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ABSTRACT

Noting that recent Supreme Court decisions (including Hazelwood School District v. Kuhlmeier and Bethel School District No. 403 v. Fraser) moved markedly away from protecting students' First Amendment rights, this paper examined justifications for granting public school students freedom of expression. Rather than looking at where students' First Amendment rights stand, the paper's focus is on where they should be. The paper notes that courts have granted students expressive rights (such as the case of "Tinker v. Des Moines Independent Community School District"), but then essentially withdrew them on legal (public forum) and educational (inculcating the majority's values) grounds that can lead only to continually diminished protection for students' freedom of expression. The paper argues that the approach should have been--and should be--utilizing freedom of expression rationales which are advocated for society at large. Arguing that the First Amendment is instrumental in providing the foundation for dissent, self-fulfillment, human dignity, and liberty, the paper concludes that students' expressive rights should be seen as a "basic educational mission" and are best protected by applying to the school setting basic First Amendment principles. One hundred forty-four notes are included. (RS)

FREE SPEECH FOR PUBLIC SCHOOL STUDENTS: A "BASIC EDUCATIONAL MISSION"

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The Supreme Court's *Fraser* and *Hazelwood* decisions moved markedly away from protecting students' First Amendment rights previously established in *Tinker*. Since then, lower courts have bolstered school officials' concerns with controlling student conduct and instilling generally accepted views at the expense of students' expressive rights. This paper suggests that these rights should be seen as a "basic educational mission," and are best protected by applying to the school setting basic First Amendment principles.

FREE SPEECH FOR PUBLIC SCHOOL STUDENTS: A "BASIC EDUCATIONAL MISSION"

Freedom of expression for public secondary school students has had a checkered history, with courts originally finding limited freedom,[1] then generally bringing students within the First Amendment and then, with two Supreme Court decisions in the late 1980s, restricting students' free speech rights. Recently, for example, federal courts have stated that a public junior high school may open its grounds to free expression or limit expression at will,[2] agreed that students could not distribute nonschool-sponsored publications in public school hallways,[3] upheld the suspension of a public middle school student for wearing a shirt displaying the words "Drugs Suck,"[4] and agreed with a school district that high school newspapers and yearbooks could not accept informative advertisements from Planned Parenthood.[5] Even a Ninth Circuit decision allowing students to bring an action against a school district which imposed discipline for the wearing of buttons and stickers during a teachers' strike established a three-part categorization for student expression which arguably grants administrators nearly a free hand in limiting public school students' free speech.[6]

Courts have moved far from the protection offered students by the Supreme Court in *Tinker v. Des Moines Independent Community School District*.[7] After the Court's rulings in *Hazelwood School Dist. v. Kuhlmeier*[8] and *Bethel School Dist. No. 403 v. Fraser*,[9] public school students' freedom of expression is, at best, minimally protected. The rationales for severe limitations on public secondary school students'

freedom of expression as put forth by educators and administrators and now widely accepted by the courts no longer can be justified. It is time to revisit public high school students' freedom of expression and to determine whether its boundaries may best be established by the values which underlie the First Amendment itself. While excellent arguments on the basis of a positive educational mission for schools have been made for broadening students' expressive rights, at least to the level accepted by many courts from the early-1970s through the mid-1980s,[10] this paper will examine whether basic First Amendment principles are themselves the best grounds for protecting freedom of expression for students.

A. The Development of Public Secondary School Students' Freedom of Expression

The Supreme Court held fifty years ago that public school students have First Amendment rights. It found unconstitutional a state law requiring students to pledge allegiance to the American flag, holding that schools must protect "Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[11] And nearly twenty-five years ago the Court stated that "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[12]

In practice, however, courts have not been faithful to these bromides. More than a dozen decisions by federal courts from 1969 through 1971 involved public high school students' First Amendment rights, and students lost nearly half those cases.[13] The most

important court ruling during this period was the Supreme Court's decision in *Tinker*. There, two senior high school students and one junior high school student were suspended for refusing to remove black arm bands they wore to school to protest the United States' involvement in the Vietnam war. The Court found that the school's action abridged the students' First Amendment rights:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. . . . Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[14]

Students are "persons" under the federal Constitution and may not be disciplined for expressive activity when school officials merely have an "undifferentiated fear or apprehension of disturbance" from a student's expressive conduct, said the Court.[15] The Court found that no actual disruptive activity occurred or potentially would have stemmed from the students wearing arm bands.

During the same period, a federal court found that administrators could not discipline students for distributing on school grounds an "underground" publication critical of school policies and officials.[16] While acknowledging that school officials have authority to control student conduct so that an atmosphere conducive to learning prevails, the court held that administrators could not reasonably have predicted disruptions would occur due to distribution of the newspaper. Similarly, another federal appellate

court found that a school board's decision to prohibit a student from distributing antiwar leaflets on school grounds could not stand.[17] The board had adopted rules banning material which, among other things, advocated illegal action. Recognizing that school officials could punish students for disruptive activities, the court said the rules in question were unconstitutionally vague when applied to student expression.

However, federal courts during this period were just as likely to grant public school administrators broad powers to restrict students' First Amendment rights. Seeing a need for the educational process to be protected, one court stated that students' expressive rights were not coextensive with those of college students or adults generally.[18] The court thus upheld the suspension of two students for using what the court found to be profane and vulgar language in an "underground" paper distributed outside the main entrance to a public high school. Another court described an independently produced alternative newspaper as containing "four-letter words, filthy references, abusive and disguising language and nihilistic propaganda."[19] After being told he could not distribute the paper on campus, a student appeared with several copies which he refused to surrender to school officials. The court balanced the student's First Amendment rights against the administrators' responsibilities to encourage respect for authority and to protect the rights of students to an orderly learning atmosphere. Stating that "the activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature stage of life and less able to screen fact

from propaganda,"[20] the court upheld the student's suspension. Another court allowed administrators to punish students' "gross disobedience" for distributing copies of an underground newspaper after the school principal had twice told students that unauthorized material could not be handed out on campus.[21] The court stated that the students knew of the rule and that they would be subject to disciplinary action for violating it. Since the student could have distributed the paper off school grounds, the student's First Amendment rights were not the concern, according to the court. Rather, the issue was maintaining order in the school.

From the early- through the late-1970s, federal courts generally took a more expansive view of public secondary school students' First Amendment rights than they had earlier. For example, although noting administrators' rights to adapt students' free expression rights to the school setting, a court held that rules forbidding distribution of material advocating illegal action or that was grossly insulting to a group or individual were overbroad.[22] The court required that the rules had to be modified so as permit disciplinary action for distributing such material only if there were evidence that it could lead to substantial disruption of school activities. Also, the Seventh Circuit held vague and overbroad a school board rule that prohibited distribution of material that (1) was not written by a student, teacher or other school employee, or (2) did not contain "'the name of every person or organization that shall have participated in the publication,'" and was "'likely to produce a significant disruption of the normal educational processes.'"[23]

Even the approach of courts to "vulgar" material changed. For example, a principal had seized copies of a magazine which contained "four-letter" words and described a scene from a movie in which a couple "'fell into bed.'"[24] The court found the publication's sexual content limited and relatively mild, no more highly charged than heard by people "who walk the streets of our cities."[25] Since the magazine was not obscene, even under the Supreme Court's variable obscenity standard,[26] and since protecting students' free expression rights was an important constitutional mandate, the court held that the student should be permitted to distribute the publication.

In another case, administrators were not allowed to impound a sex education supplement when the court found that maintaining school discipline and avoiding material and substantial interference with school procedures could be achieved through methods short of abridging students' First Amendment rights.[27] Several courts found regulations designed to limit free expression on public secondary school grounds to be overbroad, such as rules prohibiting distribution of materials "'alien to school purposes'"[28] and rules requiring student publications to relate to the school's purposes and not conflict with school order.[29] Rules also were found to be vague, such as regulations which failed to make clear what expressive activities could be substantially disruptive[30] or which required that student-distributed materials must comply with "journalistic standards of accuracy, taste, and decency maintained by newspapers of general circulation."[31]

Also during the mid- to late-1970s, federal courts generally held either that prior restraint could not be imposed on public

secondary students to any greater extent than on the public at large,[32] or that it could be imposed only if there were carefully and narrowly drawn procedural guidelines.[33]

B. *Fraser* and *Hazelwood* and the Demise of Free Expression

This general acceptance by federal courts of secondary school students' First Amendment rights, generally based on the Supreme Court's *Tinker* decision, seemed to be sufficiently in place by the late 1970s that few cases involving this question were decided in the first half of the 1980s. But cases decided by the Court in 1986 and 1988 dramatically changed the protection for students' freedom of expression.

Before an assembly of students, Matthew Fraser delivered a speech nominating a fellow student for a student body office. The speech included sexually suggestive language[34] which administrators found to be indecent and lewd, violating a school board rule prohibiting "'[c]onduct which materially and substantially interferes with the educational process . . ., including the use of obscene, profane language or gestures.'"[35] Giving a nod to the role of schools in teaching students fundamental democratic values, including "tolerance of divergent political and religious views, even when the views expressed may be unpopular," the Court quickly made clear that this discourse need not offend the "personal sensibilities of the other participants and audiences."[36] In part for this reason, and acting in their *in loco parentis* roles, administrators may punish "inappropriate" speech, including that which is "sexually explicit, indecent, or lewd . . . ."[37] Fraser's speech, then, was not of the same

type as that at issue in *Tinker*, and therefore did not merit protection under a strict scrutiny rule.

In *Fraser*, the Court gave considerable weight to the school's educational mission, but saw that mission as instilling values of the majority:

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. . . . [I]t was perfectly appropriate for the school to . . . make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[38]

The Court found more importance in the teaching of "values of civility" and allowing schools to determine "the form and content of those values" than in "freedom of student speech."[39] Administrators were permitted to discipline Fraser for his remarks even though the language in his speech did not meet the "variable obscenity" standards the Supreme Court established in *Ginsberg v. New York*,[40] nor the "indecent" speech standards of *FCC v. Pacifica Foundation*,[41] both cases permitting a narrower application of the First Amendment to minors than for adults.[42]

In *Hazelwood*,[43] the Supreme Court extended *Fraser* and returned to school authorities control over public secondary school students' expressive activities, arguably wresting away from students the rights recognized in *Tinker*. The principal of Hazelwood East High School in a St. Louis suburb ordered the faculty advisor of the student newspaper to remove a two-page spread containing a story about student pregnancy and another story about the effect on

students of parental divorces. Several students brought an action against the principal and school district.[44] As in the *Fraser* opinion, the Supreme Court began its decision in *Hazelwood* with reference to *Tinker* and the protection of students' First Amendment rights. Again, however, it noted that "the special characteristics of the school environment" give administrators the power and duty to alter those rights as needed to serve the goals of educating students.[45] Citing *Fraser*, the Court said that "First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'"[46]

The Court distinguished *Hazelwood* from *Tinker* in that the latter involved symbolic speech by students in a non-curricular setting. The situation is quite different, according to the Court, where students attempt to use a school-sponsored publication to present information and opinions. The difference is that between tolerating expression, as in *Tinker*, and "lend[ing the school's] name and resources" to the expression.[47] The latter exists when a newspaper is published by the school and prepared by students in a class under the supervision of a teacher, said the Court.

The *Hazelwood* Court applied a public forum analysis to the student newspaper in order to determine if the paper were a traditional[48] or limited[49] public forum, in either of which the government may proscribe or limit expression only under narrowly drawn guidelines designed to serve a state interest of the highest order, or if the paper were a nonpublic, or closed, forum[50] in which limitations on speech need only be "reasonable in light of the purpose served by the forum and . . . viewpoint neutral."[51] The

importance of this distinction is in the test applied to determine if governmental abridgment of expression is valid under the First Amendment. For traditional and limited public fora, courts will apply a strict scrutiny test, requiring proof that a speech limitation is needed to further a compelling governmental interest.[52] For a nonpublic forum, which has not been opened to the public for speech activities either by tradition or designation, the government need show only that its limitation on expression is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[53] The Court held that the school newspaper at issue in *Hazelwood* was a nonpublic forum because administrators had not allowed it to be put to "indiscriminate use," rather "reserv[ing it] for other intended purposes," i.e., teaching reporting skills and journalistic responsibility. Also, material for each issue was reviewed by the faculty adviser and the school principal prior to publication.[54] Therefore, the school authorities could restrict expression in the school paper if such restrictions were "reasonable." The Court said it was "reasonable" for the school to reject the two articles on the basis that they did not meet the standards of skills and responsibility for which the newspaper had been reserved.[55]

Hazelwood, which built on *Fraser* in giving public school administrators the leeway to suppress student expression that does not comport with traditional educational values, may have swept away more than a decade of judicial support for students' First Amendment rights.[56] Today, as one court has stated, "protections afforded students' First Amendment rights in the schoolhouse are a maze of subtle and somewhat conflicting distinctions."[57] Since

Hazelwood, perhaps in an effort to cut through those "conflicting distinctions," courts have tended slavishly to apply the public forum analysis, find many forms of student expression to have taken place in a nonpublic forum and thus apply the "reasonableness" test. Protection for student speech rarely can survive that approach.

For example, in *Poling v. Murphy*,[58] a candidate for student council president made a speech containing "discourteous" and "rude" statements.[59] Administrators then disqualified him from running for office. The Sixth Circuit found the speech to have been delivered in a "school-sponsored" forum, thus giving school officials "greater control" over this expression than over personal speech.[60] The dissent's contention that the presentation was political speech, thereby falling within *Tinker*'s protection, and not the vulgar speech of *Fraser* or speech invading another's privacy as in *Hazelwood*, was unavailing against a *Hazelwood* public forum analysis.[61]

Similarly in *Planned Parenthood v. Clark County School District*,[62] the Ninth Circuit found a student newspaper and yearbook and even school athletic programs to be nonpublic fora, allowing school administrators to refuse to accept advertisements from Planned Parenthood. This decision was in the face of a student newspaper in a district school which had accepted advertisements from "casinos, bars, churches, political candidates and the United States Army,"[63] and despite the district's rationale that the Planned Parenthood ad was rejected in part to avoid "the sensitive and controversial issue of family planning."[64] In *Hedges v. Wauconda Community Unit School District*,[65] a federal district court allowed distribution on public school grounds of material not primarily

prepared by a student, but permitted administrators to forbid distribution of publications concerning activities and meetings of non-school sponsored organizations. Of more concern, the court stated that "where school officials open an otherwise closed forum as a limited public forum, they are not required to maintain it as a limited public forum indefinitely. They may, if they choose, return the forum to its closed state."[66] Once administrators again designate the school buildings and grounds as a closed, or nonpublic, forum, they are able to limit student expression under the restrictive *Hazelwood* and *Fraser* standards.

Hazelwood also has reopened the issue of prior restraint, generally settled in the 1970s by requiring carefully formulated procedural guidelines if administrators were to review material prior to distribution on school grounds.[67] In a footnote, the *Hazelwood* court suggested that such guidelines might not be required, and that even "underground" publications could be subject to prior restraint.[68] Lower courts have not ignored this. For example, in *Nelson v. Moline School District*,[69] a court upheld a school policy limiting student distribution of materials to certain times and places within the school, and only if the materials previously were approved by the principal. Using *Hazelwood*'s public forum analysis, the court found school buildings to be nonpublic fora, thereby permitting administrators to apply reasonable rules, including prior restraint, to distribution of materials by students.

In deciding a case involving an "underground" newspaper, the Eighth Circuit stated that the question it faced was "the right of public high school authorities to regulate or prohibit the distribution

on school property of written material prepared by students or others."[70] To the contrary, the proper question in this case and similar cases is not whether administrators have the right to regulate distribution but whether students have the First Amendment right to freedom of expression. The focus must be on students' constitutional rights, not school officials' statutory or common law rights.

It is a recent Ninth Circuit decision, *Chandler v. McMinnville School District*, which may best reflect the severe mischief done by the *Fraser* and *Hazelwood* cases.[71] In response to a lawful strike by teachers in an Oregon school district, the district hired replacements. A day later, two students, both of whose fathers were on strike, came to the public high school wearing buttons and stickers on their clothing, displaying slogans such as, "I'm not listening scab," "Do scabs bleed?," Scab we will never forget," "We want our real teachers back" and the word "Scab" with a line drawn through it. A vice principal asked them to remove the buttons and stickers, saying they were disruptive, although the students and at least one replacement teachers said that no disruptions had occurred. When the students refused to obey the vice principal's order, they were sent home for the day. They returned the next day with different buttons and stickers, were asked to remove them and, anticipating further punishment, complied. The students filed an action in federal court arguing that their First Amendment rights had been abridged.[72] Finding that the buttons and stickers were "offensive" and "inherently disruptive," the district court granted the school district's motion to dismiss the action.[73]

The Ninth Circuit reversed, allowing the students to pursue their claim. The court's opinion, however, hardly furthers the cause of public secondary school students' freedom of expression. Agreeing that students do not "'shed their constitutional rights'" by attending public school,[74] and that they "'cannot be punished merely for expressing their personal views'" in school without a showing of substantial interference with school activities,[75] the court also stated that students' First Amendment rights "'are not automatically coextensive' with those of others in society.[76] On that basis, said the court, determining "'what manner of speech'" is inappropriate in the school setting "'properly rests with the school board.'"[77]

Turning to *Hazelwood* "for guidance in interpreting the meaning and scope of . . . *Tinker* and *Fraser*,"[78] the court determined that there are "three distinct areas of student speech . . . : (1) vulgar, lewd, obscene, and plainly offensive speech," even if delivered in a non-school sponsored forum, "(2) school-sponsored speech, and (3) speech that falls into neither of these categories," but "'might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'"[79] Public school student speech falling into any one of these categories may be the basis of disciplinary action, including prior restraint, under Supreme Court precedent. Thus, if on remand the district court were to find "that the word 'scab' can reasonably be viewed as insulting, and . . . that the slogans were directed at the replacement teachers," the language on the buttons and stickers might be placed in the third category and be grounds for discipline.[80]

The result of the court's adopting the three-category analytical approach is that much student speech would be judged under the "deferential *Fraser* standard . . . even if such expression occurs outside the context of an official school program or event."[81] *Tinker* may remain somewhat protective of expression when administrators discipline students on the basis of disruptive speech. However, the *Hazelwood* Court categorized many forms of student expression as school-sponsored speech,[82] and *Fraser* identified as "vulgar, lewd and plainly offensive" speech which had not previously been so classified by the Supreme Court. Both these types of expression may be restricted if such limitations are "reasonable." Further, the *Chandler* decision acknowledges the *Fraser* and *Hazelwood* deference to "'legitimate pedagogical concerns.'"[83]

C. A First Amendment Defense of Public Secondary School Students' First Amendment Rights

Apparently today, students' First Amendment rights are what remains after administrators have limited free expression on the basis of their statutory or common law responsibilities, as school officials and the courts see them, for the orderly and effective instillment of majoritarian societal values. This turns the First Amendment on its head. Rather, a more considered freedom of expression analysis suggests that students' expressive rights should be at the core of the societal values that public schools teach -- and that schools should allow students to practice. The very rationales on which legal scholars find the First Amendment to rest, are the

justifications for granting freedom of expression to public school secondary students.

While little is known about the philosophical reasons for adopting the First Amendment,[84] aside from the political necessity for doing so,[85] a number of justifications for the existence of freedom of expression have been posited. Attempts have been made to discredit some of these, such as the marketplace of ideas,[86] but new rationales, including some pertinent to the question of free speech rights for public secondary school students, have emerged. These justifications for freedom of expression are not mutually exclusive and, in some instances, overlap. No single explanation can adequately delineate the need for the free flow of communication.[87]

1. Protecting Dissent

The debate regarding whether public secondary schools should be enclaves for inculcating students with the traditional views of the United States' populace[88] or should allow students to test the boundaries of their own thoughts and perceptions of themselves and the world[89] may be seen as analogous to a centuries old philosophical split over the role of the state and the purpose of laws which govern a given society. Aristotle believed that law exists to make people good, to bind them together in a cohesive and just community. The Aristotelean perspective is an optimistic one, a view of organizing a community around principles of justice, equality and virtue.[90]

Aristotle's vision can be seen throughout western political thought, notably in the social contract theory of philosopher Thomas Hobbes. In this view, it is accepted that the benign, friendly state --

a leviathan -- may exercise censorship over speech which would hinder the development of community,[91] just as courts have permitted public schools to limit student speech seen as disruptive to educational goals.[92] Hobbes and his younger contemporary, John Locke, believed that individuals enter into an agreement with their government, granting power to that government to secure their lives, liberty and property. However, they do not give the state authority to interfere in other domains. For example, in his "Letter Concerning Toleration," Locke used this analysis to place control of religious beliefs outside the ambit of secular authority.[93] His conclusions have broader implications, extending to states of mind and activities that do not threaten to interfere with the limited aims of a government.

The views of the social contract, however, compete with the contemporary liberal vision that whether law exists to make people good is not the concern of the state. Likewise, raising the level of public discourse is also outside the state's purview, as is censorship of speech that may discourage this discourse. In short, the liberal view distrusts the state to do what is best for the public; in turn, the individual must be assured the right to dissent from state action, even if it is supported by a majority. Rodney Smolla maintains that the interests of the state "must be furthered by governmental *encouragement*, not governmental *coercion*. The government may seek to foster unity through persuasion and example, but not by bringing to bear the heavy-handed machinery of the criminal law."[94]

Steven Shiffrin contends that the dissenter -- the lone voice in the wilderness, the one against the many -- is the essence of First Amendment symbolism. Lee Bollinger also argues that the First

Amendment is in part symbolic. In addition to protecting our freedom of speech, Bollinger claims, the amendment is "one of our foremost *cultural* symbols."[95]

> [Protecting] free speech involves a special act of carving out one area of social interaction for extraordinary self restraint, the purpose of which is to demonstrate a social capacity to control feelings evoked by a host of social encounters."[96]

Shiffrin agrees:

> The idea of free speech does not merely protect the negative liberty of freedom of speech: it has indeed functioned as a cultural symbol to promote tolerant attitudes in America. . . . [A]s a cultural symbol, the first amendment has enlivened, encouraged, and sponsored the rebellious instincts within us all. It affords a positive boost to the dissenters and rebels.[97]

Because dissent is already a part of our cultural landscape, Shiffrin believes, to support judicial protection of individual dissenters is merely to affirm a shared value.

Shiffrin suggests that the American philosophical tradition of Ralph Waldo Emerson and Walt Whitman "eloquently express[es] an important part of the American tradition -- the part that encourages an independent spirit," celebrating the American who is not "wedded to the comforts of the present nor tied by the bonds of the past. They celebrated the courage of the nonconformist, the iconoclast, the dissenter."[98]

> In urging self-reliance and independence of thought, in praising the heroism of those willing to speak out against the tide, they sided with the romantics--those willing to break out of classical forms. Their conception of democracy had little to do with voting and everything to do with the American spirit.

> They sided with John Stuart Mill, in recognizing the ease of conformity. And, with Mill, they sponsored nonconformity.[99]

Emerson's early essays praised the virtues of intellectual independence and resistance to convention.[100] Emerson himself was a dissenter, an outcast from the Unitarian church. In him Shiffrin sees a resistance to orthodoxy and a skepticism about the truth and power of prevailing institutions. He likely would agree with the literary critic who argues that "[t]he mind of Emerson is the mind of America,"[101] symbolic of the essence of American culture.

For Shiffrin, "[d]issent communicates the fears, hopes, and aspirations of the less powerful to those in power. . . . The democratic value of dissent in this connection transcends the voting booth; it is part of the daily dialectic of power relations in the society."[102] Shiffrin calls on the judiciary to adopt a renewed respect for the dissenter and the value of dissent. If dissent advances collective goals by reminding those in power of shared cultural values, then its appreciation may provide a means of vindicating the majority's true will. The organizing principle of the First Amendment, Shiffrin argues, "is not the image of a content-neutral government; it is not a town hall meeting or even a robust marketplace of ideas; still less, it is liberty, equality, self-realization, respect, dignity, autonomy, or even tolerance."[103]

According to Shiffrin, the organizing principle of the First Amendment should be the Emersonian symbol of the dissenter, the unorthodox, the outcast. To highlight this perspective, Shiffrin targets those individuals' whose efforts to flaunt convention were ultimately at the center of cases which were argued before (and

whose convictions by lower courts were upheld by) the United States Supreme Court. Two separate eras are encompassed by this analysis. In both, the key element within the context of the present discussion is the value that dissent provides to society. Questioning the accepted values of the status quo not only serves to enrich the marketplace of ideas with an infusion of unique thoughts, but it also implants in the minds of the populace the notion that nontraditional viewpoints may be worthy of consideration.

It may not be the role of schools to foster dissent. However, neither should it be their role to suppress it. The questioning of authority is a positive, not a negative, educational value, and it is an important reason for granting students freedom of expression.

2. Self-Realization

Thomas I. Emerson's concept of individual self-fulfillment[104] speaks directly to the issue of the ability of free expression to foster personal growth and completeness, or what psychologist Abraham Maslow called self-actualization.[105] Similarly, the liberty theory advocated by C. Edwin Baker conceives of speech as being integral to human self-realization,[106] as does Martin Redish's First Amendment theory.[107] This role of the First Amendment is particularly applicable to young persons.

Redish's freedom of expression thesis is that the First Amendment is best understood in terms of a single value -- self-realization. Self-realization results from the "inherent value in allowing individuals to control their own destiny," and recognizes speech as instrumental "in developing individuals' mental faculties so

that they may reach their full intellectual potential."[108] Redish's concept of self-realization goes beyond Emerson's self-fulfillment prong. For Redish, the only value of the constitutional guarantee of free expression is individual self-realization, which:

> can be interpreted to refer either to development of the individual's powers and abilities -- an individual "realizes" his or her full potential -- or to the individual's control of his or her own destiny through making life-affecting decisions -- an individual "realizes" the goals in life that he or she has set.[109]

Redish emphasizes the distinction between his notion of self-realization and the more classical conception outlined by Justice Louis Brandeis which defended the "freedom to think as you will and to speak as you think [as] means indispensable to the discovery and spread of truth."[110] Redish is much more the modern liberal. Whereas Baker, for instance, does not believe commercial speech merits First Amendment protection because of its coercive potential, Redish takes the opposite view because such speech can make a valuable contribution to one's self-realization. Moreover, because all speech aids self-realization, the government cannot legitimately distinguish protection of political expression from protection of other forms of speech.[111]

Another element of self-fulfillment is the autonomy to which free speech contributes. Freedom of discussion promotes independent individual judgment. When many ideas are expressed, people's decisions will be less subject to the dictates of others, and individuals will be encouraged to exercise this independence in a

manner that reflects their fullest selves. As Kent Greenawalt has said:

> The supposition is not that freedom of speech will actually produce fully autonomous persons, or even that by some measure it will produce people who are more autonomous than not; the claim is only that people will be more autonomous under a regime of free speech than under a regime of substantial suppression.[112]

The self-fulfillment concept also has application in the social setting. By accommodating competing interests and desires, free speech contributes to social stability.

> Failures of accommodation are often a source of social instability. Those who are resentful because their interests are not accorded fair weight are likely to be doubly resentful if they have been denied the opportunity to present those interests in the political process.[113]

The Redish, Baker and Emerson concepts of self-fulfillment apply with some force to public secondary schools. Adolescents are in a stage of life in which they are seeking to know who they are and what they believe. This period of growth and maturation can only be stymied by repressive academic policies. One of the schools' primary goals should be to encourage self-fulfillment among their students.

3. Human Dignity

Whether authority -- for example, in the form of school administrators -- is by nature nurturing of free speech and its products such as self-realization, or whether it is to be mistrusted, is

at the heart of another rationale for freedom of expression. This approach holds that free expression is an end itself, "an end intimately intertwined with human . . . dignity."[114] A symbiosis exists between respect for individual autonomy and free speech; one leads to the other. Advocates of this view claim that the government -- school officials -- should treat people as if they were autonomous by allowing them all the information that might be helpful in making rationale choices.[115] "An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."[116]

This First Amendment rationale demands that government treat people with dignity. As a matter of basic human respect, people owe it to one another to listen to what others' views, at least not foreclosing the opportunity to speak and to listen.

> Under this view, suppression represents a kind of contempt for citizens that is objectionable independent of its consequences; and when suppression favors some points of view over others, it may be regarded as failing to treat citizens equally.[117]

According to Emerson, the right to freedom of expression "is justified first as the right of an individual purely in his capacity as an individual,"[118] and lies in the human ability to reason.

> It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. . . . [E]very man -- in the development of his own personality -- has the right to form his own beliefs and opinions. . . . [I]t also follows that he has the right to express these beliefs and opinions. . . . [E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. . . .

> [Accordingly,] suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.[119]

Just as Emerson maintains that the purpose of society is to promote the welfare of the individual, public schools should serve a similar function. They can and should serve their students by allowing them to grow. One avenue through which this can be achieved is permitting orderly and free expression. As Supreme Court Justice Thurgood Marshall said, "The First Amendment serves not only the needs of the polity but also those of the human spirit -- a spirit that demands self-expression."[120] Free speech is particularly valuable, then, for reasons that have little to do with the search for truth or self-governance, but rather for growing as an individual. Certainly public schools must have fostering such growth among students as one of their most important responsibilities. Particularly applicable to people beginning to form their views of themselves and the world is the notion that

> [i]t is a right defiantly, robustly, and irreverently to speak one's mind just because it is one's mind. Even when the speaker has no realistic hope that the audience will be persuaded to his or her viewpoint, even when no plausible case can be made that the search for truth will be advanced, freedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment.[121]

This is not to suggest that anarchy should reign in public schools. To the contrary, as C. Edwin Baker says, "For the community to legitimately to expect individuals to respect collective decisions . . . the community must respect the dignity and equal worth of its members."[122]

Respect of individuals' self worth also leads each person to appreciate the rights of others to express themselves, that is, leads to tolerance.[123] If people are forced to acknowledge the right of people with minority views to speak, views which may be abhorred by most in society, they learn to be tolerant of other opinions and behavior which, while less extreme, are nevertheless outside mainstream thought. Such tolerance enhances both individual dignity and the qualities of being human, two characteristics which public schools should be attempting to foster in students.

4. The Liberty Principle

A minimal principle of liberty advocates that government should not prohibit people from acting as they choose unless it has a positive reason for doing so. With regard to communication, this principle establishes that government should not interfere with speech that has no potential for harm.[124] This concept is analogous to the standards set by the Supreme Court in *Tinker*,[125] but which may have been lost after *Fraser* and *Hazelwood*.

C. Edwin Baker "is perhaps the most consistent and eloquent defender of radically protective liberal first-amendment theory in the legal academy."[126] At the foundation of his perspective is absolute protection for "a broad realm of nonviolent, noncoercive,[127] expressive activity."[128] Baker argues that only an unqualified commitment to expansive liberty can lead to a society in which liberal values are truly realized. "[T]he expressive and self-determinative practices permitted by a society committed to individual liberty and autonomy are also the practices necessary for

achieving that society."[129] Baker's absolutist defense of freely chosen, noncoercive expression leads him to regard any time, place or manner restriction that would prevent the exercise of liberty as unconstitutional.

Drawing on Emerson's work,[130] Baker says that achieving self-fulfillment and participation in change requires protecting a broad realm of activity. Self-fulfillment, he says, best can be attained if individuals are free to determine for themselves how to achieve it. In part, this must come through a freedom to express oneself. Similarly, to achieve participation in societal change, there must be protection for expressive activities essential to a democratic and participatory process.[131]

> This respect for defining, developing or expressing one's self is precisely Emerson's value of self-realization. Moreover, since group decisions significantly influence both one's identity and one's opportunities, respecting people's autonomy as well as people's equal worth requires that people be allowed to participate in the process of group decision making--which is precisely Emerson's other key value, participation in collective decision making.[132]

First Amendment interpretation must, according to Baker, respect people's integrity as rational, equal and autonomous moral beings.[133] It must also respect people as ends and not just means. Self-fulfillment and participation in change are important values to members of society, including adolescents, and they also are justifications for freedom of speech. Indeed, Baker argues that individual self-fulfillment and participation in change are fundamental purposes of the First Amendment.[134] However, these

are not concepts on which *Fraser* and *Hazelwood* and their progeny are based.

Baker does not believe in unlimited freedom of expression, and thus presumably would grant public school officials powers to prevent the type of material and substantial disruption of school activities forbidden by *Tinker*. That is, coercive speech falls outside the sphere of Baker's view of protected expression According to Baker, coercive speech is employed in ways which interfere with another's rights, thereby failing to respect the recipient of such speech as an autonomous individual.

> Both the concept of coercion and the rationale for protecting speech draw from the same ethical requirement that the integrity and autonomy of the individual moral agent must be respected. Coercive acts typically disregard the ethical principle that, in interactions with others, one must respect the other's autonomy and integrity as a person. When trying to influence another person, one must not disregard that person's will or the integrity of the other person's mental processes.[135]

Drawing on the social theory of Jurgen Habermas,[136] Baker maintains that extensive protection of speech allows individuals to attack the separation of ends and means in existing liberal institutions. Society or social organizations -- and this must include public secondary schools -- will become a liberal community only by promoting broad popular participation from the bottom up.[137]

One element of Baker's thesis is that change -- both social and political -- is desirable, and that the means to such change is greater expressive activity.[138] Change will result, he says, only if people engage in expressive resistance to the instrumentalism of current institutions.[139]

Baker's approach, then, would grant public school officials a certain amount of control over student expression where that expression is coercive in nature. Otherwise, students would be allowed to grow as individuals through the process of self-expression.

D. Conclusion

This paper has examined justifications for granting public school students freedom of expression. Rather than looking at where students' First Amendment rights now stand, this paper's focus has been on where they should be. Courts have granted students expressive rights, but then essentially withdrew them on legal -- public forum -- and educational -- inculcating the majority's values -- grounds that can lead only to continually diminished protection for students' freedom of expression. The approach instead should have been -- and should be -- utilizing freedom of expression rationales which are advocated for society at large. These justifications apply equally inside and outside public schools, and allow a return to the *Tinker* Court's decree that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[140]

The First Amendment is instrumental in providing the foundation for dissent, self-fulfillment, human dignity, and liberty -- all vital in the realization of both the polity and the individual. Just as meaningful is the cultural symbolism conveyed by both the First Amendment itself and the school system within which the amendment may operate. The importance of the cultural symbol of

constitutional protection of expression in the educational setting is apparent. "Culture" applies not merely to society, but to any organization or institution. Every organization, including the school, has a culture, serving to inform its membership about how to interpret and respond to social life, providing "the knowledge people use to interpret and generate social behavior."[141] This information can be imparted either explicitly or implicitly, invoking a "culture as iceberg" metaphor. "Culture goes deeper than written or spoken words, and in this lies its tendency to be carried by tacit understandings and expectations."[142] Schools are societal surrogates for students. The school is one of the few -- perhaps the only -- institutions with which the pre-adult has contact outside the home. By providing structure and standards, the school can bestow a sense of significance to its students, letting them "know they belong to a functioning and complete society."[143] Alternatively, a system which distinguishes between what is permitted within the school and outside its doors symbolically conveys to students -- citizens who are in their politically formative years -- that viewpoints can be constrained based not merely on their content, but also on their location.

In *Fraser* and *Hazelwood* the Court maintained that a school need not tolerate student speech that is "inconsistent with its basic educational mission."[144] Contrary to the Court's notion, that mission should be defined broadly. The school teaches lessons beyond the culture of the classroom. The values learned there transcend the schoolhouse, flowing also into the social arena. Educators may choose to impart messages which coincide with those inherent in and

integral to a truly free society, or they may wish to further encourage "proper" methods of conduct -- those which comport with traditional educational values and which have been condoned by the Supreme Court. The choice is one that rests not only in the hands of the courts, but also with the school boards which approve the rules and regulations governing students and which ultimately determine what kinds of cultures they will endure.

NOTES

[1]*See, e.g.*, Blackwell v. Issaquena County Board of Educ., 363 F.2d 749 (5th Cir. 1966) (upholding suspensions of students wearing "freedom buttons"); *cf.* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (finding violative of First Amendment requirement that public school students salute the flag and recite the pledge of allegiance).

[2]Hedges v. Wauconda Community Unit School, 807 F. Supp. 444 (N.D. Ill. 1992).

[3]Hemry v. School Board, 760 F. Supp. 856 (D. Colo. 1991).

[4]Broussard v. School Board, 801 F. Supp. 1526 (E.D. Va. 1992).

[5]Planned Parenthood v. Clark County School Dist., 941 F.2d 817, 835 (9th Cir. 1991) (en banc).

[6]Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992).

[7]393 U.S. 503.

[8]484 U.S. 260 (1988).

[9]478 U.S. 675 (1986).

[10]*See, e.g.*, Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253 (1992); Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development,* 79 CAL. L. REV. 1269, 1284-85 (1991).

[11]*West Virginia State Board,* 319 U.S. 624, 637.

[12]*Tinker,* 393 U.S. at 506.

[13]Decisions favoring student(s), *see, e.g.*, Eisner v. Stamford Board of Educ., 440 F.2d 803 (2d Cir. 1971); Hatter v. Los Angeles City High School Dist., 452 F.2d 673 (9th Cir. 1971); Riseman v. School Committee, 439 F.2d 148 (1st Cir. 1971); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), *cert. denied,* 400 U.S. 826 (1970); Poxon v. Board of Educ., 341 F. Supp. 256 (E.D. Cal. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); decisions favoring school board, *see, e.g.*, Katz v. McAulay, 438 F.2d 1058 (2d Cir. 1971), *cert. denied,* 405 U.S. 933 (1972); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Graham v. Houston Ind. School Dist., 335 F. Supp. 1164 (S.D. Tex. 1970); Baker v. Downey City Board of Educ., 307 F. Supp. 517 (C.D. Cal. 1969); Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969).

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

[15]*Id.* at 508.

[16]*Scoville,* 425 F.2d 10.

[17]*Riseman,* 439 F.2d 148.

[18]*Baker,* 307 F. Supp. 517.

[19]*Schwartz,* 298 F. Supp. at 240.

[20]*Id.*, at 242.

[21]*Graham,* 335 F. Supp. at 1166.

[22]Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).

[23]Jacobs v. Board of School Comrs., 490 F.2d 601, 604, 607 (7th Cir. 1973), *vacated on other grounds,* 420 U.S. 128 (1975).

[24]Koppell v. Levine, 347 F. Supp. 456, 458 (E.D.N.Y. 1972).

[25]*Id.* at 459.

[26]Ginsberg v. New York, 390 U.S. 629 (1968).

[27]Bayer v. Kinzler, 383 F. Supp. 1164 (ED.N.Y. 1974), *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975).

[28]Cintron v. State Board of Educ., 384 F. Supp. 674, 679 (D.P.R. 1974).

[29]Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977) (per curiam).

[30]*See, e.g.*, Nitzburg v. Parks, 525 F.2d 378 (4th Cir. 1975).

[31]Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977).

[32]Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).

[33]*See, e.g.*, Shanley v. Northeast Ind. School Dist., 462 F.2d 960 (5th Cir. 1972); Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977).

[34]For example, the speech began with the words, "I know a man who is firm -- he's firm in his pants . . . ." *Fraser*, 478 U.S. at 687 (Brennan, J., concurring). The "man" was the student Fraser was nominating for student body office.

[35]*Id.* at 678.

[36]*Id.* at 681.

[37]*Id.* at 683, 684.

[38]*Id.* at 685-86.

[39]Richard L. Roe, *supra* note 10 at 1284-85.

[40]390 U.S. 629.

[41]438 U.S. 726 (1978); *see Fraser*, 478 U.S. at 689 n.2 (Brennan, J., concurring).

[42]The Eighth Circuit has suggested that greater restrictions on public school students' First Amendment rights than on those of adults may be justified by the fact that violations of such restrictions "does not subject anyone to criminal sanctions, nor do [restrictive rules] apply to the public at large or to territory outside school property. The [students] . . . are not fully *sui juris;* they are minors, or at least most of them are." Bystrom v. Fridley High School Ind. School Dist. 14, 822 F.2d 747, 750 (8th Cir. 1987). This pre-*Hazelwood* dictum would seem to contradict the Supreme Court's views in *Barnette* and *Tinker*, but may have been prescient considering the Court's *Hazelwood* decision.

The Supreme Court in *Fraser* quoted with approval the statement that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket," referring to Cohen v. California, 403 U.S. 15 (1971), in which the Court overturned a conviction based on the wearing of a jacket with the slogan, "Fuck the draft." Thomas v. Board of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980) (Newman, J., concurring).

[43]484 U.S. 260.

[44]For a history of the factual background and litigation history of the *Hazelwood* case, *see* J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706.

[45]484 U.S. at 266

[46]*Id.* (quoting *Fraser*, 478 U.S. at 682).

[47]*Id.* at 272.

[48]Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

[49]Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[50]*Perry*, 460 U.S. at 46.

[51]*Cornelius*, 473 U.S. at 806.

[52]*Id.* at 800; *Perry*, 460 U.S. at 45.

[53]*Perry*, 460 U.S. at 46.

[54]*Hazelwood*, 484 U.S. at 267, 267-70.

[55]*Planned Parenthood*, 941 F.2d at 835 (Norris, J., dissenting).

[56]*See* Abrams & Goodman, *supra* note 44.

[57]*Hedges*, 807 F. Supp. at 453.

[58]872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

[59]The speech stated:

> The administration plays tricks with your mind and they hope you won't notice. For example, why does [the assistant principal] . . . stutter while he is on the intercom? He doesn't have a speech impediment. If you want to greak the iron grip of this school, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you have always wanted. All you have to do is vote for me, Dean Poling.

Id. at 759.

[60]*Id.* at 762.

[61]*Id.* at 765-66 (Merrit, J., dissenting).

[62]941 F.2d 817.

[63]*Id.* at 830-31 (Norris, J., dissenting).

[64]*Id.* at 829.

[65]807 F. Supp. 444.

[66]*Id.* at 461.

[67]*See supra* notes 32-33 and accompanying text.

[68]

> We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate. We need not now decide whether such regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds.

484 U.S. at 273 n.6.

[69]725 F. Supp. 965 (C.D. Ill. 1989).

[70]*Bystrom*, 822 F.2d at 749.

[71]978 F.2d 524.

[72]*Id.* at 526.

[73]*Id.*

[74]*Id.* at 527 (quoting *Tinker*, 393 U.S. at 506).

[75]*Id.* (quoting *Hazelwood*, 484 U.S. at 266).

[76]*Id.* (quoting *Fraser*, 478 U.S. at 682).

[77]*Id.* (quoting *Hazelwood*, 484 U.S. at 267; *Fraser*, 478 U.S. at 685).??both

[78]*Id.* at 528.

[79]*Id.* at 529 (quoting *Tinker*, 393 U.S. at 514).

[80]*Id.* at 531 (last par. in sec. II).

[81]*Id.* at 532 (Goodwin, J., concurring).

[82]"[The] question [at issue] concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. 271.

[83]978 F.2d at 529 (quoting *Hazelwood*, 484 U.S. at 273).

[84]*See, e.g.*, LEONARD LEVY, EMERGENCE OF A FREE PRESS (1975).

[85]*See, e.g.*, ROBERT ALLEN RUTLAND, THE FIRST GREAT NEWSPAPER DEBATE: THE CONSTITUTIONAL CRISIS OF 1787-88, at 50 (1987).

[86]*Compare* John Milton, *Aeropagita* (London 1644) in 2 COMPLETE PROSE WORKS OF JOHN MILTON 486 561 (E. Sirluk ed. 1959) ("[T]hough all the wines of doctrine were let loose to play on earth, so Truth be in the field, we do so injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put her to worse, in a free and open encounter.") (footnotes omitted); John Stuart Mill, *On Liberty*, in ON LIBERTY AND CONSIDERATION ON REPRESENTATIVE GOVERNMENT 1, 14-15 (R. McCallum ed. 1948) ("Were an opinion a personal possession of no value except to the owner, if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of thought to get itself accepted in the competition of the market."), *with* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 71 ("the market, as it functions within our society of high technology and unequal distribution of wealth, position, and communicative skill, is strongly biased toward status quo viewpoints"); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988) ("Especially when the wealthy have more access to the most potent media of communication than the poor, how can we be sure that 'free trade in ideas' is likely to generate truth?").

[87]*See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 128-29 (1989).

[88]*See* Richard L. Roe, *supra* note 10, at 1276.

[89]*See, e.g., Shanley,*, 462 F.2d 960.

[90]*See, e.g.*, ARISTOTLE, THE POLITICS, Book I, Ch. 1, reprinted in G. Christie, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW (1973).

[91]*See, e.g.*, THOMAS HOBBES, LEVIATHAN, Part II, Ch. 18, reprinted in *id.*

[92]*See, e.g., Fraser*, 478 U.S. 675.

[93]John Locke, "A Letter Concerning Toleration," in 6 WORKS OF JOHN LOCKE (1963)(1st ed. London 1689).

[94]RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 86 (1992) (emphasis in original).

[95]LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 7 (1986) (emphasis in original).

[96]*Id.* at 10.

[97]STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 87 (1990).

[98]*Id.* at 78.

[99]*Id.*

[100]*See* Ralph Waldo Emerson, *The American Scholar*, in RALPH WALDO EMERSON: ESSAYS AND LECTURES 53-71 (Joel Porte ed. 1983); Ralph Waldo Emerson, *The Divinity School Address*, in *id.* at 75-92; Ralph Waldo Emerson, *Self-Reliance*, in *id.* at 259-82.

[101]H. BLOOM, AGON: TOWARDS A THEORY OF REVISIONISM 145 (1982).

[102]SHIFFRIN, *supra* note 97, at 96-97.

[103]*Id.* at 5.

[104]THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966).

[105]*See, e.g.*, Abraham H. Maslow, *Psychological Data and Value Theory*, in NEW KNOWLEDGE IN HUMAN VALUES (A.H. Maslow ed., 1959). Maslow believed that once a person's basic needs are satisfied, there is an innate tendency toward personal growth. Individuals seek to go beyond what they have done and have been in the past. They may welcome both uncertainty and greater tension if these are perceived to be a route toward greater fulfillment. *See* PHILIP G. ZIMBARDO, PSYCHOLOGY AND LIFE 422 (9th ed. 1975).

[106]*See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

[107]*See, e.g.*, MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

[108]MARTIN H. REDISH, FREEDOM OF EXPRESSION, *supra* note 107, at 30.

[109]*Id.* at 11.

[110]*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[111]MARTIN H. REDISH, FREEDOM OF EXPRESSION, *supra* note 107, at 263.

[112]Kent Greenawalt, *supra* note 87, at 144.

[113]*Id.* at 142.

[114]RODNEY SMOLLA, *supra* note 94, at 9.

[115]*See, e.g.*, C. Edwin Baker, *Scope of First Amendment*, *supra* note 106, at 991, 992.

[116]Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 216 (1972).

[117]Kent Greenawalt, *supra* note 87, at 153.

[118]THOMAS I. EMERSON, *supra* note 104, at 4.

[119]*Id.* at 4-5.

[120]Procunier v. Martinez, 416 U.S. 396, 427 (1974).

[121]RODNEY SMOLLA, *supra* note 94, at 9 (footnotes omitted).

[122]C. Edwin Baker, *Scope of First Amendment*, *supra* note 106, at 991.

[123]*See* LEE C. BOLLINGER, *supra* note 95. Bollinger advocates the view that tolerance is the primary justification for free speech.

[124]Kent Greenawalt, *supra* note 87, at 121-122.

[125]Baker disagrees with Emerson's speech/action dichotomy, which may be drawn into question in the arm band situation of *Tinker*. Baker believes that "non-verbal, creative and self-expressive activities," i.e., acts of conduct, are protected when they advance First Amendment values in a manner relatively

similar to speech. C. Edwin Baker, *Scope of First Amendment, supra* note 106, at 997.

[126]Jordan M. Steicker, *Creating a Community of Liberals*, 69 TEX. L. REV. 795, 799 (1991).

[127]Coercive speech is that "not chosen by the speaker and which, therefore, cannot be attributed to the speaker's manifestation of [the speaker's] substantive values." C. EDWIN BAKER, HUMAN LIBERTY, *supra* note 106, at 59.

[128]*Id.* at 47.

[129]*Id.* at 122.

[130]*See, e.g.*, THOMAS I. EMERSON, *supra* note 104.

[131]C. Edwin Baker, *Scope of First Amendment, supra* note 106, at 991.

[132]*Id.* at 992.

[133]*Id.*

[134]*Id.*

[135]*Id.* at 1001-02.

[136]*See* JURGEN HABERMAS, COMMUNICATION AND EVOLUTION OF SOCIETY (1979).

[137]C. EDWIN BAKER, HUMAN LIBERTY, *supra* note 106, at 120-21.

[138]*Id.* at 98.

[139]*Id.* at 117.

[140]393 U.S. at 506 (1969).

[141]J.P. SPRADLEY & D.W. MCCURDY, THE CULTURAL EXPERIENCE: ETHNOGRAPHY IN COMPLEX SOCIETIES 8 (1972).

[142]LAWRENCE SCHEIN, A MANAGER'S GUIDE TO CORPORATE CULTURE 4 (1989).

[143]TERRENCE E. DEAL & ALLEN A. KENNEDY, CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE 60 (1982).

[144]*Hazelwood*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).