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The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

I. INTRODUCTION

WHILE MUCH HAS been written recently about the prerogatives of students on the college and university level,[1] the prerogatives of secondary school students have, to date, been largely ignored.[2] This may partially explain why case law concerning the requirements of due process of law in administrative hearings for high school students indicates that a pupil may be expelled from a public school without notice or a formal hearing;[3] or why it has been said that the application of the first amendment to public school students is "of questionable

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[1] The exhaustive treatment given this subject on the college level need not be repeated here. For a comprehensive bibliography see Van Alstyne, *Student Academic Freedom and the Rule Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1, 2 n.3 (1965); *Symposium: Student Rights and Campus Rules*, 54 CAL. L. REV. 1, 177-78 (1966). *See also* Moneypenny, *University Purpose, Discipline and Due Process*, 43 N.D.L. REV. 739 (1967); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968); *Symposium: Legal Aspects of Student-Institutional Relationships*, 45 DENVER L.J. 497 (1968); Comment, *The College Student and Due Process in Disciplinary Proceedings*, 13 S.D.L. REV. 87 (1968); Comment, *Due Process in Public Colleges and Universities — Need for Trial Type Hearings*, 13 HOW. L.J. 414 (1967); Comment, *Due Process and Dismissal of Students at State-Supported Colleges and Universities*, 3 GA. S.B.J. 101 (1966); Note, *Due Process and Dismissal of Students at State-Supported Colleges and Universities*, 10 ST. LOUIS U.L.J. 542 (1966); *Are the Rights of Students Expanding?*, 38 OKLA. BAR ASS'N J. 1585 (1967).

[2] As used in this paper, the term "secondary school" or "high school" will refer generally to all grades above the elementary level.

[3] This is supposedly the weight of authority at the secondary school level. *See generally* Annot., 58 A.L.R.2d 903 (1958). Eleven states have statutory provisions which require a hearing. *See* WELFARE L. BULL., June 1968, at 18.

relevance."[4] Perhaps this is not surprising. For unlike teachers and professors who have large and influential lobbies to give needed support,[5] secondary students do not have such organizations. Moreover, only recently have college and university students begun to wield power commensurate with the size of their potential membership.[6]

The obvious consequence of the indifference toward the secondary school has been to leave largely unexplored any differences which may exist in the legal principles underlying the administrative handling of demonstrations or dismissals at the high school level. Recent events,[7] however, make it clear that there is a need for an enunciation of these differences. As Justice Jackson so aptly remarked, school boards "are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account."[8]

Although the high school student is less likely to receive the protection to which he is entitled, it does not follow that he is less likely to need it. Thus, many recent cases indicate that there is an

[4] *See* Note, *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968) [hereinafter cited as *Developmental Note*]. Elsewhere, however, the authors recognized:

> [A]lthough freedom of speech and thought in the learning situation has been given little emphasis as such at the lower levels, with the recognition of education as indispensable to the welfare of the individual and of society the right of protection from arbitrary treatment by the school has become a principal ingredient of pupil freedom. *Id.* at 1050.

[5] This would include the American Association of University Professors at the college level and the National Education Association and the American Federation of Teachers in the public schools. *See generally id.* at 1105-28.

[6] For example, the National Student Association, Students for a Democratic Society, and the Student Non-Violent Coordinating Committee. *See generally* U.S. NEWS & WORLD REP., May 20, 1968, at 42; N.Y. Times, May 19, 1968, § 1, at 1, col. 2; *id.*, May 5, 1968, § E, at 3, col. 1; *id.* Feb. 25, 1968, § 1, at 16, col. 1.

[7] *See* text accompanying notes 10-26 *infra.*

[8] Board of Educ. v. Barnette, 319 U.S. 624, 637-38 (1943). In the past, the problem has been no less troublesome at the college level. Over a decade ago, the situation prompted this quote from Harvard law professor Warren Seavey:

> At this time when . . . we proudly contrast the full hearings before our courts with those in benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket. Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406, 1407 (1957).

inchoate body of law which is applicable to student demonstrations and dismissals and which is only beginning to be felt by secondary school administrators. This article explores the present strength of student prerogatives on the secondary level and attempts to show that we are beyond the point of no return in guaranteeing the applicability of the 14th amendment and the Bill of Rights to all, regardless of age or status. The Supreme Court established this point quite clearly in describing the due process which must be accorded juvenile offenders, saying that "whatever may be their precise impact neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[9]

II. THE PROBLEM

Demonstrations are a symbol of our times. The uproar emanating from direct group confrontations with the establishment has, by virtue of the mass media, brought an unequalled awareness of social reform movements into every American living room. Contrary to previous beliefs, the young have realized the effectiveness of acting in concert.[10] Student demonstrations may be viewed, in part, as a microcosm of the greater malaise that afflicts our society. Thus, the strength of student sit-ins, boycotts, and mass rallies has assumed heretofore unknown proportions.[11] Likewise, the racial overtones

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[9] *In re* Gault, 387 U.S. 1, 13 (1967). Section 1 of the 14th amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of 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 laws." U.S. CONST. amend. XIV. § 1 (emphasis added).

[10] The extent of the misconception of student strength, particularly on the college level, is exemplified by this recent comment which might raise some eyebrows today:

> The student, on the other hand, is generally too tender in years and experience to be an effective spokesman for his interests. He has neither reputation, prestige nor power to add convincing force to his proclamations of selfrighteousness and good conduct. Often he has no financial resources and seldom any spokesman. Certainly the relative interests of the parties and their relative ability to defend those interests indicate that absent judicial intervention, the student, and the student body, is rather helpless in resisting the serious injury which may be unjustly imposed when a college invokes its disciplinary sanctions. Goldman, *The University And The Liberty Of Its Students — A Fiduciary Theory*, 54 KY. L.J. 643, 660 (1966).

Possibly today's student unrest has resulted, in a large measure, from the powerlessness Goldman described.

[11] Recent events have included a boycott by 500 high school students to force integration in Hillsborough, North Carolina, and sit-ins in Cincinnati, Ohio, which resulted in the suspension *en masse* of 1400 students from the public schools. *See* Durham Morning Herald (North Carolina), May 15, 1968, § A, at 1, col. 4; N.Y. Times, May 2, 1968, § C, at 41, col. 2. Similar acts in South Bend, Indiana, resulted in scores of arrests on trespass charges. In Camden, New Jersey, junior and senior high students

and the pleas for equal educational opportunities have been accompanied by lawlessness and violence.[12] There is little question that the problem is a growing one.[13]

In addition, the difficulties in handling this type of student activity are compounded when met with hasty or arbitrary action[14] which may affect those involved far more than is necessary, prudent, or even legally permissible. The recentness of such events has no doubt caught many administrators unaware of how to react to demonstrations or how to handle school dismissals. Yet it is important that they do so in a way that comports with the "fundmental fairness" which has long been a part of our constitutional scheme. Certainly, it would be anomalous to regulate the conduct of students by standards of equal justice which differ from those taught in the classroom.[15]

The fear of arbitrary "unfair" decisions is magnified because of the nature of the group most often involved. In New York State, the problem was recently described in this manner:

> As the Director of the Bureau of Child Guidance testified, most of the pupils [suspended for misconduct] are members of "multi-problem families." The expression "multi-problem families" appears to be a euphemism for the new aliens in our midst — the urban poor . . . . These children emerge, in the main, from the quagmire of urban poverty and vast social distortions which now infect the inner city.[16]

In addition, the very reasons that have compelled these students to make demands on the establishment in the only way known to

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were meeting in executive session with the board of education after they had staged demonstrations asking for the resignations of white principals, coaches, and athletic directors; meanwhile in White Plains, New York, an agreement was signed in answer to student demands for the inclusion of courses in Afro-Asian culture and other curriculum changes. *Id.*, May 12, 1968, § 1, at 36, col. 1; Leeson, *The New Mood of Blackness — Theme and Variations*, SOUTHERN EDUC. REP., July/Aug. 1968, at 3.

[12] *See* TIME, Feb. 23, 1968, at 48.

[13] *See* Leeson, *supra* note 11, at 3.

[14] The recent Columbia University riots resulted in bills, designed to deny financial aid to participants in campus disruptions, being introduced in both the New York legislature and the United States House of Representatives. N.Y. Times, May 10, 1968, § C, at 43, col. 5; *id.*, May 2, 1968 § C, at 1, col. 3. The federal bill was adopted soon after its introduction. P.L. 90-575 (1968). Nevertheless, one wonders whether our present experience in these matters is sufficient to enable us to attempt to preempt the school's or university's role in handling its students through a hierarchy of secondary sanctions.

[15] Professor Seavey argues that professors (and presumedly teachers also) are fiduciaries for their students and should thus come to their aid in areas requiring protection of students rights. Seavey, *supra* note 8. *See also* Goldman, *supra* note 10.

[16] Madera v. Board of Educ., 267 F. Supp. 356, 374 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

them — through demonstrations and riots[17] — prevent them from being able to defend themselves before it when required to do so. The same problems which the middle class citizen might feel are a routine matter may strike a chord of genuine intimidation in ghetto residents who are not accustomed to dealing directly with principals, school counsellors, or judges. While many similar legal problems face both the middle class citizen and the poor man, the poor man may need assistance "in areas in which the more affluent are not involved."[18] One of the more important of these areas is the dispute with a high school principal over the dismissal of a child. While the poor man's lack of education and social status may handicap his efforts,[19] he is not likely to have the financial resources with which to employ a lawyer — that protective buffer which the more affluent instinctively seek.

The problem can be put in greater perspective by considering the importance of fair procedure to the student involved. He may have as much to fear from the arbitrary use of power at the secondary level as at the college or university level. This is particularly true where the misconduct may result in an expulsion or a lengthy suspension. The stigma of compulsory withdrawal may follow even a high school student for many years after the institution has considered the incident closed.[20] Expulsion or suspension always involves a permanent notation on the student's record which may have long term effects on his ability to achieve entry into college or the job market. Moreover, if the child is unable to return to school, the economics of a premature withdrawal are startling and more tangible evidence of the burden that he must shoulder.[21] Fifteen years ago the Supreme Court realized the value

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[17] However, a recent study in Washington, D.C. revealed that,

> the young Negroes in the newspaper headlines — except for small numbers of the ideologically radical and the extremely alienated — are not rioting because they want "out" from the white world, but because they want "in." They share the values of their white peers and want the same privileges.
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> Standing in the margins of a white society that both invites and rejects, the Negro youth is frustrated by the incongruity. Hence anger. Hence violence. McDowell, *How Anti-White Are Negro Youth?*, AM. EDUC., March 1968, at 3.

[18] Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROB. 211, 216 (1966). For example, the poor man may need assistance in determining his eligibility for public assistance, in asserting a right to a partial refund for payments made on installment credit purchases, or in complaining about a landlord's violation of health and building codes. *Id.*

[19] *Id.*

[20] *Cf.* Dixon v. Board of Educ., 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[21] As of 1965, the lifetime mean income of people with less than 8 years of public

of education when it observed that "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[22] Moreover, expelling a student for exercising fundamental rights of free speech or association without requiring a showing that the conduct was detrimental to the functioning of the school, or without affording the student an opportunity to appear so that he can attempt to demonstrate his innocence,[23] may leave psychological scars on his attitude and personality.[24] In addition, such expulsions are calculated to encourage the type of conformity and dependence which is the antithesis of education.[25]

In conclusion, the culturally deprived students who will most often face school dismissal are apt to be the ones least able to afford it. Thus, it must be remembered that no matter how difficult the problems, "they are not a reason for setting aside constitutional guarantees. For most of these children, perhaps the one state conferred benefit which [has the] . . . greatest monetary value is the right . . . to attend the public schools without charge."[26]

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education was $159,000; for people with 4 years of high school, $297,000; and for people with 4 years of college, $482,000. The annual mean income of a college graduate was almost $2300 above that of a high school graduate and about $1500 above that of a person with 1 to 3 years of college work. *See* 1967 STATISTICAL ABSTRACT OF THE UNITED STATES 117.

[22] Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[23] Smith v. Board of Educ., 182 Ill. App. 342 (1913). In *Smith* the school board did hear evidence concerning the alleged infraction.

[24] The following remark by the fifth circuit would seem to apply with equal force to secondary school students:

> In the disciplining of college students there are no considerations . . . which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. *Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education.* Dixon v. Board of Educ., 294 F.2d 150, 157 (5th Cir.) (emphasis added), *cert. denied*, 368 U.S. 930 (1961).

[25] *Cf.* W. VINACKE, FOUNDATIONS OF PSYCHOLOGY 213 (1968).

[26] Madera v. Board of Educ., 267 F. Supp. 356, 374 (S.D.N.Y.), *rev'd* 385 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). It is also possible that dismissals without hearings and without requiring a showing of detriment to the school will reinforce the helplessness which motivated the students' conduct. *See* note 17 *supra*. *Cf.* Dixon v. Board of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), where the court said that "[w]ithout sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." *Id.* at 157. *See also* Madera v. Board of Educ., 385 F.2d 778, 784 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Meyer v. Nebraska, 262 U.S. 390, 400 (1923); E. EDDY, WALK THE WHITE LINE 18-19 (1967); N. GLAZER & P. MOYNIHAN, BEYOND THE MELT-

III. An Historical Overview of Judicial Restraint

A. The Non-exercise of Judicial Power

Relatively few cases have been filed and many that are filed go no further than the trial court where there is often no published report. Even where cases are filed, however, the courts have been traditionally reticent to exercise their power in the educational sphere. The courts have maintained: that they had no power to entertain student suits "except where fraud, corruption, oppression or gross injustice is palpably shown . . .";[27] that public education is a matter reserved for state administrative control;[28] or that the 14th amendment is not applicable to the prerogative of a school to discipline its students.[29] There is also a natural inclination to consider such matters as only within the special competence of school administrators and teachers. However, where students face expulsion or suspension for misconduct, these notions have since been laid to rest.[30] It now seems well established that students enjoy the protection of the 14th amendment[31] notwithstanding the fact that "the responsibility for public education is primarily the concern of the States . . . . Such responsibilit[y], like all other state activity must be exercised consistently with federal constitutional requirements as they apply to state action."[32]

Procedural complications also played a part in the non-exercise of judicial power. Often the use of mandamus to attempt to compel affirmative action by the school or university was considered inapposite. Even today it may be ineffectual because of its discretionary nature and because of the burden of establishing arbitrary

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ING POT 127 (1963); C. SILBERMAN, CRISIS IN BLACK AND WHITE 224-25 (1965); Reich, *The New Property*, 73 YALE L.J. 733, 736-37 (1964).

[27] Smith v. Board of Educ., 182 Ill. App. 342, 347 (1913).

[28] *See, e.g.*, Steier v. State Educ. Comm'r, 271 F.2d 13, 18 (2d Cir. 1959).

[29] State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, *cert. denied*, 319 U.S. 748 (1942). It has been suggested, however, that such an interpretation is misleading. *See* Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368, 373 n.23 (1963).

[30] *See, e.g.*, Dixon v. Board of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

[31] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958). *See also* Slochower v. Board of Educ., 350 U.S. 551 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954); Davis v. County School Bd., 347 U.S. 483 (1954); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Board of Educ., 363 F.2d 749 (5th Cir. 1966).

[32] Cooper v. Aaron, 358 U.S. 1, 19 (1958).

or capricious conduct in the expulsion or suspension of a pupil.[33] Jurisdiction also posed another procedural problem until *Monroe v. Pape*,[34] where the Supreme Court substantially expanded its interpretation of title 42 of the *United States Code*, section 1983, determining that a cause of action was stated under section 1983 where the plaintiff alleged a denial of due process at the hands of state officials.[35] The expansion of section 1983 in *Pape* has allowed student suits to be brought under that statute in a due process proceeding.[36]

B. The Special Role of In Loco Parentis

One of the more significant reasons for judicial inaction stems from the peculiar legal relationship between student and school. Although the theories of "privilege" and "contract" commonly applied on the university level[37] are unsuitable to the secondary school, a third proposition, that the school stands *in loco parentis*, has achieved historical popularity on both college and high school levels.[38] This doctrine, emphasizing the role of the school in bring-

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[33] Vermillion v. State *ex rel.* Englehardt, 78 Neb. 107, 112, 110 N.W. 736, 738 (1907). *See also* Goldman, *supra* note 10, at 664; Harker, *The Use of Mandamus to Compel Educational Institutions to Confer Degrees*, 20 YALE L.J. 341 (1911); Pennypacker, *Mandamus to Restore Academic Privileges*, 12 VA. L. REV. 645 (1926); 21 S.W.L.J. 664 (1967).

[34] 365 U.S. 167 (1961).

[35] Thus, the Court implied that the district court had jurisdiction of Monroe's claim under section 1343(3) of title 28, which allows suits under section 1983 regardless of the amount in controversy. *See generally* Comment, *The Civil Rights and Mr. Monroe*, 49 CAL. L. REV. 145 (1961).

[36] *See, e.g.*, Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Blackwell v. Board of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Dixon v. Board of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Zanders v. Board of Educ., 281 F. Supp. 747 (W.D. La. 1968); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

[37] Unlike a college education which sometimes has been characterized as a privilege rather than a right, the public schools are generally compulsory until the child reaches a certain age. Likewise, there has been no need for a contractual theory in the public school, though one could urge that it is implied. Even on the university level, however, both theories have been discredited. *See* Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961) ("Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth.") *See also*, Van Alstyne, *supra* note 1, at 8-12; Van Alstyne, *The Demise of the Right — Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *The College Student and Due Process in Disciplinary Proceedings*, 13 S.D.L. REV. 87, 88-92 (1968).

[38] On the college campus there is a growing tendency to reject the theory entirely and three jurisdictions have recently done so. *See* Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 729 (M.D. Ala. 1968); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d

ing up the child, is an extension of the concept of the state as *parens patriae* — the state succeeding to the duties of the parent whenever the latter is unable to attend to them.[39] However, even on the secondary level, the *in loco parentis* concept[40] is ill-suited to the realities of the relationship it describes and does not present a rational basis for judicial review. Although the theory on its face imposes no self-evident restrictions, it is clear that some are required because of the harm that may result from an expulsion or a lengthy suspension from school. A state court exposed the more obvious difficulties of *in loco parentis* over a century ago:

> From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.
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> The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence . . . is responsible for their reasonable exercise.[41]

867, 57 Cal. Rptr. 463 (1967). *Cf.* Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961). *See also* Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 292-95 (1965).

[39] Where parental duty for any cause is not performed, the state, through its appropriate agencies succeeds thereto, not as an original right, but a resumption of a right delegated to parents as the natural guardians of their children, the persons under natural conditions having the most effective motives and inclinations and in the best position and under the strongest obligations to give to such children proper nurture, education and training. In cases of necessity, however, children become the wards of the people as a whole, with the duties that spring from that reaction .... In its capacity of *parens patriae* the state can and should make provision for the care and education of these wards of society, not only for the protection of society, but also for the benefit of the children themselves. Wisconsin Indus. School for Girls v. Clark County, 103 Wis. 651, 668-69, 79 N.W. 422, 428 (1899).

But see In re Gault, 387 U.S. 1 (1967), where the Supreme Court observed that the concept of *parens patriae* "proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme . . . but its meaning is murky and its historic credentials are of dubious relevance." *Id.* at 16.

[40] *Cf.* Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913), where the doctrine is well illustrated by the following quotation:

> College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise, or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be ....

[41] Lander v. Seaver, 32 Vt. 114, 122-23 (1859).

Functionally, the role of the secondary school differs from that of the college or university. The former has traditionally been viewed as a disseminator of established cultural values while the latter is thought to be a place of creative development and research.[42] Moreover, while many university students are reaching a leveling-off period in academic and emotional maturity, high school students may only be emerging from adolescence. Nevertheless, today's student unrest is but one indication of the increased sophistication and knowledge which renders the American teenager much less susceptible to the attitude symbolized by the switch-carrying schoolmaster of yesterday.[43] In addition, the currently popular theory in regard to the breakdown of the family unit does not necessarily imply an obligation on the part of the state to preempt the parental role.

The power that the school must have to deal with distracting elements in the classroom, even subjecting them to expulsion if necessary,[44] does not resemble the duty of a parent to care for his child until emancipation. But even if there were a resemblance, the doctrine is not an excuse for judicial inaction because:

> [I]n the case of a minor son, the circumstances would be rare, which could demand an expulsion from the parental roof and the hospitalities and associations of home. Nor even if such circumstances existed, would any prudent parent impose so serious a penalty, without first consulting the primary sources of his information, and freely communicating them to his accused son, and according to him the amplest time and opportunity to exculpate himself.[45]

Nor does the doctrine of *in loco parentis* allow for those times when the pupil may be acting with parental consent, yet violating a rule of the school. Finally, it is argued that for those teachers in the slum-centered school, there is a special need to assume parental

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[42] *Developmental Note, supra* note 4, at 1050.

[43] *Cf.* D. REISMAN, CONSTRAINT AND VARIETY IN AMERICAN EDUCATION 122 (1958); NEWSWEEK, July 29, 1968, at 53. *See also* E. WILLIAMSON & J. COWAN, THE AMERICAN STUDENTS FREEDOM OF EXPRESSION 150-70 (1966); Peterson, *The Student Left in American Higher Education, Symposium — Students and Politics*, J. AM. ACADEMY OF ARTS & SCI. 293-317 (Winter 1968); Rossman, *The Movement and Educational Reform, Symposium — Youth: 1967 — The Challenge of Change*, 36 AM. SCHOLAR 594-600 (1967).

[44] Unlike a university, when expelling or suspending a student, a public school may have an obligation to provide a program by which he can continue his education elsewhere, particularly if the student is within the compulsory age limits. *Cf.* Madera v. Board of Educ., 267 F. Supp. 356, 374 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

[45] Commonwealth *ex rel* Hill v. McCauley, 3 Pa. County Ct. 77, 87-88 (1887).

responsibility by means of compensatory education.[46] However, such a theory adds little weight to the utility of *in loco parentis* as a standard of review where arbitrary action is alleged. In fact, it may also be urged that it is for these students that the analogy truly breaks down, because the extent to which a white middle-class teacher can veritably be considered to stand *in loco parentis* to a black student from the ghetto is dubious and is apt to be so perceived by teacher and pupil alike. This is particularly likely to be a factor in light of the recent movement towards the desegregation of teachers[47] as well as students.[48]

One suspects that the concept of *in loco parentis* is too easily used as a mask or shield to cover a variety of situations in which absolute control over pupils is sought without the concomitant responsibilities that must necessarily flow from such a proposition.[49] Taken literally, it is a misguided analogy to the relationship that one assumes should exist between parent and child. As a guide to the evaluation of teacher-pupil relationships, it serves to obfuscate the problem rather than enlighten the court. It would seem that the demise of *in loco parentis* as a theory to guide action on all levels would indeed be welcome.

IV. STUDENT DEMONSTRATIONS

It is irrefutable that the right of high school students to demonstrate is protected by the 14th amendment.[50] Thus, in *Edwards v.*

[46] *See Developmental Note, supra note* 4, at 1144.

[47] *See, e.g.*, United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill. 1968); Lieberman, *Teachers and the Fourteenth Amendment — The Role of the Faculty in the Desegregation Process,* 46 N.C.L. REV. 313 (1968). As of 1966, the Office of Education found that 41 percent of the teachers of secondary school Negro pupils are white. UNITED STATES OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY 3 (1966).

[48] *See, e.g.*, Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564 (1965).

[49] *Cf.* note 15, *supra.*

[50] The first amendment prevents Congress from making any law "abridging the freedom of speech, or of the press; or the right of people to peaceably assemble and to petition the Government for a redress of grievances." U.S. CONST. amend. I. These first amendment freedoms are protected from state invasion by the 14th amendment. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); DeJonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925). *See also* Board of Educ. v. Barnette, 319 U.S. 624 (1943) (first amendment compels decision that high school students are not required to salute flag).

However, since demonstrations are not considered to be pure speech, they may be afforded less protection than verbal oratory. Nevertheless, a recent Supreme Court decision indicates that only reasonable restrictions as to time, place, duration or manner may be constitutionally imposed by the state in such cases. *See* Cox v. Louisiana, 379

South Carolina,[51] black high school and college students were allowed to assemble at the site of the state government to express their "feelings and . . . dissatisfaction with the present condition of discriminatory actions against Negroes."[52] In striking down a breach of the peace conviction, the Supreme Court pointed out the strength underlying the precepts of the first amendment:

> [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 preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, and unrest . . . . There is no room under our constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[53]

More recently, in *Hammond v. South Carolina State College*[54] a federal district court held that a rule requiring prior administrative approval of all public demonstrations[55] was an unconstitution-

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U.S. 536 (1965). *See also* Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 89 S. Ct. 98 (1968), and Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967), where the respective courts held that long hair is not symbolic expression within the first amendment and even if it were, it is conduct subject to regulation by school authorities. But a lower California court has held that, under certain circumstances, it can be a violation of the 14th amendment to discriminate against a teacher who has a beard. Finot v. Board of Educ., 58 Cal. Rptr. 520 (Ct. App. 1967). *See generally* Comment, *A Student's Right to Govern His Personal Appearance*, 17 J. PUB. LAW 151 (1968); Comment, *The Personal Appearance of Students — The Abuse of a Protected Freedom*, 20 ALA. L. REV. 104 (1967); Note, *Regulations of Demonstrations*, 80 HARV. L. REV. 1773 (1967); Annot., 14 A.L.R.3d 1201 (1967).

[51] 372 U.S. 229 (1963).

[52] *Id.* at 230.

[53] *Id.* at 237, *partially quoting* Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949). *See also* Cox v. Louisiana, 379 U.S. 536, 551-52 (1965).

[54] 272 F. Supp. 947 (D.S.C. 1967).

[55] The regulation, proscribing "parades, celebrations, and demonstrations" was a result of a resolution by the board of trustees and provided for summary expulsion. *Id.* at 949-50. Although the court did not reach the issue of due process in expulsion proceedings, the provision for summary expulsion would hardly have met the requirements laid down by other circuits. *See, e.g.*, Dixon v. Board of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967). *See also* Snyder v. Board of Trustees of Univ. of Illinois, 286 F. Supp. 927 (N.D. Ill. 1968), where a statute prohibiting university officials from extending university facilities to subversive organizations was struck down because it lacked precision and procedural safeguards and was an unjustifiable prior restraint on speech.

al restraint on a student's first amendment rights and required a reversal of the unlawful suspensions. The Court also felt that a college campus was sufficiently analogous to the "site of State government" protected in *Edwards*.[56] The decision seems to be a sound one, since it is difficult to conceive of a place better-suited to the free discussion or dissemination of ideas than a college, university, or under proper conditions, a high school. However, where a student rally displays objectionable signs and broadcasts obscene expressions which threaten to disrupt the maintenance of order on campus,[57] or where students block access to school buildings,[58] expulsions by the institution will be upheld. Similarly, student after-hours sit-ins in campus buildings may result in criminal convictions for trespass or unlawful assembly.[59] Such results are consistent with providing a forum for all within narrow and reasonable restrictions that do no more than proscribe conduct unreasonable in terms of time, place, or manner.

Accordingly, in *Burnside v. Byars*[60] a high school regulation prohibiting students from wearing "freedom buttons" was struck down as an arbitrary and an unnecessary infringement on the students' protected right of free expression. The court recognized that the efficient functioning of a school requires regulations which are necessary in order to maintain an orderly forum for classroom learning and considered a "reasonable regulation" to be one which contributed to that end.[61] However, mild curiosity over the wearing of the buttons did not "materially and substantially interfere" with normal school decorum,[62] "nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so."[63] In a companion case, the court upheld a regulation forbidding the wearing of similar buttons because an "unusual degree" of boisterous conduct and commotion

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[56] Hammond v. South Carolina State College, 272 F. Supp. 947, 950 (D.S.C. 1967). In upholding the right to protest on campus, the court distinguished Adderly v. Florida, 385 U.S. 39 (1966), where it was held that demonstrations conflicting with the lawfully dedicated use of property would not be protected under the first amendment.

[57] *See* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

[58] *See* Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Zanders v. Board of Educ., 281 F. Supp. 747 (W.D. La. 1968).

[59] *In re* Bacon, 49 Cal. Rptr. 322 (Dist. Ct. App. 1966).

[60] 363 F.2d 744 (5th Cir. 1966).

[61] *Id.* at 748.

[62] *Id.* at 749.

[63] *Id.* at 748.

resulted;[64] but without prejudice to the plaintiffs so that they could show that the activity could be carried on without upsetting the school routine.[65]

However, the fifth circuit's approach in *Burnside* is not universally followed. In *Tinker v. Des Moines Independent Community School District*[66] the eighth circuit upheld a school district regulation that prohibited the wearing of "mourning armbands"[67] on school facilities. Although conceding that the wearing of the band was a symbolic act of expression that fell within the first amendment, the court went on to say that school officials not only had a right but "an obligation to *prevent* anything which might be disruptive of such an atmosphere."[68] Since the Vietnam war is a subject of major controversy,[69] the court concluded that, "[i]t was not unreasonable in this instance for school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance."[70]

The conflict between circuits focuses on the extent to which officials may suppress otherwise constitutionally protected expression. The *Tinker* decision allows unlimited discretion to school administrators when they believe a regulation is necessary to prevent future "reactions and comments from *other* students . . . likely to disturb the . . . classroom."[71] Such a formulation leaves little "breathing space"[72] for free expression. The argument that

[64] Blackwell v. Board of Educ., 363 F.2d 749 (5th Cir. 1966). *Cf.* Ferrell v. Dallas Independent School Dist., 392 F.2d 697, 703 (5th Cir.), *cert. denied*, 89 S. Ct. 98 (1968); Jones v. State Bd. of Educ., 279 F. Supp. 190, 204 (M.D. Tenn. 1968). *But see* Ferrell v. Dallas Independent School Dist., *supra*, at 705 (dissenting opinion).

[65] Blackwell v. Board of Educ., 363 F.2d 749, 754 (5th Cir. 1966). This decision seems sound since the school authorities never explained that the buttons were permissible providing school discipline was not undermined as a result, and a mandatory preliminary injunction which would have allowed the students to resume wearing the buttons under those circumstances was denied. *Id.* at 752.

[66] 258 F. Supp. 971 (1966), *aff'd mem.*, 383 F.2d 988 (8th Cir. 1967), *cert. granted*, 390 U.S. 942 (1968). Perhaps the Supreme Court now will resolve the conflict between *Burnside* and *Tinker*.

[67] The mourning was for those who had lost their lives in the Vietnam war.

[68] *Id.* at 972 (emphasis added).

[69] *Id.* "When the arm band regulation involved herein was promulgated, debate over the Vietnam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court." *Id.* at 972-73.

[70] *Id.* at 973. Although the court was aware of the fifth circuit's decisions in *Byars* and *Blackwell*, it chose not to follow them. *Id.*

[71] *Id.* (emphasis added).

[72] "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." N.A.A.C.P. v. Button,

the state may be able to impose more severe restrictions on demonstrative activity which occurs during school hours is well-taken,[73] but goes too far when it becomes a prophylactic measure designed to suppress any attempt at freedom of expression without regard to its relation to the necessary atmosphere required for classroom learning.[74] Although factors of immaturity may indeed be relevant in determining the extent to which free discourse is permitted in the secondary school classroom, and may somewhat alter the doctrine of a "free marketplace of ideas,"[75] the argument is too facile that it has no application whatsoever[76] or that school administrators in their unrestricted wisdom will always handle delicate constitutional rights with the greatest care so that guideposts are neither required nor desirable. Where it can be done in a reasonable and non-disruptive fashion, secondary school students should be able to "ridicule the governor, argue for the admission of Red China to the United Nations, sign a petition urging a general blockade of Cuba or participate in orderly demonstrations to promote any lawful end"[77] just as their college counterparts may do.[78] Whether they will choose to do so is yet another matter.

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371 U.S. 415, 433 (1963). *Cf.* DeGregory v. New Hampshire, 383 U.S. 825, 829 (1966); Elfbrandt v. Russel, 384 U.S. 11, 18 (1966).

[73] *Developmental Note, supra* note 4, at 1132 n.21. *Cf.* State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), *cert. denied*, 390 U.S. 1028 (1968) (march by adult pickets solely for purpose of attracting attention of students and teachers held violative of statute prohibiting willful disturbance of public school, though defendants walked silently, were not on school grounds, and provoked no violence).

[74] *Cf.* Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 89 S. Ct. 98 (1968). The dissenting opinion of Judge Tuttle found the wearing of "Beatle type" haircuts to be protected behavior under the first and 14th amendments, and in language applicable to both the *Blackwell* and *Tinker* cases added:

> These boys were not barred from school because of any actions carried out by them which were of themselves a disturbance of the peace. They were barred because it was anticipated, by reason of previous experiences, that their fellow students in some instances would do things that would disrupt the serenity or calm of the school. It is these acts that should be prohibited, not the expressions of individuality by the suspended students. *Id.* at 706 (dissenting opinion).

Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 605-06 (1968).

[75] "[T]he best test of truth is the power of the thought to get itself accepted in the market . . . . That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919). *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968) (constitutionality of statute forbidding sale to minors under 17 of material declared obscene upheld).

[76] *See Developmental Note, supra* note 4, at 1053.

[77] Van Alstyne, *supra* note 1, at 22. *Cf.* AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM IN THE SECONDARY SCHOOLS 15-16 (1968) [hereinafter cited as ACLU].

[78] *Cf.* Dickey v. Board of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *final decision postponed on appeal*, 394 F.2d 490 (5th Cir. 1968) (student editor's right to publish

It would seem self-evident that, even when dealing with minors, it is incumbent upon the state to show a compelling state interest that will justify an abridgement of freedom of expression[79] just as it must do when dealing with any other group. Since it is precisely at the lower levels of government that freedom of expression is the more likely to occur,[80] it is here that we should be most chary. This is not to say that local officials should have no discretion, but rather that the importance of their work demands the closest attention to traditional constitutional freedoms. In the words of the Supreme Court:

> That they are 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.[81]

V. THE ADMINISTRATIVE HEARING AND STUDENT MISCONDUCT

Dixon v. Board of Education[82] firmly established the modern-day precedent that has greatly influenced the expansion of student procedural rights. Since that fifth circuit decision, the proposition seems unassailable that students at a tax-supported institution of learning must be afforded notice of the charges against them and some type of hearing that will at least comport with minimum due

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editorial critical of state government upheld). *See also* Pickering v. Board of Educ., 391 U.S. 563 (1968).

[79] *But see* Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968). In *Scoville* the district court upheld the summary dismissal of students who had published a mimeographed journal urging faculty and students to ignore the school administration's propaganda. The court said that the journal was a direct threat to the school's operation and thus the state's interest outweighed the importance of first amendment guarantees to the students. *Id.* at 992. However, the court had earlier said that in the procedural posture of the case (motion to dismiss) it had to take as true the allegation that the publication "created no disturbance which did, or could have caused, any commotion or disruption of classes." *Id.* at 989.

[80] *See* note 8 *supra* & text accompanying. *Cf.* T. EMERSON, TOWARD A THEORY OF THE FIRST AMENDMENT (1967):

> [I]nfringement of freedom of expression is the more likely to occur the lower the level of official involved, and local institutions are less capable of maintaining individual rights than the more remote and often better-staffed institutions at the higher levels. The objection that national uniformity in this area constitutes an unwarranted interference with state or local rights is not sufficiently persuasive to outweigh the advantages and the need of federal supervision. *Id.* at 45.

[81] Board of Educ. v. Barnette, 319 U.S. 624, 637 (1942).

[82] 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

process standards[83] before they can be expelled or given a lengthy suspension for misconduct. Such a position seems sound and necessary even at the secondary level, where such disciplinary action will be a part of the students' permanent record, may well have a bearing on their acceptance at the college of their choice, and in any case is but a recognition that students, as well as adults, have a right to be treated fairly. It is doubtful that lesser punishments would merit such a proceeding, particularly since the child's age and the discretion inherent in the teacher's role become increasingly important factors as the educational level of the student decreases.

Many issues yet to be resolved are the specifics that should be afforded students in any particular case. There is no doubt room

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[83] *Id.* According to *Dixon*, the notice must contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the board. In addition, the student must have an opportunity to present his own defense against the charges and produce either oral testimony or written affidavits of witnesses in his behalf. Also he should be given the names of the witnesses against him and an oral or written report on the facts to which each testifies. Finally, if the hearing is not directly before the board the findings should be presented in a report open to the student for inspection. *Id.* at 158-59. *See also* State *ex. rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, (1942); Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144 (1901). For various modifications of the *Dixon* approach see Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dunmar v. Ailes, 348 F.2d 51 (D.C. Cir. 1965); Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968); Scoggin v. Lincoln Univ., 37 U.S.L.W. 2187 (Oct. 1, 1968) (W.D. Mo.); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Zanders v. Board of Educ., 281 F. Supp. 747 (W.D. La. 1968); Jones v. State Bd. of Educ., 279 F. Supp. 649 (W.D. Mo. 1967); Wright v. Texas S. Univ., 277 F. Supp. 110 (S.D. Tex.), *aff'd*, 392 F.2d 728 (5th Cir. 1968); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Knight v. State Bd. of Educ., 200 F. Supp. 396 (M.D. Tenn. 1961); Woody v. Burns, 180 So. 2d 56 (Fla. Ct. App. 1966); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967).

Note that the distinction between the public and the private sphere insofar as state supported versus privately funded schools are concerned is an increasingly nebulous one. The arguments delineating those factors that have heretofore constituted "state action" and thus rendered a private interest subject to the restraint of the 14th amendment need not be repeated here. *See, e.g.*, Guillory v. Tulane Univ., 203 F. Supp. 855, 858 (E.D. La. 1962); Goldman, *supra* note 10, at 650; Johnson, *The Constitutional Rights of College Students*, 42 TEX. L. REV. 344, 347 (1964); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 291-92 (1968); Note, *Private Government on the Campus — Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1382-86 (1963). The concept of education as a public function will undoubtedly receive additional impetus in the years to come. At the elementary and secondary levels, where education is compulsory for all, a dismissal without procedural safeguards is soon likely to be held arbitrary action that is contrary to 14th amendment limitations, notwithstanding the characterization of the institution as public or private. *Cf. Developmental Note, supra* note 4, at 1060-61. *But see* Greene v. Howard Univ., 271 F. Supp. 609 (D.C.D.C. 1967); Miami v Militana, 184 So. 2d 701, *cert. denied*, 192 So. 2d 488 (Sup. Ct. 1966); Robinson v. University of Miami, 100 So. 2d 442 (Fla. 1958).

and need for a flexible approach.[84] It is generally conceded that a full trial, identical to that in a court of law, need not be provided.[85] *Dixon* indicates that the hearing provided must be more than an "informal interview" and that the "rudiments of an adversary proceeding" should be preserved.[86] Thus, it would seem that the student should be allowed to compel the use of witnesses in order to adduce the evidence he feels should be before the administrative board. Where those involved are other students or faculty, this should pose no problem. Such a procedure should also obviate any untoward feelings concerning "tattling."[87] Although some risk of perjury may exist even at the lower levels, the right to the aid of witnesses is sufficiently important to outweigh such a possibility and the opportunity to cross-examine will further reduce

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[84] ACLU, *supra* note 77, at 17-18. "Within limits of due process, institutions must be free to devise various types of disciplinary procedures relevant to their lawful missions, consistent with their varying processes and functions, and not an unreasonable drain on their resources and personnel." Scoggin v. Lincoln Univ., 37 U.S.L.W. 2187, 2188 (Oct. 1, 1968) (W.D. Mo.).

[85] *See, e.g.*, Madera v. Board of Educ., 386 F.2d 778, 786 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Dixon v. Board of Educ., 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Zanders v. Board of Educ., 281 F. Supp. 747, 759 (W.D. La. 1968).

[86] 294 F.2d at 158-59. One court has described a procedure which would be acceptable. The primary procedural features are: (1) furnishing the accused with a written statement of the charges 10 days before the hearing; (2) having the hearing conducted by the person with authority to expel or suspend; (3) allowing the accused, prior to the hearing, to inspect any affidavits or exhibits which the school intends to submit at the hearing; (4) allowing the accused to have counsel at the hearing; (5) affording the accused the right to present his version of the charges orally or by using witnesses, affidavits, or exhibits as he desires; (6) permitting the accused to hear the evidence against him and allowing him (but not his counsel) to question any adverse witnesses; (7) empowering only the person with the authority to expel or suspend to decide on the facts; (8) restricting the decision to the facts presented at the hearing; (9) requiring that the decision state in writing whether or not the student is guilty and the disposition to be made; (10) allowing either side, at its own expense, to make a record of the proceeding. Esteban v. Central Mo. State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967). *Compare* the similar procedure followed by the disciplinary board and approved by the court in Buttny v. Smiley, 281 F. Supp. 280, 288-89 (D. Colo. 1968), *with* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). *But see* Wright v. Texas S. Univ., 277 F. Supp. 110, 112 n.1 (S.D. Tex. 1967), where the court commented that "the procedure followed by . . . [the] Dean . . . [in] summoning the student to his office, demanding an explanation for the student's conduct; and deciding whether he is to be disciplined is [in the campus context] a procedure consistent with due process." For some detailed comments on the proper make-up and *modus operandi* of disciplinary boards, see Blackburn, *Some Thoughts on the Administrative Process as a Means Toward Revoking the Public Education Benefit*, 47 NEB. L. REV. 528 (1968); Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CAL. L. REV. 73 (1966).

[87] *Compare* Vermillion v. State *ex rel.* Englehardt, 78 Neb. 107, 110 N.W. 736, 737 (1907), *and* State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943), *with* Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77, 88 (1887).

the probability of false testimony being taken as true. As important as cross-examination may be in other contexts, however, it will no doubt be largely ineffectual for the high school student unless the more obvious need of some form of counsel is met.[88] Thus, a high school senior was held to have the right to counsel in order to face a charge of cheating where the consequences would have been the denial of a state diploma and of certain scholarship and qualifying exam privileges.[89] But the second circuit held that a mere "guidance conference" to determine whether a child suspended for misconduct may return to the school he had been attending or be transferred to another does not require the presence of a lawyer.[90] Although the lower court thought that counsel was necessary because the child could ultimately have been placed in an institution or suspended from school for an indefinite period, the second circuit pointed out that the only *final* decision which the district superintendent in charge of the guidance conference could make as a result of the conference was to reinstate the child or

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[88] The National Crime Commission adopted a similar view in juvenile court proceedings which, in functional terms, is equally applicable to the public school situation involving a threat of expulsion or a lengthy suspension:

> The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. . . . PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967).

See id., for a discussion of the fears as to formalizing such hearings by having counsel present.

[89] Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967). Arguing by analogy to the decision of the Supreme Court in Brown v. Board of Educ., 347 U.S. 483 (1954), that an individual may not be deprived of an equal opportunity to obtain whatever education may be provided by the state, the *Goldwyn* court held that, "*a fortiori*, one may not be arbitrarily deprived of whatever certificate, diploma or other evidence of that education may be provided." 54 Misc. 2d at 99, 281 N.Y.S.2d at 905. *See also* Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967); Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887). Other school review boards have allowed counsel without a ruling on this issue. *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968); Zanders v. Board of Educ., 281 F. Supp. 747 (W.D. La. 1968); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). *But see* Madera v. Board of Educ., 267 F. Supp. 356, 374 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S. 2d 231 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 905, 281 N.Y.S.2d 970 (1967). *Cf. In re* Groban, 352 U.S. 330 (1957).

[90] Madera v. Board of Educ., 267 F. Supp. 356, 374 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). *Cf.* Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 905, 281 N.Y.S.2d 970 (1967).

transfer him to another school.[91] While the procedure followed in that case seems sufficiently circumspect one might not feel as easy in other situations.

Although a lawyer at the secondary level may be more intimidating to school administrators than to college personnel, it is also true that the former are more apt to be oblivious to constitutional safeguards.[92] This oblivion may indicate a greater need for an attorney or his equivalent at the secondary level.[93] In addition, the public school student, perhaps unlike his university counterpart, most of whom are over 21,[94] may be unable to articulate a defense or even spell out mitigating circumstances. Moreover, as we have observed, this is most likely to be true of the "urban poor."[95] Therefore, if one can assert that the "liberty" of the 14th amendment encompasses the right to pursue a public education, it does not seem to be a libertarian invention to suggest that the indefinite suspension of a pupil may be equivalent to a deprivation of that liberty. Where this follows as a *direct* result of a disciplinary hearing, counsel should be permitted.[96] For those not able to afford an attorney and where a legal services center is not available, there is reason to argue that the school should provide some form of counsel, even if not a trained lawyer, to represent the child.[97]

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91 Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.), *rev'd*, 386 F.2d 778, 783 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). The second circuit also noted that "[w]hat due process may require before a child is expelled from public school or is remanded to a custodial school or other institution which restricts his freedom to come and go as he pleases . . ." was not here in issue. *Id.* at 788. *See generally* 32 ALBANY L. REV. 467 (1968); 22 RUTGERS L. REV. 342 (1968); 46 TEX. L. REV. 540 (1968).

92 *See* notes 8 & 80 *supra* & accompanying text.

93 One could adopt procedures that might effectively reduce any threat of intimidation. This might be accomplished by requiring the lawyer to remain seated when addressing witnesses or board personnel (a procedure followed in some state courts) and by requiring him to gain recognition by the head of the panel before speaking. *Cf.* the procedures outlined in note 86 *supra*, especially provision (6) allowing only the student to question witnesses.

94 U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, Series P-20, No. 110, at 12, July 24, 1961, *cited in* Van Alstyne, *supra* note 1, at 17 n.52.

95 This was evidently the case in *Madera* where the child's mother spoke only Spanish and where the lawyer obtained by the parents was provided by a legal services organization. *See* Madera v. Board of Educ., 267 F. Supp. 356, 358 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

96 *Compare* the district court opinion in Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.), *with* the decision at the appellate level, 386 F.2d 778 (2d Cir. 1967).

97 Such a suggestion is not far removed from the "para-professionals" that others have advocated for use in legal services as informal advocates, technicians, counselors, sympathetic listeners, investigators, researchers, etc. Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927, 934 (1966).

At the hearing strict rules of evidence should not be mandatory,[98] particularly where the presence of counsel could insure that a fair balance is struck in the evidence received, even though his opinion would not be binding. But there is little reason why a transcript could not be furnished where desired by either party.[99] Such a requirement could be met in its simplest form by the use of a tape recorder and thus would require little, if any, administrative inconvenience. Some form of review by the governing board of the institution concerned would impart a healthy atmosphere of accountability.[100]

It has been suggested that the privilege against self-incrimination may be applicable to expulsion proceedings and the like.[101] While it is not likely to be a problem in most cases, there is no reason why it should not be honored. Coercive intimidation is most likely to occur, if at all, at the lower levels.[102] On the other hand, the inconvenience and formality attached to the warnings of a right to counsel or to keep silent[103] and the interest in preserving a rehabilitative atmosphere would not seem to warrant those elements of criminal procedure.[104] Similarly, an extensive behavioral code typical of the criminal laws is not required.[105] However, the regulation in question should not be "so vague that men of common intelligence must necessarily guess at its meaning and differ

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See also Handler, *The Role of Legal Research and Legal Education in Social Welfare*, 20 STAN. L. REV. 669, 670 (1968).

[98] *See* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

[99] *See, e.g.*, the procedure approved in Buttny v. Smiley, 281 F. Supp. 280, 289 (D. Colo. 1968); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 474 (1967); and followed in *Esteban* as summarized in note 86 *supra*, where transcripts were permitted. *But see* Wasson v. Trowbridge, 269 F. Supp. 900, 903 (E.D.N.Y. 1967); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963).

[100] *Cf.* Zanders v. Board of Educ., 281 F. Supp. 747, 761 (W.D. La. 1968).

[101] *Cf. In re* Gault, 387 U.S. 1 (1967). In discussing the civil-criminal distinction in relation to the privilege against self-incrimination the Court said that, "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. . . . The privilege may . . . be claimed in a civil or administrative proceeding if the statement is or may be inculpatory." *Id.* at 49.

[102] *Cf.* Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899, (Sup. Ct. 1967); *In re* Gregory, 19 N.Y.2d 55, 277 N.Y.S.2d 675, 224 N.E.2d 102 (1966).

[103] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[104] *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 906 (Sup. Ct. 1967).

[105] Buttny v. Smiley, 281 F. Supp. 280, 281 (D. Colo. 1968).

as to its application."[106] Finally, the burden of proof should rest upon those bringing the charge.[107]

VII. CONCLUSION

Hopefully, school administrators will soon recognize the opportunity that exists to effectively channel traditional concepts of freedom of speech and association and due process of law into lessons of how a democratic society should function. This would seem to be a far wiser course than resisting the implementation of due process standards. Certainly there is an implicit warning in the growing number of cases that even public school students will not be satisfied with less than their just demand for constitutional protection, whether such protection is conceived as "fundamental fairness" or a "fair shake" or some other label. The point was well made recently by a federal court and should not be lost by those responsible for the direction of the secondary schools:

> From the standpoint of administering justice, we strongly urge that this State, in its own wisdom, encourage their educational institutions to review their existing procedures to insure that they have adequate procedural machinery to implement the minimum standards already in force. As an enlargement on previous decisons, we strongly recommend that disciplinary rules and regulations adopted by a school board be set forth in writing and promulgated in such manner as to reach all parties subjected to their effects. . . . Moreover, we recommend that each disciplinary procedure incorporate some system of appeal . . . . 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.[108]

This is particularly important where there are racial overtones present; one can hardly overlook the fact that many of the procedures now guaranteed as a result of court action arose out of such incidents.[109] Moreover, with the growing pains that will inevi-

[106] Dickson v. Sitterson, 280 F. Supp. 486, 498 (M.D.N.C. 1968); Buttny v. Smiley, 281 F. Supp. 280, 285 (D. Colo. 1968). *See also* Hammond v. South Carolina State College, 272 F. Supp. 947 (D.C.S.C. 1967).

[107] Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887); Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406, 1409-10 (1957).

[108] Zanders v. Board of Educ., 281 F. Supp. 747, 761 (W.D. La. 1968).

[109] *See, e.g.*, Blackwell v. Board of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Dixon v. Board of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961). For those incensed by such a state of affairs, one is reminded that "[One often hears] the complaint that 'discrimination in reverse' is permitting the Negroes to take over

tably come with the increased integration of the public schools, the fairness of administrative procedures — if history is a guide — will no doubt assume even greater importance.

It is time for the school administrator to take the initiative and recognize that students as well as adults have the right to fair treatment. Similarly, it can be urged that the long used shibboleth of *in loco parentis* as it applies to disciplinary measures should be exchanged for one of procedural fairness. As the federal district court pointed out in *Madera v. Board of Education*:

> The need for procedural fairness in the state's dealing with college students' rights to public education, where in many instances students are adults and have already attained at least a high school diploma, should be no greater than the need for such fairness when one is dealing with the expulsion or suspension of juveniles from the public schools. Such fairness seems especially required when the child involved has yet to acquire even the fundamental educational prerequisites that would allow him to go on to college.[110]

As the first of the recent due process cases dealing with student rights reaches the Supreme Court,[111] it may be well to remember the words of Justice Frankfurter who was of the opinion that "[t]he history of American freedom is, in no small measure, the history of procedure."[112] It is clear by the recent decisions of his contemporary brethren[113] in the field of due process of law that they have studied their history.

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the country, but none of those proponents has yet yearned to become a Negro and get in on the great bonanza." Sax & Heistand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 912-13 (1967).

110 267 F. Supp. 356, 373 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

111 *See* Tinker v. Independent Community School Dist., 383 F.2d 988 (8th Cir. 1967), *cert. granted*, 390 U.S. 942 (1968).

112 Malinski v. New York, 324 U.S. 401, 414 (1945) (separate opinion).

113 *Cf.*:

> But the survival of our society as a free, open, democratic community will be determined not so much by the specific points achieved by the Negroes and the youth generation as by the procedures — the rules of conduct, the methods, the practices — which survive the confrontations. Procedure is the bone structure of a democratic society, and the quality of procedural standards which meet general acceptance — the quality of what is tolerable and permissible and acceptable conduct — determines the durability of the society and the survival possibilities of freedom within the society. Fortas, *The Limits of Civil Disoberience*, N.Y. Times, May 12, 1968, § 6 (Magazine), at 29, 95.