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John H. Garvey
The Catholic University of America, Columbus School of Law

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John H. Garvey*

If children possess moral and political rights against the state, theories about these rights have scarcely progressed beyond first principles. The state must retain power to regulate education and some aspects of family life. Parents sometimes have a final say concerning what a child may do and experience. Professor Garvey offers an account of the way in which these and other realities shape the child's rights of free expression under the first amendment.

I was more than a little amused when the Supreme Court announced last Term that it was all right to make sure children didn't hear the word "shit" on the radio,[1] because the eight-year-old who cuts my grass knows even better ways to get the mower started. The "Seven Dirty Words Case," as it is called, contributes to what many must regard as a general confusion about children's rights of free expression. Unfortunately, courts have most often resolved questions in this area either by extrapolating plenary first amendment rights from the child's rights protected by other constitutional provisions, or by discounting adult free speech rights by an arbitrarily chosen factor. Almost no effort has been made to consider the philosophical underpinnings of whatever expression rights children may have[2] and to discover the limits of those rights from more fundamental premises. It is important that a first attempt be made if we are to reach rational conclusions on the subject.

This Article considers the problem in at least a systematic, if at

* Assistant Professor of Law, University of Kentucky. A.B. 1970, University of Notre Dame; J.D. 1974, Harvard University.

1. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

2. Even Professor Emerson's monumental treatise finds that problem "beyond the limits of this book." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 502 (1970). Tentative efforts of rather narrow scope appear in Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of Law*, 52 N.Y.U.L. REV. 1015 (1977), and Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746.

times inconclusive, fashion. Part I begins at a point far removed from the issue of free speech, discussing in a general way what it means for children to have rights at all. Part II examines the conception of the child's right of free expression that emerges from the few Supreme Court opinions addressing the question. It concludes that although it makes a good deal of sense to say that there is such a right, we should view that right as instrumental, that is, as serving ends that will be important for the individual once he reaches adulthood. Part III applies this conclusion to four issues currently troubling both courts and commentators: student criticism of school personnel and rules; racial slurs and the problem of the hostile audience; book bans and curriculum controls; and student discussion of sex, obscenity, and vulgarity.

I. Children and the Notion of Rights and Liberties

Rather than ask whether the assumptions we make in applying our more or less shared moral concepts justify any conclusions about the legal rights of children, this Article considers those issues only in examining rights that command the notice of consitutional law. Traditional analysis of these rights assumes that they are general moral rights against the state,[3] which implies that in recognizing them a legal system

3. Legal and moral rights, of course, need not coincide; it can be wrong to interfere with another's exercise of a right or to fail to act as another has a right to insist that one shall, even if the conduct does not violate any law. Certain moral and legal rights, however, are peculiarly related. This can best be seen from the following observations and distinctions. A useful division of rights, moral or legal, turns on whether a right arises from a particular relationship or transaction. Hart, *Are There Any Natural Rights?*, in HUMAN RIGHTS 61, 68-73 (A. Melden ed. 1970). A serious promise gives the promisee a right to its fulfillment; lovers, members of associations, parties to business ventures, and others in voluntary relationships may have rights between themselves to mutual cooperation, loyalty, and trust, and to the performance of certain acts, even if no one specifically promised the required conduct when the relationships were formed. These "special" rights exist only between parties to the transactions or relationships. Other rights are "general," in the sense that special circumstances do not create them. Roughly speaking, if a general right exists, it extends to everyone; if something is a general moral right, those who possess it must do so simply by virtue of having certain human characteristics. Wasserstrom, *Rights, Human Rights and Racial Discrimination*, in HUMAN RIGHTS, *id.* at 96, 100. A general legal right, however, need not be a moral right at all, for a statute may grant a right to everyone within the power of the state even if moral and political standards would not otherwise require this. On the other hand, it has been a central feature of some political theories, including that on which our own legal system rests, to recognize some general rights as imprescriptible, which presumably entails that they are moral as well as legal rights. The labels we give them—"moral and political rights," "human rights," "natural rights," "basic" or "fundamental rights," and even "rights" *tout court*—allude to their peculiar status. While this Article will deal with some rights that are fundamental in this sense, the whole class is controversial. For example, some theorists have thought it an essential feature of these rights that they are "absolute," *i.e.*, incapable of being overridden even though other interests may be compromised, *see, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 191 (2d ed. 1978), while others think a fundamental right only grounds an especially weighty claim against which rival claims may successfully compete, *see, e.g.*, Hart, *supra*, at 62; Vlastos, *Justice and Equality*, in HUMAN RIGHTS, *supra*, at 76, 81, and sources cited therein. A few proponents of the latter view associate it with the thesis that all fundamental rights are aspects of a

does more than bestow certain privileges on those within its power; it acknowledges that the rights in question are inalienable. Other rights and obligations, however, are not irrelevant. In particular, the complex of moral rights and obligations that characterize the parent-child relationship plays a part in shaping whatever fundamental rights children have.

The question whether children have *any* fundamental rights poses an intuitive difficulty. We are accustomed to thinking that the physical, mental, and emotional immaturity of children in some way makes them ineligible to possess rights.[4] Discussions of rights often casually accept this on the broad ground that children lack the human characteristic of a capacity for rational choice, on which fundamental rights, in their guise as general moral rights, depend. But even if human rights generally do presuppose full possession of human characteristics, the complexities of children's rights raise serious questions about the application of this thesis. A recent theory of fundamental rights illustrates how.

Professor Ronald Dworkin suggests[5] that if we start with the assumption that government must treat each person with equal concern and respect, the notion of rights to particular liberties should play the following role: Government is entitled, under some circumstances, to limit an individual's freedom to do as he wishes for utilitarian reasons—because, roughly speaking, in that way more citizens will have more of what they want overall, though some will have less. These limitations do not violate the commitment to equality, because they treat the desires of all members of the community as on a par with each other. But individual preferences may be either or both of two kinds: personal—a preference for one's own enjoyment of some goods or opportunities—or external—a preference for the assignment of goods and opportunities to others. Any calculation that includes the latter kind of

single right to liberty, which cannot be exercised by everyone to its fullest extent because of possible conflicts, and so requires a calculus of compromise. *See* Hart, *supra*, at 62-63. It has also been suggested that while fundamental rights may properly be limited when they would otherwise conflict among themselves, other legal rights cannot override these rights and governmental interests never justify curtailing them. *See* R. DWORKIN, *supra*, at 193, 274. The question whether rights are vulnerable to limitation plays no part in this Article's discussion, which treats the extent of fundamental rights as primarily a constitutional, and hence a legal, issue, so that a judicial decision concerning an alleged violation of rights can be indifferently interpreted as either a determination of the scope of the rights or a determination that the rights may or may not be curtailed in deference to other interests.

4. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in result); J.S. MILL, ON LIBERTY 9 (E. Rapaport ed. 1978); Dworkin, *Paternalism*, in MORALITY AND THE LAW 118-19 (R. Wasserstrom ed. 1971); Worsfold, *A Philosophical Justification for Children's Rights*, 44 HARV. EDUC. REV. 142, 146-47 (1974).

5. R. DWORKIN, *supra* note 3, at 274-76.

preference violates the commitment to equality, since the losing claimant must compete not only with the personal desires of others, but also with desires simply that he should lose, or another should win, the contest.

Of course, if the only method available for polling preferences is the vote, it will often be impossible to distinguish personal and external preferences. The concept of rights serves to "protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals."[6] Suppose a referendum is called on the proposal that we forbid the advocacy of totalitarian principles. A majority might well be mustered in favor of a law to that effect, and yet some people who voted for it would do so not because they preferred peace and quiet for themselves, but because they feared that others might be converted, or felt that any advocate of totalitarianism does not deserve the right to speak his mind. The right to freedom of speech protected by the first amendment inhibits action based on external preferences and protects the personal preference even of those who enjoy raving about antidemocratic principles. Its inclusion in the Bill of Rights is easy to understand, since it was antecedently easy to see that powerful impulses drive people toward the elimination of unorthodox expression.[7]

This account of the role that rights play in a system of government apparently undermines the attribution of rights to children. To begin with, much as we might decry the imposition of external preferences on mature adults, it is impossible for parents to avoid imposing their personal preferences on their children. A twelve-year-old who wants to watch the Phillies play a night game may be made to go to bed instead, not because his parents would be happier if he did, but because they think he would be better off doing so. If it makes no sense to say in this case that the child has a right[8] against his parents, it might well seem to

6. *Id.* at 277.

7. T. EMERSON, *supra* note 2, at 9.

8. Instead of supposing that the child has no right against his parents in this situation, it may be preferable to describe our intuitive judgment as the correct resolution of various rights and obligations arising from the parent-child relationship. Parents have a duty to their children not to harm them, and this duty perhaps extends to species of harm that a parent is in a peculiarly strong position to inflict, such as permitting a child to do things that may have a bad effect on the child's moral or social character in the long run. Closely connected with this duty is the right parents have, *see* A. MELDEN, RIGHTS AND RIGHT CONDUCT 6-12 & *passim* (1970), to the child's special consideration. Although it would be comic for a parent to assert this right against a three-year-old, on the strength of it a parent may certainly interfere with the exercise of what would otherwise be a teenager's prerogative, *e.g.*, to see a certain film. However, to insist on this right to special consideration in some contexts would seem inappropriate or even wrong.

follow that he has no right against the city government that imposes a curfew.[9] This difference in the treatment of external preferences may ultimately be traced back to the assumption of a right to equal concern and respect with which we began. The right to respect presupposed in the liberal conception of equality seeks to protect "human beings who

> It is not always the prudent thing to make an issue of one's privileged moral position and, when what is at issue is of minor consequence, one can be offensive in making an unseemly fuss about little or nothing at all. Indeed, cases of this latter sort are apt to puzzle us when we see them occur; we may not understand a person when we observe him standing on his rights about something trifling. What is such a person trying to do? And if no answer can be given, we should write him off as either mad or bewildering. But there are cases in which a person would be intelligible but morally unjustified in standing on his rights, when there is neither fraud nor mistake . . . , when there is no disputing the relevance of the right to the specific circumstances of the case, when there is no question of prudence or distasteful fuss about trifles, and when, granted that he has a right that can be honoured, it would be morally desirable to waive, without losing or forfeiting, the right he does have. For a parent not only has a right vis-à-vis his son, but also responsibilities and obligations to him, not only a moral interest in the relations in which he stands to him, but also in the moral relations in which his son stands to others.

Id. at 10. Professor Melden argues that, accordingly, we should recognize some conduct as "obligation-meeting" (*e.g.*, the child's conduct in complying with his parent's wishes) even though it would be wrong to say that the child is under an obligation to act in that way on the particular occasion. Thus, it is imaginable, on Professor Melden's theory, that both the parent and the child should find themselves unable to assert justifiably their rights concerning whether the child should engage in a particular course of action. Suppose a fifteen-year-old girl's mother has decided that her daughter spends too much time playing tennis and visits her grandfather too infrequently; the first occasion on which the mother expresses a desire that her daughter forgo tennis and instead visit her grandfather is the afternoon of a casual match between the daughter and a friend with whom she often plays. There will be other occasions for both to have their wishes respected. Surely, neither mother nor daughter can justifiably make much of her rights here, although rights figure in the background of the disagreement. If disagreements about the same alternatives occur repeatedly, and either mother or daughter always has her way, it would be reasonable for the other to speak of her right in the matter.

It is worthwhile to note, for the purposes of our discussion, that the rough distinction between general and special rights provides no easy classification of the rights of parents against their children. Although the parent-child relationship creates rights only between the child and his parent, the parent's rights are naturally thought of as general rights, rights against all human beings with regard to the relationship. This exclusive character of parental rights has no obvious counterpart in other special rights. To classify parental rights as fundamental rights is not implausible, either, in view of the fact that we may feel the parent's rights as a human being are violated by outside interference, and only make an exception if the parent is unable to make rational decisions concerning the child as, for example, when the parent is insane. Generally, however, little is to be gained by classifying parental rights as special or general.

9. The legal issue is unsettled. *Compare* Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976); *In re* C., 28 Cal. App. 3d 747, 105 Cal. Rptr. 113 (Ct. App. 1972); People v. Walton, 70 Cal. App. 2d Supp. 862, 161 P.2d 498 (App. Dep't Super. Ct. 1945); People v. Chambers, 66 Ill. 2d 36, 360 N.E.2d 55 (1976); Thistlewood v. Trial Magistrate for Ocean City, 236 Md. 548, 204 A.2d 688 (1964); *In re* Carpenter, 31 Ohio App. 2d 184, 287 N.E.2d 399 (1972); *and* City of Eastlake v. Ruggiero, 7 Ohio App. 2d 212, 220 N.E.2d 126 (1966), *with* Alves v. Justice Court of Chico Judicial Dist., 148 Cal. App. 2d 419, 306 P.2d 601 (Dist. Ct. App. 1957); *In re* Doe, 54 Hawaii 647, 513 P.2d 1385 (1973); *and* City of Seattle v. Pullman, 82 Wash. 2d 794, 514 P.2d 1059 (1973). *See also* R. MNOOKIN, CHILD, FAMILY AND STATE 712-14 (1978); Note, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109 (1977); Note, *Assessing the Constitutional Validity of Juvenile Curfew Statutes*, 52 NOTRE DAME LAW. 858 (1977); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66 (1958); Comment, 13 URB. L. ANN. 193 (1977).

are capable of forming and acting on intelligent conceptions of how their lives should be lived."[10] Our Phillies fan arguably lacks this capacity.

It would be a mistake, however, to suppose that the apparent absence of rights against parents pairs up necessarily with an absence of rights against the state. To take only one obvious example, a parent may wash out his child's mouth with soap for saying "damn," but it is fairly clear that public school authorities cannot properly do the same thing.[11] This lack of symmetry is not just one that attends the distinction between rights against individuals and rights against the state; something about the status of being a child further diminishes conventional kinds of rights at least against parents.[12] Yet the child's narrower entitlement to the kind of equal concern and respect that adults deserve might be taken to indicate a contrary outcome in the school setting. The problem is to define some other basis on which to recognize children's rights against the state, while leaving some room for parental control.

However incomplete or misguided their conception of how to live, children will in the near future be members of the adult community and entitled to act on their own ideas regardless of how they have come by them. Any attempt at that point to impose a different pattern of thought or action without the most compelling justification would violate their right to equal respect for their conception of how to live. The first amendment will then strictly prohibit the state from forcing them to pledge allegiance to the flag if they think American ideas unworthy of respect, or believe that flag saluting falls within the Decalogue's proscription of worship of graven images. Nor would it change our opinion of this form of coercion if we could be certain that after years of saluting the flag they would come to believe firmly in the value of that exercise.[13] The right to equality of respect from the state comprehends a limited right of choice free from government interference.

Is there a significant difference between this hypothetical case and

10. R. DWORKIN, *supra* note 3, at 272.

11. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

12. Even an adult speechmaker has no right not to be heckled by someone holding conflicting views since the "fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violations or abridgment by the United States, or by the States, as the case may be . . . ," Logan v. United States, 144 U.S. 263, 293 (1892); he may have a right against heckling by a sheriff, Terminiello v. Chicago, 337 U.S. 1 (1949). The speechmaker would of course have a tort claim for assault and battery if the holder of conflicting views tried to wash his mouth out with soap.

13. *See* J. RAWLS, A THEORY OF JUSTICE § 39, at 249-50 (1971).

West Virginia State Board of Education v. Barnette,[14] which held unconstitutional an attempt by school authorities to force children to salute the flag? One difference lies in the comparative maturity of the victims of state coercion in the two cases. Another is closely related to the first: adults would probably at the time be sensitive to the coercion behind the patriotic drill, whereas children who went through the same thing might never be.

Yet, at least to the extent that the exercise of pledging allegiance has lasting effects, children, once they reach maturity, will have been finessed out of their right of choice,[15] just as the adults in the hypothetical were forced to abandon theirs.[16] To say that it would not violate the children's rights because they would never feel the loss is like saying that taking money from a rich man would not be wrong because he would never miss it.

It makes some sense, therefore, to speak of children as having rights to certain freedoms against the government, even though they are not capable of the intelligent choice that is usually the precondition for such claims. The rights that the state must recognize are, however, different in kind from, and perhaps parasitic upon, the rights that we grant to adults.[17] Some of them are future-oriented in the sense that they will have real meaning and use once the child reaches maturity. Because the child is not yet a fully rational actor, and is to a degree insensitive to coercion, we are not primarily concerned with his present personal autonomy.[18] We are interested in safeguarding the chance of the future adult to enjoy rights and liberties, opportunities and powers, and wealth and a sense of self-worth equal to those shared by currently mature members of society.[19]

All this is abstract, however, and still leaves rather serious questions unanswered. The example from which we drew the limitations on state conduct makes it clear that we feel strongly about efforts by the

14. 319 U.S. 624 (1943) (overruling Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940)).

15. *Id.* at 633.

16. Professor Rawls recognized the separate impact of these two distinctions by providing that any paternalistic intervention must not only be justified by the evident absence of reason and will, but must also be guided by the principles of justice and what is known about the subject's more permanent aims and preferences, or by the account of what he calls primary goods. J. RAWLS, *supra* note 13, § 39, at 250.

17. *See* pp. 343-44 *infra*.

18. Perhaps the most poignant illustration of that fact is the Court's decision in Ingraham v. Wright, 430 U.S. 651 (1977). Justice Powell's majority opinion noted that the rule concerning corporal punishment in schools had changed little since the time of Blackstone, who "did not regard it a 'corporal insult' for a teacher to inflict 'moderate correction' on a child in his care." *Id.* at 661.

19. *See* J. RAWLS, *supra* note 13, §§ 11, 15, 67. *See also id.* at 250.

state to compel belief. The step from that conviction to a general principle against state restriction of the individual's freedom of conscience is a short one. Both the feeling and the principle square with accepted constitutional doctrine, not only in the area of free speech typified by the flag salute cases,[20] but also in the closely related area of compulsion of religious belief, forbidden by the free exercise clause.[21] The fit is not as close, however, when we move from coerced belief to questions of limitations on expression. With respect to adults, we find little to recommend either brainwashing or censorship by the state, and react no more strongly to attempts to coerce political[22] or religious belief[23] than to efforts to curb political,[24] religious,[25] or even vulgar expression.[26] It is worthwhile, however, to explore whether the child's less developed sensitivity to the deprivation and the difficulty of predicting the future effects of isolated instances of limitation bears on the permissibility of limits on freedom of expression. For example, a school regulation that prohibits the wearing of buttons carrying political slogans of any kind in at least some sense will have a smaller impact on the child's future political choices than one compelling him to salute the flag. The former regulation leaves the child's beliefs intact, if untested. Moreover, it is not immediately apparent that the inability to debate, for example, the evils of socialism during a particular portion of the day, is a serious influence on junior high school students who may not "possess sufficient sophistication or experience to distinguish 'truth' from 'falsity' " anyway.[27] The flag salute drill, on the other hand, may affect children at an unconscious level. As applied to adults, a rule against wearing political buttons would be obnoxious both as an affront to the dignity of the individual and as an intrusion on the sphere of free choice among world views.[28]

This discussion of the relation between child and state has ignored

20. *See* note 14 *supra*.

21. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). The issue of coercion may also arise in establishment clause cases. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 287-93 (1963) (Brennan, J., concurring) (Bible reading); Engel v. Vitale, 370 U.S. 421, 430-31 (1962) (school prayer).

22. *See, e.g.*, Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (loyalty oath requirement for inclusion on ballot held unconstitutional).

23. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (notary need not take oath of belief in God).

24. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

25. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

26. *See, e.g.*, Lewis v. City of New Orleans, 408 U.S. 913 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (mem.); Brown v. Oklahoma, 408 U.S. 914 (1972) (mem.); Cohen v. California, 403 U.S. 15 (1971).

27. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968).

28. *See* T. EMERSON, *supra* note 2, at 6.

the problem of parental control. It may be tempting to say that the justifications given for recognizing children's rights against the state ought to apply as well to the relation between child and parent, but it should be clear that they do not, at least not without qualification. Consider the following example. The establishment and free exercise clauses certainly prohibit the government from requiring all children either to attend Catholic schools, or to attend only public schools.[29] It also seems evident that, up to a certain age, the child is incapable of choosing rationally between public and parochial schools.[30] Obviously the parents must make the decision, and it will necessarily affect the conception the child later has as an adult of how he should live his life.

It might be argued that parents therefore have a duty to make that choice for the child that will maximize his exposure to different ideas and life styles, a principle of least restriction that apparently favors the public school. There are objections, however, to this conclusion. It is not clear which school will have the desired effect of maximizing exposure. Although the public school may offer greater religious and perhaps economic heterogeneity, it would be naive to identify that kind of exposure with training to appreciate a variety of ideas and conceptions of how to live. Anyway, the child's future choices may be increased as much by a developed habit of tolerance as by acquaintance at an early age with cultural pluralism. The most serious objection to the notion that parents have a duty to maximize their child's future choices is that it implies a simplistic view of the child's right of choice. However many options an individual on the verge of maturity may have, he must still make some choices. If, as is likely, he is inclined to rely on the parental model, he may feel acutely the deprivation of a better acquaintance with the heritage that his parents might have provided him. If the child altogether rejects the ideas and conceptions of life that his parents held, it will be crucial for him to do so from a position of inner stability that can only come from an earlier identification with parental attitudes.[31] If mere acquaintance with a diversity of life situations alone were the best way of maximizing future choices, the best plan for

29. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (free exercise clause); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (establishment clause); Engel v. Vitale, 370 U.S. 421 (1962) (establishment clause). *Cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (due process clause).

30. *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). *But see* INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS 125 (tentative draft 1977) [hereinafter cited as RIGHTS] (dissenting view of Commissioner Wald).

31. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973).

the child's development would perhaps be frequent transfer from one environment to another. But frequent uprooting is precisely the most unfortunate aspect of the foster care system in most states today. What it lacks is not only love on the part of the caretakers, but stability.[32]

Although the child's immersion in his parent's world and subjection to parental decisions may be necessary to assure his future ability to choose for himself, it does not follow that the child is without rights against his parents. The goal of preserving the child's future options helps to define children's rights that even parents must respect. For example, physical abuse is ground for civil and criminal actions on the child's behalf,[33] and removal of the child from the home.[34] It is difficult today to imagine circumstances under which the mature individual would later acknowledge the wisdom of abusive treatment. The need for identification with parental attitudes also suggests that the child may make justified claims of another sort, although it would be imprecise to characterize them as rights to liberty in any but the most attenuated sense. The child has a right to the imposition of certain external preferences: to be taken to church on Sunday; or to be steered away from church on Sunday; to be taught the pledge of allegiance at the breakfast table; or to learn to revere Ho Chi Minh. In cases of extreme deprivation, such rights may now be enforced under neglect statutes,[35] although for obvious reasons the law should not enforce rights of this kind too rigidly. Further, as a child matures, his interpersonal moral rights become less distinguishable from those of adults. Adults, of course, have moral rights "against all the world" in addition to those elevated by tort law to the status of legal rights. The individual is entitled to a minimum level of decent treatment, not only by the state, but by all others, and children certainly share this entitlement, although they have a duty, varying with their ages, to defer to their parents and other adults in some things. The parental privilege of authority over

32. *Id.*, *passim*; E. SHERMAN, R. NEUMAN & A. SHYNE, CHILDREN ADRIFT IN FOSTER CARE: A STUDY OF ALTERNATIVE APPROACHES (1973); Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (1975). *See also* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977).

33. On the question of civil liability, see R. MNOOKIN, *supra* note 9, at 305; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 864-68 (4th ed. 1971); Annot., 41 A.L.R.3d 904 (1972). On the question of criminal liability, see, *e.g.*, CAL. PENAL CODE §§ 273a, 273d (West Cum. Supp. 1978); Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 680-93 (1966).

34. *See, e.g.*, CAL. WELF. & INST. CODE § 300 (West Cum. Supp. 1978); COLO. REV. STAT. ANN. §§ 19-1-103(20)(a), 19-3-111 (1974); Paulsen, *supra* note 33, at 693-97.

35. *See* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

the child does not suspend the child's right to decent treatment; although it changes what counts as decent treatment in some circumstances, it enlarges the range of transactions to which the child's right is relevant.

Three further variations on the theme of children's rights deserve attention before we examine cases dealing with free speech. Since rights against parents and rights against the state are not symmetrical, complexities are bound to arise when parents and state both give orders and the child opposes one or both. To begin with the easiest combination, suppose that child and parents prefer a course of conduct that the state opposes. That was the situation in *Barnette*,[36] and its solution seems simple: the child has not only a right against state restriction of his future choices, but also a right to the benefits of parental direction, both of which favor sitting through the pledge of allegiance. The case leaves open the question whether the right to parental direction taken alone is enforceable against the state. *Wisconsin v. Yoder*[37] implied that it is, at least when the child is aligned with his parents. The state in *Yoder* sought to enforce compliance with its compulsory school attendance law, a measure that very few would suppose children have a constitutional claim to prevent.[38] The Court nonetheless held that Amish parents could withdraw their children from school to be educated within the Amish community.

A more difficult aspect of the same question is presented when child and state are aligned against parents. This unsettled issue would have been presented in *Yoder* had it clearly been shown that the Amish children preferred to remain in public school. If the right to have parents impose external preferences means anything, it certainly means that parents can direct their child to accept their ethical views regardless of the child's personal preference. In the case of preadolescent children this principle seems to offer an easy answer to our question: since the child's right to parental direction seems unexceptionable at that age, he should be withdrawn from school. The case of older children is harder since the state may find itself closing schoolhouse doors to individuals who are old enough to refuse parental direction.

The conceptual issues become knotty when the child is properly aligned against both the state and his parents. Ordinarily the state

36. 319 U.S. 624 (1943). The similarity of the alignment of guardian, child, and state in Prince v. Massachusetts, 321 U.S. 158 (1944), suggests that the case was wrongly decided.

37. 406 U.S. 205 (1972). Precisely what the child is entitled to on the authority of *Yoder* is a bit unclear, since the case involved the conviction of several parents for violation of the compulsory attendance law.

38. *But see* H. FOSTER, A BILL OF RIGHTS FOR CHILDREN 55-56 (1974).

ought, for example, to have little control over what the child reads outside school hours; the role of big brother here is perhaps as likely as any to produce the kind of robots that *Barnette* worried about. We do not think it extreme, however, for parents to forbid their children to see violent television programs or to buy *Penthouse* magazine, in part because parental direction is unlikely to be a disguise for governmental direction, and in part because parents are in the best position to judge what kinds of intellectual activity are appropriate for their child's state of development. Even when the state does no more than assure enforcement of parental decisions, however, it may be hard to determine whether the child receives all the benefits of parental direction, without suffering the unhappy consequences of state control. Take by way of illustration the law approved in *Ginsberg v. New York*,[39] which forbade minors under seventeen to purchase obscene materials, but permitted parents to give them to their own children.[40] From one perspective, the law seems designed only to protect parental decisions to withhold dirty books. It makes less sense to speak of the child's right against state coercion in this case than it would if the statute forbade everyone—parents and third parties alike—to hand out certain kinds of reading matter to children. Yet there is merit in the view that if parents cannot secure compliance simply on the strength of family ties, without resorting to outside help, it is time to let the child strike out on his own. Everyone reaches a stage at which parental direction becomes not only unnecessary but a cause for resentment, and state enforcement of parental wishes becomes objectionable.[41] The real force of this observation is that the law makes no provision for the emancipated minor, and not that it is wrong to say that up to a certain level of maturity the child may have no right against state enforcement of parental choices.

Parental control obviously competes with the child's subjective interests, some of which will receive protection ultimately in the scheme of adult fundamental rights. For some purposes, it may be important to decide whether society's acceptance of parental control elevates that principle to the status of a right, and if so, whether the right belongs to the child or to the parents.[42] We need not face these issues, however, in

39. 390 U.S. 629 (1968).

40. *Id.* at 639.

41. This notion seems to be the basis for the Court's recent decision in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), which involved a law forbidding girls under 18 to secure abortions without parental consent. The Court held that giving parents a veto did not serve the interests of family unity or parental authority "where the minor and the nonconseuting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure." *Id.* at 75.

42. In the discussion that follows, I will speak of the parent's right to direct the child's intel-

order to be certain that respect for parental control and for society's power to make certain decisions for children affects the logic of children's (other) rights. Part II examines how first amendment jurisprudence has dealt with these factors in construing children's rights of free speech.

II. The Supreme Court's Conception of the Child's Right of Free Speech

A. The Child's Need to Grow

The child must grow both mentally and socially in order to reach adulthood. To understand how the Court has dealt with the problem of free speech for minors, we must begin with the proposition that certain limits may constitutionally be set to ensure proper growth and that beyond them expression may be curtailed. As might be inferred from the foregoing discussion, the limits set for growth are generous, but they are not—as they may be for adult expression—infinite. The state's authority to discourage children's expression derives from the child's need for parental direction and the state's interest in educating future citizens.

Cases dealing with children's exposure to obscenity and vulgarity have most clearly recognized the child's need for parental direction. The Court has permitted legal rules in these areas to be structured to allow a child access to obscene or vulgar materials if the parents consent. The most recent example of this approach is *FCC v. Pacifica Foundation*,[43] a case initiated by the complaint of a father who heard

lectual and social formation as the counterpart of the child's need for parental direction. It must be explained at this point that the parent's "right" might be analyzed differently. Even though we agree that children genuinely need and are obliged to accept parental involvement in their upbringing (or the involvement of a few individuals who perform something like the traditional role of parents), the state's obligation not to override this parental direction need not correspond to a fundamental parental right. The apparent parental right is not fundamental in the sense that the state never has the right to tamper with it. A parent properly loses whatever right he has when a child is voluntarily given up for adoption or when the state justifiably separates the child from the parents. Foster parents certainly accept the obligation of providing parental direction, and yet, unlike adoptive parents who seem to have the same parental "rights" as natural parents, have no strong claim against the state's interference. These considerations arguably support the conclusion that the state's obligation not to interfere with parents' direction of their child's development is the counterpart, not of a fundamental parental right, but of the child's fundamental right to a stable upbringing. What does this imply, though, about situations in which the child opposes his parents' decisions? Parents' decisions for the child may or may not conflict with the child's rights. Certainly, as the child matures he acquires some rights, at least as against persons other than parents—versions of the usual rights of adults. The parental "right" may at that stage best be understood in terms of something like Professor Melden's description of the parent's right to special consideration. *See* note 8 *supra*.

43. 438 U.S. 726 (1978).

George Carlin's "Filthy Words" monologue on the radio one afternoon while driving with his young son. The FCC issued a declaratory order[44] finding that it had power to control the use of vulgarity in broadcasting under 18 U.S.C. section 1464, which forbids the use of "any obscene, indecent, or profane language by means of radio communications."[45] The Commission made clear that the broadcast was primarily objectionable because it took place at a "time . . . of the day when there is a reasonable risk that children may be in the audience."[46] The Supreme Court upheld both the Commission's interpretation of section 1464 and its constitutionality.[47]

Pacifica's basic constitutional claim was that the first amendment forbids any abridgment of the right to broadcast material that is not obscene, which Carlin's monologue plainly was not.[48] The Court's rejection of the argument rested in part on the "pervasive presence" of the broadcast media, which can confront even adults with indecent material in the privacy of the home.[49] In addition, the Court held that the FCC could control vulgar language in support of parents' authority in the home, which could be undermined by the unique accessibility of broadcasting to children.[50]

Ginsberg v. New York[51] bolsters the message of *Pacifica*. The *Ginsberg* Court upheld a state statute prohibiting the sale to minors under seventeen of material that would not be obscene for adults, adopting a standard of variable obscenity based on the then prevailing *Roth-Memoirs*[52] test; the "factor of immaturity,"[53] among other things, made children less able to "determine for themselves what sex material they

44. Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94 (1975) (memorandum opinion and order).

45. *Id.* at 96. The Commission also relied on 47 U.S.C. § 303(g) (1976), which requires the FCC to "encourage the larger and more effective use of radio in the public interest." *Id.* at 99.

46. *Id.* at 98 (footnote omitted); 59 F.C.C.2d 892 (1976).

47. FCC v. Pacifica Foundation, 438 U.S. 726 (1978), *rev'g* 556 F.2d 9 (D.C. Cir. 1977).

48. *Id.* at 742.

49. Miller v. California, 413 U.S. 15 (1973); Cohen v. California, 403 U.S. 15 (1971). "Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic." *Id.* at 20.

50. 438 U.S. at 749-50. The Court emphasized that neither its opinion nor the stance of the FCC necessarily precluded broadcasts in the late evening when few children were likely to be listening. *Id.* at 750 n.28.

51. 390 U.S. 629 (1968).

52. *Id.* at 635-43. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957). In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), Justice Powell's majority opinion stated that the Court had not had occasion to decide what effect the adoption of a different standard of obscenity in Miller v. California, 413 U.S. 15 (1973), would have on the *Ginsberg* test for minors. 422 U.S. at 213 n.10. But as *Miller* indicated, what at most might be contemplated is a reformation, rather than an abandonment, of the idea of variable obscenity. 413 U.S. at 36 n.17. Support for this suggestion is provided by Justice Powell's concurrence in *Pacifica Foundation*. 438 U.S. at 756-57.

may read or see."[54] What is most relevant for our purposes is the Court's recognition of parents' right to limit their children's access to specific sorts of otherwise protected speech. The law approved in *Ginsberg* was deliberately structured to accommodate parental authority.

> The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . . . Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.[55]

It would be a mistake to suppose that the real explanation for *Ginsberg* and *Pacifica Foundation* is our common squeamishness about obscenity and vulgarity rather than parents' prerogative of controlling the communications their children receive. The Court's first recognition of this prerogative was its holding in *Pierce v. Society of Sisters* that parents had a right under the due process clause to send their children to private rather than public schools—not because the latter were indecent, but because parents might wish to shelter their children from the standardization that results from instruction by public teachers.[56] Only recently, in *Wisconsin v. Yoder*,[57] the Court found that the free exercise clause permitted Amish parents to withdraw their teenage children from public schools, where they might be exposed to "worldly influences in terms of attitudes, goals, and values contrary to their beliefs."[58] Neither *Pierce* nor *Yoder* presented the difficult problem of children opposing parental choices, and it is possible to regard both as focusing on conflicts between parents and state, and saying nothing about the child's right to freedom of speech or belief.[59] It is not possible, however, to see how the state could side with the child against the parents concerning the same sort of decision without arrogating to itself the power to determine the child's future beliefs or thought processes,[60] a result even more distasteful than parental tyranny. The only sensible solution in these cases is to support parental choices, at least while the family structure is intact.[61]

53. 390 U.S. at 638 n.6 (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963)).
54. 390 U.S. at 637.
55. *Id.* at 639 (footnote omitted).
56. 268 U.S. 510, 535 (1925).
57. 406 U.S. 205 (1972).
58. *Id.* at 218.
59. *Yoder*, in fact, takes pains to emphasize this point. *Id.* at 229-34.
60. *Id.* at 232.
61. Garvey, *Child, Parent, State, and the Due Proeess Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 796-808 (1978).

Parents' authority to direct their children's moral and intellectual growth provides, as it were, a value-free argument for state restriction of the free speech rights of minors.[62] The state, however, has an independent interest in the growth of young people that also permits it to encourage, and within very broad limits direct, development of its future citizens. Most obviously, a concern for the child's health may take precedence over the minor's right to free expression and even over religious expression that has parental sanction. That was the gist of *Prince v. Massachusetts*,[63] in which the Court concluded that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection."[64] However, the state's power is not confined to the rather easy case of physical danger. It may be asserted to control distribution of obscenity to children, as in *Ginsberg*. In that case the Court, besides relying on the parental right to control a child's development, found that the state had an independent interest in its youth: " 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.' " [65]

The state's interest in its future citizens is more apparent in cases affirming the existence of children's free speech rights than in those

62. Although parents are the natural protectors of their role in shaping the child's development, our intuitive acceptance of that role does not point unambiguously to the conclusion that parents have a right to it. *See* note 42 *supra*. Yet even if parents' authority in the matter derives from a right the child possesses, the right to a family upbringing, that authority would provide a value-free basis for the state's refusal to recognize minors' unlimited freedom of expression, for the refusal would not reflect the state's preferences for the content of that expression.

If parental control is the child's right, it is different from most fundamental rights because the child cannot intelligibly claim or waive it on his own decision. The right merely represents the receiving end of an obligation the state owes the child. Thus, the state's lack of power to interfere in some respects with the parent-child relationship may be of a different sort from the state's lack of power to restrict an adult's or even a child's freedom of expression. In the most familiar instances, the state must respect freedom of expression because the individual has a right that he may or may not choose to assert.

The state's lack of power to interfere with parental guidance is also conditional on the existence of a family group—a natural family or one that qualifies for special consideration under the adoption laws. Here as well, the obligation of the state not to interfere does not resemble obligations imposed on others by one's possession of a fundamental right, since this obligation presupposes a particular relationship to which the child is a party; the obligation thus seems to be the counterpart of a special, rather than a general, right, while most fundamental rights are general. On the other hand, the division between special and general rights runs into difficulties elsewhere in the children's rights area, and so our failure to find a straightforward classification in this instance indicates little.

63. 321 U.S. 158 (1944).

64. *Id.* at 168.

65. 390 U.S. at 640-41 (quoting Prince v. Massachusetts, 321 U.S. at 165).

denying them.[66] This is as it should be, if we keep in mind the child's primary right to have his freedom of choice preserved against state encroachment.

That the state has a compelling interest in the development of its future citizens by no means entails that it may control their input and output of ideas according to what it conceives to be the most desirable pattern. The Court's disparaging reference in *Meyer v. Nebraska*[67] to Plato's discussion of child-rearing in the *Republic* makes this point indirectly. The Court did not disagree with the fundamental principle of the Platonic philosophy of education: that the state should train each individual to master his own mode of excellence, because this training will bring about the optimum fulfillment of social needs. The cases seem to indicate that, as John Dewey noted, the Platonic view is ill-suited to a democratic society, "not in qualitative principle, but in [its] limited conception of the scope of vocations socially needed; a limitation of vision which reacted to obscure [Plato's] perception of the infinite variety of capacities found in different individuals."[68]

The essential thing to emphasize here is the common ground, not the point of disagreement. However much space may be left for individual initiative and the development of a capacity to follow one's own aims, the bedrock principle evident in *Prince* and *Ginsberg*, and in the cases discussed in the next section, is that society must to some extent focus and order the child's growth to achieve a "common understanding of the means and ends of action."[69] Even if these cases, like Dewey, conceive the democratic ideal to be the maximization of points of shared common interest and progressive societal development in response to free interaction between social groups,[70] they also emphasize societal control of individual growth to accomplish those aims. What this entails in the great majority of cases that seem to recognize children's rights of free speech is not *very* different from a more thoroughgoing individualism that treats children as possessing the same plenary rights adults have. The principle of limited societal control does mean, however, that expression to or by children that goes beyond the rather large, socially advantageous perimeter may be curtailed, even though the first amendment would protect identical expression to or by adults.

66. *See* pp. 352-79 *infra*.
67. Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (commenting on PLATO, REPUBLIC 459d-460d).
68. J. DEWEY, DEMOCRACY AND EDUCATION 309 (1916).
69. *Id.* at 23-40.
70. *Id.* at 81-88.

B. The Role of Free Speech in the Process of Growth

The preceding section showed that the state's interest in children as future citizens was, if anything, more apparent in cases affirming the existence of children's free speech rights than in those denying it. The reason is that free speech plays an important role in the child's development, a role that is socially desirable quite apart from whether children have or should have full free speech rights. This section will consider the Court's recognition of other ways in which free speech contributes to the child's development. Lest the emphasis on growth mislead, however, I should say that a fair reading of the cases indicates no *other* justification for what Justice Stewart criticized as "the Court's uncritical assumption that, school discipline aside, the first amendment rights of children are co-extensive with those of adults."[71]

1. Training for Participation in Democratic Self-Government.— The natural place to begin consideration of the Court's attitude toward the free speech rights of minors is *Tinker v. Des Moines School District*.[72] The case develops several ideas about the role expression plays in the child's development, the first of which is that speech assists the young in preparing to participate in democratic self-government. There is a tendency—to which Justice Fortas' majority opinion gives no small impetus[73]—to regard the decision as recognizing the child's claim to free speech rights, and hence to actual participation in self-government, as equal in all respects to adults', discounted only by the environmental peculiarities of the schoolhouse.[74] The suggestion advanced here is that the child's claim to recognition of such a right is valid only insofar as free speech is instrumental in the growth of his ability to participate in self-government.

The facts of *Tinker* are well known. Three students, aged thirteen, fifteen, and sixteen, were suspended from school for wearing black armbands to protest United States involvement in the Vietnam War, an action they had discussed and agreed on with their parents. At times Justice Fortas' opinion seems to imply that the students' right to express their opinions is the natural consequence of the individual's claim to communicate with and influence others regarding the formulation of

71. Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring).

72. 393 U.S. 503 (1969).

73. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Id.* at 506.

74. *See, e.g.*, Nahmod, *Beyond* Tinker*: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278, 300 (1970); *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1457-60 (1976).

political policy.[75] But the exclusion of persons under eighteen from the franchise renders that right a rather empty one.[76] The Court plainly indicates elsewhere that its conception of the right is in fact more instrumental. "[P]ersonal intercommunication among the students" is above all "an important part of the educational process."[77] The significance of the school's permitting students to wear other symbols of controversial political import—the Iron Cross, for example—was not that this undermined the serious examination of the country's current foreign policy, but that by specifically impairing a conscious political statement the armband prohibition would impair the growth of future citizenship: " 'The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." ' "[78]

That some guarantee of free speech is an important part of educating the young for citizenship does not mean that it is a hoax to speak of "rights," a deception that we reveal to the child when he is initiated into the adult community. The right of free speech is really an essential adjunct to the fundamentally just claim all children have against the state—that it should respect and leave open the possibilities of choice that they will have on reaching maturity. But there is no denying that the child's speech right is different in kind as well as degree from the right of free speech possessed by adults. A comparison of the two will make the point clearer.

It is generally accepted that one end served by the free speech guarantee is protection of the individual's right to participate in self-government.[79] The latter right may ultimately be traced to a presumption of the equality of men and women as moral and rational beings;[80] in a system of government built on this assumption, it naturally follows

75. Justice Fortas said, for example, that the students wore their armbands "to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." 393 U.S. at 514.

76. Tushnet, *supra* note 2, at 753-54 & n.36.

77. 393 U.S. at 512.

78. *Id.* (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). *See also* 393 U.S. at 507 (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)) (" '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.' ").

79. Professor Alexander Meiklejohn gives a classic statement of the thesis. A. MEIKLEJOHN, POLITICAL FREEDOM (1960); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). *See also* T. EMERSON, *supra* note 2, at 7; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 577-78 (1978); Emerson, *supra* note 53, at 882-84.

80. J. RAWLS, *supra* note 13, § 36, at 221-28; Emerson, *supra* note 53, at 883.

that the state's just powers derive from the consent of the governed.[81] Several desirable consequences obtain within a system of this kind, among them that better collective decisions may result from permitting individuals to consider all alternative lines of action.[82] In this respect, our traditional notion of free speech presupposes individuals equal in their moral and rational faculties, who are able to consent freely in matters of governance. This aspect of free speech—again, in its traditional form—does not, strictly speaking, apply to those who are not self-governing.[83]

In what sense, then, is it proper to characterize the claim that *Tinker* recognizes as a right of free speech? The answer lies in the Court's implicit endorsement of Dewey's philosophy of education. The most striking aspect of the *Tinker* opinion is its implicit rejection of the idea that discipline is itself one of the objectives of education.[84] This departure from traditional thought bothered Justice Black, who complained in dissent that "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[85] Since discipline is no longer uppermost in the hierarchy of educational values, we may speak of students as "self-governing" to some extent.[86] It is wrong, however, to suppose that reducing the scope of appropriate occasions for discipline necessarily entails an abandonment of the theory that students need direction, or in stronger language, control. Dewey's contribution to American education, to which the *Tinker* Court apparently subscribes, was the thesis that schools should permit the young to participate in the process of learning, merely controlling an environment that, if all works well, calls forth certain responses from the student. Dewey rejected the epistemological dualism that supposed the mind's abilities to be divorced from

81. A. MEIKLEJOHN, FREE SPEECH, *supra* note 79, at 9-19.

82. *Id.* at 26.

83. *Id.* at 84-85.

84. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 580-81 (1970).

85. 393 U.S. at 524 (Black, J., dissenting).

86. The implication was not lost on Justice Black, who commented: "I wish . . . wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." 393 U.S. at 526.

One can better appreciate the significance of the Court's departure from the position advocated by Justice Black by comparing *Tinker* with Waugh v. Board of Trustees, 237 U.S. 589 (1915), in which the Court upheld a Mississippi act forbidding the formation of fraternities at state educational institutions. It stated that the legislature could validly enact "disciplinary regulations" if it felt that "membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions." *Id.* at 596-97.

the subject matter on which they operate, and that regarded the reception and storage of information as the goal of education.[87] Even this approach to education assumes, however, that learning can only take place within a larger sphere of social control, the aim of which, like Justice Black's, is the formation of better citizens.

In *West Virginia State Board of Education v. Barnette*[88] the Court displayed an attitude like that of the *Tinker* majority, and devoted some attention to the kinds of social benefits that accrue from the formation of thinking citizens. The case concerned a state board of education resolution passed in the wake of *Minersville School District v. Gobitis*,[89] requiring all teachers and pupils in public schools to salute the flag daily. A student's refusal to do so would lead to expulsion, which could be followed by delinquency proceedings. The student's parents were also liable to prosecution. In an action brought by three Jehovah's Witnesses on behalf of themselves, their children, and others similarly situated, the Court held the regulation unconstitutional as a violation of the first amendment, made applicable to the states by the fourteenth amendment.

The Court began by noting that no one claimed the "flag salute discipline"[90] had any educational value, and that in requiring it school officials seemed to have been concerned merely with the promotion of national unity.[91] The Court then said that the proper formation of future citizens is best assured not by a forced feeding of ideas, but by permitting students to experience in actual operation the freedoms they will later enjoy fully. "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."[92] The notion that the child's appreciation of the virtues of a democratic system could be won only by coercion, the Court took pains to point out, rests on a mistaken view of how the educative process works.[93]

Not only was the student's orientation toward democratic self-government best assured by allowing him to participate in the process of

87. J. DEWEY, *supra* note 68, at 54-68; Berkman, *supra* note 84, at 581.
88. 319 U.S. 624 (1943).
89. 310 U.S. 586 (1940).
90. 319 U.S. at 635.
91. *Id.* at 631-32 n.12.
92. *Id.* at 637.
93. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." *Id.* at 641.

learning, but any other approach would necessarily prove counterproductive. Enforced uniformity of opinion could only lead to factional attempts to secure government backing for one ideology or another.[94] Moreover, it should not be forgotten that cultural diversity and intellectual individualism are values to be prized for their own sakes.[95]

2. Training and the Search for Knowledge and Truth.—A second justification frequently advanced for the first amendment's free speech guarantee is that it advances the search for knowledge and truth. This notion may seem a bit old-fashioned now that we are accustomed to consider truth a characteristic of the conclusions of mathematics and the natural sciences, which much less often collide with governmental interests in regulation, and not of philosophy, theology, and the social sciences, whose propositions do not admit of strict proof.[96] But if we acknowledge that there is a social interest in discovering, for example, whether exposure to obscenity has an effect on morals, or whether American imperialism is consistent with the notion of justice for underprivileged nations, this purpose of the first amendment does not seem all that far-fetched.

The classic argument in favor of the truth-finding function is that of John Stuart Mill,[97] who makes essentially three claims for the institution of free speech. First, the limits of human reason imply that there is no certain way of telling whether orthodox opinion is in fact true. To suppress contrary opinion is ultimately to claim infallibility.[98] In the second place, even if we could establish that received learning captured the complete truth, shielding it from criticism would eventually cause it to be received as nothing more than a formula. "Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth."[99] Finally, and what is likely the more common

94. "If [free public education] is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system." *Id.* at 637. "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Id.* at 641.

95. *Id.* at 641-42.

96. *Cf.* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes.").

97. J.S. MILL, *supra* note 4. This argument, which Mill makes for the beneficial effects of free institutions in chapter II, is by no means the unique basis for his position. Chapter III argues with equal force that free institutions have a value in themselves, since they are a basic element of man's ability to develop his own capacities and lead a rational and free life.

98. *Id.* at 16-33.

99. *Id.* at 34. "David Garrick tells of the power of George Whitefield's voice, that he could

case, neither of two conflicting opinions is either completely true or false, but both will embody some element of a larger truth.[100]

There were early indications that this view of free speech played at least some role in the gradual recognition of children's rights of expression. In *Meyer v. Nebraska*[101] the Court invalidated a state law that forbade the teaching of modern languages to students who had not passed the eighth grade. Since Meyer himself was a teacher, and since the Court referred most prominently to the rights of parents to direct the education of their own children,[102] it is difficult to say that the child's independent claim of free speech was established.[103] Given the age of the students, it was unlikely that any of them would soon advance the state of German philology, and hence none of Mill's arguments was strictly applicable to the case.[104] Yet protection for speech rights plays an instrumental role in the development of children who some day may be able to consider Hegel in the original text. The Court pointed out, "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age . . . ."[105] Thus, it was fair to say that the state had "attempted materially to interfere with . . . the opportunities of pupils to acquire knowledge"[106] that "has been commonly looked upon as helpful and desirable."[107]

Keyishian v. Board of Regents[108] also shed indirect light on the role this function of the first amendment plays for children. Invalidating New York's loyalty requirements for teachers as vague and overbroad, Justice Brennan commented:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom

make men either laugh or cry by pronouncing the word 'Mesopotamia.' A story goes that an old woman told her pastor that she often found great support in that comfortable word, Mesopotamia." S. TAPSCOTT, MESOPOTAMIA 10 (1975) (quoting Francis Jacox).

100. J.S. MILL, *supra* note 4, at 44-50.

101. 262 U.S. 390 (1923).

102. *Id.* at 399-401.

103. Moreover, since the first amendment had not yet been held applicable to the states through the fourteenth, the case was decided on due process grounds. It does not seem open to doubt, however, that if the issue were to arise today, it would be resolved on the basis of the guarantee of free speech. *See, e.g.*, T. EMERSON, *supra* note 2, at 600.

104. *Cf. Developments in the Law—Academic Freedom, supra* note 27, at 1053 ("It seems unwise to assume as a matter of constitutional doctrine that school children possess sufficient sophistication or experience to distinguish 'truth' from 'falsity.' ").

105. 262 U.S. at 403.

106. *Id.* at 401.

107. *Id.* at 400.

108. 385 U.S. 589 (1967).

> is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[109]

This statement eventually furnished support for Justice Fortas' conclusion in *Tinker* that students themselves—not just teachers and parents—had some protected free speech rights.[110]

Evaluated with reference to Mill's claims for the value of free speech, all these assertions about the child's right to seek knowledge and truth in the marketplace of ideas may seem strained. Except in the case of the most exceptional prodigy, it is undeniable that children's debates about adult issues generally serve no immediate social purpose. The child's participation in the process of thinking and discussion, however, is important: "The Nation's future depends upon leaders *trained* through wide *exposure to* that robust *exchange* . . . ."[111] It is also crucial, as *Meyer* emphasized, for the child to encounter data that can be grasped, even though the faculty of judgment is not yet fully matured through growth and experience. Guaranteeing the child's right of free speech thus plays an instrumental role in advancing the search for knowledge and truth; the benefits do not accrue immediately, but neither can they be secured by sheltering the child until he is ready to join the adult community.

3. Growth, Autonomy, and Self-Realization.—It has been suggested that, whatever ends freedom of speech may serve, it is fundamentally not so much a means for accomplishing other individual and social desiderata as an end in itself.[112] Some clarification of terms is needed. Up to this point, I have contended that the right to freedom of speech that the Supreme Court has recognized for children is most sensibly considered an instrumental right, because it serves the function of advancing the child's growth into an adult capable of participating in

109. *Id.* at 603.

110. Shortly before *Tinker* was announced there was a strong hint of the same conclusion in Epperson v. Arkansas, 393 U.S. 97 (1968), which struck down an Arkansas law forbidding the teaching of Darwin's theory of evolution. Suit was brought by a teacher of tenth grade biology, but she was joined as plaintiff by a parent of children attending the public schools. The Court relied on the establishment clause, rather than the free speech provisions of the first amendment, for its conclusion that the state could not select one particular theory from the body of knowledge and forbid the teaching of those which contradicted it. Its precedential force is thus narrowly confined. T. EMERSON, *supra* note 2, at 609.

111. 385 U.S. at 603 (emphasis added).

112. *See, e.g.*, L. TRIBE, *supra* note 79, § 12-1, at 578-79; Emerson, *supra* note 53, at 879-81; Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY & PUB. AFF. 204 (1972). *Cf.* J. RAWLS, *supra* note 13, § 33, at 205-11 (on the principle of equal liberty of conscience).

self-government and in the quest for knowledge and truth. This section illustrates by way of contrast that, even for adults, free speech may be a means to other ends. Rather than prized for its own sake, free speech may be thought valuable because it is a crucial tool for democratic government, or for the success of philosophical inquiries. But once that is clear, it ought to be obvious that the first amendment is for children a second, not a first, derivative from those ends: it serves as a means of their growth into adults who are capable of employing the tool of free speech to pursue the ends of self-government and the advancement of knowledge.

The notion that liberty of speech is a primary, rather than an instrumental, good rests on the close connection between free expression and individual autonomy and self-realization. Human beings are unique in their capacity for reasoning and emotion; individual fulfillment is tied to the development of this capacity, and expression "is an integral part of the development of ideas, of mental exploration and of the affirmation of self."[113] Suppose that I instinctively believe it profoundly immoral for one person under any circumstances to do physical harm to another, and conclude that the aim of individual development should be to acquire the ability to turn the other cheek. For my instinct to become a rational choice, it is important for me to test it in discussion with others, exploring, for example, the questions of self-defense, just war, and so on. Moreover, if this rule of conduct is important for me as an individual, it will also be important to convince others of its worth. My interchange with others may take place not just on the plane of calm discussion, but also on the level of emotive expression. My feelings may be so strong that I think it best to emblazon "Fuck the Draft" on the back of my jacket and parade the idea around in public places. As Justice Harlan noted in *Cohen v. California*[114] when that activity was in question, expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." Free speech is thus important not only because "such freedom will ultimately produce a more capable citizenry and more perfect polity . . . [but also because] no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[115]

It seems impossible to justify the almost unbounded freedom of expression accorded adults by the first amendment without ultimate

113. Emerson, *supra* note 53, at 879.
114. 403 U.S. 15, 26 (1971).
115. *Id.* at 24.

reference to personal dignity as a noninstrumental value. While emotionally loaded expression may significantly differentiate value judgments, effective democracy does not, without qualification, require this variety. The gamut of protected speech does not narrowly afford the opportunity for all to communicate their views and the force with which they hold them. No one can explain, for example, what some works of art advocate, or show that they contribute to the political process, though we may suppose that they do contribute because of our commitment to the principle that all expression is in some respect political. The principle may be indispensable to the liberal tradition on which our national political theory draws. We should perhaps look at the breadth of free speech, therefore, not in terms of its empirical contribution to democratic procedures, but as required by a theory that gives individual and collective values equal emphasis. That double emphasis stretches the assumed causal role of self-expression in assuring democracy, just as it instigates a casuistry of freedoms and unprotected activities to permit the state to preserve itself against the flood of individual strivings. If we must understand individual dignity and citizenship in *pari materia*, with as near as possible an equal emphasis on individual and collective goals, the scope of dignity seems best charted by the practical requirements for self-realization and individual development *within* society. Even for adults, the process of growth is never complete. Just as society must always leave the most settled orthodoxy open to challenge, so too individuals should and do remain continually open to new thoughts about their basic life choices.

From this it seems a short step to the conclusion that growth has much the same meaning for both adult and child, and hence that free speech serves not an instrumental, but an ultimate, function with respect to the child's autonomy, as it does for adults.[116] The difficulty with this theory is that it assumes, after the fashion of Jean Jacques Rousseau,[117] that children's natural capacities develop best if we permit them to follow their native bent, that social direction will necessarily inhibit the optimum course of growth. Left wholly unsupervised, however, the child's development will be random and capricious.[118] The

116. *See, e.g.*, RIGHTS, *supra* note 30, at 119-22; Letwin, *Regulation of Underground Newspapers on Public School Campuses in California*, 22 U.C.L.A. L. REV. 141, 199, 203 (1974); Tushnet, *supra* note 2, at 760; *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1460 (1976); Comment, *Public Secondary Education: Judicial Protection of Student Individuality*, 42 S. CAL. L. REV. 126, 141 (1969).

117. *See* J.J. ROUSSEAU, ÉMILE, OU DE L'ÉDUCATION (1762).

118. J. DEWEY, *supra* note 68, at 112-14.

question in all cases must be to what extent the child's impulses should be channeled, and in what direction.

That the child's right of free speech, so far as it exists, is subordinate to and at the service of the child's growth in a way in which it is not for adults, does not imply that the right is some sort of charade; it plays a vital role in the process of becoming an autonomous individual. To permit the state to abridge it whimsically would destroy that contribution. The subordination of the child's free expression subjects it to greater limitations than adult speech because it has an instrumental rather than an ultimate character. The occasions that justify its restriction are indicated in broad outline above, in the discussion of the child's need to grow. The bounds and direction that may be used by the state to control the minor's development include those chosen by parents and those necessary to effectuate the state's own interest in its future citizens. A consideration of the cases will make this clearer.

One of the ways in which free speech performs its instrumental role in the child's growth toward autonomy is by permitting the individual to experience the satisfaction that results from self-expression, and in a larger sense, self-definition. What is at issue is quite properly called a right of free speech, since expression confined to an approved list of topics or points of view would not suffice. Individuality is the sense of being different, and its expression may take, for example, the form of opposition to the Vietnam War precisely because the school administration wishes to remain neutral and the rest of the child's peer group find Iron Crosses fashionable. The *Tinker* Court's emphasis[119] on the importance of individuality pointed to this conclusion.[120] The same perception is evident in *Barnette*'s rejection of "national unity" as a justification for imposing the flag salute on unwilling students.[121] Both cases recognize that parental influence plays a large role in the child's development of his own individuality,[122] but this fact does not and should not overwhelm the child's right against the state.[123]

A second instrumental function that free speech plays in the

119. *See* Nahmod, *supra* note 74, at 292 n.58.

120. 393 U.S. at 511.

121. 319 U.S. at 640-42.

122. In *Barnette* the class action representatives were parents of the students. The Supreme Court noted that parents were likely to complain most forcefully about any attempt to compel children to hew the state line. In *Tinker* it is difficult to ignore that the children's decision to wear armbands was reached in consultation with their parents. 393 U.S. at 504; *id.* at 516 (Black, J., dissenting). Moreover, the most striking feature of Spartan education that the Court condemns as an effort to "foster a homogeneous people" is that children were taken from their parents at age seven. *Id.* at 511 (citing Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

123. It is difficult to imagine that the outcome in *Tinker* would have been different if the parents of the children who wore armbands had favored the American involvement in Vietnam.

child's development is that of offering occasions for practice in the skills of rational discourse: the weighing of evidence, persuasion, the technique of patient listening, and so on. Unlike the opportunity for self-expression, this aspect of speech might lend itself more to restriction, since, for example, deduction can be learned from mathematics and logic, induction from the natural sciences, persuasion in organized debate about assigned topics, and so on. But this view ignores the importance of motivation in the sharpening of skills. To the child of a certain age, there may be no more engrossing question in the world than whether free availability of contraceptives to minors will result in an increase in premarital sex.[124] The argument against restricting this motivational aspect of free speech derives from the need for "train[ing] through wide exposure to that robust exchange of ideas" of which *Keyishian* spoke:[125] here the justification for training is not a social interest in future leaders nor in discovery of truth, but the strictly individual interest in perfection of one's own faculties.

A third instrumental function is that of showing the young the potential of speech to accomplish good or bad results.[126] In a sense this element of education is not unlike training in handling a gun. Speech may have consequences that a child does not appreciate as an adult would; and until he has gained sufficient experience to know how to use it, prophylactic measures may be appropriate that would not be tolerable for someone fully mature. Use of racial epithets[127] is an obvious example. This aspect of free speech provided the element of tension in *Tinker*. The Court's conclusion that even provocative speech should be tolerated unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school"[128] has something in common with the "clear and present danger"[129] formula applicable to adult speech. Despite suggestions that

124. Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

J.S. MILL, *supra* note 4, at 35.

125. 385 U.S. at 603.

126. *See* Ladd, *Allegedly Disruptive Student Behavior and the Legal Authority of School Officials*, 19 J. PUB. LAW 209, 237-40 (1970).

127. *See* pp. 361-66 *infra*.

128. 393 U.S. at 505 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

129. Schenck v. United States, 249 U.S. 47, 52 (1919). For the more contemporary statement of the doctrine, see Brandenburg v. Ohio, 395 U.S. 444 (1969), decided the same Term as *Tinker*.

the two should be conflated,[130] however, there has to be a difference. It is not merely the special environmental conditions of the schoolhouse—a large number of people contained for hours in the same small area, the need for quiet to pursue studies, and so forth—that distinguish the two formulae; *Tinker*'s formula taken alone could be fit quite neatly into the adult standard, which requires a consideration of likely effect and audience reaction. The more substantial difference must reflect the nature of the speaker; children more often lack sufficient experience to appreciate the likely consequences of their statements, or do not possess sufficient self-restraint either as speakers or as listeners to keep within the bounds of socially acceptable discourse. The limitations that may be imposed in this regard stem from the state's independent interest in the upbringing of its future citizens as well as the state's present interest in maintaining order. Greater restraints on the child's speech are a deep-water marker that the individual can ignore only when he has had sufficient experience with the medium.

Still a fourth instrumental function that the right of free speech may serve is that of allowing the receipt of information important for the child's development.[131] The Court stressed this element in *Meyer*: "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age . . . ."[132] The scope of this function is not limited to language acquisition. To take another obvious example, the child's natural curiosity about sexuality may best be met by frank discussion of some of the details of human sexual relations, even though at the time the child has insufficient experience to make morally sound judgments concerning the matters discussed. The advantage of earlier acquainting the child with the facts is that it assists the development of judgment and provides for the immediate possibility of sound exercise of the faculty once acquired. This area, however, provides the most difficult problems for the instrumental notion of free speech. As both *Ginsberg* and *Pacifica Foundation* indicate, there is something to be said for withholding certain kinds of information from children until the ability to make sound judgments develops with expe-

130. *See, e.g.*, Berkman, *supra* note 84, at 589; Ladd, *supra* note 126, at 239; Letwin, *supra* note 116, at 152; Nahmod, *supra* note 74, at 283; Note, *The Public School as Public Forum*, 54 TEXAS L. REV. 90 (1975). *But see* Haskell, *Student Expression in the Pubic Schools:* Tinker *Distinguished*, 59 GEO. L.J. 37, 53-55 (1970).

131. Up to this point there has been no effort to distinguish between the child's right as listener and his right as speaker. Both are essential concerns of the first amendment. Stanley v. Georgia, 394 U.S. 557, 564 (1969); T. EMERSON, *supra* note 2, at 613-14. *See* pp. 366-75 *infra*.

132. 262 U.S. at 403.

rience.[133]

C. *An Instrumental Approach to Freedom of Speech for Children*

Insofar as children lack full rational powers and broad experience, not all claims that they may make on their own behalf deserve the same concern and respect to which mature individuals are entitled. The state is not free, though, to do whatever it wants to minors. The child's future interests demand that the state take present steps to assure the preservation of the freedoms, opportunities, and powers to which adults are entitled. This means for one thing that the state may not attempt to coerce belief by the child, because it would thereby abridge future freedom of choice.

The extent to which the fundamental rights children have against the state bar it from restricting expression is a somewhat more difficult question, which has several aspects. First, it is difficult to predict the effect that a present ban on some type of expression will have on the child's future options. Second, given those difficulties, the extent to which the minor's right to freedom of speech should be treated as an absolute raises the issue: should it matter that forbidding any particular speech-act is not likely to count for much in the long run? To what other values should the child's free speech claim yield, given that both the child's freedom of speech and the state's restriction of that freedom are primarily means of preserving other goods to the future adult?

The Supreme Court's treatment of the problem outlined in Section A of this Part helps to clarify the values served by the child's free speech and the kind of protection expressive activity deserves. In general, free speech plays an instrumental role in the child's development in three respects: it prepares him for the obligations of citizenship, assists in the refinement of his ability to pursue truth, and helps in several ways to further his nascent interest in individual self-fulfillment and autonomy. That it is merely a means to those ends does not imply that the state is at liberty to restrict free speech and select other means to accomplish the same objectives. For example, there may be no other way to permit the development of individuality than to allow children to express ideas objectionable to government: only by speaking out against the Vietnam War when the school administration favors it can a particular student experience a sense of individuality.

133. *See* Ginsberg v. New York, 390 U.S. at 643 n.10, in which the Court seems to recognize that parental and societal disapproval of obscene material may have a "potent influence on the developing ego." *Cf.* CAL. EDUC. CODE § 1550 (West 1978) (barring sex education in the classroom without parental approval).

On the other hand, the instrumental coneeption of free speech for children justifies abridging expression in order to accomplish the primary objeetives. Preparation for citizenship may best be accomplished by permitting the young to partieipate in the process of learning, but Justice Fortas, like John Dewey, seemed to accept that free expression always takes place within an environment controlled by the state to serve its own interest in forming future citizens. The societal interest in the pursuit of knowledge and truth may depend heavily on the development of children's abilities to undertake political, philosophical, or scientific inquiry in a hardheaded fashion, but the same interest depends to a degree on diseussion free from violence and libel; teaching children to respect those limits may require prophylactic measures that would be intolerable for adults. Finally, free expression aids the growth of individual autonomy and self-realization, although again the minor's undeveloped sense of judgment may justify that certain kinds of information be withheld, or that some types of speech be more severely hemmed in than they would be for adults.

Whenever the child's expression is curtailed, the justification will be that some decisionmaker has concluded that this is necessary for order in the classroom or serves the child's future interests. If the state has made that decision on its own, it should be able to show that present or unprotected future antisocial behavior is likely to result in the absence of restraint. If the state does no more than back up parental decisions, the required showing may be far more limited.

III. Some Applications of the Instrumental Approach

It is always difficult to state broad principles so clearly and consistently that they make the resolution of concrete cases a simple matter. It is also often hard to comprehend an abstract approach to a legal problem like children's rights unless one can see it implemented in a more familiar factual setting. In this section I shall address a few areas in which courts and commentators seem to be at a loss for a way to resolve recurring problems, and thus illustrate the approach to children's free speech rights that I have suggested above.

A. Criticism of School Personnel and Rules

1. "Clear and Present Danger."—One of the pricklier problems faced by the courts in the years following *Tinker* has been the extent to which elementary and high school students should be permitted to criticize school personnel and rules. Torn between the feeling that there is something wrong with students calling the principal "a liar," "ra-

cist,"[134] "sick,"[135] or worse, and the conviction that even unpleasant forms of student speech deserve some protection, courts have tended to permit expression unless it threatens "material and substantial interference with schoolwork or discipline."[136] General agreement on the appropriate verbal formula merely serves to hide a fundamental disagreement about its meaning. One approach has been to treat the "threat of material and substantial disruption" like the "clear and present danger" test developed in sedition cases, and to require a rather high probability of serious disruption before expression may be curtailed.[137] Most courts have been willing to allow greater leeway to the determinations of school administrators, demanding that the finding be not "clear and present," but merely a "reasonable forecast" before expression may be restricted.[138] To resolve the controversy, we must examine the purposes behind the courts' adoption of the two formulae.

The present approach to the problem of adult advocacy of lawless action, stated by the Court in *Brandenburg v. Ohio*,[139] holds that speech loses protection only when "such advocacy is directed to inciting or producing imminent lawless action," and when it "is likely to incite or produce such action."[140] The test is a composite of two approaches: the first, emphasizing the importance of language seeking to incite, has its origin in Learned Hand's opinion in *Masses Publishing Co. v. Patten*;[141] the second, focusing on the likelihood of actual harm, has its roots in the "clear and present danger" test, the aims of which are best defined in Justice Brandeis' concurring opinion in *Whitney v. California*.[142] A look at these seminal opinions reveals an appreciation of several values that a cautious approach to seditious speech seeks to protect. A common theme of both is the importance of free expression in preserving

134. Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969).

135. Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970).

136. Tinker v. Des Moines School Dist., 393 U.S. at 511.

137. *See, e.g.*, Scoville v. Board of Educ., 425 F.2d 10, 13-14 (7th Cir. 1970).

138. *See, e.g.*, Karp v. Becken, 477 F.2d 171 (9th Cir. 1973); Hatter v. Los Angeles City High School Dist., 310 F. Supp. 1309 (C.D. Cal. 1970); Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969). *See also* Haskell, *supra* note 130, at 53-55. Even most decisions that have found school authorities to be overzealous have done so by reference to the more relaxed "reasonable forecast" standard. *See, e.g.*, Shanley v. Northeast Ind. School Dist., 462 F.2d 960, 970-75 (5th Cir. 1972); Sullivan v. Houston Ind. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969).

139. 395 U.S. 444 (1969) (per curiam).

140. *Id.* at 447 (footnote omitted).

141. 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). *See* L. TRIBE, *supra* note 79, § 12-9, at 615-17; Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 750-55 (1975).

142. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). The first statement of the doctrine occurs in Justice Holmes' opinion in Schenck v. United States, 249 U.S. 47 (1919), upholding convictions under the Espionage Act of 1917. But its first application with any bite appears in Holmes' dissent in Abrams v. United States, 250 U.S. 616, 624 (1919).

governmental stability and assuring that the process of change will be free from violence.[143] The reasons for linking free speech with governmental stability are several. To oppose dissent with force rather than argument, substituting muscle for logic, makes rational judgment impossible.[144] Moreover, by diverting public attention from the real ills facing society and permitting established institutions to become complacent, control of speech leads inexorably to violent and radical, rather than modest and gradual, change.[145] Participation in decisionmaking makes it likely that even losers on any issue will feel a duty to abide by the result of politically legitimate processes.[146]

A related value discussed in both *Masses* and *Whitney* concerns not so much the neutral or process-oriented issue of stability, but the positive role of free speech in self-government, a value ultimately based on the presumption of the equality of men and women as moral and rational beings.[147] As I have already suggested,[148] a democratic conception of government has little vitality if it does not recognize that equal respect is due all beliefs in the formation of the common judgment. Moreover, the social good is advanced by permitting open consideration of all viewpoints, so that decisions take account of all available insight.

Justice Brandeis' opinion also stressed, in language reminiscent of Mill,[149] that "the final end of the State [is] to make men free to develop their faculties; . . . [that] liberty [is] both . . . an end and . . . a

143. The point is eloquently made by Justice Brandeis:

> Those who won our independence . . . knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

274 U.S. at 375. The line drawn by Judge Hand between permissible and impermissible speech in *Masses* emphasizes the same conclusion: any agitation short of incitement to lawless action is not only lawful but desirable. 244 F. at 540.

144. Emerson, *supra* note 53, at 884.

145. *Id.* at 884-85. *See also* W. BAGEHOT, *The Metaphysical Basis of Toleration*, in 2 WORKS OF WALTER BAGEHOT 339, 357 (R. Hutton ed. 1889).

146. Emerson, *supra* note 53, at 885; J. RAWLS, *supra* note 13, § 37, at 234.

147. *See* p. 340 *supra*. Justice Brandeis again put the matter nicely:

> They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

274 U.S. at 375. *Cf.* Masses Pub. Co. v. Patten, 244 F. at 540 ("tolerance of all methods of political agitation . . . in normal times is a safeguard of free government").

148. *See* pp. 339-40 *supra*.

149. " '[T]he end of man . . . is the highest and most harmonious development of his powers to a complete and consistent whole.' " J.S. MILL, *supra* note 4, at 55 (quoting W. VON HUMBOLDT, THE SPHERE AND DUTIES OF GOVERNMENT (unspecified translation)).

means."[150] Not only is expression important to assure political stability and effective democracy, it has a value of its own in the exercise and development of the individual's capacities for reason and emotion. As a consequence, speech has a preferred position in the constitutional firmament and only "more speech" can combat it, unless serious evil will ensue before full discussion can take place.[151]

It is obvious that student criticism of administrative personnel and regulations can serve these purposes with beneficial effect within the microcosm of the school. Although it involved a political rather than school-related issue, *Blackwell v. Issaquena County Board of Education*[152] may well have involved a situation that would illustrate the value of permitting protest in preserving stability within the school system. On January 29, 1965, some thirty students at an all black high school wore to class buttons supporting the Student Non-Violent Coordinating Committee. After the principal's office forbade wearing the buttons, approximately 150 students did so the next Monday, and nearly 200 did so on Tuesday. The situation eventually became so disruptive—classes were interrupted, students in the halls pinned buttons on those unwilling to wear them, others threw buttons into the building through the windows—that mass suspensions resulted. It may well be that tolerance of expression in the first instance, instead of bottling up student tensions, would have averted the violent outburst.[153]

The role speech plays in self-government has a counterpart in the narrower political sphere of the schoolhouse. This view is expressed in *Scoville v. Board of Education*,[154] which enjoined interference with a student publication critical of school policies and authorities. *Grass High*, an underground newspaper circulated in the school, characterized as "idiotic and asinine" the school's procedure for excused absences and stated that the senior dean's attitude toward discipline was evidence of "a sick mind." Concluding that "[s]chools are increasingly accepting student criticism as a worthwhile influence in school administration," the court found that even high school juniors may be "peculiarly expert in [school] issues and possess a unique perspective on matters of school policy."[155] *Scoville* also suggested that student criticism of authority may aid the child's development as an individual:

150. 274 U.S. at 375.
151. *Id.* at 377.
152. 363 F.2d 749 (5th Cir. 1966).
153. The Court of Appeals saw it differently, however, and upheld the district court's refusal to enjoin enforcement of the rule banning SNCC buttons.
154. 425 F.2d 10 (7th Cir. 1970).
155. *Id.* at 14 & n.8.

"[T]he law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled."[156]

Yet these free speech values by no means have the paramount importance in schools that they have in the adult world. *Karp v. Becken*[157] illustrates the point. Steven Karp and several companions, in order to protest the school's refusal to rehire an English teacher, notified the news media that they intended to walk out of an athletic awards ceremony. School officials cancelled the assembly when they learned that the athletes might attempt to prevent the demonstration. Karp later gathered with newsmen during the lunch hour in the school's multi-purpose room and distributed signs in support of the English teacher to other students. The vice principal confiscated the signs, although no school rule prohibited them, and Karp was suspended for five days. The Ninth Circuit concluded that the school officials had acted properly, since the evidence supported the "forecast of a reasonable likelihood of substantial disruption."[158] It held, however, that Karp's suspension was not justified, since he had broken no school rule by simply displaying the signs, an activity that the court characterized as "pure speech rather than conduct."[159] The holding that Karp should not have been suspended makes fairly plain that the court believed the school athletes, and not the protestors, threatened disorder. In the parlance of adult cases, the school had curtailed Karp's speech because of the reaction of a hostile audience. If any principle can be derived from the adult cases, it is that the "clear and present danger" test does not apply straightforwardly—the authorities must first make an attempt to control spectator violence before silencing the speaker.[160] The Ninth Circuit in *Karp* expressed no concern that the school authorities had not tried to control the athletes' activities.

Greater control over student criticism of school personnel and regulations might appear to be justified simply by the environmental peculiarities of educational institutions.[161] Among the elements that

156. *Id.* at 14.
157. 477 F.2d 171 (9th Cir. 1973).
158. *Id.* at 176.
159. *Id.*
160. *See, e.g.*, National Socialist Party v. Skokie, 432 U.S. 43 (1977); Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana (I), 379 U.S. 536, 550 (1965); Edwards v. South Carolina, 372 U.S. 229, 232-33 (1963). *See* T. EMERSON, *supra* note 2, at 325-26; Note, *Hostile-Audience Confrontations: Police Conduct and First Amendment Rights*, 75 MICH. L. REV. 180 (1976).
161. *See, e.g.*, Shanley v. Northeast Ind. School Dist., 462 F.2d 960, 968-69 (5th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54, 58 & n.8 (4th Cir. 1971); Haskell, *supra* note 130, at 57-58.

distinguish the educational situation are the obvious need for quiet and order for the conduct of classes, and the daily collection of large numbers of people in a relatively small space for long periods of time. But too little attention has been given to the obvious fact that children, as participants in this conflict over free speech values, are less experienced and less developed in their rational powers than the adults whose rights are at stake in the seditious speech cases.

In discussing this point, it is useful to begin in the middle, with the political participation argument of *Whitney* and *Masses*. Part II[162] advanced the thesis that the political value served by student free speech is that of training the child for future participation in self-government. To the extent that the student is engaged in a dress rehearsal and not an actual performance, the ideas expressed (the value of specific rules, the virtue of particular administrators) are not really at stake. This is not to discount entirely the claim that student criticism often may have healthy consequences,[163] but it is to say that self-government is not often an unqualified good because students' insights are generally less worthy of consideration, and that the assumption on which democratic government rests—the equality of people as moral and rational beings—does not carry over to the relation between child and adult. The consequences for regulation of student criticism are then easier to see. Brandeis based his argument for protection of all speech that does not present a clear and present danger on the postulate that: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[164] If it is true that children respond less predictably to rational argument—because of their less developed ability to perceive or will to acknowledge falsehood—the remedy to be applied to potentially disruptive speech is not necessarily more speech. The importance of preserving the educational environment, which Dewey recognized, would then justify intervention at an earlier stage than would be proper vis-à-vis adults.

Much the same can be said of the other social value addressed in *Whitney* and *Masses*: the preservation of stability by permitting free expression. The posited relation between speech and nonviolent change rested on a preference for rational judgment when possible and on the citizens' assumed capacity for a sense of duty derived from political participation. To the degree that the young are less capable of ra-

162. *See* pp. 338-42 *supra*.
163. *See* text accompanying note 155 *supra*.
164. 274 U.S. at 377.

tional judgment and less susceptible to the promptings of a sense of duty, the connection between social stability and free expression becomes questionable.

The final value to which Justice Brandeis referred was the importance of free expression to the exercise and development of the individual's capacities for reason and emotion. For children, as for adults, free speech plays a variety of important roles in the development and definition of individual autonomy:[165] it permits the child to experience the pleasure of self-expression; offers occasion for practice in the skills of rational discourse; teaches the impact that speech can have to accomplish good or bad results; and allows the receipt of information crucial to the child's development. Implicit in at least some of those functions, however, are limiting principles. For example, that the child may not appreciate the gravity of consequences that can follow incitement may imply that school authorities should be allowed to establish a demilitarized zone between protected speech and dangerous speech, merely as a precaution against students crossing the latter line. That is what the *Tinker* formula does, by allowing school administrators to shut off discussion once it reaches a "reasonable forecast of substantial disruption," but before it occasions a "clear and present danger." Similarly, because a child lacks the skills of rational discourse, he may be inclined to react physically to speech with which he disagrees, but to which he is unable to respond on a sophisticated level. Learning self-control is also valuable for the young listener, and school officials should not deprive him of that lesson.[166] Nevertheless, the greater danger of confrontation between students unskilled in the etiquette of discourse may again justify more intervention than would be appropriate in the case of adults.

2. Prior Restraint.—A second issue presented by student criticism of school personnel and regulations arises because this criticism most often appears in print in the school newspaper or in some underground paper or pamphlet. As a result, it has been the frequent practice of school administrators to require submission of such material to the principal's office before it is distributed. In the realm of adult expression it is clear that any such prior restraint on political speech would be invalid.[167] And yet, of the five circuit courts that have considered the

165. *See* pp. 347-50 *supra.*
166. Ladd, *supra* note 126, at 238.
167. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Only in the areas of censorship of obscene films, Times Film Corp. v. Chicago, 365 U.S. 43 (1961),

question, four have indicated their belief that prior restraint would be permissible given well-drawn procedures.[168] Only one has indicated—and then rather ambiguously—that under no conditions should prior restraints be tolerated.[169]

Although the courts have most often reached conclusions without any attempt to explain why prepublication restrictions of the high school press are or are not appropriate, the Second and Fourth Circuits have indicated that the justification for such restrictions may be traced to Justice Hughes' dictum in *Near v. Minnesota*[170] that publications creating a clear and present danger might be so constrained.[171] In the educational context, the stronger showing of danger must be modified to the "reasonable forecast of substantial disruption" standard announced in *Tinker*. Yet, although the Supreme Court has never expressly disavowed the *Near* exception to the general rule against prior restraint, it has no continuing vitality in the realm of adult expression.[172] The question presented by the school press cases, then, is why the interests of students in airing criticism of school personnel and rules should be entitled to less protection.

Any answer to that question must begin with an appreciation of the consequences of delay caused by prior restraint of adult speech, since these have been the essence of the Court's objection to the technique of prior restraint.[173] In the area of political speech, timeliness is

commercial advertising, Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189-91 (1948), and permit requirements for the use of public places, Cox v. New Hampshire, 312 U.S. 569 (1941), has the Court tolerated prior restraint.

168. Mitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Shanley v. Northeast Ind. School Dist., 462 F.2d 960 (5th Cir. 1972); Riseman v. School Comm'n of Quincy, 439 F.2d 148 (1st Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).

169. Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972). *But see* Jacobs v. Board of School Comm'rs, 490 F.2d 601 (7th Cir. 1973).

170. 283 U.S. 697, 716 (1931).

171. *See* Eisner v. Stamford Bd. of Educ., 440 F.2d at 807; Quarterman v. Byrd, 453 F.2d at 58 & n.9.

172. Note, *Prior Restraints in Public High Schools*, 82 YALE L.J. 1325, 1332 (1973). Imagine a New York City ordinance requiring that all *New York Times* articles critical of city government be cleared before publication, and permitting censorship of those presenting a clear and present danger of substantial disruption of governmental operations.

173. *See* L. TRIBE, *supra* note 79, § 12-33, at 730-31. Professor Tribe suggests that the permissibility of prior restraints in the context of obscenity and commercial advertisements may also be explained by the greater possibility of a prepublication showing of harm. By contrast, a majority of the Court in New York Times Co. v. United States (Pentagon Papers Case), 403 U.S. 713 (1971), permitted publication because "they were not persuaded that the publication of the Papers would *surely* cause the harm alleged by the government." L. TRIBE, *supra* note 79, § 12-33, at 729-30 (emphasis in original). That distinction, however, is obviously unsatisfactory. In obscenity cases, the Court has required no factual prediction of harm whatsoever. *See* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963). And the fraud statute involved in Donaldson v. Read Magazine, 333 U.S. 178, 189-91 (1948), required no showing that

crucial to effective expression.[174] Revelation of a politician's sins the day before rather than the day after election is a simple example. Prior restraint necessarily interferes with the decision about timing in both obvious and imponderable ways. Publication at the right moment, however, is also a central fixture of the other values served by freedom of speech. The difference between a meaningful contribution to the search for scientific or social truth and an addition to the problem of periodical paper waste is often no more than a matter of timing. Since speech has an emotional, as well as a rational, value, the frustration of delay may be tantamount to outright and permanent censorship.

The instrumental role that freedom of expression plays in the lives of children creates an entirely different perspective on the matter of delay. Consider again the values discussed in Part II, in light of a hypothetical case. Suppose that the local school board is scheduled to meet tonight to decide whether sex education courses should be offered to high school students, and that the issue has been attended by brouhaha among the students—graffiti pro and con, disruption of health classes with arguments, and so on. Suppose too that the school paper, scheduled to come out today, argues that students with any sense of social responsibility should boycott ninth period classes to protest the board's past failure to include sex education as part of the curriculum. Finally, suppose that the school has a posted rule forbidding circulation of the paper without administrative approval, stating that: "No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others."[175] The rule also provides appropriate procedural safeguards for hearing, prompt determination, etc., but it is unlikely that an adverse decision could be overturned in the course of the day.

It was suggested in Part II that free speech plays an important role in training the young for participation in democratic self-government.

someone was actually misled, nor statistics about the likelihood of that happening, but merely evidence satisfactory to the Postmaster General. The Court's approval of the Postmaster's action was based simply on a view of the effect the solicitation's language would have on "ordinary minds." *Id.* at 189.

The best theoretical treatment of the problem of prior restraint, Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955), raises a number of severe objections to the technique in addition to the issue of delay. *Id.* at 656-60. The statement in text is not intended to discount those problems, but merely to indicate that they also arise with regard to obscenity, advertising, and parades, activities for which the Court has permitted prior restraints.

174. *See, e.g.*, Carroll v. President of Princess Anne, 393 U.S. 175, 182 (1968).

175. *See* Eisner v. Stamford Bd. of Educ., 440 F.2d at 805.

And quite apart from any value that the publication would have for the editors' and readers' development, it is clear that what the students think about sex education may have a useful impact on the board's decision. But as is obvious from the institutional composition of virtually all school boards—and their method of election—students, strictly speaking, have no right to participate in the board's decisions, nor even to have their views heard.[176] Simply put, in matters of curriculum approval, students are not self-governing. In this perspective, it is apparent that the matter of delay has less importance.

This conclusion does not belittle the relevance, even for instrumental purposes, of minimizing the use of prior restraint. To be effective in securing adherence to the principles of democracy[177] and in promoting the acquisition of political skills, student participation must take place under realistic conditions and cannot be restricted to hypothetical or moot controversies.[178] Even this training value, however, presupposes the maintenance of the school environment intact. Preserving a modicum of order may justify restraint even if it means that delay will thwart the developmental experience in this particular instance.

A second suggestion made earlier about the instrumental value of free speech concerned the child's contributions to the search for truth. It is reasonable to suppose that no rational decision can be hoped for in the matter of sex education unless student views, amply developed, reach those who must make the decision. The relative maturity of students, their present sexual habits, the current state of knowledge among them about human physiology and sexual relations, the success or failure of communications between them and their parents and peers, are data of prime importance. But this does not at all imply that the conclusions of the students on the matter should in themselves play an important role. The value of a student article, discussing the relation between sex education and the reduction of adolescent anxieties, to a proper social resolution of the sex education question is not likely to be its persuasive effect on other students, but its role as a kind of performative utterance—a datum concerning student attitudes. It is in a sense irrelevant whether these attitudes are published at all, provided they come to the attention of the school board.[179]

176. *See* Tushnet, *supra* note 2, at 753. I ignore the complications presented by the fact that some high school seniors are 18 or older, and may be eligible to vote for the election of school boards.

177. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 637.

178. *See* Ladd, *supra* note 126, at 235-38.

179. Publication would also serve the useful purpose of eliciting the attitudes of other students,

The real value of student free speech in the search for truth is the training it provides for future active participation in the process. As with the lessons of self-government, so too here it is crucial that the student learn by taking part in actual disputes that count for something.[180] But it is equally true that the training's effectiveness depends on preservation of the environment in which it can take place.

The third suggestion made above concerned the instrumental value of free speech in developing the minor's autonomy. Considerations relevant to the permissibility of prior restraints in this area do not differ greatly from those already discussed in connection with the clear and present danger formula. The minor's less developed skills of rational discourse and insufficient awareness of the effects of provocative speech support the conclusion that students' publications often pose a risk of disruption that adults would avoid.

B. Racial Slurs and the Problem of the Hostile Audience

The problem of student criticism of administrative personnel and regulations required a special focus on the role free speech plays in the student's progress toward participation in democratic self-government. This section considers the appropriate treatment of the minor's freedom to express racially antagonistic sentiments, an issue that demands particular attention to the function of speech in the child's growth toward individuality and autonomy. The problem has two facets, one more actively litigated than the other. Commentators and school officials have given considerable thought to schools' authority to forbid racial epithets on school grounds.[181] Racial insults addressed directly to an individual present not only a likelihood of real emotional injury, but also a high risk of violent physical reaction. Another element of the problem, which courts have faced with some frequency, has been the more general advocacy of racially antagonistic ideas, often within a setting of prior racial dispute among the students. The courts have shown surprisingly little inclination to find a first amendment right

which the board will also want to consider. To permit a boycott to provide occasion for a nose count, however, seems a rather silly way to gather the information.

180. *See* p. 343 *supra*.

181. *See, e.g.*, INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO SCHOOLS AND EDUCATION 4.2C & Commentary, at 84-91 (1977) [hereinafter cited as STANDARDS]; Berkman, *supra* note 84, at 592-95; Gyory, *The Constitutional Rights of Public School Pupils*, 40 FORDHAM L. REV. 201, 216-19 (1971). *Cf.* NEW YORK CITY SCHOOL DISTRICT, CODE OF RIGHTS AND RESPONSIBILITIES OF HIGH SCHOOL STUDENTS § 4(c), *reproduced in* HARVARD CENTER FOR LAW & EDUCATION, CODE GOVERNING RIGHTS AND CONDUCT OF HIGH SCHOOL STUDENTS 96 (1971) (nothing "advocating racial or religious prejudice shall be permitted to be distributed within the school").

even to wear a Confederate flag under such circumstances,[182] although there have been exceptions.[183] The friction generated by the wearing of buttons proclaiming "White is right" and "Happy Easter, Dr. King" led the Sixth Circuit to uphold a school rule banning all buttons, even though the rule had prevented a student from protesting the Vietnam War.[184]

The most striking feature of the courts' treatment of this problem has been their willingness to countenance departures from the rules that would govern adult expression under similar circumstances. It is conceivable that the "uncontrollable impulse" test of *Chaplinsky v. New Hampshire*[185] would still apply to face-to-face racial slurs among even mature adults.[186] But in cases involving statements that merely advocate racial or religious bigotry, the most reliable indications are that the Court would today afford the speaker first amendment protection. When state authorities have attempted to control this sort of expression by means of a general breach of the peace statute, the Court has fairly consistently refused to countenance the restriction,[187] although the Court's frequent reliance on the doctrines of vagueness and overbreadth make it difficult to say that the cases stand for any hard proposition. On the other hand, *Beauharnais v. Illinois*[188] held that a group libel statute narrowly aimed at racially or religiously antagonistic speech was constitutional, without applying the "clear and present danger" test. Criticisim of *Beauharnais* has been severe, however, and it is more than likely that the Court today would take a different view of the few group libel laws still on the books.[189]

It is useful to examine the justifications thought to underlie the

182. *See, e.g.*, Augustus v. School Bd. of Escambia County, 507 F.2d 152 (5th Cir. 1975); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972).

183. *See, e.g.*, Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970). *Cf.* Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) ("Dixie," played at assembly where black students walked out, did not constitute "fighting words.").

184. Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970).

185. 315 U.S. 568 (1942).

186. *See generally* T. EMERSON, *supra* note 2, at 326; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 793 (1978); Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 27 (1974).

187. Terminiello v. Chicago, 337 U.S. 1 (1949); Cantwell v. Connecticut, 310 U.S. 296, 307-11 (1940). *Cf.* Carroll v. President of Princess Anne, 393 U.S. 175 (1968) (improper ex parte injunction against militantly racist rally); Kunz v. New York, 340 U.S. 290 (1951) (denial of permit to anti-Catholic and antisemitic speaker).

188. 343 U.S. 250 (1952).

189. For a sampling of some of the criticism, see Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Anti-Defamation League v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring); Cincinnati v. Black, 8 Ohio App. 2d 143, 154, 220 N.E.2d 821, 828 (1966) (holding a group libel statute unconstitutional under New York Times v. Sullivan); T. EMERSON, *supra* note 2, at 391-99; H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 7-64 (1965); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 186, at 780.

free speech right of adults to abuse others. A starting point is the generally held conviction that no system of free expression can long endure unless courts and legislatures stay out of the business of ranking kinds of speech according to value or content.[190] As long as the external effects of speech are consistent with the preservation of social order, the first amendment assumes that unrestrained rational, emotive, and even irrational discourse will in the end make us all better off. From an academic point of view, vicious name-calling may have little social value. In the heat of argument, however, it may serve unquestionably important values. Most obviously, it satisfies for some the need for a sense of personal importance. Criticism of others may also be a way of advancing religious or political principles that the critic thinks worthy of adoption even by those he takes to task.[191] Even if verbal attacks are simply a way of letting off steam, they may be preferable to physical violence. Moreover, by inviting verbal dispute, castigation of one's opponents may serve the ends of stable political change and effective self-government.[192]

Several writers have suggested that racially or religiously inflammatory speech in the school setting should be subject to strict controls for reasons not related to the age of students, a suggestion that does not presuppose the inferiority of children's rights to those of adults in any respect.[193] Since students in school are a captive audience, any rule governing this kind of speech must take account of the rights of those who must listen. Laws require the student to attend daily; financial constraints limit the number who can select a private rather than a public school—a decision that is in any case likely to be made by parents. Once inside the school building, with a schedule regulating his hourly activity, the student will find it difficult simply to walk away from of-

190. FCC v. Pacifica Foundation, 438 U.S. 726, 762 (1978) (Brennan, J., dissenting). *See generally* Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1. *See also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

191. In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.

Cantwell v. Connecticut, 310 U.S. at 310.

192. "The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." Terminiello v. Chicago, 337 U.S. at 4.

193. *See, e.g.*, STANDARDS, *supra* note 181, at 89-90; L. TRIBE, *supra* note 79, § 12-10, at 619 & n.12, § 12-21, at 690; Berkman, *supra* note 84, at 592-93; Ladd, *supra* note 126, at 239.

fensive speech.[194] While the Court has not explicitly so held, it seems fairly clear that the adult listener under similar circumstances would be entitled to great consideration.[195]

It must also be recognized, however, that characteristics peculiar to their age-group augment the rights of student listeners. One of the most significant of these characteristics is the heightened sensitivity of the young to racial disparagement, which may result in psychological harm. As the Court recognized in a related context in *Brown v. Board of Education*,

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[196]

A related factor from the speaker's side is the familiar callousness, or lack of awareness, of children inflicting such harm, which perhaps makes it more probable that the bounds of civility will be crossed in a closed area populated only by the young.

Another suggested justification for greater strictures on racial or religious antagonism among children hinges on the special value of order in schools. Schools, like libraries and (excuse the simile) prisons, prompt a greater-than-average governmental concern for peaceful conditions the lack of which would frustrate the very purpose of the institution.[197] To say, however, that the special purpose of schools requires a limitation of students' freedom to make antagonistic speeches is only to assert that the state's interest in teaching its future citizens things *other than* bigotry takes precedence over the child's right of free speech. The state has the necessary power only because the child is immature and society has a legitimate concern about how he develops.

Though it is undeniable that the captivity of the student audience affects students' rights, the immaturity of the audience is of course relevant as well. The discussion in Part II distinguished several ways in which a general rule of freedom of expression serves the child's progress toward autonomy. A closer look at some of these distinctions in connection with antagonistic speech supports the thesis of this section.

One instrumental role of free speech in the child's individual de-

194. STANDARDS, *supra* note 181, at 89.

195. *See* FCC v. Pacifica Foundation, 438 U.S. at 748-49; Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (Blackmun, J.); *id.* at 305-08 (Douglas, J., concurring); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

196. Brown v. Board of Educ., 347 U.S. 483, 494 (1954). *See also* STANDARDS, *supra* note 181, at 88-89.

197. *See* L. TRIBE, *supra* note 79, § 12-21, at 690.

velopment is that of offering occasions for experiencing the pleasure of self-expression, or more largely, self-definition. In the adult world, prejudice serves this end in a twisted fashion. In the realm of the nonadult, it counts for something that there are other, more genuine, ways of enjoying that experience. The state has an interest in encouraging these alternative modes of distinguishing oneself—as a basketball player, a mechanic, a social critic, a wit. Because of the state's interest in the kind of adult citizen the child speaker becomes, as well as the harm to the listener that it seeks to avoid, this is an area in which the kind of control envisioned by Dewey, and by the Court in *Ginsberg* and *Prince*,[198] has real bite.

A second benefit of free speech for minors is the practice it offers in the skills of argument. Not only does the speaker learn the methods of persuasion, but the audience learns the virtue of tolerance by listening. It would be an easy out to say that there is very little social value in encouraging perfection of this particular technique of persuasion. But as George S. Kaufman said, there may be some value in trying everything once in life, except incest and folk-dancing. If nothing else, the speaker may learn the lesson that it is distasteful. It is implausible, though, to expect the adolescent listener in this situation to learn tolerance by experience. To the extent that racial or religious antagonism has a lasting psychological effect on the young, the lesson in rhetoric does not seem worth the risk. Avoiding this harm necessitates controlling the speaker, not the audience.

Still a third function performed by a system of free expression in the student's life is that of providing him with an opportunity to become acquainted with the effects words and symbols can have. The presumption that the young are less well informed about those consequences or less circumspect in producing them, however, means that frequently the reaction they provoke may be more violent or more damaging to the listener than the speaker anticipated or perhaps cared about. It may be urged that the very function of free speech is to offer first-hand the lesson Cantwell may have learned: that religious antagonism (or some other form) is not a particularly effective way to make any point, and is likely to be followed by some kind of injury to everyone involved.[199] It is best for the child to become acquainted with some kinds of speech, as he should come to know of dynamite, by hearsay. Treating adults differently is not all that peculiar, once we recognize that the adult speaker will know what happens when he pushes the

198. *See* pp. 336-38 *supra.*
199. *See* Cantwell v. Connecticut, 310 U.S. at 301-03, 309-10.

plunger, and the audience will be better prepared to shield themselves from the blast.

C. *Book Bans and the Right to Know*

A split between the Second and the Sixth Circuits[200] over the permissibility of removing "unsuitable" books from school libraries underscores one of the more widely noted current problems in the area of children's free speech rights.[201] In *Presidents Council, District 25 v. Community School Board No. 25*[202] a group of students, parents, and others sought declaratory and injunctive relief against the School Board's removal of Piri Thomas' *Down These Mean Streets* from junior high school libraries in the district. The book is an autobiographical account of a Puerto Rican youth's childhood in Spanish Harlem, and contains graphic descriptions of criminal violence, drug abuse, and normal and abnormal sexual relations. The Second Circuit affirmed the dismissal of the action and rejected plaintiffs' suggestion that, since there was no showing of disruption as envisioned in *Tinker*, the students' right to receive information was not subject to content-based restrictions.[203] It found that the board, which had unfettered discretion in the initial selection of books to stock the library, must be given similar authority to remove "books which become obsolete or irrelevant or where [*sic*] improperly selected initially, for whatever reason."[204] That some limits on library content would result was deemed irrelevant: "speech or the expression of opinions [by the] students" was in no way restricted, since teachers could still discuss the book in class, and since the book was available to children through their parents.[205]

A parallel problem came before the Sixth Circuit in *Minarcini v. Strongsville City School District*,[206] a class action begun by five high school students to protest a board of education decision to remove *Catch 22* and *Cat's Cradle*, novels by Joseph Heller and Kurt Vonnegut, from the school library. The complaint also requested relief from the board's refusal to approve *Catch 22* and another Vonnegut

200. Minarcini v. Strongville City School Dist., 541 F.2d 577 (6th Cir. 1976); Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir. 1972).

201. For a sampling of the commentary on these cases, see Tushnet, *supra* note 2, at 753-58; Comment, *The Right to Know and School Board Censorship of High School Book Acquisition*, 34 WASH. & LEE L. REV. 1115 (1977); 27 CASE W. RES. L. REV. 1034 (1977); 45 FORDHAM L. REV. 1236 (1977); 55 TEXAS L. REV. 511 (1977); 13 WAKE FOREST L. REV. 834 (1977).

202. 457 F.2d 289 (2d Cir. 1972).

203. *Id.* at 293.

204. *Id.*

205. *Id.* at 292-93.

206. 541 F.2d 577 (6th Cir. 1976).

novel, *God Bless You, Mr. Rosewater*, as textbooks.[207] The court of appeals affirmed the dismissal of this claim, observing simply that discretion over curriculum control had to be lodged somewhere, and state law had given it to the local board of education.[208] It found more merit in the first claim. The court apparently assumed that the right to know, to the extent that it had been recognized by the Supreme Court, belonged in the same degree to high school students as to adults. It held that any removal of books from the library had to be justified on grounds other than the objectionableness of content. The availability of a book from sources outside school was not a sufficient excuse for censorship.[209]

Plainly, the crucial question in any dispute over curriculum controls or library acquisitions should be the existence and scope of the students' right to know, a point to which the Supreme Court's decisions involving minors give, at the moment, only the most ambiguous support. The two most clearly relevant cases are *Epperson v. Arkansas*[210] and *Meyer v. Nebraska*.[211] *Epperson* struck down an Arkansas law that forbade the teaching of evolution in biology classes. An obvious limitation on the precedential effect of the case is that the Court ultimately rested its decision on the establishment clause, an issue not likely to arise in connection with most curriculum choices and library acquisitions. Moreover, even if we can take seriously the Court's references to freedom of speech,[212] it is still impossible to read the case as support for a right to have the state include any particular subject matter in the curriculum.[213] At most, its implication is that it is unconstitutional for a school to forbid any general approach to a subject that it has chosen to include in the curriculum.[214] The "general approach" requirement certainly does not confer a right to consult any particular book.[215]

Meyer at first reading seems to stand for the right to have a particular subject—in this case, German—included in the curriculum. The

207. Plaintiffs also claimed that the board had violated the first amendment by prohibiting teachers from discussing any of the three books in class; the Court of Appeals found insufficient evidence to support that claim. *Id.* at 583-84.

208. *Id.* at 579-80.

209. *Id.* at 580-83.

210. 393 U.S. 97 (1968).

211. 262 U.S. 390 (1933).

212. *See* 393 U.S. at 104-05.

213. *See id.* at 111 (Black, J., concurring); *id.* at 116 (Stewart, J., concurring); Tushnet, *supra* note 2, at 756.

214. *See* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 856-57 (1970); *cf.* Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1504 (1972) (prohibiting mention of matter relevant to curriculum subject held more objectionable than exclusion of subject from curriculum).

215. Tushnet, *supra* note 2, at 756.

Court found that Nebraska could not, consistently with the due process clause, forbid the teaching of foreign languages to students in elementary school. Meyer taught in a private school, however, and the state's decisions about educational priorities when its own resources are at stake would deserve more respect. In modern first amendment dress,[216] *Meyer* seems to say only that parents have a right to have their children instructed in private schools in subjects other than those the state deems important.[217] If the issue were presented in the context of a state law banning books from a private school library, I have no doubt the Court could resolve it without having to rely on the child's right to know.

The inquiry does not end merely because the Court has not yet spoken. The issue is whether the child's right to know ought to be coextensive with the adult's. Numerous Supreme Court cases suggest, and several hold, that the adult's right is in fact only the reverse of a coin whose obverse is the right of free speech.[218] Like free speech, however, the right to know is not a unitary concept, and the extent of the protection to which it is entitled may depend on how the information is to be conveyed, as well as the role the government plays in its restriction.[219] One facet, for example, is the right of citizens to know what the government "is up to,"[220] the kind of issue raised by the *Pentagon Papers Case*[221] and *United States v. Richardson*.[222] A second facet involves the individual's claim against state interference in private communications, a question presented when the government reads someone's mail.[223] Still a third might be the evolving claim that the government must exercise affirmative control to expand the system of free expression in the broadcasting and print media.[224] These kinds of information involve different considerations relevant to the extent of

216. For suggestions that *Meyer* would now be approached under the rubric of free speech rather than substantive due process, see Griswold v. Connecticut, 381 U.S. 479, 482 (1965) and G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 618 (9th ed. 1975).

217. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1308 (1976).

218. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976); Procunier v. Martinez, 416 U.S. 396, 408 (1974); Kleindienst v. Mandel, 408 U.S. 753, 763 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); Martin v. City of Struthers, 319 U.S. 141 (1943).

219. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

220. Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273 (1971).

221. New York Times Co. v. United States (Pentagon Papers Case), 403 U.S. 713 (1971).

222. 418 U.S. 166 (1974).

223. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Lamont v. Postmaster General, 381 U.S. 301 (1965).

224. Emerson, *supra* note 219, at 8-14.

protection. In the first situation, the legitimate demands of secrecy regarding, for example, weapons design, diplomatic negotiations, collective bargaining, uncompleted litigation, and executive, legislative, and judicial privilege impose obvious constraints.[225] In the second, the intimacy and directedness of one's personal message seem to warrant absolute protection for the rights of receiver as well as sender. With respect to broadcasting and print media, the questions of access and balance permit a number of solutions, there being little use for absolutes in the allocation of limited resources. None of these facets sheds much light on the obligations of government when it engages in expression through a system, like that of school book acquisition, over which it retains a monopoly of sorts. There is no precedent on the question in the area of adult speech, and we can only speculate about the ultimate resolution. The question is like the one that would have been presented in *Public Utilities Commission v. Pollak*[226] had the Public Utilities Commission, rather than the Capital Transit Company, run the Washington, D.C., bus system. Government broadcasting to a captive audience on a bus is not very different from government broadcasting to school children, except that silence is an available alternative only in the first situation. Any approach that would avoid the danger of propagandizing[227] must be based on a duty to provide a balanced presentation.[228] A diversity of views and theories should be offered. Procedures for direct citizen participation in the selection of program offerings also may be desirable. The necessary balance would be affected by the possibility of relying on private resources to finance the presentation of opposing views.

Whatever the scope of the adult's right to acquire information, recognition of that right serves the same values as the right to communicate.[229] The need to hear and to be informed is a necessary precondition of democratic self-government.[230] Most obviously, this need is implicit in the right to vote. Even apart from the franchise, however, an informed perspective is necessary for one who would influence elected or appointed officials, the media, and fellow citizens to

225. *Id.* at 17.
226. 343 U.S. 451 (1952).
227. *Id.* at 463.
228. *Cf.* Emerson & Haber, *The* Scopes *Case in Modern Dress*, 27 U. CHI. L. REV. 522, 527-28 (1960) (suggesting a stricter standard of balanced presentation is required in school setting than in other areas of government broadcasting); Emerson, *supra* note 219, at 9-11.
229. Emerson, *supra* note 219, at 2.
230. A. MEIKLEJOHN, POLITICAL FREEDOM 115-17 (1960); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 46 (1974); Steel, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

see things his way. An unregulated governmental monopoly of any channel of communication would not long satisfy the need.[231] The public interest in the pursuit of social and scientific truth also requires freedom of access to information as a correlative of freedom of speech. Suppose that the government of the State of North Carolina, protective of tobacco interests in that state, is unwilling to communicate the information that cigarette smoking is linked to lung disease. This might not only affect people's habits, but also inhibit research into the effects of smoking. That private speakers would still be free to declare the dangers of smoking publicly might not discharge the state's obligation if, as we have hypothesized, the state controlled the most effective channels of communication. The state's conduct should serve the goal "not that a given speaker be heard, but that every citizen hear him."[232] Finally, the individual's interest in the direction of his own life relates importantly to the availability of information. The Court made this point in *Stanley v. Georgia*,[233] striking down a state law that made private possession of obscene materials a criminal offense. For the proposition that the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society,"[234] the *Stanley* Court referred to a passage in *Winters v. New York*[235] in which the Court had rejected the view that the right to a free press extended only to

> the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.[236]

Before considering the child's right to know in the context of these values, it will be useful first to clear some of the underbrush that clutters the opinions in *Presidents Council* and *Minarcini*. *Minarcini* confusingly suggests that the student's right to know is less pressing in the area of curriculum controls than it is with regard to library acquisitions.[237] It is true that several practical considerations suggest that state

231. Steel, *supra* note 230, at 331-32.
232. *Id.* at 331.
233. 394 U.S. 557, 564 (1969).
234. *Id.*
235. 333 U.S. 507 (1948).
236. *Id.* at 510.
237. Although the *Minarcini* court dealt with the right to know in connection with the library claims, 541 F.2d at 583, it spoke as if the faculty alone had advanced the curriculum claims, *id.* at 579-80, a curious oversight in a case brought simply on behalf of the students. The claim actually presented to the district court was that the board's refusal to accept the faculty recommendation of curricular texts denied "to plaintiffs their right to academic learning freedom, and thereby con-

authorities should have more discretion in choosing textbooks than in choosing library acquisitions. Curriculum choices reflect considerations of time and technique not relevant to library selections: all students in a class must use the same book, and the small number of class periods means that fewer choices are possible. Obviously the need to equip all students with books also means that a different order of expense is involved. Finally, it is likely that the need for summer storage of books in those districts that merely lend to students raises problems of spatial constraint that do not exist for libraries. None of this, however, explains why the individual's interest in acquiring knowledge should be more limited in the curriculum area. A school library's effect on the individual student is largely determined by the individual's own choices from the library's holdings, and since initiative on the student's part is a precondition of any effect the library may have, it is not irrelevant to consider students' ability to supplement their school library choices with other choices from public libraries. In contrast, the student's comparative lack of freedom regarding course choices, coupled with the authority of the teacher (by virtue of his official position, control over class discussion, and the grading system) means that the state exerts a more direct influence through curriculum text selection. These facts suggest that greater solicitude for subject-matter preferences expressed by students in the classroom is more essential for protecting the student's right to know than permitting students to influence library purchases. *Minarcini* seems to suggest that since the curricular decision "must be lodged somewhere," it is best left with the elected and representative board.[238] If this implies that library acquisitions are not political in the same sense, it ignores the fact that books cost money and occupy space, both of which are limited in most school districts.[239]

Another red herring is the distinction *Minarcini* draws between the original purchase of books for the library and their subsequent removal. The Second Circuit in *Presidents Council* disparaged the view that a book acquired "tenure by shelving," deciding that the board's discretion both in purchasing and in removing books was unfettered.[240] The Sixth Circuit seemed to concede that initial selection was subject to

stitut[ed] a prior restraint on the freedoms of speech and press . . . ," 384 F. Supp. 698, 700 (N.D. Ohio 1974).

238. 541 F.2d at 579.

239. The court seemed to recognize the continuum when it argued that "[a] public school library is also a valuable adjunct to classroom discussion," *id.* at 582, but it drew the odd conclusion that there should be less rather than more control.

240. 457 F.2d at 293.

only the most minimal constraints,[241] but demanded that removal from the shelf could not be ordered to suit the "social or political tastes of school board members."[242] Based as it is on the child's right to know, this argument is hard to follow. If the right requires that the government provide a balanced viewpoint when it speaks in a forum over which it exercises monopolistic control, the right would attach as soon as it was decided that the school should have a library at all—that is, as soon as enabling legislation was passed, or funding made available. If the goal is balance, selection and removal from the library shelf are both relevant. The only difference between the two is that nonneutral rejection of particular books is harder to spot at the acquisition stage, because failure to select may be attributed to considerations of cost or ignorance of a book's existence.[243]

The way in which the asserted right to know serves first amendment values appropriate for minors is a more difficult matter. Because the inability to develop a broad perspective will affect the child's participation in the political process only at some time in the future, and because of the possibility that the defect will be remedied otherwise in the meantime, the right to be presented a balanced view imposes only rough requirements on the state. On the other hand, an individual is not automatically endowed with all requisite knowledge for political decisions on his eighteenth birthday; the process must have been going on for some time.[244] Obviously a school library stocked with nothing but McGuffey Readers and biographies of Herbert Hoover, Douglas MacArthur, and Eddie Rickenbacker will not do the job.[245]

Unlike the other limitations that free speech may impose on the school system, the requirement of balance in curricular and library of-

241. "Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion . . . to choose any particular books." 541 F.2d at 582.

242. *Id.* The court's assertion that content-based removal of books was an "unconstitutional condition" on the right of students to use the library, *cf.* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (rejecting a school board argument that by accepting employment teachers forfeited the right to comment publicly on matters relating to school policy), is nonsense. The state did not offer the benefit of a library on the condition that students agree not to assert their right to know conflicting points of view. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1446 (1968). It simply failed to satisfy that interest entirely, leaving students free to fulfill it elsewhere. The same argument the court makes could apply at an earlier point: when the school decides to provide a library, a duty to represent a wide range of views with balanced holdings would attach.

243. Curiously enough, the facts of the case required the court to consider this point, since one of the students' claims focused on the school's refusal to buy *God Bless You, Mr. Rosewater* for the library. 541 F.2d 578-79. The court simply ignored that claim, leaving the impression that it was found indistinguishable from the claim concerning refusal to buy the book for use as a text.

244. Tushnet, *supra* note 2, at 753.

245. The suggestion is not fanciful. It was made by Dr. Cain, a member of the Strongsville Board of Education, 541 F.2d at 581-82.

ferings presents a genuine conflict with the prescriptive role the schools play in the formation of future citizens.[246] To the extent that it is permissible for the state to win elementary and high school students over to the virtues of democracy, it makes no sense to say that there is any obligation to offer a balanced presentation either in class or in the library. If the permissibility of value-inculcation is admitted, as it generally seems to be,[247] it is no solution to say that respect for democracy is best fostered by permitting the student to see the undesirability of the alternatives. This kind of program merely lends sophistication to an unbalanced presentation. In this respect the requirement of balance is fundamentally different from the restrictions imposed on the school board by other aspects of an instrumental right of free speech. Permitting students to speak as *Tinker* requires in no way interferes with the curricular message. Indeed, once student speech becomes disruptive it is no longer protected.

The second instrumental value of children's free speech on which Part II focused was preparation for participation in the search for truth, first by permitting the child to participate in the process of a robust exchange of ideas, thereby acquiring a skill, and second, by bombarding the child with data—facts, principles, sensations—upon which developing judgment could operate. These values do not entail a recognition of the right to know simply on the grounds that no unbalanced exchange of ideas can be "robust," and that the accumulation of knowledge is the point of the right to know.[248] To begin with, it is not unreasonable to suggest that in some areas the existence of a right to know must be predicated on the possession of judgment and experience. The recent controversy over a Harvard undergraduate's thesis on building an atom bomb at home offers a rather extreme example, but *Presidents Council* appeared to consider this justification for restrictions concerning the more mundane matters of sex, violence, and drugs.[249] As *Presidents Council* suggests, it is preferable to respect the child's right to know of vulgarity and obscenity, not by requiring cur-

246. I borrow the term "prescriptive" from Professor Goldstein. *See* Goldstein, *supra* note 217, at 1297, 1342-55; Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970).

247. *See* Goldstein, *supra* note 217, at 1350-51.

248. Quite a different question is presented by speaker bans on college campuses, a situation in which it might make eminently good sense to find a resolution in the students' right to know. *See, e.g.*, Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1050-52 (1969); Note, *Students' Constitutional Rights on Public Campuses*, 58 VA. L. REV. 552, 570-71 (1972). For a collection of the cases, virtually all of which have struck down the bans, see N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 682 (1976).

249. 457 F.2d at 291.

ricular or library representation of those topics, but by delegating the problem to parents.[250]

Apart from the peculiar problems presented by these specific types of information, it is not generally clear that the state has or ought to have an affirmative obligation to supply students' lack of knowledge in any prescribed fashion. *Meyer v. Nebraska*, though it invalided a statute forbidding the teaching of German in elementary schools, explicitly noted that

> [t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports.[251]

Meyer's conclusion that the state cannot prevent the acquisition by private schooling of knowledge that parents deem important is reinforced by the terse disposition of *Pierce v. Society of Sisters*[252] two years later. Institutional considerations, including the unlikelihood that a school could strike a neutral balance of views and subjects, particularly in the humanities and social sciences, argue against requiring the state to provide instruction in particular subjects.[253]

The third instrumental value of free speech in the child's development is assistance in his progress toward autonomy and self-definition. Most of the functions of free speech rights for children that we have discussed are bound up with the expression, rather than the receipt, of information.[254] The most crucial function of the system of freedom of expression for children may be that of providing the child with the information necessary for an understanding of himself and the world around him. What has been said of the values treated above is relevant here as well. The right to know should not impose an affirmative obligation on the state to provide specific information; the better role for free speech is to restrict attempts by the state to coerce belief or to forbid the acquisition of knowledge. Affirmative provision of information seems better left to parents.

250. *Id.* at 292.
251. 262 U.S. at 402.
252. 268 U.S. 510 (1925).
253. Goldstein, *supra* note 217, at 1345. Since this suggestion is, of course, applicable with the same force to the adult situation, it does not explain why children's right to know should deserve less respect.
254. Opportunities to experience the satisfaction of self-expression, practice communication skills, and learn the effect that mere speech can have, are only remotely connected with the privileges of audiences.

D. Sex, Obscenity, Vulgarity and the "Right Not to Know"

One of the more intractable questions over which the courts have recently divided is the extent to which the state or its schools may shield minors from the perceived harmful effects of obscenity, vulgarity, and explicit discussion of sexual matters. *Ginsberg* seems to enshrine the state's right to define obscenity more broadly when its distribution to children is at issue, with the consequence under the current "two-level" theory of the first amendment[255] that a broader range of expression may be controlled. *Pacifica Foundation* also evidences a special solicitude for the young who may be exposed to mere vulgarity, although the peculiarities of the broadcast media leave some ambiguity about the real basis for the Court's decision. The uncertainty of the law is perhaps nowhere more evident than in several cases dealing with discussions in high school newspapers of contraception and sexual attitudes. In *Gambino v. Fairfax County School Board*[256] the Fourth Circuit upheld students' right to print an article entitled "Sexually Active Students Fail to Use Contraception" in the school paper, although the court did not address the question whether the content of the article was entitled to first amendment protection. In *Bayer v. Kinzler*[257] the Second Circuit summarily upheld the right of student editors to distribute a supplement to the school paper dealing with contraception and abortion. The Fifth Circuit held in *Shanley v. Northeast Independent School District*[258] that students had at least a right to publish information about the availability and location of treatment for birth control and venereal disease. The Second Circuit, however, recently concluded that expression by high school students concerning sexual matters is not entitled to the plenary protection accorded adult speech.[259] In *Trachtman v. Anker*[260] a group of students sought to enjoin administrative interference with their attempts to distribute a questionnaire seeking information about students' attitudes toward premarital sex, contraception, homosexuality, masturbation, and "sex-

255. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 7-16.

256. 564 F.2d 157 (4th Cir.), *aff'g* 429 F. Supp. 731 (E.D. Va. 1977). The school board concentrated its objection to the content of the article in an argument that other students were a captive audience of the newspaper; the district court found that there was no captive audience, and the Fourth Circuit held the evidence for this was sufficient.

257. 515 F.2d 504 (2d Cir. 1975) (*mem.*), *aff'g* 383 F. Supp. 1164 (E.D.N.Y. 1974). According to the Second Circuit's rules, decisions rendered from the bench have no precedential effect. 2D CIR. R. § 0.23.

258. 462 F.2d 960 (5th Cir. 1972).

259. In Carey v. Population Serv. Int'l, 431 U.S. 678 (1977), the Supreme Court held that adult free speech rights are incompatible with restrictions on the advertising and display of contraceptives. *Id.* at 700.

260. 563 F.2d 512 (2d Cir. 1977).

ual experience." The information was to be sought through the voluntary cooperation of students polled in the ninth through the twelfth grades, and was to be incorporated in an article to be published in the school paper. The court held that distribution of the questionnaire, although protected to some extent by the first amendment, would invade the rights of more sensitive students and possibly cause psychological harm; school authorities could therefore forbid it.[261]

It is perhaps misleading to speak of the interest of sensitive students as a "right not to know," as though it were a kind of consitutional antimatter opposed to and commensurate with the rights to speak and know protected by the first amendment. Although similar to the lay notion of privacy, the interest of these students does not fall within the Court's emerging definition of that nebulous constitutional right,[262] since it was not the state that sought the information, since any disclosure would have been voluntarily made,[263] and since the harm feared by the court was not so much the scrutiny to which the answering student's life would be subjected by others, as the anxiety that might result from premature consideration of problems the student might not otherwise have had occasion to consider.[264] The interest in not yet knowing or thinking about particular matters is perhaps as close an approximation to *Trachtman*'s—and for that matter *Ginsberg*'s and *Pacifica*'s—guiding value as can be hoped for; that it is not a right of constitutional stature does not mean that it cannot at times override first-class first amendment rights.[265]

The Supreme Court has on occasion heeded similar claims when adult rights of expression were at stake. The Court has protected the individual's interest in shutting off the flow of information that will reach him in his home, even if the communication is not obscene in the sense that would justify suppression in the marketplace.[266] But it is fairly clear that the interest in not knowing provides no significant pro-

261. *Id.* at 519-20.

262. "The cases sometimes characterized as protecting privacy have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnotes omitted).

263. A cover letter accompanying the questionnaire stated, "You are not required to answer any of the questions and if you feel particularly uncomfortable—don't push yourself." 563 F.2d at 515.

264. *Id.* at 519-20. Even further removed from the notion of privacy was the concern for readers of the article that would have incorporated the results of the survey. *Id.* at 516 n.2.

265. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926 (1973).

266. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

tection for the adult outside the precincts of his house.[267] Moreover, there seems to be a fundamental difference in the nature of the adult interest in closing off expression that removes it a step from anything properly called a "right not to know." Rarely would the adult homeowner not grasp the significance of, for example, advertisements for contraceptives or erotic material sent through the mail. What the cases seek to protect is not an interest in remaining ignorant of such things, but a haven where the adult may "be free from sights, sounds and intangible matter [he does] not want . . . ."[268] The harm inflicted by invasion of that interest, at least in the case of vulgarity and erotic materials, is not caused by any message they may contain, but by the perception of some people that they have "the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions."[269]

On the other hand, the state on behalf of the child may close off certain topics altogether, or at least as far as possible.[270] At times the Court has indicated that the state may pursue that goal by restricting the flow of factual information. It noted in *Pacifica Foundation* that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[271] The outcome in *Ginsberg* turned on the Court's conclusion that "minors' reading and seeing sex material," in contrast with learning the German language, for example, could "reasonably be regarded as harmful."[272]

The Second Circuit in *Trachtman* strove to distinguish that case from *Bayer v. Kinzler*, claiming that unlike the article on contraception and abortion in the earlier litigation, the questionnaire before it "does not seek to convey information but to obtain it."[273] It is unrealistic to suggest that ideas can only be conveyed by declarative sentences, not by those in the interrogative. Much or all of the information contained in the *Trachtman* questionnaire was available to the students in sex education courses that were part of the school curriculum.[274] What

267. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971).

268. Rowan v. Post Office Dep't, 397 U.S. at 736. *See* FCC v. Pacifica Foundation, 438 U.S. at 748-49; Breard v. Alexandria, 341 U.S. 622, 644 (1951).

269. FCC v. Pacifica Foundation, 98 S. Ct. at 3039 & n.23 (opinion of Stevens, J.) (quoting 56 F.C.C.2d 94, 98 (1975)).

270. Obviously it is not permissible to shut off all public consideration of taboo subjects simply because children may be present in the audience. *See* Butler v. Michigan, 352 U.S. 380, 383-84 (1957).

271. 438 U.S. at 749.

272. 390 U.S. at 641 (quoting Meyer v. Nebraska, 262 U.S. at 400).

273. 563 F.2d at 516 n.2. *See also id.* at 520 (Gurfein, J., concurring).

274. *Id.* at 518.

Trachtman illustrates instead is a more appropriate way of looking at the loosely termed "right not to know;" it implicitly recognizes an interest in not being required prematurely to make judgments. For at least according to the defendants' experts on whom the court relied, the anxiety and tension likely to result from distribution of the questionnaire would occur when the sensitive student attempted to formulate a personal position on homosexuality, masturbation, "sexual experience," etc.[275] In that regard the *Trachtman* questionnaire differs from school paper articles that simply convey factual information such as where contraceptives may be procured, how an abortion is performed, or the incidence of contraceptive use among sexually active students.

The line between acquiring information and having to make up one's mind, although clear enough, is not a very satisfactory one for defining the permissibility of speech regulation, since it is virtually impossible in the particular case to say what stimulus will provoke reflective activity on the child's part. Reading that many of his peers engage in sexual activity may be enough to lead a teenager to question his own or his parents' position on whether doing so is right or wrong. On the other hand, it is probably safe to assume that many students who would have received the *Trachtman* questionnaire would simply have thrown it away without giving it a thought. Nevertheless, there are indications that the Supreme Court has toyed with the distinction drawn by the Second Circuit. For example, in *Ginsberg* the Court supported its conclusion that obscenity might reasonably be regarded as harmful for those under seventeen by referring to the views of a psychiatrist who

> made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, *i.e.*, disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.[276]

In short, the Court indicated that the crucial thing to guard against was not receipt of the information itself, but the influence on a child's judgment that would result from state or parental failure to disapprove. One suspects that the regulation of vulgarity stems from a similar impulse—hence, the widespread agreement with Justice Stevens' com-

275. *Id.* at 517-18.
276. 390 U.S. at 642-43 n.10 (quoting Gaylin, Book Review, 77 YALE L.J. 579, 594 (1968)).

ment in *Pacifica Foundation* that "[t]hese words offend for the same reasons that obscenity offends."[277]

Of the various values advanced by a system of freedom of expression in the child's world, the one that most directly touches the interest in not being led to premature or unguided judgments is the value of growth toward personal autonomy. The "right not to know" limits the speaker's and willing auditors' means of achieving this sort of growth. If the free speech rights of children were absolute rather than instrumental, the willingness of some children to discuss a matter would be decisive. State-imposed limitations on obscenity, vulgarity, and discussions of sexual activity, however, are universally aimed at enforcing parental preferences for the child, and leave open the option of instruction with parental consent.[278] From that perspective, restriction attempts to assist the growth of the more sensitive, rather than dampen freedom of choice, by delegating authority to the presumptively most competent decisionmakers. As Part I brought out, it is hard to say that a regulation of this type limits any rights children have.

277. 438 U.S. at 746. The Court, however, did not agree with Justice Stevens' conclusion that vulgar speech was subject to stricter regulation because of its lower social value.

278. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. at 757-58. (Powell, J., concurring); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974).