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CONSTITUTIONAL RIGHTS AND THE PUBLIC HIGH SCHOOL STUDENT

by

Johnny Earl Presson

A Dissertation Submitted to
the Faculty of the Graduate School at
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Thomas Joseph McCook

Dissertation Adviser

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Dissertation Adviser Thomas Joseph McCook

Oral Examination Committee Members

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PRESSON, JOHNNY EARL. Constitutional Rights and the Public High School Student. (1974) Directed by: Dr. Thomas Joseph McCook. pp. 257.

The purpose of this study is to examine on a case by case basis decisions in the federal courts which define the constitutional rights of public high school students. The following issues are considered: (1) freedom of speech and expression, (2) freedom of the press and student publications, (3) assembly and association, (4) search and seizure, (5) dress and grooming.

These emerging student rights are protected by the First, Fourth and Fourteenth Amendments to the United States Constitution. The constitutional rights of students have increasingly come under scrutiny by federal courts since 1967.

The data for this study are based primarily on research of federal court cases involving the constitutional rights of secondary students. Pertinent state cases are used to supplement the data in the absence of federal cases on a particular issue. Additional data have been collected from a review of the literature.

Analysis and review of federal court cases and the literature indicate an emerging interactive pattern between student life style and efforts to secure constitutional rights. This interactive pattern is having great impact on the total school program. This interaction is bringing about changes

in the curriculum school organization and approaches to discipline in secondary schools. One finds greater student involvement with high schools adopting codes of student rights and responsibilities, student disciplinary hearing boards and revitalizing student council. These changes are also bringing about examination of other school practices.

The status of the constitutional rights of secondary student, based on cases in this study, is given as a summary. Conclusions are given in the form of guidelines for school administrators. These guidelines should help administrators to maintain discipline and avoid litigation in the federal courts.

ACKNOWLEDGMENTS

The writer wishes to express his appreciation to Dr. T. Joseph McCook, Visiting Professor, School of Education, for the helpful criticism and encouragement rendered during the process of the study. Other persons of assistance were Dr. Joseph E. Bryson, Associate Professor, School of Education, Dr. Arthur L. Svenson, Burlington Industries Professor of Economics and Business Administration, School of Business and Economics, and Dr. Bert A. Goldman, Professor, School of Education, and Dean of Academic Advising.

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INTRODUCTION

INTRODUCTION

Student life style, changes in society and decisions of the federal courts have had great impact on public schools since 1967. The period since 1967 has been one of dissent and protest in America with a large portion spawned and nurtured in the confines of secondary schools. In such an atmosphere one finds an increasing number of students supported by their parents challenging the authority of school officials in the courts.

The legal rights of students vary to a considerable degree from state to state. Most state constitutions establish the basic principles governing students at school. State constitutions have been supplemented by statutes of the state legislature, rulings of state departments of education and policies of local school boards. Recently, the federal courts have interpreted the Constitution of the United States as applying to students in schools in the same manner as it applies to adult citizens.

This application actually began with the In re Gault[1] decision by the United States Supreme Court in 1967. This case held that juveniles have the same rights in criminal

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[1] In re Gault, 387 U.S. 1 (1967).

procedures as adults. The landmark case on the constitutional rights of students in the secondary school remains Tinker v. Des Moines Independent School District.[2] This 1969 decision by the United States Supreme Court held that students could exercise their constitutional rights in school as well as out of school.

This was an abrupt change by the courts for most in the past have given deference to administrative judgment. Prior to Gault and Tinker the courts usually resolved the issue by the doctrine of in loco parentis.

The in loco parentis doctrine held that schools and teachers could exercise total control over students because they acted as parent-substitutes and out of concern for students' welfare. In loco parentis in schools has not been eliminated by the federal courts but has been narrowed in its application to students. Tinker made it clear that in loco parentis must yield to the broader concept of the constitutional rights of the individual whatever his age.

Though granting constitutional rights to high school students the courts have also stated that it is the duty of the school administrator to maintain order in the school.

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[2]Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

Therefore, school officials may impose reasonable rules and regulations but the closer the rule comes to infringing upon basic constitutional rights, the more justification administrators must have for the rule.

Students have been aided in their efforts to secure their constitutional rights by local chapters of the American Civil Liberties Union. The American Civil Liberties Union believes that students are entitled to freedom of expression, of assembly, of petition, and of conscience, and to due process and equal treatment under the law.

The dissertation will look at both the life style and constitutional rights of students. The issues included in the paper are (1) freedom of speech and expression. (2) freedom of the press and student publications, (3) assembly and association, (4) search and seizure and (5) dress and grooming.

PURPOSE OF THE STUDY

The purpose of this study is to examine on a case by case basis decisions in the federal courts which define constitutional rights of students in public high schools. Issues included in the study are (1) freedom of speech and expression, (2) freedom of the press and student publications, (3) assembly and association, (4) search and seizure, and (5) dress and grooming. These issues are covered by the First, Fourth and Fourteenth Amendments to the United States Constitution.

The study also looks at conditions in society which have influenced students and attempts to show an emerging interactive pattern between student life style and efforts to secure their constitutional rights. This interactive pattern is represented not only by the students' constitutional rights issue but from changes taking place in secondary schools as a result of the student revolution. A better understanding of this interaction should enable school officials to maintain discipline without infringing on the individual rights of students.

Finally, after analysis and review of cases in the federal courts, the study summarizes the status of the constitutional rights of students in secondary schools. Guidelines have also been formulated that hopefully will assist school administrators in avoiding litigation.

METHOD OF PROCEDURE

The data for each chapter have been gathered from a variety of material including books, periodicals, pamphlets, professional journals and court cases. In Chapter I a review of the literature is used to look at society in the 1960's to give background information and an overview of student life style.

The research for Chapters II through VI is guided mainly by judicial reference to federal court cases. These include cases before the United States Supreme Court, the United States Circuit Courts of Appeals and the Federal District Courts. The federal court decisions are supplemented by selected state cases in the chapters on assembly and association and search and seizure.

The historical development of each constitutional right is given at the beginning of each chapter. This is necessary since the Bill of Rights prior to the adoption of the Fourteenth Amendment applied only to action of the federal government. The application of the Bill of Rights to state action did not become automatic with the adoption of the Fourteenth Amendment. This did not happen until 1925 in Gitlow v. New York[1] when the United States Supreme Court declared:

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[1] Gitlow v. New York, 268 U.S. 652 (1925).

> For present purposes we may and do assume that freedom of speech and of the press - which are protected by the First Amendment from abridgment by Congress - are among the fundamental personal rights and "liberties" protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states.[2]

This began the Nationalization of the Bill of Rights even though the state statute was upheld in Gitlow.

Each chapter attempts to develop the issue on a chronological basis as courts define and expand the particular student right. This is not always possible when the decision of a federal court is appealed to the federal circuit court of appeals.

Chapter VII combines an analysis of court cases involving student constitutional rights with a review of the literature on student life style to show an emerging interactive pattern. Because of the scope of this pattern chapter VII touches only on the major points of interaction in public secondary schools.

A summary of the constitutional rights of secondary students based on the research in the study is given in Chapter VIII. The guidelines for administrators are also based on decisions of court cases included in the study.

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[2] Ibid.

LIMITATIONS OF THE STUDY

This study is limited to an examination of the constitutional rights of students in public secondary schools under the First, Fourth and Fourteenth Amendments to the United States Constitution. It is further limited in that religion and race issues under the First and Fourteenth Amendment have not been included in the study. Religion has not been an issue in the students' rights movement in the 1960's and race cases while related to the students' rights issue would constitute a separate study.

Key cases have been selected when the number of cases on a particular issue prohibited the inclusion of all federal cases. In the absence of federal cases involving high school students reference has been made to allied or related cases in educational institutions of higher learning or to pertinent state cases applicable to the constitutional issue. This is especially true in chapters four and five.

The study is confined to the period from 1967 to the present - the period generally recognized as the beginning of the secondary school revolution. Some cases are included in the study prior to that date for background purposes. The In re Gault decision by the United States Supreme Court was in 1967 and the Tinker case went into the federal district court the same year finally reaching the Supreme Court in 1969.

Finally, the study is limited by the judgment and interpretation of all the material cited. Based primarily on research of a legal nature the paper has been written for school officials who deal with high school students on a day-to-day basis.

DEFINITION OF TERMS

Action: To bring legal action against another for the protection of a right or the redress of a wrong.

Amicus curiae: (Latin for "friend of the court") not a party to the party directly involved.

Appellant: The party who takes an appeal from one court to another.

Appellee: The party against whom an appeal is taken.

Concurring opinion: An opinion written by a judge who agrees with the majority of the court as to the decision in a case, but has different reasons for arriving at that decision.

Court: Where the word Court is capitalized, it denotes the United States Supreme Court.

Defendant: The party against whom relief or recovery is sought in a court action.

Dissenting opinion: The opinion in which a judge announces his dissent from the conclusions held by the majority of the court.

Due process: The exercise of the powers of government in such a way as to protect individual rights.

En banc: ("as a whole") All federal judges in one circuit sitting as a court.

Enjoin: To order a defendant in equity to do or not to do a particular thing by writ of injunction.

Expulsion: Prerogative of the superintendent or school board and is usually permanent.

Injunction: A judicial order requiring a party to take or refrain from some specified action.

In loco parentis: (Latin for "in place of the parent") Being charged with some of the rights, duties and responsibilities of the parent.

In re: (Latin for "concerning").

Litigation: The act or process of carrying on a lawsuit.

Penumbra: Marginal or unclear.

Plaintiff: He who, in a personal action, seeks a remedy for an injury to his rights.

Precedent: A judicial decision, or a form of proceeding, or course of action, that serves as a rule for future determinations in a similar or analogous cases; an authority to be followed in courts of justice.

Quasi: As, as of, as it were, relating to or having the character of.

Remand: To send it back to the same court out of which it came, for the purpose of having some action on it there.

Rights: Commonly used in a quasi - legal or moral sense to identify "something to which one has a just claim."

School disruption: Any event which significantly interrupts the education of students.

Suspension: An act of a professional member of the school staff usually for a short period until pupil conforms to the rule or regulation.

Writ of certiorari: (Latin for "to be informed of something") An order from a higher court to a lower court requesting that the entire record of a case be sent up for review by the higher court.

PLAN OF THE STUDY

The constitutional rights of students in the public high school cannot be examined without looking at the relationship of their life style to the issue. In like manner, one cannot look at the issue outside the context of the public schools.

Chapter I presents an overview of conditions in society which influenced student life style in the late 1960's and early 1970's. Among the major influences identified are (1) the Civil Rights movement in the 1960's, (2) the Vietnam War, (3) use of drugs, and (4) Hippie subculture. Other influences also contributed in varying degrees to the life style of students in a particular area.

Chapter II is concerned with pupil expression in the secondary schools as a constitutional issue. Pupil expression denotes (1) the right to speak and express an opinion, and (2) the right to "symbolic expression" which covers the wearing of such items as buttons, badges and armbands. The first is protected by the First Amendment to the United States Constitution and decisions in the federal courts have given First Amendment protection to certain forms of "symbolic expression" with some limitations. It is the latter which has become a major issue in the public schools and will be of primary concern in this chapter.

In Chapter III the student's right of publication and distribution of literature on school premises is reviewed. Students have brought suits in the federal courts on the grounds that such activity is protected under freedom of the press in the First Amendment. The issue also involves the question of obscenity and censorship.

Chapter IV looks at the issue of the student's right of assembly and association as a constitutionally protected right under the First Amendment. Federal cases involving higher education and some state cases are included due to the limited number of federal cases at the secondary school level. The right of association has not been challenged by high school students in the federal courts but state courts have ruled on secret fraternities and sororities in high schools.

Chapter V is concerned with the issue of search and seizure in the public schools. The Fourth Amendment protects against unreasonable search and the chapter will look at both the search of the student and his locker. The growing problem of illegal drugs in the school has contributed to the need for clarification of the application of this constitutional right in the public schools. To date there have been only a few cases in the federal courts so selected state cases are included to give insight into future trends on this issue.

In Chapter VI the question of whether the dress and grooming of a high school student is a constitutionally protected right is considered. Because of the growing number of cases on the issue of dress and grooming only those in the federal circuit court of appeals and selected cases from the federal district courts are included in this chapter. Challenges have been made on this issue under several amendments to the Constitution but the majority of the federal courts felt the issue properly came under the Fourteenth Amendment Due Process Clause. The chapter considers due process only as a substantive right not as a procedural right.

Chapter VII attempts to analyze the emerging interactive pattern between student life style and student efforts to secure their constitutional rights. This analysis attempts not only to establish interaction between the life style and constitutional rights of students but also to examine the impact of both on the school program. Special emphasis is given to the changes in the public high schools brought about by the student movement.

Chapter VIII gives a summary of the constitutional rights of students in secondary schools today as defined by the federal courts. Conclusions reached are given in the form of recommended guidelines for school administrators, on the constitutional rights of students.

CHAPTER I

STUDENT LIFE IN THE 70'S

The life style and constitutional rights of public high school students represent an attempt on the part of the students to become active participants in determining their own future. Students want more control over their own lives and are saying they want to be contributors to the educational process, not just recipients.

Students contend that the best way to learn about the democratic system is not out of a book but by participation. They call for student freedom, involvement and responsibility as necessary prerequisites for adult participation in society.

This desire for participation by students is often repressed by an autocratic administrator who perceives it as a genuine threat to his authority. Thus the stage is set for either student demonstrations or litigation in the courts to obtain constitutional rights.

While there has always been a generation gap, the one today reflects a real and serious conflict between the "establishment" and the youth of this nation. This generation gap and changes in life style, constitutional rights and values of the secondary students will be considered in the context of this paper. It presents an emerging pattern

which touches all aspects of the school program.

Chapter one will look at student life as a background to the issue of the constitutional rights of students in public secondary schools. This will put the issue in perspective before a review of the cases adjudicated in the federal courts.

The country experienced an unstable period marked by sit-ins, boycotts, marches, walk-outs, demonstrations, bombings and riots in the 1960's. Youth played a major role in this revolution as they protested against war, racism, poverty, poor teaching, irrelevant programs, unilateral decisions by teachers and principals and school rules and regulations.

One finds many conditions and causes contributing to the dissent and unrest of students in the 1960's. The civil rights movement and the Vietnam War can be listed as major causes, but other related and non-related factors also contributed to the upheaval during the decade.

The early 1960's saw the drive for individual rights and freedoms led by civil rights activists determined to gain equality for minority groups in the United States, particularly black Americans.

The student activist movement is usually dated from the beginning of the Free Speech Movement in 1964, at the University of California at Berkeley which thrust organized

student protest into the national limelights.[1]

One college administrator marks the beginning of the student protest movement as February 1, 1960, when four freshmen from North Carolina Agricultural and Technical College did not receive service at the lunch counter in Woolworth's. The incident occurred in Greensboro, North Carolina, and the black youths remained seated, reading their textbooks until the facility closed.

The next day twenty-five of their fellow students joined the protest. By the end of the week more than one hundred students became involved in sit-ins at segregated facilities throughout Greensboro. The protest spread quickly to nearby Durham and by spring, one found protest groups conducting sit-ins in every southern and border state,with more than 70,000 persons involved.

The majority of sit-ins remained non-violent and many sympathetic whites joined the blacks. These whites later turned their protest to other issues and problems of society.[2]

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[1]Dale Gaddy, Rights and Freedoms of Public School Students: Directions From the 1960's (Topeka, Kansas: National Organization of Legal Problems in Education, 1971), p. 8.

[2]Henry King Stanford, "The Tides of Change," Ten Year Report From the President of the University of Miami, 1962-1972 (Coral Gables: University of Miami, 1972), pp. 3-4.

Today's youth is acknowledged as the best-informed generation in the history of the world. Aware of the events and circumstances surrounding the disturbances at the Berkeley's and Columbia's of higher education, pre-college youths have undoubtedly been influenced by college activists. This influence has either been indirectly through the news media or directly through personal contact. This is evidenced by the formation of chapters of Students for a Democratic Society at the high school level.[3]

In examining student life in the 1970's, one uses the term "student unrest" to describe the period. "Student unrest" is defined as:

> A discontented attitude on the part of students toward school and its objectives, expressed in a manner that threatens the codes of conduct, written or implied, and disrupts the orderly process of education.[4]

A survey by the National Association of Secondary School Principals in March of 1969, reported that fifty-nine percent of the high schools and fifty-six percent of the junior highs experienced some form of "protest." The survey involved one thousand schools.[5]

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[3]Dale Gaddy, op. cit., p. 9.

[4]Student Unrest, California Association of Secondary School Administrators, 1967, p. 51.

[5]Editors of Education, U.S.A., The Shape of Education for 1969-70 (Washington, D.C.: National School Public Relations Association, 1969), p. 5.

A May, 1969, issue of LIFE magazine carried results of two thousand five hundred interviews across the United States among students, parents, teachers and principals conducted by Louis Harris. The interviews covered one hundred schools in big cities, suburbs, small towns and rural areas. Students expressed concerns for more student participation in policy making, making rules, deciding curriculum and discussion concerning the use of drugs, sex, hygiene and Black students' rights. Harris concluded that:

> the key to what is going on among high school students today is that a majority clearly want to participate more in deciding their future. They are willing to be taught, but they will not abide by rules which put them down. They are aware of the need for authority, but not impressed by it for its own sake.[6]

Who are the student protestors? At least four different alienated student groups have been identified. They are: (a) the Hippies, (b) the New Left Activists, (c) the Advocates of Black Power, and (d) the Third World Liberation Front.

The Hippies for the most part are largely apolitical. They are heavily involved with drugs, mysticism and communal living. Hippies do not want power, but flee from it.

The Hippie Movement demonstrates the enormous appeal of withdrawal. However, the Hippie founders were not fourteen

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[6] Life, "What People Think About Their High Schools," 66 (May 16, 1969), p. 24.

year-old runaways, but very serious young people longing for the promises of America. The Hippies have enjoyed immense popularity evidenced by the dress and grooming of the young. The jeans, love-beads and long hair are not accidental fashion trends, but youth's way of recognizing and giving approval to the Hippie Movement.

The New Left Activists are deeply committed to political action. They want change and some desire revolution to bring about this change. Their plan is to reshape society by assaulting school authorities and gaining power.

The Black Power groups concentrate mostly on specific issues of race, such as the rights of black students, black studies in the curriculum and hiring of black teachers.

The Third World Liberation Front has not had the impact, as yet, on high schools as have the other groups. It is the most radical of the four groups.[7]

While these four groups represent nationwide activist organizations or movements, the majority of student protestors are simply those who feel most alienated by the high school environment.

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[7]Richard L. Hart and J. Galen Saylor, Student Unrest: Threat or Promise (Washington : Association for Supervision and Curriculum Development, NEA, 1970), p. 36.

In the middle-class and upper-middle-class schools, students direct their protests against: authoritarian regulations leading to conformity of dress and hair styles, being considered as IBM numbers, lack of involvement and curriculum that fails to deal with adolescent concerns and controversial issues.

In the less privileged schools, one finds a concentration of Negroes and other minority groups along with poor whites. The Negroes, for the most part, follow the concerns of the Black Power groups. Their strongest protest is usually over the lack of a black studies program, the need for more black teachers, or over such items as cheerleader selection. In the Southwest and West, the Mexican-American students protest their lack of recognition and involvement. In these schools, both whites and minority groups protest:

> the impersonal big city atmosphere which demands smooth functioning of the bureaucracy and conformity of the mass above toleration of individual differences in dress, morals, and personal grooming.[8]

The contemporary student has acquired a certain level of sophistication through technological development. This worldliness expands the youngster's scope on one hand; but on the other, it accelerates anxiety. Faced with this kind of

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[8]Samuel S. Brodbelt, "The Problem of Growing Dissent in the High Schools," The High School Journal, LIII (March, 1970), p. 364.

world, the student may make one of three alternate choices: (1) to withdraw or drop out and join the Hippie Movement, (2) to challenge the system and fight the establishment or (3) to simply ride along with the institutional tide. The majority of young people make the third choice for it is the safest and most accepted. Both dropouts and rebels invite censure.[9]

The challengers of the schools not only represent an outspoken minority, but the feelings of many less vocal students. The so-called "student movement" is not unified, for it is concerned with both in school matters, such as the right peacefully to assemble; and matters outside of school, such as the war in Vietnam.

What are the issues that have brought about student unrest in the public? School rules are pointed out as causes of protest in eighty-two percent of the schools reporting to the National Association of Secondary School Principals. Approximately one-third of these noted that unrest erupted over dress requirements and one-fourth of the schools experienced confrontations over hair styles.

Other issues cited are smoking rules and cafeterias. Also at issue are assembly programs, censorship and regulation

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[9]Richard L. Hart and J. Galen Saylor, op. cit., pp. 50-51.

of school papers, underground newspapers, open v. closed campus and cheerleader elections.[10]

High school students increasingly look upon school regulations as arbitrary and petty. This is especially true in regard to the wearing of beards, moustaches or sideburns and at what length a skirt may be worn above the knees. Other regulations, such as requiring socks to be worn and not allowing shirttails out are thought of as totally unrelated to an education by many students.

The irony of many school regulations is apparent when one realizes that a school senior has to ask for a toilet pass and at age eighteen is permitted to vote. A junior needs permission to go to the school library yet most youths can legally drive an automobile at age sixteen.[11]

Security personnel have been employed in many schools. One of the duties of the security personnel may be to check hall passes. This has a negative effect on students just as a curfew on a community in times of crisis. Security personnel may be needed to patrol the halls, restrooms, parking lots and other places where student traffic exists and where trouble is

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[10]National School Public Relations Association, High School Student Unrest (Washington : National School Public Relations Association, 1969), pp. 1-3.

[11]Samuel S. Brodbelt, op. cit., p. 365.

likely to break out. However, the security force should be seen and not heard.

Today's high school students are the product of an environment which renders the classroom gray by comparison. The barrage and impact of the world has exhausted the student's capacity for drama. The student of today is distracted only by the outlandish and the preposterous.[12]

The youngsters of today comprise the first generation weaned by the mass media. The effects of watching the world in the living room are now becoming manifest. These students fed by the mass media and urged by parents and teachers to inquire, have become sensitive to the larger world. Students have also come to realize the limited role they play in the world in which they live.

One report suggests that student activism can be attributed, to some extent, to the alienation of the student subculture way of life. Because the student is not currently occupied with adult concerns related to earning an income, raising a family and pursuing a career, a young person must express his judgment of our democratic system from a limited perspective and with mixed emotions. It would be helpful if this student concern could be channeled into a cooperative

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[12]Richard L. Hart and J. Galen Saylor, op. cit., p. 7.

approach toward solving problems related to student activism.

An editor saw the cause of student protest and confrontations at the secondary and higher education level as being two fold:

> (1) The individual student is seeking some sort of identification because all schools have become impersonal and,
>
> (2) The majority of parents have become too permissive and have not given their children a sense of direction.[13]

While there has always been a generation gap, the current one is more serious because youth under the age of twenty-five constitute a majority and are potentially better educated and better informed than those who are in positions of power and leadership.

In contrast with the youth of previous generations, today's youth is more likely to grow up in the city rather than the country and be educated rather than trained. Because of the nation's affluence, teenagers have control of fifteen billion dollars which is used to buy clothing, records, cars, televisions, exotic foods, travel, drugs and entertainment. In addition, the automobile allows youth to be largely free

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[13]"Confrontation or Participation:The Federal Government and the Student Community, "NASSP Spotlight on Junior and Senior High Schools, Number 87 (March-April, 1969), Washington, D.C., pp. 2-3.

of adult supervision adding another dimension to the problem.[14]

The Vietnam War, violence, television and drugs have all had an impact on student life.

The Vietnam War was rivaled only by the Civil Rights Movement in the 1960's as a cause of both division and dissent in this country. The war sparked protest by students ranging from the wearing of black armbands to the wearing of long hair.

This Southeast Asian War beamed by television into the American home each evening on the news brought about a polarization of political attitudes. Vietnam not only broadened the generation gap, but threatened the democratic system in this country.

Violence in America has been a significant part of our culture since frontier days. The under thirty generation in the United States has grown up during a period of three wars: World War II, the Korean War and the Vietnam War. Since World War II, television has portrayed this violence in the American home whether it was an urban riot or the Vietnam War. Students in North Carolina and California thus can see pictured a riot that occurs in New York the same day.[15]

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[14]Samuel Brodbelt, "Values in Conflict:Youth Analyzes, Theory and Practice," The High School Journal, LV (November, 1971), pp. 64-65.

[15]Stephen K. Bailey, Disruption in Urban Public Secondary Schools (Washington:National Association of Secondary School Principals, 1970), p. 14.

With television, the youth of today in the United States is the first generation anywhere in history to receive graphic portrayals of almost every feature of the society in which they live. Over one hundred million television sets beam any newsworthy event almost anywhere in the country. Two unique features of television will be given here:

> First, a whole society is almost forced to see daily the grotesqueness of its blemishes, and there are social psychologists who are seriously asking whether any society can stand that. For the adolescent young, there is no innocence. The discrepancy between the nation's claims and its actual practices is starkly pictured. The results, as so many have pointed out, is assault by the young on the hypocrisy "of those over 30." . . .
>
> Second, education is suddenly a much bigger word than it used to be. Only a fraction of it goes on inside school buildings. One salutary effect has been a sharp widening of subjects to be considered . . .[16]

On the second point, instructors can no longer ignore or describe other than honestly such issues as racial conflicts or the war in Indochina.

A recent report by the Federal Bureau of Narcotics and Dangerous Drugs indicated that drug abuse, nationwide, increased seven hundred percent for all ages from 1964 to 1969. During the same period, drug use by those under age eighteen increased twenty-four percent.

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[16] Ibid., pp. 23-24.

The prevalence of drug use by youth is closely related to the dominant pressures of society and day-to-day existence. The past decade has seen unprecedented changes, resulting in confusion and disillusionment among youth.[17]

The introduction of new drugs since World War II and commercials which tell of their wonderous effects have also contributed to the problem.

The way they dress indicates their free sexual expression. The girls wear hot pants, tight blouses and no bras and boys wear tank shirts and jeans.

During the teenage years, youth typically is idealistic; but today's youth has also rejected the materialism of society and returned to the fundamental humanism of the nineteenth century. They no longer are content to settle for the house in the suburbs, two cars and membership in the country club. This is evidenced by their commitment and involvement in the social environmental issues of today. Many of these dedicated youths have volunteered for the Peace Corps, Vista or other social work.[18]

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[17]Jack Sarmanian, "An Interactional Approach to Preventing Drug Abuse," NASSP Bulletin Vol. 57, No. 372 (April, 1973) pp. 66-67.

[18]Samuel Brodbelt, op. cit.

The United States is faced today with problems of value conflicts. Values are defined as the axis upon which society revolves. Therefore, social institutions exist to preserve the values of the society and values form the guidelines for institutions, particularly as they are stated in historic documents.

"The Bill of Rights," the "Constitution," "Declaration of Independence" and "Pledge of Allegiance" are documents held sacred, because they are historically the greatest thoughts and desires of American democracy. For many youths today, the symbols of peace have replaced the traditional symbols of Americanism of past generations, such as the flag and "Pledge of Allegiance." Youth today want both peace and patriotism, but with an international flavor.

Consequently:

> . . the older generation often reacts negatively towards youth because of the perceived if not real value differentiation. The Spring, 1970, confrontation of students and Ohio National Guard at Kent State University also indicated that the generation gap was viewed as a threat by the oldsters who with passion and malice seemingly wished to eliminate debate, dissent, and outspoken youth in general.[19]

Today's youth is dissatisfied with both the government and their role in the political process. They graphically

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[19] Ibid., p. 67.

portrayed their feelings on both matters during the 1968 Democratic Convention in Chicago. Even though the Twenty-Sixth Amendment has since given eighteen year olds the right to vote, the full impact is yet to be felt, despite their vote in the 1972 presidential election.

Student unrest will continue unless three major problems of the secondary school are attacked. These problems are:

> (1) dull and irrelevant curricular content and non-motivating teaching methods (2) lack of broad involvement of students in the decision-making process, and (3) poor human relations between students and their instructors.[20]

The immediate reaction of school officials has been to treat symptoms rather than causes. Their attempts to maintain discipline may result in negative behavior on the part of students ranging from dropping out, to violent crime.

Great numbers of students report that curriculum content is not only uninteresting, but also irrelevant. They contend that it does not reflect the rapid changes in society nor consider the major problems at the local, national or international level.

The second problem is the lack of involvement of students in decisions that affect their lives. Students study democracy in the classroom, but do not experience such a

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[20]Bernard McKenna, "Student Unrest:Some Causes and Cures," The Bulletin of the National Association of Secondary School Principals, Vol. 55 (February, 1971), p. 54.

democratic system in their daily lives in school. Students soon come to realize that a school is a functioning bureaucracy under the control of the administration. The student council is thus limited to such things as planning dances, resulting in no meaningful involvement in the decision-making process.

The third area is human relations. Students complain that their instructors do not treat them with dignity and respect. Students point out that teachers do not try to understand how students feel and continually put down students' behavior, dress and hair style. The area of human relations is a difficult one with no ready-made solutions. With this in mind, teachers must realize that human relations is a vital ingredient in all phases of the school program.[21]

Students do have some fundamental needs, regardless of cause, which many schools for the most part have ignored. All students want to be seen and acknowledged as thinking, feeling human beings. Second, they want to participate in the process of their education. Finally, students want their curriculum to be applicable to their individual lives - culturally, politically, socially and personally. The cry for relevance is

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[21] Ibid., pp. 57-58.

self-evident and has echoes across the nation.[22]

The school has become the immediate target of the student revolution, for it constitutes the community of the young. Moreover, the school as a miniature of society, exhibits the same shams and distortions that the radicals want to change in the larger society.

The pressure and conditions of the past twenty years have contributed to the problem of student unrest in the public schools. Education has been faced with such challenges as Sputnik, finding enough buildings to house the post-World War II baby boom and providing a curriculum to enable students to pass college entrance examinations.

During this twenty year period, schools have been preoccupied with devising an assembly line educational process which would disseminate the greatest amount of information to the largest number of students. This was during a time when there were too many students and too few teachers.[23]

Youth is aware that poverty, air pollution and racism exist in America, while the majority enjoy a high standard of living. Also known is that the most technologically developed nation in the world has a high rate of unemployment. These

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[22]Richard L. Hart and J. Galen Saylor, op. cit., p. 52.

[23]Ibid., pp. 81-82.

and other related problems have created conflict in society and led George Counts to state:

> In the first place, we must realize that we have created a society founded on physical science and technology without giving much thought to the total problem of the rearing of the young. Except for the school, we have provided less and less place for boys and girls and youth. For many in our cities and urban communities, and we are overwhelmingly urban today, there is nothing of social significance to do. As a consequence, they tend increasingly to become alienated from society and seek outlets for their energies by forming gangs and engaging in antisocial and even criminal activities.[24]

The United States today is at a crossroad, faced with many difficult, important decisions that may well determine if our democratic system is to survive.

The youth of today are no longer willing to follow a value system that teaches one way and acts in another manner. They no longer accept things in a passive manner, but willingly and openly challenge all institutions and the establishment.

Many people bemoan the fact that change is taking place in society. This group longs for a return to the ways of former days. These individuals call for repression of dissent by force, if necessary.

This viewpoint is not limited to just those outside the education field. A survey by the National Education Association in 1969, found that eighty-five percent of the teachers polled

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[24]George S. Counts, "Where Are We?" Educational Forum, 30 (May, 1966), p. 404.

thought that schools should have the power to regulate both a pupil's dress and grooming. Only seven percent thought the school should not have such power. The remaining percent thought schools should be able to regulate one or the other.[25]

Others look upon the times as presenting both a challenge and an opportunity. One who believes this way is the noted author, James A. Michener. He wrote:

> I am heartened by the responsibility demonstrated by our young people, black and white, in recent years. What some of their elders have described as rebellion I have seen as a proper assumption of responsibility and a long overdue attention to problems requiring change. This willingness to challenge patterns, if projected into adult life and if accompanied by competence, will do much to change America in those areas where change is needed.[26]

It is unfortunate that the youth of this nation had to turn to the federal courts rather than educational leaders to bring about change and achieve their constitutional rights in the public schools. One could almost attribute the educational philosophy of contemporary times to the federal judges rather than to educators.

The next five chapters will review the decisions of the federal courts in regard to students' constitutional rights under the First, Fourth and Fourteenth Amendments.

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[25]Education, U.S.A., Student Rights and Responsibilities (Washington; National School Public Relations Association, 1972), p. 30.

[26]James A. Michener, America vs. Americans:The Revolution in Middle Class Values (New York:The American Library, 1968), pp. 73-74.

High school students in the 1970's seem to have taken the advice of the eighteenth-century French philosopher, Jean Jacques Rousseau who wrote:

> Teach him to live
> rather than avoid death;
> life is not breath,
> but action
> the use of our senses,
> our mind,
> our faculties,
> every part of ourselves
> which makes us conscious
> of our being.[27]

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[27]Jean Jacques Rosseau, Emile (New York; E.P. Dutton and Company, 1938), p. 10.

CHAPTER II

FREEDOM OF SPEECH AND EXPRESSION: FIRST AMENDMENT

The "Bill of Rights" became effective on December 15, 1791, a little more than three years after the United States Constitution was adopted. The first Ten Amendments were designed to protect the individual rights of the citizen by restricting the power of the Federal Government.

The First Amendment follows:

Article I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

The First Amendment says a great deal and the guarantees which it contains are basic to liberty. They are considered fundamental rights of man in a democracy.

The first Ten Amendments applied only to Federal Laws and these rights were not protected from state and local governments unless included in the state constitution.

With the ratification of the Fourteenth Amendment in 1868, it was assumed that the provisions of the first eight amendments would be made applicable to the states by the due process clause. This was not interpreted as such by the

United States Supreme Court for many years.[1]

In examining the development of free speech, one finds the first major speech case before the United States Supreme Court was Schenck v. United States (1919).[2] The Court in upholding the Espionage Act of 1917 stated that freedom of speech and press are not absolute rights and were never intended to be so. They are relative in the sense that they are limited by the co-existing rights of others, by the demands of national security and public decency. Mr. Justice Holmes writing the majority opinion said:

> The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.[3]

The case of Gitlow v. New York (1925)[4] was the first case in which the Bill of Rights was applied to states under the due process clause of the Fourteenth Amendment. Justice Sandford made two points in the majority opinion of relevence here: (1) the Constitution does not confer an absolute right

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[1]William R. Barnes, The Constitution of the United States, (New York: Barnes and Noble, 1966), p. 52.

[2]Schenck v. United States, 249 U.S. 47 (1919).

[3]Ibid.

[4]Gitlow v. New York, 268 U.S. 652 (1925).

to speak, without responsibility; and (2) that it was entirely reasonable for a state to attempt to protect itself from violent overthrow.

In Whitney v. California (1927)[5] the court ruled that an act of the legislative body may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the state in the public interest.

In the case of Dennis v. United States (1951)[6] the Court held that liberty of expression guaranteed by the First Amendment can be abridged by state officials, if their protection of legitimate state interest necessitates an invasion of free speech.

The Supreme Court has repeatedly held that speech occupies a privileged position in the "Bill of Rights" restricted only by the laws of libel and slander.

The sentences taken from the four cases do not give a true picture of the decisions of the Supreme Court. It does, however, give a brief glimpse into the development

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[5]Whitney v. California, 274 U.S. 357 (1927).

[6]Dennis v. United States, 341 U.S. 494 (1951).

of free speech; for the Court has repeatedly held that speech occupies a priviledged position as one of man's fundamental freedoms. Moreover, the Court has insisted this freedom does not extend to the obscene, the profane, the libelous or insulting utterances which tend to cause an immediate breach of the peace.

The case of Tinker v. Des Moines Independent Community School (1966)[7] involving the protesting of the Vietnam War by wearing armbands came before the United States District Court for the Southern District of Iowa in September of 1966. The district court upheld the school rule prohibiting the wearing of armbands. The Court of Appeals affirmed the lower court's decision. This key case in the development of the constitutional rights of students reached the Supreme Court in 1969. For this reason, the case will be discussed in detail later in this chapter.

Two cases involving freedom of expression reached the Fifth Circuit Court of Appeals in 1966. The decisions in both cases were handed down by the court on the same day.

The Blackwell v. Issaquena Board of Education (1966)[8] involved the wearing of "freedom buttons" at the all Negro

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[7]Tinker v. Des Moines Independent Community School, 258 F. Supp. 971 (1966).

[8]Blackwell v. Issaquena Board of Education, 363 F. 2d 749 (1966).

Henry Weather High School in Mississippi. A small number of students distributed the buttons among their classmates, forced the buttons on unwilling wearers, threw the buttons through the windows and otherwise caused a disturbance which disrupted class. Several students were suspended; their parents sought an injunction to re-admit the suspended students and allow them to peaceably wear the buttons. The injunction was denied by the district court.

The issue involved here was whether a school rule forbidding the wearing of Student Non-violent Co-ordinating Committee "freedom buttons" was a reasonable rule necessary for the maintenance of school discipline or an infringement on students' constitutional right of free speech.

The Court of Appeals affirmed the lower court decision noting that school authorities have the right to prohibit and punish acts undermining school routine. The statement of the court on this matter follows:

> The interest which regulation curbing freedom of expression seeks to protect must be fundamental and substantial if there is to be valid restrictions of speech.[9]

The court on students constitutional right of free speech said:

> Constitutional guarantee of freedom of speech does not confer an absolute right to speak and law recognizes that

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[9] Ibid., p. 753.

there can be an abuse of such freedom.[10]

The court also addressed itself to the relationship between the Federal Courts and public schools. The Fifth Circuit Court of Appeals said:

> It is not for the court to consider whether rules and regulations promulgated by school authorities are wise and expedient, but merely whether they are a reasonable exercise of the power and discretion of school authority in protecting substantial interest in the school's operation.[11]

Burnside v. Byars (1966)[12] was another Mississippi case involving the wearing of freedom buttons.

Parents brought suit to enjoin school officials from denying their children the right to wear Student Non-violent Co-ordinating Committee buttons bearing the words, "SNCC" and "One Man One Vote", while attending Booker T. Washington High School in Philadelphia, Mississippi.

Parents insisted that regulations were unreasonable and abridged their children's constitutional right of free speech. School authorities maintained that such regulations were reasonable in maintaining proper school discipline.

The district court denied the injunction, but on appeal the decision was reversed by the court of appeals on

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[10] Ibid., p. 754.

[11] Ibid.

[12] Burnside v. Byars, 363 F. 2d 744 (1966).

the basis that the buttons caused no commotion, only curiosity. The school rules were held to be arbitrary and unreasonable.

The court stated:

> The liberty of expression guaranteed by the First Amendment can be abridged by state officials if their protection of legitimate state interest necessitates an invasion of free speech. The interest of a state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school system. The establishment of an educational program requires the formulation of rules and regulations ..... the school is always bound by the requirement that the rules and regulations be reasonable.[13]

The injunction should have been granted and students should have been permitted to wear buttons peaceably. The court held:

> School officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on the student's right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the schools do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.[14]

Thus in two similar cases decided the same day by the Fifth Circuit Court of Appeals opposite decisions were handed down. The difference cited by the court was the disruption of the educational process in Blackwell which was not present in Burnside.

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[13] Ibid., p. 748.

[14] Ibid., p. 749.

The Tinker v. Des Moines Independent Community School District (1969)[15] case mentioned earlier in this chapter came before the United States Supreme Court on Writ of Certiorari. The opinion of the majority of the Court was delivered by Justice Fortas on February 24, 1969.

This case had a great impact on schools throughout the United States. It extended constitutional rights to students in school and weakened the doctrine of in loco parentis. This doctrine had given school officials the authority to act "in place of the parent." This case also opened the doors for many other cases involving students to be brought before the Federal Courts. In the majority of these cases Tinker was cited as the precedent case.

The Tinker case involved the wearing of black armbands by the three Tinker children and another boy to protest their objection to the war in Vietnam. This was during the Christmas season of 1965. Aware of the intentions of some students to wear black armbands, the principals of Des Moines adopted a regulation against black armbands on December 14. Knowing this regulation, the Tinker children wore black armbands to school on December 16. All were suspended.

A complaint was filed in the United States District

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[15]Tinker v. Des Moines Independent Community School District, No. 21, full text of opinion taken from U.S. Law Week, 37 LW 4121-4128. Feb. 25, 1969.

Court by petitioners, through their fathers. It sought an injunction restraining the school officials from disciplining the petitioners. The district court dismissed the complaint and upheld the school authorities action on the ground that it was reasonable in order to maintain school discipline.

The Eight Circuit Court of Appeals affirmed the decision of the district court without opinion.

The district court did recognize the wearing of armbands for the purpose of expressing certain views as the type of symbolic act that is within the free speech clause of the First Amendment. The wearing of armbands entirely divorced from disruptive conduct is closely akin to "pure speech." Justice Fortas wrote:

> 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 school house gate. This has been the unmistakable holding of the Court for almost fifty years.[16]

The Court has repeatedly affirmed the authority of the states and school officials, consistent with fundamental constitutional safe-guards, to prescribe and control conduct in the schools. The problem here comes when students in the exercise of First Amendment rights collide with the rules of school authorities.

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[16] Ibid., p. 4122.

This case did not involve aggressive disruptive action or even group demonstrations. It was the silent, passive, expression of opinion which was not accompanied by disorder. It should be pointed out here that the rule passed did not prohibit all symbols, only black armbands.

> In our system, state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution ..... In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gwyn, speaking for Fifth Circuit Court said, school officials cannot supress "expressions of feelings with which they do not wish to contend." Burnside v. Byars, supra at 749.[17]

A student may express an opinion in the cafeteria, on the playground or in the hall even on controversial subjects such as the war in Vietnam. However, any conduct which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the Constitutional guaranty of freedom of speech.

> The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech connected activities in carefully restricted circumstances. But we do not confine the permissable exercise of First Amendment Rights to a telephone booth or the four corners of a pamphlet, or to a supervised and ordained discussion in a school classroom.[18]

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[17] Ibid., p. 4123.

[18] Ibid., p. 4124.

The prohibiting of the wearing of armbands in silent opposition to the Vietnam War is no less offensive than would be a regulation prohibiting the discussion of an opposition to the Vietnam War or school property. The Court said the Constitution does not permit officials of the state to deny this form of expression. The case was reversed and remanded.

Justice White and Justice Stewart wrote concurring opinions. Justice Stewart did not agree with the idea that First Amendment rights of children are coexistent with those of adults.

Justice Harlan dissenting would in this case cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate concerns.

Justice Black in a vigorous dissent felt the control of pupils had been taken from school officials and transferred to the Supreme Court by the majority decision in this case. He disclaimed any purpose on his part to hold that the Federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school students.

Justice Black further stated:

While I have always believed that under the First and Fourteenth Amendments neither the State nor Federal Government has any authority to regulate or censor the content

> of speech, I have never believed that any person has right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In Cox v. Louisiana, 379 U.S. 536 (1964), for example, the Court clearly stated that the right of free speech and assembly "do not mean that anyone with opinions or beliefs to express may address a group at any public place and at any time." 379 U.S. 536, 554 (1964).[19]

Justice Black goes on to mention the constitutional test of reasonableness that brought on President Franklin Roosevelt's well known court fight. The Ferguson v. Skrupe, 372 U.S. 726 (1962) case:

> Totally repudiated the old reasonableness due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of the judges that they are "unreasonable", "arbitrary", "shock the conscience", "irrational", "contrary to fundamental decency", or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother Fortas, is resurrecting that old reasonableness due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of bench and bar. It will be a sad day for this country, I believe, when the present day court returns to the McReynolds due process concept.[20]

This concept was included in the opinion written in Meyers v. Nebraska, 262 U.S. 390 (1923) and Bartells v. Iowa, 262 U.S. 404 (1923) by Mr. Justice McReynolds.

A person does not have the constitutional right to say what he pleases, when he pleases, and where he pleases. The

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[19] Ibid., p. 4125.

[20] Ibid., p. 4126.

Supreme Court decided precisely the opposite in Adderly v. Florida, 358 U.S. 39 (1966).

Tinker was a landmark decision in the extension of constitutional rights to students in the public schools. This decision weakened the doctrine of in loco parentis and recognized the rights of students.

In Re Gault (1967)[21] was as significant as Tinker in that for the first time the United States Supreme Court considered the rights of children in juvenile court. The Court ruled that juvenile courts must grant to children many of the procedural protections required in adult criminal trials by the Bill of Rights.

While this case does not bear directly on the right of free speech it is mentioned here for it occurred during the same period as Tinker and the majority opinion was written by Mr. Justice Fortas. This case does have bearing on the constitutional rights of students and will be included in chapter five.

School dress codes, especially regulations on the length of male students' hair, were challenged as an infringement on constitutional rights. Students contended that hair style constituted symbolic expression of speech and was subject to First Amendment protection.

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[21]In Re Gault. 87 S. Ct. 1428 (1967).

The district court in upholding a school board rule regulating length of hair in Davis v. Firment (1967)[22] and while agreeing that symbolic expression is entitled to First Amendment protection said:

> A symbol must symbolize a specific viewpoint or idea, what is student Davis trying to express? Nothing really. Even if hairstyle fell within this type of expression it would still be subject to reasonable regulation in furtherance of a legitimate state interest.[23]

The United States Supreme Court denied certiorari in Ferrell v. Dallas Independent School District, (1966).[24] The Supreme Court refusal to hear a haircut case has left the issue in the district courts. Length of hair on male students has not been decided under First Amendment protection of freedom of expression. The many cases in this area will be considered in Chapter VI for the question of hair length has come under the Fourteenth Amendment.

Following the decision by the Supreme Court in Tinker, other cases reached the Federal Courts on the issue of the First Amendment right of free speech. These cases involved armbands, buttons, berets and protests. Each case continues to interpret the Tinker decision.

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[22] Davis v. Firment, 269 F. Supp. 524 (1967).

[23] Ibid., p. 527.

[24] Ferrell v. Dallas Independent School District, 261 F. Supp. 545 (1966).

The case of Einhorn v. Maus (1969)[25] resulted from a civil rights action to enjoin school officials of Springfield Township Senior High School in Illinois from placing certain notations upon school records or making certain communications to institutions of higher learning.

The confrontation with school officials began when a group of students distributed literature and wore armbands during the graduation ceremonies, even though school officials had requested that they not do so.

Following the action of the students at graduation, school officials placed the following notation on the record of students involved and sent it as a supplement letter to colleges.

The notation follows:

> This letter is submitted to supplement the information we have furnished concerning _____. He/she was one of 22 seniors who wore armbands at our Commencement Exercises bearing the legend "Humanize Education" as an indication of his/her concern regarding certain aspects of our educational program.
>
> These students wore armbands even though they had been requested not to wear any insignia which deviated from the formal graduation attire. There was no disorder at the Commencement Exercises.[26]

The court agreed that students expression of opinion through the wearing of armbands in orderly demonstration was

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[25] Einhorn v. Maus, 300 F. Supp. 1169 (1969).

[26] Ibid., p. 1170.

constitutionally protected citing the Supreme Court ruling in Tinker.

However, the district court went on to hold that the notation by school officials was a true factual account, without expression of opinion as to the lawfulness of the demonstration. The court held there was no constitutional invasion of plaintiffs' rights since they could not demonstrate likelihood of immediate, irreparable harm resulting from defendant's action. The court also pointed out there had been no disciplinary action by school officials.

The plaintiffs' motion for a preliminary injunction was denied by the court saying:

> We perceive no threatened irreparable harm flowing from the proposed letter nor have the plaintiffs offered any evidence to demonstrate any likelihood thereof. School officials have a right and we think, a duty to record and to communicate true factual information about their students to institutions of higher learning for the purpose of giving to the latter an accurate and complete picture of applicants for admission.[27]

The case of Butts v. Dallas Independent School District (1969)[28] involved the wearing of black armbands in the Dallas Schools in violation of the school district's policy prohibiting the wearing of such bands in the schools.

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[27] Ibid., p. 1171.

[28] Butts v. Dallas Independent School District, 306 F. Supp. 488 (1969).

Action was filed on behalf of six minors (age 15 to 17) to enjoin the Dallas Independent School District and Superintendent Nolan Estes from enforcing the policy.

The wearing of black armbands occurred on and soon after October 15, 1969. This was the date set for a National Moratorium day by various groups around the country. This has bearing on the case, since violence and unrest resulted in many parts of the country. In Dallas, students had attended moratorium rallies and urged other students to boycott classes. Moreover, a bomb threat had been received at one school. Demonstrations took place near several schools on the morning of October 15.

These circumstances prompted this statement by the court:

> It is difficult for the court to imagine that such disorder did not materially interfere with school work for at least part of that day.[29]

Reference to Tinker was often made in this case. The court at many points contrasted the case before it with Tinker. The court said:

> First Amendment Rights must be interpreted according to the "special characteristics" of environment therein.[30]

The court further stated in reflecting on Tinker that:

> The authority of a former decision as a precedent must

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[29] Ibid., p. 490.

[30] Ibid., p. 491.

> be limited to the points actually decided on the facts before the court.....[31]

The district court denied the request for a temporary injunction in the case. The record in this case revealed disruptive circumstances unlike Tinker and the court felt that school authorities had acted in the interest of its duty to educate those who were seeking an education. The court rejected the contention of the plaintiffs that school authorities were not afraid of disruption, but had enforced the regulation against the principle of the demonstration itself.

The case of Hatter v. Los Angeles City High School District (1970)[32] resulted from the suspension of two high school girls who attempted to bring about a boycott of the school candy drive for the purpose of protesting the school dress code.

The district court in its decision stated:

> In weighing importance of maintaining administrative authority to regulate and discipline students against students' personal rights to stir up boycott of school's candy drive for purpose of protesting school dress code, latter activity was without weight or substance and raised no question of constitutional proportions. .....
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> In considering action against school by student who claimed infringement of right of free speech, it is the

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[31] Ibid., p. 489.

[32] Hatter v. Los Angeles City High School District, 310 F. Supp. 1309 (1970).

> duty of the court to ask whether that which student wishes to say is of such importance as would justify court in interfering with school authorities attempt to regulate where, when and how he shall say it.[33]

The plaintiffs cited Tinker and Burnside in request for preliminary injunction against school officials. The court pointed out in both cases cited that young children were protesting and attempting to express an opinion in matters of great national concern. In both cases, the issues were wholly unrelated to the school program.

In the present case the issue involved was solely a school one. The district court held that since students had been reinstated, candy sale was over and dress code had been modified though not entirely to their satisfaction that no question of constitutional proportion existed. The preliminary injunction was denied.

The case of Aguirre v. Tahoka Independent School District (1970)[34] came in an action filed on behalf of five minor children who were students at Tahoka Jr. or Sr. High School, Tahoka, Texas. The students were suspended for wearing brown armbands to protest certain school policies. They were of Mexican-American descent. Their parents had met with school officials concerning certain practices and had filed suit

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[33] Ibid.

[34] Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (1973).

alleging violation of their Civil Rights.

The students in question first wore brown armbands on February 12. On that date no dress regulation was in effect which would have been violated by such armbands.

The board of education met on February 13 and promulgated a supplement to the existing student handbook in which it was announced that:

> Any act, unusual dress, coercion of other students, passing out literature, buttons, etc., or apparel decoration that is disruptive, distracting, or provocative so as to incite students of other ethnic groups will not be permitted.[35]

The disciplinary procedure of suspension for violation was also passed on February 13. The plaintiffs continued to wear armbands and were suspended.

The district court held that:

> Wearing of brown armbands by high school students for purpose of expressing view that substance of their grievance, respecting certain educational policies and practices within school system was justified and worthy of corrective action came within protection of First Amendment.[36]

The case of Hernandez v. School District No. 1, (1970)[37] also involved students of Mexican descent. These students were suspended for wearing black berets to school.

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[35] Ibid., p. 665.

[36] Ibid., p. 666.

[37] Hernandez v. School District No. 1, Denver, Colorado, 315 F. Supp. 289 (1970).

In August of 1969 the plaintiff, Hernandez, asked the principal if students would be permitted to wear black berets to school. The reason given for the request was that the berets would be a symbol of their Mexican culture and show unity among Mexicans.

Mr. Shannon, the principal, also of Mexican descent, agreed to the request with the statement: "we would try and see if we could live with it." He went even further and granted permission to celebrate September 16, as Mexican Independence Day in the school.

After this, undisputed testimony showed that the plaintiffs were becoming arrogant, boisterous and trying to have their way in school. They were using their berets as a symbol of power and to exercise control over other students.

Examples of conduct given were shouting in the halls, blocking students from passing in the halls, refusing to give names to teachers, walking out of class and attempting to interfere with discipline of other students.

Mr. Shannon in trying to solve the problem talked with the students and then with the parents. This approach was not successful, so the plaintiffs were told they would have to cease wearing the berets in school or be suspended. They ignored the request and were suspended for five days by the principal. The principal's suspension was upheld and

extended to ten days, or until berets were removed, by the superintendent.

The plaintiffs claimed that berets were worn as a political symbol and the ban on wearing berets was a violation of their Constitutional right to free speech. They cited Tinker as justification of their claim.

The district court dismissed the complaint and in its decision said:

> It follows that the disruptive conduct of the plaintiffs in this case is not immunized by the Constitutional guarantee of free speech.[38]

The case of Guzick v. Drebus (1970)[39] went before the United States District Court for the Northern District of Ohio. The complaint had been dismissed by the district court.

The complaint charged that Thomas Guzick, Jr., a seventeen year old, eleventh grade student at Shaw High School, had been denied the right of free speech guaranteed to him by the First Amendment of the United States Constitution. His charge followed his suspension: for refusal to remove, while in school, a button which solicited participation in an anti-war demonstration that was to take place in Chicago. The legend of the button was:

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[38] Ibid.

[39] Guzick v. Drebus, 305 F. Supp. 479 (1970).

April 5 Chicago
GI - Civilian
Anti-war
Demonstration
Student Mobilization Committee[40]

The plaintiff sought reversal of the district court decision on grounds that facts in the case brought it under the rule of Tinker. The Sixth Circuit Court of Appeals had to either distinguish the case from Tinker or reverse the decision of the lower court.

The rule applied to Appellant, at Shaw High School in East Cleveland, Ohio, was of long standing. The rule originated when fraternities were competing for the favor of students and causing disruption in the school. The rule had been uniformly enforced since that time.

The school population had changed from all white to 70% black and racial buttons such as "White is Right" and "Black Power" had been prohibited. Such buttons had caused disruption at Shaw High School in the past.

The district judge in looking at Tinker said:

> Furthermore, there is in the present case much more than an undifferentiated fear or apprehension of disturbances likely to result from the wearing of buttons at Shaw High School. The wearing of buttons and other emblems and insignia has occasioned substantial disruptive conduct in the past at Shaw High. It is likely to occasion such conduct if permitted henceforth. The wearing

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[40] Ibid.

> of buttons and insignia will serve to exacerbate an already tense situation, to promote division and disputes, including physical violence among the students, and to disrupt and interfere with the normal operation of the school and with appropriate discipline by school authorities.[41]

The district court in reference to black armbands being singled out in Tinker while other students wore buttons made this statement:

> In addition any rule which attempts to permit the wearing of some buttons, but not others, would be virtually impossible to administer.[42]

The Sixth Circuit compared the case before it with the Fifth Circuit decisions in Blackwell and Burnside. In Blackwell the court in upholding the school rule found that the wearing of freedom buttons caused disturbance of the educational process. In Burnside the wearing of freedom buttons by students was upheld since there had been no previous rule and it caused no disturbance in the school.

Judge O'Sullivan, Senior Judge for the Sixth Circuit Court of Appeals said:

> We will not attempt extensive review of the many great decisions which have forbidden abridgment of free speech. We have been thrilled by their beautiful and impassioned language. They are a part of our American Heritage. None of these masterpieces, however were composed or uttered to support the wearing of buttons in high school classrooms.

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[41] Ibid.

[42] Ibid., pp. 477 & 478.

> We are not persuaded that enforcement of such a rule as Shaw High School's no-symbol proscription would have excited like judicial classics. Denying Shaw High School the right to enforce this small disciplinary rule could, and most likely would, impair the rights of its students to an education and the rights of its teachers to fulfill their responsibilities.[43]

The Sixth Circuit Court of Appeals reviewed several historic cases and writings concerning the First Amendment right of free speech. Two of these are included in this chapter.

The first was made by Mr. Justice Douglas speaking for the majority of the Court in Terminiello v. Chicago (1949)[44] which had to do with utterances made at a public meeting in a Chicago auditorium. Justice Douglas describing the nature of free speech, said:

> (A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea.[45]

The Circuit Court in application:

> However correct such language when applied to an open public protest meeting, we doubt the propriety of protecting in a high school classroom such aggressive and colorful

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[43] Guzick v. Drebus, 431 F. 2d 600 (1970).

[44] Terminiello v. Chicago, 337 U.S. 1 (1949).

[45] Ibid.

use of free speech.[46]

The second was taken from a monograph by Mr. Justice Brennen entitled "The Supreme Court and the Meiklejohn Interpretation of the First Amendment". He had this to say about balancing of First Amendment Rights with governmental power.

> The 'redeeming social value,' 'clear and present danger,' and 'balancing' tests recognize some governmental power to inhibit speech, but it must also be said that none of these limitations has been given an across the board application. Each has been primarily utilized to sustain governmental regulation in particular contexts ..... and the 'balancing' test primarily in the case of regulations not intended directly to condemn the content of speech but incidentally limiting its exercise.[47]

The majority of the three judge panel affirmed the dismissal of the complaint by the district court. Judge McAllister dissented and filed opinion. Judge O'Sullivan in the majority decision stated:

> Where high school rule prohibiting wearing of any buttons or any insignia was of long standing and had been universally applied, and situation at high school which had undergone change of racial composition from all white to 70% black was incendiary, enforcement of rule against student who wore button soliciting participation in anti-war demonstration did not deny right of free speech.[48]

Judge McAllister dissenting:

> When a few students noticed the button which Appellant was wearing, and asked him "what it said," Appellant's

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[46] Guzick v. Drebus, 431 F. 2d 600 (1970).

[47] 79 Harvard Law Review 1, 11 (1965).

[48] Guzick v. Drebus, 431 F. 2d 601 (1970).

> explanation resulted only in casual reaction; and there was no indication that the wearing of the button would disrupt the work and discipline of the school..... would reverse judgment of the district court and dismiss case on the authority of Tinker v. Des Moines.[49]

Tinker and other decisions of the federal courts on the right of expression have not provided specific guidelines for students. The decisions did tell students that if they protested silently and with no substantial disruption, their actions would be upheld and protected by the Free Speech and Due Process Clauses of the First and Fourteenth Amendments. This was indicated by the Fifth Circuit Court decision in Blackwell and Burnside.

The cases that have dealt with the First Amendment freedom of speech have emphasized repeatedly that the state and school authorities have comprehensive authority and may exercise this authority as long as it is within the constitutional framework to conduct and prescribe conduct in the schools.

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[49] Ibid.

CHAPTER III

FREEDOOM OF THE PRESS AND STUDENT PUBLICATIONS: FIRST AMENDMENT

Freedom of the press in the First Amendment of the Constitution of the United States gives protection to written expression. Since the Tinker decision students have attempted to establish their right to publication and distribution.

Justice William O. Douglas writing about the basic freedoms in this country pointed out that United States Constitution prohibited any form of censorship over the newseditor, the author or the lecturer. He also raised the question of movie and television censorship which is certainly not clear with the 1973 decision of the United States Supreme Court to judge obscenity by local standards.

Justice Douglas stated:

> The argument against censorship is clear: no person shall dictate our tastes, ideas or beliefs. No official has the right to say what is trash and what has value. Fiction, movies, cartoons, painting, sculpture, though intended primarily for entertainment, also convey ideas. To allow suppression of a publication on the basis of someone's opinion that such utterances are offensive to some political or sectarian group and have no artistic or intellectual merit would afford an easy device for the silencing of unpopular ideas. As a work of literature, UNCLE TOM'S CABIN was no model, but its effect on people's ideas was tremendous.[1]

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[1]William O. Douglas, A Living Bill of Rights (New York: Anti-Defamation League of B'nai B'rith, 1966), pp. 25, 26.

Douglas went on to point out that James Madison's view had been, the constitution gave no power whatever over speech or press to the federal government, because of the First Amendment. The importance of free speech and a free press has led the courts to hold that guarantees of the First Amendment extend to state action by reason of the due process clause of the Fourteenth Amendment. This was the decision of the United States Supreme Court in Gitlow v. New York (1925).[2]

The case of Near v. Minnesota (1931)[3] involved the "Minnesota gag law" of 1925. This law provided for the padlocking by injunctive process, of a newspaper for printing subject matter which was scandalous, malicious, defamatory, or obscene. Such an injunction could be lifted only by convincing the judge who issued it that publication would, in the future, be acceptable.

Such action was brought against THE SATURDAY PRESS published by the defendants in the city of Minneapolis. The paper had attacked city officials and charged that gangsters were running the city.

A temporary injunction and then a permanent injunction had been issued by a judge. This action had been affirmed in

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[2]Ibid., p. 28.

[3]Near v. Minnesota, 283 U.S. 697 (1931).

the state courts.

The case reached the United States Supreme Court on appeal. Chief Justice Hughes speaking for the Court pointed out that freedom of the press is not an absolute right, and the state may punish its abuse. He also stated that remedies for libel remained available and unaffected by the gag law. Chief Justice Hughes speaking for the Court said:

> . . . the statute in question does not deal with punishments, it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication . . . . . we hold the statute so far as it authorized the proceedings in the action under clause (b) of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment.[4]

This case, Near v. Minnesota, was the first case in which a state law was held unconstitutional by the United States Supreme Court. The Court held that it violated freedom of the press and was protected from state action by the due process clause of the Fourteenth Amendment.

The case of Kingsley Books v. Brown (1957)[5] raised the question of prior restraint in the sale of books judged to be obscene. The appellants questioned the use of an injunction by the state of New York to halt the sale of books pending a

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[4] Ibid.

[5] Kingsley Books v. Brown, 354 U.S. 436 (1957).

judicial decision. At issue was the procedure used by the state of New York, not obscenity.

The United States Supreme Court in a five to four decision upheld the New York law. Justice Frankfurter in the majority opinion stated:

> The phrase prior restraint is not a self-wielding sword. Nor can it serve as a talismanic test.[6]

Prior censorship of motion pictures raised the constitution issue of prior restraint. The question concerned the application of the broad language of Near v. Minnesota to motion pictures.

The case of Times Film Corporation v. Chicago (1961)[7] challenged a city ordinance requiring submission of all motion pictures for examination before they were shown.

In a five to four decision the United States Supreme Court upheld the ordinance. The Court once again recognized that previous restraint was not absolutely unlimited. However, this limitation was only recognized in exceptional cases.

The majority opinion saw the legal question as the submission of the film. The dissenting opinion saw the Court giving official license to censors.

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[6] Ibid.

[7] Times Film Corporation v. Chicago, 365 U.S. 43 (1961).

The case of Freedman v. Maryland (1965)[8] once again brought the question of prior restraint before the Court. In this case the Court ruled that a Maryland statute requiring submission of motion pictures to the state board of censors prior to showing was unconstitutional. The Court found the statute did not meet procedural safeguards, since the burden of proof did not fall on the censors.

The findings of the censors had the effect of finality and delay was built into any final judicial determination.

These cases have been reviewed to give historical background to the question of freedom of the press. One must remember that the laws of libel and slander protect a person from being injured by false statements which another makes about him. These are state laws which also permit a person to recover damages.

The growing phenomenon of underground newspapers and the problem of censorship of school papers was pointed out by SATURDAY REVIEW in February of 1969. At that time, it was estimated there were five hundred such underground newspapers published off campus.[9]

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[8]Freedman v. Maryland, 380 U.S. 51 (1965).

[9]Diane Divoky, "Revolt in the High Schools: The Way It's Going to Be," Saturday Review, (February 15, 1969). p. 83.

The National Association of Secondary School Principals in 1969 conducted a poll of one hundred representative schools. The poll found that in sixty per-cent of the schools reporting, the school newspaper was firmly under the thumb of the principal. The students in the schools polled said that over half the principals attempted to suppress under-ground newspapers.[10]

This attempt on the part of administrators to suppress underground newspapers or to censor school newspapers resulted in litigation in the federal courts following the Tinker decision. This has been especially true where students have been punished by suspension or expulsion.

The case of Segall v. Jacobson (1969)[11] arose from the publication of a name-calling article containing obscenities published in a paper which forged the official masthead of the school newspaper. The student involved was suspended from a Manhattan, New York, high school, but was allowed to transfer to another school. The student brought action for reinstatement to his original school.

The plaintiff was involved in disruptive activities at school in December of 1968 which resulted in injury to a fellow student. After this incident, he signed an agreement to obey

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[10]J. Lloyd Trump and Jane Hunt, "The Nature and Extent of Student Activism," The Bulletin: National Association of Secondary School Principals, Vol. 53 (May, 1969), p. 151.

[11]Segall v. Jacobson, 295 F. Supp. 1121 (1969).

school rules and to not become involved in disruptive activities.

In January of 1969 he distributed in the school lunchroom and gymnasium the forged paper. The plaintiff admitted breaking his agreement and further stated that he would assist in any disruptive conduct at school when the opportunity presented itself.

The student was suspended and a hearing was held before the district superintendent who sustained the suspension and transferred the student to another school.

The district court denied the preliminary injunction, since plaintiff had been admitted to another school and because of the facts presented in the case.

The case of Schwartz v. Schuker (1969)[12] also occurred in a New York City High School. The plaintiff, Jeffrey Schwartz, had distributed peace strike material on the school ground during the school day and called for a student strike.

Jeffrey was not punished, but was advised by the dean that distribution of outside literature was not permitted on campus without specific permission.

Jeffrey admitted to the administrative assistant that he was part of the group calling for a student strike. At this

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[12]Schwartz v. Schuker, 298 F. Supp. 238 (1969).

time city-wide riots were occurring because of the length of the school day.

In conference with the parents, they asserted Jeffrey had a right to carry on student strikes at all times and in any manner he deemed proper.

Unable to resolve the problem, Jeffrey was suspended and the parents given written notice of a hearing. Prior to the hearing he appeared in class in defiance of school officials on the instructions of his mother.

At the hearing Jeffrey was given the option of graduation as of January 31, 1969, or transferring to another high school. Neither option was exercised.

Action was brought before the district court for reinstatement and other relief on the grounds that First Amendment rights had been violated.

The district court held:

> . . . that suspension of high school student who had been cautioned by principal not to bring on school premises copies of newspaper published off school property but nevertheless did so and who when asked to surrender newspapers refused to do so and attempted to influence another student to do likewise and who after suspension defied superintendent's orders by appearing in school did not violate student's First Amendment right of free speech.[13]

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[13] Ibid., p. 239.

The court in denying the injunction went further and said:

> . . . that First Amendment rights must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner and to protect the rights not of a few but of all the students in the school system.[14]

New York continued to be the scene of court battles over student publications. The case of Zucker v. Panitz (1969)[15] arose in New Rochelle, New York.

The conflict leading to a court case resulted when a group of students attempted to put a paid advertisement in school newspaper in opposition to the war in Vietnam. The principal directed that it not be published in keeping with a long standing policy of the school. This policy did not permit advertisements of a political nature.

The plaintiffs brought action against school officials for violation of constitutional rights. The court ruled that high school students, on freedom of speech grounds, were entitled to publish paid advertisement in school newspaper. This decision was based on evidence introduced that articles on the war and the draft had appeared in the school newspaper.

The plaintiffs' motion for summary judgment was granted

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[14] Ibid., p. 242

[15] Zucker v. Panitz, 299 F. Supp. 102 (1969).

by the court saying:

> . . . that newspaper was a forum for dissemination of ideas and was open to free expression of ideas in news and editorial columns and letters to editors.[16]

The issue of possession of obscene literature by students is closely related to distribution of literature. Because both questions have come before the federal courts, a case dealing with possession of obscene literature will be included at this point. Possession of obscene literature has most often been in the federal courts when students have been punished by suspension or expulsion.

Such a case, Vought v. Van Buren Public Schools (1969)[17], resulted from student possession and disciplinary action by school officials in a high school in Wayne County, Michigan.

The principal of Belleville High School took from the plaintiff, David Vought, copies of a slick page booklet called "White Panther Statement". He was sent home, but re-admitted when his mother returned with him for a conference with the principal.

The very same day the principal read a memorandum to the student body that any student found with obscene literature in his possession would be suspended from school.

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[16] Ibid.

[17] Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (1969).

A few days later, David was suspended for having a copy of the magazine ARGUS at school which contained a certain four letter word. He was suspended and then expelled by the board of education without receiving notice of the meeting. The plaintiff, through an attorney, appealed to the board to rescind its expulsion; but the board refused.

The plaintiff filed a complaint with the district court. The court granted a temporary restraining order which reinstated student in school pending the outcome of the trial.

Since the suspension and expulsion was based on possession of a magazine containing a four letter word, evidence was brought before the court that plaintiff had been required to read CATCHER IN THE RYE in the tenth grade, which contained the same four letter word. A copy of HARPER'S magazine in the school library also contained the same four letter word.

The court in reference to the four letter word said:

> If we, as a trial court, are confused, what are we to suppose is the state of mind of a student subjected to such a double standard.[18]

The court in its decision did not consider obscenity, but found for the plaintiff on the grounds of denial of due process. The court went on to say that a school regulation providing that any student found with obscene literature in his possession would be suspended from school did not violate the free

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[18] Ibid., p. 1395.

speech provision of the First Amendment. The court went further in stating that in this particular case the punishment did not fit the crime.

The case of Baker v. Downey City Board of Education (1969)[19] involved the publication of an off-campus newspaper called OINK by two senior boys at Earl Warren High School in Los Angeles, California. The two boys were suspended for ten days for profanity and vulgarity appearing in the newspaper. In addition, both boys were removed from their elected school office for failure to keep their oath of office.

The court found that the plaintiffs were not entitled to the injunctive or declaratory relief sought by their complaint. The court said:

> Temporary suspension of high school students for use of profanity or vulgarity appearing in off-campus newspaper published by them and distributed to students just outside main campus gate did not violate students' First Amendment right of freedom of speech.[20]

The court emphasised the earlier finding of the Supreme Court in that freedom of speech is not the right to say anything one pleases in any manner or place.

The case of Sullivan v. Houston Independent School District

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[19] Baker v. Downey City Board of Education, 307 F. Supp. 517 (1969).

[20] Ibid., p. 520.

(1969)[21] grew out of the publication and distribution of an off-campus newspaper called PFLASHLYTE by two senior boys at Sharpstown Junior/Senior High School in Houston, Texas. The Newspaper was published at the University of Houston Print Shop in cooperation with the Students for Democratic Society chapter on the campus. The boys distributed the newspaper across the street from the school in a park. Students receiving the newspaper were asked not to have it out in school.

School officials found a stack of the newspapers in a restroom with a sign saying take one. Copies were also found in a towel dispenser and a sewing machine in a girl's home-making class.

Groups of students gathered in the hall to discuss the newspaper. Copies were taken from students in class, but only one student was sent to the principal because of the newspapers.

When the two boys were identified and had admitted to the distribution of the newspapers, they were expelled for the rest of the school year. This occurred on March 12, 1969. A visit to the assistant superintendent did not help in their effort to gain admittance to another high school in Houston.

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[21] Sullivan v. Houston Independent School District, 307F. Supp. 1328 (1969).

The plaintiffs brought action for reinstatement and declaratory relief against school authorities in the district court. They challenged the school district regulation giving authority to the principal to make any necessary and reasonable rules.

The court in April granted a preliminary injunction reinstating the two boys in school while trial was in session. The court also enjoined school officials from disciplining plaintiffs for the publication or distribution of other written material away from school premises.

The case did not reach the court until after the two boys graduated. School officials contended that the question was moot since plaintiffs were no longer students. The plaintiffs argued that it was still on their school records and that the suit was a class action on behalf of other students in Houston. The court agreed to the class action, since all students in Houston were subject to the same regulations.

The case reached the court in November of 1969 and the district court cited Tinker in saying:

> . . . freedom of speech, which includes publication and distribution of newspapers, may be exercised to its fullest potential on school premises so long as it does not unreasonably interfere with normal school activities. Administration can properly regulate the times and places within the school building at which papers may be distributed. Obviously the first amendment does not require that students be allowed to read newspapers during class periods. Nor should loud speeches or discussions be tolerated in the halls during

> class time. A proper regulation as to place might reasonably prohibit all discussion in the school library, administration may not, however, apply regulations as to time or place or manner in a discriminatory fashion.[22]

The court further stated in answering the question of school disruption that:

> It is also clear that if a student complies with reasonable rules as to times and places for distribution within the school, and does so in an orderly, non-disruptive manner, then he should not suffer if other students, who are lacking in self-control, tend to over react thereby becoming a disruptive influence.[23]

The court while not clear whether the law gave schools authority to discipline students for off-campus conduct said certainly that a school could not exercise more control over off-campus activities than over on-campus conduct. The court said that students off-campus are subject to the same laws as other citizens.

The court concluded by saying:

> There is no question that these minor plaintiffs were engaged in acts of expression protected by the first amendment; indeed excepting only oral expression, the publication of a newspaper is First Amendment activity in its purest form. It appears that (the two students) were disciplined because school officials disliked PFLASHLYTE's contents. The constitution prohibits such action.[24]

The court in its judgment for the plaintiffs found the

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[22] Ibid., p. 1340.

[23] Ibid.

[24] Ibid., p. 1341.

regulation of the Houston Independent School District vague and overbroad.

This case did give some guidelines for administrators on distribution of literature on school grounds. The court said that reasonable rules could be made in regard to the time, place, manner and duration of distribution.

The next four cases in this chapter are significant in that in each one, the decision in the district court was appealed to the circuit court of appeals. The cases are not listed in the order in which they arose, but in the order they were decided on by the court of appeals.

The first of these cases was Scoville v. Board of Education of Joliet Township High School District 204 (1970).[25] This case resulted from the publication and distribution of a paper entitled GRASS HIGH by two students at Joliet Central High School in Illinois.

On January 18, 1968, three days after GRASS HIGH was sold in the school, the dean advised the plaintiffs they could not take their semester exams. Four days later, they were suspended for five days. Some nine days later one boy was removed as editor of the school paper and the other boy deprived of the privilege to participate in debate activities.

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[25]Scoville v. Board of Education of Joliet Township High School District 204, 425 F. 2d 10 (1970).

Following this, the dean recommended to the superintendent that plaintiffs be expelled for the remainder of the school year. The plaintiffs' parents were advised that a recommendation would be presented to the board and they were invited to be present. The mother of one of the plaintiffs wrote the superintendent that she felt the boys had been adequately punished. The parents did not attend the meeting and the board expelled the plaintiffs on the grounds of gross disobedience and misconduct. The plaintiffs were allowed to attend a day class in physics and night school on a probationary basis.

Action was brought by the plaintiffs in district court for injunctive relief and damages. The court applying the clear and present danger test upheld the expulsion. The expulsion was upheld on the basis of a statement in GRASS HIGH urging students not to accept for delivery to parents any propaganda issued by the school and to destroy any material, if accepted.

Thus, the decision of the board was justified only on objectionable content; since no objection was made to place, time or manner of distribution. In addition, no charges were made that publication was libelous or obscene. The United States District Court for the Northern District of Illinois dismissed the complaint and appeal was taken.

A panel of the Seventh Circuit Court of Appeals affirmed the district court decision and subsequently a petition for rehearing en banc was granted.

Both defendants and plaintiffs cited Tinker in their arguments before the six judges of the Seventh District Court of Appeals. Before the court were questions of student constitutional rights, school rules and regulations and disruptions of the school day. The court made the following statement in regard to school rules governing expression:

> State and school officials have comprehensive authority to prescribe and control conduct in schools through reasonable rules consistent with fundamental constitutional safeguards and where rules infringe upon freedom of expression the school officials have burden of showing justification.[26]

The court said that the burden of forecasting substantial disruption lay with school authorities if student freedom of expression was infringed by school board action of expulsion.

The court agreed that statements in GRASS HIGH were disrespectful and tasteless, but cited Burnside in saying that:

> school officials cannot suppress expression by students with which they do not wish to contend.[27]

A random statement in GRASS HIGH illustrates this point.

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[26] Ibid., p. 13.

[27] Burnside v. Byars, 363 F. 2d 744 (1966).

The statement said, "oral sex may prevent tooth decay." The court commented:

> This attempt to amuse comes as a shock to an older generation. But today's students in high school are not insulated from the shocking but legally accepted language used by demonstrators and protestors in streets and on campuses and by authors of best-selling modern literature. A hearing might even disclose that high school libraries contain literature which would lead students to believe that statements made in GRASS HIGH were unobjectionable.[28]

The circuit court of appeals in a five to one decision reversed and remanded the decision of the lower court.

One judge dissenting did not agree that the present case was in line with Tinker. This judge saw the action of the minor plaintiffs in GRASS HIGH calling upon their fellow students to flaunt the school administrative procedure by destroying, rather than delivering to their parents material given to them for that purpose.

The judge stated:

> (he) could not find for the plaintiffs private interest of free expression against the state's interest in conducting an efficient system of public schools.[29]

In the case of Katz v. McAulay (1971)[30] court action resulted from a challenge to a New York Board of Regents rule,

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[28]Scoville v. Board of Education of Joliet Township High School District 204, 425 F. 2d 10 (1970).

[29]Ibid., p. 13.

[30]Katz v. McAulay, 438 F. 2d 1058 (1971).

some forty years old, which prohibited soliciting of funds from pupils in the public schools. The plaintiffs, four students in a public high school in Westchester County, N.Y., brought a civil rights action for anticipatory relief against enforcement of the rule. Their action arose when school officials threatened plaintiffs with expulsion, if they distributed on school premises leaflets soliciting funds from their fellow students. The leaflets sought funds for defense of the "Chicago 8."

The district court denied plaintiff's motion for a preliminary injunction and found the Board of Regents' rule:

> . . . was not intended to prevent the exercise of free speech but rather set forth a reasonable regulation to protect school children from annoyance at the hands of solicitors eager, for one cause or another, to induce them to part with their pocket money.[31]

The plaintiffs appealed and the Second Circuit Court of Appeals in a two to one decision affirmed the decision of the lower court saying:

> The Board's regulation appears to be reasonable and proper and has a rational relationship to the orderly operation of the school system.[32]

J. Joseph Smith, Circuit Judge, in his dissent was concerned, since this was a public issue. He also pointed to the

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[31] Ibid., p. 1060.

[32] Ibid.

absence of gross disruption in the case before the court. Judge Smith stated:

> . . . I think on a showing such as this the courts must protect the students in their efforts to communicate, misguided as we may consider them. I would reverse.[33]

The case of Riseman v. School Committee of City of Quincy (1971)[34] came when junior high students sought to distribute political material and were denied the right by the school committee.

The case went to district court which denied the plaintiffs' request for a preliminary injunction. However, the court temporarily restrained school authorities from interfering with orderly and non-disruptive distribution on school premises, outside the school building, of material of a political nature or of public concern.

The plaintiffs appealed, they felt they had gained only half a victory. The court of appeals granted a temporary injunction prohibiting enforcement of the regulation both within the building as well as on school grounds.

The First Circuit Court of Appeals pointing to the fact that the committee regulation was not designed or aimed at First Amendment rights, but was used as such to prohibit dis-

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[33] Ibid., p. 1062

[34] Riseman v. School Committee of City of Quincy, 439 F. 2d 148 (1971).

tributions of a political nature, ordered the school committee to come up with guidelines for distribution of material.

The court of appeals in its decision said:

> . . . (committee) rule appeared devised only to control in school advertising or promotional efforts of organizations and, as sought to be applied to First Amendment activities, was vague, overbroad, and did not reflect effort of prior restraint. Reversed and remanded.[35]

The case of Eisner v. Stamford Board of Education (1970)[36] came as a challenge to a school board regulation requiring prior approval by school officials of material distributed on school grounds. The case arose after three issues of the STAMFORD FREE PRESS were distributed outside school; but when the fourth issue was distributed at school, it brought warning of suspension from school officials. Negotiations on the issue broke down and a suit was filed in district court.

The only issue before the court concerned the constitutional validity of the requirement that content of the literature be submitted to school officials for approval prior to distribution. The plaintiffs acknowledged that school authorities could establish reasonable regulations governing the time, place and manner of distribution. They further agreed the author of each article should be identified and to a prohibition

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[35] Ibid.

[36] Eisner v. Stamford Board of Education, 314 F. Supp. 832 (1970).

of obscene or libelous material.

The district court cited Near v. Minnesota and Freedman v. Maryland on the constitutional questions of prior restraint and censorship.

The court found:

> Board of education could not constitutionally require that content of student newspaper, which was printed at students' expense and which was sought to be distributed on school grounds, be submitted to a board of education for approval prior to distribution; regulation on its face constituted unjustified prior restraint.[37]

The broad, comprehensive order of the district court prohibiting any system of prior restraint and the reliance of the court on several college cases indicated the court viewed the rights of high school students as parallel to those of college students where distribution of literature was concerned. Therefore, the decision of the district court was appealed by the school board.

The Second Circuit Court of Appeals wrote an opinion establishing several specific guidelines under which a valid rule requiring prior approval might be developed. The court said:

> . . . to resolve this problem we are required to consider principles and concepts which courts have fashioned over several decades of this century, giving effect to the proscription of the First Amendment against any law abridging

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[37] Ibid.

> freedom of expression, and applying them to the unique social structure prevailing in a public system of secondary schools.[38]

The court suggested that school board should make policy more specific in how school officials would attempt to prevent disruption in other ways, before limiting distribution rights.

The appeals court in its opinion pointed out that United States Supreme Court in Near v. Minnesota and other cases had not prohibited all prior restraints. Prior restraint can be justified, if it does not unduly restrain protected speech. While generally approving the procedural requirements established in Freedman v. Maryland, the appeals court recognized the impracticality of requiring a prior judicial hearing before school officials may place a restraint on distribution. The court stated:

> . . . we believe that it would be highly disruptive to the educational process if a secondary school principal were required to take a school newspaper editor to court everytime the principal reasonably anticipated disruption and sought to restrain its cause.[39]

The Second Circuit Court of Appeals set forth the following as essential elements in setting up a procedure for submission of material which will satisfy the demands of the

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[38] Eisner v. Stamford Board of Education, 440 F.2d 803 (1971).

[39] Ibid., p. 810.

constitution.

1. Adequate definition must be given to the term "distribution" to make clear that policy is directed at substantial disruption and not the passing of a note from one student to another or the exchange of copies of TIME or LIFE.

2. A definite person must be established to whom the material is to be submitted for approval and how the submission is to be accomplished.

3. A definite, brief period must be set within which the review will take place and be completed.

4. A provision that the policy will not operate until each school has established its review procedure and informed its students.[40]

These guidelines set forth by the court give direction to school boards in making policy limiting high school students' rights to distribute literature in school. The court left no doubt they would approve properly drawn regulations involving a prior restraint.

The court of appeals also confirmed the distinction between the rights of high school students and college students in the area of First Amendment rights. The district court earlier in its decision had viewed the rights of high school students as parallel to those of college students.

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[40]T. Page Johnson, "Eisner v. Stamford! Prior Restraint on Distribution of Literature in High Schools," Nople School Law Journal, Vol. 2 (Spring, 1972), p. 30.

The court of appeals modified, affirmed and remanded the case back to the district court.[41]

The decision of the Second Circuit of Appeals in Eisner by giving guidelines seemed to have resolved the issue of distribution of literature on school premises. This was not to be, as other cases soon followed in the federal courts.

A North Carolina case, Quarterman v. Byrd (1971),[42] resulted from the suspension of a tenth grade student for distribution of an underground newspaper. The Pine Forest High School near Southern Pines had a rule requiring permission of the principal before literature could be distributed. The plaintiff violated the rule and was suspended for ten days. He returned to school after the suspension and two months later distributed another underground newspaper. The plaintiff was once again suspended for ten days. He brought action in the district court asking for declaratory judgment. Plaintiff alleged that school rule violated First Amendment rights. He sought temporary and permanent injunction against enforcement of his suspension and damages.

The district court denied the temporary injunction and stayed the action until state administrative and judicial remedies

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[41]Eisner v. Stamford Board of Education, 440 F. 2d 810 (1971).

[42]Quarterman v. Byrd, 453 F. 2d 54 (1971).

had been exhausted. The plaintiff appealed the stay order to the Fourth Circuit Court of Appeals.

The court of appeals granted injunctive relief pending the appeal. The circuit court saw the issue as dealing directly with a fundamental constitutional right under the First Amendment. The court concluded that administrative remedies did not provide a satisfactory alternative and the federal, not the state, court was the proper place for the suit.

The Fourth Circuit Court while reaffirming that First Amendment rights were not absolute for either students or adults, that a difference did exist between the constitutional rights of secondary students and college students in the area of publications and that constitutional rights of secondary students could be modified, nevertheless, found the school regulation invalid.

The court in regard to prior restraint on the distribution of literature said:

> Specifically, school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "reasonably forecast" substantial disruption of or material interference with school activities on account of the distribution of such printed material.[43]

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[43] Ibid., p. 58

The court pointed to the Fifth Circuit case of Butts v. Dallas Independent School District (1971) where the court held that school authorities in exercising a power of prior restraint did not have to wait until disruption actually occurred.

The court also made reference to the position of the American Civil Liberties Union on student publications. In their pamphlet one finds the following statement:

> Neither the faculty advisors nor the principal should prohibit the publication or distribution of material except when such publications or distribution would clearly endanger the health or safety of the students, or clearly or imminently threaten to disrupt the educational process, or might be of a libelous nature. Such judgment, however, should never be exercised because of disapproval or disagreement with the article in question.[44]

The Fourth Circuit Court of Appeals found the school regulation in this case invalid due to the absence of any criteria to be followed by school authorities in deciding whether to grant or deny permission and the absence of procedural safeguards in regard to review procedure of the decision of school authorities. The court said:

> Eisner, which involved largely the same issue as is presented here, set forth the reasonable requirements for "an expeditious review procedure" that are practical as applied in connection with the operation of a public school and

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[44]American Civil Liberties Union, Academic Freedom in the Secondary Schools (New York: American Civil Liberties Union, 1968), pp. 11-12.

that will meet the basic requirements of Freedman.[45]

The court in reference to the guidelines drawn by the Second Circuit in Eisner said:

> . . . the regulation involved in this action includes neither such limited procedural safeguards nor any guidelines for determining the right to publish or distribute and is accordingly constitutionally defective.[46]

The Quarterman case relied heavily on the finding of the court in Eisner. The case of Baughman v. Freinmuth (1972)[47] in Montgomery County, Maryland, quoted often from Quarterman in reaching its decision.

The action in Baughman was filed in December of 1969 on behalf of infant plaintiffs against the Montgomery County Board of Education and the Maryland State Board of Education. The suit alleged that school regulations, by way of prior restraint, violated the First Amendment right of students to distribute non-school sponsored literature on school grounds.

The action arose over the distribution of a position paper critical of the regulations on distribution. The parents of the students involved were notified in a letter by the principal of their children's behavior. There was no other punishment.

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[45] Quarterman v. Byrd, 453 F. 2d 60 (1971).

[46] Ibid.

[47] Baughman v. Freinmuth, 343 F. Supp. 487 (1972).

After the action was filed, all types of procedural maneuvers were used including appeals, a counter suit by concerned parents opposed to the plaintiffs and action by the state board to void the Montgomery County regulation. These legal steps delayed the case from reaching the district court until May of 1972. The board regulation had been modified twice in the interval between the filing of the action and the case reaching the court. Due to these factors and the fact that no punishment was involved, the district court considered only the constitutional validity of the regulation.

The district court using Quarterman as the precedent case suggested the Fourth Circuit Court had called for the same guidelines drawn by the court in Eisner. Judge Northrup in this case saw Eisner as requiring:

> (1). The specifying of a definite brief period within which review of material will be completed;
>
> (2). The specifying of to whom and how material must be submitted; and
>
> (3). A provision that the prohibition against distribution will not become operative until each school has established its own screening procedure.[48]

In comparing the Montgomery County regulation to these guidelines, the court found that a time period was not provided, that principal as the receiving officer seemed all right and

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[48] Ibid., p. 492.

that it was a uniformly administered county policy.

On the basis of this comparison the court held:

> . . . that the Montgomery County rule must fall in light of the requirements of Eisner via Quarterman because of the absence of a definite short period of time in which the censoring individual must make his decision.[49]

The district court refused to enjoin the Montgomery County Board from adopting a rule of prior restraint following the principles of Quarterman. The court further refused to enjoin the board from enforcing in the future a rule re-drafted within the parameters of Quarterman. The district court said:

> . . . if Quarterman stands for anything at all, it stands for the proposition that a rule of prior restraint may be imposed if that said rule is properly drafted to avoid constitutional pitfalls. This Court is not about to declare the Montgomery County Board incapable of carrying out this task any more than this Court is about to take over the running of the schools themselves, however much certain elements of the school patron population would like to see that unlikely event come to pass. Indeed, one sometimes gets the feeling in cases such as this that the mouths of babes are oft times the vehicles by which the parents seek to publicize their pet peeves.[50]

The case of Fujishima v. Board of Education (1972)[51] resulted from action brought by three high school students in Chicago, Illinois. They were suspended for violating a school rule. This rule prohibited distribution of material on the

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[49] Ibid.

[50] Ibid., p. 493.

[51] Fujishima v. Board of Education, 460 F. 2d 1355 (1972).

school ground without the approval of the general superintendent of schools. The plaintiffs alleged violation of their constitutional rights under the First Amendment.

In an unprecedented move, the district judge gave an opinion on all motions before the court without a hearing or oral argument. The judge granted some of the plaintiffs' requests, denied others and left the issue in a general state of confusion. The plaintiffs appealed to the United States Seventh Circuit Court of Appeals.

The defendants contended the regulation was constitutionally permissible, because it did not require approval of the content of a publication before distribution. The court of appeals did not agree and held that a regulation requiring prior approval is unconstitutional as a prior restraint in violation of the First Amendment.

The Seventh Circuit traced the course of litigation involving distribution of literature in the public schools. The circuit court said:

> We believe that the court erred in Eisner in interpreting Tinker to allow prior restraint of publication - long a constitutionally prohibited power - as a tool of school officials in "forecasting' substantial disruption of school activities.[52]

The court pointed out that the forecast rule in Tinker

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[52] Ibid., p. 1358.

was meant to be used to justify punishment of students for exercise of their First Amendment rights, not to prevent First Amendment rights by establishing a system of censorship.

The Seventh Circuit Court in its decision stated:

> Because we believe Eisner is unsound constitutional law and because defendants in effect concede that they cannot require submission of publications before approval of distribution, we declare section 6-19 unconstitutional and remand the case for entry of an injunction against its enforcement.[53]

The decision went further by denying a class action in the suit and expunging suspensions from the records of all three students.

In the case of Koppell v. Levine (1972)[54] the court applied the "reasonable forecast of substantial disruption or material interference with school activities test" and found the principal had invaded student rights by the suppression of material he felt was obscene.

The principal was ordered to return to plaintiffs the impounded copies of the literary magazine in question. The court refused to award damages, but did award court cost since the plaintiffs were forced to sue to obtain constitutional rights.

[53] Ibid., p. 1359.

[54] Koppell v. Levine. 347 F. Supp. 456 (1972).

The case of Egner v. Texas City Independent School District (1972)[55] took an unusual turn and resulted in a decision which was a complete reversal of the procedure in Quarterman.

Action was commenced in a state court over the suspension of a high school student for distribution of certain literature in violation of a school rule. Before the hearing in the state court, the defendants removed the suit to the federal court. The plaintiff filed a motion to remand.

The plaintiff's motion was granted by the United States District Court on the basis that available and adequate judicial remedy had not been exhausted. The district court said:

> The times must indeed be out of joint when an agency of the state flies headlong into a federal court in order to avoid subjecting itself to a federal constitutional adjudication in a court of its own state. Although this court is reluctant to attribute to defendants the base motive of judge-shopping, this would appear to be the only rational explanation for such an anomolous procedural maneuver.[56]

On the issue of publication and distribution of literature in the public schools, the federal courts have made it clear that school officials may regulate the time, place and manner of distribution. However, the constitutional right to distribute does not give the student the right to disrupt the educational process in the school.

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[55] Egner v. Texas City Independent School District, 338 F. Supp. 931 (1972).

[56] Ibid., p. 945.

One facet of this issue that remains to be resolved is the submission of material for approval by school authorities or even approval by school authorities to distribute material. The court in Eisner and Quarterman held that rules of prior restraint could be drawn up by boards of education within certain parameters. The court in Fujishima v. Board of Education held that no rule of prior restraint could be adopted by boards of education.

Nat Hentoff writing in SATURDAY REVIEW put the issue in proper prospective when he said:

> Not all cases have been won, but the direction of court opinion is toward broadening high school students' rights to publish and distribute their news. Censorship of school papers and the banning of outside material remain the normative conditions in most schools, but now when these restrictions are challenged, the burden is increasingly on school authorities to prove that unfretted freedom of expression will lead to substantial disorder in the school or to infringement on the rights of others.[57]

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[57]Nat Hentoff, "Why Students Want Their Constitutional Rights Now," Saturday Review (May 22, 1971), p. 63.

CHAPTER IV

ASSEMBLY AND ASSOCIATION: FIRST AMENDMENT

This chapter will look at the constitutional right of students to assemble in the public schools. This First Amendment right of the people peaceably to assemble is closely related to the right of free speech and expression. Both issues have manifested themselves in the public schools.

The right of secondary students peaceably to assemble is an emerging issue in the federal courts. For this reason, it will be necessary to include in the chapter related higher education cases and state cases involving the use of an injunction to prohibit meetings.

The First Amendment to the Constitution of the United States reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The clause on assembly in the First Amendment did not grant any new freedom, but was simply a constitutional bar to congressional restrictions of freedom of assembly as the right was understood to extend at that time.

This interpretation of freedom of assembly was upheld by the United States Supreme Court in the case of United States

v. Cruikshank (1876).[1] Cruikshank and others were charged with conspiring in violation of the Enforcement Act of May 31, 1870, to hinder certain persons from peaceably assembling. Holding the act applicable only to deprivation of national rights and not state rights, the majority decided the general right to hold a lawful meeting was in the latter category and dismissed the indictment. Chief Justice Morrison Waite; in the opinion for the Court, gave the intent and effect of the First Amendment Assembly Clause:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government.... It is found wherever civilization exists. It was not, therefore, a right granted to the people by the constitution.[2]

Since the First Amendment right of assembly offered protection against abridgement only by the federal government, an individual had to rely on his state constitution for protection against state action. Only four of the original thirteen states had expressed guarantees of the right of assembly in their state constitution in 1789.

A statement on the right of assembly first appeared in a state constitution in the North Carolina Constitution

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[1] United States v. Cruikshank, 92 U.S. 542 (1876).

[2] Ibid.

of 1776. Article XVIII states:

> That the people have a right to assemble together to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.[3]

Today, only Virginia and Minnesota do not have specific constitutional guarantees of the right of assembly.

With the ratification of the Fourteenth Amendment containing the "equal protection" and "due process" clauses, questions arose that the liberty protected should include at the very least, the freedom of speech and press mentioned in the First Amendment. The Supreme Court under jurisdiction of the due process clause of the Fourteenth Amendment brought freedom of speech in the First Amendment under protection from impairment by the states in Gitlow v. New York in 1925. The Court followed by voiding a state law in Near v. Minnesota in 1931, because it denied due process by unreasonably restricting freedom of the press.[4]

In DeJonge v. Oregon (1937)[5] the Court brought freedom of assembly under the same rule announced for freedom of speech

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[3]Glenn Abernathy, The Right of Assembly and Association (Columbia: University of South Carolina Press, 1961), p. 15.

[4]Easter C. Sweet, Civil Liberties in America (Princeton, N.J.: Van Nostrand Company, Inc., 1966), p. 80.

[5]DeJonge v. Oregon, 229 U.S. 353 (1937).

in Gitlow. Chief Justice Charles Evans Hughes, speaking for a unanimous Court in the DeJonge case, stated:

> Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution ... The right of peaceable assembly is a right cognate to those of free speech and equally fundamental ... The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, principles which the 14th Amendment embodies in the general terms of its due process clause .....[6]

The Court went even further in 1944, in a statement in Thomas v. Collins to the effect that First Amendment rights be accorded a preferred position in the American pattern of democracy.[7]

The exercise of freedom of speech so often involves a gathering of people, that conflicts often affect more than one right under the First Amendment. Because freedom of speech occupies a "preferred position" in the words of the Court, many decisions are made on the basis of this right; although, the freedom to assemble is also in question. This happened in civil rights cases such as Edwards v. South Carolina (1963).[8]

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[6] Ibid.

[7] Abernathy, op. cit., p. 16.

[8] Edwards v. South Carolina, 372 U.S. 229 (1963).

After assembling peaceably on the State House grounds to protest discriminatory actions against Negroes, the petitioners were told they would be arrested if they did not disperse in fifteen minutes. They continued their protest, were arrested and charged with breach of peace. The Court reversed the decision which had been upheld by the South Carolina Supreme Court. The Court held that South Carolina infringed on the petitioners' constitutionally protected rights of free speech and assembly. The decision of the Court was based on the First Amendment freedoms, protected under the Fourteenth Amendment from invasion by the states.

The strategy used by civil rights groups has been adopted by both college and public school students. Thus the problem of the right of assembly in the public schools has been associated with protests, demonstrations, boycotts and sit-ins.

Limitations can be placed on First Amendment rights as pointed out in the Court in DeJonge v. Oregon. If the right of assembly is used to incite violence or crime, the government is free to take appropriate action against such conduct. However, assembly for lawful discussion cannot be made a crime merely because those who exercise the right are despised or unpopular.

A gathering of people together often creates problems which must be subject to some control in the interest of law

and order. A person may not; for example, call a meeting in the middle of a busy highway. Such things as noise, riots and traffic jams can be regulated so long as the regulation is not used as a cloak for stifling freedom of expression.

ASSEMBLY

The student's right peaceably to assemble has not arisen as a separate issue in the public secondary schools. It has arisen in connection with a number of court cases involving freedom of expression or speech in the schools.

The right of assembly has manifested itself most often in connection with boycotts, walkouts, sit-ins and demonstrations. The authority of school officials has been challenged in the courts for suspending students for participating in the above named activities. The constitutional right of students to assemble and express themselves comes into conflict with the authority of the school to maintain order and discipline. The school does have the legal authority to prohibit activity that disrupts the educational process.

Another issue is the challenge to injunctions that prohibits certain activity in school or on school grounds. These temporary restraining orders issued by state courts have been upheld and overruled by the federal courts. Each case stands

on its own merit.

The federal courts have repeatedly affirmed the authority of the states and school officials, consistent with fundamental constitutional safeguards to prescribe and control conduct in the schools. The problem here comes when students in the exercise of First Amendment rights collide with the rules of school authorities.

The Supreme Court said in Tinker that students may express an opinion in the cafeteria, on the playground, or in the hall; even on controversial subjects. However, any conduct which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the Constitutional guarantees of the First Amendment.[9]

Since most cases involving right of assembly come to the courts usually after the suspension of students, this brings into the courts alleged violation of due process along with First Amendment rights. Due process will be mentioned in this chapter only in its relation to First Amendment rights.

The claim of a First Amendment right was raised by a student in the Dunn v. Tyler Independent School District (1971)[10]

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[9]Tinker v. Des Moines Independent Community School District, U.S. 21 L Ed 2nd 781, 89 S. Ct. (1963).

[10]Dunn v. Tyler Independent School District, 327 F. Supp. 528, (1971).

case in Texas. The case arose over the protest of the election procedure of cheerleaders by black students. The black students were suspended after they walked out of school and gathered around the flag pole. The United States District Court found the following school rule constitutionally defective.

> Any student who participates in a boycott, sit-in, stand-in, walk-out or other related forms of distraction ..... shall by this action be subject to automatic suspension from school.[11]

The court found the regulation defective, because it did not stress that it was limited to disruptive activity that materially interfered with the educational environment. The court in the decision did say:

> School district's interest in preventing substantial disorder and material disruption of classroom activity is of such compelling interest as to justify reasonable regulation which will have some impact upon speech and assembly rights.[12]

In Farrell v. Joel (1971),[13] Molly Farrell, a high school sophomore, was suspended for participating in a sit-down outside the school administrative offices. The incident occurred in Connecticut and came before the Court of Appeals

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[11] Ibid., p. 533.

[12] Ibid., p. 529.

[13] Farrell v. Joel, 437 F. 2d 160 (1971).

in 1971. The sit-in was in protest to the suspension of three fellow students and involved approximately thirty students.

The suspension was for violation of Rule 15 (c) of the Clinton Board of Education Policies, which was read to the protesters by the principal. The rule stated in part that:

> Pupils who walk out of school, sit-in, damage property, harass teachers will be dealt with as follows:
> *
> 2. Pupils who walk-out or sit-in will be given the opportunity to return to their classes and appoint designated leaders to meet with school officials to discuss and seek solutions to the problem.
> 3. Pupils who fail to heed the warning to return to classes and continue the walk-out and/or sit-in, will be suspended at once.[14]

The Court affirming the decision of the lower court, upholding the decision stated:

> First Amendment does not guarantee right to substantially disrupt operation of a school; thus where substantive portions of school rule governing suspension of students for participating in sit-in were reasonable, student's suspension under authority of rule was not invalid on ground that it had a significant chilling effect on exercise of First Amendment rights by other students.[15]

Two cases involving picketing recently heard by the United States Supreme Court polished up the Tinker doctrine and at the same time provided schoolmen with guidelines under which picketing may be banned on or near school grounds. Both cases concerned city ordinances prohibiting picketing on or

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[14] Ibid., p. 161.

[15] Ibid., p. 160.

near schools.

The first case occurred in Rockford, Illinois, in which the defendant was convicted of violating the city ordinance by demonstrating in front of the senior high school. Mr. Justice Marshall speaking for the Court in the decision of Grayned v. City of Rockford (1972):[16]

> held that city antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or a diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad.

Mr. Justice Marshall in reference to Tinker in the decision of the Court stated:

> But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted but only if the forbidden conduct materially disrupts classwork or involves substantial disorder or invasion of the rights of others.[17]

The second case concerned a Chicago ordinance which said:

> A person commits disorderly conduct when he knowingly pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any

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[16] Grayned v. City of Rockford, 92 S. Ct. 2294, (1972).

[17] Ibid., p. 2304.

school involved in a labor dispute.[18]

The defendant was frequently a lone picket with a sign alleging racial discrimination. After the ordinance was passed, he filed suit in federal court alleging the statute was unconstitutional; because it was too broad and restricted free speech.

The Supreme Court in this case, Police Department of City of Chicago v. Mosely (1972)[19] did not follow the Tinker doctrine in ruling that the ordinance was too broad a restriction. It voided the ordinance on a point not even considered by lower courts: the special exception for labor disputes, an exception the Court considered arbitrary. Mr. Justice Marshall delivered the unanimous decision of the Court:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.[20]

Several cases involving higher education will be considered for they may have implications for future cases involving the right of assembly in the public schools. The

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[18]Police Department of the City of Chicago v. Mosley, 408 U.S. 92(1972).

[19]Ibid.

[20]Ibid., p. 96.

first three cases will involve cases in state courts and are included here, because they are concerned with injunctions or temporary restraining orders limiting the rights of students.

In the case of Board of Higher Education of the City of New York v. Marcus (1970)[21] Brooklyn College had been granted a temporary restraining order against disruptive student activity on the campus. The students in a counter motion asked the court to vacate the order. The court continued the temporary order in effect with a modification that permitted peaceful protest, demonstration, and assembly on campus by the students.

In the case of People v. Hariston (1970)[22] in Los Angeles County, an order of a university president was challenged. The court held that in view of the history of violence and disruption on a state university campus, an order by the president prohibiting "during the emergency" all demonstrations, assemblies, rallies and meetings in open forum or elsewhere, except for classes was constitutional.

In a Florida case, Lieberman v. Marshall (1970)[23] the right of the university to deny recognition to Students for

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[21]Board of Higher Education of the City of New York v. Marcus, 311 N. Y. S. 2nd 579, (1970).

[22]People v. Hariston, 87 Cal. Reptr. 470, Superior Court, Los Angeles County, (1970).

[23]Lieberman v. Marshall, 236 S. 2nd 120, Florida, (1970).

Democratic Society (SDS) was held valid. The court did not decide the question of whether any student group could use campus buildings without permission, but in ruling against the SDS motion the court said:

> The rights of students must be balanced against the right of the university to maintain order and respect for fair rules, and its need to pursue educational goals without disturbance. The court found this balancing resulted in favor of the university, and the activities of SDS and its members fell beyond the limits of protected speech.[24]

The next three cases have been decided by the Federal Courts. The first case is Hammond v. South Carolina State College (1967).[25] The case involved the suspension of students at South Carolina State who assembled to express themselves against certain practices of the college.

The district court held that a rule promulgated by college authorities prohibiting "parades, celebrations, and demonstrations" without prior approval of college authorities was a prior restraint on the right of freedom of speech and assembly, and was incompatible with the First Amendment and therefore invalid.

Judge Hemphill stated in his decision:

> Unless the officials have authority to keep order, they have no power to guarantee education ...

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[24] Ibid.

[25] Hammond v. South Carolina State College, 272 F. Supp. 947 (1967).

colleges, like all other institutions, are subject to the Constitution.[26]

In the Wisconsin Student Association v. Regents of University of Wisconsin (1970)[27] case at issue was the use of sound-amplifying equipment. The court held that a state statute which delegated unrestricted discretion to the administrative head of an educational institution to decide whether sound-amplifying equipment may be used in educational or administrative buildings owned or controlled by a state institution was declared unconstitutional, since there was an absence of standards to govern the exercise of discretion by the administrative officer.

As a result of student protest, demonstrations, sit-ins, and walk-outs many state legislatures, including North Carolina, have passed bills involving trespass and disorderly conduct. The North Carolina law will be considered later in the chapter.

In Tennessee, the case of Baxter v. Ellington (1970)[28] involved rulings on several Tennessee statutes in regard to disorderly conduct. Baxter was a student leader at the University of Tennessee and Ellington the governor. The court upheld one part of the statutes, modified one part and held one unconstitutional.

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[26]Ibid., p. 949.

[27]Wisconsin Student Association v. Regents of University of Wisconsin, 318 F. Supp. 591, (1970).

[28]Baxter v. Ellington, 318 F. Supp. 1079 (1970).

This part of the statute made one guilty of trespass, if he failed to leave an educational building or grounds when ordered to do so by an administrative official. This was declared to constitute a prior restraint on First Amendment freedoms.

ASSOCIATION

The issue of students' right of association arose in the state courts in the early 1900's. The controversy centered around secret societies and fraternities; it resulted in passage of anti-fraternity laws in at least twenty-five states. Local boards of education in most of the other twenty-five states adopted policies prohibiting such organizations.

The first recorded case was adjudicated in Washington in 1906. The case resulted from a school board regulation denying fraternity members the right to participate in extra-curricular activities. Even though the fraternity met outside school hours, the state court upheld the board regulation.

Several similar cases followed upholding school board regulations. The legal precedent was reversed in a Missouri case in 1922. This was the first and only time an anti-fraternity rule was declared illegal by a court.

One of the key cases on the issue arose in North Carolina in 1944. Students in Durham were required to sign pledge cards of non-affiliation with secret societies. Those who re-

fused to sign the pledges were denied participation in extra-curricular activities. The court upheld the school rule and emphasized that attendance at a public school is not an absolute right, since students are subject to all school rules and regulations.

Despite the firmness of the North Carolina decision, other cases reached the state courts. An Oregon case in 1952 resulted from a regulation subjecting students to suspensions or expulsions for joining secret societies. The plaintiffs contended the rule violated the right of assembly. The state court in upholding the board regulation called attention to the fact that by enrolling in and attending the public schools, the pupils came under the control and discipline of school officials. Other cases followed with the courts upholding school board regulations.[29]

One must realize these were state cases and most occurred before the civil rights movement in the 1960's. The Brown v. Board of Education (1954)[30] decision made education a right which had to be made available to all on equal terms. This case and the Civil Rights Act of 1964 marked the beginning of a procession of school related issues in the federal courts.

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[29]Edward C. Bolmeier, The School in the Legal Structure (Cincinnati: W. H. Anderson Company, 1968), pp. 211-214.

[30]Brown v. Board of Education, 347 U.S. 483 (1954).

These cases involving association also occurred before the Tinker decision in 1967. This was a landmark decision in the area of student constitutional rights and any ensuing challenge on the issue of association would certainly weigh the applicability of Tinker to the issue.

ANALYSIS

Since the First Amendment right of assembly is so closely related to that of speech and expression it is difficult to get an accurate and clear picture of students' right to assemble in the public schools.

The second problem that exists is the problem of defining a peaceable assembly. The definition often depends on the opinion of those in authority. It is in this context that courts must decide reasonableness of rules in relation to the rights of students.

The courts made it quite clear in Tinker v. Des Moines Independent Community School District (1969) and other decisions that students do not give up their constitutional rights at the school house gate. In Tinker the Court stated:

> In our system, state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons

under our Constitution.[31]

Several implications to school administrators should be evident as a result of Tinker and other court decisions. First, students may not be punished on the presumption that an act might cause disruption. Second, students may express objection to or rejection of any issue as long as it does not result in disruption of class. Thirdly, the concept of in loco parentis has been eroded as it relates to free speech and non-disruptive types of protest. The administrator's disagreement with the student's words is no longer sufficient grounds for punishment.[32]

On the other side of the question, the courts have clearly stated that unreasonable and disruptive behavior will not be tolerated in the schools. This was shown in the Blackwell case in 1966. This Mississippi case involving the wearing of freedom buttons in a high school saw the District Court uphold the school rule forbidding buttons.

The Court of Appeals affirmed the lower court decision and in its decision noted that school authorities have the right to prohibit and punish acts undermining school routine.

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[31]Tinker v. Des Moines Independent Community School District, 393, U.S. 503 (1969).

[32]National Association of Secondary School Principals, "A Principal's View of The Tinker Case," The Bulletin, Vol. 55 (February, 1971), p. 73.

It also stated that the student's constitutional right of free speech is not absolute, but must be balanced against the need for school order.[33]

Burnside (1966) was another Mississippi case involving the wearing of freedom buttons. In this case, the court held that the school rule was arbitrary and unreasonable since the wearing of the buttons did not cause disruption. The court stated in the decision:

> The liberty of expression guaranteed by the First Amendment can be abridged by state officials if their protection of legitimate state interest necessitates an invasion of free speech. The interest of a state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school system.[35]

The Tinker decision which gave wide latitude to school demonstrators has been modified by the Supreme Court in Grayned v. City of Rockford and Police Department of City of Chicago v. Mosley. Within the guidelines of these two cases, communities can adopt special, limited, and non-discriminatory regulations forbidding noisy - or even peaceful - demonstrations,

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[33] Blackwell v. Issaquena County Board of Education, 363 F. 2d 749 (1966).

[34] Burnside v. Byars, 363 F. 2d 744 (1966).

[35] Ibid.

while schools are in session.[36]

The General Assembly of North Carolina enacted legislation in 1971 covering riots and civil disorders. In light of the decision in Baxter v. Ellington in Tennessee, section four and five of the North Carolina statute will probably be challenged in the courts. Parts of Article 36A entitled Riots and Civil Disorders follow:

> 14-288.4. Disorderly conduct. - (a) Disorderly conduct is a public disturbance caused by any person who:
> *
> (3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative; or
> (4) Refuses to vacate any building or facility of any public or private educational institution in obedience to:
>
> a. An order of the chief administrative offices, the institution or his authorized representative, or; . . . . .
>
> (5) Shall after being forbidden to do so by the chief administrative officer, or his authorized representative, of any public or private educational institution:
>
> a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or

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[36]Lawrence W. Knowles, "High Court Uses Picketing to Tinker with Tinker," Nations Schools, Vol. 90 (November, 1972), p. 17.

> b. Congregate, assemble, form groups or formations (whether organized or not:, block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or facility. As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.[37]

Violation is a misdemeanor punishable by a fine not to exceed $500 or imprisonment for not more than six months.

The American Civil Liberties Union believes that if secondary school students are to become citizens trained in the democratic process; they must be given every opportunity to participate in the school and community, with rights parallel to those of adult citizens. In a broad sense, students are entitled to freedom of expression, of assembly, of petition, due process and equal treatment under the law.

The difference in age between secondary school and college students suggests the need for a greater degree of advice, counsel, and supervision by the faculty in the high schools than is appropriate for the college and university.

It is the responsibility of faculty and administration to decide when a situation requires a limit on freedom from harsh consequences. In exercising that responsibility,

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[37]North Carolina, Public School Laws of North Carolina (Charlottesville, Va. : The Michie Company, 1971), p. 230.

certain fundamental principles should be accepted in order to prevent the use of administrative discretion to eliminate legitimate freedom. The principles are:

(1) A recognition that freedom implies the right to make mistakes and that students must therefore sometimes be permitted to act in ways which are predictably unwise so long as the consequences of their acts are not dangerous to life and property, and do not seriously disrupt the academic process.

(2) A recognition that students in their schools should have the right to live under the principle of "rule by law" as opposed to "rule by personality." To protect this right, rules and regulations should be in writing. Students have the right to know the extent and limits of the faculty's authority and, therefore, the powers that are reserved for the students and the responsibilities that they should accept. Their rights should not be compromised by faculty members who while ostensibly acting as consultants or counselors are, in fact, exercising authority to censor student expression and inquiry.

(3) A recognition that deviation from the opinions and standards deemed desirable by the faculty is not ipso facto a danger to the educational process.[38]

The right peaceably to assemble is constitutionally bracketed with the right to petition the government for a redress of grievances. Accordingly, individual students and student organizations should be permitted to hold meetings in school rooms or auditoriums, or at outdoor locations on

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[38]American Civil Liberties Union, Academic Freedom in the Secondary Schools (New York: American Civil Liberties Union, 1968), p. 10.

school grounds. In such meetings, students should be free to discuss, pass resolutions, and take other lawful action respecting any matter which concerns them. Such assemblages should not be limited to the form of audience meetings; any variety of demonstration, whether it be a picket line, a walk-out, or any other peaceful type, should be permissible. The school administration is justified in requiring that meetings or demonstrations be held at times that will not disrupt classes or other school activities and in places where there will be no hazards to persons or property. The administration may also require advance notice when necessary to avoid conflicts and arrange for faculty supervision.[39]

The American Civil Liberties Union released a later statement in April of 1969. It warned student protest leaders and their followers against lawlessness and violence that could lead to backlash and counterviolence. The ACLU pointed out that it was committed to the protection of all peaceful, nonobstructive forms of protest, including mass demonstrations, picketing, and rallies. The organization was, however, disturbed about methods that some student activists have used in an attempt to achieve their ends. These methods violate

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[39] Ibid., p. 15.

and subvert the basic principles of freedom of expression and academic freedom.

The ACLU said:

> Protest that deprives others of the opportunity to speak or be heard, that requires physical take-over of buildings to disrupt the educational process, or the incarceration of administrators and others are anti-civil-libertarian and incompatible with the nature and high purpose of an educational institution.[40]

Assemblies are recommended to give students an opportunity to voice concerns and/or frustrations. Such assemblies could be both highly educational and serve as emotional outlets. The principal and key staff members should attend assemblies, participate in discussion and answer questions. The principal in the Farrell v. Joel case called an assembly to keep a small protest from developing into a large demonstration.[41]

Institutional control of campus facilities must not be used as a device for censorship. A committee made up of student, faculty and administration should draw up written procedures for organizational use of institutional facilities.

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[40]National School Public Relations Association, High School Student Unrest (Washington: National School Public Relations Association, 1969), p. 23.

[41]Richard L. Hart and J. Galen Saylor, Student Unrest: Threat or Promise (Washington: Association For Supervision And Curriculum Development, NEA, 1970), pp. 91, 92.

Such procedures should be designed only to facilitate scheduling and to permit adequate preparation. The procedures may include regulations on timing of request and the proper maintenance of facilities. The actual assignment function may be delegated to an administrative official with the committee retaining the right to hear appeals.[42]

Another consideration in the secondary school is the requirement of student organizations to obtain faculty advisers. The function of the adviser is to counsel, not control. Faculty, students and administration should all be aware of this role. In order to function, the adviser must not be held responsible for the actions of the group he counsels.[43]

Today, the question of association in the secondary schools revolves around student organizations. This question has not reached the federal courts. In several cases before the United States Supreme Court involving the NAACP, the Court pointed out that the Constitution protects expression and association without regard to the race, creed or political

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[42]NEA Task Force on Student Involvement, Code of Student Rights and Responsibilities (Washington : National Education Association, 1971), p. 17.

[43]Ibid., p. 18.

or religious affiliation of the members of the group.[44]

The issue of association becomes complex, because it involves not only the First Amendment, but also the Fourteenth Amendment and the Civil Rights Act of 1964. The right of association falls into the same category with the right of expression and assembly.

Alternatives to the traditional school day for public secondary students will have bearing on the issue of assembly and association. The traditional school day finds the student in class or study hall each period of the day.

One of these alternatives is the open campus concept where students are not in class each period, but have free time during the school day. The only criteria limiting any gathering of students would seem to be activity that disrupted the educational process of the school. Students would have freedom of movement, but would also have the responsibility of deciding how to best use their time.

Another alternate concept is that of independent study. Students would be free to work in the media center, the lounge or any other acceptable place on campus. The only limitation would be consulting with the instructor and a specified time period within which to complete an assignment.

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[44]NEA Task Force on Student Involvement, op. cit., p. 16.

Finally, there is the alternate school; such as the Parkway Project in Philadelphia where there is no school building. Students meet in the community and this school and others like it are called schools without walls. Here the question of assembly becomes a daily one of where to meet as a group.

The constitutional right of assembly must be viewed in the framework of the organizational and instructional pattern of the school. These alternate patterns may remove the question of the right of assembly and association as well as other issues from the courtroom back to educational planning within the school.

CHAPTER V

SEARCH AND SEIZURE : FOURTH AMENDMENT

Until recently the right of school officials to search a student's person or his locker had been little questioned. The Fourth Amendment's prohibition against unreasonable searches and seizures, as applied to the states and their institutions through the Fourteenth Amendment, was generally thought inapplicable.

The schools exercised this right under the in loco parentis doctrine which holds that parents transfer authority over the child to school officials while he attends class.

This places great responsibility on the school administrator who must act for the welfare of the child. The responsibility becomes more difficult with the growing problem of illegal drugs, bomb threats and weapons in the school. In addition, the decision to search a student or his locker entails the risk of bringing a legal action where the school official could be charged with violation of the student's constitutional rights.

The following review of legal precedents and recent court decisions concerned with cases involving alleged illegal search should be helpful to the school administrator in establishing guidelines to decide when to search a student or

his locker.

The first Ten Amendments to the Constitution of the United States, Bill of Rights, were to protect the individual rights of citizens from infringement by the Federal Government. These rights were not protected from state action unless included in the state constitution.

The Fourth Amendment to the Constitution of the United States follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The provisions of the Fourth Amendment can be traced back to the injustices suffered by American colonists under the British. During the colonial period, the British king permitted his judges to issue writs of assistance which were blanket search warrants.[1]

With the ratification of the Fourteenth Amendment it was assumed that provisions of the first eight amendments would be made applicable to the states by the due process clause. This was not interpreted as such by the United States Supreme

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[1] Frank K. Kelly, Your Freedoms : The Bill of Rights (New York: G. P. Putnam's Sons, 1964), p. 96.

Court for many years.

The case of Boyd v. United States (1886)[2] was the first in which the United States Supreme Court interpreted the Fourth Amendment protection. The decision of the Court was significant in that it tied together the Fourth and Fifth Amendments to make a search unreasonable if it resulted in self incrimination.

In Weeks v. United States (1914)[3] a conviction in a lower court was reversed by the United States Supreme Court, because Week's home had been searched by a U. S. Marshall without a search warrant. In the opinion the Court said that the action of the marshall was in direct violation of the constitutional rights of the accused. The decision resulted in the "Week's rule." This rule excluded illegally seized evidence in Federal Courts. Some states voluntarily adopted the rule, but most did not and so evidence illegally obtained was still permitted in state courts.

Olmstead v. United States (1928)[4] brought the question of wiretapping to the Court. The decision in the case was that wiretapping was not a violation of the Fourth Amendment.

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[2] Boyd v. United States, 116 U.S. 616 (1886).

[3] Weeks v. United States, 232 U.S. 383 (1914).

[4] Olmstead v. United States, 227 U.S. 438 (1928).

In Wolf v. Colorado (1949)[5] the Court was urged to make the rule of the Weeks case obligatory on the states. The Court refused to do so and Justice Frankfurter in the majority opinion stated:

> We hold, therefore, that in prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.[6]

This issue came before the Court once again in Rochin v. California (1952).[7] The Court bypassed the issue of illegal search by ruling that due process had been violated by methods that "shock the conscience."

Rochin was suspected of selling narcotics and three deputy sheriffs went into his bedroom and saw two capsules on a night stand beside the bed. Rochin put the capsules in his mouth. The deputies tried, but were unsuccessful in extracting the capsules. He was taken handcuffed to the hospital and at the direction of one of the officers, his stomach was pumped. The two capsules were recovered and found to contain morphine. Rochin was convicted and sentenced to sixty days.

The United States Supreme Court in reversing the decision of the state court found these methods to be too close to

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[5]Wolf v. Colorado, 338 U.S. 25 (1949).

[6]Ibid.

[7]Rochin v. California, 342 U.S. 165 (1952).

the rack and screw.

In a five to four decision in Irvine v. California (1948)[8] the Court upheld the admission of evidence obtained by wire-tapping in state courts. The majority opinion held that this was not forbidden by the Fourteenth Amendment in state cases.

In Mapp v. Ohio (1961),[9] the Court in a five to four decision made the provisions of the Fourth Amendment applicable to the states through the due process clause of the Fourteenth Amendment.

Justice Clark in the majority opinion stated:

> . . . . right to privacy no less important than free speech, free press, fair public trials, etc.
>
> . . . . our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense.[10]

The Court looked at the fact that it was thirty-five years from the time of the Weeks' rule to the Wolf case in 1949. In Wolf the Court had ruled that the Fourth Amendment could be applied to the states through the Fourteenth Amendment. This was not done and the Mapp decision removed the double standard as applied to state and federal courts.

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[8] Irvine v. California, 347 U.S. 128 (1954).

[9] Mapp v. Ohio, 367 U.S. 643 (1961).

[10] Ibid.

The question of wiretapping continued to pose a problem for the Court and is still permitted today under certain guidelines set down by the Congress and the Court.

Prior to the In re Gault (1967)[11] decision the courts had for many years operated under the philosophy that procedural safeguards were not necessary in juvenile proceedings.

The Gault decision was a landmark case in that it was the first time the United States Supreme Court considered the constitutional rights of children in juvenile courts. The Court ruled that Juvenile courts must grant to children many of the procedural protections required in adult criminal trials by the Bill of Rights.

Justice Abe Fortas in the majority opinion stated:

> . . . Neither Fourteenth Amendment nor Bill of Rights is for adults alone.
>
> . . . The United States Constitution would guarantee him rights and protections with respect to arrest, search and seizure and pretrial interrogation.[12]

Justice Fortas with this statement in Gault made the Fourth Amendment right of search and seizure applicable to juvenile proceedings. The Gault case did not involve search and seizure, but it is significant in the extension of this right of juveniles.

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[11] In re Gault, 87 S. Ct. 1428 (1967).

[12] Ibid., p. 1444.

An example of the application of this Fourth Amendment right can be found in a North Carolina case that occurred in Alamance County. The case of Bumper v. State of North Carolina (1968)[13] finally reached the Unites States Supreme Court on writ of certiorari.

Bumper, a sixteen year old black boy who lived with his grandmother, was convicted in superior court of rape and felonious assault. The implicating evidence in the trial was a rifle found by authorities in the grandmother's home, where the boy resided. The authorities had gained entrance into the house by telling the grandmother they had a search warrant. However, the search warrant was never shown to the grandmother.

The decision of the superior court was appealed to the Supreme Court of North Carolina which affirmed the decision of the lower court. The case then went to the United States Supreme Court.

The United States Supreme Court reversed the decision and Mr. Justice Stewart in the majority opinion stated:

> Search conducted in reliance upon search warrant cannot later be justified on basis of consent where warrant turns out to be invalid or state does not attempt to rely on validity of warrant or to show that there was, in fact, any warrant at all.

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[13]Bumper v. State of North Carolina, 88 S. Ct. 1788 (1968).

> Law enforcement officers claiming authority to search a house under a search warrant announces, in effect, that occupant has no right to resist search, and therefore, situation is instinct with coercion, albeit colorably lawful coercion, and hence, there cannot be consent to search.[14]

The probable cause requirement of the Fourth Amendment has been rarely raised in the lower courts as it applies to the detention of juveniles by authorities. In Baldwin v. Lewis (1969)[15] the Wisconsin Court held that the probable cause requirement of the Fourth Amendment did apply to a juvenile who was taken into custody.

The question of the right of school officials to search students is not a new one for the courts. The Gault decision has raised the constitutional question of the protection of juveniles from unreasonable search and seizure. The right of school officials to search both students and student lockers is being challenged today.

The case of Phillips v. Johns (1930)[16] involved a young boy and girl who were searched after twenty-one dollars was taken from a teacher's pocketbook. The principal searched the boy and the woman teacher, the fourteen year old girl. The teacher told the girl she was looking for notes written by the girl. The girl had to remove her clothes during the search.

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[14] Ibid., p. 1792.

[15] Baldwin v. Lewis, 300 F. Supp. 1220 (1969).

[16] Phillips v. Johns, 12 Tenn. App. 354 (1930).

It turned out that neither the boy nor girl who was searched had taken the money.

The girl learned later the real reason for the search. She was too ashamed to go back to school. Her mother transferred her to another school and brought charges against the teacher.

The jury upheld the right of school officials to conduct such a search and held that:

> A school teacher stands in loco parentis, and when a child is charged with taking money the teacher has a right to search the child the same as a parent would have in order to remove suspicion.[17]

On appeal the appellate court reversed the decision and declared that the search was illegal. It ruled that even though the search was made in good faith and without violence, it was made for the benefit of the teacher and not the child.

In another Tennessee case, Marlar v. Bill (1944),[18] a ten year old child entered a classroom during recess in violation of school rules. He lied to the teacher and was turned over to the superintendent. He was punished by the superintendent. Shortly afterwards, a dime was reported missing in class and the teacher searched this same boy's pocket.

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[17] Ibid.

[18] Marlar v. Bill, 178 S.W. 2d 634 (1944).

An action was brought on behalf of the ten year old student on a charge of an illegal search by school personnel. The teacher explained in court that she had searched the child not to find the money, but to remove suspicion since he had lied earlier about being in the room.

The trial court found for the teacher and the decision was upheld by the appellate court. The appellate court ruled that unlike the Phillips case, the search was to clear the child of suspicion and was not to recover the money and thereby benefit a third party. The court found the search permissable because it was done for the benefit of the child.[19]

Two recent state cases, both involving drugs, give some guidelines on the search of a student by school officials.

In a New York case, People v. Jackson (1971),[20] a high school coordinator of discipline, alerted to possible drug use, asked a student to go with him to his office. On the way the student broke and ran from the building pursued by the coordinator who with the assistance of a policeman caught the student after a three block chase. The coordinator confiscated various drug apparatus from the student and turned them over to the policeman. At the trial the court disallowed the evidence on

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[19] Ibid.

[20] People v. Jackson, 319 N.Y.S. 2nd 731 (1971).

the grounds that the coordinator was acting as a governmental official and searched the student without probable cause.

The appellate court reversed the decision on the basis of the high school standing in loco parentis to the student. The court stated that the evidence would have been inadmissible, if the search had been made by the policeman. The coordinator because of his relationship to the student was not bound by the probable cause doctrine and had a duty to investigate suspicions of illegal narcotics use. The court went even further ruling that this duty extended beyond the physical limitations of the school grounds.

In another state case, State of Delaware v. Baccino (1971),[21] a high school assistant principal while trying to get a student to return to class seized his coat. Because he had been suspected of previous drug use, the school official made a search of his coat. He discovered narcotics and the student was arrested.

An attempt was made to suppress the evidence on the grounds that the assistant principal, as a state official, made the search without probable cause and therefore the evidence was inadmissible, stating:

> . . . that a principal is not a private individual for purposes of the Fourth Amendment, but that his actions are

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[21] State of Delaware v. Baccino, Del. Super., 282 A. 2d 869 (1971).

> those of a state official and are subject to the Fourth Amendment. This does not mean, however, that the entire law of search and seizure as it applies in the criminal law is automatically incorporated into the school system of this state. The Fourth Amendment is the line which protects the privacy of individuals including students, but only after taking into account the interests of society. In Delaware a principal stands in loco parentis to pupils under his charge for disciplinary action, at least for purposes which are consistent with the need to maintain an effective educational atmosphere.[22]

The court said the in loco parentis doctrine must be balanced against student's Fourth Amendment rights to determine if these rights have been violated. The court ruled:

> (The) in loco parentis doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that . . . a search, taken thereupon on reasonable suspicion should be accepted as necessary and reasonable . . . This standard should adequately protect the student from arbitrary searches and give school officials enough leeway to fulfill their duties.[23]

The court in its decision denied the motion to suppress the evidence on the basis that the vice-principal had reasonable suspicion to believe that defendant's jacket contained contraband.

The problem of search and seizure is not only a constitutional issue, but presents a real problem to school administrators and teachers. The Fourth Amendment protects against unreasonable search and seizure, but the Constitution does not

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[22] Ibid., p. 871.

[23] Ibid., p. 872.

define what constitutes unreasonable or illegal search. The principal or teacher must therefore decide whether or not to search a student, his desk or locker.

The problem is made more complex in today's schools by the problem of drugs, bomb threats and weapons such as knives and guns.

One author states:

> While the student is under his jurisdiction, the administrator's responsibility and relationship with the child is that of in loco parentis, and he must act for the welfare of the child. The administrator or teacher, in his role as supervisor of children, has assumed the serious obligation of protecting the student from injuring himself or injuring others. He must also act to protect the child's best interests.[24]

Under the doctrine of in loco parentis, parental authority over the student is transferred to school officials while a youth attends class. This doctrine permits school officials to use whatever means a reasonable parent would employ in disciplining the student.

The doctrine of in loco parentis has recently been eroded by the federal courts. The United States Supreme Court in Tinker v. Des Moines Independent School District (1969)[25] recognized and acknowledged that students, like adults, have rights which "do not stop at the school house gate." While

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[24]Charles M. Wetterer, "Search and Seizure in Public Schools," Nolpe School Law Journal, Volume 1 (Spring, 1971), p.21.

[25]Tinker v. Des Moines Independent School District, 89 S. Ct. 737 (1969).

some rudiments of *in loco parentis* still exist, judges have interpreted the First Amendment as giving students increased freedom of the press and enlarging their right to speak.

The *Gault* decision extended the Fourth Amendment right of protection against unreasonable search and seizure to juveniles. The question to be considered here is whether this prohibits school personnel from inspecting lockers.

First to be considered will be cases that have reached the Federal Courts. In *Piazzola v. Watkins* (1970)[26] the United States Middle District Court in Alabama in 1970 held:

> It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security.[27]

The court also stated:

> A student is subject only to reasonable rules and regulations, but his rights must yield to the extent that they would interfere with the institution's fundamental duty to operate the school as an educational institution.[28]

The case of *Overton v. Rieger* (1970)[29] in New York started when Dr. Panitz, the vice principal, was presented by three detectives of the Mount Vernon Police Department with a

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[26] *Piazzola v. Watkins*, 316 F. Supp. 624 (1970).

[27] *Ibid.*, p. 626.

[28] *Ibid.*, p. 628.

[29] *Overton v. Rieger*, 311 F. Supp. 1035 (1970).

search warrant. The warrant seemingly authorized a search of two students and their lockers. The boys were searched and nothing found; but because of the suspicion, the vice principal opened the school locker of one of the boys, Carlos Overton, and found four marijuana cigarettes. The warrant was later declared defective as to school lockers, but the evidence was allowed on the grounds that the vice principal had voluntarily consented to the search of the student's locker and had the right to do so.

The Appellate Term of the Supreme Court in New York reversed Overton's conviction saying that since the consent for the search was induced by the search warrant, it was not freely given.

The New York Court of Appeals reversed the Appellate Term and reinstated the original conviction. The court in Overton said:

> The power of Dr. Panitz to give his consent to this search arises out of the distinct relationship between school authorities and students. The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.
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> Indeed, it is doubtful if a school would be properly discharging its duty of supervision over the students, if

it failed to retain control over the lockers.[30]

The case was appealed to the United States Supreme Court. The Court in a brief unsigned opinion, vacated the judgment of the New York Court of Appeals and remanded the case back to the New York Courts for further consideration in light of another United States Supreme Court decision, Bumper v. North Carolina. This case held that a search cannot be justified as lawful on the basis of consent where that "consent" has been given only after the official conducting the search has asserted that he possesses a search warrant.

In a rehearing of the Overton case by the New York Court of Appeals the court in a four - three decision reaffirmed their previous decision and held that the Bumper decision was not relevent in the Overton case, because Dr. Panitz obviously consented to the search and was not coerced by the search warrant. It is a noteworthy case, since it is most unusual for a state court to find contrary to the obvious desires of the United States Supreme Court.

State cases in Kansas and California were also concerned with the legality of locker searches.

The case of State v. Stein (1969)[31] was refused certiorari by the United States Supreme Court which allowed the decision of

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[30] Ibid., p. 1038.

[31] State v. Stein, 203 Kansas 638, 456 P. 2d 1 (1969).

Kansas Supreme Court to stand.

The Stein case grew out of an incident involving police officers who requested a high school principal to open a student's locker. A key was found which led to stolen goods in a bus station locker. Though he had agreed to the search of his locker, the student contended that the evidence obtained could not be used against him, because he had not been given the Miranda warning before the search, see (Appendix A). This warning is the explanation of one's rights by the police. The court ruled that the Miranda warning was not applicable to search and seizure generally, and to school student lockers specifically.

The court sustained the legality of the search since prior approval had been given by the student and the student did not have exclusive ownership of the locker. The court in Stein said:

> Although a student may have control of his school locker against his fellow student, his possession is not exclusive against the school and its officials. A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe the right of inspection is inherent in the authority vested in school administration and that the same must be retained and exercised in the management of our schools, if their educational functions are to be maintained and the welfare of the student body preserved.[32]

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[32] Ibid.

In a California case, In re Donaldson (1969),[33] a high school assistant principal, acting on information from a student, conducted a search of a student locker and seized marijuana. The search was conducted without a search warrant and without the student's consent. The student was convicted in juvenile court, but the decision was appealed on the basis that the marijuana was obtained by an unlawful search and seizure conducted by a school official who was a governmental official within the meaning of the Fourth Amendment.

The California Court of Appeals found in Donaldson that:

> . . . the vice principal of the high school (was) not. . . a government official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable search and seizures . . . . that the school official's search was not to obtain conviction, but to secure evidence of student misconduct . . . . (that) school officials . . . have a responsibility for maintaining order upon the school premises so that the education, teaching and training of the students may be accomplished in an atmosphere of law and order.[34]

The court did say that had the principal and police jointly searched the locker, the search would have been tainted with state action; therefore, illegal.

The law generally allows administrators to search lockers, but it is not a carte blanche right. School officials are

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[33] In re Donaldson, 75 Cal. Rptr. 220 (1969).

[34] Ibid., p. 222.

charged by the state with operating the school, and safeguarding the health, welfare and safety of students; therefore, when drugs, weapons, or other dangerous material is suspect, the principal not only has the right, but duty to make a thorough investigation.

Dr. H. C. Hudgins, associate professor of school law, Temple University, points out that the courts have not answered specifically if teachers may conduct locker searches. It is wise, therefore, to limit this responsibility to the principal or to a person delegated with specific administrative assignments.

Hudgins also states that while it is recognized that administrators can search lockers, they should be prudent in doing so. He recommends that the student be present when his locker is searched and that a third party be present as a witness.[35]

Eric Olson, an attorney, writing for the National Association of Secondary School Principals listed four circumstances for a lawful locker search by school officials:

> 1. The search is based on reasonable grounds for believing that something contrary to school rules or significantly detrimental to the school and its students will be found in that locker.

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[35] H. C. Hudgins, Jr., "Locker Searches and the Law," Today's Education 60:8 (November, 1971), p. 31.

2. The information leading to the search and seizure are independent of the police.

3. The primary purpose of the search is to secure evidence of student misconduct for school disciplinary purposes, although it may be contemplated that in appropriate circumstances the evidence would also be made available to the police. If evidence of a crime or grounds for a juvenile proceeding is lawfully obtained by school personnel, it may be turned over to the police and used by them.

4. The school has keys or combinations to the lockers and the students are on some form of prior notice that the school reserves the right to search the lockers.[36]

The courts have also held that police officers with a valid warrant may make a search of a student locker in connection with a valid arrest. The principal or other school official should be present at the time of the search. Parents should also be notified. In all instances a complete written report of the incident should be immediately recorded.

The Gault decision in 1967 did not answer all questions about the rights of juveniles. It was in effect only the first step in defining the constitutional rights of juveniles. Only Justice Douglas and Justice Black have advocated the same application of the Bill of Rights for both adults and juveniles. The Supreme Court will deal with the question of the constitutional rights of juveniles on a case by case method.

The precedent case of the juvenile right of protection

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[36]Eric Olson, "Student Rights - Locker Searches," The Bulletin of the National Association of Secondary School Principals, 55:352 (February, 1971), pp. 47-48.

from unreasonable search and seizure remains the Bumper v. North Carolina case. This case was cited by the Court in remanding the Overton case back to the New York Courts. The refusal of the Court to grant certiorari in the Stein case seems to leave the question of search and seizure in the state courts unless due process is violated.

While upholding the right of school officials to search student lockers, the cases do suggest that a school should publicize its locker policy, see (Appendix A). A reservation of right to search a student's locker should be published, stating that the administration retains the right to search student lockers, if such is necessary to maintain the integrity of the school environment and to protect other students.[37]

Still another question that remains unanswered is a search that does not satisfy Fourth Amendment standards, by school officials, of either a locker or a student's person to obtain evidence as a basis for suspending or expelling a student. One writer on the subject of searches of high school students thinks that such evidence illegally obtained under Fourth Amendment standards cannot be used against the student in a disciplinary proceeding that may lead to suspension or

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[37]National Association of Secondary School Principals, A Legal Memorandum (Washington: National Association of Secondary School Principals, 1972), p. 6.

expulsion. This would bring school disciplinary procedure in line with criminal procedure. At this writing, no court has held evidence in an expulsion hearing inadmissible on the grounds that it was obtained by methods which violate the Fourth Amendment.[38]

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[38]Robert E. Phay, editor, "Searches of Students and Lockers," School Law Bulletin, Vol. II, No. 1, Institute of Government (Chapel Hill:University of North Carolina, January, 1971), p. 6.

CHAPTER VI

DUE PROCESS; DRESS AND GROOMING:FOURTEENTH AMENDMENT

While dress and grooming regulations in the public schools have been challenged under the First, Fifth, Eighth and Ninth Amendments to the United States Constitution, most cases have been considered by the federal courts under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

Section one of the Fourteenth Amendment follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law.[1]

The majority of cases involving dress and grooming regulations have been considered by the courts under the Due Process Clause of the Fourteenth Amendment. Therefore, a brief explanation of due process will be given, but only in its relation to the issue of dress and grooming regulations in the public schools.

A due process clause is found in both the Fifth and Four-

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[1]Edward C. Smith, The Constitution of the United States (New York: Barnes and Noble, 1966), p. 52.

teenth Amendment to the United States Constitution as a restraint upon the federal and state governments respectfully. A clause in the Fifth Amendment states. . . "nor be deprived of life, liberty or property, without due process of law. . ."[2]

In discussing due process, one must break it down into two parts: Procedural due process concerns itself with correct procedures. This is especially true in the area of how cases are to be tried and steps leading up to the trial. As an example, a grand jury indictment and a trial by jury is essential in criminal cases.[3] In some school cases where violation of constitutional rights were alleged the issue was not considered by the court, because due process was not followed either by not giving notice or by not conducting a hearing before suspension or expulsion.

The second part is substantive due process. It is concerned with the underlying freedom of liberty. Justice Harlan in defining the term said, "It was the right founded in natural equity and based on the principle of universal law."[4]

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[2] Ibid., p. 50.

[3] Subcommittee on Constitutional Rights, United States Senate, Laymen's Guide to Individual Rights Under the United States Constitution/Washington: Government Printing Office, 1966), pp. 8-9.

[4] Patterson v. Colorado, 27 S. Ct. 559 (1907).

The Bill of Rights originally applied only to action by the federal government. Through the Due Process Clause of the Fourteenth Amendment, many of the guarantees and protections of the first ten amendments have been made applicable to state governments and their subdivisions. Operating under this principle:

> . . . certain rights and freedoms are deemed so basic to the people in a free and democratic society that state governments may not violate them, even though they are not specifically mentioned in the Constitution.[5]

The Equal Protection Clause of the Fourteenth Amendment prevents the state from making unreasonable, arbitrary distinctions between different persons as to their rights and privileges.[6] This clause has been cited by the federal courts in only a small number of cases, because of the difference in the application of school rules and regulations to boys and girls.

The problem of dress and grooming in the public schools is not new, but only since the Tinker and Gault cases have the federal courts considered the issue.

In 1923 the Arkansas Supreme Court in Pugsley v. Sellmeyer upheld the right of a school to prohibit any style of dress tending toward immodesty. The case involved the wearing of transparent hosiery and make up by girls. The Court said in its

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[5]Subcommittee on Constitutional Rights, United States Senate, op. cit., pp. 11-12.

[6]Ibid.

decision, that unless the rule was unreasonable the Court would not question the wisdom of the rule.

In 1932 the Supreme Court of North Dakota in Stromberg v. French upheld the right of school officials to prohibit the wearing of heel taps at school.

The Supreme Court of Massachusetts in Antell v. Stokes in 1934 by dismissing the case upheld the right of school officials to prohibit the wearing of jerseys and caps of a secret society on the school premises.[7]

In the 1950's the problem of tight pants on girls was unresolved. In 1966 the New York State Commissioner of Education ruled that a Saratoga Springs High School had overstepped its authority in suspending a girl who came to school on a cold day wearing slacks.

In the 1960's the problem was a girl's skirt length being too short and the hair length of boys too long. Where parents and school officials agree, it has been possible to establish regulations and enforce them. Though the number of parents siding with their offsprings is still a minority, the number is growing.[8]

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[7]Edward C. Bolmeier and Anne Flowers, Law And Pupil Control (Cincinnati: The W. H. Anderson Company, 1966), p. 83.

[8]Paul Woodring, "Long Hair and Mini-Skirts," Saturday Review (January 21, 1967), p. 55.

Both students and school officials cite Tinker as the basis for their position on dress and grooming regulations. Students challenge school regulations using Justice Fortas statement in Tinker that:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State.[9]

School officials point to Tinker because the Court said:

> The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.[10]

While there has been an avalanche of cases in the federal courts involving the length of male hair, only one case could be found dealing with dress per se as an issue.

This case, Bannister v. Paradis (1970),[11] saw action brought on behalf of a twelve year old sixth grader who was sent home for wearing dungarees to school in violation of the dress code in the Pottsfield, New Hampshire, schools.

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[9] Tinker v. Des Moines Independent School District, 89 S. Ct. 739 (1969).

[10] Ibid., p. 737.

[11] Bannister v. Paradis, 316 F. Supp. 185 (1970).

The court did not see the First Amendment as an issue, since there was no suggestion that wearing of blue jeans, clean or otherwise, constituted a right of expression. The court could find no other cases under the Civil Rights Act where the issue has been wearing apparel.

The district court did not see the right to wear clean blue jeans as being very high on the value scale of constitutional liberties. However, the court found no evidence that the wearing of dungarees inhibited or tended to inhibit the educational process.

The district court in prohibiting the school from enforcing that portion of the dress code which prohibits boys from wearing dungarees said:

> A person's right to wear clothes of his own choosing provided that, in the case of a school boy, they are neat and clean, is a constitutional right protected and guaranteed by the Fourteenth Amendment.[12]

The court went on to say that schools can exclude persons who are unsanitary, obscenely or scantily clad. Good hygiene and the health of other pupils require that dirty clothes be prohibited. Also obvious was that the lack of proper covering, particularly with female students, would distract other students and disrupt the educational process. The court thus recognized

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[12] Ibid., p. 188.

that school boards have the power to adopt reasonable restrictions on dress as part of its educational policy.

The court in its decision permanently enjoined the principal and school board from enforcing that portion of the dress code which prohibits boys from wearing dungarees. There were no costs to either party before the court.

The district court overruled only the section dealing with dungarees, thus upholding the rest of the school dress code. See Appendix B for the dress code adopted by the school board in April, 1970.

While only one case was found in the federal courts dealing with dress, every circuit court of appeals with the exception of the second circuit has ruled on school hair length or hair style regulations. There have been cases involving this issue in the district courts of the second circuit.

Three early cases in the federal courts will introduce the hair issue in the public schools and serve as background for the rest of the chapter. Cases reviewed will then be divided into those where school regulations were upheld and those decided in favor of the student.

An early case involving the length of a boy's hair, Davis v. Firment (1967),[13] saw a suit filed by a parent on

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[13] Davis v. Firment, 269 F. Supp. 524 (1967).

behalf of his fifteen year old son against the New Orleans School Board, the superintendent, and the principal of his high school.

The suit asked damages in the amount of $12,000 each for himself and his son, for embarrassment resulting from the boy being suspended for sixteen days because his hair was too long.

It was argued that action of the school authorities violated rights guaranteed by the First, Eighth, Ninth, and Fourteenth Amendments to the Constitution, as buttressed by the Civil Rights Act.

A conflict developed since Louisiana law requires school attendance for fifteen year olds and also provided for suspension with good cause.

A student handbook with regulations for dress was distributed the first three days of school. The principal warned all students on two successive days that students ignoring regulations would be suspended. The student in this case was warned by two teachers and then suspended for three days. Several conferences were held with no result prior to court action. The boy was finally readmitted when he showed up with an acceptable haircut.

The issue revolved around the question of the boy's constitutional right to keep his hair long in direct disobedience

to rules and regulations of the school. He contended that his hair style constituted symbolic expression of speech and was subject to First Amendment protection.

The court upheld the school board and while agreeing that symbolic expression is entitled to First Amendment protection it said:

> A symbol must symbolize a specific viewpoint or idea, what is student Davis trying to express? Nothing really. Even if hair style fell within this type of expression it would still be subject to reasonable regulation in furtherance of a legitimate state interest.[14]

The first major haircut case was Ferrell v. Dallas Independent School District (1966).[15] In this case three high school boys were denied admission to school, because they wore their hair "Beatle" style. These students were members of a professional music group whose performance contract required them to have this hair style.

They did not follow normal registration procedures at the beginning of school year, but went straight to the principal's office. His refusal to admit them and the publicity that followed was thought to have been planned by their agent.

The students brought action seeking to restrain school authorities, claiming that action of the school principal

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[14] Ibid., p. 527.

[15] Ferrell v. Dallas Independent School District, 261 F. Supp. 545 (1966).

denying them admission into school until they cut their hair was arbitrary and discriminatory and violated their constitutional right to equal opportunity for a public education.

The court held there was no abuse of discretion on the part of school authorities and that they had acted reasonably under the circumstances, considering the individual student and the need for an academic atmosphere.

It found no violation of the students' state or federal rights and went on to say that terms under which a free public education is granted in the high schools of Texas cannot be fixed or determined by the students themselves.

Therefore, the court dissolved the temporary order requiring admission of the students without compliance with the haircut rule and denied the students motion for a temporary injunction.

On appeal the Fifth Circuit Court of Appeals in a two to one decision upheld the regulation and the decision of the district court.[16]

The United States Supreme Court denied certiorari in the Ferrell v. Dallas Independent School District, Mr. Justice Douglas dissenting said:

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[16]Ferrell v. Dallas Independent School District, 393 F. 2d 697 (1968).

> It comes as a surprise that in a country where the states are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of "life, liberty, and the pursuit of happiness," expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncrasies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow-men.[17]

The next major hair case was in the United States District Court in Wisconsin. The following policy of the Williams Bay Board of Education affecting male students was challenged in Breen v. Kahl (1969):[18]

> 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.[19]

An important distinction was made in the hearing in that the state superintendent did not find the length of hair a disruptive influence or factor, but only that Breen's refusal to obey the rule was disruptive.

The question before the court concerned the board regulation as applied to the plaintiff violating the United

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[17] Ferrell v. Dallas Independent School District, 89 S. Ct. 98 (1968).

[18] Breen v. Kahl, 296 F. Supp. 702 (1969).

[19] Ibid., p. 703.

States Constitution. The judge placed the burden of justification on the defendents and summarized their justification under the following two points:

> (1). . .than in Williams Bay a male high school student whose hair is longer than the Board standard so departs from the norm that his appearance distracts his fellow students from their school work.
>
> (2). . .that students whose appearance conforms to community standards perform better in school, both in strictly academic work and extra-curricular activities, than those whose appearance does not conform.[20]

The district court held that school regulations forbidding high school students' long hair violated the Fourteenth Amendment. The school board appealed the decision.

The Seventh Circuit Court of Appeals in considering the case agreed with the district court that:

> Defendants here have fallen far short of showing that the distraction caused by male high school students where hair length exceeds the board standard is so aggravated, so frequent, so general, and so persistent that the invasion of their individual freedom by the state is warranted. The same is true of defendants showing with respect to the differential in school performance between male students with long hair and those with short hair.[21]

The school board argued before the circuit court that disciplinary powers of school authorities would be diminished, if the regulations were not upheld.

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[20] Breen v. Kahl, 419 F.2d 1036 (1969).

[21] Ibid.

The court replied:

> To uphold arbitrary school rules which sharply implicate basic constitutional values for the sake of some nebulous concept of school discipline is contrary to the principle that we are a government of laws which are passed pursuant to the United States Constitution.[22]

The Seventh Circuit Court of Appeals affirmed the district court's decision by a vote of two to one.

One circuit judge dissented on the basis that: (1) the regulation was not vague; (2) the norms were in accordance with area; (3) wearing long hair was the same as carrying a sign defying school officials; and (4) federal courts should not be the arbitrator of school regulations and hair length.[23]

The United States Supreme Court following their precedent in Ferrell denied certiorari in Breen v. Kahl.[24]

With the introduction of the hair issue, the cases in the remainder of the chapter will be divided into those decided in favor of the board of education upholding school regulations and those decided in favor of the student holding such regulations unconstitutional. Decisions in the courts are running about fifty-five percent to forty-five percent in favor of the student. These cases are only representative cases, but attempt to cover all phases of the problem of hair length.

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[22] Ibid., p. 1037.

[23] Ibid., p. 1038.

[24] Breen v. Kahl, 90 S. Ct. 1836 (1970).

In Neuhaus v. Torrey (1969),[25] a suit was brought by high school athletes against the superintendent for injunctive and declaratory relief against enforcement of school district regulations which established grooming regulations for athletes.

The grooming regulations challenged in a federal district court in California follows:

> (a) Each athlete will be well groomed and neat in appearance at all times.
> (b) Each athlete will be clean shaven.
> (c) The hair will be out of the eyes, trimmed above the ears and above the collar in back.[26]

The penalty for violation of the rule was suspension from all athletic competition for the season. The plaintiffs conceded they were in violation of the rules.

The court considered testimony of a number of witnesses, including team coaches called by both parties. In addition, authority was granted the California Coaches Association and the American Civil Liberties Union to file briefs amici curiae and to argue the case at length.

The court noted that the rules applied only to students participating in athletic competition and the alternatives were merely to forego athletic competition or trim the hair

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[25] Neuhaus v. Torrey, 310 F. Supp. 192 (1969).

[26] Ibid., p. 193.

above the collar and around the ears for a few months.

The court was convinced through testimony offered by the defendants, especially the coaches; that athletics require discipline, individual sacrifice and teamwork. Evidence was also presented that long hair could adversely affect performance in track events and certain other sports.

The court in its decision held that grooming standards for male students participating in extra-curricular athletic competition was rational, reasonable and was not an arbitrary or capricious decision of school officials. The decision held there was no violation of the Fourteenth Amendment and denied motion for preliminary injunction and vacated a temporary restraining order.[27]

The issue in Corley v. Daunhauer (1970)[28] was the length students participating in band must wear their hair. The plaintiff, a twelve year old seventh grade student, contended he was wearing long hair to protest United States involvement in the Vietnam War. The regulation was challenged as violating freedom of expression protected by the First Amendment.

The court could find no evidence that school officials were trying to prevent the plaintiff from protesting against

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[27] Ibid., p. 194.

[28] Corley v. Daunhauer, 312 F. Supp. 811 (1970).

the Vietnam War or against anything else. There was no attempt to punish him for his protest.

On the application of the band policy to plaintiff the court said:

> Reasonable restrictions on students in the fields of conduct, dress, and appearance are desirable if the schools are to operate effectively and efficiently. That is necessarily so because learning for many people is a discipline rather than a pleasure, and if it is to be practiced successfully, the practice must be carried out in dignified and orderly surroundings. Public school students, particularly those at the elementary and junior high school levels, are still immature, some of them are children of tender years. They are excitable and prone to be distracted from their tasks. Whatever may be thought about conformity in general, it seems clear that unreasonable conformity to established norms of dress and appearance contributes to orderly administration of classrooms, and that uncontrolled individuality of appearance tends to disrupt it. That has been the uniform experience of teachers and administrators for years, and that is why many of them have an almost reflexive tendency to move against personal oddities or eccentricities in the dress or appearance of individual students.[29]

The court went on to say that it was not unreasonable for the school to require band members to wear uniforms and strive for uniformity in appearance.

The court ruled that plaintiff's right to protest the war in Vietnam by wearing long hair was no higher or better than the right of some other band member to protest something else in some other manner. The district court held that requiring students in the band to conform their hair length to

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[29] Ibid., 816.

reasonable requirements of band director did not deprive them of a federally protected right. The complaint was dismissed.[30]

Christmas v. El Reno Board (1970)[31] was a case in which action was brought by the plaintiff for being unlawfully prohibited by acts of defendants from participating in a postgraduate diploma ceremony.

The diploma in the El Reno, Oklahoma, school system is an unofficial document presented in a postgraduate ceremony. The plaintiff along with other seniors had regularly graduated earlier. Attendance by students who had graduated was optional. An eight year old rule on hair length for diploma ceremonies was known to the plaintiff. He had been warned in September, October, November, April and May. His parents had also been informed of the regulation.

The district court ruled:

> . . . . regulations prohibiting male students from wearing their hair over their ears, eyes or collar were reasonable, uniformly enforced, and did not unlawfully or invidiously discriminate, as there were valid and compelling reasons for their enactment and enforcement, and that neither plaintiff's constitutional nor civil rights were violated by a refusal to allow him to attend ceremony without complying with regulations. Relief denied.[32]

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[30] Ibid., p. 817.

[31] Christmas v. El Reno Board, 313 F. Supp. 618 (1970).

[32] Ibid.

In Jackson v. Dorrier (1970),[33] male students and their parents brought action against the high school principal and board of education to enjoin enforcement of the school board regulation which prohibited male students from wearing long hair. The United States District Court for the middle district of Tennessee dismissed the action and the pupils and their parents appealed.

The case arose in Donelson High School in Nashville, Tennessee, over a board of education dress and grooming code adopted in 1961. The plaintiffs were allowed to finish out the 1967 - 1968 school year, but were suspended at the beginning of the 1968 school year. They were members of a musical rock group. During the previous year they were often absent from school and made low grades. Teachers and students both testified that plaintiffs were a disturbing influence in the school.

The Sixth Circuit Court of Appeals in its decision stated:

> In the absence of infringement of constitutional rights, the responsibility for maintaining proper standards of decorum, discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the board of education.[34]

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[33] Jackson v. Dorrier, 424 F. 2d (1973).

[34] Ibid., pp. 218-219.

The Sixth Circuit Court followed the Ferrell decision by the Fifth Circuit in holding that the district court committed no error in dismissing the case. The decision of the lower court was affirmed.

In Griffin v. Tatum (1970), a high school student sought readmission as a student in good standing and an injunction restraining school authorities from taking any other disciplinary action, because of the length and manner in which he wore his hair. The district court ordered readmission and granted injunction against application of rule. The defendants appealed to the Fifth Circuit Court of Appeals.

The high school student was suspended solely for the reason that his hair was blocked, rather than tapered in the back. This fact was undisputed before the court. The student made no claim that the overall regulation was invalid, so the issue before the court was blocked haircuts. The hair regulation prohibited Beatle haircuts, long sideburns and ducktails.

The district court ruled the hair regulation was arbitrary and unreasonable as applied to students and violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court did not stop with the blocked haircut portion, but struck the entire regulation.

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[35] Griffin v. Tatum, 425 F. 2d 201 (1970).

The Fifth Circuit Court of Appeals affirmed in part and reversed in part the decision of the district court. The court said:

> The clearly erroneous rule is a sufficient basis for affirming the district court as to the wrongful suspension of the appellant and for striking the blocked hair prohibition as it was applied to him.
>
> We reverse however, as to the action of the district court in striking the entire hairstyle regulation. This court held in Ferrell (1968) that it was proper for school authorities to establish rules and regulations in the interest of school management and this included a hairstyle regulation.[36]

Another case before the Fifth Circuit Court of Appeals was Stevenson v. Wheeler County Board (1970).[37] This was a civil rights case brought under 42 U.S.C.A. § 1981 and 1983, and 28 U.S.C.A. § 1343 (3), (see Appendix B), by three male Negro high school students who were suspended for refusing to shave. The district court denied relief and appeal was taken.

In September the District Court for Southern District of Georgia handed down a desegregation order to this high school. The Stevenson case was before the same district court in November, which prompted the following statement from the court:

> All this [desegregation effort] is suddenly jeopardized by a lilliput of a lawsuit - a legal controversy - a cause celebre that attracts a courtroom full of spectators . . .

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[36] Ibid., p. 203.

[37] Stevenson v. Wheeler County Board, 426 F. 2d 1154 (1970).

> What does it involve? It concerns the monumental question of the constitutional right of a student to wear a mustache in violation of a regulation of the school authorities.[38]

The Fifth Circuit Court of Appeals considered two questions:

> (1) . . .whether the school board could constitutionally maintain a good grooming rule for its students which as a part, thereof, required that male students shave.
>
> (2) . . .if so, whether the rule was unconstitutionally applied to the three students in question.[39]

The Fifth Circuit Court affirmed the district court decision and held that no substantial federal question was presented. Judge Bell for the court in answer to the two questions held:

> The Fifth Circuit Court has not denied school authorities in this circuit the right to promulgate reasonable regulations concerning hair styles.
>
> . . . .there was no evidence of racial discrimination nor any denial of equal protection as amongst male students, and also held that rule was founded on a rational basis and was not arbitrarily applied.[40]

The action in Carter v. Hodges (1970)[41] was brought by a twenty year old tenth grade student at Northside High School in Fort Smith, Arkansas. His action was brought to enjoin the

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[38] Stevenson v. Wheeler County Board, 306 F. Supp. 98 (1969).

[39] Stevenson v. Wheeler County Board, 426 F. 2d 1156 (1970).

[40] Ibid., p. 1158.

[41] Carter v. Hodges, 317 F. Supp. 89 (1970).

enforcement of a high school dress code prohibiting long hair.

The plaintiff was a member of a rock group and lived in an apartment away from his parents. He returned home before reporting for school in August of 1970. The plaintiff reported to school, picked up schedule cards and was sent to the dean's office, because of the length of his hair. After being suspended by the dean, the plaintiff physically assaulted him. He was expelled for the semester.

The dress code in question read:

> Hair of extreme length or bizarre style will be considered undesirable, this to be regulated by school officials. Facial hair will not be considered appropriate. Any hair over the ear lobe will be considered facial hair.[42]

In regard to the question of hair length being a federal question, the district court said:

> There is no United States Constitutional requirement that any State of the Union maintain a public school system and there is no United States public school system.[43]

On the question of the power to make and enforce such regulations, the court said:

> The courts are agreed that school authorities have broad discretion to enact and enforce student regulations so as to insure proper and efficient operation of the school.[44]

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[42] Ibid., p. 90.

[43] Ibid., p. 91.

[44] Ibid., p. 92.

The court found the code reasonable citing Corley v. Daunhauer and Ferrell and upheld student expulsion for striking the dean. The burden of proof in this case was on school officials to show the rule was reasonable and related to the educational process. The proof in this case was overwhelming in favor of the school.

The case of Jeffers v. Yuba School District (1970)[45] resulted from action by plaintiffs to have certain portions of the school dress code pertaining to the length of male students' hair declared unconstitutional. After the plaintiffs were suspended for being in violation of the dress code, they brought class action on behalf of all male students in the high school.

At the beginning of the 1969-70 school year, dress regulations were in effect which prohibited the wearing of excessive hair styles by male students. In February of 1970, the standards were formalized prohibiting (1) beards; (2) sideburns below the ear lobe; and (3) hair draping over the ears, shirt collar or eyes.[46]

Trial began in the District Court for the Eastern District of California in April 1970. The court considered the haircut issue under the First, Ninth and Fourteenth Amendments

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[45] Jeffers v. Yuba School District, 319 F. Supp. 368 (1970).

[46] Ibid., p. 369.

to the Constitution and decided the Fourteenth was the proper framework within which to place the hair regulation problem.

The court was faced with the following question:

> Do the hair regulations at Yuba City High School substantively violate the Fourteenth Amendment to the Constitution?[47]

In answer to this question, the court made the following statement:

> . . . because of compulsory attendance laws students don't always want to attend school, discipline under these circumstances is difficult to maintain. The court therefore feels that school authorities should be given the widest discretion within constitutional limits in promulgating regulations in the school. Unless the regulation is arbitrary and capricious the court will not interfere.[48]

In addition to the briefs and opinions filed with the court, there were many educators who testified on both sides of the issue. The court pointed out that its decision considered only the right of school officials to make the regulation and not the wisdom of maintaining the hair regulation. On the basis of the evidence presented:

> The court therefore finds that the hair regulations at Yuba City High School are reasonably and rationally related to the educational process and they do not deprive plaintiffs of their constitutional rights.[49]

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[47] Ibid., p. 372.

[48] Ibid., p. 373.

[49] Ibid., p. 374.

In the case of Wood v. Alamo Heights Independent School District (1970),[50] the Fifth Circuit Court of Appeals held that hair regulations were not arbitrary or unreasonable and were sufficiently related to alleviating interference with the educational process. One significant point in the case was the recognition by the court of student participation in the drawing up of dress code regulations.

The case of Freeman v. Flake (1971)[51] before the Tenth Circuit Court of Appeals involved the consolidation of three cases concerning regulation of hair styles for male students in the public schools. Before the court were decisions by the district court which upheld school board regulations in Utah and Colorado and rejected board regulations in New Mexico. The district court decision in each case had been appealed.

Though different in language, the regulation in each case essentially required that hair should not hang below the collar line in the back, the ears on the side and the eyebrows in front. In each case students sought to express their individualities and the school board offered justification for the regulations.

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[50] Wood v. Alamo Heights Independent School District, 433 F. 2d 355 (1970).

[51] Freeman v. Flake, 448 F. 2d 258 (1971).

The Tenth Circuit Court reviewed male hair regulations at the appeals court level and found the circuit courts sharply divided on the issue.

In regard to challenges to hair regulations in the federal courts, the Tenth Circuit said:

> No apparent concensus exists among the lawyers for the students as to what constitutional provision affords the protection sought. Reliance is variously had on the First, Fourth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution and on the penumbra of rights assured thereby. The uncertainty of position complicates, rather than clarifies the issue.[52]

The briefs for students in all three cases cited Tinker, but the court did not agree that hair style constituted symbolic speech.

The briefs for students also alleged the hair regulations were an invasion of privacy protected by a combination of the First and Ninth Amendments to the constitution. Griswold v. Connecticut (1965) was cited as the basis for this claim. The court did not agree with this assertion. The Tenth Circuit agreed with the Ninth Circuit in King v. Saddleback Junior College District (1970:[53]

> . . . that conduct controlled by hair style regulation is not conduct found in the privacy of the home but in

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[52] Ibid., p. 260.

[53] King v. Saddleback Junior College District, 445 F.2d 938 (1970).

> public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others.

The briefs for students either dismissed or entirely failed to discuss the problem of federal intervention in the control of state schools. In addressing himself to this question, the circuit judge stated:

> United States Constitution and statutes do not impose on federal courts duty and responsibility of regulating hair styles of male students in state public schools, and problem, if any, is one for states and should be handled through state procedures.[54]

The court felt the strongest constitutional argument which could be made on behalf of the students was based on the liberty assurances of the Due Process Clause of the Fourteenth Amendment.

The Tenth Circuit Court expressed doubts about the need for a test of reasonableness on any asserted constitutional rights concerning hair length for male students. The court further questioned the wisdom or necessity of the issue turning on the views of federal judges. The court said:

> The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools.[55]

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[54] Ibid., p. 258.

[55] Ibid., p. 261.

The court felt that all three complaints should have been dismissed for failure to state a claim on which relief could be granted. The Tenth Circuit affirmed the decision of the district court in the Utah and Colorado cases and reversed the district court decision in the New Mexico case.

The case of King v. Saddleback Junior College District (1971)[56] involved appeals by high school district, junior college district and junior college district superintendent from orders of the United States District Courts in California. Both cases involved dress codes placing limitations on the length of hair for male students. The cases were argued and submitted to the Ninth Circuit Court of Appeals. Since the issues were substantially the same, they were considered together.

In California, the statutory and regulatory authority for a junior college is the same as that for a high school, since both institutions are a part of the public secondary school system.

Under California law, a board of education has the power to adopt a code of pupil discipline including a grooming policy. Such policy is to insure personal cleanliness and neatness of dress, but the rule must not unreasonably infringe upon the exercise of a constitutional right.

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[56] King v. Saddleback Junior College District, 445 F. 2d 932 (1971).

Both cases were on appeal from orders of the district court enjoining the enforcement of a dress code regulations, pertaining to length of hair, by school officials.

The high school case before the Ninth Circuit Court was Olff v. East Side Union High School District (1969).[57] A fifteen year old was denied enrollment at the beginning of the school year, because his hair length was in violation of the dress code. The code included seven items to be observed by boys and five to be observed by girls. The policy also provided for a review committee made up of students, parents, teachers and administrators. This committee had affirmed the hair regulation in question in June of 1969.

Action was brought by the plaintiff in district court and school officials were enjoined from enforcing the hair regulation. Defendants were also enjoined from excluding the plaintiff from attending school.

The King case involved a dress code in a student handbook for junior college students similar to the regulation in Olff. The King case had been in the Court of Appeals before when a preliminary injunction was vacated and the case remanded for further proceedings.[58]

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[57]Olff v. East Side Union High School District, 305 F. Supp. 557 (1969).

[58]King v. Saddleback Junior College District, 425 F. 2d 426 (1970).

The Ninth Circuit Court of Appeals reviewed the hair length cases decided in the circuit courts. It reviewed the challenges to the issue under the First Amendment, Fifth Amendment right of privacy and under the Equal Protection Clause of the Fourteenth Amendment. It rejected all claims under these challenges.

The court saw the only challenge being under the Due Process Clause of the Fourteenth Amendment. However, under California law the circuit court found that: (1) school boards have the authority to establish regulations for the day to day operation of its schools; and (2) students have the duty to comply with the board's regulations.[59]

The court also placed the burden of proof on those who attached regulations unless there was a clear violation of a constitutional right. In both Olff and King, affidavits had been presented by experienced teachers and administrators that extreme hair length of male students interfered with the educational process.

In its decision the Ninth Circuit Court stated:

> This is not a question of preference for or against certain male hair styles or the length to which persons desire to wear their hair. This court could not care less. It is the question of the right of school authorities to develop a code of dress and conduct best conducive to the

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[59] King v. Saddleback Junior College District, 445 F. 2d 939 (1971).

> fulfillment of their responsibilities to educate and to do it without unconstitutionally infringing upon the rights of those who must live under it. We do not believe that the plaintiffs have established the existence of any substantial constitutional right which is in these two instances being infringed. We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process.[60]

The judgment granting a permanent injunction in King was reversed and the preliminary injunction in Olff was set aside by the Ninth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals found itself once again with a lawsuit attacking hair length regulation in the case of Karr v. Schmidt (1972).[61] The appellee, Chesley Karr, was a sixteen year-old student who had not been permitted to enroll for his junior year in an El Paso, Texas, high school; because he was in violation of school board regulation limiting the length of male students' hair.

The district court enjoined school officials to enroll Karr and to refrain from enforcing the hair-length regulation. The district court decision was based on the regulation being in violation of the due process and equal protection guarantees of the Federal Constitution.[62]

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[60] Ibid.

[61] Karr v. Schmidt, 460 F. 2d 609 (1972).

[62] Karr v. Schmidt, 320 F. Supp. 728 (1970).

The Fifth Circuit Court stayed the district court's injunction pending appeal by school authorities. Karr then petitioned Mr. Justice Black in his capacity as Circuit Justice for the Fifth Circuit to vacate the stay of injunction, pending appeal. Mr. Justice Black denied the petition saying:

> All the federal courts, including the Supreme Court are heavily burdened with important cases, the kind they must be able to handle if they are to perform their responsibility to society. Moreover, our Constitution has sought to distribute the powers of government in the nation between the United States and the states. Surely, the federal judiciary can perform no greater service to the nation than to leave the states unhampered in the performance of purely local affairs. Surely few policies can be thought of in which states are more capable of deciding than the length of hair of school boys.[63]

The Fifth Circuit Court of Appeals sitting en banc with fifteen judges heard the Karr case. In a review of hair length regulations in numerous cases, the Fifth Circuit beginning with Ferrell had upheld the validity of hair and grooming regulations with the exception of Dawson v. Hillsborough County, Florida School Board, 445 F. 2d 308 (1970).[64]

The district court in Karr ruled that hair regulation was unreasonable and in violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment. The court

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[63] Karr v. Schmidt, 91 S. Ct. 592, 593 (1971).

[64] Karr v. Schmidt, 460 F. 2d 612 (1972).

placed the burden of proof on school authorities to demonstrate that long hair resulted in disruption of the educational process.

As a result of the district court decision, the circuit court was called on to answer a question reserved in Ferrell:

> Is there a constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer?[65]

The Fifth Circuit Court rejected the First, Eighth, Ninth, Tenth and Fourteenth Amendments as supplying a basis in the Constitution for such a right. After a full review, the court held no such right was found within the Constitution.

The Fifth Circuit based its decision on two major premises: First, that interference with this liberty is temporary and relatively inconsequential. Second, that local school boards should be given wide latitude in the management of school affairs. On this point the court said:

> School administrators must daily make innumerable decisions which restrict student liberty . . . . . Examples are regulations requiring students to park automobiles in a designated parking lot and not move them until a designated hour; forbidding students from leaving school grounds during recess and noon hour; prohibiting membership in high school fraternities and sororities; forbidding students from taking lunch except from the school cafeteria. Each of these regulations imposes restrictions on student liberty at least as substantial as the regulation here in question.[66]

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[65] Ibid., p. 613.

[66] Ibid., p. 615-616.

These regulations were cited by defendants as having been held valid in the Texas state courts.

The Fifth Circuit Court announced a per se rule that school grooming regulations are valid. District courts in the circuit were directed to dismiss such actions for failure to state a claim unless a regulation was wholly arbitrary or discriminatory in its enforcement.

The Fifth Circuit Court of Appeals reversed the district court decision by an eight to seven vote with this final statement by the majority:

> In conclusion, we emphasize that our decision today evinces not the slightest indifference to the personal rights asserted by Chesley Karr and other young people. Rather, it reflects recognition of the inescapable fact that neither the Constitution nor the federal judiciary it created were conceived to be keepers of the national conscience in every matter great and small. The regulations which impinge on our daily affairs are legion. Many of them are more intrusive and tenuous than the one involved here. The federal judiciary has urgent tasks to perform, and to be able to perform them we must recognize the physical impossibility that less than a thousand of us could ever enjoin a uniform concept of equal protection or due process on every American in every facet of his daily life.

There were three dissenting opinions filed in the case with the First, Ninth, and Fourteenth Amendments cited as justification for the constitutional protection of students

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[67] Ibid., p. 618.

to wear their hair as they pleased, although unspecified in the Bill of Rights. Unlike the majority, they viewed the liberty as a fundamental right.[68]

Cases where the federal courts held invalid regulations involving hair style and hair length in the public schools will be considered in this part of the chapter. The same amendments to the United States Constitution are cited in these decisions as those upholding grooming regulations.

The case of Sims v. Colfax Community School District (1970)[69] was the only federal case found involving a female student for violation of a hair regulation in the public schools.

The plaintiff, Susan Sims, was suspended in December of 1968 from an Iowa high school for failure to comply with a hair rule as set forth in student handbook. The hair rule follows:

> Hair must be kept one finger width above the eyebrows, clear across the forehead.[70]

The issue before the court was whether the rule in question violated the plaintiff's constitutional rights. While there has been many hair cases, to the court's knowledge, this was the first involving the hair length of a female student.

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[68] Ibid., p. 621.

[69] Sims v. Colfax Community School District, 307 F. Supp. 485 (1970).

[70] Ibid., p. 486.

Faced with a case dealing with hair length of a female student, the district court said:

> The Court well knows that the field of female coiffure is one of shifting sand trodden only by the most resolute of men. The Court thus undertakes this journey with some trepidation. Since time immemorial attempts to impose standards of appearance upon the fairer sex have been fraught with peril. Arbiters of hirsute fashion, perhaps understanding the chameleon nature of the subject matter, have approached the problem with more innovation than insight. Against this delicate social milieu and ever mindful of the equal protection clause, this court undertakes to comb the tangled roots of this hairy issue.[71]

The district court found that a student's choice of his appearance was constitutionally protected under the Due Process Clause of the Fourteenth Amendment. The court held that school hair rules are reasonable and constitutional only if the school can objectively show that such rules are needed to prevent disruption.

The defendants gave only two reasons for such a rule. First, the rule promoted good citizenship by teaching respect for authority and instilling discipline. Second, typing class was disrupted because the instructor could not see the plaintiff's eyes. The court did not accept the first reason and was not convinced of the second.

The district court found the Colfax Community School rule governing student hair length had unnecessarily and un-

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[71] Ibid.

reasonably circumscribed the plaintiff's constitutional rights under the Fourteenth Amendment. Due to the interest in the case and for further clarity, the court pointed out that in the area of law, a court proceeds on a case by case approach. Thus, if disruption had been shown the court might have reached a different decision.

The court denied the second count in the suit seeking monetary damages and entered the following judgment:

> (1) declare the hair rule herein unconstitutional;
> (2) forbid further enforcement of said hair rule;
> (3) expunge from the school record any reference to plaintiff's suspension from which she complained, and;
> (4) award plaintiff her statutory costs.[72]

In the case of Crossen v. Fatsi (1970)[73] the court held that a high school grooming code in Connecticut was unconstitutionally vague and unenforceable. The court ruled the code violated the pupil's right to privacy under the Griswold doctrine.

The basis for such a constitutional right was found in an expansive reading of the United States Supreme Court's

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[72] Ibid., p. 489-490.

[73] Crossen v. Fatsi, 309 F. Supp. 114 (1970).

holding in Griswold v. Connecticut (1965).[74] In the case, the court invalidated a Connecticut statute forbidding the use of contraceptives. The Court said certain specific provisions of the Bill of Rights have "penumbras" that create a "zone of privacy" that must not be transgressed by the state.

The plaintiff in Crossen generalized from Griswold a constitutionally protected zone of personal privacy which may be infringed only for compelling reasons.

In other cases long-haired students and their lawyers have sought to bring hair within that "zone of privacy" by contending that the Griswold decision means that hairstyle is a matter of the individual's right to privacy. The courts have rejected this contention on the basis that the bedroom and classroom were quite different, constitutionally speaking.

The case of Dunham v. Pulsifer (1970)[75] involving an athletic grooming code was similar to the Neuhaus case in California. The district court held in Neuhaus that groom-

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[74] Griswold v. Connecticut, 85 S. Ct. 1678 (1965).

[75] Dunham v. Pulsifer, 311 F. Supp. 411 (1970).

ing standards for male athletes was not a violation of the Fourteenth Amendment.

In Dunham, action was brought by students in Battleboro Union High School in Vermont to enjoin school authorities from enforcing an athletic grooming code. The district court held:

> . . . that athletic grooming code requiring males to wear hair tapered in back and on sides of head with no hair over the collar, and with sideburns no lower than ear lobe and trimmed was unconstitutional, and asserted justification based on performance, dissension on teams, discipline and conformity and uniformity were not substantial justification for infringement on fundamental right.[76]

The district court held that athletic grooming code was a violation of equal protection under the constitution.

The case of Richards v. Thurston (1970)[77] involved a seventeen year old boy who was suspended from school at the beginning of his senior year because he refused to cut his hair. A local paper described his hair as falling loosely about his shoulders.

The school had no written regulations governing hair length or style. The principal, defendent in this case, con-

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[76] Ibid.

[77] Richards v. Thurston, 424 F. 2d 1281 (1970).

tended that students and parents were aware of the fact that long hair would not be permitted.

The plaintiff brought action in the district court seeking injunctive relief against deprivation of his rights under 42 U.S.C. § 1983. Both parties in court sought to place the burden of proof on the other. The plaintiff felt that since there was no evidence that his appearance caused a discipline problem, the court should uphold his rights. The defendant maintained that plaintiff had failed to show that a fundamental right had been infringed or that defendant was motivated by other than a legitimate school concern.

The district court granted the plaintiff's request for a permanent injunction and ordered that he be readmitted to school. Judge Wyzanski in his decision for the district court in Massachusetts made the following statement:

> . . . liberty to express in his own way by preference as to whatever hair style comports with his own personality and his search for his own identity was protected under the broad terms of the Due Process Clause of the Fourteenth Amendment from what the court found was a lack of a rational ground for regulation.[78]

This statement has since been quoted often in hair length cases before the federal courts. The principal appealed the decision of the district court.

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[78] Richards v. Thurston, 304 F. Supp. 452, 453 (1969).

The First Circuit Court of Appeals asked two basic questions in this case: First, was there a personal liberty involved which was protected by the Constitution? The court established there was such a right under the Due Process Clause of the Fourteenth Amendment saying:

> Many cases have involved rights expressly guaranteed by one or more of the first eight amendments. But it is clear that the enumeration of certain rights in the Bill of Rights has not been construed by the court to preclude the existence of other substantive rights implicit in the "liberty" assurances of the Due Process Clause.[79]

Second, does the state's interest in maintaining a school system justify the intrusion? The court responded:

> The answer to this question must take into account the nature of the liberty asserted, the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served. For example, the right to appear au naturel at home is relinquished when one sets foot on a public sidewalk. Equally obvious, the very nature of public school education requires limitations on one's personal liberty in order for the learning process to proceed. Finally, a school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student twenty-four hours a day, seven days a week, nine months a year.[80]

The First Circuit Court of Appeals in the decision placed the burden of proof on school authorities since there was no visible justification. Since the defendant offered no justi-

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[79] Richards v. Thurston, 424 F. 2d 1284 (1970).

[80] Ibid., p. 1285.

fication, the judgment of the district court was affirmed.

Crews v. Cloncs (1970)[81] came before the Seventh Circuit Court of Appeals after the district court in Indiana had upheld school regulations requiring satisfactory hair length and style before admittance to public high school. The school rules and regulations in question were unpublished.

The school officials maintained that regulations were necessary for reasons of health and safety. They alleged the plaintiff's long hair distracted other students and provoked incidents that caused actual disruption in the school. On the point, the court said:

> [t]he record is silent however, concerning actions taken by school officials to punish those students who actually caused the relatively insubstantial disruption which occurred in this case. Therefore, we hold that defendants have failed to satisfy their substantial burden of justification under their [disruption] theory.[82]

The Seventh Circuit Court of Appeals reversed the decision of the district court and held that school officials' actions constituted denial of equal protection to male students. This decision was based on the fact that school officials offered no reasons why health and safety objectives were not equally applicable to high school girls who engaged in the same activities as boys, although only boys had been required to cut

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[81] Crews v. Cloncs, 432 F. 2d 1259 (1970).

[82] Ibid., p. 1265-1266.

their hair to attend class.

The case of Bishop v. Colaw (1971)[83] resulted when Stephen Bishop, a fifteen year old student in a St. Charles, Missouri high school, was suspended for violating provisions of the school dress code. A suit was brought seeking readmission and to overturn the dress code regulation governing the length and hair style of male students. The rule was challenged as violating the plaintiff's and his parents' personal rights guaranteed by the United States Constitution.

The plaintiff based jurisdiction upon 42 U.S.C. § 1983 and upon 28 U.S.C. § 1343. After the district court denied the Bishops any relief, they appealed to the Eighth Circuit Court of Appeals.

The regulation in question stated:

> A. All hair is to be worn clean, neatly trimmed around the ears and back of the neck, and no longer than the top of the collar on a regular dress or sport shirt when standing erect. The eyebrows must be visible, and no part of the ear can be covered. The hair can be in a block cut.
>
> B. The maximum length of sideburns shall be the bottom of the ear lobe.[84]

The appellant trimmed his hair to conform to the regulation at the insistence of his physical education teacher in

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[83] Bishop v. Colaw, 450 F. 2d 1069 (1971).

[84] Ibid., p. 1070-1071.

September and again in November of 1969. In January of 1970 because his math teacher objected to his hair length, he once again trimmed his hair. When school administrators demanded that his hair be trimmed again in February, the student and his parents refused and he was suspended. Litigation followed the suspension.

The Eighth Circuit Court of Appeals reviewed the cases involving hair regulations in the circuit courts. This review found disagreement about the validity of hair-length regulations in both the federal, district and circuit courts. Only two cases were found in the district courts of the Eighth Circuit where hair regulations were upheld. In both cases, the courts were shown factually that students' appearance caused school disruption.

Thus the Eighth Circuit joined the First and Seventh Circuits in holding that students possess a constitutionally protected right to govern their personal appearance, and that any infringement of the right must be justified by the state.[85]

After this background review, the court turned to the Bishops' challenge that regulation violated:

> (1) Stephen's First Amendment right to "symbolic expression"; (2) his Fourteenth Amendment right to equal protection; (3) his Ninth and Fourteenth Amendment rights

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[85] Ibid., p. 1073.

> to govern his personal appearance; and (4) his parents' Ninth and Fourteenth Amendment rights to governing the raising of their family.[86]

The Eighth Circuit did not find merit in the First Amendment challenge. The court likewise did not agree with the Seventh Circuit decision in Crews that regulation violated the Equal Protection Clause of the Fourteenth Amendment. No record of any invasion of the parents' rights was established before the court.

The court held valid the third point raised by appelant, that Stephen possessed a constitutionally protected right to govern his personal appearance while attending a public high school. Among the circuit courts that recognized such a right existed there had been disagreement as to the nature and source of the right. The Eighth Circuit referred to Breen, Crews, and Richards in stating:

> Some have referred to the right as "fundamental," others as "substantial," others as "basic," and still others as simply a "right." The source of this right has been found within the Ninth Amendment of the Due Process Clause of the Fourteenth Amendment, and the privacy penumbra of the Bill of Rights.[87]

A common theme was found in the decisions striking down hair style regulations. This was that the United States

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[86] Ibid., p. 1074.

[87] Ibid., p. 1075.

Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's appearance is one of those guaranteed rights.

The court said:

> The existence of rights other than those specifically enumerated in the Constitution was recognized by the Supreme Court in Griswold v. Connecticut. . . . .
>
> We believe that, among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance. As a freedom which ranks high on the spectrum of our societal values, it commands the protection of the Fourteenth Amendment Due Process Clause.[88]

The Eighth Circuit Court of Appeals while reversing the decision of the district court by holding the hair length regulation invalid did point out that personal freedoms were not absolute and must yield when they intrude upon the freedom of others. School administrators must demonstrate the necessity for regulations of hair length and they failed to do so in this case.

Massie v. Henry (1972)[89] was a North Carolina case, which resulted from suspension of male high school students for their deliberate refusal to conform to grooming guidelines. The guidelines on length of hair and sideburns were recommended by a student-faculty-parent committee and adopted by the high school

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[88] Ibid.

[89] Massie v. Henry, 455 F. 2d 775 (1972).

principal.

Action was brought by students under 42 U.S.C.A. § 1983 in the United States District Court for Western District of North Carolina at Asheville. The district court dismissed the action and plaintiffs' appealed.

The regulations at Tuscola Senior High School in Haywood County were defended before the Fourth Circuit Court of Appeals as being necessary for safety reasons, to promote good discipline and to avoid disruption.

The Fourth Circuit traced the history of the hair issue and stated.

> We find Breen, Crews, Richards and Bishop, and their decisional approaches more persuasive than Ferrell and its progeny, and we have concluded to follow the former.[90]

The court in looking at the reasons for such regulations suggested the faculty teach tolerance rather than use suppression to avoid disruption over hair length of male students. The court also suggested the use of hairbands, hairnets or protective caps for safety reasons in shop or laboratory classes as an alternate solution - short of shearing locks.

The court made reference to our forefathers and the past presidents of the United States and pointed out that every president before Woodrow Wilson would have been in violation

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[90] Ibid.

of this school regulation.[91]

The Fourth Circuit Court of Appeals in a two to one decision reversed the action of the district court on the grounds that guidelines were not justified on the theory of need for discipline and consideration of safety.

Judge Boreman dissented citing the statement from Tinker on dress and grooming and Justice Black's ruling in Karr as the basis for his position.[92]

Chapter six has reviewed the issue of dress and grooming regulations in the public schools as adjudicated in the federal courts. The chapter has centered on the hair controversy with a complete review of the cases at the circuit court level, supplemented by selected district court decisions.

This review has shown that the First, Fourth, Seventh and Eighth Circuits are holding for the student and the Third, Fifth, Sixth, Ninth and Tenth Circuits, for school officials. The Second Circuit was the only one without a court of appeals decision, but district courts in the circuit seem to be leaning toward the student. Se Appendix B for the organization of the circuit courts.

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[91] Ibid., p. 780.

[92] Ibid., p. 788.

The United States Supreme Court has denied certiorari in the following cases upholding the school board: King v. Saddleback Junior College District, Stevenson v. Wheeler County, Jackson v. Dorrier and Ferrell v. Dallas Independent School District. Certiorari was also denied in Breen v. Kahl where the court held for the student.

Until the United States Supreme Court considers the hair issue, the split seems likely to remain in the circuit courts.

With the federal courts struggling to decide if hair length is a constitutionally protected right, adult society has added this controversy to the growing debate about government v. the individual. One side contends that extension of personal freedoms leads to a breakdown both of our society and discipline in the schools. The other side warns that government is becoming too restrictive and seeking to regulate too many aspects of the personal life of adults and students.

There are no problems if one talks about extremes, for both state and federal courts have consistently upheld the authority of school officials to regulate student conduct that results in disruption in the school. Thus, if a student's hair is so outlandish it disrupts school he can be sent home.

However, if hair style is only a matter of fashion and not disruption some parents are insisting that school

boards have no right to enforce grooming regulations unless it can be shown that hair length is disrupting school or violates health standards.

With the growing number of hair cases the federal courts are having second thoughts about the emphasis and time spent on student appearance. Following the lead of the Fifth Circuit Court of Appeals the federal courts are increasingly taking the position that hair length of students in secondary schools does not involve a substantial federal question and should more properly be decided by state courts.

This trend seems likely to continue and school administrators may find themselves in state courts if they deny a student the right to an education because of his appearance unless it can be shown that his conduct infringes on the rights of other students to an education.

CHAPTER VII

LIFE STYLE AND CONSTITUTIONAL RIGHTS: AN EMERGING INTERACTIVE PATTERN

The life style of students and their quest for constitutional rights form an emerging interactive pattern with public schools both the target and the site. When student's life style confronts authority of school officials litigation often results in the federal courts. Students have alleged their constitutional rights are being violated while school officials maintain their authority is being undermined by the courts.

One has difficulty determining if student life style led to efforts to secure their constitutional rights or were efforts to secure constitutional rights for the purpose of enjoying their own life style. Regardless of the reason student efforts to secure constitutional rights has touched all phases of the school program.

This chapter will not only focus on the interaction between the life style and constitutional rights of secondary students but will also examine changes taking place in the schools as a result of the student movement. Most of these changes are in response to student demands for greater participation in their school and community. High school students want to be involved in decisions affecting their life and recognized as individuals.

The movement in the 1960's by students to achieve their constitutional rights originated over matters of national and international concerns. Students wishing to express their views on the Vietnam War, the Civil Rights Movement, or other political and social issues have been denied this opportunity by school authorities. This denial often came in the form of suspension or threat of suspension. As a result, one can see an interaction between the life style of students and their effort to achieve constitutional rights.

Protest of the Vietnam War by the wearing of black armbands resulted in litigation in both Tinker and Butts. The civil rights movement prompted the wearing of buttons in both the Burnside and Blackwell case. Ethnic recognition resulted in the wearing of black berets in Hernandez and brown arm bands in Aquirre.

The action of students in each case resulted in reaction on the part of school officials. In most incidents, students have been suspended for their expressions.

Youth, by their expression, indicate their awareness of the problems of both the nation and the world. Youth are speaking up, because they realize they have had little or no voice in determining their goals in life. Even their life style and ideas have been generally foisted on them by the adult society.

By speaking out, youth have threatened the political establishment and institutions of society. This is most evident in the public school which, as a miniature of society, exhibits the same shams and distortions as the larger society.

This points out a paradox. The youth of today are more intellectually able to speak up, because of better education received as a result of mass communication and prolonged schooling. Youth thus taught to think, find their ideas repressed when they seek to express them.[1]

Polarization of attitudes is reflected in the generation-gap in the United States. The American ideal of freedom and liberty of the individual has not been extended to the high school student. The high school student aware of the discrepancy between the ideal and its practice in the area of expression would probably subscribe to the proposition of John Stuart Mill, a great British writer of the Nineteenth century, who stated:

> If all mankind were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were

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[1]Samuel Brodbelt, "Values in Conflict : Youth Analyzes Theory and Practices," The High School Journal, Vol. 55 (November, 1971), p. 70.

> simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[2]

Underground newspapers have become part of the school scene, because students feel school publications are controlled and censored by the school administration. Opposition to the Vietnam War, protest of school rules and regulations and criticism of school officials have been major topics in publications involved in court cases.

The sexual freedom of youth has created a moral gap between generations. Attempts by school officials to stifle this freedom has resulted in litigation, especially when expressed in off-campus publications distributed at school.

Indeed, the whole question of obscenity poses a problem for both students and adults today. With local community standards serving as the guide established by the Supreme Court, this question remains a puzzle to all.

Censorship by school authorities of responsible criticism

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[2]John Stuart Mill, On Liberty, Etc. (England: Oxford University Press, 1912), pp. 23-24.

does not serve a democratic objective, if the school is to provide a free market place for ideas. Student newspapers could provide a peaceful channel for dissent, if encouraged rather than suppressed.

The student revolt manifested itself with sit-ins, walk-outs and other forms of protest in the schools. Students challenged assembly not as a per se issue, but as a result of protest over the Vietnam War or school rules and regulations.

Such demonstrations disrupted the educational process and have not been upheld by the courts. The courts have ruled that picketing and parading on public premises may be regulated. Tennessee and North Carolina are among states that passed stronger legislation to deal with student demonstrations.

Student life style is having an impact on the high school with both students and educational leaders questioning the rationale of students having to spend every minute of the school day in class or under supervision.

The wide spread use of drugs by the youth of this nation, along with an effort to establish constitutional rights for juveniles has provided the framework for challenges, under the Fourth Amendment, to searches by school officials.

The In re Gault (1967)[3] case while not directly concerned with search and seizure extended this right to juveniles as a

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[3] In re Gault, 87 S. Ct. 1428 (1967).

result of Justice Fortas' statement in the decision of the Supreme Court.

The tenor of the times with bomb threats being received by schools throughout the nation has generally affirmed the right of school officials to search student lockers. Another problem supporting this right of school officials is weapons brought to school by students. North Carolina is among the states that have passed stricter laws prohibiting weapons on school grounds.

The counter culture influence and the popularity of rock music groups left its mark on the dress and grooming habits of youth in the 1960's. Like each teen-age generation, students today have their own fashions for adornment and amusement.

Students in the past have been more manageable and usually wore their costumes or extreme fashions away from school. In the past, the girls, not the boys, paraded the reigning adornment or new fashion.

Today, the girls wear mini-skirts, jeans and sweatshirts with slogans and patches on all types of clothing. The boys, in addition to the jeans, sweatshirts, and patches have long hair, beards and mustaches.

Whether to express their individuality, to conform to peer influence, or to challenge the authority of school officials, students increasingly are challenging dress and grooming

regulations in the school. As a result, the length and style of male students' hair became both the most controversial and most contested issue of appearance in the federal courts.

Prior to 1969 there had been only two hair cases in the federal courts. At the present time, the number of hair length cases in the federal courts exceeds one hundred.

Hair styles have changed in recent years and long hair has become common place. Still unanswered is whether this occurred as a part of mod dress or as symbolic protest against those in control of society. The federal courts have not upheld hair length as a form of symbolic expression protected by the First Amendment.

Rock and protest music of the past decade, beginning with the Beatles, contributed greatly to the popularity of long hair for males. HAIR is even the name of a popular musical.

School authorities assert the right to regulate length of hair as a means of promoting order, discipline, an academic atmosphere, and good citizenship. Students insist the length of one's hair is a matter of individual discretion and personal freedom, hence protected by the Constitution and exempt from any school regulation.

Despite the fact that their own grandfathers wore long hair, many school officials look upon long hair with great distaste and perceive it as a genuine threat to their own

authority and to quality education. School authorities, by banning unusual hair and dress, tell students by their actions that it is acceptable to condemn and repress any deviation from the norm.[4]

The right to wear one's hair in the manner desired is at best an ambiguous constitutional right and appears trivial, except to the individual involved. The validity of hair rules and regulations have been questioned for reasons other than just constitutional. Personal choice, pride and human dignity are other factors governing one's appearance.

Today, neither the student nor his principal can say with any certainty that there is or is not a constitutional right concerning long hair. Unless the United States Supreme Court changes its judicial mind or unless long hair on boys ceases to be stylish, the present state of confusion will probably continue. The manner in which one may wear his hair will vary according to the state in which the student resides.[5]

Young people have evolved their own views on life, their own music, their own fashion and they exact a significant influence on our society. In addition to their own life style,

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[4]Nat Hentoff, "Why Students Want Their Constitutional Rights," Saturday Review (May 22, 1971), p. 62.

[5]T. Page Johnson, "The Constitution, The Courts and Long Hair," NASSP Bulletin, Vol. 57 (April, 1973), p. 32.

it has become evident that young people have contributions to make to the society and the schools. Indeed, Margaret Mead pointed out that:

> . . . the young people of today have had experiences that no adult has had at the same age, so they have a unique perspective. If their ideas are to benefit rather than divide our society, students must exercise the right to make choices that will make a difference, not just pretend decisions.[6]

The life style of students and their efforts to secure constitutional rights form an interactive pattern. This pattern is observable when students are suspended for their expression or appearance and seek relief in the courts.

The movement by students to gain their constitutional rights has been as varied as their life style. There has been no discernible chronological or geographical pattern to the movement. Students across the nation have challenged dress codes, censorship of the press, right to wear buttons and armbands, or other rights of immediate concern in a particular school or city. Though part of a common cultural pattern, the effort to gain constitutional rights for students has been largely a decentralized phenomenon.

At a White House Conference on Youth held in the spring of 1971 at Estes Park, Colorado, fifteen hundred delegates

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[6]Margaret Mead, Culture and Commitment: A Study of the Generation Gap (Garden City, New York: Natural History Press, Doubleday and Company, 1970), p. 64.

including one thousand young people age fourteen to twenty-four heard the preamble read by Karen Rux of Durham, North Carolina at the close of the conference. Part of the preamble is included here for it sums up the feelings of youth in the 1970's. The preamble stated:

> The approach of the two hundredth anniversary of the revolution which gave birth to the United States of America leads us to re-examine the foundations of this country. We find that the high ideals upon which this country was ostensibly founded have never been a reality for all peoples from the beginning to the present day. The Constitution was both racist and sexist in its conception. The greatest blemish on the history of the United States of America is slavery and its evil legacy. The annihilation of Indians, genocide, exploitation of labor, and military expansion have been among the important shortcomings which have undermined the ideals to which the people of this country have aspired.[7]

The preamble contained a list of rights and grievances, spoke of deprivation, repression and fear in the nation and concluded by saying:

> Out of the rage of love for the unimplemented principles we here assert, we challenge the government and power structures to respond swiftly, actively and constructively to our proposals. We are motivated not by hatred, but by disappointment over and love for the unfulfilled potential of this nation.[8]

The reports of the various task forces at the conference found many beliefs and ideals shared by all youth. These youths

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[7]Bonnie Barrett Stretch, "The White House Conference on Youth," Saturday Review (May 22, 1971), p. 76.

[8]Ibid.

felt one should be free to choose his own life style so long as it did not interfere with the rights of others.

Out of the 1971 White House Conference on Youth came a call for the adoption of written policies by boards of education on student rights. The Education Task Force urged junior and senior high schools to adopt codes of student rights, responsibilities and conduct.

The American Civil Liberties Union has called for regulations governing students in school to be fully and clearly formulated, published and made available to all members of the school community. Such regulations should be reasonable and clearly defined avoiding such vague statements as - conduct unbecoming a student or not in the best interest of the school. Board regulations of this nature allow a wide latitude of interpretation on the part of the school principal.

Review of the cases in chapters two through six of this paper show the need for written codes of rights for students. A trend is developing in that such codes have been drawn up as guidelines for some schools and school districts. Sometimes called "student bill of rights," these written codes are most often found today in metropolitan areas.

Some codes of student rights and responsibilities have been developed jointly with the local chapter of the American Civil Liberties Union. A guide to student rights was developed

independently by the American Civil Liberties Union chapter in New York City and distributed to students in the city without the endorsement of school officials.[9]

Some codes of student rights have been developed cooperatively by students, teachers, administrators and parents. These codes attempt to establish an operative definition of student liberties, rights and responsibilities. With a clear set of guidelines on paper, it may become easier for many school administrators to come to terms with the United States Constitution.

Written student codes are needed to clearly define the legal and social relations of the institution to the student and the student to the institution in such areas as speech, distribution of literature, dress, etc.

Despite Tinker, written codes of student rights are also needed to define the gray areas of the law for both students and teachers. Such codes may establish additional rights for students or may impose new restrictions. Many schools only need to put on paper their unwritten codes.

Two examples of written codes will be given to show how they can be established. In the first example, a state seized

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[9]Ira Glasser and Alan H. Lovine, "Bringing Student Rights to New York City's School System," Journal of Law and Education, Volume I (April, 1972), p. 213.

the opportunity to develop student responsibility while spelling out student rights. A balance sheet is set forth in tandem giving each right and its corresponding responsibility.

This code was developed in South Dakota by a project financed through Title III, Section 303 of the Elementary and Secondary Education Act. The end result of the project involving students, board members, teachers, principals and parents was the publication of A Guide to Student Rights and Responsibilities. The thirty-one page publication included the student code of rights and responsibilities on page ten through twelve. (see Appendix C).

The second example is the code in Seattle, Washington where students were told that it was their responsibility as citizens to observe the laws of the United States and the State of Washington and/or its subdivisions. The code also points out that students shall respect the rights of others and not interfere with their education.

The written code covers all aspects of the student's life at school. Each topic will be listed; but because of the length, only the topics related to the First, Fourth and Fourteenth Amendments will be included in detail in this paper. (see Appendix C).

Written codes of student rights will call for a revision in the procedure for handling student suspensions and expulsions

in the public schools. Such procedures will have to satisfy the requirements of due process. Most cases involving student rights in the federal courts resulted after suspension for violation of school rules.

Until Tinker, few procedural requirements were placed upon the school when it decided to suspend or expel a student. Education was considered a privilege, not a right, prior to the decision in Brown v. Board of Education (1954). This question is still in doubt and will be pursued further, later in the chapter.

North Carolina General Statute 115-147 permits a principal to suspend a student for up to ten days. A suspension for over ten days must have the approval of the superintendent.[10]

Robert E. Phay in a fifty page publication for the Institute of Government, University of North Carolina, recommends an examination of the procedures and policies for the suspension of students. These procedures and policies should be in written form.

Phay calls for the establishment of a hearing board to make recommendations to the superintendent for any suspension

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[10]State Board of Education, Public School Laws of North Carolina (Charlottesville, Va.: The Michie Company, 1971), p. 104.

over five days. Any suspension for less than five days would be handled administratively by the principal.[11]

The hearing board would be chaired by a presiding officer either appointed by the principal or elected by the faculty. This person would schedule and conduct the hearing, but would not have voting power. The board should consist of an odd number to avoid tie votes.

Three options were recommended for the membership of the hearing board. Option one would find the board made up of students, teachers and parents. Option two would limit membership to teachers and parents and option three would consist of teachers only.

The hearing should be closed, with witnesses brought in only at the time to be heard. The parents of the student appearing before the board should be present. An attorney might be permitted, if the school board attorney were available for the hearing board. A record of the hearing should be kept in case of an appeal.

The hearing board would vote on the evidence presented and send its recommendation to the superintendent. If the recommendation was to suspend, then the student should have

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[11]Robert E. Phay and Jasper L. Cummings, Jr., Student Suspensions and Expulsions : Proposed School Board Codes (Chapel Hill : Institute of Government, University of North Carolina, 1970), p. 30.

the right of appeal either to the board of education or a district review board.[12]

One direction of change in the public schools attributable in part to the movement to gain student rights concerns compulsory attendance laws. Due to poor attendance and the number of drop-outs in the public schools, many educators are beginning to question the wisdom of compulsory attendance in school until age sixteen.[13]

Figures from the National Education Association and the United States Office of Education show that approximately seventy-eight percent of the students in the ninth grade in 1966 graduated in 1970. Poor attendance is an even greater problem with daily attendance less than fifty percent of enrollment on any given day in many inner-city schools. Enforcement of compulsory attendance laws under such conditions becomes an impossibility.

Still another reason for re-examining compulsory attendance laws is the decision by the United States Supreme Court in Yoeder v. Wisconsin (1973),[14] in which the Court held that

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[12] Ibid., pp. 35-36.

[13] Howard M. Johnson, "Are Compulsory Attendance Laws Outdated?" Phi Delta Kappan, Vol. LV (December, 1973), p. 226.

[14] Yoeder v. Wisconsin, 92 S. Ct. 1526 (1973).

Amish children could not be forced to attend school beyond age fourteen. If Amish children cannot be compelled to go to school, it is hard to see how others can be under a rule of law that promises equal treatment to all.

The relationship to student rights was established by the federal district court in Jeffers v. Yuba School District (1970),[15] when a hair regulation in a California school was upheld partly because of compulsory attendance laws. The court pointed out that students did not always want to attend school and that discipline under such conditions was difficult to maintain.

The National Commission on the Reform of Secondary Education sponsored by the Kettering Foundation has urged the lowering of the compulsory attendance age to fourteen. The Commission stated that public schools could no longer remain custodial institutions in view of the expanded rights given students by the federal courts.

The Commission further recommended that at age fourteen youngsters who did not wish to continue at traditional schools be given opportunities for alternate kinds of schooling. These

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[15]Jeffers v. Yuba School District, 319 F. Supp. 368 (1970).

alternates would include occupational education, on-the-job training or entry into the job market.[16]

The recommendation of the National Commission is in line with the growing trend of starting small sub-schools as alternative schools with different educational emphasis from the traditional school. The intent is to offer students more of a choice and to place more responsibility on the student for his conduct and educational progress.

Despite the call for change by the National Commission on the Reform of Secondary Education, changes in secondary education are extraordinarily slow in coming about. Demonstration schools or pilot programs may be established with federal funds but seldom are major revisions undertaken in a school system.

Silberman in his book, CRISIS IN THE CLASSROOM, lists the changes taking place in the secondary schools into three broad categories:

> (1) Modest changes in school regulations designed to create a freer and more humane atmosphere outside the classroom;
>
> (2) Somewhat bolder attempts to humanize the schools as a whole - for example, by cutting the number of required classes, leaving students with a third or more

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[16] Los Angeles Times - Washington Post News Service Dispatch, Greensboro [N.C.] Daily News, December 9, 1973.

> of their time unscheduled, to be used for independent study, for taking more elective courses, for fulfilling some course requirements outside the classroom, or for relaxation and leisure;
>
> (3) Radical experiments involving changes of the most fundamental sort - reordering the curriculum and indeed the entire teaching - learning process, and in some instances broadening the very concept of what constitutes a school.[17]

One finds most changes taking place in the secondary school are of the modest type. Some changes have occurred voluntarily and others have been mandated by court action. Examples are modification of dress and grooming regulations and eliminating the requirement of a pass to the toilet or library.

One way in which high schools are finding it possible to move toward greater freedom and responsibility for their students is the adoption of flexible modular scheduling. Rather than six fixed periods of fifty minutes the school day is divided into modules of fifteen to twenty minutes which make it possible to vary class length. One might have forty minutes for a lecture or demonstration and eighty minutes for a seminar or lab. The schedule is also flexible in that it may vary each day.

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[17] Charles E. Silberman, Crisis in the Classroom (New York : Random House, 1970), p. 337.

Another innovative program in the secondary school is the mini-course. These courses which vary in length from one week to one semester began as non-credit courses of special interest to students such as guitar playing and pottery making.

Mini-courses are now being taught as credit courses in some schools. This is especially true in required courses such as English and Social Studies. Most courses are nine weeks in length which is one-fourth of the school year. One finds such mini-course titles as Mystery and Suspense, The Novel, Speech, Journalism, Adventures in Reading and many others listed in the curriculum guide of a high school English department. Some high schools offer twenty to thirty English mini-courses each nine weeks. The student still is required to take an English course each quarter but he has an option as to which one.

Independent study is another approach to making schools more responsive to the needs of the student. This has been especially adaptable to the teaching of such courses as Russian, Botany and Advanced Math where only a few students in a given school wish to take the course. One instructor could possibly serve several schools using programmed material, tape recordings and video tapes.

Whether by modular scheduling, mini-courses or independent study one outgrowth has been to bring more openness to

the high school campus. The modular schedule permits blocks of time to be built in for research in the library or relaxation in the student lounge. A mini-course in English may involve a nine week project culminating in a poetry booklet complete with illustrations. The student involved in an independent study program has unscheduled time set aside each day.

These are not separate programs from which a school must select one, for all three or a combination of any two may be found in a given school.

A radical change in secondary schools took place with the introduction of the alternative school. The forerunners of the alternative school concept can be found in the Philadelphia Parkway Program, the Murray Road Annex in Newton, Massachusetts and John Adams High School in Portland, Oregon.[18]

NATION'S SCHOOLS found in November of 1972 that sixty school districts are either operating or planning to begin some form of alternative school. These alternatives cover grades K-12 and include open schools, learning centers, community schools and schools without walls.[19]

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[18] Ibid., p. 349.

[19] Robert D. Barr, Vernon H. Smith and Daniel J. Burke, "All About Alternatives," Nation's Schools, Vol. 90 (November, 1972), p. 33.

Open schools are patterned after the British Infant School. Space is divided into resource areas, which works especially well in the non-graded schools. Emphasis is placed on informality, independence and creativity.

Learning centers are specialized subject area centers that usually serve students of all schools in a school system. Students leave their regular school and go to the learning center for seminars or mini-courses in subjects like physics, foreign language, art or career exploration.

Community schools are designed to involve both parents and students in policy-making with professionals. Students help to decide the courses to be taught, help to select the instructors and participate in drawing up rules and regulations. Community schools differ greatly in structure, organization and approach to teaching.

Schools without walls began with the Philadelphia's Parkway Program. The school functions without classrooms by utilizing the resources of the community. Parkway offers students over a hundred learning options in hospitals, museums, social agencies and local businesses.[20]

Alternative schools or options to the traditional school program may represent an effective change mechanism for

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[20] Ibid., pp. 36-37.

education. Alternative schools should be thought of not as a cure all for public education, but only as one of a variety of change strategies to solve educational problems.

The process should take precedence over substance in alternative schools. For example, student participation in decision-making essential to an alternative school may also be found in a regular school. The alternative or option should provide a different way of constructing a learning environment for a group of children which would be impossible, if the alternative did not exist.

Today there is a need in the alternative school's field for research and evaluation. Research is needed to learn more about the effects of options as a change strategy for public school systems. Evaluation is needed to help guide participants in making decisions as to how to reach desired goals.[21]

Alternative schools are more in line with student life styles in the 1970's than traditional schools. Schedules are usually more flexible and rigid rules and regulations are conspicuously absent. School officials maintain control while sharing real power and responsibility for the success of the school program with students.

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[21]David L. Clark, "Options-Success or Failure?" NASSP Bulletin, Vol. 57 (September, 1973), pp. 2-3.

The changes taking place in the curriculum of secondary schools today can be attributed in part to student efforts to gain constitutional rights. While these changes might have occurred eventually, they certainly appeared more quickly as a result of the student revolution.

The student movement offers a tremendous impetus and indefinite resource for educational reform in the United States. Through the objectives and energies of youngsters a new institutional foundation can be constructed. The angry voices of the young do not deserve just more coverage by the press and media. They also deserve responsible and responsive action by school officials.

Another result of the student revolution is the establishment of a student advocate or student ombudsman who will represent student interest. The ombudsman idea came from Sweden where the office of "citizens' protector" was set up one hundred-sixty years ago to watch-dog the government.[22]

The idea seems to have merit in the schools as a way of dealing with student unrest and of protecting student rights against arbitrary and impersonal district bureaucracies.

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[22]"Crusader For Conciliation," Nation's Schools, Vol. 89 (June, 1972), p. 33.

Opinions differ as to where the school ombudsman fits into the school structure. Is he independent, an administrator, a faculty member or student? Is he responsible to the principal, the superintendent or the board of education? Does he serve one school or the entire district?

The answer to these questions would vary according to the school or school district of the particular ombudsman. The ombudsman in Englewood, New Jersey, is a faculty member responsible to the superintendent and serving one school. The Montgomery County, Maryland, ombudsman serves as a district representative for the system. He is an administrator responsible to the board of education. The high school in El Cerito, California, has a student ombudsman, who is responsible to the principal.

By far the largest and most ambitious school ombudsman program in the United States can be found in Philadelphia, Pennsylvania. Under the controversial "Student Bill of Rights and Responsibilities" adopted by the board of education in December, 1970, the students choose their own ombudsman. They may pick an adult, peer or no one at all. Most schools have chosen students, but teachers, parents and people in the community also serve. The student ombudsman in the Philadelphia program serves without pay.[23]

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[23] Ibid., pp. 34-37.

Schools using the student ombudsman have not emphasized the watch-dog function; however, they have used the position as one of conciliation and communication between administration, faculty, students and the community. The primary duty of the ombudsman to this point has been that of fact-finding in the mediation of complaints. Rather than authority, he has relied on politeness and tact to accomplish his task.

The position of student ombudsman may well be one that will be required, if the high school of the future is to operate effectively. The person in the position would be in charge of all the school services that serve the wants, needs and purposes of students. The success of the position will depend on the ability of the ombudsman to always speak for students and at the same time to work cooperatively with the faculty and administration of the school.

M. Chester Nolte, professor of educational administration at the University of Denver, went one step beyond the ombudsman and suggested the possibility of boards of education negotiating with students. The precedent is already established, since boards have gone to collective bargaining, with teachers, even in states that have no legislation on the subject.

Nolte found no legal barrier to collective bargaining on student rights in most states. He points out that many school principals have bargained with students in arriving

at dress codes, behavior and ethical standards. A written agreement, thus arrived at would help each side to know what to expect from the other. Youngsters might have more respect for a set of rules they help formulate themselves.[24]

Codes of student rights and responsibilities, student disciplinary hearing boards and possible student negotiations call for a restructuring of student government organizations in secondary schools. Student councils need to be upgraded if they are to truly represent various student concerns.

Traditionally, only honor students have become student council members and their main function has been to plan school dances and keep the halls clean. If these councils are to become student policy-making groups, they need to be given far greater voice in developing positive programs about hall rules, cafeteria regulations, curriculum changes and enforcement of student developed rules and regulations.

One suggestion for making student government more viable is to have student council participation accredited as a laboratory course in political science. A second method would provide an avenue for conflict resolution among students by establishing disciplinary hearing boards as a student council function. Finally, it is suggested that special days be set

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[24]M. Chester Nolte, "Student Rights:The Next Negotiable?" American School Board Journal, Vol. 159 (November, 1971), pp. 44-45.

aside once a month with student planned classes, seminars or programs. A two or three hour period for student activities can be arranged by having a shortened schedule for regular classes.[25]

High school youngsters are saying that student involvement does not necessarily mean student dissent. This offers a potential resource to schools if educators take advantage of student interest and channel it into responsible areas of activity. Thus, the means of achieving a new level of student involvement is limited only by the imaginations of students and educators.

The reaction of school officials to the student revolution has been as varied as the protest of students. Many administrators are attempting through their leadership to involve students in the decision making process, to restructure the curriculum and to help students understand that when one exercises constitutional rights he must also assume responsibility.

Other administrators have not been as creative and are attempting to recontrol students through suspension and expulsion, use of police in school and loyalty oaths. This

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[25]Richard L. Hart and J. Galen Saylor, Student Unrest: Threat or Promise (Washington: Association for Supervision and Curriculum Development, 1970), p. 88.

repression has not worked, as Silberman points out in this statement:

> Certainly it is clear that repression does not work that "cracking down" serves only to breed more defiance and disruption, which breeds more repression and so on ad infinitum. And all the more so when "cracking down" is accompanied by the kind of arbitrariness, racial prejudice, assumption of student guilt and general disregard of individual rights that characterizes "difficult schools." In a war between faculty and students, the students are bound to win, there are more of them, and when put to the test, they can be disruptive in the most ingenious ways.[26]

Another response on the part of educational leaders to the student revolution has been to ignore or deny that a crisis exists. These administrators focus on symptoms of unrest rather than inequities in school life. Such educators may distort student grievances or demands to gain sympathy and support from the community. Still another form of denial is the administrator's statement that he is powerless to act and students should go to the superintendent or board of education with their grievance.

A third popular response used in a crisis is the attempt to cool off the situation by talking matters to death. Administrators use this response as a delaying tactic to avoid answering a student grievance or to consolidate their position.

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[26]Silberman, op. cit., p. 340.

It is evident that school boards and administrators are becoming more sophisticated in drawing up school rules and regulations. Detailed dress and grooming regulations have given way to broad general statements on student conduct. Students now face suspension for being disrespectful, provocative or disruptive.

School boards and administrators have also become more knowledgeable about the application of the Bill of Rights to high school students by the federal courts. Since Tinker, each new student rights decision has brought a review and often a modification of school rules and regulations in an effort to avoid litigation.

The well informed administrator knows the courts are not anxious to become school administrators and handle every act of disobedience and disruption in the schools. He realizes that courts will interfere only when administrators act outside the legal parameters set forth by the courts.

Since it would be impossible for a stated rule to cover all possible situations concerning student conduct, administrators do possess the prerogative to exercise discretion in governing situations that continually arise in the day-to-day operation of their schools. The courts have only said that administrators must act in good faith and with reason in exercising their prerogative as disciplinarians.

Some administrators feeling that the movement to gain student rights is a threat to their authority continue to restrict student expression and appearance despite federal court rulings to the contrary in their district. These administrators realize that a suit through the federal courts is a long and difficult process. Also, they are aware that each case stands on the merits of the facts presented to the court unless it is a class action case.

These administrators continue to enforce regulations that probably would not be upheld by the courts knowing the odds are they will not be challenged. This enforcement often has the backing and support of the majority of people in the community.

Such action by school administrators prompted the American Civil Liberties Union to issue a memorandum on class action in civil liberty cases. Designed for use primarily in hair and dress cases the memorandum came out in April, 1970. Called a plaintiff's class action it secures a judgment on behalf of the class. If a defendant does not comply with the court decision, any member of the class can seek relief without having to initiate a law suit. This tactic proved most successful during the Civil Rights Movement in suits filed on behalf of all black children in a particular school or school system.

This memorandum advocates a new procedure known as bilateral class action where the judgment of the court is binding on both parties to the suit. Thus, a decision on behalf of all high school students affected by the rule would be binding on all principals in an administrative unit. This recommendation is aimed particularly at school systems where regulations on dress and grooming are left to the discretion of the school prinicpal.

The organization points out that risks are involved, for a bilateral class action results in added procedural difficulties and renders improbable new suits on the same issue, if the suit is lost.[27]

The high school principal, as a result of the expansion of student rights, is faced with the critical task in the 1970's of redefining the concept of discipline in the public schools. Many principals believe they must decide between authoritarian rule or a completely permissive atmosphere. These administrators feel the courts are forcing them toward the latter choice.

Some form of control must be present to insure a learning environment in a public school. North Carolina General Statute 115-146 under the paragraph entitled "Duties of Teachers and Principals" states in part:

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[27]American Civil Liberties Union, Class Actions in Civil Liberty Cases (Memorandum. New York: American Civil Liberties Union, 1970).

> It shall be the duty of all teachers, including student teachers, substitute teachers, voluntary teachers, teachers' aides and assistants when given authority over some part of the school program by the principal or supervising teacher, to maintain good order or discipline in their respective schools; . . .[28]

This law points out that principals and teachers in North Carolina are the qualified people legally charged with the responsibility of maintaining discipline.

A professor at Virginia Commonwealth University writing in THE HIGH SCHOOL JOURNAL points to punishment as the key element in discipline. He feels that punishment should not be generalized but thought of as treatment of the individual problem. The author further states his position on discipline by saying:

> . . . if public schools are going to produce students as individuals capable of facing and coping with the complex problems of our society, individuals who will feel responsible for their actions and behavior, school principals must see to it that discipline exists as an educational experience and cease to be solely punitive.[29]

Robert L. Ackerly, chief counsel for the National Association of Secondary School Principals, in his publication THE REASONABLE EXERCISE OF AUTHORITY while calling for full participation of students in drawing up rules of discipline agrees

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[28]State Board of Education, Public School Laws of North Carolina (Charlottesville, Va.: The Michie Company, 1971), p. 104.

[29]Richard S. Vacca, "The Principal as Disciplinarian: Some Thoughts and Suggestions for the 70's," The High School Journal, Vol. 54 (March, 1971), p. 406.

that public school principals are responsible for discipline and order in the school. Ackerly said:

> The principal must in the final analysis, exercise the final authority and assume responsibility for the proper application of all rules. The rule of law, not the rule of personality should be his guide. Tolerance of dissent and non-violent protest may avoid violence and serious disruption.[30]

The Gallup Poll on important problems confronting the public schools found discipline at the top of the list in four of the last five years. In 1971 the public cited finance as the major school problem, with discipline rated third.[31]

Whether the result of an irrelevant curriculum, permissiveness in society, expanded student rights, Hippie influence, drugs or other school and societal causes discipline seems likely to remain the major problem of school administrators in the 1970's.

Discipline remains the means of achieving the necessary climate for effective teaching and learning within the school. The courts have not said that schools must give up discipline to remain within the framework of the law. The court's position

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[30]Robert L. Ackerly, The Reasonable Exercise of Authority (Washington: National Association of Secondary School Principals, 1969), pp. 15-16.

[31]George H. Gallup, "The Fifth Annual Gallup Poll of Public Attitudes Toward Education," Phi Delta Kappan, Vol. LV (September, 1973), p. 38.

is that administrators may not act arbitrarily, but must observe due process of law. One might say that courts are replacing the in loco parentis doctrine with the due process doctrine.

One question that arises out of cases involving the constitutional rights of students in the federal courts is whether education in the United States is a right or privilege. This question remains unresolved.

The United States Supreme Court in a five to four decision in the historic desegregation case of Brown v. Board of Education (1954)[32] and subsequent decisions involving race have held that education is a right which should be available to all students regardless of race, nationality or ethnic background.

The case of Serrano v. Priest (1971)[33] before the Supreme Court of California challenged the public school financing system in the state with its substantial dependence on local property taxes and resultant wide disparities in school revenue, as violating the Equal Protection Clause of the Fourteenth Amendment.

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[32] Brown v. Board of Education, 347 U. S. 483 (1954).

[33] Serrano v. Priest, 96 Cal. Rptr. 601 (1971).

The California Court cited the Brown decision of 1954 in holding that education is a right by saying:

> We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest.[34]

A similar case in Texas, San Antonio Independent School District v. Rodriquez (1973),[35] reached the United States Supreme Court. The Court in a five to four decision ruled that education is not a fundamental right since it is not specified in the Constitution. Justice Powell for the majority stated:

> Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.[36]

Thus, the United States Supreme Court has expressed opposite views in Brown and Rodriquez on whether education is a right or privilege. Constitutional rights of students could be the issue that decides whether education is a constitutionally protected right in the United States.

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[34] Ibid.

[35] San Antonio Independent School District v. Rodriquez, 16-105, 40 (1973).

[36] Ibid.

The status of student rights in secondary schools today can best be illustrated by this statement in Esteban v. Central Missouri State College (1969):[37]

> The court recognizes that education is no longer a luxury but a necessity, education is vital and valuable and remaining in college or school in good standing, much like reputation is something of value. So, too, is one's personal freedom. But one may act so as to constitutionally lose his right or privilege to attend a college or a school.

Any student rights issue could conceivably reach the United States Supreme Court just as the wearing of black armbands did in Tinker. The issue may not be as important as the suspension or expulsion of the student which denies him an education whether it be a right or a privilege. It appears the Fourteenth Amendment may be the route to student constitutional rights and the establishment of education as a federally protected right.

Tinker and other federal court decisions covered in this paper are only the beginning of the search for a definition of student rights. There is an emerging trend toward an extension of student rights in the public schools, but full constitutional guarantees will not be achieved until society demands the change and makes it imperative upon the courts.

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[37] Esteban v. Central Missouri State College, 415 F. 2d 1077 (1969).

CHAPTER VIII

SUMMARY AND CONCLUSIONS

Decisions of the federal courts in cases involving student rights have had a great impact on the public schools since 1967. The time in which children are viewed as chattels in the public schools is long passed. Students are now considered clients of the school. Schools exist for students and the school's purpose is to serve them.

Students in the public schools have two basic rights: (1) rights guaranteed to them as citizens under the United States Constitution and the Bill of Rights, and (2) rights they derive as clients of an educational institution.[1] The constituional rights of students are decided by federal courts on a case by case basis. Thus each case stands on its own merit and each decision is based on the facts before the court. Decisions in previous cases are often cited as precedents to an issue before the court. The circumstances in each case must be considered by the court before handing down a decision.

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[1]National Education Association, "Student Rights and Responsibilities," Today's Education, Vol. 61 (January, 1972), p. 50.

The courts are not anxious to become school administrators and historically have been reluctant to interfere with the principal's control of students in the secondary school. The courts remain reluctant to become enmeshed in educational policy and will only when the actions of administrators are arbitrary or capricious.

The substantive constitutional rights of students are defined in degrees and such degrees are defined by court decisions. This is especially true in the federal district courts where decisions governing the constitutional rights of students are dependent in part upon the judge's attitude and philosophy.

Since the Supreme Court in the Gault decision ruled that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[2] federal courts have been in the process of defining the constitutional rights of secondary students. The reported decisions in this study are only the beginning of this search for a definition of student rights.

Tinker remains the only discipline case from the public schools to be decided by the United States Supreme Court. Tinker along with the decision in Gault extended

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[2] In re Gault, 307 U.S. 1 (1967).

constitutional rights to juveniles both in and out of school.

The extension of rights to students must consider a balance between institutional needs and individual rights. The rights of students like those of adults are not absolute. Also, the rights of one student should not limit the rights of another student.

The question of students' freedom came before the United States Supreme Court in West Virginia Board of Education v. Barnette (1943). In this case involving a required flag salute in all public schools of the state the Court proclaimed:

> . . . that educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[3]

This case won by Barnette, a Jehovah's Witness, did not recognize student rights; for it only prohibited the state from compelling individuals to act in a certain manner. However, Barnette philosophically did lay the ground work for the Tinker decision which established student rights.

Despite the gains made since Tinker, Nat Hentoff made the following statement on student rights in 1971:

> Such basic rights of an American citizen as freedom of speech and assembly, protection from invasion of privacy,

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[3]West Virginia Board of Education v. Barnette, 319 U.S. 637 (1943).

and guarantee of due process of law do not exist for the overwhelming majority of high school students.[4]

Since the constitutional rights of students are emerging as an issue in the federal courts a summary of these rights is included here. These rights are protected by the First, Fourth and Fourteenth Amendments to the United States Constitution.

Justice Fortas in the Tinker decision pointed out that "students did not shed their constitutional rights at the school house gate."[5] He went further in stating that wearing of armbands divorced from disruptive conduct was closely akin to pure speech.

The Court, while pointing out that speech holds a privileged position, stated that this right must be balanced against the state interest of maintaining a school system.

The federal courts have repeatedly held that freedom of speech is not an absolute right and officials may make reasonable rules and regulations for the maintaining of order in the school.

The courts have also held that a student's freedom of expression could be limited, if it resulted in school disruption. This was evidenced by the Fifth Circuit Court deci-

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[4]Nat Hentoff, "Students Want Their Constitutional Rights," The Education Digest, XXXVII (October, 1971), p. 39.

[5]Tinker v. Des Moines Independent School District, 393 U.S. 506 (1969).

sion in Blackwell where school officials were upheld, because of the disruptive activity of students wearing buttons. In the Burnside case before the same court on the same day, the right of students to wear buttons was upheld due to the absence of any disruptive conduct.

The major problem in any speech or expression case is defining substantial disruption and determining the reasonableness of a rule or regulation. This determination is made on the basis of facts before the court. Protection of free speech is usually afforded on a sliding scale. The less the speech element, the less protection the First Amendment gives to a particular form of expression.

The key to student freedom of expression centers around the "clear and present danger" and "balancing" test so often referred to by the federal courts. These tests, while recognizing governmental power to inhibit speech, does not permit across the board application of this limitation.

A review of cases involving freedom of the press found courts generally upholding the students' right to publish and distribute underground newspapers. In doing so, the courts pointed out that state laws of libel and slander remain available and cover such publications.

While upholding the publication and distribution rights of students, the courts stated that school authorities may de-

termine the time, place, manner and duration of distribution on school premises. On these points the courts are in agreement and consistent in their judgments. Freedom of the press is thus one of the most settled of the constitutional rights of students.

One aspect of freedom of the press remains to be resolved. This is the question of prior restraint or censorship of the press. The Second Circuit Court in Eisner held that rules of prior restraint could be drawn up by boards of education within certain constitutional limits. The Fourth Circuit Court agreed in Quarterman using Eisner as the basis for its decision. The Seventh Circuit Court in Fujishima held that no rule of prior restraint could be adopted by boards of education. This aspect of the issue will likely remain unclear until the United States Supreme Court rules on the question of prior restraint.

The right of assembly is a constitutionally protected right, but it has only been challenged as a result of sit-ins, walk-outs or other types of protest in the public schools. Students are limited in the exercise of this right by class periods. The right of assembly outside of class time can be limited in time of an emergency.

The courts have ruled that stricter regulations are permissible for high school students than for college students. The state is able to impose greater restrictions on demonstra-

tion activity at the high school level during the school day, because of the responsibility to use limited student time most efficiently.

High school students have the right to assemble peaceably on campus during school hours, when class attendance is not mandatory. This First Amendment protection does assure students of an outlet for their grievances, since it also involves the right to petition.

Once again one must define what constitutes a peaceful assembly or an orderly demonstration. As with freedom of speech and the press, any activity that disrupts the educational process is not constitutionally protected.

Freedom of association in the judicial sense remains in the abstract as an alleged right in the public schools, for it has not been challenged in the federal courts. State courts, however, have consistently upheld anti-fraternity rules in the public schools.

Chapter five reviewed both state and federal cases involving Fourth Amendment protection from unreasonable search and seizure in the public schools. Several state cases were reviewed, since this is an emerging issue brought about primarily by drugs in the school.

The courts have said that this protection is not an absolute right, for there is such a thing as a "reasonable search."

What constitutes an unreasonable search and seizure, as specified in the Constitution is difficult to state, and it must be determined by the facts in each case. The standard established by courts is reasonable cause to believe that criminal law is being violated or other evil is present.[6]

The doctrine of in loco parentis remains undisturbed as to the Fourth Amendment rights of students. In view of this fact, students should consider their lockers public, not private places. School lockers are not the exclusive possession of the student, for the school retains ownership. State courts have also ruled that the search of a student does not violate the Fourth Amendment, if it is made with probable cause or on reasonable suspicion.

The courts have ruled that school administrators are not government officials, for the purpose of the Fourth Amendment. Further, the courts have held that school officials not only have the authority; but also have a duty to search, if necessary.

Court decisions indicate that if a student has reached the age of criminal responsibility, the prudent action for school authorities would be to call the police and let them make a search with a warrant, if such action might result in an arrest.

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[6]Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (1968).

If circumstances do not permit such action, the school administrator should have the student present and a third party as a witness, before making a search of the student or his locker.

No issue remains as uncertain and with as many conflicting court decisions as that of regulations on dress and grooming in the public schools. Cases on this issue were reviewed extensively in chapter six. This controversial issue has centered primarily around the question of male hair length and suspension for violation of grooming codes.

Not only has the issue been conflicting judicially; but also procedurally, as rules and regulations on dress and grooming have been challenged under several amendments to the constitution. Challenges have been brought under: (1) The First Amendment as violating freedom of expression, (2) The Ninth Amendment as violating the right of privacy,[7] (3) The combining of First and Ninth Amendment to find a penumbra in which the right to govern one's appearance is fundamental,[8] and (4) The Fourteenth Amendment - Equal Protection Clause and Due Process Clause. Most courts have considered the issue under the Fourteenth Amendment - Due Process Clause.

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[7]Crews v. Cloncs, 432 F. 2d 1259 (1970).

[8]Breen v. Kahl, 419 F. 2d 1034 (1969).

In general, dress and appearance may be regulated only when necessary for reasons of health, safety, and welfare of students or to control material disruption of the school program.

With decisions on dress and grooming running about fifty-five to forty-five percent in favor of the students, one can see the split in the circuit courts. The circuits upholding dress and grooming regulations are doing so when school authorities show the need for such rules, if they are reasonable.

Reasonableness becomes the key in determining if regulations on dress and grooming violate the constitutional rights of students. Courts determine reasonableness by: (1) the circumstances of each case, (2) the evidence of need for such rules, (3) the rationale behind the questioned rule, and (4) the relationship of rule to the operation of the school.[9]

The effect of the regulation on the student is another judicial criterion of reasonableness. Prohibiting students from playing in the school band or participating in athletics is one thing, but it is another matter for a student to be denied an education because of his hair length.

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[9]Ronald Sealey, "The Courts and Student Rights - Substantive Matters," Emerging Problems in School Law (Topeka, Kansas: National Organization on Legal Problems in Education, 1972), pp. 31-34.

The courts have said that certain elements of dress can be controlled by school authorities. The idea that students may wear whatever they want to at school is an overgeneralization. If a particular element of dress or appearance constitutes a health hazard, the element can be controlled. Thus students with dirty hair or apparel can be barred. If the regulation is justifiable as a safety precaution, it is enforceable in any activity where a danger derived from the attire is present. As a distraction school officials can bar those who are obscenely or scantily clad.

Appearance rules generally can be enforced if uniformity of dress is important for the activity such as a band concert or graduation exercise. The rules must be applied equally so that if long-haired females can participate in band, long-haired males cannot be excluded. In regard to uniformity of appearance for athletic competition, the cases are in conflict.

Another legal problem with many dress codes is that they are either too vague or too broad. Thus a regulation prohibiting extreme hair style allows the administrator to have complete authority in determining the standard to be applied. An example of an over-broad regulation is one completely banning dungarees which are acceptable on the streets.

Underlying this whole new concept of student rights is the one basic fact that all actions by school authorities should be ones of fairness to all students. Students need to feel that individuals in responsible positions will not act in an arbitrary way. Decisions should be based on facts. School districts as arms of the state government must uphold the concept of one's legal rights.

Guidelines for school administrators which should help to minimize disruptions in the educational process and protect them in the event of litigation are included here. These guidelines are drawn from a review of the cases in this study and will cover only those areas.

These guidelines will be general in nature, since student rights are generally relative as compared to absolute. The relative rights of students were described by Justice Wysanski in Richards v. Thurston (1969), with this statement:

> Order can be defined properly only in terms of the liberties for which it exists, as liberty can be defined properly only in terms of the ordered society in which it thrives. As Albert Camus implied in The Rebel, order and liberty must find their limits in each other.[10]

The guidelines that follow are not intended as the final statement on student rights, because circumstances differ in

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[10] Richards v. Thurston, 304 F. Supp. 449 (1969).

in each case. Despite this limitation, much of what is contained should contribute to a better understanding of students' constitutional rights.

I. Freedom of Speech.

A. The First Amendment to the United States Constitution guarantees the right of freedom of speech to all Americans, including students.

B. This constitutional right is not absolute and does not include license to interfere with the orderly conduct of class, to coerce or violate the rights of others.

C. Student speech may be subject to disciplinary action by school officials, if such speech:

1. is slanderous
2. poses a clear and present danger to school property or other students
3. materially and substantially interferes with the normal operation of the school.

II. Freedom of Expression

A. Students have the right to wear or display buttons, armbands, flags, decals or other badges of symbolic expression.

B. Symbols worn by students must symbolize a specific viewpoint or idea to be protected by the Constitution.

C. The right of expression may be limited by school officials, when its exercise materially disrupts the educational process or infringes on the rights of others.

III. Freedom of the Press.

A. The First Amendment provision of freedom of the press gives students the right of distribution on campus. This right extends to their own publications.

B. School officials may regulate the time, manner, place and duration of distribution on the campus.

C. The distribution of such material may not interfere with or disrupt the educational process.

D. All material must identify the person or persons distributing; who in turn, assume full responsibility for the content of such publications.

E. Distribution may be prohibited by school officials, when publications contain material that is obscene or libelous. Also prohibited is material which expresses or advocates racial, ethnic, or religious prejudice creating a clear and present danger to the orderly operation of the school.

IV. Assembly:

A. Students may exercise their constitutionally protected right peaceably to assemble provided it does not inter-

fere with the operation of the regular school program.

B. Under this right, students may also petition school officials for redress of grievances.

C. Facilities, under the right of assembly, must be granted on a non-discriminatory basis to school groups without regard to point of view.

V. Association:

A. State courts have consistently upheld school rules prohibiting secret societies and fraternities in the high schools.

VI. Search and Seizure:

A. The Fourth Amendment does not prohibit reasonable search, when the search is conducted by a superior charged with the responsibility of maintaining discipline and order or of maintaining security.

B. The principal is not a government official within the meaning of the Fourth Amendment.

C. The principal may search a student or his locker on reasonable suspicion.

D. The right of inspection of students' school lockers is inherent in the authority granted school boards and administrators and should be exercised so as to assure parents that the school will exercise every

safeguard for the well-being of the children.

E. The courts have left the doctrine of in loco parentis undisturbed with respect to locker search.

VII. Dress and Grooming:

A. Students should have the right to determine their appearance provided it is not destructive to school property, complies with health and safety standards and does not interfere with the educational process.

B. Regulations governing hair will probably be upheld within the Third, Fifth, Sixth, Ninth and Tenth Federal Court Circuits, if school officials show some compelling reason related to education to justify such regulations.

C. Articles of clothing that cause excessive maintenance problems such as cleats on shoes that scratch floors and rivets on jackets that scratch furniture can be ruled unacceptable.

D. Apparel must meet obscenity standards in the community.

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APPENDICES

APPENDIX A

CHAPTER V

THE MIRANDA WARNING

The United States Supreme Court case of Miranda v. Arizona, 86 S. Ct. 1602 (1966), set out clear requisities for policemen when making an arrest: The Miranda warning demands that an individual subject to arrest must be advised that he has the right to remain silent; that anything he says may be used against him in a court of law; and that, if he cannot afford an attorney, one will be appointed before any further questions are asked.

SEARCH OF STUDENT AND LOCKERS

The National Association of Secondary School Principals in a Legal Memorandum on search and seizure in September of 1972 suggested that in the spirit of due process the following general guidelines might well be taken into account when personally making a search of the student and/or his property:

1. The student should be present when his property is searched.

2. The presence of a third party as witness could well prevent many kinds of countercharges.

3. Although not legally required in a strict sense, an attempt to secure prior student consent would promote student - administrative relationships.

4. The school has keys or combinations to the lockers and the students are on some form of prior notice that the school reserves the right to search the lockers.

APPENDIX B

CHAPTER VI

The Pittsfield School Board adopted the proposed dress code which was initiated by the student council.

DRESS CODE
1970-71

BOYS:

1. Hair cannot be over the eyes, ears or over the collar. Sideburns are allowed provided they are not below the earlobe.

2. Shirts must be tucked in unless they are square cut in which case they can be left out. T-shirts, sweatshirts will not be allowed as outside garments. Jersey shirts without lettering or pictures will be allowed.

3. Dungarees will not be allowed.

4. Cleats will not be added to shoes. Socks must be worn at all times. Sandals will not be allowed.

5. No neck jewelry.

6. Outer clothing will remain in the locker unless specific permission is given by the office.

7. No bell bottoms will be allowed.

GIRLS:

1. No dungarees, slacks or shorts will be worn during the school day.

2. Blouses will be tucked in unless designed with a straight edge.

3. Skirts must be a reasonable length and in lady like appearance.

4. Culottes may be worn.

5. Make up may be worn with discretion. No hairclips, curlers, or kerchiefs may be worn.

6. Sandals are not allowed.

7. Maxi and midi skirts will be allowed.

GENERAL:

1. Ankle high footwear may be worn.

2. No bleached clothing will be allowed.

UNITED STATES CODE ANNOTATED

42 U.S.C.A. 1981
Equal Rights Under the Law

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.

42 U.S.C.A. 1983.
Civil Action for Deprivation of Rights

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

28 U.S.C.A. 1343
Judiciary and Judicial Procedure 3. Purpose

Provisions of this section authorizing civil action in district courts to redress deprivation, under color of any

state law, of any right, privilege or immunity secured by the Constitution of the United States or by acts of Congress providing for equal rights of citizens has as its purpose the enforcement of U.S.C.A., Constitutional Amendment 14.

This section conferring jurisdiction in civil rights cases was not adopted to supersede state laws affording remedies for derelictions by state officials but was enacted to provide remedy only where one either did not exist or for some reason existing remedy was unenforced or otherwise insufficient.

Major purpose of civil rights jurisdiction of federal courts is to redress deprivation of constitutional rights having no pecuniary valuation.

UNITED STATES COURTS OF APPEALS

First Circuit: Maine, New Hampshire, Massachusetts, Rhode Island

Second Circuit: New York, Connecticut, Vermont

Third Circuit: Pennsylvania, New Jersey, Delaware

Fourth Circuit: West Virginia, District of Columbia, Virginia, Maryland, North Carolina, South Carolina

Fifth Circuit: Mississippi, Alabama, Georgia, Florida, Louisiana, Texas

Sixth Circuit: Michigan, Ohio, Kentucky, Tennessee

Seventh Circuit: Wisconsin, Illinois, Indiana

Eighth Circuit: North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Missouri, Arkansas

Ninth Circuit: Alaska, Hawaii, Washington, Oregon, California, Nevada, Idaho, Montana, Arizona

Tenth Circuit: Wyoming, Colorado, Utah, New Mexico, Kansas, Oklahoma

APPENDIX C

CHAPTER VII

A GUIDE TO STUDENT RIGHTS AND RESPONSIBILITIES IN SOUTH DAKOTA

Free Public Education

A prized birthright of state citizens is that an education at public expense for those citizens between the ages of five and twenty-one unless they graduate from high school before the age of twenty-one. The birthright carries with it correlative responsibilities, as follows:

It is the Student's Right to:	It is the Student's Responsibility to:
Attend school in the district in which his/her parent or legal guardian resides	Attend school daily, except when ill, and to be on time at all classes
Attend school until graduation from high school at public expense	Attend school until sixteen or complete the eighth grade
Obtain free textbooks and supplies needed in the course of study	Pay admission to activities if attendance therein is voluntary
Attend school at no expense even though married	Obey reasonable restrictions on married students where the board has such rules and regulations

It is the Student's Right to:	It is the Student's Responsibility to:
Assist in the making of decisions affecting his/her life in school	Pursue and attempt to complete the course of study prescribed by the state and local authorities

Express his/her opinions verbally or in writing	Express his/her opinions and ideas in a respectful manner so as not to offend or slander others
Expect that the school will be a safe place for all students to gain an education	Be aware of all rules and regulations for student behavior and conduct himself/herself in accordance with them
Dress in such a way as to express his/her personality	Dress and appear so as to meet fair standards of propriety, safety, health and good taste
File a grievance with the appropriate school official when accused of misconduct	Be willing to volunteer information in disciplinary cases should he/she have knowledge of importance
Be afforded a fair hearing with the opportunity to call witnesses in his/her own behalf, and to appeal his/her case in event of disciplinary action	Be willing to volunteer information and cooperate with school staffs in disciplinary cases
Expect that where he/she bears witness in a disciplinary case, his/her anonymity will be honored by the school	Assist the school staff in running a safe school for all students enrolled therein
<u>It is the Student's Right to</u>:	
Be represented by an active student government selected by free school elections	Take an active part in student government by running for office, or voting for the best candidates; making his/her problems known to the staff through his/her representatives
Assist in the making of school rules	Assume that until a rule is waived, altered or repealed that it is in full effect

August, 1972

STUDENT RIGHTS AND RESPONSIBILITIES

Seattle Public Schools

August 12, 1970

Rights, Responsibilities and Limitations

1. Criminal Acts Defined

2. Smoking

e. Dress and Appearance

   a. Dress and Appearance must not present health or safety problems or cause disruption

4. Attendance

5. Disruptive Conduct

6. Cooperation with School Personnel

7. Refusal to Identify Self

8. Off-Campus Events

9. Freedom of Speech and Assembly

   a. Students are entitled to verbally express their personal opinions. Such verbal opinions shall not interfere with the freedom of others to express themselves. The use of obscenities or personal attacks are prohibited.

   b. All student meetings in school buildings or on school grounds may function only as a part of the formal education process or as authorized by the principal.

   c. Students have the freedom to assemble peacefully. There is an appropriate time and place for the expression of opinions and beliefs. Conducting demonstrations which interfere with the operation of the school or classroom is inappropriate and prohibited.

10. Freedom to Publish

a. Students are entitled to express in writing their personal opinions. The distribution of such material may not interfere with or disrupt the educational process.

b. Students who edit, publish or distribute hand written, printed or duplicated matter among their fellow students within the schools must assume responsibility for the content of such publications.

c. Libel, obscenity and personal attacks are prohibited in all publications.

d. Unauthorized commercial solicitation will not be allowed on school property at any time. An exception to this rule will be the sale of non-school-sponsored student newspapers published by students of the school district at times and in places as designated by the school authorities.

e. The distribution by students in school building or on school grounds of unlawful or political material whose content reflects the special interest of a political candidate or political organization is prohibited.

11. Search and Seizure

The following rules shall apply to the search of school property assigned to a specific student (locker, desk, etc.) and the search of items in his possession.

a. There shall be reasonable cause for school authorities to believe that the possession constitutes a crime or rule violation.

b. General searches of school property may be conducted at any time.

c. Search of an area assigned to a student should be for a specific item and be in his presence.

d. Illegal items (firearms, weapons) or other possessions reasonably determined to be a threat to the safety or security of others may be seized by school authorities.

e. Items which are used to disrupt or interfere with the educational process may be temporarily removed from student possession.