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STUDENT DISCIPLINE IN PUBLIC SCHOOLS UNDER THE CONSTITUTION

WILLIAM D. VALENTE†

preceding panelists in this Symposium have outlined the contemporary developments which have created confusion and consternation for school administrators and their counsel in the discipline of students.¹ They remind us that the burden of reform in school governance² is not unlike that previously falling upon other public institutions and that schoolmen can best meet these challenges by retaining a detached and historical perspective of the adaptation of all public institutions to the pressures of cultural and constitutional changes.³ It is, however, far simpler to perceive new needs than to adjust operational patterns and ingrained attitudes. The goals of limited government and of maximum student liberty and participation in school affairs, however eagerly espoused, do not indicate the correlative limits of official power and student immunities in school activities. School superiors must still reckon with the bounds of student discipline in specific situations and with respect to the different bodies of law concerning: (a) the classes of activity that they may regulate; (b) the kinds of sanctions that they may lawfully impose; and (c) the procedural requirements of due process that they must observe.

This Article will consider the nature of the roles and tasks that school authorities and their counsel encounter by reason of recent landmark judicial decisions. A survey of the various categories of constitutional speech and of the distinct case law directed to classified speech activities⁴ would be too extensive an undertaking for present

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1. In this Article the term "discipline" is used in a broad sense to cover the functions of management control, and not merely the restrictive forms of training or punishment.

2. This discussion excludes private schools which, except in special situations, have different administrative patterns, and come under different statutory and constitutional controls than those pertaining to state institutions. See, e.g., Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), aff'd, 445 F.2d 412 (7th Cir. 1971) (per curiam). Cf. Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); O'Neil, Private Universities and Public Law, 19 BUFFALO L. REV. 155 (1970); Wilkinson & Rolapp, The Private College and Student Discipline, 56 A.B.A.J. 121 (1970).


4. "The reasons for which students may be lawfully suspended . . . are limited only by the varieties of misbehavior which their ingenuities can devise. They are so
purposes. The cases selected for discussion herein are, therefore, intended primarily to illustrate current problems, the need for a fresh appraisal of administrative policies and methods, and the need for the intelligent involvement of legal counsel in structuring discipline programs, which, if they are to be effective in school, must also be effective in court.

The Tinker decision, as Mr. Johnston indicated, undoubtedly heralds a new balance between student liberty and official control of school activity. It cuts away, in constitutional terms, much of the assumed authority to prevent all political expression or activity in the school and the assumed authority to exercise plenary power over student expression under the traditional rubric, in loco parentis.

numerous as to defy listing." Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 288 (S.D. Fla. 1970), vacated, 401 U.S. 988 (to allow timely appeal), aff'd, 450 F.2d 1103 (5th Cir. 1971). See note 33 infra. Different forms of constitutional expression often entail distinct analysis and application (i.e., the different dimensions of written vis-à-vis oral criticism, vulgarity, or obscenity; control of written publications; student associations and group activities; and student appearance and grooming). The myriad combinations which these forms of expression may take in connection with student activities would further extend and complicate any attempt to catalogue the legal aspects of speech control.

The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression.


Moreover, the *Tinker* decision has tended to shift the burden of persuasion in constitutional litigation away from the student who challenged disciplinary decisions to the school officials who initiated them. Under *Tinker*, the school is undisputably a public forum where limits are yet to be defined for the expression of student-citizen opinion on matters of general social and political moment, as well as on matters more directly pertinent to the school program.

The practical question — where do we go from here? — is not admirably illuminated by the generalized language and broad-ranging case authorities cited in *Tinker*. The Court's general declaration that it had "unmistakably" held that teachers and students carry their constitutional rights into the school oversimplified the issues presented regarding student political expression. As to such expression *Tinker* was unmistakably a case of first impression at the Supreme Court level. The precedents cited in *Tinker* related not to student political speech, but to parental rights, religious liberty, teachers' rights, and academic freedom. At best they provided loose analogues which, to more than one Justice, remained unconvincing.

*Academic Freedom, 20 U. Fla. L. Rev. 290, 298-304 (1968); Developments, supra note 4, at 1144-45.*

9. 393 U.S. at 509, 511.

10. Mr. Justice Black's dissent in *Tinker* rested upon the thesis stated in his dissent in Brown v. Louisiana, 383 U.S. 131, 151 (1966). A fair statement of this thesis is that where political speech (according to his classifications of government functions) is inconsistent with the operation of special purpose public facilities, the state may constitutionally limit expression therein without meeting the heavy burden of justification that would be required in other centers of public discussions:

Public buildings, such as libraries, schoolhouses, fire departments, courthouses and executive mansions are maintained to perform specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation.

383 U.S. at 157 (Black, J., dissenting).


The weakness of the Black thesis, however, lies in the question- begging classification of particular public buildings and functions. His assertion that student political expression is per se inconsistent with the primary educational functions of public schools is too static, and it covers too many different levels and circumstances of public education. At the high school level one can reasonably conclude, as did the majority in *Tinker*, that such expression is unavoidable, relevant, necessary, and consistent with education and citizen preparation. See 393 U.S. at 512; Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943); text accompanying note 11 supra. On the public forum concept, see generally H. Kalven, THE NEGRO AND THE FIRST AMENDMENT (1966); Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1.

11. 393 U.S. at 506.

12. Id. at 506, 507.

13. "I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse
The closest factual precedent to *Tinker* was *Burnside v. Byars* in which the Fifth Circuit disapproved a high school regulation prohibiting students from wearing buttons (SNNC and one man, one vote buttons). Both cases involved selective bans on specific political symbols. Hence *Tinker* could allude to the dangers posed by such selective bans and by the official censorship of particular opinions. But *Tinker* was less concerned with the narrow issue of censorship or equal protection than with the broad sweep of constitutional protection for all passive political expression that is deemed "akin to pure speech." After specifically excluding from consideration less direct forms of student expression that might qualify for first amendment protection, the *Tinker* Court emphasized that the constitutional protection of primary speech extended to all physical areas of the school, and that such protection could be limited only upon demonstrated facts that would support a "*reasonabl*[e] . . . *forecast* [of] *substantial disruption*" of school activities. Thus, the Court left to future determination what circumstances of time, place, manner, and duration will satisfy the elastic terms of the first amendment standard.

The discretion invited by such terms has permitted lower courts to disagree with each other, as well as with school administrators, on the "forecast" and "disruption" issues. On these issues the *Tinker* gate' constitutional rights to 'freedom of speech or expression.'" *Id.* at 521 (Black, J., dissenting). "I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults." *Id.* at 514, 515 (Stewart, J., concurring).

14. 363 F.2d 744 (5th Cir. 1966).

15. The selective censorship aspect of the *Tinker* dispute was one of the factors seized upon by the court in Guzik v. Drebush, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971), to distinguish *Tinker* and uphold a universal ban on all political emblems and symbols by students in a racially tense high school. *Id.* at 597. The equal protection attack in selective prohibition of expression was sustained in Channing Club v. Board of Regents, 317 F. Supp. 688 (N.D. Tex. 1970).

16. 393 U.S. at 508.

17. "[T]he present case does not relate to regulation . . . of clothing, to hair style or deportment . . . . It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct primary First Amendment rights akin to 'pure speech.'" 393 U.S. at 507-08. The limited scope of the *Tinker* decision was later confirmed in Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969) (Fortas, J., concurring).

18. 393 U.S. at 512, 513.

19. *Id.* at 514 (emphasis supplied).


21. As to school prohibitions of student armbands, buttons, and other insignia, compare, e.g., Guzik v. Drebush, 431 F.2d 594 (6th Cir. 1970); Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971); and Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970), modified and *remanded*, 443 F.2d 422 (10th Cir. 1971), all of which upheld such prohibitions; with Butts v. School Dist., 436 F.2d 728 (5th Cir. 1971), which disapproved such a prohibition.

As to the issue of advocacy and incitement to violence, compare Siegel v. Regents of Univ. of Cal., 308 F. Supp. 832 (N.D. Cal. 1970), *vacated*, 449 F.2d 788
facts provide only the simplest and narrowest model for judgment. Tinker presented no past history such as might support a forecast of trouble, nor did the Court essay upon the weight that might be given to historical experience. It did not indicate whether past troubles arising out of similar expression would have had to be fairly proximate in time — i.e., last week or last month, rather than last year — in order to elevate official concern from an insufficient "undifferentiated fear" into a "reasonable forecast." Nor did it touch upon the myriad kinds of possible disruption or indicate the degree or gravity of physical disorder, distraction, disrespect, or low level student language that would satisfy the constitutional, and potentially spacious, concept of "disruption." There is no empirical frame of reference for the evaluation of the circumstances of speech activities as they bear upon disruption which is not physical or patent. Speech activities may clearly distract by diverting students' attention away from particular studies at a given point in time; but they also might, over a period of time, drain off an excessive allotment of student time in derogation of general study work, without posing any direct interference with particular classes. The manner and intensity of student expression might

(9th Cir. 1971) (remanded to three-judge court on constitutional issue), which upheld dismissal of a student for inciting an attempted takeover of state college property, with Molpus v. Fortune, 311 F. Supp. 240 (N.D. Miss. 1970), which overturned, in the absence of a showing of clear and present danger, a state university ban on the use of the campus by a speaker who advocated campus disorder.


As to group protests and demonstrations and the danger of the "dragnet" approach to student sanctions, compare Zanders v. Board of Educ., 281 F. Supp. 747 (W.D. La. 1968), with Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969). It should be remembered, however, that "[t]he facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate." Carroll v. President & Comm'rs, 393 U.S. 175, 183 (1968).


23. 393 U.S. at 508, 514.

24. See note 21 supra.
not, in any single instance, rise to the level of "fighting words" or constitute specific defiance or disrespect. However, if such expression were to continue over a period of time, cumulatively it could strain school relationships, render impossible the maintenance of an academic atmosphere, and undermine educational efficiency.

Clearly, reasonable men may differ in drawing the constitutional line on such difficult questions; the characterization of given facts and the inferences drawn therefrom concerning the prospect and gravity of any likely "disruption" unavoidably remains largely subjective.25 One need not be a master psychologist to recognize that, by reason of their different primary interests, training, and experience, educators and judges will tend to differ in their perception and evaluation of the counterbalancing hazards of impaired education vis-à-vis impaired freedom of speech. The educator must, therefore, be more than satisfied in his own mind on the need for discipline; he must understand and be prepared to convince judges who are empowered to review his decisions.

Tinker was somewhat ambivalent on the scope and standard for judicial review of administrative judgments. The majority confirmed the "comprehensive authority" of local school officials to maintain discipline,26 acknowledged that the "special characteristics" of the high school environment require special application of constitutional principles,27 and Tinker stated that the Constitution permits "reasonable regulation."28 In isolation, these statements would support restrained review and judicial deference to administrative judgment, with the burden upon students to show that school officials acted unreasonably.29 However, that conclusion is counterbalanced by other parts of the opinion which required affirmative justification for school regulation of speech activity.30 Further, the Court's citation to Terminiello v. Chicago,31 which some courts have discounted as a rhetori-

25. Compare, e.g., the different glosses and opinions based on the same facts on the issue of disruption in Tinker, as rendered by Justice Fortas (398 U.S. at 508, 509), with those by Justice Black (393 U.S. at 517, 518).
26. Id. at 507.
27. Id. at 506.
28. Id. at 513. See note 20 supra.
29. Id. at 515 (Stewart, J., dissenting), 526 (Harlan, J., dissenting).
31. 337 U.S. 1 (1949). "[F]reedom of speech, though not absolute ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantial evil that rises far above public inconvenience, annoyance, or unrest." 393 U.S. at 508.
cal flourish," pointed to a kind of "clear and present danger" test. Thus, while the Supreme Court obviously did not mean to equate the latitude of speech enjoyed by Terminiello, a street speaker inflaming a hostile audience, to that of students in the compact and compulsory forum of the public school, the reference to Terminiello complicated any interpretation of the Tinker rationale.

A further question is raised by the Tinker Court's omission of any reference to Pickering v. Board of Education. In Pickering, the Court explicitly adopted an open-ended balancing approach to the constitutional claim of a public school teacher to express himself on school matters away from the school with immunity from disciplinary sanctions. Did Tinker intend to place higher constitutional protections on student political speech or was Justice Fortas merely advancing substantially the same test in more colorful rhetoric? The federal courts have not provided a uniform answer. Rather, they have focused attention on different segments of the Tinker opinion to develop divergent interpretations of the applicable standard, the permissible degree of judicial reconsideration of administrative judgments, and of the precedential force of Tinker in a broad spectrum of speech-connected activities.

Furthermore, Tinker dealt with elementary as well as high school students, and there was, therefore, no discussion of the possible distinctions that might be drawn between younger children and adolescents. It is submitted that the susceptibility of younger children to distraction or imposition by political speech activities merited a separate discussion and application of the Court's test and indeed an independent constitutional rationale as well. Perhaps, one will be forthcoming in

Because of the enormous variety of fact situations in which critical statements by teachers . . . may be thought . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of controlling interests should run.
Id. at 569. It should be noted, however, that Pickering involved criticism of school officials by a teacher away from school grounds on an issue that concerned him and others as taxpayers, as well as citizens, and thus it is readily distinguishable from Tinker and other cases involving in-school student activities.
35. See notes 21, 30 & 32 supra.
36. "A special note should be taken that the activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature state of life and less able to
future cases, but age level cannot be excluded from any legal analysis of disciplinary actions.

Unfortunately, the Court did not directly consider, perhaps because they were not developed by the record in Tinker, the various possible justifications for speech regulation based upon general concerns of administrative necessity and feasibility that are independent of the proximate consequences of student expression. It is submitted that isolated analysis of the proximate results of particular expression ignores long term elements of cost, in dollars and program efficiency, and ignores the deferred or cumulative effects of ongoing political speech activities. The decision does not foreclose consideration of such factors, but school officials must be prepared to explain their significance. Although Mr. Justice Black's dissent exhibited a sensitive, perhaps exaggerated, fear of the long term disruptive effects of limited speech regulation on public education, only concrete illustrations by administrative experts can enable courts to judge the validity of those fears.

Notwithstanding the mixed readings given Tinker, it cannot be denied that the decision reflects a cultural force that must be accommodated. Like the twenty-sixth amendment, giving full voting rights to 18-year-olds, and recent state legislation reducing the age of majority from 21 to 18 years, Tinker reflected the community judgment that, at least as to high school students approaching adult citizen status, high school activities should prepare them for the independent exercise of civic roles. The natural training ground for such preparation is the high school, where students relate to the school administration and their peers much as they will relate to general government and fellow citizens upon graduation. Moreover, it is no longer possible to immunize the schools from political discussion and activism. It should remain possible, however, to apply the familiar principle that the nature of the forum conditions the latitude to be given to individual expression. The Supreme Court decisions recognize that principle, and it is up to school administrators in the first instance to remedy


37. "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." 393 U.S. at 511.

38. Id. at 525.

this problem. If they are sufficiently flexible and sensitive to student rights in revising school governance and discipline, it is probable that they will command judicial concurrence and retain that initiative. If they fail, the level of litigation and judicial interference can be expected to increase.\(^4\)

Only by losing sight of the productive interplay between public administration and judicial lawmaking can schoolmen view their task as a negative burden. The goal is not so much to second guess the courts or civil libertarians, as to create an educational process that realizes basic societal and constitutional values of fairness and reasonableness. These values already underly non-constitutional law,\(^4\) but they now are fortified by a constitutional additive and by the special relief provided by the federal civil rights acts, which students understandably prefer to advance in the federal courts.\(^4\)

Beneficent intent and purpose, however, is not sufficient to withstand attacks by knowledgeable and militant litigants. They insist upon compliance with procedural and technical requirements — that regulations be neither "vague"\(^4\) nor procedurally deficient.\(^4\) These are tasks which often require a legalistic skill for which schoolmen are generally not trained. Since so many disciplinary actions are overturned solely on these grounds,\(^4\) it remains somewhat a mystery

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40. "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students." 393 U.S. at 506 (emphasis supplied). "We properly read it [the Constitution] to permit reasonable regulation of speech-connected activities in carefully restricted circumstances." Id. at 513. See generally Cohen v. California, 403 U.S. 15, 19-23 (1971).

41. For example, one district court has imposed code-like regulations. See General Order on Judicial Standards of Procedure and Substance in Review of Student Disciplinary Actions in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968). As Professor Wright observed, this quasi-legislative and administrative exercise by the judiciary followed a series of difficult cases and the apparent anticipation by the court that, without a detailed order, it would be required to repeat the message of constitutional limitations in a burdensome piecemeal fashion. Wright, supra note 4, at 1033. Of course, such an extraordinary judicial action would not have been precipitated if the university and college administrations had taken the initiative to supply satisfactory administrative guidelines in response to earlier litigation. See note 8 infra.

42. See generally Goldstein, supra note 8.

43. This preference is especially true where relief on non-constitutional grounds is foreclosed by prior state court decisions. See, e.g., Richards v. Thurston, 424 F.2d 1281, 1282-83 n.3 (1st Cir. 1970) (most of the cases discussed therein sought relief under the federal civil rights statutes, as well as under the Constitution).

44. See notes 93-97 and accompanying text infra.

45. See Buss, supra note 8.


Regarding interim suspensions, compare Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416 (W.D. Wis. 1969), appeal dismissed, 420 F.2d 1257 (7th Cir. 1971), with Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971).
why school districts continue to invest so little time and funds for advance legal counselling. The cost of defending litigation is immensely greater than that of preventive counselling. With all the money being spent to improve educational administration, it is ironic that funds can not be found to bring school counsel into the decision making process on matters touching constitutional rights.

The need for supporting administrative decisions by previously developed legal acumen is all the more acute because of the diverse patchwork of disciplinary decisions in different jurisdictions. Since the law of the jurisdiction governing a specific school district, and not that of the majority of jurisdictions, will control, specific counselling is necessary. Where the law on a particular question is not settled in a given jurisdiction, opinion of counsel based upon whatever indirect authority is available should be sought by schoolmen and supplied by the Bar. Furthermore, in the application of precedent, as Tinker recognized, different circumstances surrounding identical forms of student expression can generate opposite constitutional results.47 In the "choppy wake" left by Tinker, therefore, the courts have taken different courses in their analyses of similar circumstances,48 illustrating the uncertain growth of law in this area. These different courses have prompted the ranking of different kinds of expression and have highlighted the need for careful appraisal of precedents.49

Tinker was, in a sense, an "easy" case, involving a single, peaceful expression on a single political issue; Tinker does not address other contextual elements that enter into the reasonableness of forecasting the likelihood and seriousness of disruption. Later courts have recognized, however, that the nature of the potential conflict is an important variable. Thus, symbols that involve racial or ethnic identification may be controlled much more rigidly than those inviting mere political dispute,50 and even those addressed to identical political causes may be banned, not only on the basis of immediately observable differences in reaction to them in different schools,51 but also on the basis of

47. In Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), the court nullified as an unconstitutional impairment of free speech, a school regulation which prohibited the students' wearing of designated buttons in school. However, the same court, on the same day, upheld another school district's substantially similar regulation against such buttons because of different school conditions. Blackwell v. Board of Educ., 363 F.2d 749 (5th Cir. 1966). Both cases were cited with approval in Tinker. 393 U.S. at 512, 513.

48. See note 21 supra.

49. See text accompanying notes 64-73 infra (problems of ranking student constitutional claims in hair length and style).

50. See, e.g., Butts v. School Dist., 436 F.2d 728, 731, 732 (5th Cir. 1961) (impliedly condoning exclusion of student for wearing Nazi symbols to school, while nullifying restriction on student armbands).

51. See note 47 supra.

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potential conflict due to the location of a school grounded in a sort of "administrative notice" of neighborhood sentiment.\(^5\) Finally, the school context may be such that a universal ban on all symbols and insignia, irrespective of a past history of use of specific symbols, might be upheld, such as in a racially troubled school where, in the past, student activists have made use of different symbols to heighten group antagonisms and provide a stimulus to conflict.\(^6\) Thus, it may be said of the generalized Tinker standard that "mere articulation of a well intentioned but abstract principle does not always provide the pragmatic and just answer."\(^7\)

Assuming a reasonable forecast of disruption is achieved, the question remains whether school authorities should attempt to control an inflammatory speaker or restrain an inflamed audience. The street speech cases, such as Terminiello, imposed a duty to protect the speaker short of an imminent riot, but schools cannot operate in near riot rumblings and they lack the resources necessary to maintain a police force at the ready.\(^8\) The practical question, again bypassed in Tinker, as to how far the school must protect stimulating speech, draws a different reaction in different courts.\(^9\)

Cases regarding student criticism of superiors and school policy, hair length regulations, and student surveillance and search provide still other examples of the lack of fully developed legal precedents to guide educational decision makers. Like their elders, students enliven their advocacy with emotional appeals. They also exploit the shock value of vulgarity and personal ridicule and are quick to express their disrespect for, and defiance of, authority.\(^10\) The perennial constitutional problem of distinguishing between permissible advocacy and expression on the one hand, and impermissible incitement and insubordination on the other, has sprouted anew in the schools and requires a fresh solution for that context. Absent controlling precedents, these distinctions can only be estimated, for the dynamics of speech and disruption are too varied to capture in a facile verbal formula. The

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52. Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971) (antiwar armbands prohibition upheld in school where parents of more than one-third of its students were government personnel at a nearby military base and where there existed a growing threat of counterdemonstrations by other students).


57. See notes 59 & 60 and accompanying text infra. See also note 40 and accompanying text supra.
educator's perspective tends to focus on the damaging educational impact of critical speech, while the judicial perspective tends to highlight the chilling impact of discipline and regimentation upon free speech. This contrast, resting, unfortunately too often on unstated factual assumptions, is well illustrated by the opposed opinions of Justices Fortas and Black in Tinker.\(^{58}\) As the following cases reveal, their differences endure in the federal circuits where similar divisions and dissents abound.

In Norton v. Discipline Committee,\(^{59}\) the Sixth Circuit upheld the suspension of state college students for distributing literature on campus that ridiculed the administration and called for a student takeover of campus buildings. In Scoville v. Board of Education,\(^{60}\) the Seventh Circuit first sustained, but on rehearing reversed and remanded for trial, the suspension of high school students who had distributed underground papers which ridiculed school superiors and called upon students to refuse to deliver materials sent by the school to their parents. The tone and thrust of these opinions, one stern, one permissive, cannot readily be harmonized. In Schwartz v. Schuker,\(^{61}\) a federal district court in New York upheld the suspension of a high school student who, having disobeyed his principal's order, had distributed an underground newspaper calling for a student strike and containing scurrilous attacks upon the school administration. Similar conflicts appear in cases involving protest expression by group demonstrations at the college level and are noted in Esteban v. Central Missouri State College.\(^{62}\) In Esteban, Mr. Justice Blackmun, writing for the majority, sustained the suspension of students who refused to leave a disorderly demonstration near campus when so ordered by a college official. Justice Blackmun's strong disapproval of the defiant and vulgar language by which the students addressed the administration officials is not shared by courts in other circuits.\(^{63}\)

Placing speech in the proper constitutional perspective is further complicated by the judicial ranking of different kinds of expression in the scheme of constitutional protection. Perhaps the best examples are found in the male hair-length-regulation cases where the conflict among and within the federal circuits is quite sharp and disorderly.

58. See note 25 supra.
59. 419 F.2d 195 (6th Cir. 1969).
60. 425 F.2d 10 (7th Cir. 1970).
62. 415 F.2d 1077 (8th Cir. 1969).
63. Id. at 1089. But see Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir. 1970).
On no less than six occasions, the Supreme Court has declined to review these decisions, all of which purport to be consistent with *Tinker*. At present count, four circuits deny that male students have a substantial constitutional right or protection for their hair length; five circuits recognize such a right, though on diverse constitutional grounds. Constitutional protection of student interest in hair length and style has been rationalized under the first amendment freedom of expression, the equal protection clause, the concept of fourteenth amendment liberty independent of the Bill of Rights, and the “penumbral” zone of privacy emanating from the first, ninth, and other amendments. The Eighth Circuit declined to specify any particular constitutional provision for its position, finding it unnecessary to do so. These divisions at the circuit level are reflective of the divisions which previously prevailed among the trial courts within each circuit.

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65. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971); King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971). Adhering to the views he expressed in his *Tinker* dissent, Mr. Justice Black also expressed the view that federal courts lacked the constitutional power to interfere with public school regulation of hair. Karr v. Schmidt, 401 U.S. 1201, 1202 (Black, Circuit Justice, 1971).

66. Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Crews v. Clonces, 432 F.2d 1259 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

67. The possibility of hair style constituting a form of symbolic expression protected by the first amendment was recognized in Massie v. Henry, 455 F.2d 779 (4th Cir. 1972), but not adopted on that record. The court in Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), also recognized the possibility of elements of expression in the choice of hair style, but rejected the notion that hair style was of a sufficiently communicative character to warrant protection under the first amendment.

68. Crews v. Clonces, 432 F.2d 1259 (7th Cir. 1970) (discriminating among short and long hair students and between male and female students in affording an opportunity for public education); Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970) (discriminating without justification between school athletes and other students).

69. See Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Crews v. Clonces, 432 F.2d 1259 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

70. See, e.g., Crews v. Clonces, 432 F.2d 1259, 1263 (7th Cir. 1970). Cf. Massie v. Henry, 455 F.2d 779 (4th Cir. 1972) (refers to the right to be secure in one's person).

71. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).

Immunity from hair regulation is, of course, not absolute (such as where considerations of safety or sanitation outweigh the student's interest). Nevertheless, school authorities may be required by some jurisdictions to adopt control methods which cut no more deeply than is necessary into the student's constitutionally protected locks and lifestyle. Thus, some courts can be expected to overrule a requirement that the hair be sheared, when the use of nets or hairbands would be adequate to serve the temporary needs of school administration.73

Review of the cases on student surveillance and search indicates that the student's constitutional interest (privacy) does not weigh as heavily in the balance as his primary right of expression. The shift in favor of official interests is understandable, in view of threats of violence, drugs, or other criminal activity that afflict many schools. But here also, reliance can be placed only on specific cases rather than on constitutional generalities regarding warrantless searches. Neither educators nor judges have resolved differences of public policy on the proper degree and manner of student surveillance and search, and semantic labelling of such activity as responsible vigilance and protection, or snooping intrusion and prosecution, does not assist in the making of practical judgments as to the limits of a student's right of privacy.74 While the relatively few decisions do not warrant any projection of their positions to jurisdictions where the law remains to be flushed out by new cases, some are instructive on the legal issues facing school administrations.

A few courts have totally avoided the fourth amendment prohibition against unreasonable search and seizure75 on the questionable premise that a search by a school superior acting in loco parentis is not a governmental, but a "private" act, so that the amendment does not apply.76 Equally gratuitous reasoning prevails in decisions which,

73. [T]he evidence ... if credited, might well justify the enforcements of regulations pertaining to the length or at least management, of hair as a condition of taking the various shop courses at the school. For instance, perhaps nets or hairbands could provide the requisite safety in such classes, or other measures could be adopted which are designed to assure that their legitimate purpose — safety — is accomplished, as long as they are as limited as possible so as not to overly burden the exercise of a protected right. Stull v. Board of Educ., 459 F.2d 339, 347 (3d Cir. 1972). Cf. Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971).

74. For a critique of the privacy interests of public school students, see W. BUSS, LEGAL ASPECTS OF CRIME INVESTIGATION IN THE PUBLIC SCHOOLS (1971).

75. The fourth amendment is applicable to state and local governments, including school districts, through the fourteenth amendment. Cooper v. Aaron, 358 U.S. 1, 17 (1938).

76. Ranniger v. State, 460 S.W.2d 181 (Tex. 1970); In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Ct. App. 1969). The leading authority is Burdeau v. McDowell, 256 U.S. 465 (1921), but the vitality of that decision, in light of subsequent Supreme Court elaborations of the law of search and seizure, may be
while admitting the governmental nature of such action, still find, in
the legislative grant of in loco parentis, the foundation of a "com-
pelling state interest" that outweighs the student's immunity from
search.\textsuperscript{77} Only the strongest judicial inclination to support adminis-
trative discretion in this area could induce such facile reasoning, but
such an inclination is also evident in those cases which uphold searches
on the traditional ground that they were "reasonable" and not viola-
tive of even the fifth amendment, notwithstanding that the fruits of
those searches could be admitted into evidence in delinquency and
criminal proceedings, as well as in disciplinary proceedings.\textsuperscript{78} In those
cases, the courts have substantially lowered the standard of reasona-
bles, below the level of "probable cause." \textsuperscript{79} The basis for such
relaxation of constitutional requirements has been the peculiar envi-
ronment of the public schools:

New York has recognized that a student has a right to freedom
from unreasonable searches and seizures. . . . Texas apparently
does not. . . .

. . . .

. . . [W]e cannot ignore the students' constitutional rights.
But various factual situations give rise to different standards and
procedures in light of the Fourth Amendment. Compare Terry
v. Ohio, 392 U.S. 1 . . . (stop and frisk on reasonable suspicion)
and Henderson v. United States, 390 F.2d 805 (9th Cir. 1967)
(border searches — even mere suspicion not required to search
bags and vehicles).

. . . .

Thus, I conclude . . . that "[t]he 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 thereunder upon reasonable suspicion should be accepted as
necessary and reasonable."\textsuperscript{80}

\textsuperscript{77} See People v. Jackson, 63 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971).
\textsuperscript{78} Cf. Overton v. New York, 393 U.S. 85 (1968) (remanded for further con-
\textsuperscript{79} State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971) (search of a coat of an
absentee student based upon his past record of drug use).
\textsuperscript{80} See note 77 supra. See also Ranniger v. State, 460 S.W.2d 181 (Tex. 1970)
(search of an absentee student having a suspicious bulge in his pocket); People v.
Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (Crim. Ct. 1970) (search based upon
suspicions raised by reports of other student informers).
When locker searches are initiated by police request or from police information, it is questionable whether the administrator who furthers the police investigation by using his own key, with or without obtaining student consent, is conducting a warrantless search principally as an agent of the police department (which is subject to a much stricter legal control on searches), or principally upon his own authority as a school administrator to investigate alleged incidents and to allay his reasonable suspicions. Realistically, in most cases, the school superior is simultaneously serving both school and law enforcement interests. Irrespective of his subjective motive, he is acting in both capacities. Nevertheless, the distinction, if made, is critical to judicial analysis, for it not only determines whether the strict or relaxed constitutional standard is to apply to such warrantless searches, but also whether or not all the complicating procedural due process protections afforded in criminal and delinquency proceedings extend to lesser but still serious school sanctions, such as exclusion from classes. Applied to school searches, strict constitutional due process safeguards would greatly reduce the utility and effectiveness of searches, and delimit the power of the school administration to prevent suspected illegal activities through special or periodic search. Persuasive arguments have been mounted to give greater weight to the privacy interests of the suspected students, but only the naive could deny that the requirements of Miranda-type warnings, of affirmative proof of voluntary consents to searches, and of the application of exclusionary rules governing confessions and evidence produced through searches, would deter, if not defeat, the purposes of administrative searches where they are most utilized. Below the college level, the courts, by relying upon independent school authority to search the locker, have tended to classify and uphold as legitimate such administrative searches. The school’s ownership and maintenance of such lockers and its freedom to search as a condition to granting student use of the lockers are cited as additional grounds to support the resemblances of administrative investigation and search. By way of contrast, the ownership interests of private landlords and college


82. See generally W. Buss, supra note 74.
administrators have not often justified their consent to warrantless searches initiated by policemen. 83

Student consent, of course, legitimates a search, but the tangle of constitutional decisions bearing upon the issue of what is a fully voluntary and knowledgeable consent to a search has yet to be clarified for the public school setting. Any discussion of this aspect of student surveillance would be too extensive to be pursued here, 84 but one can confidently note that, as between a superior and a student, especially regarding lockers that are school as well as student “turf,” the border between consent and coercion is wavering in the law and is already treacherous in practice.

A shift of scene from the locker to the parking lot illustrates the legal significance of locale. Automobiles are strictly personal property, and students suspected of using that shelter for illegal activity may be more prone to resist warrantless searches. Regulations may, of course, prohibit illegal use of student automobiles on or near school property, but the means used to check autos for disciplinary violations through periodic or special searches ought to be cleared with professional counsel, for the precedents here are sparse and limited in their coverage. 85 One could continue with the student’s reasonable expectation of the privacy and confidentiality of his records, 86 but the list of illustrations is already adequate.

It should be obvious by now that a few milestone decisions acknowledging the existence of constitutional rights in public school

83. See, e.g., Stoner v. California, 376 U.S. 483 (1964) (third-party consent to warrantless search of private residential quarters invalidated); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971) (state university dormitory search conducted by police with permission of administration officials, but without valid warrants nullified); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970) (warrantless police search of private university dormitory on authority of administration officials nullified). But see notes 75 & 78 supra (public school search cases). Professor Buss has outlined the different decisional treatment given to searches of students and their effects in high school, on one hand, and colleges and universities on the other, and the distinctions of degree in the protection of student privacy expectations that may be made between locker searches, searches of living quarters, and searches of publicly owned equipment used by students vis-à-vis those used by government employees. W. Buss, supra note 74.

84. See W. Buss, supra note 74, at 63–67.


do not chart the course of these rights in everyday practice. The erosion of traditional doctrines, such as in loco parentis, as limitations on student liberties in one area — speech — cannot imply their equal demise in other areas — student privacy and search. Our Constitution, unlike the broad gauge guidelines for administrative authorities provided by state education codes, requires highly functional analyses to balance and evaluate particular civil interests in particular relations and particular situations. The functional analyses must be elaborated case-by-case, but, until a clear rule emerges on any administrative practice, administrators retain the regulatory initiative. The Constitution does not require that all instances of disciplinary action be covered by a formal rule. Nevertheless, the extent to which school supervisors involve students in effecting disciplinary programs may be seen as a measure of their ability to defuse potential litigation and, more importantly, may provide assurance of the fairness, reasonableness, and consequent legality of such regulations.

Official decisions to develop and publish discipline codes tend to reflect, perhaps over-stress, the concern with student unrest and, in part, the intent to deter extreme or radical student groups. That same concern may underly the fear that the very attempt at code formulation with student participation may be "provocative" and accentuate

87. See Eisner v. Board of Educ., 440 F.2d 803, 808 n.4 (2d Cir. 1971); Richards v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970).

88. By grappling with some of the difficult issues suggested, the Board might also succeed in demonstrating its conscientious intent to formulate policy not only within the outer limits of constitutional permissibility, but also with a sensitivity to some of the teaching reflected in relevant constitutional doctrine . . . . The greater the generosity of the Board in fostering — not merely tolerating — students' free exercise of their constitutional rights, the less likely it will be that local officials will find their ruling subjected to unwieldy constitutional litigation.


[W]e strongly urge that this State . . . encourage their [sic] educational institutions to review their existing procedures . . . to implement the minimum standards already in force. As an enlargement on previous decisions, we strongly recommend that disciplinary rules and regulations adopted by a school board be set forth in writing and promulgated in such a manner as to reach all parties subjected to their effects. . . . The practicality of this suggestion lies in the fact that this would evidence one more sign of the particular institution taking initiative carefully to safeguard the basic rights of the student as well as its own position, prior to disciplining him for misconduct.


89. The Association directs its officers and staff to establish a taskforce to —
a) study further the rights and responsibilities of students and the causes of student unrest . . . .

National Educational Association, Student Involvement (Res. 69–12, 1969).

90. Although there was a good deal of trepidation among principals and teachers when the Bill [of Students Rights and Responsibilities] was first adopted by the Board in 1970, these fears have proven ungrounded. Students have been judicious in their use of the rights granted them by the Bill and there have been relatively few grievances brought under the grievance procedure. I might add that the
unreasonable student demands in school governance. Nevertheless, the personal needs of all pupils, both as maturing citizens and school clients, should provide the primary and positive incentive to expedite the integration of student viewpoints into the disciplinary process. Limited experience to date under school codes does not suggest that the majority of students will abuse attempts to define their rights and responsibilities in order to achieve student takeovers or subversions of school administrations.\footnote{91}

Are the benefits of published codes worth the substantial man-hours and laborious efforts required to forge them? Are there legal as well as practical limitations on the degree of generality or specificity used in such codes? The refined answer to these threshold questions must, of course, be tailored to conditions in each district, but a few general observations are in order. At the higher education level, the cost-benefit question has been answered affirmatively by respected educators and legal scholars who have been directly involved in the task of code negotiation and drafting.\footnote{92} Their answers would seem to apply a fortiori to the high schools, where the physical compactness and population density of the school environment require even greater regulatory control of student movements. High school students need the sense of personal determination, as well as the training and guidance, afforded by such code programs.

The problem of specificity or generality in making rules, at any level, is also one of balance. Regulations must be sufficiently general and flexible to cover a fair range of activity under rapidly changing conditions,\footnote{93} but not so general as to deny fair notice and to incur

\footnote{91}{Wright, supra note 4, at 1064.}

\footnote{92}{Id. at 1063-65.}

\footnote{93}{The courts are agreed that the technical standards of specificity and vagueness applied in criminal proceedings do not govern school regulations. Nevertheless, such regulations must provide fair and reasonable notice to students of the conduct which they are expected to adopt or to avoid. What is required is that basic notions of justice and fair play be employed within the school setting to insure that the standards for acceptable conduct are easily understood. Florida Statute 232.26, F.S.A., does use broad language but the rules of conduct contained therein are not so vague as to require the court to declare them invalid. Although not all of the statutory language to which plaintiffs object is couched in specific prohibitions, it is obvious that the many and varying types of misconduct which justify a suspension are incapable of exact description and, therefore, necessitate the use of encompassing words. Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 290 (S.D. Fla. 1970). See Eisner v. Board of Educ., 440 F.2d 803, 809 (2d Cir. 1971); Esteban v. Central Mo.
legal damnation for "vagueness."\textsuperscript{94} While the authorities are agreed that the requirement of due process in student discipline does not necessitate the same standards as apply to criminal proceedings, there remains, at present, a diversity of opinion among the federal courts on (1) the inadequacy or vagueness of particular critical terms as regulatory guidelines\textsuperscript{95} and (2) whether in certain situations the vagueness doctrine may be avoided on the ground of the "inherent authority" of administration officials to maintain discipline.\textsuperscript{96} Given these judicial vagaries on the vagueness issue and the appearance of indecisive application of critical regulation terms, administrators may well have to rely on nothing more than counsel's guess as to the adequacy of regulations under the vagueness doctrine.\textsuperscript{97} Skirting constitutional objections to vagueness\textsuperscript{98} without surrendering good sense and without proliferating school rules to encyclopedic proportions is a difficult exercise for which courts have often shown too little appreciation and provided even less guidance.\textsuperscript{99} Nevertheless, it is one which, with the support of intelligent counsel and commentary, administrators

\textsuperscript{94} See Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969); Wright, supra note 4, at 1065-66; note 97 infra.

\textsuperscript{95} See note 97 infra.

\textsuperscript{96} The "inherent authority" ground for sanctions, in the absence of a covering regulation, was adopted in Norton v. Discipline Comm., 419 F.2d 195 (6th Cir. 1969), and recognized in Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969).

\textsuperscript{97} Compare, e.g., Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969), with Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969). Cf. Pervis v. School Dist., 328 F. Supp. 638 (S.D. Tex. 1971) (upheld the use of the term "incorrigible" as directed to school administrators, though the court might have considered it unduly vague, if intended to define limits of student conduct); Governing Bd. v. Brennan, 18 Cal. App. 3d 396, 95 Cal. Rptr. 712 (Ct. App. 1971) (sustained the statutory guideline, "immoral conduct," as not being an unduly vague standard for teacher dismissal).

In French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969), the court rejected an attack on a university regulation requiring "responsible social conduct" due to the flagrancy of the students' conduct, stating: "However, while this [vagueness] argument may be valid in other circumstances, under the particular facts of this case we are of the opinion that it is without merit." Id. at 1339. Contra, 418 F.2d at 168 ("The issue here is not the character of the student behavior but the validity of the administrative sanctions").

\textsuperscript{98} The doctrine of "overbreadth" is related to the "vagueness" doctrine but is not within the scope of this article. See generally Wright, supra note 4, at 1066.

\textsuperscript{99} The Supreme Court's own constitutional guidelines are open to the charge of vagueness. See text accompanying notes 19-25 supra. See also Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-08 (1968) (Harlan, J., dissenting).
are equipped to perfect. The result, hopefully, would be a more harmonious school community and a better informed judiciary.  

A school code, fairly arrived at, which reflects a community consensus as to the practical and reasonable accommodation of individual, group, and official interests may well offer the best means to minimize intramural conflict and command judicial acceptance of a school's discipline program. Even lawyers and courts are well aware of the disadvantages of technical and excess legalism in the management of educational affairs.

**Addendum**

Three United States Supreme Court opinions, namely, *Healy v. James*, *Police Department v. Mosley*, and *Grayned v. City of Rockford*, too recently published to be considered in the original Article, should be noted in connection with the points made therein. *Healy* confirmed the constitutional rights of association for students in state schools. *Healy* requires schools to justify refusal of school recognition of student organizations (in this case, Students For a Democratic Society) on the thesis that refusal of such recognition would chill and impede organizational expression by excluding groups from school facilities enjoyed by other student associations.

*Police Department* and *Grayned* struck down ordinances which barred all picketing, other than labor dispute picketing, from school grounds. The Court viewed these ordinances primarily as denials of equal protection; however, there were strong indications that, independent of the selective aspects of the ordinances, they might well infringe on constitutionally protected speech. More interesting, however, is the second holding in *Grayned*, which upheld an ordinance

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101. Some encouragement is provided by the experience of judicial deference to higher education codes. See *Stricklin v. Regents of Univ. of Wis.*, 297 F. Supp. 416, 420 (W.D. Wis. 1969), *appeal dismissed*, 420 F.2d 1257 (7th Cir. 1970); *Wright, supra* note 4, at 1075.

102. See note 88 supra.

103. 92 S. Ct. 2338 (1972).

104. 92 S. Ct. 2286 (1972).

105. 92 S. Ct. 2294 (1972).
prohibiting "any noise or diversion which disturbs or tends to disturb
the peace or good order of the school session or class thereof."\textsuperscript{106}

These recent opinions place illuminating glosses on \textit{Tinker}, especially
with reference to "vagueness,"\textsuperscript{107} the speech-limiting special character-
istics of the school forum,\textsuperscript{108} and the adumbration of the "disruption"
benchmark.\textsuperscript{109} The repeated stress in \textit{Healy} and \textit{Grayned} upon the
school environment as conditioning the time, place, manner, and dura-
tion of protected student expression\textsuperscript{110} clearly delimits the force of
precedents, such as \textit{Terminiello}, wherein the peculiar characteristics of a school community were not present.\textsuperscript{111}

On the troublesome norm of "vagueness," \textit{Grayned} confirmed the
futility of pressing for a precise, objective measure as to which words
and phrases are sufficiently clear to assure fair notice within the bounds
of the Constitution. Writing for the Court, Mr. Justice Marshall
candidly stated the problem, and then answered it in what might, for
convenience, be deemed conservative terms: "Condemned to the use
of words, we can never expect mathematical certainty from our lan-
guage. The words of the Rockford ordinance are marked by 'flexibility
and reasonable breadth, rather than meticulous specificity,' \textit{Esteban
v. Central Missouri State College . . .}"\textsuperscript{112}

As previously mentioned,\textsuperscript{113} in \textit{Esteban}, Mr. Justice, then Judge
Blackmun, aligned the Eighth Circuit with the Sixth Circuit. In
opposition stood the "liberal" or "permissive" (as you please) Seventh
Circuit, not only on the vagueness issue, but also on the scope of dis-
ciplinary authority via the "inherent authority" thesis,\textsuperscript{114} with respect
to which \textit{Esteban} was quoted approvingly in \textit{Healy}.\textsuperscript{115} The present
Court's attitude toward the discretionary authority of school boards is
further indicated by its reversal of the Seventh Circuit's decision in
\textit{Roth v. Board of Regents}.\textsuperscript{116} In \textit{Roth}, the Supreme Court upheld a
discretionary refusal to renew a nontenured teacher's contract and
refused to hold that the nontenured teacher had an expectancy of
employment that entitled him to a hearing on a nonrenewal decision.\textsuperscript{117}

\textsuperscript{106} \textit{Id.} at 2298.
\textsuperscript{107} See notes 93–102 and accompanying text \textit{supra}.
\textsuperscript{108} See notes 55–73 and accompanying text \textit{supra}.
\textsuperscript{109} See notes 16–25 and accompanying text \textit{supra}.
\textsuperscript{110} See, e.g., 92 S. Ct. at 2303, 2304.
\textsuperscript{111} See \textit{ supra}.
\textsuperscript{112} 92 S. Ct. at 2300–01; \textit{ supra}.
\textsuperscript{114} 92 S. Ct. at 2300.
\textsuperscript{115} See notes 62 & 63 and accompanying text \textit{supra}.
\textsuperscript{116} See note 96 and accompanying text \textit{supra}.
\textsuperscript{117} 92 S. Ct. at 2352.
\textsuperscript{118} \textit{ supra}.
\textsuperscript{119} 446 F.2d 806 (7th Cir. 1971), rev'd 92 S. Ct. 2701 (1972).
\textsuperscript{120} \textit{Accord}, \textit{Perry v. Sindermann}, 92 S. Ct. 2694 (1972).
It would, therefore, appear that the present Court does not view Tinker as requiring the same vigorous limitations in all areas of educational management as were imposed with respect to free speech activities.

Grayned also manifests the sheer power of the Court to reconstitute weak legislative language — "tend to disturb" — into the familiar, but unreal, technical formula, "actual" or "imminent" disruption. The process calls to mind Professor Laski's critical description of such judicial technique: "[They twist meaning] by efforts at classification which have no other reality in the living material than the passion of the jurist to bring under the dominion of his art something that is only so brought by the deliberate rape of nature." Functional analysis is retarded by imprisoning the basic test of reasonable fairness qua notice and coverage within judicial constructs of "vagueness" and "overbreadth." Such technical terms, no less neutral and certainly more constrictive than the balancing value of reasonableness, are too costly, as convenient predicates, for complete, independent judicial review.

Grayned gave a further illustration of the ill-defined norm of "disruption" impeding a rational decision. The Court recognized that an anti-noise ordinance aims to control non-physical interference; that is, noise can be disruptive, if only to stir the curiosity of those within earshot. Nevertheless, the Court insisted that the ordinance could be applied constitutionally only to prevent "actual or imminent" disruption. The ad hoc discretion entrusted to policemen in applying the ban, in the absence of any background history (none was cited in Grayned), was not deemed unbridled or overbroad by the Court. Therefore, how much more may school administrators, who operate from a continuing frame of experience, claim like deference from the courts? The Grayned Court did not "hug the shores" of its familiar doctrine; rather, it shifted attention to "the crucial question . . . whether the manner of expression is basically incompatible with normal activities . . . ." Incompatibility in a total operational context and imminent disruption in a specific instance, are not commensurate concepts even if they are to be applied to a simple question of physical housekeeping. Until the tensions between critical concepts, such as "vagueness" or "disruption," are resolved or clarified, the limits of reasonable speech regulation will remain in doubt.

120. 92 S. Ct. at 2303.
Justice Powell, speaking for the Court in *Healy*, and Chief Justice Burger, concurring, focused in practical terms on the preservation of the disciplinary authority of the institution. Notwithstanding the administration’s failure to justify its restriction of associational expression, the *Healy* Court remanded the case for further hearing and recognized the school’s authority to precondition its approval of an organization by having the organization agree to abide by reasonable school regulations, including a code of student rights and responsibilities.121 This stance is somewhat less than a rigorous prophylaxis against prior restraint and chilling effects, since such codes are always subject to future modification. The deference and approval afforded student codes122 re-enforces the suggestion that the regulatory initiative must remain with school administrators. Judicial intervention may also be dampened as a result of Chief Justice Burger’s declaration that the schoolroom, not the courtroom, is the best forum for developing disciplinary standards that properly balance individual and institutional rights and needs.123

121. 92 S. Ct. at 2352, 2353.
122. Id. at 2351, 2353.
123. Id. at 2353 (Burger, C.J., concurring). “The success of any school system depends on a vast range of factors that lie beyond the competence and the power of the courts.” *Wright v. City Council*, 92 S. Ct. 2196, 2211 (1972) (dissenting opinion).