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Cover Page Footnote
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THE CONSTITUTIONAL RIGHTS OF PUBLIC SCHOOL PUPILS

RICHARD GYORY*

I. INTRODUCTION

THERE has been a rapid extension of the legal rights of minors in recent years which is comparable, in many ways, to the earlier extensions of constitutional rights to black persons and women. As in each of those cases, the new definition of constitutional rights reflects a pervasive societal change. But as compared to the political upheaval which preceded the fourteenth, fifteenth and sixteenth amendments to the Constitution, and the disciplined and persistent drive that resulted in the woman’s right to vote, the extension of constitutional rights to children has been largely unorganized. Although legislation has played a part—most recently the dramatic passage of the twenty-sixth amendment to the Constitution—judicial decisions have played the major role.

A large part of the redefinition of the rights of minors has taken place in cases which arose as a result of the prohibition by public school officials of certain student activities. This was a logical progression from the civil rights cases arising out of Brown v. Board of Education. However, until recently, and in particular until Tinker v. Des Moines Independent Community School District, the case law focused more on the racial conflict and the demand for equal education than it did on assertions of the individual rights of students. Prior to the decision in Tinker, the attempts to exercise protected constitutional rights (aside from efforts to obtain equality) were found chiefly at the college level. The primary forum since Tinker has been the high school.

There may be an objection to the statement that recent decisions have effected an “extension of constitutional rights” to minors on the ground that these rights have always existed. Those who make the objection may

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1. The twenty-sixth amendment extends to citizens eighteen years of age or older the right to vote. U.S. Const. amend. XXVI.

2. The constitutional rights of minors in juvenile delinquency proceedings have also undergone major redefinition in recent years. See, e.g., In re Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).


note that there was an actual extension of constitutional rights to Negroes by virtue of the thirteenth, fourteenth and fifteenth amendments, and to women through the nineteenth amendment, but no such literal extension to minors was made prior to 1971. This, however, is a very limited aspect of what has occurred. Supreme Court decisions characteristically do not state that new rights have been granted. On the contrary, aside from dissents, the Court usually declares that it is stating rights that were always present. Such a bland characterization of the effect of decisions of the Supreme Court may do for those constitutional opinions that do not vary the pattern of law; it may also be true for cases where theretofore untested matters are the subject of an opinion, especially if they reaffirm situations that existed. But it is an unrealistic appraisal of those occasions where the Court’s pronouncements have had the effect of rearranging established relationships as did the decision in Brown; indeed, one has only to witness the tremendous amount of judicial activity that followed it. In a less dramatic way the impact of Tinker has been similar.

As originally drafted, the Constitution said little about individual rights, expressing them only inferentially as limitations on the power of the legislature. The Bill of Rights did reserve rights to “the People” and “Persons,” but these did not cover many of what today are deemed to be the important rights of participation in governmental activities. Citizenship was an obscure subject, occasionally mentioned in the Constitution, but remaining ill-defined. Clearly all citizens were not equal under the Constitution; but it is equally clear that constitutional rights were never confined to citizens at any point in time.

Reading the Constitution literally, it would be hard to argue by strict construction that children are excluded from the rights of “Persons.”

5. E.g., Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), where the Court held that the Constitution did not give women the right to vote. The result was to leave things where they had been before. No new legal or governmental pattern resulted.


8. For example, article I, section 2 provides that “No person” under twenty-five years of age or less than “seven Years a Citizen,” may be a congressman. Article I, section 3 provides that “No Person” may be a Senator who is not thirty years of age and “nine Years a Citizen.” Under article II only a “natural born Citizen,” or one at the time of the Constitution’s adoption can become President.

9. However, at times the Supreme Court has come close to equating constitutional rights with those of citizenship. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958), where the court stated: “[W]e deal here with a constitutional right of the citizen . . . ?” Id. at 130. In that case the right of foreign travel which by statute, involves the rights of citizenship, was at issue.

10. See Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969). Mr. Justice Stewart expressly limited the application of the rights although he concurred in the result. Id. at 514-15.
The fact that little constitutional law regarding the rights of minors developed until the past few years is probably a reflection of the lack of a broad movement among the population until the present time. Whatever the reason for the delay of almost two centuries in passing upon the rights involved, the Supreme Court, given the language of the Constitution, had both a practical and constitutional mandate to pass upon the assertion of constitutional rights made by or on behalf of minors.\textsuperscript{13} This article is an attempt to assess the impact of the Supreme Court's decisions relating to the rights of public school pupils.

\section{The Child Steps to Stage Center}

The minor may still have to share his legal billing in the caption credits with his parents, but there is no longer any question as to whom the star is. He will generally sue in his own name through his guardian ad litem to assert civil or property rights. However, in adjudicating those rights, the focus is not on the parent, the taxpayer, or the state; it is on the minor.\textsuperscript{12}

The emphasis on the welfare of the child was the basis of the decision in \textit{Brown}: "Does segregation ... deprive the children of the minority group of equal educational opportunities?"\textsuperscript{13} Probably no other judicial decision has had a greater effect on American society. The drama of \textit{Brown} obscured the very important fact that it was a child oriented opinion. Immediate attention was focused on the right to equal education, which was not a new concept under the fourteenth amendment. But characterizing the right as that of the child was novel. It remained, however, for \textit{Tinker} to indicate the scope that the Supreme Court was to give to this new measuring rod of constitutional rights.

There were earlier references to the rights of children in discussions of constitutional questions, but the Court had been hesitant to state the right as that of the child alone. For example, in \textit{Meyer v. Nebraska}\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{11} "The issue is fairly joined. It is precisely the kind of issue the Constitution contemplates this Court must ultimately decide. This is true although neither affirmation nor reversal of any of these cases follows automatically from the spare language of the First Amendment . . . .” Lemon v. Kurtzman, 403 U.S. 602, 662 (1971) (White, J., concurring in part, dissenting in part).
  \item \textsuperscript{12} E.g., Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz.), appeal dismissed, 372 U.S. 228 (1963), where the court noted in a National Anthem case that the parents sued improperly in a class action, but deemed them to be guardians ad litem, stating: "[T]he children will be considered to be the plaintiffs, since they are the real parties in interest . . . ." Id. at 767. In New York the Commissioner of Education accepts appeals in the pupil's name. See, e.g., In re Bustin, No. 8257 (N.Y. Educ. Dep't, March 25, 1971).
  \item \textsuperscript{13} 347 U.S. at 493.
  \item \textsuperscript{14} 262 U.S. 390 (1923).
\end{itemize}
a law prohibiting instruction in the German language was held "to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own [children]." Mr. Justice McReynolds' decision in that case relied mainly on the parents' rights to engage teachers in private schools. The reference to the rights of the child to an education was not ready to stand alone. Two years later Mr. Justice McReynolds, again speaking for the Court, held that a law prohibiting private sectarian schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Thus, while occasional mention was made of the right of the child to equal "care, protection and training," the decisional law usually rested on either the right of the parents to train their children or the interest of the state in educated citizens.

Although the tremendous impact of Brown in its substantive content overshadowed the manner in which the Court reached its conclusion, i.e., in terms of the right of the pupil, Brown was not the first case to urge students' rights. Earlier cases involving state universities discussed such rights; however, in each case the Court was dealing with adults who demanded equal opportunities for themselves through equal access to governmental offerings.

In Brown it was mentioned that society had an interest in equal opportunity in order that each pupil would be able to develop his intellect to its maximum potential for the benefit of all. But this assumption underlies all of our rights; its reiteration in Brown was no longer a ground for the result and appeared only as an explanation of the right. The assertion of the minor pupil's right in Brown was a break with the past, thus representing a new emphasis—the pupil. It was many years before the implications of pupils' rights were to become evident. Not until Tinker could the significance of this aspect be fully appreciated.

Tinker was the first unambiguous assertion by the Supreme Court of the constitutional rights of school children. It was one of three notable

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15. Id. at 401.
17. "The prime object and fundamental principle of our free school system is to educate all citizens of the state to the end that they may become more efficient." Trustees of Graded Free Colored Common Schools v. Trustees of Graded Free White Common Schools, 180 Ky. 574, 578, 203 S.W. 520, 522 (1918).
decisions by the Supreme Court within approximately one year dealing with large areas of pre-college public education, thus indicating that the Court’s interest extended beyond equal rights. Indeed, the interest seemed to extend to the entire process of public education.

*Tinker* was not without antecedents. Mr. Justice Fortas adduced those earlier decisions of “almost 50 years” which referred to constitutional rights in educational matters. But a reading of these cases does not disclose a single clear statement according the minor pupil constitutional guarantees in the terms stated in *Tinker*: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” True, this was prefaced by an important qualification that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.” The important point is that the “rights,” whatever may be their ultimate content, were recognized, thereby raising questions as to their extent with the attendant difficulties of definition.

Additional previous references to children’s rights are found in decisions which denied the relief sought. In 1899, in *Cumming v. Richmond County Board of Education*, the Court, speaking through Mr. Justice Harlan, suggested:

If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the Board of Education, out of the funds in its hands or under its control, to establish and maintain a high school for colored children, and if it appeared that the Board’s refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court.

... *[A]ny interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.*

But unfortunately no such issue was presented. The Court’s alacrity at finding deficient pleadings continued to be equal to the acceptance of racially separate schools. For example, in *Gong Lum v. Rice*, decided in 1927, Chief Justice Taft suggested:

Had the petition alleged specifically that there was no colored school in Martha Lum’s

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20. See cases cited at 393 U.S. at 506-07.
21. Id. at 506. It is worth recalling that the application of first amendment rights to the states and the schools is recent. See Epperson v. Arkansas, 393 U.S. 97, 105 (1968). See also Denno, Mary Beth Tinker Takes the Constitution to School, 38 Fordham L. Rev. 35 (1969).
22. 393 U.S. at 506.
23. 175 U.S. 528 (1899).
24. Id. at 545.
25. 275 U.S. 78 (1927).
neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the State Supreme Court's construction of the State Constitution as limiting the white schools provided for the education of children of the white or Caucasian race. But we do not find the petition to present such a situation.26

It is doubtful that the unsuccessful petitioners were consoled by the expression of a right in terms of Chinese children. The fact that children's rights were expressed only in cases where the relief sought was denied underlines the elusive nature of such constitutional guarantees in times past. There is little in the decisions of the Supreme Court prior to Brown which foreshadowed Tinker. Although Gong Lum is within the period of "50 years" alluded to by Mr. Justice Fortas in Tinker,27 it understandably was not cited by him. Prior to 1954, the context in which the Court dealt with educational matters was either the claims of adults to equal access to higher education28 or actions which mingled the rights of parents and taxpayers.29

III. THE SUBSTANCE OF CONSTITUTIONAL RIGHTS

The racial struggle for integrated education preempted consideration of the substantive rights of the pupils themselves. The movement, which culminated in Brown, was one seeking equal rights, i.e., the equal right to education, or the right to an equal education, insofar as the state maintained an educational system. The Court has not yet gone so far as to say that education is a right in the sense that it is an obligation of the state to make it available to all children.30 Chief Justice Warren expressly phrased

26. Id. at 84.
27. See text accompanying note 20 supra.
28. See cases cited at note 18 supra.
29. E.g., Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948); Pierce v. Society of Sisters, 268 U.S. 510 (1925). An exception is Cochran v. Louisiana Bd. of Educ., 281 U.S. 370, 375 (1930), where, although the Court noted a "public purpose" in giving texts to students in non-public schools, it said: "The school children and the state alone are the beneficiaries." This does not indicate a "right" of the children but it does indicate that they, rather than their parents, are the ones to whom the state might look. The Court's emphasis reverted again to the parents in Everson v. Board of Educ., 330 U.S. 1 (1947), when it declared that the purpose of the disputed statute was "a general program to help parents get their children . . . to . . . schools." Id. at 18.
30. However, certain lower court decisions have stated that there is no such obligation. E.g., Carter v. Hodges, 317 F. Supp. 89, 91 (W.D. Ark. 1970). But see Sims v. Colfax Community School Dist., 307 F. Supp. 485, 487 (S.D. Iowa 1970) ("It cannot be seriously disputed that the interest of the State in maintaining an educational system is of such importance that the State is in fact charged with the duty to further and protect the public school system."); James v. Almond, 170 F. Supp. 331, 338 (E.D. Va.), appeal dismissed, 359 U.S. 1006 (1959) (schools may not be selectively closed). Note that state constitutional provisions
the question presented in *Brown* as one of depriving children of "equal educational opportunities." The Court held that "[s]eparate educational facilities are inherently unequal."

The focus on equality of rights assumed that one group had more of something which, for the good of others, it should share. The benefit to be conferred by reason of enforcing the constitutional right was achieved by comparing it with the benefit already enjoyed by others. This did not involve a redefinition of the content of the rights. The comparative simplicity of the measure avoided the more difficult questions of discussing constitutional rights in terms of pupils which arose once it was determined that the pupil possessed such rights. In order to ascertain the constitutional rights of the pupil, the pupil is now compared to adult citizens. No longer is one pupil defined in terms of another. As each assertion of a heretofore recognized right arises the question will be asked: How can that right be exercised in the school setting? In time, the concept of rights will itself probably be modified by the assertion of pupils' rights.

Constitutional "civil" rights were never sharply defined. As already noted, the original document of 1787 devoted little space to such rights, are often applicable, although the overriding effect of the federal law on basic rights leads to their being but rarely cited today. Examples are found in the New York Constitution, mandating the legislature to provide "free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1; see Va. Const. art. IX, § 129. See also Ordway v. Hargraves, 323 F. Supp. 1155, 1158 (D. Mass. 1971).

31. 347 U.S. at 493; see text accompanying note 13 supra.

32. 347 U.S. at 495.

33. In the field of religion and education this assumption was traced to the Ordinance of 1787 which declared that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ordinance of 1787: The Northwest Territorial Government, art. III, in U.S.C. xxxix (1970). See Meyer v. Nebraska, 262 U.S. 390, 400 (1923). There was also an unstated assumption that the mandate of equality would force the "haves" to share their benefits rather than deny themselves. This appears, in general, to be the enforcement technique in the desegregation area where the process has gone forward, albeit with more deliberation than speed. That the assumption may not always be reliable is emphasized in the recent "swimming pool case," Palmer v. Thompson, 403 U.S. 217 (1971). In 1899 Mr. Justice Harlan rejected such an argument to achieve equality: "But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children." Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 544 (1899). Apparently Mr. Justice Harlan felt that there was less danger of stopping the railroads! "Our Constitution is color-blind . . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
expressing them as limitations on the legislative power. The Bill of Rights, although devoted entirely to the subject of personal rights, continued the negative method of phraseology. Thus, the first ten amendments are essentially prohibitions. As with the Biblical commandments, the ideals of our society must be inferred from the statements of proscribed activity. The ringing phrases of the Declaration of Independence—"Life, Liberty and the pursuit of Happiness"—were partially restated in the preamble: "Justice... domestic Tranquility... the general Welfare... the Blessings of Liberty." But once past these introductory phrases, the draftsmen of the Constitution depended on the common law to supply the substance of the personal rights of the inhabitants of the land.

The Supreme Court has been similarly loath to enter into general descriptions of substantive rights guaranteed by the Constitution. Characteristically, the early cases concerning civil liberties dealt with property or commercial rights. It was not until the close of the nineteenth century that the "business" rights, i.e., the right to pursue a livelihood, moved seriously into the realm of what is thought of today as civil rights. An early dictum is found in a case involving the right to sell commercial insurance:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Another example is found in Meyer:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

35. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), and cases cited therein. In Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870), the Court approved movement from state to state "for lawful commerce" as one of the "privileges and immunities."
38. 262 U.S. at 399.
This is a well-rounded statement, if somewhat more attuned to the livelihood and morals of mankind than to his pleasures. Usually the Court has been content to arrive at a description of the basic rights and privileges by an accretion of opinions based upon specific examples. Slowly, and not always consistently, a path is traced between permissible and prohibited activities. From the accumulation of decisions an outline of the right is drawn. This method has the advantage that the rule thus arrived at is a more practical working tool for the lawyer than are generalized descriptions of rights. The latter are more likely to be certain in appearance, but difficult to apply.

The case-by-case process of the common law has the virtue of adaptability. Societal changes cause developments that are difficult to foresee. Nevertheless, the question of whether the activities conducted in the new setting are constitutionally protected or not must be resolved. The societal changes may be so marked as to virtually bring about new activities. Thus the media of radio and television have profoundly affected the activities covered by the first amendment. The process of adjusting the new means of communication and the older concepts of freedom is illustrative of the type of adaptation involved in interpreting the Constitution. The substance of the rights is not constant. Both social changes and physical changes of an industrial or scientific nature produce alterations which are translated into new activities and new rules.

The recent developments in constitutional law with respect to students' rights come at the same time as a worldwide movement toward youthful participation in the governing process and the other societal structures which influence our lives. The state and federal legislation of the past few years extending the vote to eighteen-year olds,\textsuperscript{39} culminating in the twenty-sixth amendment, is illustrative. It is safe to assume that the continuation of this phenomenon will have its impact upon the present-day concepts of constitutional rights, and that its early results will be found in the old molds. Terms such as "freedom of speech," "freedom of the press," and "due process" do not have the same content today as they did one hundred years ago, but they continue to furnish the broad outline which encompasses most of the civil rights cases. Within these categories fall the recent developments which are considered in this article.\textsuperscript{40}


\textsuperscript{40} Consideration of one significant right that the court has developed is deferred, namely, "bodily freedom," which does not neatly fit into any specific category and yet has special significance in an area almost co-equal with compulsory education. See part III E infra.
A. The Tinker Case

The Tinkers were an Iowa family with strong beliefs concerning American participation in the war in Vietnam. The Tinker children attended public schools in Des Moines. Upon learning that a group of adults and their children had intended to wear black armbands during the Christmas holiday season, the Des Moines school officials adopted a regulation prohibiting the wearing of any armbands in the schools. As a result of the refusal of the Tinker children to obey the regulations, the principals of the schools involved suspended them. Subsequently, the Tinkers commenced an action in the federal district court for an injunction which was denied following an evidentiary hearing. The ruling was sustained without opinion by an equally divided court of appeals sitting en banc. The Supreme Court granted certiorari and reversed.

The Court, speaking through Mr. Justice Fortas, held that the wearing of black armbands to symbolize a political grievance was close to "pure speech" and therefore was within the protection of the first amendment. The opinion strongly emphasized the facts of the case, noting the lack of danger or disruption to the school system. The majority implied that there was nothing in their opinion which had not "been the unmistakable holding of this Court for almost 50 years."

One must look at the concurring and dissenting opinions to ascertain the true significance of Tinker. The breadth of the decision was emphasized by Mr. Justice Harlan's brief dissent, which would scarcely have been necessary if the pronouncement had been merely a reiteration of earlier decisions: "I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association." A stronger indication of the sweep of the decision occurred in the opening remarks in the concurring opinion of Mr. Justice Stewart: "Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."

45. Id. at 506.
46. Id. at 526.
47. Id. at 514-15.
The view attributing the most far-reaching significance to Tinker was found in the unusually caustic dissent of Mr. Justice Black: "The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . . ' in the United States is in ultimate effect transferred to the Supreme Court."48 This opening volley was followed by a remark that implied that the Court had granted the petitioner's claim that pupils from kindergarten through high school were free to express political views in school. Justice Black claimed that the question was "whether students and teachers may use the schools at their whim as a platform for the exercise of free speech . . . "49 adding that he had "never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases."50 But one might note that many of Justice Black's earlier pronouncements on constitutional rights had asserted their "absoluteness," and tended in the very direction he later disclaimed.51 It is this absolutist quality accorded to constitutional rights which makes Justice Black's position in Tinker readily understandable. His fear in the past had been that attempts to limit free speech were frequently veiled efforts to deny its exercise under the guise of protecting the rights of others. The fear, of course, was that such an approach would make the first amendment a fiction rather than a reality, i.e., that, in effect, only approved expressions in a narrow area would be allowed, thus stifling the free airing of information and ideas. Mr. Justice Black was as zealous as any in this view. It therefore becomes a difficult task for one adhering to the absolutist view to accept a situation hedged about with qualifications.

Although Justice Black's dissent might have been understandable in the terms stated above, he did not so state them. However, his fear seemed to be that the majority thought in such terms, for he stated:

And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.52

48. Id. at 515 (footnote omitted).
49. Id. at 517.
50. Id.
51. E.g., Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting): "It is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation."
52. 393 U.S. at 518. The next step Mr. Justice Black foresaw in the list of evils "would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting . . . ." Id. Congress and the Court were not long in reaching the subject. Voting Rights Act Amendments
Did the Court's opinion herald an era of student rebellion? Did it purport in broad terms to grant unfettered liberties to children where previously the courts had been willing to defer to school officialdom in perhaps an even greater measure than to the legislative and executive branches of government?

It is submitted that aside from the general ambiance of the opinion, which certainly is libertarian, the holding is not necessarily broad. Indeed, were it not for the remarks of the dissenters, the decision might have been read as indicating little new in the annals of constitutional law. The caution of the early statements made by Mr. Justice Fortas seemed to extract much of what the decision is reputed to confer: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."53 Because this pronouncement is so ambiguous it is not very useful in assessing the rights of the individual or the rules of conduct which might guide school boards and school staffs; nor is it helpful as a guide to pupils. It is of little value to say that there is a general right which is specially limited in the school environment. The earlier expression might have been that the right of free speech, at least to the extent which it is found elsewhere, does not extend to the school situation. The majority might well claim that it stated little new in its holding on the issue of free speech. That, however, does not tell the whole story.

More important than the tribute to stare decisis is the extreme emphasis of the Court on the factual situation. This emphasis provides some insight into the intent of the Tinker majority. Clearly the Court was concerned with evidence of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint;"54 in particular, the subject of Vietnam. The opinion observed that the authorities had singled out "the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam,"55 while at the same time the school administration did not prohibit "buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a

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53. 393 U.S. at 506.
54. Id. at 509.
55. Id. at 510 (footnote omitted).
symbol of Nazism. Although the subsequent remarks of Mr. Justice Fortas struck at "enclaves of totalitarianism" attempting to confine expression to sentiments "officially approved," it is clear that the lack of an evenhanded approach by the school authorities was a significantly prejudicial factor against their case.

The Court also placed heavy reliance upon a record which "[did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." This conclusion was flatly contradicted by Justice Black. The differences in emphasis by the two judges would have sufficed to explain their different results, even had neither expressed a difference as to the legal or constitutional principle. Indeed, it is this very emphasis which beclouds the significance of the decision. For if some see it as the bold (or horrendous) pronouncement of a new era in the American public school system, others wonder whether its future may not be closer to the fate of the Dartmouth College case, somewhat long on pontification, but of little practical consequence. It is suggested that neither view is appropriate.

In the three years that have elapsed since Tinker was decided, the decision has figured in a remarkable number of cases on either side of the proposition of students' rights. The frequency of citation for a restrictive position vis-à-vis the pupil might lead one to wonder "what all the shouting was about" so far as the dissents were concerned. Clearly its initial

56. Id. Not of Nazism, but of German imperialism.
57. Id. at 511.
58. Id. at 514.
59. Id. at 517-18 (dissenting opinion). Mr. Justice Fortas began the majority opinion with a recitation of the ages of petitioners as sixteen, fifteen, and thirteen years old. Id. at 504. Mr. Justice Black listed the pupils' ages as eight, eleven, thirteen and fifteen. Id. at 516. Contrasted to the majority's recitation of the "silent, passive 'witness of the armbands'" which "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others," and only caused some "discussion outside of the classrooms" (id. at 514), Justice Black's dissent noted: "[A] warning [was made] by an older football player that other, nonprotesting students had better let them alone . . . and a teacher of mathematics had his lesson period practically 'wrecked' . . . by . . . Mary Beth Tinker, who wore her armband for her 'demonstration,' . . . that this armband did divert students' minds from their regular lessons . . . and diverted them to thoughts about the highly emotional subject of the Vietnam war." Id. at 517-18.
60. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). In that case the Supreme Court held that an amendment by the state of the college's charter would destroy a contract. Thereafter the states were careful to insert the necessary reservations in their corporation statutes.
impact has not been to unleash the "new revolutionary era of permis-
siveness" feared by Justice Black. Nevertheless, *Tinker* is far from
devoid of importance.*

*Tinker*, although providing little guidance in particular circumstances,
is significant as an expression of judicial concern extending to areas there-
tofores regarded as better left outside the legal process. Considered with
*Pickering v. Board of Education*, and *Puentes v. Board of Education*, it is clear notice that educational endeavors are no longer beyond the
judicial pale. In this respect, the significance of *Tinker* is not unlike that
of *Baker v. Carr*, which gave notice that the Court was ready to look
into elective processes, and *Gideon v. Wainwright*, in which the Court
indicated judicial scrutiny was to be applied to implement a fair trial.
The language by which the Court announced that the student has constitu-
tional rights both inside and outside the classroom signifies a new
term of reference for measuring the rights to be defined. It no longer
suffices that the student be treated equally to other students; adult rights
appear to be the new measure, albeit, perhaps, one that may vary.*

Significantly, as a result of the *Tinker* decision the federal courts are
today an active forum in which the educational system is scrutinized and
the merits of constitutional rights asserted by public school pupils are
reviewed. While this has been indicated in integration and equality
claims, no broad interest had previously been expressed in the terms used
in *Tinker* and *Pickering*. The knowledge that a new concern had been
expressed, that judicial review in terms of constitutional rights may be
available, must have an impact upon the operation of schools, even as it
has had an impact on elections and courts, although the results are not
likely to be as immediate as in those fields. The impact may be ascribed
either to an attitude of "Big Brother May be Watching" or "Someone Up
There Will Listen" depending upon one's point of view. Attention is at

61. 393 U.S. at 518.
62. Recent decisions may portend a narrowing of the scope of judicial review of school
matters at least in the federal courts. See Freeman v. Flake, 448 F.2d 258, 259 (10th Cir.
1971); Farrell v. Joel, 437 F.2d 160, 163 (2d Cir. 1971); Mailloux v. Kiley, 436 F.2d 555, 556
64. 392 U.S. 653 (1968). In this case a teacher was held to have been insubordinate for re-
fusing to answer an administrator's investigative questions following the teacher's circulation
of a letter critical of the school. In a per curiam decision citing Pickering, the Court remanded
the case to the New York Court of Appeals, which reversed its earlier decision. Puentes v.
67. 393 U.S. at 506.
68. Id. at 512-13.
this point directed to specific categories of rights in order to see how the
adjustments have been effected since Tinker was decided by the Supreme
Court.

B. Freedom of Speech

The free speech issue was the basis for Tinker and Pickering. It there-
fore enjoys a peculiar primacy in the list of rights accorded to public
school pupils.69 The right to express political views has impeccable cre-
dentials in the history of civil rights. Although extending the right to
school children may have been novel, there clearly was nothing new in
stating that the expression of criticism of governmental policy was con-
stitutionally protected. The issues presently posed are: (1) What does
“free speech” mean as applied to pupils in school?, and (2) What are
“the special characteristics of the school environment” that limit the
activity?

In considering the school setting, there are the normal problems pre-
sented by aggregations of people which require some regulation if each
person is to be allowed the optimum exercise of his own rights. Primarily
the school is a place for learning; hence, those rules which are necessary
to permit the educational task to be performed must be maintained. But
what “those rules” are may run the gamut from the scholastic to the
open schoolroom approach. A further consideration is the age factor.
Generally, the age of the children involved ranges from five to eighteen
years old, and in many schools the overlap of ages may run from three
to nine years. Obviously, the questions of diverse abilities, physical
attributes, comprehension, and maturity compound the difficulties.70 While
Tinker did not, at least in the majority opinion, address itself to these
questions, it did not exclude their consideration. What Tinker did say
was that the difficulties that inhere in the school environment are not a
ground for arbitrary and repressive solutions. Mr. Justice Fortas stressed
that “undifferentiated fear or apprehension of disturbance is not enough
to overcome the right to freedom of expression.”71 The board of educa-
tion “must be able to show that its action was caused by something
more than a mere desire to avoid the discomfort . . . [of] an unpopular
viewpoint.”72 Certainly where there is no finding and no showing that

69. Tinker specifically mentioned both teachers’ and pupils’ rights. Id. at 506. Both Pickering v. Board of Educ., 391 U.S. 563 (1968), and Puentes v. Board of Educ., 392 U.S. 653 (1968), were decided during the same term.

70. “Moreover, the general age level of the student group involved might affect determination of the constitutional issue. A ‘demonstration’ in kindergarten, after all, is not the same as one in college.” Farrell v. Joel, 437 F.2d 160, 162-63 (2d Cir. 1971).

71. 393 U.S. at 508.

72. Id. at 509.
engagement in the forbidden conduct would "'materially and substantially interfere with the requirements of appropriate discipline ...'" the prohibition cannot be sustained.73 Similar strands are found in Mr. Justice Marshall's opinion in Pickering with respect to teachers:

Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. ... The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing.74

Neither case sounds, upon reading these phrases, like a ringing declaration of a new era of freedom. Indeed, one might read their end result to be an insistence on greater procedural precision in hearings, rather than a remarkable step in defining the scope of free speech. Such insistence, of course, is not without an indirect effect on speech since its operative effect would be to make school officials a bit more hesitant to summarily mete out punishment or to see emergencies or potential harm to others. The evidence to sustain that position would have to be presented with care and detail, and possibly be subjected to appellate review. But one must probe deeper to arrive at the new outline—if it is new—of free speech inside the school.

Tinker suggests that for pupils and teachers the rights are to be "applied in light of the special characteristics of the school environment ..." 75 However, as to teachers, "the State has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 76 Clearly then, the Court distinguished degrees of exercising the right, or to phrase it otherwise, a differing right depending upon where the speech is made. It therefore seems odd to find the Court referring to Terminiello v. Chicago,77 as authority for the statement: "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument.

73. Id.
74. 391 U.S. at 570.
75. 393 U.S. at 506.
76. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). It is assumed that this refers to the rights of the board regarding teachers while they are actually teaching as compared to teachers outside their teaching function.
or cause a disturbance. But our Constitution says we must take this risk . . . .\textsuperscript{78}

Terminiello exemplified the very situation which, it is believed, the Court will not permit to develop as a part of the right of free speech in the schools. Terminiello involved a political speech in a turbulent rock-throwing setting, where the free use of radical epithets and "fighting words" figured prominently. Mr. Justice Douglas, speaking for the Court in a 5-4 decision, said the conviction was void because of a charge which too broadly defined a breach of the peace as "'misbehavior which violates the public peace and decorum'. . . ."\textsuperscript{770} In dissent, Mr. Justice Jackson referred to the "'surging, howling mob hurling epithets,' " to violence, to thrown objects, and to police unable to control the mob.\textsuperscript{80} Against this background Terminiello delivered a vituperative speech. The "[e]vidence showed that it stirred the audience . . . to expressions of immediate anger, unrest and alarm."\textsuperscript{81} Mr. Justice Douglas, however, observed that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."\textsuperscript{82}

It seems highly unlikely that the leeway suggested by the Court in Tinker implies anything approaching the Terminiello situation, hedged in as the Tinker holding is by references to lack of disruption of either work or discipline in that case. Broad proscriptions of political topics are no longer permissible. The excuse that they are applied to all persons, or all such topics, is insufficient to justify such regulations. The Court stated in Tinker that "a regulation . . . adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise . . . would violate the constitutional rights of students, at least if it could not be justified by a showing . . . [of danger to] work and discipline . . . ."\textsuperscript{83} Even a limited regulation prohibiting discussion of disturbing issues absent a demonstrable danger is not tenable under the Tinker decision. The showing of danger will need some substantiality; it will need more than an "undifferentiated fear."\textsuperscript{84} The school officials must be ready with facts sufficient to "reasonably . . . fore-
cast substantial disruption of or material interference with school activities...”

If the quoted rule for limits of school regulation of political discussion is not a precise guide, the difficulty is not new. The implementation of “a clear and present danger of a serious substantive evil” has from its inception been attended by difficulty. The decisions which honored the “clear and present danger” rule in the breach indicate the tenuous nature of the rule, if not the difficulty of its application. It is true that the Court has come to administer the rule with greater stringency, but the practical problems of recognizing when the threshold of violence has been reached in any given situation, or of knowing the nature of “the substantive evil” of forcible political threats, consign the rule to uncertain application. It is therefore not surprising that the Court’s recent decisions did not suggest the limits of freedom of discussion within the schools; indeed, it is not even settled outside.

Whether the clear and present danger rule, which was not adverted to in either Tinker or Pickering, has much scope in the school setting is questionable. One might say that the rule is the same but the danger of harm or violence in a school setting is much greater due to the exposure of young children and their lack of discretion or control. Hence, the need to regulate the apprehended danger is apparent as a result of the nature of the school environment. Although logically plausible, it is hard to see what practical value is left to the rule by such reasoning, for this approach could justify almost any degree of regulation.

The difficulty of the narrow line that the school administrator must tread is emphasized by the recent holding of the Appellate Division of the Supreme Court of New York in Oliver v. Donovan, indicating that there is a right on the part of parents to insist upon protection for their children if it can be established that the board or administration has been

85. Id. at 514.
88. See Terminiello v. Chicago, 337 U.S. 1, 23-24 (1949), where Mr. Justice Jackson, dissenting, suggested, by reference to Mein Kampf, that doctrines of force pose problems that, if not removing the efficacy of the clear and present danger rule, at least call for the invocation of apprehended danger at a much earlier stage than the Court on that occasion felt appropriate. In a partial concurrence and partial dissent one judge asked: “Can it be said that it is common sense to force the university to walk the tight rope of 'imminent danger' for the sake of rhetorically extending logic to its breaking point?” Korn v. Elkins, 317 F. Supp. 138, 145 (D. Md. 1970).
89. In Pickering the possibility of violence was not suggested.
90. 32 App. Div. 2d 1036, 303 N.Y.S.2d 779 (2d Dep't 1969).
inadequately attentive to the matter. There certainly is nothing shocking in the assertion, but it does highlight the problem of the beleaguered school official who may well feel "damned if he does, and damned if he does not" act in a particular way at a moment of apparent crisis.

Whether violence is to be the touchstone of free speech is doubtful. For while it may well be a test, in and of itself it is hardly the only danger to be apprehended. Would a school administrator be expected to tolerate the Terminiello speech, which included the following remarks: "Jews, niggers and Catholics would have to be gotten rid of," "Kill the Jews," and "Dirty kikes"?1 Name calling and racial epithets are, in the school setting, dangers which summon upon the likelihood of immediate physical violence for which little practical protection can be administered. But that is not to say that this justifies broad prohibitions which in effect could foreclose legitimate discussion. However, it does suggest that certain limitations which might not be permissible in adult debate may be imposed by school authorities.

Racial epithets may of themselves be sufficiently destructive, even where there is no doubt that physical harm will not result. It does not seem conceptually difficult to hold that psychological harm may befall a child subjected to overt racial prejudice in the form of verbal abuse. Some might regard this as a short step from damage due to intangible factors of which the Court spoke in Brown.2 The duty of a school system may be similar for psychological as well as physical protection. In this regard, the question may be one of balancing conflicting rights. It is suggested that as far as ethnic epithets or fighting words are concerned, the Court might be more receptive to curbs on discussions than in other areas.

Obscene language is an area which seems more likely than racial or religious epithets to be an early testing ground. Reported lower court decisions3 which are likely to find their way upward for appellate review in the near future indicate that the judicial temperament in response to public use of "dirty words" is very close to that accorded ethnic epithets and fighting words. A rationale for prohibiting such speech can be spelled out in terms of educational responsibility for the "moral" development

91. 337 U.S. at 22 (dissenting opinion).
92. 347 U.S. at 493-94. The suggested limitations may themselves be limited; thus, the constitutional limitations regarding religion may be a curb on the extent to which one can travel to avoid hurt feelings. Cf. Epperson v. Arkansas, 393 U.S. 97 (1968).
of pupils. There might also be the argument of protection, although it appears to dangerously extend the utility of this approach. It may be asserted that foul language is itself a breach of discipline, that by statute school children have the duty to be "ordinarily," and that the very act of swearing or using obscene terms is an act of disorderliness. Of course, if the constitutional right of free speech is held to include the right to use such words, then the incursion of the statute does not of itself authorize a school prohibition.

In Baker v. Downey City Board of Education, the district court went beyond the state statutes with respect to discipline. Quoting from Burnside v. Byars, Judge Crary emphasized the interest of the state in maintaining an educational system which in turn requires rules and regulations and the maintenance of discipline in which "school officials have a wide latitude of discretion." The Baker case is notable in that the court appeared to make a double resolution with respect to profanity in (1) equating vulgar language to indiscipline and (2) holding that the administration was "reasonable" in suspending students for such behavior.

Baker did not involve oral speech, i.e., actual discussion, but involved a school newspaper printed and distributed outside the school. It therefore

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95. See N.Y. Educ. Law § 3210(1)(a) (McKinney 1970). See also Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 524 (C.D. Cal. 1969), citing, inter alia, Cal. Educ. Code § 10609 (West 1969), which requires the pupil to comply with regulations and to "submit to the authority of the teachers of the schools." In another age it was simpler:

A child should always say what's true
And speak when he is spoken to,
And behave mannerly at table:
At least as far as he is able.


97. 363 F.2d 744, 748 (5th Cir. 1966).

98. 307 F. Supp. at 521. The citation of Burnside has apparently received additional impetus from its appearance in Tinker. See 393 U.S. at 513. Burnside was an appropriate precursor for Tinker. High school pupils wore "freedom" buttons and "One Man One Vote" buttons which the principal thought would cause "commotion." Upon their refusal to remove the buttons the children were suspended for a week. The district court upheld the principal; the court of appeals reversed on the basis of the first amendment. On the same day, the same panel of the same court, again speaking through Judge Gewin, held valid a regulation preventing the wearing of the same buttons where the "activity created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline . . . ."

Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 751 (5th Cir. 1966).
presented a factual situation distinguishable from the physical speech situations considered thus far in this article—a situation perhaps less compelling of support in favor of school authorities since the impact of the written word is less likely to be attended by immediate physical harm or violence. So far as the decision may be tested under the Tinker rationale, it is submitted that the result will turn on the scope the Supreme Court may be expected to give to vulgar language in general. The idea of obscenity has varied to such a degree within the past decade that it is a slippery topic with which to grapple. A respected libertarian only a generation ago assumed that a "total prohibition of previous restraint" was not a defensible position, citing as an apparently self-evident example of its indefensibility that "[i]t would forbid the removal of an indecent poster from a billboard." There are two elements in the changes which have occurred. The first is our social acceptance of a new norm which allows much that previously would have been classified as indecent. The other element has been the holdings of appellate courts, which have severely limited the extent to which administrative bodies may censor expression.

A judicial response to the obscenity problem sharply at variance to that evinced by Judge Crary in Baker was that of Judge Thornton in Vought v. Van Buren Public Schools, who declared: "[T]hat area of the law today is about as well-defined as the course of a tornado." Although it noted that the school's regulation governing obscene material on school grounds was a reasonable measure, the court did not, in the initial proceeding, reach the question of free speech because of the expulsion of the student without any hearing. The court issued a restraining order directing the school board to hold a hearing on the question of expulsion. In the quoted transcript of the school hearing held pursuant to the district court's order, the student's lawyer compiled evidence to show that the school's reading materials included words which were deemed more offensive than those which were the basis for the pupil's...
expulsion.¹⁰⁴ This led Judge Thornton to ask: "And if the student is invited and/or required to read the latter two, what can the school authorities have in mind in expelling him for possession of the former?"¹¹⁰⁵ Accordingly, the court termed the board's position "preposterous."¹⁰⁶

Judge Thornton rendered his decision in Vought on the basis of due process rather than free speech, declining, as he stated, to become involved in a discussion of obscenity. Undoubtedly there are those whose logic suggests that this rationale would indicate removing from the school library and deleting from the teacher's reading list any required reading found to be more offensive than that for which expulsions are ordered. There may also be those who find in this an example of overreaction by the administrator, where the end result appears to have opened wider the door he harshly sought to close.¹⁰⁷ It should be noted that Judge Thornton did not limit the right of the school to regulate obscene materials, but indicated that when disciplinary measures are to be imposed there must be some proportion between the offense and the penalty.

After making allowances for the changes in the judicial approach to obscenity, one may question whether the changes to date have made any notable incursions into the right of local legislative bodies to regulate obscene language where neither art nor religion are concerned. This may leave a question, as Justice Holmes once observed, as to the wisdom of particular attempts to control obscenity, but it would appear that constitutionally the means are still available.¹⁰⁸ A fortiori the ability of the state or the local board to regulate obscene language remains.¹⁰⁹

¹⁰⁴. The offending words were found in J.D. Salinger, The Catcher in the Rye (1951), and Harper's, April, 1969, both of which contained "certain four-letter words."
¹⁰⁶. 306 F. Supp. at 1396.
¹⁰⁷. The allegations of the complaint were that the principal grabbed the papers in question, struck the student, informed the parents there would be a hearing for expulsion on the basis of the one incident (the possessor possessions being unclear), then summarily informed the parents that the board had expelled the boy, without a hearing, based on the principal's statements. In the words of the court, "the drastic action of expulsion for such [a] single incident, carrying as it does a lifetime stigma, is hardly punishment fitting the crime." Id.
¹⁰⁹. To the extent that the words "profanity," "cursing," or "swearing" may involve "sacrilege" there is the possibility of transgressing the religious strictures of the first amendment. Otherwise the Court's statement in Roth v. United States, 354 U.S. 476 (1957), appears to control: "We hold that obscenity is not within the area of constitutionally protected speech or press." Id. at 485. A divided Court reaffirmed Roth in United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971), and United States v. Reidel, 402 U.S. 351 (1971). Mr. Jus-
The free speech issue is likely to be posed often in terms of the right "peaceably to assemble, and to petition the . . . [school administration] for a redress of grievances." The school authorities form an obvious target for students; it is not surprising to find that student criticism elicits the prompt defensive response that school discipline is threatened. However, if as a practical matter one may expect to find that the most probable exercise of free speech is in this area, one may also expect that the Tinker rationale would apply. Tinker prohibits limiting free speech to classroom hours; specifically enumerated places where the right may be exercised are in "the cafeteria, or on the playing field, or on the campus during the authorized hours . . ." Thus, while suggesting that limitations may be placed upon the time and place of exercising their rights, the Court clearly indicated that the students' rights included student criticism of the school staff.

Probably the most difficult aspect of dealing with elementary and secondary schools is the wide range of ages among the pupils. Thus, a student entering kindergarten is usually five years old, whereas a student about to be graduated from high school is likely to be seventeen or eighteen years old, or even older as a result of delays or postgraduate education. Accordingly, the rough and tumble of free debate on emotion-laden issues indicates some need for protection in such a setting beyond that afforded at adult levels. The strong expression of views by older pupils may take on a coercive appearance which could distort free expression into veiled aggression. The exposition of views within the school grounds is not the same as their presentation outside. In his concurring opinion in Tinker, Justice Stewart, quoting from Ginsberg v. New York, cautioned: "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."
The danger of coercion may also proceed from innocent expressions of those in authority. For example, the exercise of the right of staff members to express their views in the school or classroom can create an opportunity to overbear. What, for example, is the reaction of the young pupil upon seeing teachers and administrators wearing political buttons? Might it not be argued persuasively that the child is more likely than the adult to crave acceptance, to seek approval, and to conform? Certainly where the Establishment displays its views—the school staff is Establishment to the pupils—it may have an effect upon pupils out of proportion to that which is expected in the usual open exchange of ideas. The same principle may be applied to upperclassmen with respect to those in the lower grades, although the degree of impact might be different. Clearly, the extension of *Tinker* into the school environment must be a gradual experimental process. It must not be supposed that it is easy to be free. This is no less true in schools.

It is suggested that future regulations of free speech in elementary and secondary schools will not lend themselves to any one formula. Rather, they will probably evolve from a case-by-case consideration of the demonstrated dangers and the bona fides of the schools in meeting their problems. In this regard the knowledge which the judges possess as members of the community may be determinative of their acceptance of a given topic as the subject of public talk. Thus, an attempt by school officials to prohibit a theological issue might be more sympathetically received by a court than the exclusion of an economic subject. But assuming that a reasonably apprehended danger of violence could be shown, evidence of a practical alternative means of permitting the discussion may well be part of the necessary proof by the school whose authority is questioned.

An effort to furnish guidance in the area of the student press is found in a recent case decided by the Court of Appeals for the Second Circuit. In *Eisner v. Stamford Board of Education*, high school students desired to publish their own newspaper without having to comply with the school’s requirement that distributable written material be submitted to the school administration for approval prior to distribution. The students contended that the regulation hindered free speech, but the court felt that it was designed to maintain the orderly operation of the school, although it was unclear on the procedures to be followed once the written

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117. 440 F.2d 803 (2d Cir. 1971).

118. Id. at 807.
material was submitted. Judge Kaufman invoked the instructions of the Supreme Court in *Freedman v. Maryland* regarding censorship obligations. The emphasis, insofar as it related to prior restraint, was on clean submission procedures, coupled with prompt review and decision. In this the court of appeals differed from the lower court, although affirming the result. In the district court Judge Zampano had ruled that there could be no prior restraint. Mindful of the danger of a "chill on first amendment activity," the appellate court specified that the standards which constitute "distribution" must require "substantiality," and that the restrictive action, if any, must itself be strictly limited both as to the type of material which might be put in question, and as to the situation (danger, disruption or damage) that might permit such action.

The *Eisner* opinion is typical of the attempts made by the courts to give guidance in this troubled and difficult area. It, as well as the other "school cases," is not in keeping with the traditional judicial approach of merely disposing of the matter before it. This is because the bench seems more than ordinarily troubled about the inferences that may be drawn in these cases. Thus, the opinions rendered are longer and possibly more expository than other cases involving civil rights. In *Eisner*, the court was hopeful that its guidance might have the effect of returning "decisions with respect to the operation of local schools ... [to] local officials." To this end Judge Kaufman called upon the school board to provide specificity in its regulations as to the conduct which might be subjected to censorship, and at the same time to indicate the appropriate areas—both in terms of subject and geography—for distribution of the student press. Expressly within the area not requiring toleration by school officials is racial or religious slander. Nor, apparently, is the subject of obscenity, for which *Ginsberg* was cited. This is in accord with the rejection by the First Circuit of a teacher's right to exhibit in a school corridor paintings which emphasized genitalia. But the fact that these

119. 380 U.S. 51 (1965). Freedman held that the following procedural formalities must be observed whenever a state requires the submission of a film to a censorship board for clearance before it may be shown to the public: (1) the censor has the burden of proving that the film is unprotected expression; (2) any restraint prior to judicial review must be for the shortest period compatible with sound judicial procedure; (3) a prompt final judicial determination of obscenity must be assured. Id. at 58-59.


121. 440 F.2d at 811.
122. Id. at 810.
123. Id. at 809-11.
124. Id. at 809 n.6.
are areas in which the school officials may exercise their discretionary functions will not justify blanket prohibitions. A sense of humor might help.\textsuperscript{126}

C. \textit{Freedom of the Press}

In the past the school's interest in newspapers probably resulted as much from fear of liability as from fear of ideas, or "wrong" ideas at least. Whereas the oral remarks of the pupils on campus were unlikely to carry beyond the school grounds, the possibility existed that the school newspaper might. It was objective evidence of school activities; it was an example which could subject the school officials to citizen judgment. Therefore, the newspaper formed a basis of concern for the school staff. Whatever else may have concerned school officials in the past, it does not appear to have been freedom of the press.\textsuperscript{127} In light of \textit{Tinker}, this indifference is no longer tenable.

Although several cases involving school newspapers were decided prior to \textit{Tinker}, the number of recent opinions indicates that this is an area in which a rapid development leading to definitive guide lines may be expected. Among the cases decided subsequent to \textit{Tinker}, Zucker \textit{v. Panitz}\textsuperscript{128} fired a broadside at attempts to narrowly define the educational aspects of the school newspaper. In that case, a group of high school students sought to place an anti-Vietnam war advertisement in the school paper. The student editor approved the proposal, but the school principal disapproved it, directing that it not be published. When the students, through their parents, sought a declaratory judgment, the school authorities argued that the paper was primarily an exercise for the student staff, and that school policy limited both news and editorials to school activities. Judge Metzner, in reply to the first argument, scoffed at the educational value of a journal of such limited substance: If the news-

\textsuperscript{126} See Scoville \textit{v. Board of Educ.}, 425 F.2d 10 (7th Cir. 1970) (en banc), cert. denied, 400 U.S. 826 (1971), rev'd 286 F. Supp. 988 (N.D. Ill. 1968), where the court said: "Finally, there is the 'Grass High' random statement, 'Oral sex may prevent tooth decay.'" Id. at 14. This attempt to amuse comes as a shock to an older generation. But today's high school students are not insulated from the shocking but legally accepted language used by demonstrators and protestors in streets and on campuses and by authors of best-selling modern literature. A hearing might even disclose that high school libraries contain literature which would lead students to believe the statement made in "Grass High" was unobjectionable.

In New York, the Commissioner of Education held that there was no evidence to support the contentions of a particular board of education that a female swimming teacher wearing a bikini disrupted the discipline of the junior high school boys she taught. In re Martin, 10 N.Y. Educ. Dept Rep. No. 8156 (1970). Indeed, maybe attendance and interest improved!

\textsuperscript{127} Z. Chafee, supra note 87. Chafee's book does not contain any references to students' rights, much less free press.

\textsuperscript{128} 299 F. Supp. 102, 105 (S.D.N.Y. 1969).
paper's contents "were truly as flaccid as the defendants' argument implies, it would indeed be a sterile publication." 129 The court then observed that the newspaper did in fact contain controversial topics, and added that this was a part of teaching journalism.

The school authorities asserted, based on Tinker, that adults could not insist on placing advertisements in commercial newspapers; hence, students could not have greater rights inside the school. Judge Metzner replied that since the school provided the medium it could not, especially as a governmental organ, refuse advertisements for its "administrative convenience." 130 Furthermore, the opinion stated: "The rationale of Tinker carries beyond the facts in that case." 131 Referring to the statement in Tinker that free speech is not confined to the classroom, Judge Metzner stated: "'intercommunication among the students . . . is . . . an important part of the educational process.'" 132 The reliance on Tinker by the Zucker court appeared to be sound, especially since, as Judge Metzner noted, the Court in Tinker had pointedly referred to the chilling effect of the school principal's decision on the school newspaper. 133 Accordingly, Judge Metzner stated:

This lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community. 134

What is the student's alternative to access to the school newspaper? Possibly Judge Metzner felt overt acts are the danger that might arise, thus turning on the Establishment the very argument that it has used, and, if it can be demonstrated by proof, the principal remaining defense to justify school regulation of free press. The "safety valve" argument, or the therapeutic value of a Hyde Park discussion area, is not new. Implicit in Judge Metzner's opinion was his belief that the danger of disruption caused by the refusal to tolerate an organ for the dissemination of ideas carried as much force as the dangers that might be caused by allowing such a publication. It is not necessary to push the argument beyond this point. However, there are those who argue for greater lib-

129. Id. at 103.
130. Id. at 104 (citation omitted).
131. Id. at 105.
133. 299 F. Supp. at 105 n.6.
134. Id. (footnotes omitted).
erality by stressing the apparent lack of persuasiveness of the media in changing political opinions, of religious tracts in converting, of erotic art in seducing, or of movie or television violence in depraving. One likes to think that some achievements in art and literature, e.g., the Bible, the Declaration of Independence, Shakespeare, have had some effect on humankind for the better; it would seem to follow that their converse would also have an impact, presumably for the worse. It is not necessary to reach into the vagaries of these contentions, important as they may be. It is in terms of immediacy that the argument against censorship finds its justification, and this indeed is the very basis of the "clear and present danger" rule. If another is wanted, the difficulty of administering any standard of remote danger provides an effective reinforcement.

Zucker dealt with a school supported newspaper. The alternate means of written expression, namely the student's "private" or "underground" newspaper has generated at least as much controversy. The distribution of nonapproved or unofficial publications either on or off campus has met with sharp administrative resistance. For example, in Baker v. Downey City Board of Education, the students went off campus to produce a newspaper which the court found was common, vulgar and profane. Aside from the vulgarity exception which was discussed earlier, the case merits consideration because of the assertion of control of off campus activities by school authorities. In Baker the court specifically denied that political views or criticism of the school staff formed the basis for either the disciplinary action of the school authorities or the decision.

As a practical matter, if the on campus facilities are denied to the students, the chances are that there will be off campus publications, less likely to be subject to either scrutiny or control by school administrators. This may be a consideration addressed more to the wisdom of regulation than to its legality or constitutionality. However, drawing the line on permissible publication or distribution itself involves free speech, free press and due process. It may be unrealistic to expect that the judicial reviewer of fact will sharply separate the technical legal limits of school authority from the reasonableness of the regulations subjected to court review, assuming they are separable elements.

In Schwartz v. Schuker the court upheld the suspension of a pupil

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135. 307 F. Supp. 517 (C.D. Cal. 1969). Baker was discussed earlier in this article in the context of freedom of speech. See text accompanying notes 96-101 supra.


137. See notes 93-109 supra and accompanying text.


who, after a warning, distributed on school grounds a non-school paper which "contained four-letter words, filthy references, abusive and disgusting language and nihilistic propaganda." In addition, the paper attacked the school administration. The student refused to surrender copies of the paper after being apprehended. Despite the suspension the student attended class and was either to be graduated or transferred to another school.

Judge Bartels noted the claim of first amendment protection and cited Tinker for that proposition, but he observed that "it is far from clear that [the plaintiff] was suspended because of protected activity under the First Amendment rather than flagrant and defiant disobedience of the school authorities." The opinion is not entirely clear on this point, for the court then listed the breaches which seemed to include at least prima facie possibly protected activities, i.e., bringing newspapers on to school grounds when told not to do so, and refusing to surrender them on request. The judge also stated that the boy appeared in school after suspension "and admitted defiance of the superintendent's orders." Possibly Judge Bartels felt the newspapers themselves contained constitutionally unprotected obscenities. He implied that distribution off campus might be legal, thus indicating that the breach of discipline consisted of distribution in defiance of an order. But this of itself would not seem, under Tinker reasoning, to justify the school's action unless the court was ready to rest on the content of the newspapers, i.e., the obscenities. There was no discussion of violence or disruption caused by the distribution of the papers, nor did the court appear to hold that the "nihilistic propaganda" constituted a basis for its exclusion. Explained in these terms it would be consistent with Tinker, Baker, and even Zucker. However, as written, the opinion appears to rely more on the "[g]ross disrespect and contempt for the officials . . . ." Moreover, at least from the recitation of facts, the punishment appears to have been meted out as much for earlier misconduct as for later "misconduct" based on the disputed distribution and refusal to relinquish the newspapers. Since, however, the court seemed to stop short of stating that the newspapers themselves contained materials not protected by the first amendment, it seems not to have given the constitutional assertion of privilege its full due. If

140. Id. at 240.
141. Id. at 241.
142. Id.
143. Id. "[T]he Court does not express an opinion that distribution of such an underground paper under those circumstances would or would not be immune from restraint under the First Amendment." Id. at 241-42.
144. Id. at 242.
the plaintiff was distributing a newspaper which the school had no right to exclude, his actions would seem not, at least in a pejorative sense, to have been defiant. In that event, the defiance of orders to cease distributing that which he may have had a right to distribute, the refusal to surrender the papers, and the disobedience of the possibly improper suspension would not seem to have been flagrant. The opinion is therefore not satisfactory as an example of freedom of the press on school property.

If the school administration in *Schwartz* was seeking a more moderate solution to a particular situation, *Scoville v. Board of Education* is an example of a harsher approach in what appeared to have been less turbulent surroundings, although in both cases the courts supported the school authorities. It should also be noted that in *Scoville* the district court decision, which was subsequently reversed, preceded the Supreme Court's decision in *Tinker* and, indeed, to some extent relied upon *Tinker* at the district court and court of appeals levels.

In *Scoville* two seventeen-year-old students distributed a mimeographed "literary journal" to other students and faculty members. The paper included an editorial which criticized the administration in its communications with students, claiming that the purpose of the student paper was "the improvement of communication between parents and administration." Then followed the sentence which the court found unprotected by the first amendment: "I urge all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes...."

Three days after the distribution the students were prohibited from taking final examinations; two days later, they were removed from the debating team; yet another two days later, they were told that they would be suspended for five days in the Spring, and several days later their expulsion for the whole Spring term was recommended. All this occurred, apparently, without any hearing!

At a hearing which followed, to which the parents were invited but did not attend, the board expelled the students on the basis of "inappropriate and indecent" language. The district court, however, did not rest

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147. Id. at 989.
148. Id. at 993.
149. Id. at 989.
150. Id. at 993.
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its decision on this ground, but said that "where speech takes the form of immediate incitement to disregard of legitimate administrative regulations necessary to orderly maintenance of a public high school system . . . " it is not within the first amendment. Since no regulation was mentioned in the decision, and this appeared to have been a single occurrence, it is difficult to see in this abstract statement a sufficient basis for such a cavalier dismissal of the constitutional argument. Perhaps it may be explained in terms of a pre-Tinker decision. Admittedly, the sentence urging students to refuse " 'to accept or destroy upon acceptance all propaganda that Central's administration publishes' " may cross the line of acceptable statements, but it barely does so. This was not a covert attempt to subvert, nor was it a conspiracy, or an "underground" newspaper. For all that appears, it was addressed as much to the Establishment as to the students, and the means were certainly at hand to respond to the editors directly or in writing, as well as to present opposing views to the student body. The reaction of the administration bespoke anger, if not vengeance, and this may well have aided in the reversal.

The court of appeals held that the district court "made no meaningful application of . . . the proper rule of balancing the private interests of plaintiffs' free expression against the state's interest in furthering the public school system." The court appeared to favor the acceptance of "student criticism as a worthwhile influence in school administration." It questioned both the wisdom and the efficacy of attempting to stifle or chill "the production of well-trained intellects with constructive critical stances . . . " The court of appeals concluded that the criticism was protected by the first amendment, and that the school officials failed to show any danger flowing from the students' activities. The treatment which had been meted out to the pupils is a further example of a situation in which the penalty did not fit the crime. It illustrates the need that had existed for Tinker. The injection of constitutional considerations into everyday school affairs may have a salutary effect in dissuading those who act with great power from acting precipitately. In the absence of any disturbance, a warning against repetition of the particular overt request for action such as occurred in Scoville would seem to have met the needs of the situation.

The school administrator's problems with respect to the students' rights vis-à-vis the printed word are complicated by the nature of the school's

151. Id. at 992.
152. See text accompanying note 149 supra.
153. 425 F.2d at 14 (citation omitted).
154. Id. (footnote omitted).
155. Id.
affirmative duties. In one respect this problem is illustrated in Ginsberg v. New York\textsuperscript{156} which held that the state has an interest and right to restrict the distribution of obscene and pornographic literature to minors.\textsuperscript{157} However, there are other dangers such as the liability of the school for the publication of a libel. Clearly, this is a risk for the school supported paper. Since the editors are minors, there is a question as to whether they are subject to suit. Even if they are, the possibility of execution on a judgment against them is small. Obviously under these circumstances the school administrators may have an interest in prior inspection of the school produced newspapers. It should be added, however, all such fears notwithstanding, that reports of libel actions commenced against either students or school officials based on school newspapers are few, and reports of judgments nil.\textsuperscript{158}

The school's liability would not seem to be the same for the school supported and sponsored newspaper as for those distributed on or near the campus but produced elsewhere. Certainly as to the latter if there is no right to pre-view or pre-censor on the part of the school administrators, it would be difficult to see any basis for liability on the school's part, at least absent a prolonged event which might give notice, or repetition amounting to a pattern that might call for some protective action.

\section*{D. Due Process}

\textit{The history of American freedom is, in no small measure, the history of procedure.}\textsuperscript{159}

It is probably in procedural developments that \textit{Tinker} will effect its most significant results. Unfortunately, it is more difficult to dramatize procedural rights which depend on stated or practiced routines than it is to convey concepts of substantive rights associated with freedom of press, freedom of speech, or freedom of religion. The growth of routine is prosaic. Procedures can subject the individual to an unequal and debilitating

\begin{footnotes}
\item[156] 390 U.S. 629 (1968).
\item[157] Id. at 638.
\item[159] Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring). The distinction between the various constitutional rights is a subject of differing opinions. The phrase is used here in its procedural sense. Obviously the clause implies far more than procedure, and at the same time does not cover all the important procedural rights found in the fourth through eighth amendments, nor those found in the body of the Constitution.
\end{footnotes}
battle with an incoherent bureaucracy, giving little apparent reward in return for the cumbersome operation involving the time and effort of those concerned. The other side of the coin is that it is a brake on rough justice; it is a limitation on those in power who "shoot from the hip," on the ability to render decisions without documenting the need.

*Tinker* is not far removed in time from those cases which extended judicial protection to minors.\(^{160}\) Ironically, the recent decisions of the Supreme Court are designed to protect youth against procedures developed late in the nineteenth century especially to protect youthful offenders. The theory underlying the youthful offender legislation had been that judicial devices adapted to adults were ill-suited to youngsters. Thus, adversary safeguards designed to protect the accused gave way to investigative and quasi-administrative procedures designed to treat rather than to try the offender. The result was often the opposite of the intention. The lack of procedural safeguards removed the protection that older offenders retained, frequently with little apparent benefit unless it was that it facilitated the commitment of the accused. True, this was due as well to other factors, such as lack of sufficient personnel, funds and facilities. But especially because of these concomitant deficiencies, the loss of rights earlier accorded minors in court was important.

In criminal proceedings the question of "fairness" is co-extensive with the procedure, *i.e.*, the charge, the trial, the sentence and the appeals. In the operation of schools procedure is, in a sense, a subordinate function. Therefore, the comparison of the youthful offender in the court system to the student at school has its limitations. In the former the litigation is the whole of the procedure, whereas in the latter the objective is the education of the child. Procedural fairness in the courts is as broad as the process from complaint to commitment, while in the educational field procedure is confined to a limited operational area. Thus, to determine whether a rule governing conduct is reasonable it must be considered in terms of the student's rights and the educational objective. But the educational objective itself is not subjected to a fairness test. True, there is an increasing involvement of students in the rule making process.\(^{161}\) But it does not change the basic proposition that the school's primary objective is to impart knowledge and skill, and that this objective is subjected to a fairness test which impinges on the process only in certain specific areas of operation. Cast in these terms, the problem becomes one of determining how the school is to carry out its educational function and maintain order.


by means that conform to a concept of fairness. In one manner or another, the phraseology of the courts discusses a test or balance between the magnitude of the educational task and the harshness of the disciplinary measure.\textsuperscript{162}

While \textit{Tinker} did not deal directly with procedural due process, this may, as suggested earlier, ultimately be the area of its greatest effect. First, the very assertion of the Court's concern for the constitutional rights of minors within the schools and the explicit statement that the exercise of the rights is not confined to approved classroom activities dealing with noncontroversial matters indicates that there is a mandate to provide "fundamental constitutional safeguards."\textsuperscript{163} Presumably this must be accomplished by rules and practices that meet the requirements of due process.\textsuperscript{164} Second, the Court indicated that it would not accept an administrative evaluation limited to the efficient running of the school, nor an expression of apprehension of disturbance. There must be a "showing that the students' activities would materially and substantially disrupt the work and discipline of the school."\textsuperscript{165} In other words, to support or justify disciplinary action the school officials will have to be prepared to adduce proof in a legal sense at a hearing or similar proceeding. This requirement imposes a procedural burden which the school authorities must be ready to bear.\textsuperscript{166} The effect of this burden could be limited to careful preparation on the part of sophisticated administrators or school boards. Such an approach would reduce the procedure to a recitation by rote that could develop into little more than a formula to reach or support the desired result. But even this type of preparation imposes a brake on administrative action; it is a reminder of the possibility of review by strangers who will judge the sufficiency of the actions and the grounds

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\item\textsuperscript{162} Pickering v. Board of Educ., 391 U.S. 563, 569 (1968) ("However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.").
\item\textsuperscript{163} 393 U.S. at 507.
\item\textsuperscript{164} An absence of a written rule does not mean that the school officials are powerless to enforce discipline. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 n.4 (2d Cir. 1971); Richards v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970). See also Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970).
\item\textsuperscript{165} 393 U.S. at 513.
\end{footnotes}
asserted. One is not as likely to be unfettered in his deeds if he has the feeling that he is being observed.\textsuperscript{167} Of course, there is no reason to assume that compliance with procedural due process will be universally grudging. If the administration and school board are sufficiently sophisticated to learn the niceties of acceptable methods, it might be assumed that they will be equally able and willing to absorb the objective of the means to be employed. Efficiency of administration, if nothing else, will dictate the need for correct action that will meet standards of fairness which are acceptable to all segments of the school population.\textsuperscript{168}

One of the most important effects of \textit{Tinker} is the reduction of the relative weight to be given to the testimony of the school system's officials.\textsuperscript{169} This effect is closely related to the new legal burden mentioned above, in which it was suggested that the school as a party has been given something akin to a burden of persuasion to show that its rules or actions were justified. At the same time the officials must be aware that the courts are no longer as likely as they heretofore have been to accept the word of the educator in judgmental statements, even where his expertise is involved. In this respect, \textit{Tinker} reflects the judiciary at lower levels; it is confirmatory rather than leading.\textsuperscript{170}

Some might argue that \textit{Tinker} does not indicate a qualitative weakening of the testimonial effect of educational witnesses. Certainly no statements appear to denigrate or discount this expertise. Indeed, one might say that considerable importance was accorded the school's presentation by pointing to the lack of "evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially inter-


\textsuperscript{168} In New York State, the Commissioner of Education has indicated that a possibility of disruption may be a sufficient reason for the school administrators to take action against the harassers rather than the harassed, e.g., do not invoke a restrictive dress regulation but maintain order and discipline to protect non-conformists. In re Cossey, 9 N.Y. Educ. Dept Rep. 11 (1969). For a similar approach see Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971).

\textsuperscript{169} E.g., Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971) ("[I]f students choose to litigate, school authorities must demonstrate a reasonable basis for interference with student speech, and . . . [the] courts will not rest content with official's bare allegation that such a basis existed.").

\textsuperscript{170} See Howard v. Clark, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (Sup. Ct. 1969). Both Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), and Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), were decided three years before \textit{Tinker}. 

In addition, the Court relied on the testimony of the school authorities and the memorandum prepared by them. But granted that such testimony was considered important, the negative nature of the Court's evaluation is perhaps the most significant aspect of the attention accorded. The opinion of the authorities as to the importance of demonstrations was rejected. Their evaluation as to the probable danger of disruption was disputed. The significance of the majority's approach is emphasized by the fact that Mr. Justice Black, reading the same record, felt that "[e]ven a casual reading of the record shows that this armband did divert students' minds from their regular lessons . . . ." Thus, in large part, the difference between the majority and Mr. Justice Black lay in the stress each placed upon the testimony of the authorities. This represents a trend away from the former unquestioning acceptance accorded the testimony of school officials.

In the past it was usual for the courts to refer to the noble pursuit of the state in providing education, and on this basis to justify whatever sacrifices were made to support it. Education was a necessity for the nation, but a privilege for the student. Viewed in this light, the privilege was attended by conditions; if the conditions were not fulfilled by the student, the privilege might be withdrawn. While there might have been a sharp line drawn between university and preparatory education based upon the usually voluntary nature of college attendance, in fact the decisional law was usually expressed in the same general terms, i.e., those of privilege. Perhaps the fact that the major expansion of free compulsory public schools was roughly contemporaneous with state supported colleges is the basis for the similarity. The feeling in the nineteenth century was probably that a new benefit was being conferred on the lower classes and that the individuals had to prove worthy of the gift. Not unlikely, the fears of controlling the theretofore untaught and undisciplined, as well as the experimental nature of the new venture, reinforced the stern approach to learning which characterized education at the lower grades prior to its becoming a mass public activity. The courts tended to accept the authority of the schoolmaster with at least as much deference as was accorded the executive branch of government in time of war. A sug-

171. 393 U.S. at 509.
172. Id. at 509 n.3.
173. Id. at 518 (dissenting opinion); see note 59 supra.
174. See Meyer v. Nebraska, 262 U.S. 390, 400 (1923). Mr. Justice Holmes betrayed pride of origin in Interstate Ry. v. Massachusetts, 207 U.S. 79 (1907): "Education is one of the purposes for which what is called the police power may be exercised. . . . Massachusetts always has recognized it as one of the first objects of public care." Id. at 87 (citation omitted).
gestion that a failure to wear a white armband would impede the learning process, or the sporting of a beard and sideburns would undermine discipline in the school, was accepted not merely as persuasive expert opinion, but as established fact.\textsuperscript{176}\textsuperscript{1} Under these circumstances a constitutional argument based on the rights of pupils was unlikely to make significant headway.

The expansion of constitutional rights within the schools has largely taken place at the expense of the freedom of school administrators. If the school official is looking for signs of aid and comfort in the courts, possibly he will find it in expressions approximating "benign neglect." The school system appears in court mainly as a defendant, the aggrieved party being the pupil, the teacher, the citizen, or the taxpayer. One readily apparent effect of \textit{Tinker} was to swell the resort to judicial review, especially by the federal courts. Recent case law may, however, herald an effort to limit the number of cases and the scope of review, the practical result of which should be favorable to the school officialdom.\textsuperscript{176}

Is a breach of order of a disciplinary nature better dealt with by an adversary contest or by an administrative procedure involving educational, medical, psychiatric, or other professional aid in investigative and therapeutic measures? In a sense, the courts may have suggested that the use of modern science and skills might better be brought to bear upon the problems of school society and its individuals than older, and perhaps less relevant, legal concepts of "rights" in the abstract. In \textit{Cosme v. Board of Education},\textsuperscript{177} the New York Supreme Court rejected

\textsuperscript{175} See Calbillo v. San Jacinto Junior College, 305 F. Supp. 857 (S.D. Tex. 1969), rev'd, 434 F.2d 609 (5th Cir. 1970), clearly indicating that this is no longer the situation.

\textsuperscript{176} E.g., Farrell v. Joel, 437 F.2d 160, 163 (2d Cir. 1971) ("We would hope, perhaps wistfully, that litigants and counsel on both sides would keep several things in mind before the rush is made to the federal courts with constitutional banners waving high."). See also Mailoux v. Kiley, 436 F.2d 565 (1st Cir. 1971); Wood v. Alamo Heights Independent School Dist., 308 F. Supp. 551 (W.D. Tex.), aff'd per curiam, 433 F.2d 355 (5th Cir. 1970). A variation on the theme is found in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), where the court held that regulations on hair length do not raise "'basic constitutional values' and are not cognizable in federal courts." Id. at 262. The opinion referred to the "state[s]' ... compelling interest in the education of their children," and suggested that determinations of regulations be made by "their school authorities and their courts." Id. at 261. More specific in its requirement of first pursuing all administrative procedures is Jackson v. Hepinstall, 328 F. Supp. 1104, 1107-08 (N.D.N.Y. 1971). But bear in mind that the fear of opening the floodgates to litigation is not a constitutional test. See Breen v. Kahl, 419 F.2d 1034, 1038 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); Parker v. Fry, 323 F. Supp. 728, 729 (E.D. Ark. 1971).

\textsuperscript{177} 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1965), aff'd without opinion, 27 App. Div. 2d 905, 281 N.Y.S.2d 970 (1st Dep't 1967).
a parent's demand for representation of a child at a hearing for suspension, saying that the procedure was "purely administrative in nature, and . . . never punitive."\textsuperscript{178} The court suggested that the presence of legal counsel would frustrate the purpose of the interview between parents and school officials, turning it into a "quasi-judicial hearing."\textsuperscript{179} The desire to treat the underlying causes of disturbance in the student body and to investigate and get at the roots of the problem is a readily understandable approach. Similarly, the need for individual attention and aid for the individual to help or reform rather than punish is desirable, having had its counterpart in the movement to separate the juvenile from the adult offender.\textsuperscript{180} But it shares with this development the problem of practical shortcomings, \textit{i.e.}, the personnel and the facilities provided to help the pupil may not be adequate to cope with the problem. Thus, the pupil may be in the position of trading away rights for nonexistent aid. Hence, phrasing the problem as a choice between legal rights in an adversary setting and modern professional aid may be unrealistic. The choice may not be available, and the individual may be forced to seize the first apparent aid at hand. This is more likely to be an appeal to a lawyer, especially since he is outside the system which threatens the individual.

In \textit{Madera v. Board of Education}\textsuperscript{181} the question of the adequacy of the system to aid the individual was brought more sharply into focus than was true in \textit{Cosme}. In the district court Judge Motley heard testimony and probed into the mechanics of the suspension from school and its consequences. The court noted that the suspensory procedure could lead not only to transfer to another school, but judicial proceedings and possibly incarceration of up to two years. The drastic consequences of the administrative conference, the court held, posed a danger of loss of basic rights; therefore, legal representation was warranted.

When \textit{Madera} reached the appellate level\textsuperscript{182} the facts were reevaluated. The Court of Appeals for the Second Circuit did not purport to differ on the law, except insofar as it limited the requirement of legal representation to a proceeding for expulsion rather than one for suspension.\textsuperscript{183}

\begin{footnotes}
\item Id. at 344, 270 N.Y.S.2d at 232.
\item Id.
\item See text accompanying and following note 160 supra.
\item Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968).
\item Judge Thornton in Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969), cited the appellate court decision in Madera when he overruled the school board on expulsion in the first round. Id. at 1392. In the second round he held that the record did not show any infraction meriting expulsion. Id. at 1396.
\end{footnotes}
Judge Moore, speaking for the court, took issue with Judge Motley's evaluation of the facts:

At the very outset it should be made clear what this case does not involve. First, the Guidance Conference is not a criminal proceeding; thus, the counsel provision of the Sixth Amendment and the cases thereunder are inapplicable. Second, there is no showing that any attempt is ever made to use any statement at the Conference in any subsequent criminal proceeding... Therefore, there is no need for counsel to protect the child in his Fifth Amendment privilege against self-incrimination.184

The opinion of Judge Moore is replete with references to the requirements of due process; the reversal cannot be read as an assertion that constitutional rights do not exist in public schools. On the contrary, the appellate bench premised its decision on the applicability of due process to administrative procedures in public schools, and noted that "[t]he real question is at what point along this chain is the full panoply of due process safeguards to apply." The Court took pains to state why in this case, due process—specifically, the right to be represented by counsel—did not apply. It observed that the consequences of the hearing were either a return to the same school, transfer in grade to a similar school, or, with the consent of the parents, transfer to a special school. Judge Moore noted that a social worker from an agency familiar with the matter might be consulted by the parent, and stressed the non-punitive nature of a conference from which no criminal sanction or prejudice at a subsequent judicial proceeding could result.

It is noteworthy that the appellate court relied on the factual findings of the lower court and did not contradict what would appear to be significant and disturbing comments. While the guidance conference was not of a criminal nature and did not purport to be punitive, it was in fact simultaneous with a family court proceeding commenced by the school authorities. Although the latter proceeding was dismissed, the dismissal was attended by a finding that the minor was a person in need of super-

184. 386 F.2d at 780 (footnote omitted).
185. Id. at 785. The recent history of physical confrontation and the growth of drug related cases have sharpened difficult procedural problems for attorneys where administrative procedures involving suspension and court proceedings following arrest may be pending simultaneously. The rule is that the pendency of a criminal proceeding does not foreclose a school hearing on the same subject. In re Manigaulte, 63 Misc. 2d 765, 313 N.Y.S.2d 322 (Sup. Ct. 1970); see Johnson v. Board of Educ., 62 Misc. 2d 929, 310 N.Y.S.2d 429 (Sup. Ct. 1970). However, there are some limited advantages if the proceeding in court affords the "youthful offender" protection; it may not form any part of the charge or evidence in the suspensory hearing. In re Rodriguez, 8 N.Y. Educ. Dep't Rep. 214, 217-18 (1969). The requirement of due process may sometimes call for little more than being aware that substantial rights are involved and are not to be dealt with lightly. Thus, in Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967), a proctor's letter was held to constitute insufficient basis upon which to suspend a pupil for cheating.
This authorized further action, leading the district court to conclude that the charge of juvenile delinquency made by the school administration was not moot, and that the conference could not be viewed as unrelated to the possibility of further judicial action. The evidence adduced at the federal trial indicated that the ostensibly benign suspension might indeed have highly serious consequences. There were instances, Judge Motley noted, where, for lack of a special school or other facilities, pupils had in fact been excluded from school for as long as seven or eight months, and in one instance a student was out for nine months, only to be returned to his original school.187

If Judge Moore's decision indicates a greater reticence to leap into the school scene where the particular case does not itself furnish a clear example of the shortcomings of the system, the opinion is clearly consistent with the trend toward greater judicial concern. Judge Moore observed that the procedure of the school system showed "a high regard for the best interest and welfare of the child."188 Thus, if the school administrator believes that Judge Moore is more ready than Judge Motley to support his authority, he can scarcely expect to rely on that support without a showing of fairness and concern for the pupil.

In large part the views of the courts may illustrate a different skepticism, each in its own way healthy. Judge Motley may cast a dubious eye on the responsiveness and efficacy of the educational bureaucracy with respect to the needs of the disadvantaged. It is easy to imagine the potential fear of a minority group individual, who possibly speaks little English, ensnared in the massive machinery of the school administration where shortage of personnel, time, and funds can easily lead to the disposition of troublesome cases on the basis of administrative efficiency.189 Judge Moore, however, viewing the same picture, would have us consider whether an emphasis on legal rights, in effect a trial by ordeal, is the most reliable method of achieving "the best interest and welfare of the child."190 In this regard one may expect that what formerly might have been expressed in terms of the presence or absence of legal rights will now find its expression in factual terms. This reflects a continuing problem which is not likely to pass, for it is in the nature of due process to con-

186. See N.Y. Family Ct. Act art. 7 (McKinney 1963), which governs this type of adjudication.
187. 267 F. Supp. at 368.
188. 386 F.2d at 789.
189. See Kent v. United States, 383 U.S. 541, 555-56 (1966), describing the lack of personnel and expressing concern over the fact that the "child receives the worst of both worlds." Id. at 556.
190. 386 F.2d at 789.
stantly require redefinition. It is the focal point of competing rights in a constantly changing environment in which the involvement of people and resources is large, and the functions of vital importance.

It may be inferred that the different factual evaluations represent a different frame of legal reference and general approach to the question of "authority." It is similar to the factual differences described by Mr. Justice Fortas and Mr. Justice Black in their respective opinions in Tinker. The remarks of Judge Moore in Madera probably reflect a large segment of current thinking today both on and off the bench:

Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspension into criminal adversary proceedings—which they definitely are not. The rules, regulations, procedures and practices disclosed on this record evince a high regard for the best interest and welfare of the child. The courts would do well to recognize this.191

Judge Motley's opinion is representative of judicial scrutiny of the actual workings of school administration. She seeks sufficiently strict procedures to assure that the individual's rights will not be ignored. However, it should be observed that formal administrative hearings can create their own cumbersome bureaucracy. The phrase in which Judge Moore referred to "the full panoply of due process" indicates that the court had this in mind. The time and the expense involved in administrative hearings and procedures may be comparable on occasion to that of the courts in making "constitutional rights" an ephemeral concept for the pupil in the ghetto.

Both Cosme and Madera preceded Tinker, certiorari having been denied in Madera at nearly the same time it was granted in Tinker.194 Although it is axiomatic that denials of certiorari are not to be accorded any significance, it is of some import that the Court felt sufficiently moved to take one matter, but presumably was not disturbed by the result reached in the other. The timing suggests that the result in Madera would not be modified by the Supreme Court's decision in Tinker. Since Madera has been cited in school disciplinary matters with a frequency second only to that of Tinker, this suggestion may be important as a guide to the lower courts.195

The dividing line between the first amendment liberties and due process
as a procedural aspect of those liberties appears, at times, to be vague. The Supreme Court has occasionally referred to the due process aspects of the first amendment in cases dealing with free speech and free press. While the thoughts may be conceptually distinct, in practice a curb on freedom must occur through some act or invocation of some rule which therefore raises the question of the fairness or reasonableness of the act or rule. The situation is illustrated by the twin decisions written by Judge Gewin in *Burnside v. Byars*,\(^\text{196}\) and *Blackwell v. Issaquena County Board of Education*.\(^\text{197}\) Since these cases were cited with approval by the Supreme Court in *Tinker*, they are of peculiar importance as guides in interpreting the scope of that decision. The *Burnside* child was a high school pupil who was suspended for a week after wearing “freedom” buttons containing the words, “One Man One Vote” and the initials “SNCC.” The school principal had told several students that displaying such buttons was against the rules which, he later testified, were designed to avoid commotion.\(^\text{198}\) The court noted the fact that the resolution had not been enforced for “Beatle” buttons nor other buttons reading “His” and “Hers.” When the students continued to wear the proscribed buttons, the principal told them they had the choice of removing the buttons or being sent home. The *Burnside* girl was one of those who selected the latter alternative for which she received a one week suspension. An injunctive suit followed in which the district court denied the relief sought.

Although the district court apparently accepted the principal’s conclusion that the display of the buttons caused a commotion,\(^\text{199}\) the court of appeals scrutinized it.\(^\text{200}\) Judge Gewin observed that the “record indicate[d] only a showing of mild curiosity on the part of the other school children . . . .”\(^\text{201}\) It was conceded at the trial that the basis of the suspension was not disruption but breach of the school regulation. The court then distinguished button-wearing from “activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speechmaking, all of which are protected methods of expressions, but all of which have no place in an orderly classroom.”\(^\text{202}\) It is notable that the brief suspension from school of the *Burnside* child followed appropriate admonitions and was based on written rules. Further, there was no indication of harsh, precipitate, or inconsiderate administrative action. Nevertheless, the appellate

\(^{196}\) 363 F.2d 744 (5th Cir. 1966).
\(^{197}\) 363 F.2d 749 (5th Cir. 1966).
\(^{198}\) 363 F.2d at 746-47.
\(^{199}\) Id. at 748.
\(^{200}\) Id. at 747-48.
\(^{201}\) Id. at 748.
\(^{202}\) Id.
court, in its pre-\textit{Tinker} decision, held the denial of the temporary injunction to be an abuse of discretion.

Judge Gewin was allowed an opportunity for Solomonic justice when on the same day he announced a decision supporting the school authorities where the buttons containing the same words were worn at another school. In \textit{Blackwell} the refusal to grant a temporary injunction was affirmed. There, some of the pupils placed unrequested buttons on other pupils. As a result, "a younger child . . . began crying," and there was "confusion, disrupted class instruction, and . . . a general breakdown of orderly discipline . . . ."\textsuperscript{203} These events occurred in February, and were followed by the suspension of the children for the balance of the Spring term. Upholding this result, the court of appeals stated: "It is always within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine. This is not only proper in our opinion but is necessary."\textsuperscript{204}

Although Judge Gewin spoke of a regulation in \textit{Blackwell}, no specific rule was referred to and none was quoted as in \textit{Burnside}. The only mention of the rule was the reference to the principal's statement to the pupils that the buttons would have to be removed. In a literal sense, therefore, the \textit{Blackwell} case does not seem to be as much a case supporting reasonable rules as one supporting reasonable conduct to maintain order. The decision also indicates that an attempt to draw the line between substantive issues, \textit{i.e.}, liberties, under the first and fourteenth amendments, and the procedural issues arising out of the exercise of the substantive rights may be difficult and not altogether necessary. If, in the court's opinion, reasonableness is lacking, the judge will find against the exercise of school authority, not necessarily indicating the precise rationale. The Supreme Court in \textit{Tinker} seemed to be fully in accord with both \textit{Blackwell}\textsuperscript{205} and \textit{Burnside}\textsuperscript{206}.

The fact that \textit{Burnside} and \textit{Blackwell} involved preliminary injunctions should carry special authority in civil rights school cases—at least those cases involving substantially similar modes of communication in a peaceful setting. Nevertheless, since the measure of due process is often likely to be the conscience of the court, results such as the one in \textit{Einhorn v. Maus}\textsuperscript{207} may occur from time to time. If the judge there upheld free speech, he seemed to have done so with a curious perception of due process. Twelve minors commenced suit to enjoin school officials from placing on their school records notations that they "distributed literature

\begin{itemize}
\item \textsuperscript{203} 363 F.2d at 751.
\item \textsuperscript{204} Id. at 753.
\item \textsuperscript{205} 393 U.S. at 513.
\item \textsuperscript{206} Id. at 505, 509, 511, 513.
\item \textsuperscript{207} 300 F. Supp. 1169 (E.D. Pa. 1969).
\end{itemize}
or wore an arm band bearing the legend ‘HUMANIZE EDUCATION’ at the graduation ceremonies. The district court noted that this peaceful expression was fully protected under Tinker; however, “[s]chool officials have the right and a duty to record and to communicate true factual information about their students to institutions of higher learning, for the purpose of giving to the latter an accurate and complete picture of applicants for admission.” The court purported to see no irreparable harm in this, holding that its possible effect on subsequent graduates posed no threat of immediate damage. If such is the case one wonders what the duty was to record such “factual information.” It appears to be an irrelevant and bizarre bit of information out of the thousands of details that might be noted. The Einhorn case may perhaps best be regarded as a sport—the type of result that may occur in a broad jurisdiction where uniformity is an objective not instantly achieved. Often, the differing results are obscured by laying careful stress on factual variances which reinforce the statement of the accepted legal principle. Others illustrate the deep emotional chords that the school situations touch where the feelings of the judiciary reflect the sensitivities of their community. Cases of personal appearance seem to be preeminent in this regard.

Tinker specifically stopped short of the subject of personal appearance, making it clear that it was not, on that occasion at least, part of pure speech. Certain items of personal appearance may qualify as political expression, and perhaps then as “pure speech,” although it would be difficult to draft a regulation calculated to allow political expression, but stop short of “pure fashion.” In Wood v. Alamo Heights Independent School District, the court noted the Tinker exclusion and passed on to consider whether the regulations concerning students’ hair were reasonable. Upon entering an area so dominated by changing fashions, it seems hard to avoid a determination of “reasonableness” that is related to the personal notion of the individual judge, or to the belief that this subject is better left to the school officials. The Wood decision seemed close to the latter

208. Id. at 1170.
209. Id. at 1171.
211. 393 U.S. at 507-08.
212. 308 F. Supp. 551 (W.D. Tex.), aff'd per curiam, 433 F.2d 355 (5th Cir. 1970).
213. The standard of “reasonableness” was attacked as “evanescent” in the most recent case on the subject of hair. Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971). The court found that the regulations were motivated by legitimate concerns, observing that “the problem, if it exists, is one for the states . . . .” Id. at 259. For the opposite view see
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proposition when it suggested that judges would be well advised to "'get out of the business of running schools . . . .'"214 However, the judge in Wood did inject an additional test into his conclusion that the rule was reasonable when he noted that its adoption followed consultation between administrators and students.216 This would appear to emphasize the importance in the factual presentation of school cases. Some indication of fairness, of communication, of attempts at persuasion, will go a long way toward predisposing a court in favor of the school administrator. Such a showing should come close to being a sine qua non in any educational authority case.

In school cases the courts' decisions as to facts and law are not distinct. They come closer to those mixed questions left for the jury in tort actions. But the considerations are more elusive. The court must not only determine the facts out of a welter of highly emotional testimony, but it must assess the "thrust" of those facts. Thus, is the wearing of an item at a given time the cause of, or about to become the cause of disturbance or violence? At what point does the danger become reasonably apprehended, especially in a setting involving children from five to eighteen years of age.216 Further, if decided one way or the other, what will be the precedential impact of the ruling? For courts to shy away from this particular class of lawsuits is not surprising. If they cannot avoid jurisdiction, courts will very likely attempt to dispose of such cases by whatever route provides a workable rationale.

Whether dress and hair regulations merit the attention given them is an argument that may be employed both ways. The courts can say that

Calbillo v. San Jacinto Junior College, 305 F. Supp. 857, 862 (S.D. Tex. 1969), rev'd, 434 F.2d 609 (5th Cir. 1970) ("[R]egulations promulgated upon some unrealized fear or regulations fashioned to implement personal tastes of some school officials cannot be tolerated.").


215. However, if the court determines that the regulation is unconstitutional, the "fairness" of its adoption will not save it. Axtell v. LaPenna, 323 F. Supp. 1077, 1081 (W.D. Pa. 1971); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970). See also In re Johnson, 9 N.Y. Educ. Dept' Rep. 14 (1969), approving involvement in formulating standards and regulations, but holding that "[a]bsent . . . specific educational purpose, the imposition of a uniform manner of dress and the restriction of choice violate the individual rights of students and parents . . . ." Id. at 15.

216. The court held the grooming regulation in Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970), unconstitutionally vague, citing Tinker, notwithstanding the exclusionary remarks made there. However, after observing that the boy's moustache and sideburns did not disrupt classroom decorum, the court stated that "[a]bsent . . . specific educational purpose, the imposition of a uniform manner of dress and the restriction of choice violate the individual rights of students and parents . . . ." Id. at 118. The danger of turmoil justified regulation. Indeed, the court noted that compulsory attendance (usually a basis for recognizing the students' rights) necessitated discipline, i.e., regulation. Id. at 119.
it is not a problem of significance in terms of political expression or of communicating ideas; therefore an already overloaded judiciary should not be distracted with such trivia. But the courts might also say that this subject does not really merit such an expenditure of the energy of school administrators. Furthermore, judges may inquire as to whether there is any factual knowledge to support glib assertions of distraction and disruption. Might it not be said that school administrators are wasting time on inconsequential matters since respectable school authority has indicated that the walls will not come tumbling down if these questions are removed from the jurisdiction of the administrator and left to the student?

The personal appearance cases may be set to one side as a sort of special category, similar to that of obscenities, in that they often provoke quick negative reactions among adults. While they provoke incidents

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217. But see reference to "trivial" rights in Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970); text accompanying notes 238-56 infra.


219. In New York the school boards and administration have been limited by rulings of the commissioner. E.g., In re McQuade, 6 N.Y. Educ. Dep't Rep. 36 (1966) (girls' western style boots allowed); In re Dalrymple, 5 N.Y. Educ. Dep't Rep. 113 (1966) (girls' slacks allowed). In the latter case, the commissioner referred to an 1874 ruling of the state superintendent denying the school board's authority over a girl's hair style. Id. at 116-17. Physical danger or a style "so distractive as to interfere with the learning and teaching process" are stated as permissible grounds for regulation. Id. at 115. In Breen v. Kahl, 419 F.2d 1034, 1037 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970), the court flatly rejected an argument that even if there is no justification for the rule, the disciplinary power of school authorities will suffer if their regulation is not upheld in court.

220. Another group of cases that produces unpredictable results is that of the national symbol, i.e., the flag, the National Anthem, and the Pledge of Allegiance. The same district saw one result under a ruling by Judge Judd (Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969)), where exclusion from the classroom for refusal to either salute or stand silently was held unconstitutional, and the opposite result under a ruling by Judge Travia (Richards v. Board of Educ., No. 70 Civ. 625 (E.D.N.Y., July 10, 1970)). In Lapolla v. Dullaghan, 63 Misc. 2d 137, 163, 311 N.Y.S.2d 435, 441 (Sup. Ct. 1970), an official action was held improper where a board of education had the flag lowered in memory of the four students killed in Kent, Ohio. This was held to be "an expression of political dissent" violating the board's obligation to remain neutral. The political problem in Lapolla was perhaps more significant than the national symbol. In Nistad v. Board of Educ., 61 Misc. 2d 60, 304 N.Y.S.2d 971 (Sup. Ct. 1969), where students were allowed to voluntarily absent themselves from school for a political demonstration, it was held to be an improper pressure upon other students to state a political view. Apparently none of the foregoing cases was appealed. All shared the problem of responding to highly emotional subjects. Although approaching the subject from different vantages, e.g., Frain was a suit by an individual based on right of conscience while Lapolla was a suit by a group to enjoin a board, a rationale could be made: school authorities are limited in either committing any acts impinging upon expressions of personal views or expressing their own views where political or religious considerations are involved. Whether in fact this will be the rule will depend on cases yet to come. However,
which may lead to a test of constitutional privileges, the importance of the activity protected or excluded is highly debatable. The same cannot be said of issues in the political arena such as the Vietnam War, nor of social phenomena such as the drug problem. In Tinker the Court set forth in broad strokes its views on political liberties as practiced in the schools, a subject to which the decision was specifically directed. As noted earlier, Mr. Justice Black inferred that the decision went well beyond the immediate question under consideration, and Justice Stewart, who concurred, and Justice Harlan, who dissented, appeared to be in agreement in this, although differing as to the extent. It seems fair to conclude that the Court's assertion of constitutional rights held by public school pupils will not be limited to political subject matter. For either the children have constitutional rights or they do not, and with the conclusion that they do have them there does not appear to be any basis for limiting such rights to a particular area. Again, the manner in which those rights are described will vary, but obviously the Tinker holding cannot be ignored in such areas as the drug problem. In fact, irrespective of Tinker, there was a "tightening" of judicial attitude with respect to this difficult area. Indeed, the tightening of procedural due process has not been a result of court action alone. In New York State, the Commissioner of Education insisted upon due process and a hearing in a pre-Tinker case of expulsion, relying on In re Gaudt, Madera, and Dixon v. State Board of Education. This is further evidence supporting the statement made earlier in this article, that Tinker is, in large measure, an opinion confirming a movement toward greater emphasis on the rights of young people. Clearly the school boards, administrations and teaching staffs have as great an interest in this movement as do those not directly connected with the educational institutions. It is not so much a question of change by compulsion from outside the system as stating the legal guidelines for the changes that have been taking place.

221. See note 49 supra and accompanying text.
222. See, e.g., Howard v. Clark, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (Sup. Ct. 1969), where Judge Grady held that an arrest in a drug case could not be the basis of a suspension.
225. See notes 181-95 supra and accompanying text.
227. See text accompanying note 170 supra.
Insofar as specific procedures are concerned, the college-oriented case of Dixon set forth ground rules which have been used for cases dealing with the high schools. Upon holding that the university had failed to observe the constitutionally guaranteed rights of the student, Judge Rives outlined the procedure to be followed:

For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.

Another instance of guidelines is found in the General Order of the Western District of Missouri, and in a more limited subject area, in Eisner v. Stamford Board of Education discussed earlier in this article. In that case the Court of Appeals for the Second Circuit spoke of the difficulty of establishing rules for "the unique social structure prevailing in a public school system of secondary schools," and observed that "[t]he problems raised by this case defy geometric solutions." Inherent in the problems of due process is the necessity for fair procedure and the difficulty of achieving it. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

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228. 294 F.2d at 158-59.
229. 45 F.R.D. 133 (W.D. Mo. 1968) (adopted en banc, it applies to "tax supported institutions of higher education.").
230. 440 F.2d 803 (2d Cir. 1971); see text accompanying notes 117-26 supra.
231. 440 F.2d at 804.
232. Id. at 804 n.1.
ten regulations will fail for being too vague or too broad. The absence of such rules does not mean, however, that a school administrator is either enjoined or excused from taking action where danger threatens. But these situations should be regarded as exceptional; they should not be relied upon as an alternative to clear guidelines. As stated by the court in Eisner:

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

In drafting rules it must be borne in mind that the purpose is to guide, not to punish, to indicate permissible, if not desirable activities, and to facilitate rather than to inhibit such activity. Vagueness is not only bad in a constitutional sense; it is bad because it is not a guide. "Finally, in cases of minor discipline particularly, parent, student, and administrator should remember that substitution of common sense for zealous adherence to legal positions is not absolutely prohibited."

E. The Freedom to Do as One Pleases and Miscellany

If civil rights are discussed in terms of training for participation in a democratic society, or for protection against specific abuses, Tinker provides a logical framework. But if one moves to the broader constitutional concept of "freedom from bodily restraint," or the right "to be let alone," the logic does not fare as well. The pupil must be in school by virtue of laws mandating compulsory attendance. There is nothing in Tinker nor its progeny which indicates that the laws requiring "each minor [to] . . . attend upon full time instruction" have been modified. Consequently, it must be concluded that the constitutional rights of minors are markedly different from those of adults because of the "special char-

236. 440 F.2d at 810.
239. T. Cooley, Torts 29 (2d ed. 1888), quoted in Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891). This was a personal injury case in which the Court held the plaintiff could not be ordered to submit to surgery. See also Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).
241. See McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denial of jury trial in the juvenile court). See also Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969). Mr. Justice Blackmun, then a judge of the court of appeals, stated that first amend-
acteristics of the school environment," and because the child is compelled to attend school. The only freedom involved in this area is the parent's choice between public and private education.

Although the right to personal liberty is often discussed as an aspect of due process, it clearly is much broader than the procedural safeguards that that clause connotes. Indeed, as noted above, neither the fifth nor the fourteenth amendment tells what the liberty protected is, but only that it is not to be taken away without due process of law. The growth of the concept of freedom from bodily restraint, as expressed in judicial literature, came more than a century after the Constitution was written. Even then, considering the myriad activities and subjects the topic of personal liberty covers, there have been remarkably few cases concerning them. Probably no single source has furnished more specifics during the past few years than the length and style of students' hair, a subject briefly discussed earlier in this article. While it might be suspected that there are more important problems to occupy the scholarship of the legal profession, the research evident in the opinions concerning hair has contributed important pages defining basic rights which heretofore existed more in theory than practice. In Richards v. Thurston the district court held that a "principal's personal prejudice" does not suffice to mandate hair styles. The court stated that "when the personal liberty claimed by a minor or an adult has a high order of importance the state must make a strong showing of the need of its curtailment." In affirming, the court of appeals rejected the theory that...
hair style is protected by the first amendment, but proceeded to analyze the meaning of "liberty" in the due process clause. Apparently unsatisfied with the available case law, Circuit Judge Coffin reviewed the debate concerning the first amendment, noting that it was not deemed "necessary to write an amendment for personal appearance." He concluded that "the right to wear one's hair as he wishes" is within "the commodious concept of liberty." Even though the court acknowledged that some would term the right trivial, it held hair style to be a matter of personal liberty for which "the countervailing interest must either be self-evident or be affirmatively shown." It came as no surprise that the court of appeals held no such showing was made, and unanimously affirmed the district court decision. Since Richards did not go up to the Supreme Court, the "hair" cases are left at a stand-off, the Court having denied certiorari in Ferrell v. Dallas Independent School District, where school regulation of hair length was upheld, and in Breen v. Kahl, where a similar restriction was declared unconstitutional.

The district court observed in Richards that there were restrictions upon the exercise of one's liberties; thus, "the right to appear au naturel at home is relinquished when one sets foot on a public sidewalk." In the same way, a rule which limits skirt lengths "while on school grounds would require less justification" than hair regulations which affect an individual's conduct over a significant period of time away from the school grounds. While the court was not proscribing regulations, it was insisting that the regulations be relevant to the operation of the school and that the non-school impact be considered. The non-school impact test, which

252. 424 F.2d at 1285 (footnote omitted).
253. Id.
254. Id. at 1286. Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), the most recent hair case is, in effect, at the other end of the spectrum from Richards. The opinion expressed concern at the amount of litigation on the subject, noting: "We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair." Id. at 259. Obviously the court was not asked to do that.
255. 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968).
256. 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). The claimed unconstitutionality of grooming regulations under the ninth amendment has been accepted by some courts (e.g., Breen), and rejected by others. Miller v. Gillis, 315 F. Supp. 94, 100 (N.D. Ill. 1969).
257. 424 F.2d at 1285.
258. Id.
259. The Commissioner of Education of New York State used the same criterion in up-holding a ban on the wearing of berets during classroom instruction. In re Jimenez, 9 N.Y. Educ. Dep't Rep. 172 (1970). Also rejected was the claim that the berets had political significance and that the ban was a denial of equal rights because others were permitted
seems to be the most common sense approach, may be headed for further judicial scrutiny in the near future since several states presently purport to give school officials fairly broad quasi-disciplinary powers extending beyond the school grounds. For example, California obligates teachers to "hold pupils to a strict account for their conduct on the way to and from school . . . [260] and apparently expects that both principals and teachers will, in the exercise of morality, supervise the pupils so that they do not use tobacco, narcotics, and intoxicating liquors on the school grounds or elsewhere. [261]

By contrast, New York's statutory provisions regarding geographic jurisdiction over pupils are limited to attendance enforcement, giving school authorities the right to arrest unlawfully absent minors and the right of entry into factories or mercantile establishments for the purpose of affecting such arrests. [262] However, decisional law has expanded the ambit of the school's jurisdiction to include field trips and sports or band activities carried out under the responsibility and authority of the board of education. [263] Activities immediately outside the school gates which affect the school children have been held subject to school authority, [264] but the extent of this jurisdiction is disputed every foot of the way. [265] Hence, while school authorities cannot ignore events which occur outside the confines of school grounds and have an impact upon the students, their authority will be sharply limited by the educational objective they pursue. In addition, the connection between the exercise of any power to activities in the school must be reasonably close in time and place, and conscious effort must be made to restrict any extra-school effect where the sphere of personal liberty is concerned.

An area of unavoidable difficulty both legally and practically is the question of student arrest, search and seizure, and the consequences flowing from these acts. The problem has been magnified by the impact

263. The Commissioner of Education of New York State ruled that a child could be required to accompany a band off campus during non-school hours where the pupil was enrolled in that activity. In re Ingersoll, 6 N.Y. Educ. Dept' Rep. 137 (1967). See also Monroe v. Board of Comm'n's, 244 F. Supp. 353, 364 (E.D. Tenn. 1965), remanded, 380 F.2d 955 (6th Cir. 1967), rev'd on other grounds, 391 U.S. 450 (1968).
of the widespread use of drugs. Indeed, the dimensions of the questions raised are such that only a bare suggestion of the complications can be made here.

An arrest of a student may take place on or off the school grounds. While it may appear that an arrest away from school property is of no concern to school officials, the probability is that the school will become involved in court or court related proceedings, if for no other reason than the student’s absence from class during his incarceration. In times past, the mere word “arrest,” just as the word “pregnancy,” summoned up visions of moral disease which seemed a self-evident basis for action if the malady was not to spread. The trigger reaction to arrest has been accentuated by the so-called “drug-culture” to such an extent that administrators automatically suspend arrested students to safeguard the student body from potential harm. The drug scene has caused both judicial reaction, and counter-reaction. Legislative action to forestall automatic suspension has called for a stricter adherence to due process, and administrative rulings have successively increased and decreased the due process requirements to be accorded public school pupils.

The problem facing school authorities is that they have obligations both to the arrested or suspected student and to the student body at large. Because of their obligation to society and their desire to protect school children, school officials exhibit a natural desire to cooperate with police investigative agents. But the officials must bear in mind that they may possess information of a confidential nature, and that their “custody” or authority with respect to pupils is limited. The request to provide record information, and the request for oral or written statements from

271. Although the common law and statutory basis for privacy of an individual's school records has been sparse in New York, school officials have frequently been alert to the implication of informational requests, and a few decisions have vaguely outlined a right. See, e.g., In re Thibadeau, 1 N.Y. Educ. Dep't Rep. 607 (1960) (parent's access to records sustained).
persons outside the school system suggests a host of knotty questions for which the school administrator can find little guidance. He must be cautious of giving anything beyond purely public records or data, and tread cautiously or not at all in the area of statements to police without parental consent. It is suggested that this is a field which could well use administrative guidelines from the state departmental authorities. If fear hampers the response of school officials—and clearly it may seriously do so at present—then effective help in combating the drug problem may be greatly hampered.

Of course, when the crime occurs on the school grounds, school officials will not be able to take the route of least resistance, i.e., of avoiding involvement. But the problems are at least as substantial and more clearly immediate than when the crime occurs elsewhere. The confusion of being complainant, witness, investigator and, in effect, peace officer, complicates the role of the administrator whose expertise is in education, not law. Since even lawyers often admit to ignorance in this area, it is easy to sympathize with embattled officialdom facing a series of immediate demands requiring instant responses carrying significant legal implications. Often they have little more than their own native intelligence to rely on for guidance.

Previously, the actions of teachers and principals were justified by the theory of in loco parentis. Recently, however, this catch-all phrase has been subjected to judicial scrutiny, and it may be doubted whether its reiteration, without more, will aid the school authorities. "More" is the new burden of justification that must be shown by school authorities in areas deemed within the constitutional ambit. The rationale is that the limited hours and place of school activity necessitate restrictions on the operation of rules which affect conduct outside of those limits. Thus, Judge Kerner, speaking for the Court of Appeals for the Seventh Circuit in Breen, observed that the parents' right to determine the appearance of their children outside of school is restricted by grooming rules. While conceptually differing from Tinker's emphasis on the right of the child, Judge Kerner's view is in accord with the temporal and spacial limitations placed on the operation and effect of school regulations found in other opinions.

Guidelines are found in Opinion of Counsel, No. 148, 4 N.Y. Educ. Dep't Rep. 229 (1965): "The school particularly does not have custody of pupils for the purpose of authorizing law enforcement officers or other third parties to interrogate pupils or to remove them from the premises for any purpose whatever. The rights of the parent in all such matters are paramount and may not be assumed by the school." The school, however, is given instructions to cooperate with law enforcement officers, to honor warrants for arrest and court orders for production, and is told of the need to make students available where a crime has been committed on school grounds. Id.

See text accompanying notes 286-92 infra.

419 F.2d at 1037-38.
Notwithstanding the foregoing remarks, any report of the demise of the principle of *in loco parentis* would be an exaggeration. It has shown great vigor in the New York case of *People v. Jackson*, where a pupil was arrested off school grounds for possession of narcotics paraphernalia. The high school coordinator received information concerning the student, leading him to ask the boy to his office. When the coordinator noticed a bulge in the defendant's pocket, the defendant ran off school grounds with the coordinator in hot pursuit. A policeman near the office assisted in the chase when the school official shouted: "'He's got junk and he's escaping.' Three blocks away the two men caught the student. The coordinator grabbed the boy's hand from his pocket, allegedly causing drug "works" to be extracted. The criminal court suppressed the evidence as seized "without probable cause" in violation of the fourth amendment's provision regarding unreasonable searches. A divided appellate court reversed, holding that the school official stood *in loco parentis* to the children entrusted to his care....

Writing for the court, Justice Lupiano said that the school's obligation to protect students in its charge encompassed both the pupil suspected, who may harm himself, and others. He also stated that this quasi-parental obligation precluded the operation of the fourth amendment, since the coordinator acted *"in loco parentis."* Justice Markowitz made only the briefest reference to the philosophy of *loco parentis* in his dissenting opinion. In fact, the dissent merely noted that the distance of three blocks was too far to arrest "on suspicion alone." The dissent's emphasis was on the question of illegal search and seizure. The majority, on the other hand, assumed the coordinator acted as a private citizen, *i.e.*, a parent, whereas the minority claimed that he acted "as an agent of the city government cloaked with police powers and participating in the governmental function ...." Certainly if the coordinator was acting pursuant to the "affirmative obligation of the school authorities to investigate," it would seem hard to divorce the coordinator's duties for purposes of the arrest.

Does *loco parentis* really explain anything here? It is doubtful that a

276. Id. at 910, 319 N.Y.S.2d at 732.
277. Id., 319 N.Y.S.2d at 733.
278. Id. at 914, 319 N.Y.S.2d at 736.
279. Id. at 915, 319 N.Y.S.2d at 738.
280. Id., 319 N.Y.S.2d at 737.
282. 65 Misc. 2d at 915, 319 N.Y.S.2d at 737.
parent would have performed the action leading to the child’s arrest.\textsuperscript{284} It is true that the doctrine need not necessarily be read as a mandate to the authorities to act as the parent would. But, if the purpose of the doctrine is “preservation of order and discipline,”\textsuperscript{288} one may ask whether the powers derived from \textit{loco parentis} extend to acts which are unlikely to be committed by parents, and unnecessary for the immediate purpose of order. The concept explains too much or too little.

A further complication for the parental theory is added by the decision in \textit{Bumper v. North Carolina}.\textsuperscript{286} There, a sheriff appeared at the home of defendant’s grandmother and told the grandmother that he had a search warrant. As a result, she consented to a search of the house during the course of which a rifle was found. The sheriff did not have a warrant and the state sought to uphold the search on the basis of the grandmother’s consent. The Supreme Court held that “there can be no consent under such circumstances.”\textsuperscript{287} Justice Lupiano distinguished this in \textit{Jackson}, citing \textit{People v. Overton}.\textsuperscript{288} \textit{Overton} involved the search of a school locker consented to by the school principal after detectives showed him what later

\begin{footnotes}
\item[284] See Opinion of Counsel, No. 148, 4 N.Y. Educ. Dep’t Rep. 229 (1965) (principals advised to inform parents of both their paramount right and the right to obtain counsel). In the course of this article frequent reference has been made to opinions of the Commissioner of Education. These are important because the bulk of school litigation, at least in New York, is probably resolved in administrative proceedings within the Department of Education rather than by resort to the courts. The legislature has traditionally given wide powers to the Commissioner, together with broad discretion and jurisdiction. Apparently this is based on the assumption that education was best not subjected to normal local governmental authorities, nor to the regular court system. The result is a fairly simple “appellate” procedure, which is both easier and quicker than the normal judicial channels and has exhibited considerable care and awareness of constitutional rights. The facility with which appeals may be instituted, together with the attention paid to individual rights, provides a realistic remedy for aggrieved pupils and their parents. The courts may, and do frequently insist upon the exhaustion of this remedy as a condition to using the judicial forum. \textit{Jackson} v. Hepinstall, 328 F. Supp. 1104, 1107-08 (N.D.N.Y. 1971).
\item[285] 79 C.J.S. Schools and School Districts § 493 (1952). Query as to the extent to which the section is still valid? E.g., the remark that the “powers of the teacher in this respect are unaffected . . . by the fact that his pupils, or any of them, are over twenty-one years of age . . .” Id. (footnotes omitted). Cf. \textit{People v. Cohen}, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Nassau Dist. Ct. 1968). See also \textit{Axtell v. LaPenna}, 323 F. Supp. 1077 (W.D. Pa. 1971): “It is clear that the ‘in loco parentis’ section of the Pennsylvania School Code . . . was never intended to invest the schools with all the authority of parents over their minor children but only such control as is necessary to prevent infractions of discipline and interference with the educational process.” Id. at 1080 (citation omitted).
\item[286] 391 U.S. 543 (1968).
\item[287] Id. at 548.
\end{footnotes}
proved to be an invalid warrant. Upon a motion to suppress the evidence (marijuana cigarettes), the trial court held that the school principal had a right to consent to the locker search. The appellate term reversed on the ground that the consent could not validate an otherwise illegal search, and the court of appeals again reversed with Chief Judge Fuld and Judge Bergan dissenting. The basis of the majority's holding was the obligation of the school authority to search plus its control over school lockers. However, it should be noted that the court said that when the principal "learned of the detectives' suspicion, he was obligated to inspect the locker." The case went to the Supreme Court which remanded it. When it was again scrutinized by the New York Court of Appeals, Judge Burke, speaking for the majority, distinguished Bumper as a case involving coercion, and held that this was not present in the locker search involved in Overton. Thus, the court of appeals relied heavily on the school's responsibility for its physical facilities and the principal's obligation as a school official, as well as the fact that no student was physically involved. The narrow margin separating the majority and minority does not make the decision a certain one for future guidance. However, it it noteworthy that the basis for the decision is pragmatic, emphasizing jurisdiction over physical facilities. The specificity of this analysis has much to recommend it as against the vague loco parentis.

The Supreme Court in Gault said that the concept of loco parentis originally appeared to extend to children only until seven years of age, following which time they were treated as if they were adults. The purpose, according to Mr. Justice Fortas, was to protect "property interests" in the child. The apparently equivalent phrase of parens patriae assumed the child had no rights. Nevertheless, in time it came to be

289. 20 N.Y.2d at 363, 229 N.E.2d at 598, 283 N.Y.S.2d at 25.
291. "As the designated representative of people of Mount Vernon, Dr. Panitz [the school principal] opened the locker, which was certainly not the private property of the defendant, in fulfillment of the trust and responsibility given him by the city residents through the Board of Education." 24 N.Y.2d at 526, 249 N.E.2d at 368, 301 N.Y.S.2d at 482.
292. However, it should be observed that the coercion in Bumper was directed at the grandmother and, by analogy, would be directed here, if present, to the principal. We speak of the coercion above in terms of the pupil, because of the court's emphasis on the fact that the search was of a locker, and not involving a person. Inferentially the majority on the second review by the court of appeals felt that the principal's knowledge was sufficient ground for the search. Accord, Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968) (college dormitory search based on "reasonable" information). Contra, People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Nassau, Dist. Ct. 1968), where a college dormitory room was held to have status equal to off campus rooms. In Pizzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970), aff'd, 442 F.2d 284 (5th Cir. 1971), a college dormitory search for drugs was held illegal where the information on which the warrant was based was deemed insufficient.
293. 387 U.S. at 16-17.
294. Id. at 16.
utilized to cover the state's action of denying rights in an effort to protect the minor.\footnote{Id. at 17-18.} The Supreme Court explicitly rejected such a curtailment of rights under the guise of parental interest in\textit{Kent v. United States}\footnote{383 U.S. 541, 554-56 (1966).} and implied that the state's obligations under \textit{parens patriae} are, if anything, greater than indicated in most expressions of \textit{loco parentis} because of its function of "guidance and rehabilitation."\footnote{Id. at 554.} The "'parental' relationship is not an invitation to procedural arbitrariness."\footnote{Id. at 555.} In the cases where \textit{loco parentis} is used, the thrust seems to be to justify some act in a criminally related proceeding, rather than the actual maintenance of peace or discipline in school. It is precisely in these areas that the Supreme Court has drastically limited the applicability of \textit{loco parentis}.

\section*{IV. Areas of Evolving Relations: Thoughts on Adjustment and Assertion of Rights}

There is a pervasive quality about the present state statutory schemes for compulsory education. The current comprehensive school attendance laws indicate that every child shall attend school for ten months each year. In New York a minor may attend public school from the age of five years\footnote{N.Y. Educ. Law § 3202(1) (McKinney 1970). Public nursery school attendance is permitted at 3 years of age. Id. § 1712(2).} to the age of twenty-one years,\footnote{Id. § 3202(1); cf. Ark. Stat. Ann. § 80-1501 (1960) (6 years to 21 years permitted).} but must attend from six to sixteen years of age.\footnote{N.Y. Educ. Law § 3205 (McKinney 1970); cf. Ark. Stat. Ann. § 80-1502 (1960) (7 years to 15 years required).} The attendance requirements are closely related to the possibility or permissibility of employment, and, at least secondarily, to have been designed with an intention to restrict child labor.\footnote{See N.Y. Educ. Law §§ 3205, 3215-30 (McKinney 1970).} The supervision of the minor's life continues until age eighteen through work certificates, although exceptions are provided for those whose education continues.\footnote{Id. § 3215(4)(i).} These laws were sustained as an appropriate exercise of police power\footnote{City of New York v. Chelsea Jute Mills, 43 Misc. 266, 88 N.Y.S. 1085 (Mun. Ct. 1904). While not ruled upon by the New York Court of Appeals, this case was relied upon to uphold child labor laws in other states. See, e.g., Kowalczyk v. Swift & Co., 329 Ill. 308, 160 N.E. 588 (1928); Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N.E. 229 (1909); Casteel v. Pittsburgh Vitrified Paving & Bldg. Brick Co., 83 Kan. 533, 112 P. 144 (1910); Bryant v. Skillman Hardware Co., 76 N.J.L. 45, 69 A. 23 (1908).} at a time when the Supreme Court took a dim view of legislation showing solicitude for other classes of workers. Thus, a limitation of a baker's workday to 10 hours was held to be an unconstitutional infringement of freedom of contract for "men, \textit{sui juris},"\footnote{Lochner v. New York, 198 U.S. 45, 64 (1905). Children are not considered \textit{sui juris}.}
and women were protected against legislation designed to protect them.  

Quaere: Will the Supreme Court reconsider the legislation designed to protect children, a significant part of which are the compulsory attendance laws? As indicated above, there is nothing in Tinker or its case law progeny to suggest that the Court was inclined to modify the universal state mandates of compulsory education, but the acceptance of lower maturity levels could move us in that direction. Although most legislation appears to have settled on the eighteen-year-old level as the period to commence rights and responsibilities, and it has more recently gained constitutional status, pressures for further modification are not impossible.

There are important practical considerations which lead one to wonder whether compulsion to attend school is a good answer where interest is lacking and training is irrelevant. Whether the present laws blanketing children's lives through eighteen years of age is the wisest method of preparing them for life is at least questionable. The rigidity of the structure has resulted in a substantial number of children who are uninterested in the courses they take, and disaffected from those who offer the education. The answers to these problems do not lie in the legal system. However, to the extent that answers are developed, they will have to ultimately be expressed in terms of law. Both judicial and legislative attention to the problems of the fifteen to eighteen-year-old group may be a significant activity in the next few years.

A starting point in drafting rules for the conduct of pupils, at least in the upper grades, might be to involve the pupils in the process of formulating the regulations, as some systems have done. This should be an educational undertaking. It ought to furnish a practical demonstration to the student that he not only has rights, but obligations. In the past, the legal theory has been that the board of education had authority over the rules, but in practice it was left to administrators. The assumption was that discipline was a one-way street. Even modern texts do not trouble to talk of pupil's rights; the only question seems to be how far school authority over pupils extends. Under these circumstances it is not surprising that there has been little discussion of a pupil's legal rights, and virtually no instruction in the subject. Taken simply as an educational topic, one is led to wonder how effective social studies courses can be when they ignore matters of present interest to pupils and discuss only civil rights in the future, or those rights enjoyed by other people.

It is understandable that pupils are not well informed of their rights, until twelve years of age. See Gloshinsky v. Bergen Milk Transp. Co., 279 N.Y. 54, 17 N.E.2d 766 (1938); Meyer v. Inguaggiato, 258 App. Div. 331, 16 N.Y.S.2d 672 (2d Dep't 1940).

307. See text accompanying note 240 supra.
308. U.S. Const. amend. XXVI.
and that they are not informed as to how they may go about enforcing them. It is equally understandable that those in authority are somewhat apprehensive about educating in this area; perhaps thereby encouraging pupils to assert their rights. The danger of such knowledge is not chimerical, but it ought, in a very practical sense, to be weighed against the danger of ignorance—the item that schools seek to overcome. The ignorant student today is not totally unaware that he has some type of rights. He may consult an attorney to rectify a grievance but more likely he will, if sufficiently disturbed, engage in disruptive or destructive activities, possibly in concert with others. Surely there is a better answer to student complaints than suggesting that only non-learning, force or repression are the appropriate responses of a school system. It is submitted that only by education in civil rights, including those affecting the pupil in the school environment, can the youth of today appreciate the concomitant responsibilities. Only by such education can the student be expected to respond in terms of the laws which govern us all. If one does not know the rules it can hardly be expected that he will operate within the system.

Hopefully a responsive system would provide not only a set of rules which represents the thinking of all affected, but the mechanism for modification. Equally important, the school must furnish some means which permits the aggrieved pupil to obtain someone's attention to discuss his problem. The school should go further and provide some quasi-judicial structure to process a claim where a pupil feels his rights have been denied. Without this the pupil is likely to feel—and probably with good cause—that the enforcement procedure is a sham designed chiefly to mollify rather than protect pupils. Without active participation of pupils in review of serious claims, it is doubtful whether the structure, however elaborate and well intended, can enlist student support. This is the objective. For unless the student can expect a fair shake, we cannot expect him to petition the school officials to redress a particular grievance. The sophisticated student will seek legal aid; the others may follow less social patterns. In either case, the school officials will no longer be dealing directly with the pupil. They will be expending time, money and energy in formalized disputes which might have been more advantageously attended to within the school.

Today there are few school systems that provide formal redress or grievance procedures for pupils. There have been some attempts to replace the archaic approaches to student government. There has been a recent experience of ad hoc committees with lists of “nonnegotiable demands” which seem now to be passing into history. Possibly these were indicative of a vacuum where new forms had not emerged, and the old had expired. Irrespective of structure, we may presume that all systems provide informal approaches of varying responsiveness. But the events of the last
few years indicate that the older modes are inadequate. The answer should not be either an armed camp, nor a "rush . . . to the . . . courts with constitutional banners waving high." Nor can we trust to luck, unless we wish to repeat the disruption and sporadic violence of the last few years. Providing redress for grievances is a part of the student's education, and hopefully it will provide a readily available forum to resolve disputes without a denial of basic rights.

Obviously, new modes of activity and behavior are emerging. Not all of the changes will be of a strictly legal or constitutional nature. Administrative and educational practices may alter significantly without directly touching the legal structure. Thus, some school systems now invite students to participate in the evaluation and hiring of staff members. The accommodation will continue whether it be by thoughtful guidance and mutual development, or by default of planning. It seems reasonable to expect that the best results will be achieved by those who devote time and study to outline the rules of conduct that are to guide them, and who then proceed to exchange their ideas in an effort to achieve a mutually acceptable set of ground rules. Presumably these rules will reflect the current state of the law, but it is to be hoped that the school community will not be content to rely solely on judicial statements.

Legal concepts are often rough rules of thumb designed in an indirect way to safeguard a right. The procedures employed may achieve their result in the technical court setting, but they do not necessarily translate easily or well to serve as modes of conduct in another setting. The judicial holdings and rules, of course, form the framework or point of reference by which we measure our regulations and by laws. But the most meaningful rules will be those developed in the school systems rather than those evolved from occasional judicial opinions which touch only briefly on small surfaces of the broad picture. The slow accretion of case law has the virtue of allowing theories to be tested by time, and of permitting adaptation of rules which otherwise might become obsolete. But the courts have only an indirect and tangential experience with the substantive matter. In the emotion-laden setting of trial by ordeal, the result may vary not only according to the court's point of view in general, but the point from which it views the particular problem. It is curious how different "academic freedom" or "civil rights" may be seen, depending on whether the dispute is between teacher and administration, pupil and teacher, or pupil and administration. It is not simply a question of "whose ox is gored." Rather it is an area in which there appears to be an unusual number of combinations of interest with surprising mutations;

310. And that is before we add others who may be involved, i.e., parents, board of education, non-school officialdom and non-parent citizens.
where the interested parties may unexpectedly find their old problems in a new context. The changes can produce disorientation which in itself evokes emotional responses that are often effective deterrents to reasoned solutions. If the judges are in such cases likely to be more dispassionate in assessing such situations after they have arisen, the inhabitants of the schools should be more competent in analyzing the problems based on the background, knowledge, experience, and, we trust, their perception. The school systems themselves should produce the most significant regulations to guide their own conduct.

The Supreme Court has, during the past decade, emphasized the "inestimable right of personal security." This right is accorded to students, among others. Obviously this right means that all students are to be protected, and that one cannot be allowed to endanger the others with violence or crime. The problem is similar for all congregations of human beings, where the actions of some, well-intended as well as improper, may interfere with the actions of others. To achieve the optimum of freedom always means an accommodation and an adjustment. The school setting adds the additional difficulties of younger years and compulsory presence. But the new note that has been sounded is that the reins have been drawn tighter on the school authorities, including administrators and teachers, boards of education and custodians. Undoubtedly there will be disadvantages to the learning process along with the benefits. There is usually a cost for constitutional rights.

Among the considerations for new directions should be the extent to which schools should proceed in physically maintaining discipline. Should teachers administer physical punishment? Few today maintain that they should. Less clear, however, is the teacher's role as a proctor or guard. If there is disobedience, is it better for the educational staff to handle such matters, or might it be preferable to divorce the duties? Is it possible or practicable to do so? How many teachers can administer physical discipline to youths of fourteen years or over? The answers to these questions require thought and discussion by the participants in the school systems, legislators, and the general public. The questions do not arise simply because the Supreme Court said public school children have constitutional rights. The "youth revolution" is a feature of today's society, as are urban problems, racial conflicts and a host of other difficulties, all of which affect the school system. What the judicial opinions of the past couple of years have made plain is that authoritarian rote answers are not legally sufficient. It seems clear that authoritarian rote measures would not be "answers" practically. The answers must come from the educational system.

311. Terry v. Ohio, 392 U.S. 1, 8-9 (1968).
312. Id. at 14-15.