for the majority in certain matters or to enforce the majority's belief on the minority. Cases that involve freedom of speech or freedom of appearance clearly evolve from an attempt by a minority to speak or dress in a fashion the majority does not approve. Although the "will of the majority" is a properly revered tenet of American political philosophy, the Bill of Rights was designed to remove certain fundamental rights of individuals from the control of the majority at a given time.

The present American preoccupation with "taking the matter to court," rather than to the legislative or executive branch, seems to indicate that a substantial number of cases dealing with control of student activities are to be expected. The receptiveness of most federal courts to suits brought by parents and students under the revitalized Civil Rights Act of 1871 is a relatively new factor contributing to an upsurge in published judicial opinions in the area. (Single-judge federal court decisions are generally published, unlike most decisions by state-level trial courts.) Hopefully, better-selected and better-prepared cases in the future will more clearly define the blurred border between the rights of parents and pupils and the powers and duties of school authorities.

It would be naively idealistic to contend that the proclivities of individual judges are not discernible in decisions in cases concerning control of student activities. Indeed, a certain amount of subjectivity among judges is inevitable in an area as sensitive as this. Yet the courts actually disagree little on fundamentals. Differing

results come primarily from differing patterns of facts and arguments.

Legally, who wins the case is not nearly as crucial as why the decision was made. Educationally, who wins the case is not nearly as crucial as why the discipline situation could not have been resolved short of recourse to the public, adversary forum of a court.

THE FIRST SERIES OF FIVE PAPERS ON STUDENT CONTROL AND STUDENT RIGHTS ARE COMPLETE

They include:

1. ***Legal Aspects of Control of Student Activities by Public School Authorities***, by E. Edmund Reutter, Jr., professor of education, Columbia University;

2. ***Rights and Freedoms of Public School Students: Directions from the 1960s***, by Dale Gaddy, director, Microform Project, American Association of Junior Colleges, Washington, D.C.;

3. ***Suspension and Expulsion of Public School Students***, by Robert E. Phay, associate professor of public law and government, University of North Carolina;

4. ***Legal Aspects of Crime Investigation in the Public Schools***, by William G. Buss, professor of law, University of Iowa; and

5. ***Legal Aspects of Student Records***, by Henry E. Butler, Jr., professor of educational administration, University of Arizona; K. D. Moran, assistant executive director of Kansas Association of School Boards, Topeka, Kansas; Floyd A. Vanderpool, Jr., principal, Stober Elementary School, Lakewood, Colorado.