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Judicial Review of School Discipline

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THE COURTS have had a good deal to say about the administration of public schools and tax-supported colleges and universities during the past two decades. There have been the line of decisions eliminating racial segregation and the cases prohibiting religious exercises in the public schools. There is now in the process of development a body of law dealing with the constitutional requirements with respect to the form of student conduct rules and the administration of student disciplinary proceedings for the tax-supported college and the public school, and the constitutional protection of various forms of student expression.

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It has become apparent in recent years that the judiciary has substituted a constitutional standard in the relationship between the administration and student in the tax-supported college and university for yesteryear's standards of "in loco parentis,"[1] "privilege,"[2] and "contract."[3] That is to say, the administrator's control and discipline of students can no longer be rationalized on the ground that the administrator stands in the place of the parent, or that attendance at a university is merely a privilege and not a right, or that the student by his enrolling at a university has bound himself contractually to the rules established and to be established by the administration. Instead, restrictions upon student expression and behavior must be justifiable in terms of institutional needs and purposes, and

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[1] *See* Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923); Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); North v. Board of Trustees, 137 Ill. 296, 27 N.E. 54 (1891); People *ex rel.* Pratt v. Wheaton College, 40 Ill. 186 (1866); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); State *ex rel.* Dresser v. School Dist. No. 1, 135 Wis. 619, 116 N.W. 232 (1908).

[2] *See* Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934); Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960).

[3] This theory seems to have been limited generally to the private school. Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); University of Miami v. Militana, 184 So. 2d 701 (Fla. Dist. Ct. App. 1966); Robinson v. University of Miami, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (1962); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923).

student disciplinary proceedings must be fundamentally fair, pursuant to the first and fourteenth amendments. It also appears that the constitutional standard is replacing "in loco parentis" at the public school level. Private educational institutions have not as yet been made subject to the constitutional standard; the contract theory appears to have remained applicable.[4]

Several courts have considered whether the "void for vagueness" principle should be applicable to student conduct rules by analogy to criminal statutes. In the area of disciplinary procedures, a number of courts have held that at least rudimentary principles of due process must be observed, although there is some disagreement on details. A number of cases have dealt with demonstrations, flag salute ceremonies, contents of student publications, distribution of literature, guest speakers, hair styles, and the wearing of armbands and buttons symbolizing social and political positions. This article will examine some of the significant recent decisions involving student conduct rules, disciplinary procedures, and expression, with special emphasis upon problem areas peculiar to the public secondary schools. An attempt will be made to evaluate the apparent trend toward increased judicial oversight of the administration of educational institutions.

The author has been motivated to write in this developing area of the law because of his unhappiness with the excesses of the contemporary phenomenon of litigious libertarianism. The campus

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[4] Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *rev'd without reaching constitutional question*, 412 F.2d 1128 (D.C. Cir. 1969); *see* Wilkinson & Rolapp, *The Private College and Student Discipline*, 56 A.B.A.J. 121 (1970). In a case involving racial discrimination in admissions, it was held that a private university is subject to the fourteenth amendment where the university received and leased property from the city. Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965). In Sturm v. Trustees of Boston Univ., Equity No. 89433 (Mass. Sup. Jud. Ct., Suffolk County, April 18, 1969), it was held that a private university must afford the student procedural due process on implied contract grounds. Private school discipline is still based upon the theory of a contract between the school and the student which generally affords the school considerable freedom of action, as demonstrated in the cases cited note 3 *supra*. It is arguable that the relationship of the private school administration to the student should be governed by the law dealing with the internal management of private organizations or by the theory that the administration is a fiduciary with respect to the students. *See* Byse, *The University and Due Process: A Somewhat Different View*, 54 AMERICAN ASS'N OF UNIV. PROFESSORS BULL. 143 (1968); Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930); Goldman, *The University and the Liberty of Its Students — A Fiduciary Theory*, 54 KY. L.J. 643 (1966); Seavey, *Dismissal of Students: Due Process*, 70 HARV. L. REV. 1406 (1957); Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175 (1960); Note, *Reasonable Rules, Reasonably Enforced — Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301 (1968).

and the schoolhouse have become the subject of litigation as never before. It is too early to tell whether this activity will have a major impact upon the character and quality of our schools. The potential for significant change, however, is apparent.[5]

I. Form of Student Conduct Rules — "Void for Vagueness" Principle Applicable?

The issue of the requirement of specificity in student conduct rules of a state college was recently considered by the Court of Appeals for the Eighth Circuit in *Esteban v. Central Missouri State College.*[6] The action was brought for declaratory and injunctive relief by two students who had been suspended by the defendant college. The district court dismissed the complaint and the court of appeals affirmed. At the time of the incidents which caused the suspension of the plaintiffs, one of them, Esteban, was on scholastic probation, and had been on disciplinary probation a short time before, and the other plaintiff, Roberds, was on disciplinary probation. The basis for Esteban's suspension was his refusal to leave the scene of a violent demonstration upon the request of a faculty

[5] The following are some of the articles which have been written on this developing area of the law: Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378 (1969); Aldrich & Sommers, *Freedom of Expression in Secondary Schools*, 19 CLEV. ST. L. REV. 165 (1970); Beaney, *Students, Higher Education, and the Law*, 45 DENVER L.J. 511 (1968); Cohen, *The Private-Public Legal Aspects of Institutions of Higher Education*, 45 DENVER L.J. 643 (1968); Denno, *Mary Beth Tinker Takes the Constitution to School*, 38 FORDHAM L. REV. 35 (1969); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969); Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73 (1966); Johnson, *The Constitutional Rights of College Students*, 42 TEX. L. REV. 344 (1964); McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558 (1968); Monypenny, *The Student as a Student*, 45 DENVER L.J. 649 (1968); Monypenny, *University Purpose, Discipline and Due Process*, 43 N.D.L. REV. 739 (1967); Perkins, *University and Due Process*, 62 AM. LIBRARY ASS'N BULL. 977 (1968); Plasco, *School Student Dress and Appearance Regulations*, 18 CLEV. ST. L. REV. 143 (1969); Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23 (1966); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368 (1963); Van Alstyne, *Student Academic Freedom and the Rulemaking Powers of Public Universities: Some Constitutional Considerations*, 2 L. IN TRANSITION Q. 1 (1965); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968); Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582 (1968); Wilson, *Campus Freedom and Order*, 45 DENVER L.J. 502 (1968); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); Comment, *Student Due Process in the Private University: The State Action Doctrine*, 20 SYRACUSE L. REV. 911 (1969); Comment, *Private Government on the Campus — Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963); *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Note, *Uncertainty in College Disciplinary Regulations*, 29 OHIO ST. L.J. 1023 (1968).

[6] 415 F.2d 1077 (8th Cir. 1969).

member, his refusal to identify himself at the request of the faculty member, and his use of vile and obscene language towards a resident assistant at the school who identified Esteban to the faculty member. The basis for Roberds' suspension was that he participated in the demonstration after having informed the Dean of Men that he intended to participate in it and having been advised by the Dean that such participation would result in suspension because of his existing disciplinary probation.

The pertinent school regulations in effect at the time were as follows:

> "The conduct of the individual student is an important indication of character and future usefulness in life. It is therefore important that each student maintain the highest standards of integrity, honesty and morality. All students are expected to conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College.
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> "All students that enroll at C.M.S.C. assume an obligation to abide by the rules and regulations of the college as well as all local, state and federal laws.
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> "When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE.
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> "Conduct unbefitting a student which reflects adversely upon himself or the institution will result in disciplinary action."
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> "Mass Gatherings—Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called 'spectators' get drawn into a fracas and by their very presence contribute to the dimensions of the problems. It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd."[7]

The plaintiffs challenged their suspension on the ground, among others, that the regulations were vague and overbroad and that consequently disciplinary action pursuant to them was violative of substantive due process. It was argued that words in the regulations such as "unruly" and "spectators" and "which might be considered" are undefined and standardless, and that the term "unlawful" is only a legal conclusion. The court responded by stating that a school must have latitude and discretion in its formulation of rules and regulations of standards of conduct, and that flexibility and reasonable breadth in college regulations relating to conduct are constitutionally permissible. The court stated that it was not sound

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[7] *Id.* at 1082.

to draw an analogy between student discipline and criminal procedure because their purposes are different; college regulations dealing with student conduct have to do with the fulfillment of the educational process and not punishment as in the case of criminal statutes. The court also stated that a school has inherent authority to maintain order and to discipline students, and summed up its position as follows:

> Let there be no misunderstanding as to our precise holding. We do not hold that any college regulation, however loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded . . . by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement.[8]

It may be inferred from *Esteban* that a state college may discipline a student for unacceptable conduct even in the absence of a rule. The court does not say this in so many words, but it probably is the meaning which attaches to the references to the inherent power of the college to discipline students and to the statement that the college may expect that students adhere to accepted standards of conduct. The court was not required, however, to deal directly with that issue.

In the recent case of *Soglin v. Kauffman*,[9] the Court of Appeals for the Seventh Circuit took a position very much opposed to the holding of the Eighth Circuit in *Esteban*. The plaintiffs were 10 students at the Madison campus of the University of Wisconsin who were members of the Students for a Democratic Society. The plaintiffs and others had protested the presence on the campus of recruiters for Dow Chemical Corporation, and allegedly had physically obstructed the doorways and corridors of a university building in connection with the protest. Certain of the plaintiffs were charged with behavior characterized as "misconduct" without refer-

[8] *Id.* at 1089-90.

[9] 418 F.2d 163 (7th Cir. 1969).

ence to any regulation, and with behavior violative of certain specified university regulations, and were suspended. The plaintiffs brought the action for themselves and others similarly situated for declaratory and injunctive relief with respect to disciplinary proceedings based upon "misconduct" without relation to any express regulations and upon violation of the regulations, on the ground that the "misconduct" standard and the regulations were violative of the first and fourteenth amendments because of vagueness and overbreadth. The district court held that "misconduct" without reference to any regulation, and the regulations as well, were unconstitutional for vagueness and overbreadth, and enjoined the enforcement of the regulations but denied injunctive relief with respect to the "misconduct" standard in order that the University of Wisconsin could have a reasonable time to restate its regulations to conform to that which was constitutionally permissible. The defendants did not appeal the holding with respect to the unconstitutionality of the regulations, and the plaintiffs did not appeal the denial of injunctive relief with respect to the "misconduct" standard. The appeal then had to do only with the declaratory judgment that disciplinary proceedings of the university instituted on the basis of "misconduct" were unconstitutional. The court of appeals affirmed the judgment of the district court, reasoning as follows:

> [D]efendants contend that the "misconduct" doctrine does not constitute a "standard" of conduct and that it was not employed as such. They argue that "misconduct" represents the inherent power of the University to discipline students and that this power may be exercised without the necessity of relying on a specific rule of conduct. This rationale would justify the *ad hoc* imposition of discipline without reference to any pre-existing standards of conduct so long as the objectionable behavior could be called misconduct at some later date. No one disputes the power of the University to protect itself by means of disciplinary action against disruptive students. Power to punish and the rules defining the exercise of that power are not, however, identical. . . . The proposition that government officers, including school administrators, must act in accord with rules in meting out discipline is so fundamental that its validity tends to be assumed by courts engaged in assessing the propriety of specific regulations. . . . These same considerations also dictate that the rules embodying standards of discipline be contained in properly promulgated regulations. . . .
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> . . . The use of "misconduct" as a standard in imposing the penalties threatened here must therefore fall for vagueness. The inadequacy of the rule is apparent on its face. It contains no clues which could assist a student, an administrator or a reviewing judge in determining whether conduct not transgressing statutes is sus-

ceptible to punishment by the University as "misconduct." . . .

It is not an adequate answer to contend, as do defendants, that the particular conduct which is the object of university discipline might have violated an applicable state or local law or otherwise merited punishment. The issue here is not the character of the student behavior but the validity of the administrative sanctions. Criminal laws carry their own definitions and penalties and are not enacted to enable a university to suspend or expel the wrongdoer absent a breach of a university's own rule. Nor is "misconduct" necessarily confined to disruptive actions covered by criminal codes. The ability to punish "misconduct" *per se* affords no safeguard against the imposition of disciplinary proceedings overreaching permissible limits and penalizing activities which are free from any taint of impropriety. . . .

Pursuant to appropriate rule or regulation, the University has the power to maintain order by suspension or expulsion of disruptive students. . . . We do not require university codes of conduct to satisfy the same rigorous standards as criminal statutes. We only hold that expulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of "misconduct" without reference to any pre-existing rule which supplies an adequate guide. The possibility of the sweeping application of the standard of "misconduct" to protected activities does not comport with the guarantees of the First and Fourteenth Amendments. The desired end must be more narrowly achieved.[10]

The court of appeals in the course of its opinion made express reference to its disagreement with the holding of the Eighth Circuit in *Esteban*. It should be stressed that the court clearly stated that the standard of specificity required for student disciplinary regulations need not be as rigorous as the standard of specificity applicable to criminal statutes. The court, however, did not attempt to define further this middle ground of specificity.

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[10] *Id.* at 167-68. In 1967, a *Joint Statement on Rights and Freedoms of Students* was prepared by a committee comprised of representatives of the American Association of University Professors, U.S. National Student Association, Association of American Colleges, National Association of Student Personnel Administrators, and National Association of Women Deans and Counselors, and subsequently endorsed by those organizations and several other educational organizations. With respect to specificity in conduct rules, the *Joint Statement* provides as follows:

> The institution has an obligation to clarify those standards of behavior which it considers essential to its educational mission and its community life. These general behavioral expectations and the resultant specific regulations should represent a reasonable regulation of student conduct, but the student should be as free as possible from imposed limitations that have no direct relevance to his education. Offenses should be as clearly defined as possible and interpreted in a manner consistent with the aforementioned principles of relevancy and reasonableness. Disciplinary proceedings should be instituted only for violations of standards of conduct formulated with significant student participation and published in advance through such means as a student handbook or a generally available body of institutional regulations. 54 AMERICAN ASS'N OF UNIV. PROFESSORS BULL. 261 (1968).

Soglin and a recent federal district court decision in Texas involving high school students[10a] are the only cases in which disciplinary action has been invalidated on the ground that the expression of the standard pursuant to which the action was taken was constitutionally defective. Several other courts have expressly declined to recognize any requirement of specificity in student conduct rules. Some have spoken of the "inherent power" to discipline, which is a recognition that disciplinary action may be taken even in the absence of an express rule.[11] It should be noted, however, that several courts have held that state university rules and state statutes governing the presence on campus of guest speakers were constitutionally defective for vagueness or as a prior restraint, but student discipline was not involved in those cases.[12]

II. Student Disciplinary Proceedings — Procedural Due Process

In 1961, the Court of Appeals for the Fifth Circuit held, in *Dixon v. Alabama State Board of Education*,[13] that the expulsion of a student from a tax-supported college — presumably for acts of civil disobedience and participation in demonstrations — without notice or opportunity for a hearing, was a denial of due process, and in the opinion procedural standards were set forth for the guidance of the parties in the event of further proceedings. These standards have been accepted by a number of other courts, but there has been no Supreme Court holding on this issue. The *Dixon* standards are as follows: (1) The student must be given a notice containing a statement of the charges and the grounds which, if proven, would justify the particular sanction involved; (2) the stu-

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[10a] Sullivan v. Houston Independent School Dist., Civil Action 69-H-266 (S.D. Tex. Nov. 17, 1969).

[11] Norton v. Discipline Comm., Civil No. 19107 (6th Cir. Nov. 28, 1969); Dunbar v. Ailes, 348 F.2d 51 (D.C. Cir. 1965); French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Jones v. Board of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3317 (U.S. Feb. 24, 1970); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

[12] Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969); Smith v. University of Tenn., 300 F. Supp. 777 (E.D. Tenn. 1969); Brooks v. Auburn Univ., 296 F. Supp. 188 (M.D. Ala. 1969); Snyder v. Board of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968); Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968); *see* Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

[13] 294 F.2d 150 (5th Cir. 1961).

dent must be given the names of the witnesses against him and either an oral or written report on the facts to which each witness testifies; (3) the student must be given the opportunity to present to the hearing body his own defense and to produce it either orally or in writing; and (4) the results and findings of the hearing body must be presented in a report open to the student's inspection. The court also stated:

> 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. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college.[14]

Dixon obviously does not answer all the questions concerning the character of the hearing which is constitutionally required in order to discipline a student at a tax-supported educational institution. There have been subsequent judicial decisions, some of them conflicting, which have developed and refined the principles laid down in *Dixon*. The opinion makes no reference to whether or not the student is constitutionally entitled to be represented by counsel at the hearing. The case law on this point is thin, and what there is of it is not uniform. There is authority that the student is entitled to have counsel at the hearing,[15] that the student is entitled to have counsel if the administration has counsel at the hearing,[16] that the student is not entitled to have counsel at the hearing,[17] and that there is no right to counsel at least where the

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[14] *Id.* at 158-59.

[15] Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967); *see* Zanders v. Board of Educ., 281 F. Supp. 747, 752 (W.D. La. 1968).

[16] French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969).

[17] Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963); *see* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967).

administration does not have counsel at the hearing.[18] It seems to make good sense for the student to be entitled to be represented by an attorney at his disciplinary hearing. This is not to suggest that rules of evidence should be observed or cross-examination allowed in the hearing. The attorney, however, would better enable the student to present his position in an orderly and convincing manner.

It is not clear from *Dixon* whether or not the student is entitled to have the hearing open to the public, but there is limited authority that he is not so entitled,[19] and the writer knows of no case in which it has been held that the student is so entitled. *Dixon* does not state what the standard is with respect to judicial review of the findings of fact of the hearing body; there is authority, however, that there must be "substantial evidence" to support the findings.[20] It has occurred that a member of the hearing body is also a testifying witness with respect to the events involving the student, but this has been held not to disqualify him as a "judge" or to invalidate the hearing if it is otherwise fair.[21] The issue has also arisen as to whether the student is privileged not to testify on the ground that his testimony might be incriminating, and there is slim authority that he is so privileged[22] and slim authority to the contrary.[23] It has also been held that the hearing body must consist of those who make the final disciplinary decision, or if not, that a transcript of the hearing be made available to those making the decision.[24]

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[18] Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

[19] Zanders v. Board of Educ., 281 F. Supp. 747 (W.D. La. 1968); Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968).

[20] Wong v. Hayakawa, Civil No. 50983 (N.D. Cal. April 24, 1969); Scoggin v. Lincoln Univ., 291 F. Supp. 161 (W.D. Mo. 1968); Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969); Jones v. Board of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3317 (U.S. Feb. 24, 1970).

[21] Zanders v. Board of Educ., 281 F. Supp. 747 (W.D. La. 1968); Jones v. Board of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3317 (U.S. Feb. 24, 1970). *But see* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

[22] Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (Sup. Ct. 1967); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942).

[23] Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 883, 57 Cal. Rptr. 463, 475 (1967). In the *Furutani* case, the plaintiff students argued that if they were compelled to testify at their disciplinary hearing because they would be expelled if they did not, they would be denied their fifth amendment rights, since their testimony could be used against them in a subsequent criminal proceeding. The court responded that such testimony could not be used in a criminal proceeding, relying upon Garrity v. New Jersey, 385 U.S. 493 (1967).

[24] Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967); Schiff v. Hannah, 282 F. Supp. 381 (W.D. Mich. 1966).

There is authority that a notice of charges which is not sufficiently specific invalidates a disciplinary proceeding.[25] One case has held that the student, but not his attorney, may cross-examine witnesses who testify against him;[26] otherwise there does not appear to be any authority in support of the right of cross-examination.

It should be stressed that these cases do not require that every time disciplinary action of some sort is contemplated there must be a hearing of the kind described. The kind of hearing described is appropriate where suspension or expulsion of the student is a possible sanction. If a lesser penalty is involved, such as social probation, a much more informal hearing process is probably appropriate, such as an office discussion with an administrative officer with respect to the events involved.[27] In fact, even where suspension or expulsion is involved, there is authority upholding extremely informal factfinding procedures where there was evident fairness.[28]

There may be emergency circumstances where it appears advisable to suspend a student temporarily before a hearing can be held. There is authority that this can be done if required by reason of the

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[25] Scott v. Board of Educ., 300 F. Supp. 163 (M.D. Ala. 1969); Scoggin v. Lincoln Univ., 291 F. Supp. 161 (W.D. Mo. 1968).

[26] Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967). The court in this case directed the college authorities to grant a hearing to the plaintiff students in accordance with the following procedures:

> (1) [A] written statement of the charges to be furnished each plaintiff at least 10 days prior to the date of the hearing; (2) the hearing shall be conducted before the President of the college; (3) plaintiffs shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearings; (4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them; (5) plaintiffs shall be afforded the right to present their version as to the charges and to make such showing by way of affidavits, exhibits, and witnesses as they desire; (6) plaintiffs shall be permitted to hear the evidence presented against them, and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them; (7) the President shall determine the facts of each case solely on the evidence presented at the hearing therein and shall state in writing his finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action; (8) either side may, at its own expense, make a record of the events at the hearing. *Id.* at 651-52.

With respect to (2) above, the court added the following footnote:

> The parties acknowledge that only the President has the authority to expel or suspend a student from the college, and it is therefore necessary that all evidence be before him in some appropriate manner, as by transcript of an authorized hearing or before him directly as ordered in this particular case. *Id.* at 651 n.1.

[27] *See* French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969); Soglin v. Kauffman, 295 F. Supp. 978, 991 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

[28] Wright v. Texas S. Univ., 392 F.2d 728 (5th Cir. 1968); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

physical or emotional safety of the student, or the safety or well-being of other students, faculty, other university personnel, or university property; a preliminary hearing must be held, however, if possible in the emergency situation prior to the suspension, or as soon as possible after the suspension and prior to the hearing in which the ultimate determination is made.[29] There is also authority that a student may be suspended pending a hearing even in the absence of an emergency situation.[30] Most of the cases on procedural due process involve college discipline, but there is authority that notice of the charge and a hearing are constitutionally required also at the precollege public school level.[31]

It appears that judicial review of disciplinary action is limited to the adequacy of the procedure, possibly the formulation of the rule involved, the substantiality of the evidence to support the hearing body's findings of fact, and the substantive constitutionality of the restriction upon the student conduct as discussed in the subsequent sections of this article. Apparently the student is not entitled to litigate de novo before the trial court the determination of the facts with respect to his conduct which drew the sanction.[32]

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[29] Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416 (W.D. Wis. 1969); Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968).

[30] Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

[31] Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969); Sullivan v. Houston Independent School Dist., Civil Action 69-H-266 (S.D. Tex. Nov. 17, 1969).

[32] The dissenting judge in Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), took the position that the district court must make its own findings of fact with respect to the conduct of the student. This seems to be out of line with the other cases which give the disciplinary hearing at the school a type of administrative status.

The *Joint Statement on Rights and Freedoms of Students*, *supra* note 10, recommends the following hearing procedures:

> When the misconduct may result in serious penalties and if the student questions the fairness of disciplinary action taken against him, he should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements of procedural due process in situations requiring a high degree of formality.
>
> 1. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.
>
> 2. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularly [*sic*], and in sufficient time, to insure opportunity to prepare for the hearing.
>
> 3. The student appearing before the hearing committee should have the right to be assisted in his defense by an advisor of his choice.

Mention should be made of the question of judicial review of academic decisions as distinguished from disciplinary decisions by school authorities. It has been held that courts will not review the soundness of academic decisions, except that arbitrary, capricious, or prejudiced decisions on grading are subject to review.[33] The rationale for judicial abstention is that academic authorities are experts on these matters and the courts are not.

III. STUDENT EXPRESSION

A. *Speech and Demonstrations*

A leading case on the subject of student expression at the tax-supported college is *Dickey v. Alabama State Board of Education*.[34] The plaintiff student was editor of the student paper at Troy State College which was part of the Alabama state college system. The president of the University of Alabama, Dr. Rose, had been criticized by state legislators for not having censored a student publication at that university which had published writings by individuals representing various political viewpoints, such as Stokely Carmichael, Dean Rusk, General Earl G. Wheeler, and

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4. The burden of proof should rest upon the officials bringing the charge.

5. The student should be given an opportunity to testify and to present evidence and witnesses. He should have an opportunity to hear and question adverse witnesses. In no case should the committee consider statements against him unless he has been advised of their content and of the names of those who made them, and unless he has been given an opportunity to rebut unfavorable inferences which might otherwise be drawn.

6. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.

7. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.

8. The decision of the hearing committee should be final, subject only to the student's right of appeal to the president or ultimately to the governing board of the institution. 54 AMERICAN ASS'N OF UNIV. PROFESSORS BULL. 261 (1968).

[33] Connelly v. University of Vt., 244 F. Supp. 156 (D. Vt. 1965); Mustell v. Rose, 282 Ala. 358, 211 So. 2d 489 (1968); *see* University of Miami v. Militana, 184 So. 2d 701 (Fla. Dist. Ct. App. 1966).

In *Mustell*, it was held that a state university was not required to afford the plaintiff student a hearing at the school. The facts were litigated in the trial court. It is not clear why a hearing should be required and be given a type of administrative status with respect to disciplinary action, and not be required with respect to academic decisions.

It seems the biased grading should be judicially reviewable where a private institution is involved on contractual grounds. *See* University of Miami v. Militana, *supra*.

[34] 273 F. Supp. 613 (M.D. Ala. 1967).

Bettina Aptheker (a radical student of Berkeley fame). The plaintiff prepared a literate and restrained editorial for his paper supporting the action of the president of the University of Alabama and criticizing the state legislature. The faculty advisor for the paper and the president of Troy State refused to allow him to publish it, pursuant to their policy of not allowing criticism of the Governor and the legislature in the school paper. So the plaintiff published the title of the editorial, "A Lament for Dr. Rose," and under it the space was blank except for the word "Censored" diagonally placed across the blank space. In addition, the plaintiff mailed the editorial to a newspaper in Montgomery. Plaintiff was deemed to have been guilty of "willful and deliberate insubordination" and was suspended. Plaintiff brought the action for an order that he be reinstated. The court held for the plaintiff.

It was admitted by the president of Troy State that the policy of prohibiting criticism of the Governor or state legislators had nothing to do with the maintenance of order or discipline on the campus, but simply was a matter of not biting the hand that feeds. The court rationalized its holding as follows:

> A state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state-supported institution. State school officials cannot infringe on their students' right of free and unrestricted expression as guaranteed by the Constitution of the United States where the exercise of such right does not "materially and substantially interfere with requirements of appropriate discipline in the operation of the school." . . . The attempt to characterize Dickey's conduct, and the basis for their action in expelling him, as "insubordination" requiring rather severe disciplinary action, does not disguise the basic fact that Dickey was expelled from Troy State College for exercising his constitutionally guaranteed right of academic and/or political expression.[35]

Hammond v. South Carolina State College[36] is a leading case on the subject of demonstrations on the tax-supported campus. The college authorities had made the rule that students were not "to celebrate, parade, or demonstrate on the campus at any time without the approval of the Office of the President."[37] The plaintiffs were among 300 students who gathered together on the campus to express their feelings regarding some of the college's practices. Plaintiffs were suspended because of their participation. The plaintiffs

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[35] *Id.* at 618.

[36] 272 F. Supp. 947 (D.S.C. 1967).

[37] *Id.* at 948.

claimed that the demonstration was orderly and peaceful, whereas the school authorities claimed that the demonstration was noisy and disorderly. The court decided that the suspension of the plaintiffs was unlawful.

The court stated that it did not consider it necessary to make a finding as to whether the demonstration was orderly or disorderly because it concluded that the rule under which the plaintiffs were suspended was an unconstitutional prior restraint on the right to freedom of speech and the right to assemble. The court pointed out that the rule did not purport to prohibit assemblies which have qualities that are unacceptable under responsible standards of conduct, but rather prohibited parades and demonstrations unless prior adminstration approval was obtained without any regard to limiting its proscription to assemblies involving misconduct or disruption or violence. The defendants argued that they had the right to control the use of college property which, although state property, is dedicated to the special purpose of scholarship and learning. The court stated that this argument likened the campus to a hospital or jail entrance as in *Adderley v. Florida*.[38] The court, however, viewed the case of *Edwards v. South Carolina*,[39] which recognized that assembling at the site of government for peaceful expression of grievances was an exercise of first amendment rights, as more nearly in point.[40]

The Court of Appeals for the Sixth Circuit recently dealt with the issue of student speech on the campus in its upholding of the suspension of state college students for distributing what was characterized by the school authorities as "material of a false, seditious and inflammatory nature."[41] The school authorities considered that the material was calculated to cause a disturbance and disruption of school activities and to bring about ridicule of and contempt for

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[38] 385 U.S. 39 (1966).

[39] 372 U.S. 229 (1965).

[40] For a contrary view, see Evers v. Birdsong, 287 F. Supp. 900 (S.D. Miss. 1968).

[41] Norton v. Discipline Comm., Civil No. 19107 (6th Cir. Nov. 28, 1969). There has recently been a similar holding by the Seventh Circuit Court of Appeals in Scoville v. Board of Educ., 415 F.2d 860 (7th Cir. 1969), upholding the suspension of plaintiff high school students who had distributed literature on the school grounds which urged disregard of school procedures and condemned school officials. The literature had been prepared off school premises and at student expense. *See also* Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969); Graham v. Houston Independent School Dist., Civil Action 69-H-1019 (S.D. Tex. Jan. 21, 1970). *But see* Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Sullivan v. Houston Independent School Dist., Civil Action 69-H-266 (S.D. Tex. Nov. 17, 1969).

the school authorities. The material in question provided in part as follows:

> And how has the ETSU [East Tennessee State University] student body reacted: Have they precipitated a revolution like French students? No. Have they brought about an entirely new and liberal administration like Polish students? — No. Have they been the forerunners of a new democratic spirit like Czech students? — No. Have they seized buildings and raised havoc until they got what they were entitled to like other American students? — No. What then have the ETSU students done? They have sat upon their rears and let the administration crap upon their heads, that's what.
>
> . . . .
>
> Maybe students will get some sense and learn that this should cease and that the only way to see that it does is to stand up and fight. Maybe students will learn that the Supreme Court has declared that young people do not sacrifice their citizenship and all rights and privileges therewith by enrolling in a university. Maybe students will learn that no matter what the despots who run this school say, students have the constitutional right to protest, demonstrate, and demand their rights; that women students may not constitutionally be campussed; that students may damned well wear what they want and say what they please. And maybe, just maybe, they will discover that there are student leaders, organizers to rally around so as to assault the bastions of administrative tyranny.[42]

The plaintiff students contended that the suspension was violative of their first amendment rights since their action was speech unaccompanied by acts of violence, relying principally on *Tinker v. Des Moines Independent Community School District*,[43] wherein the Supreme Court held that public school students' wearing of armbands in protest of the Vietnam war was a form of constitutionally protected expression akin to pure speech. The court responded by stating that it would be difficult to maintain discipline on the campus if conduct of the nature involved were tolerated, and that the college authorities are not required to delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The administration of the college had the right to nip such action in the bud.

Judge Celebrezze dissented on the ground that the pamphleteering in question was protected first amendment activity.

In *Powe v. Miles*,[44] the Court of Appeals for the Second Circuit dealt with the permissible limits of the campus demonstration. The court upheld the suspension of the plaintiff students at the tax-

[42] Norton v. Discipline Comm., Civil No. 19107, at 11-12 (6th Cir. Nov. 28, 1969).

[43] 393 U.S. 503 (1969). For a further discussion of this case, see text accompanying notes 49-51 *infra*.

[44] 407 F.2d 73 (2d Cir. 1968).

supported Ceramics College of Alfred University in New York State for demonstrating at an ROTC review on the football field on Parents Day. The plaintiffs and others, carrying signs advocating scholarships for blacks, advocating the teaching of black history, protesting the Vietnam war, and advocating the end to compulsory ROTC, placed themselves between the reviewing stand and the grandstand from which the spectators viewed the ceremonies. The demonstrating students constituted an obstacle to the vision of those in the reviewing stand and those in the lower tiers of the grandstand. Their position also interfered with the movement of those involved in the ceremonies. The court stated that the fact that the demonstration was much less violent than other unhappy incidents on other campuses did not mean that it had not passed the limits that the university was required to tolerate. The court pointed out that the ROTC cadets and the parents also had rights.

In *Jones v. Tennessee State Board of Education*,[45] the Court of Appeals for the Sixth Circuit upheld the expulsion of plaintiff college students for various forms of conduct which were considered disruptive or damaging to the university. The conduct consisted in part of handing out leaflets urging the boycott of fall registration; leading a group of students that invaded and disrupted a student-faculty grievance committee meeting and saying to the president of the university who was present, "Man, we didn't come here to listen to your lies and empty promises. We came here to eliminate you and tear this joint down"; walking around the library in bare feet and wearing white overalls covered with pictures; making a speech in which members of the administration were referred to as "Uncle Tom" and the president of the university was referred to as "Super Tom"; and being arrested by city police off campus for being found in bed with a young woman. The court held that the action of the students was not constitutionally protected under the first amendment.

Recently the District Court for the Eastern District of New York sanctioned conduct which amounts to a daily demonstration in the public school classroom. In *Frain v. Baron*,[46] the court held that a public school student was entitled to remain seated in the classroom during the daily ceremony of the pledge of allegiance to the flag so long as the conduct was not disruptive, as an exercise of the

[45] 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3317 (U.S. Feb. 24, 1970).

[46] 38 U.S.L.W. 2347 (E.D.N.Y. Dec. 10, 1969).

student's first amendment rights. The school authorities recognized that participation in the ceremony could not be mandatory under *West Virginia State Board of Education v. Barnette*,[47] but required that the student either stand during the ceremony or leave the classroom. This decision is different from *Barnette*, in which the issue was whether the student could be required to participate in the ceremony as a condition of remaining in school.

It has also been held that a student is constitutionally entitled to remain seated during the singing of the National Anthem in school.[48] It should be noted that in *Frain* the objection to the flag salute was not on religious grounds but on the ground that "with liberty and justice for all" is not true in America. The students in *Barnette* and the "National Anthem" case were Jehovah's Witnesses who objected to participation on religious grounds.

B. *Armbands and Buttons in the Public Schools*

In 1969, in *Tinker v. Des Moines Independent Community School District*,[49] the Supreme Court ruled with respect to student expression. The plaintiffs were two high school students and a junior high school student. They and other students agreed that they would wear black armbands during the holiday season beginning December 16, to publicize their objections to the Vietnam war. The principals of the Des Moines schools became aware of this plan, and on December 14 adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned to school without the armband. The plaintiffs were aware of the regulation adopted by the school principals. The plaintiffs wore armbands to school as planned and were sent home and suspended from school until such time as they returned without wearing the armbands. The plaintiffs did not return to school until after the planned period for wearing armbands had expired, that is, after New Year's Day. The regulation of the school authorities did not prohibit the wearing of other symbols of political expression, such as political campaign buttons; the regulation dealt specifically and exclusively with the black armband in protest of the Vietnam war. Only a handful of students wore black armbands in the Des Moines school system pursuant to the plan, and a total of five were suspended for wear-

[47] 319 U.S. 24 (1943).

[48] Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

[49] 393 U.S. 503 (1969).

ing the armband. The majority opinion stated that there was no evidence that the work of the school was interrupted in connection with the wearing of the armbands, nor were there any threats or acts of violence in the schools in connection therewith. There clearly was, however, concern among the school authorities that the wearing of armbands might provoke some disorder.

The action was for an injunction restraining the defendant school officials from disciplining the plaintiffs, and for nominal damages. The district court dismissed the complaint after an evidentiary hearing, on the ground that the school authorities' action was reasonable in order to prevent disturbance of school discipline. The district court's decision was affirmed by an equally divided court of appeals. The Supreme Court reversed and remanded. The Court's reasoning can best be presented by excerpts from the majority opinion of Mr. Justice Fortas:

> The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. . . .
>
> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . .
>
> . . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . .
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> . . . .
>
> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .
>
> . . . Certainly where there is no finding and no showing that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. . . .
>
> In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evi-

> dence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. . . .
>
> On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.[50]

In a brief dissenting opinion, Mr. Justice Harlan set forth a constitutional rule for cases of this kind as follows:

> . . . I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.
>
> Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.[51]

There was also a dissenting opinion by Mr. Justice Black in which he took exception to the Court's substitution of its judgment on the disruption of school routine for that of the school authorities. Mr. Justice Black made it clear that he favors a "hands off" policy by the courts on matters of public school discipline, but the author is not able to extract from his dissent a constitutional principle to effect such a policy.

Recently the District Court for the Northern District of Texas upheld the public school authorities' ban on the wearing of black armbands in connection with the October 15, 1969 Vietnam moratorium.[52] The court distinguished *Tinker* on the ground that in this situation the school authorities had good reason to anticipate that the wearing of armbands would substantially interfere with school work. Group demonstrations occurred outside one school on October 15, at which some students were restrained from entering into direct conflict with the demonstrators. There was a bomb threat at another school which the authorities believed to be related to the moratorium activities. The situation was such that the Superintendent of Schools and other administrators formed teams to go to various high schools to observe and offer assistance if anything developed.

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[50] *Id.* at 505-10 (footnote omitted).

[51] *Id.* at 526.

[52] Butts v. Dallas Independent School Dist., 38 U.S.L.W. 2333 (N.D. Tex. Dec. 5, 1969).

Prior to *Tinker*, the Court of Appeals for the Fifth Circuit, in *Burnside v. Byars*,[53] had made a holding which anticipated *Tinker*. The principal of an all black high school in Mississippi had announced that students were not to wear a button containing the words "One Man One Vote" around the perimeter, with "SNCC" in the center, on the ground that the wearing of the buttons would be disturbing to the educational program. Some students were suspended for failing to comply with the regulation. An action was brought to enjoin the enforcement of the regulation. The district court dismissed the action, but the court of appeals reversed on the ground that there was no commotion caused by the wearing of the buttons, and consequently the prohibition was violative of the plaintiffs' first amendment right of freedom of speech.

On the same day that *Burnside* was decided by the Court of Appeals for the Fifth Circuit, that court held, in *Blackwell v. Issaquena County Board of Education*,[54] that the regulation prohibiting the wearing of freedom buttons by high school students in an all black high school in Mississippi was under the circumstances constitutional. The buttons depicted a black hand and a white hand joining together with "SNCC" inscribed in the margin. The issue arose when 30 students wore the buttons to school. The principal told them that the buttons were not to be worn in the school. The next day 150 students came to school wearing the buttons, and some of them distributed buttons to other students and pinned them on students who did not request a button. This activity caused some commotion and disrupted certain classes. The principal warned the students again that the wearing of the buttons was forbidden. The following day 200 students wore the buttons to school. After further warning, a number of students were sent home and suspended. Injunctive relief was sought to readmit the students and to allow students to wear the buttons. Relief was denied by the district court, and the court of appeals affirmed. The court of appeals distinguished *Burnside* on the ground that the disorder in the school in this case justified the action taken by the school principal and consequently the prohibition was constitutional.

In the recent case of *Guzick v. Drebus*,[55] the District Court for the Northern District of Ohio upheld the constitutionality of a school board policy prohibiting the wearing of buttons and other

[53] 363 F.2d 744 (5th Cir. 1966).

[54] 363 F.2d 749 (5th Cir. 1966).

[55] 305 F. Supp. 472 (N.D. Ohio 1969).

insignia by students. The facts of this case are significantly different from those of all the other cases in this area of litigation. The plaintiff wore a button to high school on which was inscribed the message "April 5 — Chicago — G.I. Civilian Anti-War Demonstration — Student Mobilization Committee." The principal demanded that he remove the button. The plaintiff refused, and the principal suspended the plaintiff until such time as he returned to school without wearing the button. The plaintiff brought an action to enjoin the school authorities from interfering with his right to wear the button while attending school and from refusing to reinstate him, and to obtain a declaratory judgment that any rule or regulation of the East Cleveland Board of Education prohibiting the wearing of such buttons was unconstitutional. After an evidentiary hearing, the district court held for the defendants.

Until recent years, East Cleveland had been a predominantly white community. At the time of the litigation, the high school was 70 percent black and 30 percent white. There had recently been considerable tension between the races in the high school, and also among students of the same race, but no major disruption or racial disturbance had occurred. Neighboring high schools with high percentages of black students had had serious disturbances. The school authorities had had a policy for 40 years of prohibiting the wearing of buttons, emblems, and insignia by students. In the past the students wished to wear fraternity and club insignia. In recent years the students had attempted to wear buttons and insignia expressing social or political positions. Some of the buttons which students had attempted to wear carried messages such as "KKK," "White is Right," "Say it Loud, Black and Proud," "Black Power," "Happy Easter, Dr. King." There had been considerable controversy among students over some of the buttons, and it had resulted in some fighting between students.

The court distinguished this case from *Tinker* on the grounds that the prohibition upon the wearing of buttons and other insignia was necessary to prevent disruption in the high school, and that the policy had been enforced for many years against all buttons and insignia. The court conceded that the particular button in question might not in itself be inflammatory at the high school, but concluded that any break in the policy of absolute prohibition of all buttons would likely cause disruption because any discrimination among buttons would be misunderstood and resented. In *Tinker*, there was no general policy against the wearing of buttons, em-

blems, and insignia, and in fact political buttons had been allowed to be worn.

C. *Hair Styles in the Public Schools*

Recently there have been a number of cases dealing with the question of the constitutionality of the suspension of public school students for failure to comply with school hair style regulations. The cases reflect a variety of conclusions with respect to the constitutional principles applicable to student hair styles. A leading case is *Ferrell v. Dallas Independent School District*,[56] in which the Court of Appeals for the Fifth Circuit upheld the suspension of several high school students for hair style regulation violations. The plaintiffs brought an action for injunctive relief following the refusal of the school authorities to enroll the plaintiffs at the beginning of the high school year because of their Beatle-type haircuts. The district court denied relief to the plaintiffs, and the court of appeals affirmed.

The plaintiff high school students were members of a musical combo which wore the Beatle hair style, and it was contended that this style was a necessary element in their entertainment field. The plaintiffs were aware of the regulation barring the style prior to their attempted enrollment in the school. The denial of enrollment to the plaintiffs by the principal of the high school was supported by the Superintendent of Schools and by the Board of Education. The high school also had rules and policies with respect to other aspects of attire and appearance: Girls had been required to remove excessive makeup, to wear dresses and not tight fitting pants, and to wear shoes, and had been sent home to change their dress because of body exposure.

The principal's reason for banning the Beatle haircut was that it caused commotion and disturbance in the school. There was testimony that boys with long hair in the past had been subject to considerable harassment. Obscene language had been directed to them, and they had been challenged to fights by other boys. In one instance a group of boys spoke of trimming another boy's hair themselves.

The court of appeals reasoned that assuming hair style is a constitutionally protected mode of expression, nevertheless the actions of the school authorities were not violative of the plaintiffs' four-

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[56] 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

teenth amendment rights because the regulation of hair style was reasonable under the circumstaces in order to maintain an effective and efficient school system. It should be stressed that the court did not concede that hair style for students would be constitutionally protected in the absence of disruption. The court stated that if it was protected, it would be under the first amendment through the due process clause of the fourteenth amendment.

The court recognized that the plaintiffs' right to play in a combo was constitutionally protected, but stated that it was not convinced that their business activity would be eliminated if they were required to cut their hair to enroll in school. The court also noted that at this stage in the plaintiffs' lives their education may be more important than their commercial activities.

In a dissenting opinion, Judge Tuttle stated that although the issue appeared to be "something of a tempest in a teapot," nevertheless the actions of the school authorities should not be upheld because the potential for disturbance which supposedly justified the regulation came not from the plaintiffs but from others, and that the rights of an individual should not be restricted because of the violent reactions of others who resent the individual's exercise of his rights. Judge Tuttle stated that it was the disruptive acts of others which should be prohibited, not the hair styles of the plaintiffs. He also stated that even though hair style may not be constitutionally protected under the first amendment, nevertheless it constituted an unreasonable classification of students by the state in granting or denying the right of public education, and was therefore violative of the equal protection clause of the fourteenth amendment.

The Supreme Court denied certiorari in *Ferrell*, but in *Tinker*, citing *Ferrell*, it noted a distinction between the types of expression involved in the two cases: "The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. . . . It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.' "[57]

The Court of Appeals for the Seventh Circuit has arrived at a conclusion opposed to *Ferrell*,[58] employing a different constitutional rationale from the "expression" and equal protection principles sug-

[57] 393 U.S. at 507-08.

[58] Breen v. Kahl, Civil Nos. 17552, 17553 (7th Cir. Dec. 3, 1969).

gested in *Ferrell.* The plaintiff students had been expelled from high school because the length of their hair violated a regulation of the school board which was as follows: "Hair should be washed, combed, and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out."[59] The action was brought for a declaration that the regulation was unconstitutional and for an injunction against its continued enforcement. The district court held for the plaintiffs, and the court of appeals affirmed. The court of appeals analogized the constitutional protection afforded tastes in hair styles to the constitutional protection afforded married couples to use contraceptives as held in *Griswold v. Connecticut.*[60] The court stated that if a state would limit such a fundamental right, it has a "substantial burden of justification." The court explained what it meant by "substantial burden of justification" by quoting from the Supreme Court opinion in a case dealing with draft card burning, *United States v. O'Brien*:[61]

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[62]

The justification offered by the school authorities for the regulation was that the appearance of long-haired male students distracted other students, that students whose appearance conforms to community standards perform better in school, and that the disciplinary powers of the school authorities would be diminished if the regulation was not upheld and the expulsions vindicated. With respect to the distraction and inferior performance arguments, the court responded that the evidence fell far short of showing that the distraction and the inferior performance were so aggravated as to warrant this invasion of individual freedom. With respect to the school discipline argument, the court stated that basic constitutional values prevail over "some nebulous concept of school discipline" in our system of government.[63]

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[59] *Id.* at 2.

[60] 381 U.S. 479 (1965).

[61] 391 U.S. 367 (1968).

[62] *Id.* at 377, *cited* in Breen v. Kahl, Civil Nos. 17552, 17553, at 3.

[63] Civil Nos. 17552, 17553, at 5. It is interesting to note that the court gave some recognition to the doctrine of "in loco parentis":

In another recent case, the District Court for the Middle District of Alabama came to the same conclusion as the Court of Appeals for the Seventh Circuit, but on different reasoning.[64] The plaintiff high school student had been suspended for violation of the school regulation on boys' hair styles which provided that there could be no sideburns longer than the middle of the ear, the hair in front could be no longer than 1 inch above the eyebrows, and the hairline in back must be shingled or tapered, as opposed to being blocked, and must be well above the collar. The justification given by the school authorities for the regulation was as follows:

> [B]oys haircuts that do not conform to the regulation cause the boys to comb their hair in classes and to pass combs, both of which are distracting; cause the boys to be late for classes because they linger in the restrooms combing their hair; cause the boys to congregate at a mirror provided for girls to use while combing their hair; in some instances, cause an unpleasant odor, as hair of a length in excess of that provided by the regulation often results in the hair being unclean; cause some of the boys who do not conform to the haircut regulation to be reluctant about engaging in physical educational activities (presumably because they do not want to "muss" their hair); and, finally, cause resentment on the part of other students who do not like haircuts that do not conform to the school's haircut regulation.[65]

The court stated that the reasons given in justification for the regulation were inadequate. The authorities could remedy the problems described by means other than requiring that the hair be shorn. As for the concern about the reactions of other students, the court stated that a constitutional right should not be curtailed because of an undifferentiated fear that others might take steps to interfere with the exercise of the constitutional right.

The court offered the following constitutional rationale for its invalidation of the regulation:

> [T]he application of this haircut rule . . . constitutes an arbitrary and unreasonable classification; for that reason, the invocation of

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In addition, the doctrine invoked by the School Board of "in loco parentis" does not bolster its discipline argument. Although schools need to stand in place of a parent, in regard to certain matters during the school hours, the power must be shared with the parents, especially over intimately personal matters such as dress and grooming. Since the students' parents agree with their children that their hair can be worn long and because it would be impossible to comply with the long hair regulation during school hours and follow the wishes of the students and their parents as to hair length outside of school, in the absence of any showing of disruption, the doctrine of "in loco parentis" has no applicability. *Id.* at 6.

[64] Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969).

[65] *Id.* at 61.

> the rule as a basis for suspending the plaintiff as a student from this public school clearly violates the equal protection clause of the Fourteenth Amendment . . . . [C]ompliance with this haircut rule imposes an utterly unreasonable condition to the plaintiff's continuing as a student in the Alabama public educational system. The interest of the State of Alabama in maintaining an effective and orderly school system and school operation will not justify the imposition of the rule. Furthermore, this Court finds and concludes that the imposition of the rule to this plaintiff to the point of suspension infringes upon fundamental substantive liberties protected by the due process clause of the Fourteenth Amendment . . . . Although there is disagreement over the proper analytical framework [citing *Griswold v. Connecticut*, 381 U.S. 479 (1965), in a footnote], there can be little doubt that the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance. . . .
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> This Court does not find it necessary to reach or decide plaintiff's First Amendment contention: that plaintiff's hair length and style is a form of expression protected by the First Amendment . . . .[66]

In the recent case of *Crews v. Cloncs*,[67] the District Court for the Southern District of Indiana refused to enjoin school authorities from denying admission to the plaintiff male high school student on account of his hair style. The plaintiff's hair was parted in the middle and extended over the ears and the collar, and reached to the shoulder, which style was in conflict with an announced standard of the school authorities. The school board, after a hearing before it, approved the action of the high school principal denying admission to the plaintiff. The court held that the notice to the student with respect to the rule on hair styles and the hearing before the school board complied with procedural due process requirements of the fourteenth amendment.[68] The court found that the plaintiff's ap-

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[66] *Id.* at 62. Other cases invalidating public school regulations on hair style on constitutional grounds are Slomovitz v. Miller, Civil No. 69-898 (N.D. Ohio Nov. 18, 1969); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969); Olff v. East Side Union High School Dist., 305 F. Supp. 557 (N.D. Cal. 1969); and Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969). In Calbillo v. San Jacinto Junior College, 305 F. Supp. 857 (S.D. Tex. 1969), and Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1969), junior college regulations on hair style were held to be unconstitutional. In Braxton v. Board of Pub. Instruction, 303 F. Supp. 958 (M.D. Fla. 1969), the court invalidated the school board's failure to reappoint a black teacher who refused to remove his goatee. With respect to regulations on the wearing of beards by public school teachers, see Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969), and Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967).

[67] 303 F. Supp. 1370 (S.D. Ind. 1969).

[68] It should be noted that there is a conspicuous absence of discussion of procedural due process factors in most of the other cases dealing with haircuts, political buttons, and armbands.

pearance caused disturbances and disruption of the educational process in the academic classroom and during physical education classes. The court held that although plaintiff's hair style "may have been protected under the First Amendment, still the defendants have not unconstitutionally infringed his substantive due process rights for the reason that plaintiff's conduct directly and materially interfered with a vital interest of the state."[69]

The plaintiff also maintained that his fourteenth amendment equal protection rights were violated by the action of the defendants. In response, the court held that the rule on hair style was not an arbitrary and unreasonable classification because it was directly related to a vital state interest, the maintenance of order in the school. In addition, it was argued that the rule was violative of the plaintiff's right to privacy, or of personality or individuality, within penumbras of particular provisions of the Bill of Rights, in accordance with *Griswold*. The court responded that while the right of husband and wife to use contraceptives is such a constitutional right, as held in *Griswold*, the choice of grooming in the public schools is not. The court noted that "[a] real and substantial constitutional difference exists between the two courses of conduct—to ignore it would be myoptic [*sic*]."[70]

In a recent case in which the suspension of public school students for violation of a rule regulating hair styles was upheld,[71] the District Court for the Southern District of Georgia offered a different rationale for its conclusion which contrasts sharply with those employed by other courts:

> [R]ules cannot be made by authorities for the sake of making them but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. By accepting an education at public expense pupils at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves. Those who run public schools should be the judges in such matters, not the courts. The quicker judges get out of the business of running schools the better. I have no intention of becoming a tonsorial or sartorial consultant of boards, superintendents and principals. Except in extreme cases the judgment of school officials should be final in applying a regulation to an individual case.[72]

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[69] 303 F. Supp. at 1376.

[70] *Id.* at 1377.

[71] Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97 (1969).

[72] *Id.* at 101. Also, it is interesting to note the distinctive argument made by the

The similarity of this reasoning and Justice Harlan's dissent in *Tinker* should be noted.[73]

The question of the constitutional protection of student hair styles obviously will not be settled until the Supreme Court chooses to speak to it. At the moment, it is apparent from the decisions that there is substantial disagreement as to its appropriate constitutional category if it is to be protected. The principles of equal protection, first amendment expression, and *Griswold* have all been proposed.

IV. Comments on the Constitutional Standard

The discussion in this section is concerned with the form of student conduct rules and the public school regulations dealing with political symbols and hair styles.

The application of the "void for vagueness" principle to student conduct rules has been clearly accepted in only two cases, and plainly rejected in several others. It has been advocated, however, by prominent academic commentators.[74] This position would require that all tax-supported universities and public schools promulgate a reasonably detailed code of prohibited student conduct and sanctions, and disciplinary action could be taken only pursuant to the provisions of such code. The writer believes this position is unsound.

Student discipline which has been the subject of litigation has involved student action which may be classified as follows: (1) Action which is criminal or wilfully tortious; (2) action which constitutionally may not be restricted; and (3) action which is not criminal or wilfully tortious but which constitutionally may be

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students in the Georgia case, all of whom were black. It was contended that because enslavement of their ancestors dehumanized them and emasculated their manhood, mustaches and facial hair are symbols for them and other black youths of their masculinity.

[73] The Supreme Judicial Court of Massachusetts has also held that a public school regulation dealing with hair length was valid because it had a reasonable connection with the successful operation of the public school. Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965). Other cases upholding public school hair regulations are Brick v. Board of Educ., 305 F. Supp. 1316 (D. Col. 1969), and Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967), *aff'd per curiam*, 408 F.2d 1085 (5th Cir. 1969). *Cf.* Schwartz v. Galveston Independent School Dist., Civil Action 69-G-185 (S.D. Tex. Feb. 2, 1970), in which suit was dismissed for failure to exhaust state remedies.

[74] *See* Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582 (1968); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

restricted. Obviously action which constitutionally may not be restricted need not concern us in this discussion.

It does not seem necessary or advisable for there to be any code for action which is criminal or wilfully tortious under the law of the jurisdiction. Certainly the student is on notice that he may be fined or incarcerated or enjoined or liable for damages on account of his conduct. If he is on notice for those purposes, then it is a very limited extension to consider that he is on notice for disciplinary purposes. It is inconceivable that the student who socks a fellow student or a professor, or who breaks up a history class by raucous conduct, or who blocks the exit or entrance of a CIA recruiter, or who occupies the dean's office, or who breaks into administrative files, or who holds a placard at a ceremony so that the vision of others is obscured, is not aware that he runs the risk that the institution may discipline him, whether or not there is some regulation covering his conduct. This is true with respect to off-campus conduct which is wilfully tortious or criminal as well as on-campus conduct, although as a matter of policy the institution may not choose to punish certain forms of off-campus misconduct.

It may be appropriate for the institution to have a rule that any act which is punishable as criminal or which is wilfully tortious may subject the student to disciplinary action. Some institutions have a rule prohibiting action which is a violation of law. But it seems that even in the absence of such a rule, the student should be subject to discipline for such action. If notice is the key, then notice of the disciplinary potential in fact exists even in the absence of any rule. It may be argued that there is a substantial gray area where it is unclear whether or not there has been a violation of law. That is, of course, true, but it is also true with respect to the criminal sanction or civil liability. It is obviously impossible to draft a statute which anticipates every situation in detail. And if a code of prohibited conduct were adopted by the school, the same gray area problem would exist. There is this inevitable imperfection in the notice idea.

With respect to action which is not criminal or wilfully tortious, but which may be constitutionally restricted, it may be appropriate to require express rules with some specificity. Certain forms of peaceful picketing or demonstrations may be constitutionally proscribable by the university, and reasonably detailed rules would be appropriate with respect to them. Also, certain forms of verbal abuse of teachers or administrators may not be tortious or criminal

but may be constitutionally prohibited. Cheating on exams may not be tortious or criminal, although a good case could be made for its tortious character. It would not seem that a rule is necessary with respect to cheating, but in the other areas there may not be notice in fact of the potential for discipline unless there is a rule covering the matter.

The courts which have refused to apply the "void for vagueness" principle to student conduct rules have not, in my view, developed an adequate rationale for their position. The "inherent power to discipline" approach seems to avoid the problem rather than answer it. A person is entitled to notice of the kind of conduct which may result in discipline, but it does not follow that the only way notice may be given is by a comprehensive school code of prohibited conduct.

Another troublesome recent development are the holdings that certain high school regulations restricting hair styles and prohibiting the wearing of armbands and buttons symbolizing political and social positions are unconstitutional. The courts in these instances have overruled, with respect to relatively minor matters, the decisions of those experienced in the field of public school administration who have been entrusted by the local community with the responsibility for making them. Certainly not all judicial action in this area has been of the same nature. The prohibition upon racial discrimination in the schools,[75] the prohibition upon the imposition of a religious exercise upon a captive audience of young students,[76] the right of a student not to salute the flag,[77] the right to teach evolution[78] or foreign languages[79] in the schools involve major moral, religious, and intellectual considerations, which distinguish them from the wearing of an armband or a button or hair down to the shoulders.

The Supreme Court has said that the wearing of an armband in protest of the Vietnam war by public school students is constitutionally protected unless it is disruptive or distracting, and several other courts have said substantially the same about the choice of hair styles by male students in the public high schools. The courts review the school authorities' determination of whether or not the

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[75] Brown v. Board of Educ., 347 U.S. 483 (1954).

[76] School Dist. v. Schempp, 374 U.S. 203 (1963).

[77] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[78] Epperson v. Arkansas, 393 U.S. 97 (1968).

[79] Meyer v. Nebraska, 262 U.S. 390 (1923).

student conduct is disruptive or distracting. The courts have given less constitutional protection in these matters than in the other matters described in the immediately preceding paragraph where the constitutional injunctions are absolute. Obviously the court which does not wish to interfere with the school administration's determination on armbands or hair styles has the out of finding that there was sufficient evidence of disruption or distraction, or the potential therefor, to justify the restriction. But the courts are free to substitute their judgment of what is disruptive or distracting in the schoolhouse for the judgment of those who are trained and experienced in school administration and who deal with problems of school discipline and control on a daily basis.

It is not suggested that we return to a full-scale in loco parentis doctrine in which the public school authorities need not justify their restrictions on student conduct as a parent need not justify the restrictive rules in the home. What is suggested is that the courts allow experts in other fields such as public school administration considerable elbow room in their work even if it results in some mistakes, particularly where the student interest involved does not seem to be one of great importance. Mistakes by public school authorities are more easily corrected than mistakes made by courts on constitutional matters. In the area of regulation of student conduct in the elementary and secondary schools, I would suggest that the only basis for constitutional invalidity should be that the regulation bears no relation to the maintenance of order in the school or concentration in the classroom. In effect, this would make valid all student conduct regulation in the public schools except that which was imposed without any regard to institutional or educational needs, presumably due to some peculiar bias of the school authorities or the community. This is very close to the position enunciated by Mr. Justice Harlan in his dissent in *Tinker* and the United States District Court for the Southern District of Georgia in a hair style regulation case discussed above.[80]

I would add one qualification to this principle. Student conduct involving reasoned expression should be subject to a different standard. The contents of student publications and classroom discussion should be protected as pure speech is elsewhere protected, allowing for the special circumstances of time, place, the age of the

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[80] The same view has been expressed by the Supreme Judicial Court of Massachusetts. Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965). *See* note 73 *supra.*

students, and the purpose of the public school and the classroom. Intellectual discourse is of much greater importance and value than the use of faddish symbols and styles, and should be accorded a greater degree of protection against the restrictions of the school authorities.

If I were a member of the school board in my community, I would be inclined to oppose any restriction upon hair style even at the risk of some distraction or disruption. I think I would take the same view with respect to black armbands worn in protest to the Vietnam war, although I do not believe this to be as significant a private interest as the choice of hair styles. I believe, in any event, that matters of this nature are better handled by local authorities who are knowledgeable in school administration and in the peculiar problems which may exist in the schools for which they are responsible. In the last analysis, the law must be judged by how well the society functions which is subject to it. It stands to reason that the school authorities know more about maintaining order in the corridors and concentration in the classroom than judges do. The courts should veto their actions only where they are clearly arbitrary or where they transgress upon a socially vital interest, such as genuine intellectual discourse.

Judge Godbold has spoken wisely about the public school situation in his concurring opinion in *Ferrell*:

> The American community groups together in its schools hundreds, even thousands, of energetic, volatile and sometimes aggressive young people in close contact with one another and in confined areas, during a substantial part of each school day for three fourths of each year and twelve years of their lives.
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> The bare process of teaching them in the traditional sense demands the best that the profession can offer. But in addition we call upon the schools to give our children driver training, vocational skills, public speaking, music instruction, and sex education, and to maintain their physical fitness, to carry on everbroadening athletic programs, engage in fund raising, and plan, produce and chaperone social events. Whether it should or should not do so, the American community calls upon its schools to, in substance, stand *in loco parentis* to its children for many hours of each school week.
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> Citizens expect and demand that their children be physically safe in the schools to whose supervision they are consigned, and the citizenry is outraged if the schools are less than safe and orderly. At the same time we expect that the requirements of order, and of protection and implementation of the educational program of the school, will be met by limited enforcement means—the force of the school establishment itself and the school-related disciplines of reprimand, suspension, and expulsion—recognizing that the school-

> room is an inappropriate place for the policeman to be either called or needed.
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> A school may not stifle dissent because the subject matter is out of favor. Free expression is itself a vital part of the educational process. But in measuring the appropriateness and reasonableness of school regulations against the constitutional protections of the First and Fourteenth Amendments the courts must give full credence to the role and purposes of the schools and of the tools with which it is expected that they deal with their problems, and careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner.[81]

The armband and haircut decisions also bring to mind one other consideration. It is suggested that judicial declarations of unconstitutionality with respect to relatively minor matters where there are close questions of judgment involved, may do some damage to the position of the judiciary in our governmental system. Judicial invalidation on constitutional grounds is a remarkable power, and it is only as secure as its social acceptance. Frequent use of this power with respect to marginal matters is not likely to add prestige to the judicial branch.

Mr. Justice Frankfurter articulates the case for judicial restraint in his dissent in *West Virginia State Board of Education v. Barnette*, in which the majority invalidated a state statute requiring public school students to salute the flag:

> The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.
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> . . . A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. . . .
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> Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make consti-

[81] Ferrell v. Dallas Independent School Dist., 392 F.2d 697, 704-05 (5th Cir.) (Godbold, J., specially concurring), *cert. denied*, 393 U.S. 856 (1968).

> tutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.[82]

[82] 319 U.S. 624, 650-52, 670-71 (1943).

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