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ABSTRACT

Student protest and misconduct have frequently resulted in the suspension or expulsion of a student. This monograph examines the school's authority to suspend or expel a student, with the purpose of determining when such an action is permissible and when it is prohibited because it infringes on a student's constitutional and, sometimes, statutory rights. The procedural issues that arise when the school has decided to remove a student are not included. Issues discussed include demonstrations, publications and underground newspapers, weapons on school grounds, school property damage, personal appearance, student marital and/or parental status, and out-of-school conduct. (Author/MLF)

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THE LAW OF SUSPENSION AND EXPULSION:

An Examination of the Substantive Issues in Controlling Student Conduct

ROBERT E. PHAY

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R.E.P.

FOREWORD

This monograph by Robert E. Phay 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.

Student vandalism, misconduct, and protest in schools have been increasing at alarming rates in recent years. In response to student conduct that violates laws or school policies, school officials often seek to punish the offending students by suspending or expelling them from school. Mr. Phay examines the school's authority to suspend or expel a student, weighing such authority against the student's constitutional and statutory rights.

Mr. Phay is professor of public law and government at the Institute of Government of the University of North Carolina at Chapel Hill. He received his bachelor's degree with honors from the University of Mississippi in 1960 and his law degree from Yale University in 1963.

Specializing in the legal aspects of public and higher education, Mr. Phay has authored a variety of publications in this area. He was editor of the 1973 *Yearbook of School Law* and authored *Suspension and Expulsion of Public School Students*, a monograph published by NOLPE in 1971. He serves as legal consultant for the North Carolina School Boards Association.

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ERIC Clearinghouse on
Educational Management

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An Examination of the Substantive Issues in Controlling Student Conduct

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Robert E. Phay

INTRODUCTION

One of the most difficult and persistent problems facing school boards and school administrators today is how to deal with student conduct that is considered unacceptable in the school. Student protest and serious misconduct are frequent in the public schools. A survey of the nation's 29,000 public and nonpublic high schools by the House Subcommittee on General Education in 1969 reported that 18 percent had had a serious student protest.[1] Serious protest was defined as student activity involving use of strikes, boycotts, sit-ins, or riots.

This percentage did not decline in the years that immediately followed, nor did the violence, which has increased at an alarming rate. In April 1975, the Senate Subcommittee to Investigate Juvenile Delinquency reported that between 1970 and 1973, homicides in the schools increased by 18.5 percent; rapes and attempted rapes by 40.1 percent; robberies by 36.7 percent; assaults on students by 85.3 percent; assaults on teachers by 77.4 percent; and drug and alcohol offenses by 37.5 percent.[2]

The subcommittee's report states: "Simply put, the trend in school violence over the last decade in America has been, and continues to

1. The National Association of Secondary School Principals reported in 1969 that 59 percent of 1,000 high schools studied had experienced some kind of student protest or activism.

2. Birch Bayh, OUR NATION'S SCHOOLS—A REPORT CARD: "A" IN SCHOOL VIOLENCE AND VANDALISM. PRELIMINARY REPORT OF THE SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY, BASED ON INVESTIGATIONS, 1971-1975, 4 (Washington, D.C.: 94th Congress, 1st Session, Committee print for use of the Committee on the Judiciary, 1975).

be, alarmingly and dramatically upward."[3] The subcommittee chairman, Senator Birch Bayh of Indiana, emphasizes the seriousness of the problem when he notes that "[t]he ledger of violence confronting our schools reads like a casualty list from a war zone or a vice squad annual report."[4]

In addition to the human cost, the property cost is high. The report states that the cost of vandalism "equals the total amount expended on textbooks throughout the country in 1972."[5]

The concern generated by increased violence also has not declined. The Sixth Annual (1974) Gallup Poll of Public Attitudes toward Education reported that the public considered lack of discipline in the schools to be the primary school problem (for the fifth time in six years). Two-thirds of those interviewed believed schools are "a breeding ground" for crime and violence. Most recently, the United States Supreme Court, in *Goss v. Lopez*,[6] noted the size of the problem: "It is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem, and one which has increased in recent months."[7]

Student protest and misconduct have frequently resulted in the suspension or expulsion of a student. This monograph will examine the school's authority to suspend or expel a student, with the purpose of determining when such an action is permissible and when it is prohibited because it infringes on a student's constitutional, and sometimes statutory, rights. The procedural issues that arise when the school has decided to remove a student are not included but perhaps will be the subject of a future monograph.

This monograph will not extensively analyze the causes of student unrest, but some understanding and appreciation of why students rebel and protest are essential to a constructive approach to the problem. Such understanding is probably more important to good judgment in applying the law than mere knowledge of the school's authority and the requirements of the law.

The causes of unrest in high schools are many. Dissent has focused on a wide variety of concerns that differ from school to school. A New Jersey school board report listed thirty-seven issues that have resulted in protest, ranging from those over which the school has little or no control—such as the events in Southeast Asia, the CIA, and the reces-

3. *Id.*

4. News and Observer (Raleigh, N.C.), April 10, 1957, at 17, col. 1.

5. Bayh, *supra* note 2, at 6.

6. 419 U.S. 565 (1975).

7. Although surveys of school misconduct continue to report an increase in crime, it is my opinion that major crime in the schools, at least in the Southern and border states, has declined in the last three to four years. *See* R. Phay, *Written Student Misconduct Codes: An Essential Ingredient in Reducing and Controlling Student Misconduct*, 6 SCHOOL LAW BULL. (Oct. 1975).

sion—to those that are basically school matters—such as dress and hair regulations, smoking rules, and curriculum.[8]

A 1969 report by the United States Office of Education listed the following major issues with which students are typically concerned: (1) dehumanization of institutional life; (2) inequities in society; (3) educational irrelevancies; and (4) racial and cultural discrimination.[9] These concerns have produced a discontent that a single spark can ignite. Incidents that have furnished such a spark were found to fall into five general categories: (1) racial conflicts, (2) political protests, (3) resentment of dress regulations, (4) objections to disciplinary actions, and (5) educational policy issues. These issues continue to be the primary ones that concern students today, and these reports indicate that some delinquency is created by the school. Greater restrictions, particularly when they are viewed as unfair, often produce greater student reactions, and when the stress level is raised in school, so is the misconduct.

The causes of school unrest listed above only reflect the concerns in society at large; the increase in crime in schools merely mirrors the increase in crime everywhere.[10] The problem, however, is that parents want schools to be as they remember them 30 years ago, when schools indeed were more disciplined and structured and had an authority that no longer exists. For schools to impose the discipline they once did, however, simply is not possible. One reason is that they no longer have the degree of legal authority they once had. The almost total in loco parentis role the school enjoyed in years gone by, when it had almost the same authority over the pupil while he was at school as the parent had over him at home, is gone. Over time, the in loco parentis doctrine was substantially modified, particularly as applied to secondary school pupils, and the courts became more willing to examine school actions and to overturn those found arbitrary or unreasonable. Another reason why the discipline and structure found in schools 30 years ago are not possible today is that the former level of discipline is not today found or imposed in the home and in other places of our society. The discipline in the public schools of 30 years ago—schools that were basically white and middle-class or black or ethnically identifiable—was reinforced by the discipline standard set at home. Consequently, schools, which had a homogeneous student body, mirrored home standards. In many respects, schools do that today, but they now are pluralistic, containing all classes and races of people. Thus it seems to me that students today cannot be expected to modify their behavior in school substantially, at least not for long periods of time, when the restraints placed on the student in school are not found outside the school. The student who has substantially modified his be-

8. N. J. Federation of District Boards of Education, Student Activism and Involvement in the Education Program (1970).

9. U.S. Office of Education, Report of Subcommittee on Easing Tensions in Education (1969).

10. *See The Crime Wave*, 105 Time, June 30, 1975, at 10-24.

havior to acceptable school standards when he enters the school door will revert to his usual behavior when he finds himself unsupervised.

I also note that most of the incidents of unrest in high schools occur suddenly and spontaneously and are touched off, for example, by the election of cheerleaders all of one race, the search of a student, or a fight between two students. Most college disorders, on the other hand, tend to be planned, structured, and deliberate acts of protest. The spontaneous nature of the high school disruption makes responsible action more difficult for the teacher, principal, superintendent, and school board because they must react immediately to keep the incident from reaching crisis proportions. Such situations require delicate judgment.

Whatever the cause or precipitating act, the disruptive conduct often results in suspension or expulsion of a student. Removing a student from school is a serious action by the school. (It can, however, be used in a nonpunitive context, for example, to reduce tensions or to provide more time than is immediately available to deal with a problem.) Because of its seriousness, only seldom can it be justified when the removal is long-term. One justifiable occasion is when a student's continued presence on the school grounds endangers the school's proper functioning or the safety or well-being of himself or other members of the school community. Another occasion arises when the suspension offers the only effective way of both communicating to the student that his conduct was unacceptable and emphasizing to his parents that they must accept a greater responsibility in helping the student meet school standards of acceptable conduct; this situation is the usual reason for imposing short-term suspensions. When either of these situations exists, the student should be removed from the school. When neither exists, other ways of dealing with the problem should be sought.

Separating a student from school is a poor method of discipline. Students who misbehave usually have academic difficulties, and removing them from school almost inevitably adds to these problems. Frequently, suspension or expulsion is precisely what a delinquent student wants. Also, as the school breaks contact with a student and loses its opportunity to work with him to eliminate his antisocial behavior, he may contine his misconduct in a way more dangerous to himself and others than the behavior for which he was expelled.

Thus school expulsion should be avoided if possible. This does not mean, however, that a disruptive child should be retained in the classroom or that improper conduct should be ignored. When the classroom is not an appropriate place for a problem child, other provisions should be made for him if possible. For example, he might be put into a special group where closer supervision and greater individual attention are available. Concerned adults and appropriate community facilities like family service agencies, mental health clinics, or the public health service might be asked to work with the problem student. It is important to note, however, that these alternatives to removing the student are expensive.

I also note that some children disrupt classes because they feel alienated or inadequate. For these children, the school should try to offer learning in a way that builds self-confidence rather than destroys self-respect. Classroom instruction should have meaning and relevance to the child's situation. If it does, an important preventive action has been taken that should reduce the need to use suspension or expulsion as a disciplinary device. To accomplish this difficult goal, the school may need to make adjustments in the curriculum to provide a more productive experience for him. These actions also cost money.

Authority of the School Board and Administration to Suspend or Expel Students

Until recently, the school board and its employees occupied a sanctified position with respect to judicial review; their decisions to suspend or expel were seldom questioned by the courts. To be sure, the courts in some cases overturned a school action or rule. In 1902, for example, a teacher in Missouri was found liable for severely flogging a child,[11] and in 1885, a Wisconsin court held unreasonable a school rule that required children to bring a piece of firewood into the school whenever they passed the woodpile.[12]

Most challenges to school operations, however, have had a cold reception by the courts. For example, in 1890, a Missouri high school student was expelled for "general bad conduct." No specific reason was given for the expulsion, and none was required by the court, which was reluctant to substitute its judgment for that of the school board.[13] In an Illinois case in 1913, a student was expelled for allegedly violating a rule forbidding membership in a fraternity. Although the student denied belonging to a fraternity, his request for a hearing was refused; the court said that under no circumstances—except when fraud, corruption, oppression, or gross injustice is palpably shown—is a court of law authorized to review the decision of a board of education and to substitute its judgment for the board's.[14]

Underlying the courts' reluctance to review school decisions is the legal concept in loco parentis. According to this doctrine, the school

11. Haycraft v. Griggsby, 94 Mo. App. 74, 67 S.W. 965 (1902).

12. State *ex rel.* Bowe v. Board of Educ., 63 Wis. 234, 23 N.W. 102 (1885).

13. State *ex rel.* Crain v. Hamilton, 42 Mo. App. 24 (1890). Recently a federal district court gave the same reason, saying that school administrators rather than the courts should judge whether a regulation prohibiting mustaches and beards is reasonable. Stevenson v. Wheeler Cty. Bd. of Educ., 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir. 1970).

14. Smith v. Board of Educ., 182 Ill. App. 342 (1913). A recent Tennessee decision that upheld a school regulation against long hair is in accord: "Unless the regulation was arbitrary, capricious, unreasonable, or discriminatory, it must stand. Courts presume the validity of regulations adopted by public bodies acting within their authority upon an adequate showing of reasonable necessity for the regulations." Brownlee v. Bradley City Bd., 311 F. Supp. 1360 (E.D. Tenn. 1970).

stands in place of the parent to the child under its jurisdiction; it thus has almost the same authority over the pupil while he is at school as the parent has over him at home.[15] Courts were reluctant to question school actions with respect to the child except in extreme cases such as those involving serious bodily injury or malicious discipline, as in the Missouri and Wisconsin cases just noted.

The assumption that school regulations are properly adopted and lawfully and reasonably implemented is obviously not always valid. As the importance of education increased in our society, courts began to consider education a right that could not be denied without proper reason and unless proper procedures were followed. Over time, the in loco parentis doctrine was substantially modified, particularly as applied to secondary school pupils, and the courts became more willing to examine school actions and to overturn those found arbitrary or unreasonable.[16]

The main assault against school limitations on student conduct has come from the application of the due process clause of the Fourteenth Amendment. Not many years ago, courts considered due process standards inapplicable to school action.[17] Today, courts apply these standards to school actions and procedures without hesitation.[18] For the past several years, courts not only have limited the types of controls that a school system may exercise over a student but also have defined minimum standards and procedures that a school must observe in disciplining students if it wishes to avoid constitutional infringement.[19]

15. For a history of the *in loco parentis* doctrine and a discussion of how it has been distorted, *see* GOLDSTEIN, THE SCOPE AND SOURCES OF SCHOOL BOARD AUTHORITY TO REGULATE STUDENT CONDUCT AND STATUS: A NONCONSTITUTIONAL ANALYSIS, 117 U. PA. L. REV. 373, 377-84 (1969). *See also* K. D. Moran, "An Historical Development of the doctrine *In Loco Parentis* with Court Interpretations in the United States" (Ed.D. diss., University of Kansas, 1967).

16. *See, e.g.*, Breen v. Kahl, 419 F.2d 1034, 1037 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). *See also* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378, 385-88 (1969), for a discussion of the *in loco parentis* concept in the local schools.

17. State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, *cert. denied*, 319 U.S. 748 (1942).

18. In the related area of juvenile court proceedings, the United States Supreme Court has required its procedure to "measure up to the essentials of due process and fair treatment." *In re* Gault, 387 U.S. 1 (1967). *See also* Kent v. United States, 383 U.S. 541 (1966).

19. This is not to suggest, however, that the in loco parentis concept and limitations placed on the child because of his age and maturity no longer apply to secondary school children. As Justice Stewart observed in a concurring opinion, the rights of children are not coextensive with those of adults. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 515 (1969). Elsewhere he noted: "[A state] may permissibly determine that, at least in some precisely delineated areas, a child like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, 390 U.S. 629, 649-50 (1968).

For an interesting analysis of changing judicial standards, *see* Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612

In determining whether school officials, in suspending or expelling a student, have infringed on his constitutional rights, the courts must balance the school's interests against the student's interests. On one side is the student's constitutional right to remain in school. In evaluating this right, the court must consider the type of misconduct and whether it is a basis for expulsion; marking on a wall, for example, will seldom justify expulsion. The court must also consider whether the conduct found objectionable by school authorities is conduct the school can prohibit; some types of demonstrations, for example, are protected by the First Amendment guarantee of free speech. Another matter the court must consider is the type of process the student must be granted before his right to attend school can be denied, but this issue is beyond the scope of this monograph.

On the other side is the school's duty to protect children and school property from injury and to see that the right of *all* students to obtain an education is not unduly jeopardized, nor the educational process disrupted. These often conflicting interests are considered in the following review of the types of conduct for which a school may suspend or expel a student.

Demonstrations, Armbands, and Freedom Buttons: Disruption of School Operations

Student demonstrations have raised the question of students' rights of free speech and assembly. Since the 1943 flag salute decision of *West Virginia v. Barnette*, many court rulings have reaffirmed the proposition that the student does not leave his constitutional rights at the schoolhouse door; he may not be expelled for exercising First Amendment rights of speech, press, or assembly.[20]

But the student's rights of speech and assembly are not absolute. They can be curtailed, as the California Supreme Court pointed out in a case arising from the Berkeley filthy-speech movement in 1967:

> An individual cannot escape from social constraint merely by asserting that

(1970). Goldstein sees the current judicial scrutiny and skepticism of school actions as a return to the late nineteenth century and early part of this century, when courts did not hesitate to declare school board actions invalid if they appeared to go beyond the scope of board power.

20. 319 U.S. 624 (1943). Several old cases placed limitations on speech that today would be considered unconstitutional. In Wooster v. Sunderland, 27 Cal. App. 51, 148 P. 959 (1919), the court upheld the expulsion of a student who had made a speech criticizing the school board; and in State *ex rel.* Dresser v. District Bd. of School Dist. No. 1, 135 Wis. 619, 116 N.W. 232 (1908), the court upheld the expulsion of a student who published a satirical poem on school rules in a local newspaper. The recent United States Supreme Court decisions in Pickering v. Board of Educ., 391 U.S. 563 (1968), and New York Times v. Sullivan, 376 U.S. 254 (1964), make such restrictions on student criticism clearly an unconstitutional abridgment of free speech. For an early case permitting student criticism of school officials, see Murphy v. Board of Directors of Indep. Dist. of Marengo, 30 Iowa 429 (1870).

he is engaged in political talk or action. Thus, reasonable restrictions on the freedoms of speech and assembly are recognized in relation to public agencies that have a valid interest in maintaining good order and proper decorum.[21]

The United States Supreme Court established the standard for balancing students' rights with the state's interest in maintaining discipline and order in the public schools in *Tinker v. Des Moines Independent Community School District*,[22] the first secondary school disruption case ever decided by the Court. The case involved junior and senior high school students who wore black armbands to school to protest the Vietnam War. The school adopted a policy requiring any student who wore an armband at school to remove it; if he refused, he would be suspended until he returned without the armband. When John and Mary Tinker and some of their friends wore armbands to school, they were suspended in accordance with this policy. No class disruption was evident, nor were any threats or acts of violence, though a few hostile remarks were made to the children with armbands.

The Court found that students are "persons" under the Constitution and thus have fundamental rights that the state must respect. It found the wearing of black armbands to protest the Vietnam War to be such a right; the act was symbolic speech protected by the First Amendment.

Recognizing the state's important interest in protecting the orderly education of its children, the Court affirmed the need for "comprehensive authority of the states and of school officials, consistent with fundamental safeguards, to prescribe and control conduct in school." However, the Court found that when the First Amendment rights of students and the rules of school officials collide, these two interests must be balanced to determine on the facts whether abridgment of student speech is justified.

The Court concluded that the school regulation was an attempt to avoid controversy that might result from opposition to the Vietnam War shown by wearing armbands. The schools are not a place where controversy can be eliminated, the Court said, and in the absence of evidence that the wearing of armbands would "materially and substantially disrupt the work and discipline of the school," the school cannot prohibit such protest.

In defining the burden of justification that the school officials must meet, the Court emphasized that ". . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." There must be facts that ". . . might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," or substantial disruption must have actually occurred.

21. Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 471 (1967). *See also* American Civil Liberties Union v. Board of Educ. of Los Angeles, 55 Cal. 2d 167, 359 P.2d 45 (1961).

22. 393 U.S. 503 (1969).

Even as the Court firmly established a broad student right of free expression in the school environment, it carefully pointed out that the First Amendment does not provide absolute protection for student expression.

> 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 guarantee of freedom of speech.[23]

The Court characterized wearing of armbands in *Tinker*, however, as "a silent, passive expression of opinion unaccompanied by any disorder or disturbance." Thus, no justification was evident for the school's prohibiting the black armbands or punishing these students for violating this prohibition.

The *Tinker* standard is not easy to apply; the Court made little attempt to clarify, define, or narrow the meaning of "material and substantial disruption."[24] To understand what the Court considered to be "material and substantial disruption," we should examine two 1966 Fifth Circuit Court decisions from which the standard was drawn.

In one, *Burnside v. Byars*,[25] a number of high school students were suspended for wearing to school buttons that bore the legends "One Man One Vote" and "SNCC" after being warned by the principal that school regulations forbade such action. The evidence indicated that the buttons evoked only "mild curiosity" from the other school children. The court said this evidence was not a basis for finding "material and substantial interference with the requirements of appropriate discipline in the operation of the school," a standard the court required to justify the abridgment of free speech. Thus, the Fifth Circuit found the wearing of "freedom buttons" to be protected "symbolic speech" and ordered the students reinstated.[26]

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23. *Id.* at 513.

24. Two weeks after the *Tinker* decision, the Supreme Court denied certiorari in a case involving the suspension of college students for disruptive activities. Justice Fortas, who wrote the majority opinion in *Tinker*, made the following statement:

> I agree that certiorari should be denied. The petitioners were suspended from college not for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others. An adequate hearing was afforded them on the issue of suspension. The petitioners contend that their conduct was protected by the First Amendment but the findings of the District Court, which were accepted by the Court of Appeals, establish that the petitioners here engaged in an aggressive and violent demonstration and not in peaceful, nondisruptive expression such as was involved in [Tinker]. The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments. [Barker v. Hardway, 394 U.S. 905 (1969).]

25. 363 F.2d 744 (5th Cir. 1966).

26. *See* Aguirre v. Tahoka Indep. School Dist., 311 F. Supp. 664 (N.D. Tex. 1970), in which the court found protest against school policies and practices by wearing brown armbands in the absence of school disruption to be protected by the First Amendment. *But see* the bizarre case of Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970), which held that if the University of Wyoming had permitted student

The second case, *Blackwell v. Issaquena County Board of Education*,[27] found both a similar regulation that prohibited the wearing of buttons and the suspensions made under that regulation to be permissible. The evidence in the case showed that students had pinned buttons on other students who did not want them, interrupted classes to distribute them, kept the halls in a state of confusion and disruption, and threw buttons into rooms while classes were being held. The court found that "more than a mild curiosity" had resulted from the students' conduct—rather an "unusual degree of commotion, boisterous conduct, collision with the rights of others, an undermining of authority, and a lack of order, discipline, and decorum." Finding that "the conduct was reprehensible and so inexorably tied to the wearing of the buttons that the two are not separable," the court held that the school regulation and suspensions were justified.

In applying the "disruption" standard, courts have sought to find the line between the nondisruptive "mild curiosity" in *Burnside* and the disruptive "commotion" in *Blackwell*. In *Karp v. Becken* (1973),[28] the Ninth Circuit Court of Appeals looked to these cases as it sought to define "substantial disruption" in a secondary school suspension suit. The incident that triggered the disruption was the cancellation by school officials of an athletic awards ceremony. Officials took the action because they feared violent confrontation between students who had announced to the media that they planned to protest the school's nonrenewal of a teacher's contract and members of the school's athletic club who had threatened to prevent the protest.

Although the ceremony was cancelled, some protesting students staged a walkout from classes. During the lunch hour, students and newsmen gathered in the school's multipurpose room, where the plaintiff distributed signs supporting the teacher. The vice-principal asked the students to surrender their signs to him. All did so except Karp, who asserted that his right to possess and distribute the signs was protected by the First Amendment. After a second request by the vice-principal, Karp surrendered the signs and was taken to the principal's office. While he was there, chanting, pushing, and shoving developed between the protesters and some members of the athlete club. School officials intervened, and the demonstration ended.

Karp was suspended for five days for bringing the signs onto campus and distributing them to other students. In federal district court, he sought to enjoin permanently the enforcement of this suspension.

In determining whether the evidence supported "a reasonable forecast of substantial disruption," the court outlined three guiding prin-

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football players to wear black armbands to protest alleged racial discrimination by Brigham Young University, a private sectarian institution, the University of Wyoming would have violated the establishment of religion clause of the First Amendment.

27. 363 F.2d 749 (5th Cir. 1966); *accord*, Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970); Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971).

28. 477 F.2d 171 (9th Cir. 1973).

ciples: (1) ". . . [The] First Amendment does not require school officials to wait until disruption actually occurs before they act." (2) "*Tinker* does not demand a certainty that disruption will occur. . . ." (3)". . . [T]he level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner."

The court, saying that it would not be a "Monday morning quarterback," found that the circumstances when the officials acted indicated that their forecast of an incident resulting in possible violence was not unreasonable.[29] Therefore, the school authorities were justified in taking the plaintiff's signs in order to prevent such an intident.

At the same time the court pointed out in *Karp* that even when the circumstances are such that school officials can reasonably forecast substantial disruption justifying curtailment of otherwise protected expressive conduct, this fact alone does not necessarily justify punishing students for exercising their First Amendment liberties. The court required separate justification in such circumstances, such as violation of a statute or a school regulation, for punishing student conduct that constituted "pure speech."[30]

Recognizing the difficulty of applying the *Tinker* disruption standard, the court in *Karp* admonished the federal courts to ". . . treat the *Tinker* rule as a flexible one dependent upon the totality of relevant facts in each case," and not to make it into ". . . a rigid rule to be applied without regard to the circumstances of each case." "Disruptions" and "interferences" are highly subjective terms, and attempts to quantify the degree of disturbance that will justify limitation on student expression are fruitless. Total incapacitation of the school

29. *Id.* at 175-76. The *Karp* court found that the record showed the following facts justifying a reasonable forecast of substantial disruption:

(1) On the morning involved, a newspaper article had appeared about the planned walkout, indicating that Karp was the reporter's source of information.

(2) School officials testified that school athletes had threatened to stop the walkout.

(3) The assembly program was canceled because of feared violent confrontation.

(4) Newsmen appeared on campus and set up their equipment, and Karp and other students were talking with them during a free period.

(5) The vice-principal testified that there was an intense feeling that "something was about to happen."

(6) There was a walkout despite cancellation of the awards ceremony.

(7) The school fire alarm was pulled at the time the assembly had been scheduled. It would have emptied every classroom had it not been previously disconnected by the vice-principal.

(8) Approximately 50 students congregated in the area of the school's multipurpose room and talked among themselves and with the news media.

(9) Excited by the general atmosphere, 20 to 30 junior high school students eating in the high school cafeteria interrupted their lunch period and ran into the multipurpose room to see what was happening.

(10) Karp left the school grounds to get the signs from his car, brought them onto campus, and distributed them to students in the multipurpose room.

30. *Id.* at 176.

program is not required; substantial interference with one lesson would probably justify the prohibition. The need for flexibility, however, does not relieve school authorities from having to show specifically that substantial or material disruption resulted or was reasonably likely to result from students' speech, picketing, or demonstration in a particular situation.

When the demonstration is carried out through "passive expression" that does not result in substantial disruption or invasion of the rights of others, as in *Tinker* and *Byars*, the student conduct is protected. Thus, in the absence of disruption, students may wear armbands, freedom buttons, or German Iron Crosses.[31] The *Tinker* decision, however, did not give students the right to speak out on any issue in any manner. When the speech or conduct results in disruption, the balance is weighted in favor of the state's interest in maintaining order and discipline in the public schools. Thus, it has been held that the First Amendment does not protect students when they walk out of classes;[32] refuse to go to classes;[33] sit in during class;[34] or demonstrate by moving through the hallways, disturbing students in class.[35]

Distribution of Underground Newspapers and Other Non-School-Sponsored Literature

Students have been suspended or expelled for distributing underground leaflets or newspapers. Since such distribution may fall within the First Amendment area of free speech, the question posed is similar to that in *Tinker*: Under what circumstances may the school restrict the exercise of speech in the interest of maintaining school operations?

The courts have decided enough cases within the last five years to permit defining with some clarity those instances when school limitations on the distribution of literature are constitutionally permissible. The permissible limitations can be divided into four broad categories:

1. The school may limit the distribution of literature if the distribution will result in or can reasonably be forecast to result in "material and substantial disruption of school activities."
2. It may set limitations on the time, place, and manner of distribution.

31. *See, e.g.*, Butts v. Dallas Indep. School Dist., 436 F.2d 728 (5th Cir. 1971). *But see* Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973), in which the court upheld the suspension of a student for wearing a Confederate flag on his jacket sleeve as justified by the tense racial situation of the school and the community.

32. Dunn v. Tyler, 460 F.2d 137 (5th Cir. 1970). *See also* Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973).

33. Gebert v. Hoffman, 336 F. Supp. 694 (E.D. Pa. 1972).

34. *Id; accord, In re* Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966).

35. Gebert v. Hoffman, 336 F. Supp. 694 (E.D. Pa. 1972).

3. It may prohibit the distribution of materials that are obscene, libelous, or inflammatory.
4. It may prohibit distribution when the manner of distribution involves the violation of school rules, though the literature itself may not be censorable.

The following sections survey the case law in each of these broad categories of permissible restraints. The discussion points out the lines that have been drawn between protected and unprotected distribution of literature and defines the standards that must be met by rules governing that distribution.

Limitations Based on a Forecast of Disruption

School officials have frequently based prohibition of student distribution of literature on a claim that disruption can be reasonably forecast if the distribution is permitted. The courts in these cases have looked to *Tinker's* warning that "undifferentiated fear" is not enough to justify abridgment of the right to speech and expression. They have tried to define the type of evidentiary showing that is necessary for a "reasonable forecast of disruption." "Bare allegations" of disruption by school officials are not enough, the Second Circuit Court of Appeals said.[36] The Fourth Circuit Court observed that there must be "substantial evidence which reasonably supports a forecast of likely disruption"[37]—or, as the Fifth Circuit noted, "demonstrable factors" and "objective evidence to support a 'forecast' of disruption."[38]

In a case before the Fifth Circuit Court of Appeals, *Shanley v. Northeast Independent School District*,[39] school officials contended that a reasonable forecast of disruption was supported by the controversial nature of the literature that the students had distributed. The court found that "controversy is . . . never sufficient in and of itself to stifle the view of any citizen. . . ." It further stated that "such paramount freedoms as speech and expression cannot be stifled on the sole ground of intuition." Other courts have echoed this rejection of unsubstantiated speculation as to what "might" happen or what "could result" as sufficient to support a "reasonable forecast of disruption."[40]

To justify a prohibition of literature distribution on the reasonable-forecast basis, the school has the burden of proof, and it is not an easy one to meet, as several court decisions demonstrate. For example, in *Shanley*, the Fifth Circuit Court rejected a contention that student reaction justified the prohibition.

36. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971).
37. Quarterman v. Byrd, 453 F.2d 54, 59 (4th Cir. 1971).
38. Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 974 (5th Cir. 1972).
39. *Id.*
40. *See, e.g.*, Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973).

> We are simply taking note here of the fact that disturbances themselves can be wholly without reasonable or rational basis, and that those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at expression merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance.[41]

The Ninth Circuit Court of Appeals, in considering a similar argument by school officials, indicated that officials must take steps to protect the reasonable exercise of free expression from the violent reactions of others. In *Jones v. Board of Regents*,[42] a nonstudent wearing sandwich boards that contained antiwar messages was passing out antiwar leaflets in violation of a university regulation against distributing handbills on campus. The campus police reported that two members of the crowd that gathered around the nonstudent demonstrator "were moved to tear the sandwich boards from Jones's body." The police also reported that after they were unsuccessful in keeping Jones off campus the first day, they received anonymous telephone threats that Jones would be removed from campus if the police did not remove him. The next day the campus police again removed Jones from campus for violating the school regulation.

The court found that Jones's activities were protected free speech, and the policemen had misdirected their efforts to maintain order. "It is clear that the police had the obligation of affording [Jones] the same protection they would have surely provided an innocent individual threatened, for example, by a hoodlum on the street."

When reasonable efforts fail to protect an individual from the reaction of others, it may be necessary to curtail his activities even though he is exercising his First Amendment rights. (However, the reactions of others do not necessarily justify punishing him.[43]) In two cases in which courts have upheld the curtailment of a student's speech, the threatened reactions of others were part of the evidence offered by school authorities to support their forecast of disruption and justify their actions.[44]

Although courts require school authorities who attempt to regulate the distribution of student publications to justify their action, this requirement can be met. As one court noted, "if a reasonable basis for a forecast of disruption exists, it is not necessary that the school stay its hand in exercising a power of prior restraint 'until the disruption actually occurs.'"[45] But in only two cases decided since *Tinker* have courts, in applying the *Tinker* standard, held that school officials

41. 462 F.2d at 974.

42. 436 F.2d 618 (9th Cir. 1970).

43. *See* text accompanying note 28 *supra*.

44. Karp v. Becken, 477 F.2d 171, 176 (9th Cir. 1973); Norton v. Discipline Comm., 419 F.2d 195, 199 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970).

45. Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971).

have presented sufficient evidence to forecast substantial disruption and thereby justify their prohibition on distribution of literature.[46]

In one case, *Norton v. Discipline Committee*,[47] a group of East Tennessee State University students were suspended for distributing on the campus "material of a false, seditious, and inflammatory nature." The literature, which was distributed in the spring of 1968 shortly after the student takeover at Columbia University, was critical of both the school administration and student apathy.

In affirming the district court's decision sustaining the suspensions, the Sixth Circuit Court of Appeals stated: "The students were urged to 'stand up and fight' and to 'assault the bastions of administrative tyranny.' This was an open exhortation to the students to engage in disorderly and destructive activities."[48] The inflammatory nature of the material, the testimony of school officials that they "feared" the material "could conceivably" cause an eruption on campus, and testimony that 25 students went to the school officials and wanted "to get rid of this group of agitators" persuaded the court that the school officials could reasonably have forecast substantial disruption, and therefore their actions were justified.

In the second case, *Baker v. Downey City Board of Education*,[49] a California federal district court found that the distribution of an underground newspaper containing "profanity and vulgarity" resulted in disruption that justified suspending distribution of the paper. The court based its decision on the testimony of school officials that the paper

> . . . threatened the educational program of the school and would diminish control and discipline. . . . A few teachers testified that there were disruptions in their classes and some testified to the contrary. On cross-examination. . . . [the principal] stated that some 25 to 30 teachers had told him of their classes being interrupted and of failure in attention on the part of students due to their reading of and talking about [the newspaper] during class.[50]

The correctness of the finding in *Norton* and *Baker* that the evidence presented by the school was sufficient to support "a reasonable forecast of substantial disruption" is questionable when other literature-distribution decisions are examined. In *Norton*, the school officials said that they "feared" that the students' distribution of leaflets "could conceivably cause an eruption." Other courts have held that evidence like "might" or "could conceivably" does not rise above the "undifferentiated fear" that the Supreme Court in *Tinker* said was

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46. *See also* Karp v. Becken, 477 F.2d 171 (9th Cir. 1973), and text accompanying notes 28-30 *supra*.

47. 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970).

48. *Id.* at 198.

49. 307 F. Supp. 517 (C.D. Cal. 1969).

50. *Id.* at 522.

insufficient to justify curtailing speech and distribution of literature.[51] In *Baker* the "profanity and vulgarity" complained of was essentially the same as that which other courts have held did not justify a reasonable forecast of substantial disruption.[52]

Limitations Based on Time, Place, and Manner of Distribution

A school clearly may regulate the distribution of literature with respect to time, place, and manner.[53] To be lawful, however, the regulations must be "consistent with the basic premise that the only purpose of any restriction on the distribution of literature is to promote orderly administration of school activities by preventing disruption and not to stifle freedom of expression."[54] Rules of time, place, and manner are not reasonable if their primary purpose and effect are to eliminate free expression. *Tinker* makes it clear that freedom of expression may not be "so circumscribed that it exists only in principle." It is not to be confined "to a telephone booth," the Supreme Court has said.

The leading case on the validity of rules of time, place, and manner is *Jacobs v. Board of School Commissioners*[55] in which the Seventh Circuit Court of Appeals quoted a 1972 United States Supreme Court decision:

> In determining whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, . . . we must weigh heavily the fact that communication is involved [and] the regulation must be narrowly tailored to further the State's legitimate interest.[56]

The *Jacobs* court found little evidence presented by the school board to justify the school's prohibiting all distribution when classes were in session. The court noted that there were periods when many students were on campus but were not involved in classroom activity. The regulation prevented these students from distributing or receiving

51. *See, e.g.*, Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973). *See also* Norton v. Discipline Comm., 399 U.S. 906 (1970) (Marshall J., dissenting), in which Mr. Justice Marshall argued that the Supreme Court should have granted certiorari because the university's justifications for stopping distribution of antiadministration leaflets on campus amounted to no more than "undifferentiated fears," insufficient reasons under *Tinker* to curtail the First Amendment rights of students.

52. *See, e.g.*, Jacobs v. Board of School Comm'rs, 490 F.2d 601, 610 (7th Cir. 1973), *vacated as moot*, 95 S. Ct. 848 (1975). *See also* Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972), in which the court described "failures of attention" similar to those complained of in *Baker* as "minor" and insufficient to justify curtailment of protected free speech. *But see* Karp v. Becken, 477 F.2d 171 (9th Cir. 1973), discussed in text accompanying notes 28-30 *supra*.

53. *See, e.g.*, Papish v. Board of Curators, 410 U.S. 667, 670 (1973); Jacobs v. Board of School Comm'rs, 490 F.2d 601, 609 (7th Cir. 1973), *vacated as moot*, 95 S. Ct. 848 (1975); Riseman v. School Comm'n, 439 F.2d 148, 149 (1st Cir. 1971).

54. Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973).

55. 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 95 S. Ct. 848 (1975).

56. *Id.* at 609, *quoting*, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

student newspapers at these times. This broad prohibition indicated that the regulation was not "narrowly drawn to further the state's legitimate interest in preventing material disruptions of classwork."

In *Shanley v. Northeastern Independent School District*,[57] the court held that the school's regulation was unconstitutionally overbroad because it established a prior restraint on distribution by high school students "at any time and in any place and for any reason." Thus *Jacobs* and *Shanley* indicate that broadly written regulations governing the time, place, and manner of distribution will not withstand challenges to their constitutionality. To withstand judicial scrutiny, they must be narrowly tailored to serve the proper purpose of preventing disruption of school operations.

Several other courts have indicated the types of rules that might be justified in limiting the time and place of distribution. The Seventh Circuit indicated that a rule prohibiting distribution during a fire drill might be reasonable.[58] The New Hampshire federal district court indicated that regulations aimed at avoiding disruption might reasonably require distribution to take place outside the school building or in the student lounge.[59] A Texas district court stated that in regulating time, place, and manner of distribution, school officials may prohibit reading newspapers in class, loud discussion in halls, or talking in the library.[60] Finally, coercion in distribution can be prohibited, though no case has dealt squarely with the issue. *Tinker*, drawing on the Fifth Circuit's decision in *Blackwell*, would indicate that in exercising their First Amendment rights, students may not coerce other students.[61]

Three other questions closely related to time, place, and manner of distribution have been litigated and undoubtedly will be raised again. One involves the authority of schools to regulate student conduct (here the distribution of literature) off campus and outside school hours. The second concerns the issue of school prohibition of the sale by students of non-school-sponsored publications. The third deals with school prohibition of the distribution of anonymous student materials.

Out-of-School Distribution

School regulations that govern the distribution of literature by students off campus and outside school hours have been challenged in at least two cases. In one, a California federal district court upheld the suspension from school of students who distributed an unofficial publication just outside the main gate to the school campus before school

57. 462 F.2d 960 (5th Cir. 1972). *See* text accompanying note 39 *supra*.

58. Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972). In this case, however, the court ruled that the school rule prohibiting distribution during a fire drill was impermissibly applied *ex post facto*.

59. Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973).

60. Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969).

61. 393 U.S. at 513.

hours.[62] Although the conduct occurred off campus and before school hours, it directly affected school operations, and therefore the school was justified in its action. A federal district court in Texas, however, was less willing to impute to the school authorities power to control student conduct that occurs off campus and outside school hours. In *Sullivan v. Houston Independent School District*, the court stated:

> Arguably, misconduct by students during non-school hours and away from school premises could, in certain situations, have such a lasting effect on other students that disruption could result during the next school day. Perhaps then administrators should be able to exercise some degree of influence over off-campus conduct. This court considers even this power questionable.
>
> However, under any circumstances, the school certainly may not exercise more control over off-campus behavior than over on-campus conduct.[63]

Sale of Non-School-Sponsored Literature

The school board regulation that was contested in *Jacobs* prohibited sales and solicitations for "any cause or commercial activity within any school or on its campus." The school board contended that this rule had the proper purpose of preventing the school premises from being used for "non-school purposes—particularly commercial activities." The court recognized that a school has a proper interest in restricting commercial activity on school premises. It found, however, that selling a newspaper is conduct that combines both speech and nonspeech elements. Thus the state's proper interest must be balanced with the students' fundamental First Amendment freedoms. In the words of the court,

> It had not been established, in our opinion, that regulations of the place, time, and manner of distribution cannot adequately serve the interests of maintaining good order in an educational atmosphere without forbidding sale and to that extent restricting the First Amendment rights of plaintiffs.[64]

A 1971 federal district court in North Carolina,[65] however, upheld a school regulation prohibiting student sale of newspapers on campus. In that case, the school authorities had not interfered with the student's right to distribute newspapers on campus; only when he began to *sell* the newspapers did they intervene. The court found no First Amendment issue, since the school sought only to regulate the commercial sale of merchandise at the school, a permissible regulation of school activities not involving constitutionally protected free speech.

On appeal, the Fourth Circuit Court of Appeals refused to review

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62. Baker v. Downey Bd. of Educ., 307 F. Supp. 517 (C.D. Calif. 1969). *See also In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

63. 307 F. Supp. 1328, 1341 (S.D. Tex. 1969).

64. Jacobs v. Board of School Comm'rs, 490 F.2d 601, 608-9 (7th Cir. 1973), *vacated as moot*, 95 S. Ct. 848 (1975). *See also* Peterson v. Board of Educ., 370 F. Supp. 1208 (D. Neb. 1973).

65. Cloak v. Cody, 326 F. Supp. 391 (M.D.N.C. 1971).

the constitutionality of the school regulation and the school's action taken pursuant to it because the plaintiff had left the state and no monetary damages had been shown.[66] Under these circumstances, the court considered any decision simply advisory. Accordingly, it vacated the district court's judgment and dismissed the action as moot.

Anonymous Materials

Jacobs also involved a challenge to the constitutionality of a school rule prohibiting distribution of any literature on campus "unless the name of every person or organization that shall have participated in the publication is plainly written in the distributable literature itself."[67] In deciding *Jacobs*, the Seventh Circuit Court of Appeals relied on *Talley v. California*.[68] In *Talley* the United States Supreme Court had ruled that a city ordinance prohibiting distribution of anonymous handbills was unconstitutional, noting the historical importance of anonymous handbills as a vehicle for criticizing oppressive laws and practices.

The *Jacobs* court found that anonymous student publications serve these same important purposes within the school community. Without anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies. The school board argued that the regulation was necessary in order to establish responsibility if libel or obscenity should be published. But the court rejected this argument because the regulation as drawn would prohibit protected anonymous expression as well as the unprotected speech it was intended to limit.

These cases make it clear that rules of time, place, and manner cannot be used to justify a vastly broader and more severe limitation on expression than those allowed under the *Tinker* disruption standard. The tests used by the Seventh Circuit in *Jacobs* illustrate the overlapping nature of the standards governing restraint of distribution that results in disruption and the standards governing regulation of time, place, and manner of distribution. If the rules are "reasonable" under these tests and if school authorities have given students notice of the rules as to time, place, and manner of distribution, then students may be required to comply with the rules even though the materials distributed come within the protection of the First and Fourteenth Amendments.

Limitations Based on Content of Materials

The First Amendment guarantee of free speech includes the right to distribute literature that is unpopular or offensive, but that right is not absolute. Distribution may be limited by school officials because

66. 449 F.2d 781 (4th Cir. 1971).
67. 490 F.2d at 607.
68. 362 U.S. 60 (1960).

of the material's content. A school may prohibit written statements that are obscene or libelous, contain "fighting words," or are "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." This section discusses these exceptions to protected First Amendment speech and shows how the courts have applied each one in cases in which schools have sought to justify limitations on distribution of written materials on the basis of that exception.

Obscenity

Obscene material is not protected by the First Amendment, and its distribution can therefore be prohibited.[69] The problem is to define what is obscene and what modifications, if any, should be made to the general legal definition of obscenity when it is applied to literature distributed on school grounds. The difficulty of defining obscenity and making these disfinctions has left the courts and school officials faced with what Justice Harlan called "the intractable obscenity problem."[70]

The Supreme Court attempted to define obscenity in *Miller v. California* (1973).[71] It said that the basic guidelines for determining whether literature is obscene are

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[72]

In 1974, the Court refined the *Miller* definition in *Jenkins v. Georgia*[73] by clarifying the "contemporary community standards" language. Emphasizing that under *Miller* the First Amendment does not require juries to apply hypothetical national or even statewide community standards, the Court said that *Miller* permitted "juries to rely on the understanding of the community from which they came as to contemporary standards . . ." Thus states have considerable latitude in framing statutes and regulations under *Miller*, and the obscenity standard may vary from jurisdiction to jurisdiction. However, the Court made it clear that the *Miller* definition requires as a minimum that the materials complained of "depict or describe patently offensive 'hard core' sexual conduct. . . ." Juries do not have "unbridled discretion in determining what is 'patently offensive,'" and their deci-

69. Miller v. California, 413 U.S. 15, 23 (1973).

70. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (concurring and dissenting opinion).

71. 413 U.S. 15 (1973).

72. *Id.* at 24.

73. 94 S. Ct. 2750 (1974).

sions are subject to review by appellate courts to ensure that First Amendment rights have been protected.

The question confronting the courts when they have had to judge school limitations on student distribution because the school said the material was obscene has been whether the special educational environment justifies a less stringent standard for testing obscenity. In trying to resolve this issue, the courts have distinguished between college students, most of whom are legally adults, and high school students, most of whom are minors.

College students. Papish v. The Board of Curators of the University of Missouri[74] concerned the constitutionality of the university's expulsion of a student because she had distributed on campus a newspaper containing a cartoon captioned "With Liberty and Justice For All" that showed a policeman raping the Statue of Liberty and the Goddess of Justice, plus an article entitled "Motherfucker Acquitted." After exhausting administrative procedures, the student appealed to the federal courts.

The district court ruled that the publication was obscene and therefore the university had not invaded protected First Amendment freedoms in stopping distribution and expelling the student. The court of appeals affirmed on different grounds. It recognized that the publication was not obscene and could have been distributed in the community at large. But it found that on the campus freedom of expression could properly be subordinated to other interests such as "conventions of decency in the use and display of language and pictures." The court concluded that the Constitution does not compel the university to allow such publications to be publicly sold or distributed on the campus.

The Supreme Court reversed, relying on *Healy v. James*,[75] in which the Court held that its precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." In *Papish* the Court concluded:

> We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.[76]

In judging whether this instance of censorship of allegedly obscene materials by college administrators was justified, the Court applied the legal definition of obscenity applicable to the community at large. The Court concluded that " . . . the First Amendment leaves no room

74. 410 U.S. 667 (1973).
75. 408 U.S. 169 (1972).
76. 410 U.S. at 670.

for the operation of a dual standard in the academic community with respect to the content of speech. . . ."

The Fourth Circuit Court in a recent case expressly followed the Supreme Court's decisions in *Papish* and *Healy*.[77] In that case, two students were expelled by a university after the campus newspaper published a letter that criticized the university's dormitory policy and ended with a "four letter" vulgarity referring to the university's president. The court found that the students had been expelled merely because the vulgar reference to the president was "offensive to good taste." The university was ordered to expunge the disciplinary action from the students' records and to allow them to continue their education if they were academically eligible. The court pointed out that college students enjoy First Amendment rights coextensive with those of other adults in the community. The vulgar reference was not legally obscene, and the fact that it was "offensive to good taste" did not justify the university's abridgement of the students' free speech.

These cases make it clear that on the college campus state laws and school regulations dealing with the distribution of obscene literature must be measured by the constitutional standards set out in *Miller*.

High school students. The *Papish* decision did not settle whether the *Miller* standard for testing obscenity applies with full force on the high school campus. In a 1968 case, *Ginsberg v. New York*,[78] the Supreme Court said that it had long recognized 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. . . .' " In that case the Court upheld the constitutionality of a New York statute that provided a different standard for testing the obscene nature of materials distributed to minors. A variable standard for obscenity that takes into consideration the age and maturity of the children to whom the materials were directed was not found to violate the First Amendment. Relying on *Ginsberg*, the lower courts have generally recognized that "[i]n the secondary school setting first amendment rights are not coextensive with those of adults" and "may be modified or curtailed by school regulations 'reasonably designed to adjust these rights to the needs of the school environment.' "[79]

Even with more limited First Amendment rights for high school students that allow a different standard for obscenity based on age and maturity, the cases dealing with distribution of allegedly obscene materials on high school campuses have applied tests that are very close to the Supreme Court standards.

In the most recent of these cases, *Jacobs*, the publication involved contained what the court described as "[a] few earthy words relating to bodily functions and sexual intercourse. . . ." In that case the

77. Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973).

78. 390 U.S. 629 (1968).

79. Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973).

court of appeals applied the test for obscenity set out in *Miller* and concluded that even when "[m]aking the widest conceivable allowances for differences between adults and high school students with respect to perception, maturity, or sensitivity, the material . . . could not be said to fulfill the *Miller* definition of obscenity." The *Jacobs* court also observed that the challenged school regulation that prohibited distribution on campus of literature "obscène as to minors" lacked specific definitions of the sexual conduct that the regulation forbade to be described or depicted. The court said that such regulations would be valid under *Miller*[80] only if they were specific.

The application of a variable obscenity standard was examined in 1972 in *Koppell v. Levine*.[81] In that case, high school students challenged a principal's impoundment of the school literary magazine because he found it obscene. The court reviewed the allegedly obscene materials under the same New York "variable obscenity" statute that had been approved by the Supreme Court in *Ginsberg*. The court found nothing in the student publication that was "obscene as to minors." In explaining the application of the concept of variable obscenity, it said,

> The definition of obscenity . . . may vary according to the group to whom material is directed or from whom it is withheld. Even regarding minors, however, constitutionally permissible censorship must be premised on a rational finding of harmfulness to the group in question.[82]

The Supreme Court's recent decisions on obscenity seem to reaffirm the Court's acceptance of the variable obscenity standard. But the concept is not a license to the states to abridge the First Amendment rights of high school students because the mode or content of their expression violates the "conventions of decency." The New York statute approved in *Ginsberg* largely mirrored the legal definition of obscenity for adults then extant.[83] The Seventh Circuit Court in *Jacobs* implies that even with a differential standard of obscenity based on age and maturity, the basic tests of the *Miller* definition must be

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80. Other cases have also applied the prevailing legal definition of obscenity in ruling that student publications were not obscene. *See, e.g.*, Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973). The one exception to this general statement is Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969). The federal district court stated, "Neither 'pornography' nor 'obscenity' as defined by law need be established to constitute a violation of . . . rules against profanity or vulgarity. . . . Plaintiff's First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas. . . ." *Id.* at 526-27. In light of the Supreme Court's decision in *Papish*, it is unlikely that the "decency" standard used in *Baker* would receive support today in the federal courts.

81. 347 F. Supp. 456 (E.D.N.Y. 1972).

82. *Id.* at 458-59.

83. Ginsberg v. New York, 390 U.S. 629, 635 (1968). For a typical state statute, *see* N.C. GEN. STAT. § 14-190.10 (1974). This statute makes it a misdemeanor to disseminate "sexually oriented" materials to minors. The variable standard for testing obscenity in this statute closely parallels the *Miller* definition of obscenity.

met.[84] In *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*,[85] a case dealing with the concept of variable obscenity in the context of a city's ordinance power, the Seventh Circuit stated:

> . . . [A] city may not, consonant with the First Amendment, go beyond the limitations inherent in the concept of variable obscenity in regulating the dissemination to juveniles of "objectionable" materials. . . . Although society is free to express its special concern for its children in a variety of regulatory schemes, it may not excise a child's constitutional prerogatives under the guise of protecting his interest.[86]

Inconsistency doctrine. Measuring allegedly obscene material against a legal definition of obscenity has not been the courts' only method of scrutinizing the attempts by school officials to restrain distribution of nonschool material because of its content. The "inconsistency doctrine" is also important in cases involving both college and high school students. Several cases have held that the materials to which school officials objected could not be forbidden because the language objected to was also found in materials in the school's library, in readings assigned by teachers for classwork, or in publications available to students on campus through student stores or newsstands.

In *Vought v. Van Buren Public Schools*,[87] the expulsion of a student was based on his possession of a "24 page tabloid-type" publication that contained the work "fuck." The officials said that he had violated a school regulation prohibiting the possession of obscene literature. The evidence in the case showed that the same word appeared in J. D. Salinger's *The Catcher in the Rye* and in an article in *Harper's Magazine*, both of which had been assigned in the school as classwork. The court found the inconsistency to be "so inherently unfair as to be arbitrary and unreasonable," constituting a denial of due process; for this reason the court ordered that the expelled student be reinstated in school.

Because of the many books, magazines, and pamphlets containing "profane and vulgar" language that are found in college and high school libraries and bookstores, the "inconsistency doctrine" represents a major obstacle for school officials who attempt to limit the distribution of student publications that have the same language.[88]

84. The courts have not been faced with whether the standards for testing obscenity would differ for students below the high school age. The Seventh Circuit in *Jacobs*, however, noted that its decisions did not answer that question and did not foreclose consideration of this question on the merits. Jacobs v. Board of School Comm'rs, 490 F.2d 601, 610 (7th Cir. 1973).

85. 493 F.2d 1297 (7th Cir. 1973).

86. *Id.* at 1302.

87. 306 F. Supp. 1388 (E.D. Mich. 1969).

88. For other cases applying the "inconsistency doctrine," *see* Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir. 1970); Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149, 1165-67 (S.D. Tex. 1971) (supplementary injunctions vacated on other grounds), 475 F.2d 1071 (5th Cir. 1973); and Channing Club v. Board of Regents, 317 F. Supp. 689 (N.D. Tex. 1970).

Libel

Libel, which is written or printed defamation, is unprotected by the First Amendment.[89] No court decision was found in which a school tried to prohibit a distribution of literature because it contained libel. Only in lower court dicta has this traditional exception to the First Amendment with respect to student publications been recognized as a basis for limiting distribution.[90]

Also, the general standard for libel is modified in the school context. The tort of libel is usually found when a false statement concerning another has been published that brings hatred, disgrace, ridicule, or contempt on that person and results in damage. The standard for judging alleged libel of school officials, however, is higher. The Supreme Court in *New York Times v. Sullivan*[91] held that the Constitution requires a public official to show that the statement was made with "actual malice" before recovery is available for a "defamatory falsehood relating to his official conduct." The Fourth Circuit Court of Appeals[92] recently indicated that this standard also applied to libel of a school official.

One way to deal with student distribution of allegedly libelous materials is for schools to prohibit what is considered to be libelous only when the school itself may be liable under state libel laws. In situations in which libel would injure individual school officials or other citizens, the libeled person could rely on the civil remedy and sue the student responsible.[93] This is precisely what an apartment manager in Columbus, Ohio, did. He filed a $1,000,000 libel suit against Ohio State University's student newspaper for articles he alleged to be "libelous and defamatory." The suit boomeranged, however, when the student responsible for the articles denied the charges and filed a countersuit charging the man with malicious prosecution and damage to her professional reputation. The court ordered him to pay the student $9,000.[94]

Criticism of School Officials and Advocacy of Violations of School Rules

The test to determine whether a student publication that criticizes school officials or advocates violation of school rules can be prohibited is the *Tinker* test of whether the publication is likely substantially and materially to disrupt school operations. The essential question

89. *See* New York Times v. Sullivan, 376 U.S. 254, 268 (1964).

90. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 971 (5th Cir. 1972); Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972).

91. 376 U.S. 254 (1964).

92. Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973). *See also* Trujillo v. Love, 322 F. Supp. 1266, 1271 (D. Colo. 1971).

93. *See* Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. CIV. RIGHTS. CIV. L. REV. 278, 290-91 (1970).

94. 9 THE CHRONICLE OF HIGHER EDUCATION 7 (Nov. 4, 1974).

is, When does a publication that is critical of school officials or advocates violating school rules lose its protection because it is likely to create a substantial disruption? The Supreme Court decision in *Healy v. James*,[95] which involved the refusal by a college to recognize a student organization, helps answer that question:

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
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> In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school."

It is significant that in *Healy* the Court linked the "reasonable forecast" language of *Tinker* to the test set out in *Brandenburg*[96] that "advocacy 'directed to inciting imminently lawless action and . . . likely to incite or produce such actions'" can be prohibited. This linkage gives added weight to those lower court decisions holding that mere criticism of school officials or advocacy of disruption is insufficient to support a reasonable forecast of disruption.

In *Scoville*,[97] summarized earlier, the student publication severely criticized the school policies and administrators and advocated that students either refuse to accept or destroy written materials distributed by the school. In that case, the district court found no evidence of actual disruption and concluded that the criticism and advocacy were insufficient to support a forecast of substantial disruption.

In a case decided by the New York Commissioner of Education, students had been suspended for distributing an article that advised incoming student to learn to steal passes, to forge teachers' signatures, to lie, and to sign their absence excuse cards in order to "make your stay more pleasurable and to drive the administration crazy."[98] The Commissioner held that the article was satire, protected by the First Amendment. He found no evidence that it had influenced any students to do or to attempt the acts suggested.[99]

"Fighting" Words

Insulting or "fighting" words, "the very utterance of which inflict injury or tend to incite an immediate breach of the peace," are not

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95. 408 U.S. 169, 188-89 (1972).
96. 395 U.S. 444, 447 (1969).
97. 425 F.2d 10 (7th Cir. 1970).
98. Matter of Brociner, 11 N.Y. Educ. Rpt. 204 (1972).
99. In light of *Healy*, the Sixth Circuit's decision in the Norton case that was discussed earlier is questionable. It is doubtful whether the testimony of school officials in *Norton* that they *"feared"* that the student publication advocating student disruption of school activities "could conceivably" cause campus disorder was enough to support a conclusion that distributing the literature was "likely to incite or produce such action." *See* text accompanying notes 44-52, *supra*.

protected by the First Amendment guarantee of free speech.[100] Although no case was found that dealt directly with student distribution of materials alleged to come within the fighting-words exception, it seems certain that such an exception does not apply in the school context and is closely related to the *Tinker* disruption standard.

The New Jersey Commissioner of Education found a school regulation totally prohibiting any student distribution on campus to be overbroad and, therefore, unconstitutional. He recognized, however, the school's right to prohibit the distribution of hate literature:

> It is beyond argument, however, that so called "hate literature" which scurrilously attacks ethnic, religious and racial groups, other irresponsible publication aimed at creating hostility and violence, . . . and similar materials are not suitable for distribution in schools. Such materials can be banned without restricting other kinds of leaflets by the application of carefully designed criteria for making such judgments.[101]

The fighting-words exception has not been expressly applied in school distribution cases, but it has been accepted in a recent case involving symbolic speech by students. In a Florida case,[102] the federal district court found that white students in a predominantly white high school wore replicas of the Confederate battle flag for the purpose of offending, irritating, and provoking black students. The court concluded that where the use of a symbol had resulted in "violence and disruption at school, and the tensions surrounding the symbols had not subsided," the wearing and display of the flag should be prohibited. The court relied on the evidence of disruption to justify its order that the school and its students discontinue using the Confederate battle flag as a school symbol. Nevertheless, the court also pointed out that in a situation like this, in which the actual purpose of using the symbol was to provoke and anger black students, the symbol was analogous to unprotected "fighting" words and could be prohibited.[103]

Distribution Cases Involving a Violation of School Rules

In several cases dealing with distribution of non-school-sponsored publications the courts have focused on the students' violation of school rules, rather than on the constitutional question of free speech, in upholding disciplinary action taken against the students. In *Sullivan v. Houston Independent School District*,[104] the Fifth Circuit Court of Appeals found that school authorities were not "powerless to discip-

100. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
101. Goodman v. South Orange-Maplewood Bd. of Educ., N.Y. Comm'r of Educ (June 18, 1969).
102. Augustus v. School Bd. of Escambia Cty, 361 F. Supp. 383 (N.D. Fla. 1973).
103. *See also* Smith v. St. Tammany Parish School Bd., 316 F. Supp. 1174 (E.D. La. 1970), *aff'd*, 448 F.2d 414 (5th Cir. 1971), in which the court-ordered desegregation plan prohibited a school from displaying a Confederate flag. The court held that the school had no constitutional right to display this or other such symbols when the symbols are an affront to others.
104. 475 F.2d 1071 (5th Cir. 1973).

line [the student] simply because his actions did not materially and substantially disrupt school activities." The high school student involved was suspended for distributing an "underground" newspaper in violation of a school regulation requiring prior approval of materials before distribution. After his suspension, the student returned to campus, refused to honor the principal's request to stop the distribution and leave campus, and twice shouted a profanity at the principal.

The court ruled that the prior-review regulation was unreasonable but upheld the suspension on the basis of the student's "flagrant disregard of established school regulations . . ." In support of its opinion, the court cited *Healy v. James*,[105] noting that the Supreme Court in that case had stated that an announced refusal to comply with reasonable campus regulations would be a proper reason not to grant university recognition to a student organization.

In *Karp v. Becken*,[106] the Ninth Circuit Court ruled that the school was justified in prohibiting distribution of signs on campus but had not shown sufficient justification for disciplining the student for the distribution. However, as the court also stated,

> What we have said does not mean that the school could not have suspended appellant for violating an existing reasonable rule. In fact, in securing the signs, he broke a regulation by going to the parking lot during school hours.[107]

The court pointed out that the disciplinary action had been based on conduct that amounted to protected "pure speech" and not on the rule violations. Therefore, it could not be upheld.

In a New York case that also focused on violation of school rules, the school principal ruled that an underground newspaper could not be distributed on campus because it contained "four-letter words, filthy references, abusive and disgusting language and nihilistic propaganda."[108] The student who was distributing the paper ignored a warning not to bring it on campus and refused to surrender the material to the principal, when asked to do so. For this conduct he was suspended from school. Despite the suspension, the student returned to class in admitted defiance of the school officials' orders. The federal district court upheld the suspension, which was based on "flagrant and defiant disobedience of school authorities" rather than on "protected activity under the First Amendment. . . ."

In a similar case from Texas,[109] the school had announced that distribution of unauthorized materials on campus would result in disciplinary action. Several students distributed an underground news-

105. 408 U.S. 169 (1972).

106. Karp v. Becken, 479 F.2d 171 (9th Cir. 1973); *see* text accompanying note 28 *supra*.

107. *Id.* at 177.

108. Schwartz v. Shunker, 298 F. Supp. 238 (E.D.N.Y. 1969).

109. Graham v. Houston Indep. School Dist., 335 F. Supp. 1164 (S.D. Tex. 1970).

paper in violation of that regulation and were suspended until they stopped the distribution. The students challenged the constitutionality of the suspension. The federal district court ruled that even though there was no evidence of "substantial and material" disruption, the school could suspend the students for their "gross disobedience" of school regulations. The evidence before the court showed that "a major purpose" of the students' acts had been to flout the rule.

These two cases leave two important questions unresolved.[110] First, should a suspension based partly on unprotected behavior (violation of school rules) and partly on the exercise of protected free speech be permitted? Second, may a school punish a student for violating a rule that is unconstitutional? Notwithstanding the thrust of these decisions, school officals should not consider it safe to discipline students for violating an invalid rule.[111]

Prior Review of Non-School-Sponsored Student Literature

Schools sometimes seek to review literature before it is distributed so that if it is found to be objectionable it can be restrained before any damage is done. A requirement that the content of publications or the time, place, and manner of distribution undergo prior review before students may disseminate written materials raises a separate set of constitutional considerations that need special examination.

The court decisions on prior review are divided. Most have said that a prior-review requirement can be imposed if adequate procedural safeguards are provided. But at least one circuit court of appeals, the Seventh, has said that prior-review requirements are unconstitutional per se.

The Fourth Circuit in *Quarterman v. Byrd*[112] and *Baughman v. Freienmuth*,[113] the Second Circuit in *Eisner v. Stamford Board of Education*,[114] and the Fifth Circuit in *Shanley v. Northeast Independent School District*[115] have all said that prior review can be exercised if done properly. But these courts have relied on different theories to justify their conclusion. The Second and Fourth Circuit courts have said that the "reasonable forecast" language of *Tinker* supports prior review of student expression, while the Fifth Circuit (in *Shanley*) justifies prior review on "[t]he necessity for discipline and orderly processes in the high school. . . ."

110. *See* Pressman, *Students' Rights to Write and Distribute*, 15 Inequality in Education 63, 68 (1973). It should be noted that the Sullivan case did not raise these questions because the court found that the prior-review rule was constitutional and therefore violating the rule did not involve protected student activities.

111. *See* Karp v. Becken, 477 F.2d 171 (9th Cir. 1973); and text accompanying note 106 *supra*.

112. 453 F.2d 54, 57-59 (4th Cir. 1971).

113. 478 F.2d 1345, 1348 (4th Cir. 1973).

114. 440 F.2d 803, 805-8 (2d Cir. 1971).

115. 462 F.2d 960, 969 (5th Cir. 1972).

Although these courts recognized that some type of prior review could be imposed, all the prior-review schemes considered in the cases just cited were found to be unconstitutional when the strict procedural standards of the Supreme Court, as set out in *Freedman v. Maryland*,[116] were applied. The courts of appeals found the school rules impermissible because they lacked adequate procedural safeguards. In addition, the Court of Appeals for the First Circuit issued an order suspending a school regulation prohibiting distribution unless advance approval was obtained.[117] The court's rejection of prior review, however, was based on the vagueness of the prior-review regulation and its failure to provide necessary procedural safeguards, and not on a theory that every system of prior review is unconstitutional.

The Seventh Circuit in *Fujishima v. Board of Education*[118] ruled that a regulation requiring prior approval of publications was unconstitutional per se because it constituted "prior restraint in violation of the First Amendment." This court expressly disagreed with the Second Circuit Court's approval of prior review in *Eisner*, arguing that the *Eisner* court had misinterpreted *Tinker*:

> 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.[119]

The *Fujishima* court argued that "in proper context" the "reasonable forecast" language of *Tinker* is not an approval of prior review of student expression.

The Supreme Court has not resolved the conflict between the courts of appeal on prior review in the school setting. However, its decisions on prior restraint of First Amendment rights in other contexts serve as guidelines in analyzing the disagreement between the courts of appeal. The Supreme Court has stated that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity."[120] The state "thus bears a heavy burden of showing justification for the imposition of such a restraint."[121]

In *Healy v. James* the Court said that the interest of the college in "preventing disruption" might justify prior restraint, but the same "heavy burden" of justification applies to prior restraint on the college

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116. 380 U.S. 51 (1965) (setting out procedural safeguards for a system of state censorship of movies).

117. Riseman v. School Comm'n, 439 F.2d 148, 149 (1st Cir. 1971). In Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H. 1973), the district court approved in principle prior review by school officials. The Vail case is now on appeal to the First Circuit, and the decision in that case should clarify the rule in *Riseman*.

118. 460 F.2d 1355, 1357 (7th Cir. 1972).

119. *Id.* at 1358.

120. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1973). *See* Near v. Minnesota, 283 U.S. 697 (1931).

121. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

campus.[122] Thus, even though the Supreme Court greatly disfavors prior restraints on the exercise of First Amendment rights, it has not ruled that all such restraints are unconstitutional per se. There might be, as the Second Circuit noted in quoting the Supreme Court in *Near v. Minnesota*, "exceptional cases" that would justify a "previous restraint."[123]

The courts of appeal that have approved the principle of prior review have recognized the heavy presumption against its constitutionality.[124] The Fourth Circuit's decision in *Quarterman* makes it clear that the special circumstance under which school authorities can justify prior restraint occurs when the school can "reasonably forecast substantial disruption of or material interference with school activities" on account of distribution of printed materials.[125] To establish a "reasonable forecast," the school must show "substantial facts which reasonably support a forecast of likely disruption";[126] thus a prior restraint based on a general fear of disruption cannot stand.

It seems that the state's recognized interest in maintaining order and discipline in the schools, when combined with a "reasonable forecast" of substantial and material disruption, would support in principle a regulation requiring prior review of student publications. The *Fujishima* conclusion that *Tinker*, when combined with *Near*, compels a rule against the constitutionality of regulations requiring prior review and approval of student publications is not compelling.[127]

If a prior-review requirement may be imposed, the procedural protections the courts require to make the requirement valid are important. Before prior review can be justified in the school situation, "a reasonable forecast" of substantial disruption of or material interference with school activities must be present or the school must specifically intend to prevent only the distribution of unprotected content. A regulation allowing prior review of such unprotected materials must ". . . contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write."[128] Terms of art such as "libelous" and "obscene," if used in a regulation, are not "sufficiently precise and understandable by high school students and administrators . . . to be acceptable criteria."[129]

Even if the prior-restraint scheme precisely defines what may not be published or distributed, it is invalid unless it meets the strict procedural safeguards required by the Supreme Court in *Freedman v.*

122. 408 U.S. 169, 181 (1972).

123. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 806 (2d Cir. 1971).

124. *See, e.g.*, Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973).

125. 453 F.2d 54, 58 (4th Cir. 1971).

126. *Id.* at 59.

127. Fujishima v. Board of Educ., 460 F.2d 1355, 1357 (7th Cir. 1972).

128. Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973).

129. *Id.* at 1350.

Maryland.[130] The Fourth Circuit, in *Baughman*, has translated these requirements for use in the school environment as follows:

> (1) A definition of "Distribution" and its application to different kinds of material;
> (2) Prompt approval or disapproval of what is submitted;
> (3) Specification of the effect of failure to act promptly; and
> (4) An adequate and prompt appeals procedure.[131]

The Supreme Court might find even a perfect prior-review rule impermissible. In a continuing system of prior review, it may be very difficult to prove a constant "reasonable forecast" of disruption as opposed to a general "undifferentiated fear" of disruption. More important, the possibility exists that even the best rule of prior review will discourage the exercise of protected First Amendment freedoms by many students unwilling to risk submitting materials or to challenge an adverse decision. This possible dampening of the expression of protected freedoms may outweigh the school's interest in constant prevention of likely disruption, especially when the school, without prior review, can effectively control disruptive conduct by punishing violations of reasonable school regulations as they occur.

Control of School-Sponsored Publications

The limitations on school control of non-school-sponsored publications just reviewed apply generally to student publications that are school sponsored and financed, such as the student newspaper, literary magazine, or yearbook. The cases have established that practically no editorial control flows from the fact that the school or university sponsors and finances student publications. School officials can require student editors to comply with state laws respecting libel or obscenity and reasonable school regulations governing student conduct. But they cannot control or prohibit content that is "controversial" unless material and substantial disruption of school discipline and order is likely to result.[132]

Most cases involving school-sponsored publications have arisen from student challenges to school censorship of written materials. As the cases below indicate, the courts have ruled in favor of the challenges and against claims of editorial control of school-sponsored and financed publications.

130. 380 U.S. 51 (1965).

131. 478 F.2d 1345, 1351 (4th Cir. 1973).

132. The American Civil Liberties Union makes the following recommendation on student publications:

> Neither the faculty advisors nor the principal should prohibit the publication or distribution of material except when such publication or distribution would clearly endanger the health or safety of the students, or clearly and imminently threaten to disrupt the educational process, or might be of a libelous nature. [American Civil Liberties Union, Academic Freedom in the Secondary Schools 11 (1968).]

The first litigated challenge to school control over student editorial comment involved a campus editor who was expelled for printing "censored" over the space where an editorial he had been told not to publish would have appeared.[133] The planned editorial praised the state university president for supporting academic freedom for university students and criticized the governor. The dismissal was held to be an unconstitutional limitation of the editor's First Amendment rights.

In a more recent case, the president of a predominantly black college announced permanent termination of school funding of the student newspaper after publication of an editorial that opposed the increased admission of white students and advocated a policy of black separatism.[134] Also, the editorial staff had adopted a policy of rejecting white students as staff members for the paper and refusing advertisements from white merchants. The president found the editorial comment and the paper's policies "abhorrent, contrary to the university policy, and inconsistent with constitutional and statutory guarantees of equality. . . ." The school argued that because the termination of financial support was to be permanent, the termination did not amount to censorship or unconstitutional curtailment of student expression. Students remained free to write, publish, and distribute on campus a non-school-sponsored newspaper.

The court of appeals rejected these arguments, stating,

> [A] college need not establish a campus newspaper, or if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. . . .
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> . . . Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse.[135]

Nothing indicated that the editorial comment had caused any disruption of the school's operation; the termination of funding resulted primarily from the president's "displeasure with the editorial policy, and this clearly did not satisfy the *Tinker* disruption standard."[136]

133. Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967). This action was later dismissed when the issue became moot because Dickey had transferred to another college and was no longer interested in returning to the original campus. Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

134. Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973). *See also* Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970), and American Civil Liberties Union of Va. v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970).

135. Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973).

136. In *Joyner*, the court of appeals also overruled the district court's conclusion that the school's action was justified because the *Campus Echo* was a "state agency" and could not legally spend state funds to advocate racial segregation. The Fourth Circuit concluded that even if the paper were a state agency, it would not be

In another school censorship case, *Bazaar v. Fortune*,[137] the Fifth Circuit Court ruled against a university's attempt to prevent publication of a student literary magazine because it contained two student short stories that were considered objectionable because of the "earthy language" and their subjects—interracial love and black pride. The court concluded that neither school financing nor a statement identifying the magazine as a university publication was sufficient ". . . to equate the University with a private publisher and endow it with absolute arbitrary powers to decide what can be printed."[138] Reviewing the case law concerning school-supported publications, the court found that ". . . the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process."[139]

The need to satisfy the *Tinker* burden of material and substantial disruption applies in the same way to high school regulations of school-sponsored student publications. In New York a high school principal impounded undistributed copies of a student literary magazine because he found it obscene.[140] The district court rejected this action, finding that the material was not obscene under the definition of obscenity for minors under state law. In the absence of "obscene" materials, the principal could not prevent distribution of the publication without an overriding justification that would satisfy the "substantial disruption and material interference standards" of *Tinker*.

School officials have also argued that censorship of school-sponsored student publications may be justified when the objectionable content may be detrimental to the public confidence and good will enjoyed by the school. The Fifth Circuit Court in *Bazaar v. Fortune* concluded that such a justification for curtailing free speech would be applicable only in the "most extreme cases," for "to stifle speech ". . . merely because it would draw an adverse reaction from the majority of people . . . would be to virtually read the First Amendment out of the Constitution. . . ."[141] Although potential danger to the public's confidence in a school system is not enough to justify censorship, on

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prohibited from "expressing hostility to racial integration." (477 F.2d at 461). For further discussion of the student newspaper as a state agency, *see* Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974).

137. 476 F.2d 570 (5th Cir. 1973).

138. *Id.* at 574.

139. *Id.* at 575 (footnotes omitted).

140. Koppel v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972). *See also* Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973), in which the editor of the student newspaper was expelled because he printed a "four-letter" vulgarity in a letter criticizing the president of his university. The Fourth Circuit affirmed the district court's decision that the expulsion violated the student's First Amendment rights. The university's belief that the idea was "offensive to good taste" could not justify the curtailment of First Amendment liberties.

141. 476 F.2d 570, 579 (5th Cir. 1973), *rehearing*, and *rehearing* granted *en banc* (May 9, 1973).

rehearing en banc the court allowed the university to print on the student magazine's cover a disclaimer stating: "This is not an official publication of the University."[142]

If a student publication is part of a journalistic laboratory, the types of permissible controls may be greater than the mere requirement that libel and obscenity laws be observed. For example, such a vehicle could be limited to student work and the writing limited to assigned topics. However, a claim that a student publication is solely an "educational device" and therefore subject to greater school control must be proved. The court will look closely to see whether faculty direction and advice is actually given in writing and publishing the materials. If this type of control does not exist and the publication is in fact an open student forum, then the school will not be able to regulate the publication as it could a product of a journalistic laboratory. Regulation of student expression will not be upheld "... merely because it comes labeled as 'teaching' when in fact little or no teaching [takes] place."[143]

The limited control a school may exercise over a high school newspaper that serves as an open forum for student opinion is illustrated by the decision of a New York federal district court.[144] The court upheld the right of students to buy space in their student newspaper to express opposition to the war in Southeast Asia, an unpopular political position in the school at that time. The principal had prohibited the advertisement on the basis that it did not deal with school-related activity. The court declared that the First Amendment guarantees the students' right to publish their paid advertisement in the school paper and noted that earlier issues of the paper had contained articles on the war and other non-school-related activities. This case indicates that when a student publication is used to communicate both general information and the concerns of the student body, the school cannot censor what is printed on the basis that the subject is controversial or not a concern of the school.

The courts have further dealt with whether school authorities can limit access of students and nonstudents to school-sponsored publications. If the publication is an open student forum used to communicate general information and concerns of the student body, the school cannot limit access to the forum, even to avoid controversy, embarrassment, or the difficult judgments on materials that may be unprotected speech, such as libel, obscenity, or speech likely to cause "substantial disruption."[145]

142. Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973).

143. Trujillo v. Love, 322 F. Supp. 1266, 1271 (D. Colo. 1971). *See also* Bazaar v. Fortune, 476 F.2d 575 (5th Cir. 1973), and Zucker v. Panitz, 299 F. Supp. 102, 103 (S.D.N.Y. 1969).

144. Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

145. *See* Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971), and Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969). *See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

Whatever the school's rights to control school publications, suspension or expulsion of a student for violating a rule on publications seems unreasonable except in extreme cases. If the school has authority to discipline a student for violating such a rule, removing him from a position that has responsibility for the publication would seem to be a more effective and appropriate form of control than suspension or expulsion. This was the action recently taken at Vassar College when the yearbook editors attempted to include both pictures of nude students showering and engaging in sexual intercourse and a senior class history said to be "full of libelous statements, pictures of nude students . . . that were clearly obscene and could cost us a libel suit." The students were removed from their positions, and the objectionable material was deleted. The students have not yet challenged their removal.[146]

Weapons on School Grounds

School boards, in discharging their responsibility to maintain orderly schools, may forbid students to bring onto school grounds weapons or instruments that might be dangerous to the possessor or other students.[147] A student who knowingly violates such a rule may be suspended or expelled. One satisfactory school board regulation on weapons provides as follows:

> A student shall not knowingly possess, handle, or transmit any object that can reasonably be considered a weapon (1) on the school grounds during and immediately before and immediately after school hours, (2) on the school grounds at any other time when the school is being used by a school group, or (3) off the school grounds at any school activity, function, or event.
>
> This rule does not apply to normal school supplies like pencils and compasses but does apply to any firearm, any explosive including firecrackers, any knife other than a small penknife, and other dangerous objects of no reasonable use to the pupil at school.[148]

If a teacher or other school official finds a student with a dangerous object, he can require the student to surrender the object and, if necessary, use force to disarm him. In a case involving a student who refused to surrender a pistol, a Texas court noted that a teacher has not only the right to remove a dangerous object from a student but

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146. News and Observer (Raleigh, N.C.), April 4, 1975, at 12, col. 1.

147. Such rules have not been seriously questioned. *See, e.g.*, Breese v. Smith, 501 P.2d 159 (Alas. 1972).

148. R. Phay & J. Cummings, Student Suspensions and Expulsions: Proposed School Board Codes 21 (1970). Such a rule would presumably encompass the situation faced by a recent Illinois court in which a sixth grader beat another with a yardstick while the teacher was out of the room. In holding the teacher not liable for negligence, the court declared that a "yardstick in a classroom cannot be considered an inherently dangerous instrumentality." Clay v. Chicago Bd. of Educ., 318 N.E.2d 153 (Ill. App. 1974).

also the duty to do so when the safety of students or school personnel might be threatened.[149]

An Illinois court held that a student's rights had not been violated when a school official, acting on anonymous information that the student had a gun, asked police officers to disarm him.[150]

Under certain circumstances, a student may bring a weapon to school, but only under close scrutiny. For example, students in ROTC or other school-sponsored activities may possess weapons. The use of the weapon, however, must be properly supervised, as a Kentucky court noted in finding a teacher liable for injuries sustained by a pupil from the discharge of a gun used during a school play. The teacher had directed the use of a gun and "live, blank" ammunition, but had not supervised the preparation of the ammunition or inspected the weapon after it was loaded.[151]

Primarily because of the increased violence in schools, some states have made possession of weapons in school a criminal violation. For example, a North Carolina statute makes it a misdemeanor, punishable by $500 fine or six months' imprisonment, or both, for any person to possess any specified weapon, openly or concealed, on school property unless used solely for educational or school-sanctioned ceremonial purposes.[152] The prohibition applies to all levels of education, to both public and private institutions, and to all property owned, used, or operated by the school board.

Damage or Destruction of School Property

The maintenance and preservation of school property are legal duties of the school board. In carrying out this responsibility, the school board may adopt regulations prohibiting misuse of and damage to school property; suspension or expulsion is a permitted sanction in extreme violations of these regulations.

The type of discipline a school may impose for damage to school property depends on the circumstances. Accidental damage or destruction is not basis for suspension or expulsion. Even damage caused by a student's carelessness or negligence does not justify depriving him of school attendance.[153] Similarly, such minor injuries to property as carving on a desk top, writing on a wall, or even ripping a page out of a school book do not warrant suspension or expulsion; thus the school has no authority to impose these sanctions for such offenses.

149. Metcalf v. State, 21 Tex. App. 174, 17 S.W. 142 (1886).
150. *In Re* Boykin, 39 Ill. 617, 237 N.E.2d 460 (1968).
151. Wesley v. Page, 514 S.E.2d 697 (Ky. App. 1974).
152. N. C. Gen. Stat. § 14-169.2 (Supp. 1974).
153. Holman v. School Trustees of Avon, 77 Mich. 605, 43 N.W. 996 (1889); *accord*, Perkins v. Indep. School Dist., 56 Iowa 476, 9 N.W. 356 (1880); and State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888). *See generally* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373, 402-3 (1969).

But if a student willfully destroys school property, he may be expelled under certain circumstances.[154] When the destruction is serious and premeditated, as in arson or major vandalism, the school board may suspend or expel the student or even swear out a warrant for his arrest.

Parental responsibility laws are another device for dealing with vandalism of school property. These statutes make parents liable for willful or malicious property destruction committed by their children,[155] and they apply whether the damage is done during or after school.[156] Most of these laws were passed in the late 1950s as a deterrent to school vandalism.[157] Courts have interpreted them strictly,[158] on the basis that they are contrary to the common law, but have upheld them.[159]

Personal Appearance

Historically, schools have exercised strict control in matters of student dress and grooming. In recent years, however, as long hair, beards, and mustaches became fashionable for men and unconventional clothes became the standard for young people of both sexes, school systems frequently have found themselves in court defending the validity of student dress codes against challenges by students and their parents. In a multitude of law suits, students have argued that the United States Constitution guarantees them the right to determine for themselves the length of their hair and the manner of their dress. School systems generally have denied that school children have such a

154. Palmyra Bd. of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959). *See also* N.J. Rev. Stat. § 18A-37-2 (Supp. 1974), which declares that "willfully causing or attempting to cause, substantial damage to school property" is a valid basis for suspending a student.

155. *See, e.g.*, N. J. Rev. Stat. § 18A-37-3 (which does not require property destruction to be willful or malicious); N. C. Gen. Stat. § 1-538.1 (1969).

156. Palmyra Bd. of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959).

157. Colmey & Valentine, *Stop Vandalism with Parent Responsibility Laws*, 145 Am. School Bd. J. 9 (1960). *See generally* Note, *The Iowa Parental Responsibility Act*, 55 Iowa L. Rev. 1037 (1970); Note, *A Constitutional Caveat on the Vicarious Liability of Parents*, 47 Notre Dame Law Rev. 1321 (1972).

158. *See, e.g.*, Lamro Indep. Consol. School Dist. v. Cawthorne, 76 S.D. 106, 73 N.W.2d 337 (1955). *See also* Allen v. Chacon, 449 S.W.2d 289 (Tex. Civ. App. 1969), in which the court enjoined a suspension based on a board regulation requiring payment in full of damages to school property before readmission to school. The court found that the school had not followed its own policy of taking parents' financial conditions into account.

159. *See, e.g., In re* Sorrell, 20 Md. App. 179, 315 A.2d 110 (1974); General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963). *But see* Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971), in which the Georgia Supreme Court struck down that state's parental vicarious liability statute as violative of the due process clause of the Fourteenth Amendment. The court noted that similar statutes upheld in other states provided for only limited recovery and were intended as penalties to aid in controlling juvenile delinquents, while the Georgia statute allowed unlimited recovery of property and personal injury damages and was not intended as a penalty.

right and have argued that even if such a right exists, it must yield to the state's overriding interest in operating the public schools.

Unfortunately, after enormous expenditures of time and money by students, parents, school officials, and state and federal courts, uniform rules on the degree to which school officials may regulate the grooming and dress of public school students do not exist. Many courts have accepted the student arguments and sharply restricted the power of schools to govern student appearance, but many have upheld the schools' authority to regulate student dress and grooming extensively. The Supreme Court has consistently and frequently refused to hear cases dealing with student appearance and thus has left standing conflicting lower court opinions.[160] Consequently, in answering questions about schools' authority to control student appearance, one must first ask, Where do you live?

Hair Codes

The most frequently litigated issue in student appearance cases concerns the regulation of hair length on male students. Five of the ten circuits of the United States Court of Appeals (First, Third, Fourth, Seventh, and Eighth) have ruled that students have a constitutionally protected right to choose their own hairstyle,[161] and this right extends to all school activities including athletics.[162] However, these five circuits have not agreed on the constitutional basis of this right.

The First Amendment's guarantee of free expression,[163] the Ninth Amendment's guarantee of the right to privacy,[164] and the Fourteenth Amendment's guarantee of due process and equal protection[165] have all been used to provide the constitutional underpinning for the right of male students to wear long hair.[166] While this right is not absolute,

160. *See, e.g.*, Holsapple v. Woods, 500 F.2d 49 (7th Cir.), *cert. denied*, 95 S. Ct. 185 (1974) (striking down school grooming code as an unjustified infringement of students' constitutional right to wear hair at any length); Karr v. Schmidt, 460 U.S. 609 (en banc), *cert. denied*, 409 U.S. 989 (1972) (upholding school grooming code and setting out a rule that in public schools dress codes are constitutional per se).

161. *See, e.g.*, First Circuit (Maine, Mass., N.H., R.I., P.R.), Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Third Circuit (Del., N.J., Pa., Vir. Is.), Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Fourth Circuit (Md., N.C., S.C., Va., W. Va.), Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Seventh Circuit (Ind., Ill., Wis.), Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); and Eighth Circuit (Ark., Iowa, Minn., Mo., Neb., N.D., S.D.), Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971). No opinion concerning long hair on male students was found for either the Second Circuit (Conn., N.Y., Vt.) or the circuit for the District of Columbia.

162. *See* Long v. Zopp, 476 F.2d 180 (4th Cir. 1973) (per curiam).

163. *See* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969) (constitutional right found in the penumbras of the First and Ninth amendments).

164. *Id.*

165. *See, e.g.*, Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); and Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

166. Mr. Justice Douglas has concluded that "one's hair style, like one's taste for

it has sufficient constitutional magnitude for these courts to require school systems to meet a substantial burden of justification to regulate student hairstyles.[167]

Absent a showing by the school system that long hair creates "substantial and material disruption" or health or safety hazards, or subverts the basic purposes of the school program, a hair-length regulation is constitutionally impermissible in the areas served by these courts.[168] Even in these limited circumstances, the school official must try to use other ways to prevent disruptions before he may order a student to shear his locks.[169] Thus, in the states within these federal jurisdictions, a school hair code is presumed invalid unless the school demonstrates with specific evidence that long hair is "disruptive" or hazardous.

In four other circuits, however, (Fifth, Sixth, Ninth, and Tenth) federal courts of appeal have ruled that students have no constitutionally protected fundamental interest in their personal appearance, and any interest they do have is so insubstantial that it is not cognizable in federal courts and therefore is subject to state and school regulation.[170]

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food, or one's liking for certain kinds of music, art, reading, or recreation, is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people." He considers deciding about the length of one's hair to be among the fundamental rights retained by the people under the Ninth Amendment. Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972) (dissenting opinion).

167. The Seventh Circuit has concluded that although one's interest in appearing as he chooses may be of a much lesser magnitude than "a fixed star in our constitutional constellation," when violation of a school grooming code could result in depriving a student of his opportunity to obtain an education, the school must meet a substantial burden of justification. Holsapple v. Woods, 500 F.2d 49 (7th Cir. 1974). *Compare* Miller v. School Dist. No. 167, 495 F.2d 658 (7th Cir. 1974), in which the court of appeals upheld the dismissal of a male school teacher because, *inter alia*, of his mode of dress and his beard. The court stated that "the constitutional interest which plaintiff seeks to vindicate is not of the first magnitude and the impairment of that interest is a relatively minor deprivation at best." *Id.* at 665. *See generally* Ham v. South Carolina, 409 U.S. 524 (1973), in which the Supreme Court concluded that a trial judge's refusal to question potential jurors as to their bias against beards did not reach the level of a constitutional violation.

168. *See, e.g.*, Holsapple v. Woods, 500 F.2d 49, 52 (7th Cir.), *cert. denied*, 95 S. Ct. 185 (1974); Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972); Bishop v. Cormenaro, 355 F. Supp. 1269 (D. Mass. 1973).

169. *See, e.g.*, Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972), in which the court rejected the school officials' arguments that a hair code was justified because of the disruptive reactions of others to long hair on males and to ensure safety in shop and laboratory courses. The Fourth Circuit panel noted that hairnets would prevent the safety hazards in shop and lab and that school officials should work for tolerance of freedom of choice in order to defuse the adverse reactions of others.

170. *See, e.g.*, Fifth Circuit (Ala., Canal Zone, Fla., Ga., La., Miss., Texas), Karr v. Schmidt, 460 F.2d 609 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 989 (1972); Sixth Circuit (Ky., Mich., Ohio, Tenn.), Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); Ninth Circuit (Ariz., Alaska, Cal., Hawaii, Guam, Idaho, Nev., Ore., Wash.), King v. Saddleback Junior College School Dist., 445 F.2d 932 (9th Cir. 1971); Tenth Circuit (Colo., Kan., N.M., Okla., Utah, Wyo.),

These courts have rejected not only the constitutional bases for the right to determine one's personal appearance outlined above[171] but also claims that hair codes violate freedom of religion[172] and parents' constitutional right to raise their children according to their own values.[173]

Within the geographic boundaries of these four jurisdictions, school systems need only demonstrate that regulation of hair length is rationally related to educational purposes—a burden of justification not difficult to satisfy.[174]

The Fifth Circuit has determined that, in public schools at the high school level and below, school grooming codes are constitutional per se. Federal district courts in that circuit must dismiss a student challenge to such regulations for failure to state a cause of action unless the student's complaint alleges that the regulation is wholly arbitrary or discriminatorily enforced.[175] Thus, the per se rule would not apply to a regulation that required all males to have crew cuts or to a regulation that was enforced only against black students wearing long afros.[176] In those federal circuits that strike the balance in favor of nonarbitrary school regulations, however, students may be able to attack school hair codes successfully in state courts on the basis that

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Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 71 (1972). Mr. Justice Black agreed with this position, arguing that no direct positive constitutional command protects student hair length and that federal courts lack power to interfere with the way state-operated public school systems regulate schoolboys' hair length. Karr v. Schmidt, 401 U.S. 1201 (Black, S.G. Justice for the Fifth Circuit, 1971) (denying emergency motion to vacate stay of injunction pending appeal).

171. *See, e.g.*, Karr v. Schmidt, 460 F.2d 609, 614-17 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 989 (1972), for a catalogue of the arguments against sustaining the students' claimed constitutional right to choose their own hair length on the grounds of First, Ninth, and Fourteenth Amendment guarantees.

172. New-Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973) (rejecting a claim that a school regulation requiring Pawnee Indian students to cut their long, braided hair violated their freedom of religion).

173. Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974). The Tenth Circuit concluded that challenges to hairstyle regulations lack "constitutional substance" regardless of who asserts them. The conflict between the grooming code and the parents' practices of child-rearing do not involve "a sharp clash with complete and religiously founded concepts of raising children."

174. *See* Karr v. Schmidt, 460 F.2d 609, 616 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 989 (1972).

175. *Id.* at 617-18. The Fifth Circuit Court imposed this per se rule to achieve uniformity among the district courts in the circuit and for reasons of judicial efficiency. *But see* Landsdale v. Tyler Jr. College, 470 F.2d 659 (5th Cir. 1972), in which the Fifth Circuit drew the line of permissibility of hairstyle regulation between the "high school door and the college gate," concluding that an "adult's constitutional right to wear his hair as he chooses supersedes the state's right to intrude."

176. Karr v. Schmidt, 460 F.2d 609, 617 n. 26 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972).

either state constitutional or statutory law limits the power of schools to regulate student appearance.[177]

Dress Codes

Even those courts that have recognized a significant constitutionally protected interest in one's personal appearance have held that school officials have broader discretion in regulating the clothing that may be worn at school than in regulating hairstyles.[178] Less justification for regulating dress is required because the infringement of personal liberty is temporary, since it is limited to the time a student spends at school. In contrast, the effect of a hair code remains with the student "24 hours a day, seven days a week, nine months a year."[179]

Despite this broader discretion, school systems may not regulate a student's manner of dress unless they can show that the regulation is necessary to the performance of the school's educational mission. In general, school dress policies that prohibit the wearing of pants by girls,[180] dungarees or jeans,[181] or any other general style of clothing[182] have been found to be impermissibly overbroad and unnecessary to prevent disruption and promote academic achievement.[183] Still, bikinis on girls and loincloths on boys are inappropriate schoolhouse attire.[184]

Schools may prohibit unsanitary, obscene, or scanty and suggestive clothing,[185] and "a certain degree of arbitrariness [will] be tolerated to permit effective and speedy enforcement" of such regulations.[186] In addition, health and safety considerations may empower schools to require that students wear certain clothing when participating in spe-

177. *See, e.g.*, Breese v. Smith, 501 P.2d 159 (Alas. 1972) (school hair-length regulation impermissibly infringed student's right under Alaska constitution to exercise his personal choice as to appearance); Murphy v. Pocatello School Dist., 94 Idaho 32, 480 P.2d 878 (1971) (under Idaho constitution, the right to wear one's hair in the manner of his choice is a protected right of personal taste); Neuhaus v. Federico, 505 P.2d 939 (Ore. App. 1973) (school board not authorized by state statute to govern student hairstyles).

178. *See, e.g.*, Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), and Copeland v. Hawkins, 352 F. Supp. 1022 (E.D. Ill. 1973).

179. Richards v. Thurston, 424 F.2d 1281, 1285-86, (1st Cir. 1970). *See* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969).

180. *See, e.g.*, Johnson v. Joint School Dist. No. 60, 95 Idaho 317, 508 P.2d 547 (1973); Scott v. Board of Educ., 61 Misc. 333, 305 N.Y.S.2d 601 (1969).

181. *See, e.g.*, Wallace v. Ford, 346 F.2d 156 (E.D. Ark. 1972); Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970).

182. *See, e.g.*, Wallace v. Ford, 346 F.2d 156 (E.D. Ark. 1972) (regulations prohibiting "granny" dresses and tie-dyed clothing).

183. *See also* Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).

184. Graber v. Kniola, 52 Mich. App. 269, 216 N.W.2d 925, 926 (1974).

185. Wallace v. Ford, 346 F. Supp. 156, 163-64 (E.D. Ark. 1972); Bannister v. Paradis, 316 F. Supp. 185, 188-89 (D.N.H. 1970).

186. Wallace v. Ford, 346 F. Supp. 156, 162 (E.D. Ark. 1972).

cific activities—for example, helmets for football players or hair nets for students who are serving food or taking shop courses. Similarly, wearing apparel that damages or destroys school property may be prohibited.[187]

As in the cases involving hairstyles, courts in those circuits that have found no substantial federal question raised in challenges to grooming codes are very likely to sustain a school's dress code unless it can be shown to be clearly unreasonable, arbitrary, or enforced in a discriminatory manner.[188] Dress codes may still be struck down in these states, however, when state and federal courts find that in enacting the regulations the school officials exceeded their authority under the state's constitution or statutes.[189]

Symbolic Speech

Students who have challenged school dress codes have frequently argued that their personal choice of clothes and hairstyle constitutes "symbolic speech," protected by the First Amendment. While this argument has met with little success in the cases involving a student's general choice of clothing and hairstyles,[190] in cases involving such items as armbands and berets courts have accepted it.[191] In these cases, courts have looked to the *Tinker* disruption standard in judging school dress codes.[192] They have struck down broad, general prohibitions of clothing that might be classified as symbolic speech[193] but have sustained school regulations when it is demonstrated that they are

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187. *See* Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931) (upholding school prohibition of metal heel plates that damage the floor).

188. *See, e.g.,* Press v. Pasadena Indep. School Dist., 326 F. Supp. 550 (S.D. Tex. 1971) (challenge to school dress code is a proper case for federal courts to apply doctrine of absention).

189. *See, e.g.,* Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970) (California statute authorizing school boards to prescribe rules for discipline did not also authorize them to regulate dress and personal appearance of public school students); Johnson v. Joint School Dist. No. 60, 95 Idaho 317, 508 P.2d 547 (1973) (school board exceeded its jurisdiction and authority by prohibiting female students from wearing slacks); Scott v. Board of Educ., 60 Misc. 833, 305 N.Y.S.2d 601 (1969) (school board had no power to regulate student dress for reasons other than safety, order, and discipline).

190. *See, e.g.,* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972), and Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970). Courts usually have found that one's general style of personal appearance has sufficient communicative content. *But see* Church v. Board of Educ., 359 F. Supp. 538 (E.D. Mich. 1972).

191. *See, e.g.,* Butts v. Dallas Indep. School Dist., 436 F.2d 728 (5th Cir. 1971) (the wearing of black armbands protesting the war in Vietnam was held to be protected expression).

192. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); *see also* text accompanying notes 22-35 *supra.*

193. *See, e.g.,* Wallace v. Ford, 346 F. Supp. 156, 164 (E.D. Ark. 1972) (general prohibition of shirts with symbols and slogans on them held to be unconstitutionally overbroad in violation of First Amendment).

necessary to prevent substantial and material disruptions of school operations.[194]

School Discipline Based on the Marital or Parental Status of Students

The question whether school authorities may discipline students because of their marital or parental status has caused confusion and disagreement in the schools and the courts for many years. As one commentator aptly phrased it,

> When teenagers combine wedding bells with school bells, the resulting commotion may sound like fire alarm bells to superintendents and boards of education.
>
> . . . .
>
> The chaos and confusion increase in intensity for both pupils and educators when wedding rings, engagement rings, and teething rings are exchanged at the same time.[195]

This section will discuss the case law that has grown out of this chaos and confusion.

Marital Status

Compulsory Attendance

The state can clearly compel children to attend school. In several cases, however, courts have been asked whether married students are subject to compulsory attendance statutes. The consensus of the reported cases is that married students are emancipated and therefore no longer amenable to compulsory attendance laws[196] unless the statute specifically requires their attendance.[197] Most state legislation that

194. *See, e.g.*, Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (high school student's suspension for wearing Confederate flag on his jacket did not violate the Constitution in view of the racially tense situation at school and in the community); Hernandez v. School Dist. No. 1, 315 F. Supp. 289 (D. Colo. 1970) (school could prohibit the wearing of black berets when wearers had participated in disruptive conduct and berets were the symbol of such disruption).

195. Corns, *School Bells and Wedding Bells*, 1 J. L. & Educ. 649 (1972).

196. *See In re* Goodwin, 214 La. 1062, 39 So. 2d 731 (1949); State v. Priest, 210 La. 389, 27 So. 2d 173 (1946); *In re* Rogers, 36 Misc. 2d. 680, 234 N.Y.2d 172 (1962); State v. Gans, 168 Ohio St. 174, 151 N.E.2d 709 (1958), *cert. denied*, 359 U.S. 945 (1959).

197. Although no statute has been found that specifically requires married students to attend school, a state probably has authority to make such a requirement. But one commentator has pointed out at least two constitutionally protected exceptions to this power: a state cannot compel school attendance if the requirement would prevent the breadwinner from supporting his family or endanger the health of a pregnant student. *See* Knowles *High Schools, Marriage, and the Fourteenth Amendment*, 11 J. Fam. L. 711, 718 (1972).

specially addresses the attendance of married students, however, exempts them from compulsory attendance laws.[198]

Expulsions and Suspensions

When schools have expelled or suspended students because they are married, they have sought to justify their action on the grounds that it discouraged teenage marriages, reduced dropout rates, and prevented "corruption" of other students by the more precocious married students. Attempts to expel married students from the public school permanently have been uniformly unsuccessful.

In the reported cases, the courts have considered the issue of permanent exclusion only twice, and both cases were decided in 1929.[199] In one of these, the Mississippi Supreme Court emphasized both the state's policy of encouraging education of its children and traditional public policy strongly favoring marriage in finding arbitrary and unreasonable a school board regulation that barred otherwise eligible married students from attending public schools. The court concluded that married students cannot be excluded from public schools unless immorality or misconduct potentially harmful to the welfare and discipline of other students is evident. Rejecting the school officials' argument, the court found that other students would benefit from association with married students.

In a more recent case involving the United States Merchant Marine Academy,[200] a federal district court ruled that the Academy could not constitutionally dismiss a cadet because he was married, even though he had agreed not to marry while he was a student. The court concluded that marriage is a fundamental right guaranteed by the United States Constitution; therefore, the Academy regulation prohibiting cadet marriages was not justified by any compelling governmental interest. Finding no concrete evidence that the proscription on marriage was factually related to academic or disciplinary necessities, the court ordered the cadet reinstated. In summarizing the law on school expulsions because of marriage, the court stated:

> [A] student may not be expelled from public school simply because of his marital status, without a factual showing of some misconduct or immorality, and without a clear and convincing demonstration that the welfare or

198. *See e.g.*, FLA. STAT. § 232.01 (Supp. 1974). The Florida statute exempts married students and unmarried students who are pregnant or have had a child out of wedlock from the compulsory attendance requirement. It also provides that "these students shall be entitled to the same educational instruction, or its equivalent, as other students, but may be assigned to a special class or program better suited to their special needs."

199. Nutt v. Board of Educ., 128 Kan. 507, 278 P. 1065 (1929); McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

200. O'Neil v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973).

discipline of the other pupils or the school is injuriously affected by the presence of married students.[201]

When school officials have removed married students for short periods rather than expelling them because of their married state, they have offered a second justification for their action. They argue that the confusion and disorder caused by a student marriage—both to the school and to the marriage itself—is greatest immediately after the marriage. It is during this difficult readjustment period, they argue, that married students have the greatest influence on other students, and most need time to stabilize their new marriage. Thus, school officials conclude, it is better for the student marriage and for the school that the student be suspended for the period immediately after the marriage.

One state court accepted this rationale and upheld the expulsion of a student for the remainder of the term in which she became married.[202] Most state courts that have ruled on this issue, however, have not approved even temporary suspensions based solely on the marital status of the student.[203] For example, a school regulation that required a married student to withdraw from school immediately for one year and then be reinstated as a special student only, with the principal's permission was held to be unreasonable and therefore void. The Kentucky Supreme Court ruled that the regulation, in determining in advance that all married students must miss one year's education regardless of the individual circumstances, was too sweeping.[204]

The Texas Civil Court of Appeals overturned the three-week suspension of a husband and wife, finding that "marriage alone is not a proper ground for a school district to suspend a student."[205] There was no evidence that the marriage had caused turmoil or interference with the education of other students.

Restrictions on School Activities

School regulations that exclude married students from extracurricular activities have met with greater success, at least when they have been challenged in court. These regulations are justified by school

201. *Id.* at 569. This statement is dictum as it concerns state-supported public education. However, in light of the importance the Supreme Court has attached to the state-granted right to a free public education, it is probably an accurate statement of the standard that federal courts will apply in similar cases. *See, e.g.*, Goss v. Lopez, 95 S. Ct. 729 (1975); and Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

202. State *ex rel.* Thompson v. Marion Cty. Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 37 (1957).

203. *See, e.g.*, Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964); Carrollton-Farmers Branch Indep. School Dist. v. Knight, 418 S.W.2d 335 (Tex. Civ. App. 1967); and Anderson v. Canyon Indep. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967).

204. Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964).

205. Carrollton-Farmers Branch Indep. School Dist. v. Knight, 418 S.W.2d 335 (Tex. Civ. App. 1967).

authorities as necessary to discourage child marriages, to curb dropout problems, and to preserve student marriages by emphasizing basic education while giving the student more time with his spouse and family. The schools have also argued that these regulations do not amount to a penalty on marriage or deprivation of education, because extracurricular activities are a nonessential part of education. Until recently, the courts generally accepted these justifications and upheld the exclusion of married students from participating in extracurricular activities.[206]

In the last few years, federal and state courts have reversed themselves, finding that such restrictions are invalid.[207] These courts have rejected the argument that extracurricular activities are a nonessential part of public education, finding instead that they are "an integral and complementary part of the total school program."[208] The courts have emphasized that restrictions on participation in extracurricular activities amount to a deprivation of an important element of a student's state-granted right to an education[209] and to an infringement of his constitutional right to marital privacy.[210] They have required, therefore, that the restrictions be necessitated by a compelling state interest in order to withstand court scrutiny.[211] School systems faced with this burden of justification have not shown that student marriages produce or contribute to student dropouts, disruption of school operations, or the corruption of students.[212]

Most cases involving restrictions on extracurricular activities have been brought by star male athletes who have been barred from participation in athletic programs.[213] The courts in these cases have recognized that in addition to the denial of a complete education and the infringement of marital rights, the reduced or denied opportunity to obtain a college athletic scholarship or employment as a professional athlete is sufficient basis for court action.[214] Of course the restrictions apply to all married students; the courts have recognized that nonparticipation in extracurricular activities may deprive

206. *See, e.g.*, Cochrane v. Board of Educ., 360 Mich. 390, 103 N.W.2d 569 (1960); State *ex rel.* Baker v. Stevenson, 189 N.E.2d 181 (Ohio App. 1962); and Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963).

207. *See, e.g.*, Hollen v. Mathis Indep. School Dist., 358 F. Supp. 1269 (S.D. Texas 1973), *vacated as moot*, 491 F.2d 92 (5th Cir. 1974); Moran v. School Dist. No. 7, 350 F. Supp. 1180 (D. Mont. 1972); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972); Holton v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972); Bell v. Lone Oak Indep. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974).

208. *See, e.g.*, Davis v. Meek, 344 F. Supp. 298, 301 (N.D. Ohio 1972).

209. *See* Bell v. Lone Oak Indep. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974).

210. *See* Holton v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972).

211. *See* Bell v. Lone Oak Indep. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974).

212. *Id.*

213. *See, e.g.*, Hollen v. Mathis Indep. School Dist., 358 F. Supp. 1269 (S.D. Tex. 1973), *vacated as moot*, 491 F.2d 92 (5th Cir. 1972).

214. *See* Moran v. School Dist. No. 7, 350 F. Supp. 1180, 1182 (D. Mont. 1972).

the nonathlete of opportunities for employment, college admission, or scholarships, which also are protected student interests.[215]

Clearly a student's marital status is an inadequate basis for restricting his attendance or participation in the full educational program offered by the public school.

Parental Status

Excluding students because of their parental status is highly questionable and soon will be relegated to the growing list of impermissible reasons for imposing school discipline. One objectionable aspect of this area of school discipline is the element of sex discrimination: female students have been the primary recipients of the discipline. Such exclusion frequently applies only to unwed mothers or, if it applies to both parents, is enforced primarily against the girl. Both situations are illegal.

Equal protection clauses of state and federal constitutions prohibit singling out female students, and federal legislation prohibits the practice on the basis of sex discrimination. HEW regulations that accompany Title IX of the Education Amendments of 1972 provide that "[a] recipient [of federal moneys] shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."[216] Thus school discipline because of parental status that applies only to female students or is applied primarily against them is illegal and is basis for terminating federal funds.

Even if school rules that authorize punishment because of the parental status of students involve no sex discrimination, they are highly suspect. Permanent exclusion of students because they have or will soon have children has been found impermissible in light of strong state policies encouraging the education of children.[217] Temporary exclusion from or restriction on school attendance based on parental status, however, has been approved by a few courts.[218]

A federal district court in Georgia held that a school regulation prohibiting married students and students who are parents from attending day school was permissible since it allowed these students to attend night school if they desired.[219] The court accepted the school's argument that mixing these "more precocious" students with other

215. *See* Reynolds v. Creighton, 351 F. Supp. 868 (S.D. Tex. 1972).

216. 45 C.F.R. § 86.37 (a) (1974).

217. *See* Nutt v. Board of Educ., 128 Kan. 507, 278 P. 1065 (1929); and Alvin Indep. School Dists. v. Cooper, 404 S.W.2d 76 (Tex. Civ. App. 1966).

218. *See* State *ex rel.* Idle v. Chamberlain, 175 N.E.2d 539 (Ohio App. 1961), in which a regulation requiring a pregnant student to withdraw from school as soon as she learns she is pregnant was found to be proper and wise to protect her health, safety, and well being from the "typical rough and tumble characteristics of children in high school." In this case the school allowed the student to receive full credit by doing her assignments at home.

219. Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973).

students would lead to disruption, and thus excluding them was rationally related to legitimate school interest. The availability of night classes was found to be a sufficient educational alternative to withstand the argument by an unwed mother that this regulation was an unconstitutional denial of her state-granted right to an education and her constitutionally protected right to procreate. Nevertheless, the regulation was found to violate the equal protection clause because night students were required to pay for their tuition and books while day students were not.

Most courts have found that excluding pregnant students from school or restricting their school activities is not permissible except when it is determined that an individual's health problems justify such actions. The Supreme Court has held that a presumption that a pregnant teacher is physically unfit to teach after a fixed point in her pregnancy is unconstitutional.[220] Similar regulations that deprive a student of her interest in an education would seem to be equally violative of the due process clause.

In addition, Congress has forbidden sex discrimination by recipients of federal educational funds.[221] The regulations enforcing this legislation expressly prohibit discrimination or exclusion of any student from a school's educational program, including extracurricular activities, "on the basis of such student's pregnancy, miscarriage, abortion, or recovery therefrom." The only exceptions allowed under the legislation are when the student voluntarily asks to be excused or her physician certifies that a different program is necessary for her physical or mental health.[222] These regulations also require that schools recognize pregnancy as a valid reason for a reasonable leave of absence, after which the student must be reinstated to her original status.[223]

Most school regulations that restrict students because of their parental status are directed at unwed mothers. Insofar as these regulations single out girls or impose harsher punishment on them, they constitute sex discrimination and are impermissible. Schools seek to justify these regulations on the basis not of the pregnancy itself but of the student's "lack of moral character" and the possibility that her presence will contaminate other students.

While "lack of moral character" has been recognized as a proper reason for excluding a child from public schools,[224] most recent court decisions find the fact that a student is an unwed mother to be insufficient by itself to justify exclusion.[225] Courts that would allow exclu-

220. Chesterfield Cty. School Bd. v. LaFleur, 414 U.S. 632 (1974).

221. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (Supp. 1972).

222. 45 C.F.R. § 86.37 (b) (proposed rules).

223. *Id.*

224. *See* Perry v. Grenada, 300 F. Supp. 748, 753 (N.D. Miss. 1969).

225. *See, e.g.*, Shull v. Columbus Mun. Sep. School Dist., 338 F. Supp. 1376 (N.D. Miss. 1972). *See also* Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971).

sion based on "lack of moral character" require that before the exclusion, the unwed mother be given "written notification of the charges of immoral character" and a fair hearing to determine whether she is "so lacking in moral character that her presence in the public school would taint the education of other students."[226]

Out-of-School Conduct

As noted in earlier sections, school authorities may suspend or expel students for misconduct committed off school premises in a nonschool setting.[227] Since the in loco parentis role of the school becomes attenuated when the student is off the school grounds and not involved in a school activity, important questions arise as to the extent of the school's authority.

Students and parents have argued that schools have no right to punish for conduct that occurs when the student is not under school control because parental authority is and should be supreme.[228] School officials, on the other hand, have argued that any student conduct that has a substantial, deleterious effect on school life, wherever it occurs, is subject to school discipline—and in certain cases suspension or expulsion of the student is justified.

The issue essentially involves balancing parents' and students' individual rights against the school's right to discipline student conduct that interferes with the general welfare and learning atmosphere of the school. Courts have usually sided with the schools as long as the conduct has some direct negative impact on the school and the suspension or expulsion rule itself is not unreasonable.[229]

An examination of early cases clearly shows a change in the types of conduct that once merited the extreme discipline of suspension or expulsion. In times when schools tried to exert more moral influence on students, they had control over all phases of student life. For example, a court once upheld the validity of an expulsion rule for students who attended movies or social functions other than on Friday or Saturday night.[230] Other cases supported a suspension rule for students who patronized certain stores.[231] Schools have tried to prohibit stu-

226. *See* Shull v. Columbus Mun. Sep. School Dist., 338 F. Supp. 1376 (N.D. Miss. 1972). In this case the court awarded the plaintiff $1,500 for attorney's fees because the school had excluded her in the face of earlier court decisions holding the same regulation invalid.

227. The conduct herein considered does not include school-related activities like athletic events or school dances that may occur off school premises and outside regular school hours. *See generally* 53 A.L.R.3d 1124 (1973).

228. *See, e.g.* Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1909).

229. *See, e.g.* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555 (Iowa 1972).

230. Mangum v. Keith, 147 Ga. 603, 95 S.E. 1 (1918). Students had attended a movie during the week with their parents' permission and were threatened with expulsion.

231. Guethler v. Altman, 26 Ind. App. 587, 60 N.E. 355 (1901); Jones v. Cody, 132

dents from attending parties during the school year[232] and to require students to be at home studying every night from 7 p.m. until 9 p.m. with suspensions for violators.[233]

Several older cases have upheld suspensions or expulsions for sexual misconduct. In 1851 a Massachusetts court upheld the expulsion of a female student for off-campus sexual activity: "Schools may legally exclude students with notorious propensities, practices and habits because the legislative intent was to make the public schools a system of moral training, as well as seminaries of learning."[234] In 1923 the Alabama Supreme Court reversed a jury verdict of libel against a school that had expelled a girl with venereal disease and had publicized the reason for the expulsion. In so doing, the court referred to a school's authority to expel anyone who is "undesirable from either physical malady or moral obliquy. . . ."[235] In 1924 a Michigan court upheld the suspension of a girl who smoked in public, rode around in a car on a man's lap, and talked to the press about her defiance of school discipline.[236]

Schools and attitudes have changed greatly. School officials today are less interested in regulating the moral habits of students and more concerned with reducing increased violence and student conduct that poses a more direct threat to orderly school operations. Increasingly, school authorities seek to control only the out-of-school conduct that directly threatens the safety and welfare of the students and teachers.[237] Court decisions resulting from student challenges to this authority, generally have upheld this authority. These recent decisions involving out-of-school conduct are discussed below under four categories: conduct in the First Amendment area, drug and alcohol abuse, fighting and other destructive acts, and miscellaneous conduct.

The First Amendment Area

Such student activities as the distribution of underground newspapers, protest marches, picketing, and demonstrations raise First Amendment freedom of speech issues. Since constitutional rights are

Mich. 13, 92 N.W. 495 (1902). In the latter case, the court upheld a rule, strictly enforced, that required students to go directly home from school. The court's reasoning was that in view of the compulsory education laws, schools had the legal and moral duty to see that students went directly home after school.

232. *See* Dritt v. Snodgrass, 66 Mo. 286 (1877).

233. *See* Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1909). A student went to church with his father during the week and was suspended. The court held the rule unreasonable as infringing into the area of parental authority without showing the conduct prohibited to have a "direct and pernicious effect on the moral tone of the school."

234. Sherman v. Charlestown, 62 Mass. 160 (1851).

235. Kenny v. Girley, 208 Ala. 623, 95 So. 34 (1923).

236. Fanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).

237. *See, e.g.*, A. Gibbon, *An 'A' in Violence: Unruly Gangs, Student Toughs Are a Serious Problem in Many Schools*, The National Observer, March 22, 1975 at 1 ff.

involved, the courts apply a stricter standard, requiring that the out-of-school conduct create a substantial disruption or material interference in the school before they will allow the school to suspend or expel for such conduct.

Courts have found authority for prohibiting disruptive behavior in *Tinker v. Des Moines Independent Community School District*,[238] in which the Supreme Court said, "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 guarantee of freedom of speech" (emphasis added). The issue in *Tinker* involved conduct in the school, but the clear implication was that First Amendment protections for students extended beyond the confines of school grounds and activities.

In *Shanley v. Northeast Independent School District*,[239] the Fifth Circuit Court applied the "reasonable forecast" standard of *Tinker*, which was discussed earlier in the section on disruption.[240] It said that schools are not required to wait for a substantial disruption; they may act when officials can "reasonably forecast" disruption from free-speech activity. *Shanley* involved the application of a school prior-approval rule to an underground newspaper published and distributed entirely off campus. In establishing the reasonable-forecast standard, the court warned that mere administrative intuition is not enough; rather, objective evidence must support any forecast of disruption. No such evidence existed in this case, nor were allegations made that the publication was libelous or obscene. Thus, it would have been virtually impossible to show the reasonable likelihood of substantial disturbance within the school. Nonetheless, the court noted that balancing expression and discipline is a question of judgment for school administrators and boards and is subject only to the constitutional requirement of reasonableness under the circumstances.

In another off-campus distribution case, a federal district court in California upheld the suspension of students for distributing to other students just outside the school gates a paper that the school found to be vulgar and profane.[241] The court looked closely at evidence that the publication was vulgar and indicated that "when the bounds of decency are violated in publications distributed to high school students, whether on campus or off campus, the offenders become subject to discipline." The court applied the material and substantial disruption test and held that conduct "which has a tendency to impair the authority of teachers and to bring them into ridicule and con-

238. 393 U.S. 503 (1969). The "material and substantial interference" standard actually comes from the Fifth Circuit in *Burnside v. Byars*, 363 F.2d 744, 749 (1966), which the Supreme Court cited with approval.

239. 462 F.2d 960 (5th Cir. 1972).

240. *See* text at note 36, *supra*, for a complete discussion of the student literature cases.

241. Baker v. Downey Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969).

tempt," as the underground newspaper apparently did from the evidence presented, passes the test.

The students argued that all their activity was off school grounds, but the court held that school authorities are responsible for the morals of students while going to and from school as well as while on the premises. The fact that the distribution was just outside the school gates, however, was critical to this finding. Had the distribution taken place farther from school grounds and school time, the court would have had more difficulty fitting its rationale to an affirmation of the suspensions. Also, had the publication not been full of diatribes against individual teachers, which can adversely affect discipline, the court might have had more trouble fitting the case within the Supreme Court standard.[242]

Another First Amendment issue is raised in discipline for students who participate in protest marches and rallies. In a Fifth Circuit decision, students had been expelled or suspended for participating in a civil rights demonstration on a Saturday outside the school grounds.[243] Many of them had been arrested and charged with parading without a permit. In reversing for the students, the court spoke rather vaguely of constitutional rights, without specifying which ones had been violated. The students' complaint, however, alleged violations of freedom of speech and due process, the latter because of the lack of a hearing; presumably the court agreed with their contentions. The court held that only under "exceptional circumstances" could schools discipline students for out-of-school conduct that involves a free-speech issue.

In Tennessee, a student was suspended and later expelled for picketing in front of the school and "enticing students not to enter the building."[244] The conduct occurred during widespread boycotts of the city schools, which were causing a substantial disruption of the school program. The court held that while the original brief suspension of the student was lawful and indeed could have been expected in view of the repeated absences and picketing, the subsequent expulsion was not lawful. The court cited a failure of proof that the student in any way "incited students not to enter the building."

Interestingly, the court found the boycott to be a substantial disruption within the schools. It also held that the student's exercise of her First Amendment rights by excessive absences warranted some disciplinary action by school officials. But her mere participation in the boycott, as opposed to any leadership role, did not merit expulsion, according to the court. The implication is that, had the proof offered

242. *See also* Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir. 1973), *reh. denied*, 475 F.2d 1401 (1973); Pervis v. La Marque Indep. School Dist., 466 F.2d 1054 (5th Cir. 1972); and State *ex rel.* Dresser v. District Bd., 135 Wis. 619, 116 N.W. 232 (1908).

243. Woods v. Wright, 334 F.2d 369 (5th Cir. 1964).

244. Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970).

at the hearings more clearly shown an active role in the citywide boycott, the expulsion would have been upheld.

Drug and Alcohol Abuse

The abuse of drugs by students is well documented.[245] School boards, principals, and legislators have all recognized the severity of the problem and have taken steps to control it. Recently school officials have noted that alcohol is the most frequently abused drug and the one that creates the greatest problem. Dr. Morris Chafetz, director of the National Institute on Alcohol Abuse and Alcoholism, estimates that some 450,000 young teenagers and children from 9 to 12 have serious problems involving alcohol.[246] Apparently, more students are turning away from what they perceive to be the legal and psychological dangers of hard drugs to an easier, "hassle-free" high of alcohol.

This section will discuss the school's authority to discipline students because of their possession, use of, or involvement with drugs. Since most of the litigation has involved use of illicit drugs off the school grounds, this discussion has been included under out-of-school conduct. However, several cases concerning drug use on school grounds are included here. One can assume that any school discipline that is permissible for drug use off the school grounds is also permissible for drug use on school grounds or at school activities off school grounds.

The authority of school boards to suspend or expel students for drug abuse has not been seriously challenged.[247] As early as 1899 a North Carolina court upheld the expulsion of four high school students for getting drunk on Sunday in a grog shop. The court considered this conduct to fall within the then standard ground for expulsion—"bad conduct."[248] Nonetheless, the issue is complicated by both state and federal criminal statutes on drug control, school board policies prohibiting the use of drugs and alcoholic beverages, criminal prosecution and school expulsion hearings running concurrently, Fourth Amendment issues of search and seizure,[249] and community and parental fear. This section will attempt to clarify some of these issues.

All states have criminal statutes that deal with narcotic drugs and alcoholic beverages. Generally these statutes define the drug and alco-

245. *See, e.g.*, G. Grizzle, A Selected Bibliography for the Analysis and Evaluation of Drug Policies (Institute of Government, Chapel Hill, N.C., Monograph No. 77, 1971).

246. News and Observer (Raleigh, N.C.), April 27, 1975, at Sec. V., p. 6, col. 8. *See also, Alcoholism: New Victims, New Treatments*, TIME, April 22, 1974, at 75-81.

247. The Supreme Court has recently upheld the school's authority to expel students for possessing alcohol on campus. *See* Wood v. Strickland, 43 U.S.L.W. 4293 (U.S., Feb. 25, 1975).

248. Horner School v. Wescott, 124 N.C. 518, 32 S.E. 885 (1899).

249. For a complete discussion of the issues involved in the search of a student, see Phay & Rogister, *Searches of Students and the Fourth Amendment*, 6 SCHOOL LAW BULL. (Institute of Government, Chapel Hill, N.C., Jan. 1975).

hol use that is prohibited and prescribe penalties for violations.[250] These statutes have varied widely, especially with regard to penalties, but the movement now is toward uniformity.

Over 30 states have patterned their laws on the federal Controlled Substances Act, which is a part of the comprehensive Drug Abuse Prevention and Control Act of 1970.[251] Essentially, the act sets forth procedures for those who may legally handle drugs and prescribes penalties for anyone who manufactures, possesses, sells, or uses the listed drugs outside the defined bounds. The act establishes five "schedules" of controlled substances by drug groupings. It redefines drug classifications and establishes penalties in the several drug categories. Mandatory minimum sentences are abolished, most penalties reduced, and most restrictions on probation and parole removed.[252]

Most student involvement with illicit drugs and alcohol occurs off school premises. In general, schools may adopt rules that provide for serious punishment for students who wrongly use drugs and alcohol off campus since the abuse frequently has a direct and immediate effect on the school's general welfare.

A recent Iowa case indicates that for the school to discipline a student for drug abuse, the student must be guilty of the misuse.[253] In this case a federal district court struck down a school athletic association's rule rendering a student ineligible for school sports because he occupied a car when he knew that beer was being drunk in the car. The court found the conduct to have at best only an indirect effect on the school.

Courts seem more willing to uphold school rules involving the use of narcotic drugs. They note the adverse effect that drugs can have on the quality of the school environment and the difficulty in trying to distinguish on-campus from off-campus abuse in terms of punishment.[254] Problems of proof may arise in establishing off-campus abuse of drugs or alcohol, but the authority of schools to punish for such abuse seems clear.

Essentially, the school has authority to suspend or expel for off-campus drug abuse so long as the rule authorizing the discipline is reasonable and the conduct can be shown to have some direct and immediate effect on the discipline or general welfare of the school. Given the nature of drug abuse, the criminal sanctions for it, and the courts' recognition of the pervasiveness of the drug problem, it seems unlikely that school boards will be forbidden to suspend or expel for off-campus abuse.

250. See, e.g., N.C. GEN. STAT. §§ 18A-1 to -58 (Supp. 1974) (Regulation of Intoxicating Liquors); N. C. GEN. STAT. §§ 90-86 to -113.8 (1974) (Uniform Narcotic Drug Act).

251. 21 U.S.C. §§ 801-956 (1970).

252. 21 U.S.C. §§ 841-851 (1970).

253. Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555 (Iowa 1972).

254. *See, e.g.*, Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex. 1972).

Students who illegally use, possess, or sell drugs may be convicted under the various state or federal statutes, or both. One question that troubles school officials is whether a criminal conviction for drug abuse that occurred elsewhere than on school property or at a school activity is a sufficient ground for automatic suspension or expulsion.

In *Paine v. Board of Regents of the University of Texas System*,[255] a federal court considered a school expulsion that resulted from a conviction for drug use that occurred off campus. It found a school rule requiring automatic suspension for two years for any student "placed on probation for or finally convicted of the illegal use, possession and/or sale of a drug or narcotic" to be invalid. The court held that the rule violated procedural due process requirements in not affording the student an opportunity to show that his continued presence on campus posed no danger that other students might be influenced to use, possess, or sell illegal drugs; the avoidance of this danger was the admitted purpose of the rule.[256]

A related question is whether a school board can automatically suspend or expel a student solely on the basis of an arrest, arraignment, indictment, or conviction for drug abuse. In New York,[257] students had been arrested and charged with possession of a hypodermic instrument. They were suspended under a board resolution providing for mandatory suspension for "any student upon his indictment or arraignment in any court . . . for any criminal act of a nature injurious to other students or school personnel."

The court did not doubt that heroin use by students off campus might endanger the health, safety, and morals of other students, thereby authorizing the board to make rules in the area. But it held that the rule violated the New York statutes specifying the grounds for suspension; because the statutes restrict important rights, the court ruled they must be strictly construed.[258] The charges against the students for possession were insufficient to meet the specific grounds in

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255. 355 F. Supp. 199 (W.D. Tex. 1972), *aff'd per curiam*, 474 F.2d 1397 (5th Cir. 1973).

256. An early general standard came in *Douglas v. Campbell*, 89 Ark. 254, 116 S.E. 211 (1909), in which the state supreme court upheld the suspension of a student who had been drunk and disorderly in violation of a town ordinance. The court's test was "any conduct that tends to demoralize other pupils and to interfere with the proper and successful management of the school, which the teacher and the board shall consider necessary for the best interest of the school, may subject the offending one to . . . [suspension]."

257. Howard v. Herman, 59 Misc. 2d 327, 199 N.Y.S.2d 65 (1969).

258. N. Y. Educ. Law § 3214 (6) (a) (McKinney Supp. 1974):

> The board of education, . . . may suspend the following pupils from required attendance upon instruction:
>
> (1) A pupil who is insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others;
>
> (2) A pupil whose physical or mental condition endangers the health, safety, or morals of himself or of other pupils;
>
> (3) A pupil . . . who is feeble-minded . . . .

the statute; the charges did not prove, if they were true, that the students were insubordinate, disorderly, or physically or mentally affected to the extent of endangering the health, safety, or morals of themselves or other students.

Another New York decision that supports this result is a holding of the Commissioner of Education that a conviction for drug abuse is not by itself a sufficient ground for suspension or expulsion. In *In re Rodriguez*,[259] the Commissioner reinstated a student expelled on the basis of an arrest for possession and sale of drugs. He applied the test in the New York statute and added in dictum: "Even had he been adjudged a youthful offender on the charges, whether by proof or plea of guilt, such adjudication alone could not have been the basis for this expulsion." The Commissioner was relying on the New York Code of Criminal Procedure, which forbids the status of youthful offender from operating to deny any right or privilege.

Some states have statutes dealing specifically with drug abuse as a ground for suspension or expulsion. In Tennessee a principal can suspend a student for unlawful use or possession of drugs, as they are defined by statute.[260] California has an even more ambitious statute. It authorizes the school board or principal to suspend a pupil who has used, sold, or possessed narcotic or hallucinogenic drugs "on school premises or elsewhere."[261] It also provides that law enforcement officials who arrest a student for drug abuse shall give written notice to his superintendent. Even if the student is later released and the charges dropped, the official may still send written notice if he believes the school district would benefit by such notification. The constitutionality of these statutes will likely be challenged soon.

The issue of double jeopardy has been raised when students have faced suspension or expulsion for drug abuse as well as criminal sanctions. The court in *Paine v. Board of Regents*[262] summarily dismissed a challenge that was based on double jeopardy, holding that while the state does impose two penalties for the same offense, it does so for entirely different purposes. One is "criminal" or "punitive," and the other is "civil" or "remedial" or "administrative." Double jeopardy can apply only to successive punishments for the same offense in the first category.

Problems in applying and interpreting statutes and school board regulations on drug abuse can be minimized if the board has clear regulations that are consistent with applicable state statutes. Nonetheless, courts seem to be willing to interpret regulations in favor of the schools if the rules are reasonable and adopted in good faith.

The United States Supreme Court recently overturned the Eighth

259. N.Y. Comm'r Dec. No. 8015, 8 ED. DEPT. REP. 214 (1969).
260. TENN. CODE ANN. § 49-1309 (Supp. 1974).
261. CAL. EDUC. CODE § 10603 (West 1975).
262. 355 F. Supp. 199 (W.D. Tex. 1972), *aff'd per curiam*, 474 F.2d 1397 (5th Cir. 1973).

Circuit Court of Appeals in a case involving the interpretation of a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities.[263] Students had brought onto campus a punch that consisted of two bottles of beer, six soft drinks, and water. The court of appeals had looked at state statutes for an interpretation of "intoxicating beverages" despite testimony at the trial that the school board did not intend, when it adopted the regulation, to link it to state statues. In any case, one reason given by the court of appeals in refusing to uphold the expulsion was the board's failure to establish that the concoction was in fact an "intoxicating beverage."[264]

The Supreme Court rejected the reasoning of the lower court entirely: "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement." The Court reasoned that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." It should be noted that the evidence indicated that the regulation's intent was reasonable—to prohibit the use or possession of alcohol at school.

The Supreme Court holding indicates that courts are to construe board regulations consistently with board intentions, but those intentions should nonetheless be expressed as clearly as possible. An example of a board regulation that could be used is the following:

> A student shall not knowingly possess, use, transmit, or be under the influence of any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana, alcoholic beverage, or intoxicant of any kind (1) on the school grounds during and immediately before or immediately after school hours, (2) on the school grounds at any other time when the school is being used by any school group, or (3) off the school grounds at a school activity, function, or event.
>
> Use of a drug authorized by a medical prescription from a registered physician shall not be considered a violation of this rule.[265]

If the school board wants to define the prohibited drugs in the regulation, it may want to consider using the state or federal statutory

263. Wood v. Strickland, 43 U.S.L.W. 1293 (U.S. Feb. 25, 1975). The disciplinary rule provides in appropriate part:

> 3. Suspension
>
> . . . .
>
> b. Valid cause for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.
>
> . . . .
>
> (4) The use of intoxicating beverages or possession of same or [sic] at a school sponsored activity.

264. *See* Strickland v. Inlow, 485 F.2d 186 (8th Cir. 1973).

265. R. PIUAV & J. CUMMINGS, STUDENT SUSPENSIONS AND EXPULSIONS: PROPOSED SCHOOL BOARD CODES (1970).

definitions. A federal district court in Texas upheld the following mandatory-expulsion rule, which was worded in that manner:

> Any student who shall sell, use or possess any dangerous drug *(as those terms are now defined, or may hereafter be defined, by law)* . . . shall be expelled from school for not less than the balance of the semester during which such offense occurs and not more than the balance of the entire year remaining (emphasis added).

This rule was found to be a reasonable exercise of the local school board's power. The court noted that possession, or certainly the use, of drugs by students could have an adverse effect on the "quality of the educational environment."[266]

Most school board regulations automatically suspend or expel a student who violates the prohibition on use of drugs. However, some regulations leave the disciplinary decision to the discretion of school officials. In New York the Commissioner of Education found that the school board violated its discretionary power when a student who had drunk beer in violation of school athletic regulations was dropped from the athletic squad, denied all other extracurricular activities for the year, and given a ten-day suspension plus probation for the year.[267] The Commissioner found the discipline excessive in relation to the violation and ordered that all punishments be dropped except the athletic squad prohibition.

But courts seldom overturn discretionary suspensions and expulsions because they are reluctant to interfere with internal school affairs.[268] For example, an Arizona court refused to find abuse of discretion when a principal recommended expulsion of a student who had distributed pills. It was the pupil's first offense and the first instance of drug abuse in the school, but the principal said he wanted a harsh remedy to nip the problem in the bud. The court recognized the current problem of drug abuse in the schools and had no difficulty in holding "the most severe sanction of expulsion [for a] student who distributed drugs to other students."

Drug abuse in the schools raises the issue of the duty of school officials to ferret out student abusers. Courts freely acknowledge the magnitude of the drug problem[269] and recognize that school officials have an affirmative duty to investigate any charge of student possession or use of drugs when a reasonable suspicion arises.[270]

An important question that arises in the area of suspension or ex-

266. Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex. 1972).

267. *In re* Giarraputo, N.Y. Comm'r Dec. No. 8005, 8 Ed. Dep. Rep. 193 (1969).

268. Kelly v. Martin, 16 Ariz. App. 7, 490 P.2d 836 (1971).

269. *See, e.g.*, People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (1971). "Rampant crime and drug abuse threaten our schools and the youngsters exposed to such ills."

270. *See* People v. Overton, 20 N.Y.2d 360, 283 N.Y.S.2d 22 (1967); People v. Maxwell, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (1970); People v. Jackson, 65 Misc. 909, 319 N.Y.S.2d 731 (1971). To argue that school officials might or might not be civilly prosecuted for failure to exercise that duty is speculative at best. In the interest of the school environment, most officials fulfill the obligation anyway.

pulsion for drug abuse is the school's authority to punish for off-campus abuse. Several cases involving arrests or convictions that have raised this question already have been discussed. But the issue also may arise without any police activity. It is part of the larger issue of the school's general authority to discipline students for conduct off school grounds.

In summary, recognizing the growing problem of drug and alcohol abuse in the schools, courts seldom overturn school board punishment for drug abuse. In fact, relatively few cases in this area even reach the courts, an indication that students and parents do not seriously question that the extreme penalties of suspension or expulsion are justified for the offense of drug abuse. This is particularly so, given the criminal sanctions in the area.

When problems arise, they usually result from poorly written statutes and board regulations that are not consistent with statutory requirements. Rules should create no difficulty for the school board if they clearly state the grounds for suspension or expulsion, are applied uniformly, and are carefully drafted to conform to applicable legislation. When the conduct is not prohibited by law, such as off-campus drinking by students who are of age, officials may have a harder time showing the effect on the school environment. If there are no real adverse effects, then probably the penalties of suspension or expulsion will not be applied anyway.

Fighting and Other Destructive Acts

Student violence that occurs off campus may have substantial impact on the school. In keeping with the general rule, when such impact substantially interferes with school operations, the school may suspend or expel the student. In an old but still viable decision, the Missouri Supreme Court upheld a rule prohibiting quarreling, fighting, or profanity by students at school or on the way home.[271] The rule was found to be valid because it was reasonable to conclude that it promoted good order and discipline in the school. The court limited its decision, however, to student conduct on the way home from school before parental control resumed. The court reasoned that the effects of student strife on the way home would necessarily be felt in the school in terms of ill will and hostility among students and parents.

In a more recent case, a New Jersey court upheld in principle the suspension of a student who was involved in the off campus stabbing of a student neighbor.[272] The court found suspension to be justified whenever reasonably necessary for the suspended student's physical or emotional safety or for the safety and well-being of other students,

271 Deskins v. Case, 85 Mo. 485 (1885).
272 R.R. v. Board of Educ., 109 N.J. Super. 337, 263 A.2d 180 (1970).

teachers, or public school property.[273] Although the court reversed the suspension because due process had been violated, it indicated that the reasonable judgment of school officials might have been sufficient to meet the test, despite psychological testimony that the student posed no threat to himself or to others.

I have found no cases involving severe school punishment for out-of-school scuffles; important questions on this subject remain, such as the authority to suspend for use of a dangerous weapon off-campus. The general rule requiring the school to show a direct connection between the out-of-school violence and school discipline and safety to justify disciplinary actions remains largely undefined in all but the most blatantly violent or destructive circumstances. For less serious misconduct, it would appear that school officials must prove that the misconduct substantially disrupts school.

Miscellaneous Conduct

Many of the early cases noted at the beginning of this section fall into an area of miscellaneous out-of-school conduct. Also, at least one recent case does not fit within any category but should be considered in assessing out-of-school conduct as grounds for suspension and expulsion. In New York, a school forbade students to leave school grounds for lunch. In response to parental complaints, the school made exceptions for several students on condition that their parents pick them up and return them to school. When the parents stopped picking up their children, the students were suspended for leaving the school grounds and told not to return until the parents agreed to pick them up or let them eat at school. In upholding the suspension, the court noted the presumption that school rules are reasonable and necessary and held the specific rule under attack to be justified because it promoted student safety.[274]

Conclusion

The evolution of student rights and the judicial protection of these rights will be regarded by many as a mixed blessing at best and as a serious interference with internal school discipline and affairs at worst. It should be remembered, however, that the schools must have and do have plenary authority to regulate conduct calculated to cause disorder and interfere with educational functions. The courts' primary concern is that students be treated fairly and accorded minimum standards of due process of law.

273 *See also* Palmyra Bd. of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959). The court upheld the suspension of a student who set fire to the school after school hours, and it held his parents liable for the damages. It relied on the legislative authority to impose restrictions on those attending public schools even for events that happen outside school hours.

274 Fitzpatrick v. Board of Educ., 54 Misc. 2d 1085, 284 N.Y.S.2d 590 (1967).

In light of the changing nature of due process in this area, the need to understand students, and the importance of avoiding disruption of school operations and unnecessary expulsion of students, I recommend that schools do these things:

1. Adopt a grievance procedure for students.
2. Adopt a written policy statement on student conduct. This statement should include a list of rights possessed by students and the types of major misconduct that are prohibited by the school. The statement should be worked out in consultation with students, teachers, and parents. When completed, the regulations should be made public and widely distributed.
3. Adopt written procedures for handling discipline cases.[275]
4. Develop an emergency plan to deal with school disorders.

Times change. The absolute control once exercised by school boards and school administrators over the operation of schools is gone. We have a new ball game, with part of the power once held by boards and administrators now held by teachers and students. We need to recognize this fact and then ask ourselves in what ways our relationships with students, parents, teachers, and administrators have changed, so that we are not fooled by our own rhetoric as we work with these groups to make our schools more responsive to community needs and to produce graduates better trained to accept responsibility in today's society.

275 A proposed code governing serious misconduct by public school students and outlining procedures for hearing alleged violations of the code has been published by the Institute of Government at the University of North Carolina at Chapel Hill. A copy can be purchased for $3.00 from the Institute (North Carolina residents should add 3 percent sales tax).

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