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FREE SPEECH AND THE STUDENT'S RIGHT TO GOVERN HIS PERSONAL APPEARANCE

GILMOUR G. SWEEZEY*

The Ontario *Schools Administration Act*¹ and the regulations passed under the Ontario *Department of Education Act*² are presently being used by school authorities to proscribe unusual styles of dress and grooming by pupils.

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¹ R.S.O. 1960 c. 361

- s.22(1) It is the duty of a teacher
- (c) inculcate by precept and example . . . the highest regard for . . . sobriety, industry . . . purity, temperance and all other virtues.
 - (d) to maintain proper order and discipline in his classroom. . .
- (2) It is the duty of a principal, in addition to his duties as a teacher,
- (a) to maintain proper order and discipline in the school
 - (h) to give assiduous attention to the health and comfort of the pupils. . .
 - (k) to suspend any pupil guilty of persistent opposition to authority, habitual neglect of duty . . . or conduct injurious to the moral tone of the school, and to notify the parent or guardian of the pupil and the board and the inspector of the suspension, but the parent or guardian of any pupil suspended may appeal against the action of the principal to the board which has power to remove, confirm or modify the suspension.
- s.34 Every board shall,
- (1) ensure that every school under its charge is conducted in accordance with this Act, the Act under which it is operated, and the regulations.
- s.35 Every board may,
- (22) expel, on the report of the principal, any pupil whose conduct is deemed to be so refractory that his presence in school is injurious to other pupils. . .
 - (28) authorize and exercise jurisdiction over such other school activities as pertain to the welfare of the pupils.

² R.S.O. 1969 c. 94

Regulation 81 (Elementary Schools) Revised Regulations of Ontario 1960:

- 2.18(1) Every pupil . . . shall attend punctually and regularly and submit to such discipline as would be exercised by a kind, firm, and judicious parent.
- (2) Every pupil shall be neat and clean in his person and habits, diligent in his studies, kind and courteous to his fellow pupils and obedient and respectful to the teachers.
 - (3) Every pupil is responsible to the principal for his conduct on the school premises.

Regulation 98 (Secondary Schools), Revised Regulations of Ontario 1960:

- s.70 A pupil shall,
- (a) attend classes punctually and regularly
 - (b) submit to such discipline as would be exercised by a kind, firm and judicious parent; and
 - (c) be neat and clean in his person and habits, diligent in his studies, kind and courteous to his fellow-pupils and obedient and respectful to the teachers.
- s.73 Every pupil is responsible to the principal for his conduct on the school premises.

School principals and teachers, and even school boards directly, frequently order their students to wear uniforms, or command their male students to cut their hair, shave their beards, and their female students to wear knee-length skirts instead of mini-skirts, slacks or jeans, and even to remove heavy makeup from their faces.³ If the students fail to comply with these directions they are sent home, suspended or even expelled. The question is, can school administrators legally make such rules? The answer to this ultimately depends on the constitutionality of the statutes and regulations from which such administrators claim to derive their authority. In short, assuming that such statutory and regulatory provisions are of such scope in the first place so to legally allow school administrators to delimit student dress and grooming in the ways already mentioned,⁴ are those provisions constitutional in Canada, or do they violate a basic right of the student?

While disputes about student dress and grooming and school regulations have frequently come before the American courts,⁵ they have rarely reached

³ Brother Dennis, principal of J. J. Lynch Secondary School in Toronto, requires students to wear uniforms. The Home and School Association at York Mills Public School recommends that students wear a standard uniform. TORONTO DAILY STAR, March 21, 1966.

Douglas Hamburg, 16, was expelled from Castle Frank High School in Toronto after principal Wilbur Bush ordered him to get his shoulder-length hair cut and he refused to do so. The expulsion was protested by 70 demonstrating students. Slacks and jeans are also prohibited at the school. TORONTO DAILY STAR, September 24, 1968.

On September 18, 1968, Tim Cressman was suspended by the principal of Newmarket District High School for failing to shave his beard. *Submission to Newmarket District High School Board* by Canadian Civil Liberties Association, A. Alan Borovoy, General Counsel, October 8, 1968.

John Young, vice-principal of Martin Grove Collegiate in Etobicoke ejected David Budgell, 17, for attending classes in "gaudy" clothes (striped bell-bottom trousers and an ascot). Young demands that students wear clothes acceptable to most businesses." TORONTO DAILY STAR, December 12, 1968.

Fifty students walked out of classes at Danforth Technical School to protest the school's regulations governing length of hair and skirts. Students complained that Eric McCann, vice-principal charged with school discipline, arbitrarily tells them to get their hair cut or wear longer skirts on personal whim. TORONTO DAILY STAR, October 17, 1968.

Also, see in this respect the reported American cases on point—footnote 5, a summary of American judicial activity in this area to date.

⁴ At least one lawyer, Kenneth Smookler from Toronto, argues that neither the common law doctrine of *in loco parentis* nor a proper interpretation of the Ontario statutory and regulatory provisions themselves allows school administrators to make the rules that they are presently making proscribing unusual dress and grooming. He argues that such statutes should be interpreted as meaning that no authority is to be exercised by the schools which is not reasonable and necessarily related to the primary function of the school, to inculcate an education. As to the common law, he admits that the Canadian doctrine *in loco parentis* (i.e. that the school administrator stands in the place of the parents with the authority of the parents) seems to be in the process of change: he notes that Mr. Justice Ritchie of the Supreme Court of Canada applied the "reasonable parent" test in determining the liability of a teacher for an injury suffered by a student and remarks that if the "reasonable parent" test is going to be applied to the teacher-liability, it may be applied to teacher-authority: See TORONTO DAILY STAR, Jan. 25, 1969. See also McKay et al., v. Board of Govan School Unit No. 29 of Saskatchewan et al. (1968) S.C.R. 589.

⁵ American courts have generally determined the dress and grooming disputes rather automatically on the basis of their established legal doctrines that (1) school regulations must be reasonable. (2) the teacher is *in loco parentis*, and (3) technical pleading requirements must be satisfied:

(1) The American courts in requiring that school regulations of student appearance have to pass a test of "reasonableness" (i.e. the regulations must not be arbitrarily

made and must be reasonably connected with educational goals) have generally been judicially passive. They have tended to abdicate their responsibility of investigating the facts and have instead upheld school regulations without any consideration of their real and necessary connection to the furtherance of education. The test of reasonableness has generally been used a device for not examining the merits of particular cases: In *Pugsley v. Sellmeyer* 250 S.W. 538 (1923) the Arkansas Supreme Court upheld the expulsion of a girl who used talcum powder on her face in violation of a rule forbidding "the wearing of transparent hosiery, low-necked dresses or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics..." It was stated at page 539 that: "The courts are usually disinclined to interfere with regulations adopted by school boards, and they will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion the board."

Most of the courts have relied on a legal presumption that school rules concerning student appearance are reasonable. The basis for this assumption is *ANTELL v. STOKES* 191 N.E. 407 (1934) where the court said at page 409: "Rules adopted by the constitutional authorities for the governance of public schools must be presumed to be based upon mature deliberation and for the welfare of the community." In *Leonard v. School Committee of Attleboro* 212 N.E.2d 468 (1965) the Supreme Judicial Court of Massachusetts upheld a student's suspension for violating a rule forbidding "extreme haircuts or any other items which are felt to be detrimental to class decorum." The court held at page 472 that it "need only perceive some rational basis for the rule requiring acceptable haircuts in order to sustain its validity. Conversely, only if convinced that the regulation of pupils' hair styles and lengths could have no reasonable connection with the successful operation of a public school could we hold otherwise... We are of opinion that the unusual hair style of the plaintiff could disrupt and impede the maintenance of a proper classroom atmosphere or decorum. This is an aspect of personal appearance and hence akin to matters of dress." In *Ferrell v. Dallas Independent School District* 261 F. Supp. 545 (1966) a Texas district court upheld the suspension of three student members of a "rock-and-roll" band for wearing a "Beatle type hair style" in school. At page 552: "It does not appear... that there has been any abuse of discretion on the part of the school authorities. On the contrary, it appears that they acted reasonably under the circumstances." The court founded its decision on the basis of prior incidents of disruption cited by the principal. In opposition was the testimony of ten students at the school, noted at page 547: "From their testimony it appeared that this type of hair style had been in vogue about three to three and half years and that some problems had developed in the beginning, but that this type of hair style was now generally accepted by other students and occasioned no difficulties at this time. One of the... students testified that he thought that the coaches, athletes and teachers created whatever problems developed in regard to the long hair." And at page 552, "Further testimony... revealed that there were no longer any disturbances resulting from long hair on boys because it 'had been around for three or four years and everyone was used to it.' Other evidence tended to show that long hair on men was part of a 'total look' called the 'Mod' look. An Iowa district court in *TINKER v. DES MOINES INDEPENDENT SCHOOL DISTRICT* 259 F. Supp. 971 (1966) upheld a school regulation banning the wearing of black arm bands (symbolizing various attitudes toward the Viet Nam war). The court noted at page 973: "While the arm bands themselves may not be disruptive, the reactions and comments from other students as a result of the arm bands would be likely to disturb the disciplined atmosphere required for any classroom. It was not unreasonable in this instance for school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance." Relying heavily on the *Ferrell* and *Leonard* cases, the court in *Davis v. Firment* 269 F. Supp. 524 (1967) upheld the expulsion of a student who violated a rule forbidding the wearing of "exceptionally long, shaggy hair." The regulation passed the test of reasonableness on the basis of evidence of prior incidents, of disruptions at other high schools, cited by the principal. And this in spite of the fact that this case, unlike the others noted, expressly had to deal with the civil liberties of the student because the protections of the Bill of Rights were raised in his support: one would have thought that this would have been enough to impress upon the court that the test of reasonableness was not to be used lightly and applied automatically if not blindly.

The courts have generally failed to define "reasonableness" and their declarations that they are reluctant to inquire into the "wisdom" of a rule are suspect as really just being their way of avoiding having to examine the merits and demerits of specific regulations and getting involved with the philosophy of education. The difference between the "wisdom" of a rule and its "reasonableness" seems more semantic and

illusory than real since both go to the quality of the rule and the difference, if any, is simply one of degree.

There have been occasions, however, when the courts have paid more than lip service to the test of reasonableness and have actually examined the factual causation elements in the particular cases before them:

The North Dakota Supreme Court in *Stromberg v. French* 236 N.W. 477 (1931) upheld a school ban on the wearing of metal heelplates which caused excessive noise in the halls and classrooms.

The court in *Valentine v. Independent School District 183* N.W. 434 (1921) held that a public college has no power to withhold a student's diploma merely because he will not wear the traditional cap and gown since (at page 436); "The wearing of a cap and gown on commencement night has no relation to educational values, the discipline of the school, scholastic grades, or intellectual advancement."

In *Mitchell v. McCall* 143 So.2d 629 (1962) an Alabama court held that although a girl would have to attend the schools' course in physical education, it would be unreasonable to require her to wear the school's prescribed gym uniform since it was "immodest and sinful" according to her religious beliefs.

The Fifth Circuit Court of Appeals in *Burnside v. Byars* 363 F.2d 744 (1966) held invalid a regulation banning the wearing of "freedom buttons" reading "SNCC" and "One Man One Vote". The court defined (at page 748) a reasonable regulation as one "essential in maintaining order and discipline" and "measurably contributes to the maintenance of order and decorum" and held the regulation to be unreasonable because, as regards the particular facts of the case, the wearing of "freedom buttons" had not actually interfered with educational activities but (at page 748): "The record indicated only a showing of mild curiosity on the part of the other school children. . . . Even the principal testified that the children were expelled not for causing a commotion or disrupting classes but for violating the school regulations. . . . If the decorum had been so disturbed . . . the regulation . . . would have been reasonable."

In a companion case in *Blackwell v. Issaquena Co. Bd. of Educ.* 363 F.2d 749 (1966) the same court upheld an identical regulation in another high school because (at page 754) ". . . there was more than a mild curiosity on the part of those who were wearing, distributing, discussing, and promoting the wearing of buttons. There was an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and lack of order, discipline and decorum."

(2) The American courts have also used the legal doctrine that the teacher is *in loco parentis* to uphold school regulation of the student's appearance:

In *Jones v. Day* 89 So. 906 (1921), the Mississippi Supreme Court upheld a regulation requiring all pupils to wear a uniform of khaki while in school. It did this by the use of the doctrine of *in loco parentis*, conceiving of the school and home as mutually exclusive spheres of authority. At page 907: "While in the teacher's charge the parent would have no right to invade the school room and interfere with him in its management. On the other hand, when the pupil is released and sent back to its home, neither the teachers nor directors have the authority to follow him thither, and govern his conduct while under the parental eye."

Furthermore, the case of *Indiana State Personnel Board v. Jackson* 192 N.E.: 2d 740 (1963) suggests that the legal principle that a teacher stands *in loco parentis* with respect to the disciplining of the pupils is being used today. In that case, involving the dismissal of a teacher for disciplining a pupil by striking her very lightly, the court made the following comment: "The law is well settled that a teacher stands *in loco parentis* to this child, and his authority . . . is no more subject to question than is the authority of the parent."

(3) Technical pleading requirements were used by some American courts to avoid deciding the student-appearance issue on its merits and to deny the students relief from expulsion:

In *McCaskill v. Bower* 54 S.E. 942 (1906) the court refused to order the school to re-admit the plaintiff's sons who had refused to comply with a rule requiring them to wear a uniform. Relief was denied because the plaintiff had chosen an improper remedy (mandamus was in order) and because he had not alleged that the particular regulation had been enforced.

In *Matheson v. Brady* 43 S.S. 2d 703 (1947) the court refused to compel a principal to permit the plaintiff's daughter to attend classes while dressed in "slacks" because he had failed to allege that the school involved was public.

In *Lamme v. Buckland* 269 P. 15 (1928) the court refused to order the school to re-admit the plaintiff's daughter who had been expelled for refusing to wear a prescribed uniform because the plaintiff had not exhausted his statutory remedy of appeal to the local superintendent of schools and to the state board of education.

courts as a constitutional rights problem; that is to say, the courts have rarely treated the student-appearance cases that have come before them as cases that involve an abridgment of the civil liberties of the student and which deserved to be expressly discussed and decided by them from that point of view.

Instead, the American courts have generally decided the disputes rather automatically on the basis of their established legal doctrines that school regulations must be reasonable, the teacher is in *loco parentis*, and technical pleading requirements must be satisfied.⁶ Dress and grooming disputes have never reached the Canadian judiciary, and more particularly, the Ontario courts. There are several possible explanations for this. Basically, the explanations are to be found in the inaccessibility of the courts,—administratively, economically, and precedentially.

Firstly, under the *Department of Education Act*⁷ the Minister of Education for Ontario has discretion to determine all appeals made to him from a decision of a principal and to decide whether or not to submit the case to a court for its decision. Consequently, even if the issue manages to work its way up the administrative ladder to the ministerial level, it is likely to be settled at this level (for instance, the Minister may make compromises with the parties in order to avoid adverse political publicity), or be otherwise disposed of (for instance, the Minister may dismiss the case and refuse to pass the matter on to the courts). And even if the parties can get the issue to the courts by way of mandamus,⁸ the fact that they have to go through

⁶ See footnote 5. One should note that there have been cases where the traditional legal doctrine of reasonableness has been applied with constitutional awareness, with an awareness of the possible abridgment of civil liberties involved. The Davis case dealt with the freedom of expression and right of privacy of the student. Mitchell (freedom of religion), Burnside (freedom of expression) and the Blackell (freedom of expression) cases also demonstrated some constitutional awareness on the part of the courts. Besides these there was the unreported memorandum opinion of *Zachry v. Brown* Civil Action No. 66-719 N.D. Ala. June 30, 1967. This case was concerned with the rules of a state junior college prohibiting the wearing of "page-boy" haircuts. The school admitted that the haircuts were not affecting the health, discipline or decorum of the institution, but nevertheless dismissed the students from school. The court held that the dismissal violated the equal protection clause of the fourteenth amendment.

⁷ R.S.O. 1960 c. 94

s.11(1) The Minister may,

- (g) submit a case of any question arising under the *Schools Administration Act*... or this Act to a judge of the Supreme Court for his opinion and decision or, by leave of a judge of the Supreme Court, to the Court of Appeal for its opinion and decision.
- (h) determine all disputes and complaints laid before him, the settlement of which is not otherwise provided for by law, and all appeals made to him from a decision of a principal, inspector or other school officer.

⁸ In regard to s.5(1)(w) Department of Education Act R.S.O. 1927 c. 322, the earlier equivalent of the present day s.11(1)(h), Kerwin J., as he then was, remarked at page 220 of *Renaud v. Roman Catholic School Section No. 11, Twp. of Tiibury North* (1934) O.W.N. 218 (H.C.J.): "It was argued that the effect of this provision is to divest the Court of jurisdiction to hear and adjudicate upon this matter and to invest the Minister of Education of the Province with sole power so to do. No authority was cited for such an astounding proposition and, irrespective of the exact meaning that these sections may have, they cannot possibly be so construed, and the application [for an order of mandamus] will therefore be granted as asked, and with costs."

this still further step makes it all the more improbable that the issue will reach the courts.

But there are so many other administrative measures available in the first place for the settlement of the dispute that most students comply with the school regulations long before the dispute has a chance to reach the ministerial level, let alone the judicial decision-making level. Normally a student is disciplined from the time he first begins to "make trouble". The disciplinary measures usually start with teacher reprimands, then come the after-school detentions, and finally teacher-principal conferences with the child's parents. Only when all these measures have failed, is it usual that the student is suspended or expelled, and even at this rather ultimate point the parents and student can argue and negotiate with the school board.⁹

Most parents are more willing to compel their children to submit to the school regulations, to cut their hair for instance, than to challenge this administrative network. There is an obvious expense of time and money involved for the parents to support their child, and to take his "long-hair" issue to court. The reluctance of parents to suffer such expense is undoubtedly a second reason why student-appearance cases do not get to the courts in Canada.

Thirdly, there are no Canadian¹⁰ precedents available to counsel for the preparation of a case for preventing the school from enforcing a dress and grooming regulation. The Canadian courts have not hitherto had to confront the problem of such regulations either on the grounds of reasonableness, *in loco parentis*, statutory interpretation and such, nor on more basic constitutional grounds. The issue of the legality and constitutionality of such regulations has simply not been raised in Canada in any form, and this fact has had a self-generating effect: Because the disputes have not reached the courts in Canada and precedents have not been judicially developed to handle them, when a potential school regulation dispute does arise it is likely to be turned down by most counsel or somehow settled out of court by them because of the especially uncertain result the litigation might have.

There would seem to be no substantial reason why principles of statutory interpretation, and the legal doctrines of reasonableness and *in loco parentis* that are used actively in the United States¹¹ could not be employed by the Canadian courts to control abuses of school authority. But there is the greater, and unresolved, question of whether a constitutional right — specifically

⁹ See footnote 1.

¹⁰ It is interesting to note that American judicial activity in the area of school regulations has not been confined to dress and grooming regulations. The school's authority to regulate student membership in school fraternities, to regulate his ability to marry and still remain in high school, and to regulate when and where he can have lunch etc., has also been questioned. See, Edward C. Bolmeier, *THE SCHOOL IN THE LEGAL STRUCTURE*, (Cincinnati, 1968), especially Chap. 16. Furthermore, in the United States, unlike Canada, great concern has been shown for the student's rights to counsel and due process of law at suspension or expulsion proceedings. See, *The Procedural Rights of Public School Children in Suspension-Placement Proceedings*, 41 *TEMP. L.Q.* 349; *Right to Counsel at Public School Disciplinary Hearings*, 42 *N.Y.U. L. REV.* 961; *Due Process and the Right to Counsel at a Public School Disciplinary Hearing*, 22 *RUTGERS L. REV.* 342; *School Expulsion and Due Process*, 14 *KAN. L. REV.* 108.

¹¹ See footnote 5.

freedom of expression¹²—exists in Canada and can be invoked in favour of the student to prohibit undue regulation of his conduct—specifically his manner of dress and grooming—by provincial school authorities. Indeed, in the United States where civil liberties are specifically granted and guaranteed by the American Constitution, and where the courts have shown concern over issues of fundamental freedom much more than have the Canadian courts, an attempt to extend the notion of free speech to endow most forms of apparel and grooming with first amendment protection has been specifically rejected.¹³ It is thus difficult to conceive of Canadian courts doing what the American courts seem reluctant to do so, especially since they have comparatively less to do it with and are traditionally more conservative. But the matter in a Canadian context is worth investigating if for no other reason than that a counsel, by at least raising the question of civil liberties may force the court to devote considerably more attention to the consideration and disposition of his case than it otherwise would.¹⁴

To establish a case for student-appearance as a protected area in Canada we must show that there is a guaranteed freedom of expression in Canada and that student dress and grooming falls within that protected area. That is no easy task—but it is a stimulating one.

The Canadian *Bill of Rights*¹⁵—although it purports to guarantee our liberties¹⁶—does not, like its American counterpart,¹⁷ bind the provincial

¹² For an interesting discussion on whether rules governing dress and grooming infringe a right of privacy, see *A Student's Right to Govern His Personal Appearance*, (1968) 17 J. PUB. L. 151.

¹³ The Fifth Circuit Court of Appeals in *Burnside v. Byars* F.2d 744 (1966) and the Texas district court in *Tinker v. Issaquena Co. Bd. of Educ.* 258 F. Supp. 971 have recognized that the wearing of freedom buttons and arm bands is protected by the constitutional right of freedom of expression. In the former decision at page 747 it was noted that the freedom buttons were worn "as a means of silently communicating an idea to encourage the members of the community to exercise their civil rights", while in the latter decision at page 972 it was remarked that the wearing of an arm band "for the purpose of expressing certain views is a symbolic act and falls within the protection of the first amendment's free speech clause."

No other decision has endowed any other form, that is, the more unspecific, not so apparently symbolic, forms of personal appearance, with this status of first amendment protection. In fact, the court in *Davis v. Firment* 269 F. Supp. 524 (1967) specifically rejected an attempt to extend first amendment protection beyond arm bands and freedom buttons to include the more common matters of personal appearance. In holding that the wearing of long hair is not symbolic and therefore not within the scope of the right of freedom of expression the court (at page 527) reasoned that a "symbol must symbolize a specific idea or viewpoint. A symbol is merely a vehicle by which a concept is transmitted from one person to another; unless it represents a particular idea, a 'symbol' becomes meaningless. It is, in effect, not really a symbol at all." The court concludes that unlike the wearing of freedom buttons—"what does the wearing of long hair symbolize? What is student Davis trying to express? Nothing really."

¹⁴ Never before the *Burnside* case in the United States, for example, was the test of reasonableness applied with greater exactitude. The gulf between the Pugsley court's interpretation of the test and the approach of the court in *Burnside* is explicable in part at least by the latter court's recognition of a constitutional right.

¹⁵ S.C. 1960 c. 44

¹⁶ S.C. 1960 c. 44, s.1(d)—freedom of speech.

¹⁷ The Amendments to the American Constitution; First Amendment—freedom of speech.

governments. The bill itself states that it only applies to Federal enactments and is subject to repeal, express or implied, by a subsequent legislative Act of Parliament.¹⁸ It has further been emasculated by restrictive interpretations of its provisions by the judiciary¹⁹ so that presently it can hardly be said to be a guarantee of any of our liberties.

Nevertheless, protection for our democratic society is given by the preamble of The British North America Act of 1867 which refers to the desire of the provinces to federate "with a constitution similar in principal to that of the United Kingdom": the courts have more than once drawn inferences from this²⁰ and have, arguably, established freedom of speech as a constitutional right in Canada.

The fundamental problem of which government, (Parliament or the provincial legislatures), if any, may abrogate this basic freedom is important in determining the real extent to which the right is guaranteed. The problem has not been resolved by the Canadian courts. Different members of the Supreme Court of Canada have voiced various opinions on the matter. For our purposes the best view is that our basic liberties, such as freedom of speech, are constitutionally guaranteed to the extent that neither the Federal nor the Provincial government has the power to abridge them. Furthermore, it is probably the view that will ultimately gain wholehearted acceptance by the Canadian courts. Three of the six judicial views on the subject support it.²¹ And too, there is something about the notion of the "untouchability" of our liberties, the knowledge that they are fundamentally unable to be abridged by any man or men, that seems to satisfy a basic human need—an emotional, if not quasi-religious, desire for security. The idea appeals, at least, to the

¹⁸ S.C. 1960 c.44, s.2 as explained by s.5(2).

¹⁹ For example: *R. v. Gonzales* (1962) 32 D.L.R. (2d) 290; *Robertson & Rosetanni v. The Queen* (1963) S.C.R. 651; *McKay v. The Queen* (1965) S.C.R. 798; *The Queen v. Drybones* (1967) 64 D.L.R. (2d) 261; but see *Drybones* case as decided by the Supreme Court of Canada in November 1969 (unreported as of yet).

²⁰ Reference re *Alberta Legislation* (1938) S.C.R. 100; *Saumur v. Quebec* (1953) 4. D.L.R. 641; *Switzman v. Elbling* (1957) 7 D.L.R. (2d) 337. Also see footnote 21.

²¹ The six judicial views are as follows:

(1) The first view—accepted by three judges of the Supreme Court, Rinfret, C. J. C., Kerwin and Taschereau, J.J., in the *Saumur* case (footnote 20)—is that provincial legislative jurisdiction is unlimited with regard to basic freedoms by virtue of the B.N.A. Act s.92(13) (property and civil rights in the province) and s.92(16) (all matters of a merely local or private nature in the province). If such is the case then the child in school has no freedom of speech that cannot be abrogated by a provincial enactment.

(2) A second view is that unlimited legislative jurisdiction falls within Dominion control under its general power to make laws "for the peace, order and good government of Canada", or, more specifically, under its power to make laws in relation to criminal law. This view was adopted by Estey, J. in the *Saumur* case. If this view is adopted by the Canadian courts we can conceivably invalidate provincial school legislation by arguing that because the provincial school dress and grooming regulations place the student in a position where he is subject to the severe penalty of expulsion if he does not comply with them, such regulations are really an exercise of the criminal law power which is within the exclusive jurisdiction of Parliament. Or, it could be argued that because such regulations impose more discipline on the student than is necessary to accomplish the legitimate aims of education (i.e. the expansion of knowledge and the inspiration of

thought and thought-processes), they are not in relation to education nor any other provincial head of power and fall within Parliament's general power.

(3) A third view, again expressed in the Saumur case, is that some of our basic freedoms are not subject matters committed exclusively to either Parliament or the legislatures. Cartwright and Fauteux, J.J. held that freedom of speech was in this category, falling in some aspects within the criminal law, but falling in other aspects within the field of civil rights. This is a middle of the road approach, a combination of the first two views, and conceivably could be used alternatively to invalidate both provincial school dress and grooming regulations and any Federal regulations of a similar nature.

(4) A fourth line of approach is that neither Parliament nor the legislatures may infringe on our traditional liberties because of the preamble to the B.N.A. Act and a resultant reference to English constitutional history: that because, by the preamble of the B.N.A. Act, our constitution is to be similar in principle to that of the United Kingdom where the basic freedoms are preserved in a written constitution, (not to mention any unwritten constitution,) exemplified by the Magna Carta (1215), the Petition of Right (1628), the Bill of Rights (1689), and the Act of Settlement (1700-1701); and such freedoms are therefore preserved by the Canadian constitution and beyond the competence of Parliament or any provincial legislature to enact so long as our constitution remains in its present form of a constitutional democracy. Support for this view can be found in the judgment of O'Halloran, J.A. of the B.C. Court of Appeal in *R. v. Hess* (No. 2) (1949) 4 D.L.R. 199 at pp. 208-9; and also in the dicta of some of the judges of the Supreme Court of Canada (see the cases in footnote 20):

Duff, C.J.C. for himself and Davis, J. stated in the Reference re Alberta Legislation case that the preamble to our constitution "contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examinations of political proposals." The judgment of Duff, C.J.C. is based on the necessity for maintaining our democratic society as contemplated by the constitution. He held that "any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces." Duff C.J.C. was willing to grant jurisdiction to Parliament to legislate "for the protection of this right" but he did not go so far as to give Parliament jurisdiction to legislate to "abrogate" the right. Indeed, he could not really since his reasoning against the legislature's power to restrict free speech applies equally well to any attempt by Parliament to do the same.

The Switzman case (footnote 20) contained the first clear judicial pronouncement denying the power of Parliament as well as the legislatures to abrogate the right of discussion and debate. The Supreme Court declared invalid the Quebec Communistic Propaganda Act which attempted to prohibit the propagation of communism or bolshevism. (It is not difficult to see how, by analogy, an educational enactment could be held invalid on the grounds that it destroys or unreasonably limits the "mod" or "beat" or "hippie" ideas and culture.) Rand, J. with whom Kellock, J. concurred implied (at p. 358) that Parliament did not have power to abrogate free speech in Canada; and Abbot, J. explicitly stated that "Parliament itself could not abrogate this right of discussion and debate." (p. 371).

(5) A fifth view is the argument that our basic liberties are guaranteed, by implication, in certain sections of the B.N.A. Act. Section 17, for example, established a Parliament for Canada and it is arguable that the word "Parliament" itself necessarily implies a political society where freedom of speech exists. This view has not expressly been enunciated by the courts but seems inherent enough in the fourth view as expressed by Duff, C.J.C. in the Alberta Legislation case. (*supra*)

(6) The sixth, last, and most recently expressed view in Canada is that the rights which find their source in natural law cannot be taken away by positive law. In the case of *Chabot v. School Commissioners of Lamorandiere* (1957) 12 D.L.R.(2d) 796, the Quebec Court of Appeal declared itself ready to hold invalid any Act or regulation which would have the effect of imposing Catholic religious instruction on a Jehovah's Witness child. Casey J. said (at p. 807): "If these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law." Surely the right to express himself is a part of the very nature of man.

minorities in our society, and since each person in some respect is a member of a minority group (racial, social, economic, intellectual or otherwise) it seems probable that the idea that our liberties are "untouchable" is much more in accord with most people's idea of democracy than is any historic British notion of the absolute supremacy of Parliament.²²

But it is not enough for our purposes to establish that there is a protected area of free speech in Canada. One must also establish that student apparel and grooming fall within that area. Although it could be argued that the free speech cases in the Supreme Court of Canada have limited the area of free speech to the traditional forms of verbal and written discussion, it seems more probable that whatever statements were made by the judges that could be construed to have that meaning were simply dictated by the particular context of the case: the statements were made to relate simply to the traditional forms of speech that were in issue, and were not made with any intention of limiting free speech once and for all time to the traditional verbal and written forms of expression. American courts, at least, have recognized that the protective scope of freedom of expression extends not only to vocal and written utterance but also to activity which symbolizes or attempts to communicate an idea or point of view. The display of a flag,²³ flag salute,²⁴ and civil rights sit-ins,²⁵ have been held to be symbolic speech and protected by the right of freedom of expression. And while one American court²⁶ has specifically rejected an attempt to endow most forms of apparel and grooming with the protected status of being a form of expression, other courts²⁷ have held that aspects of personal appearance, arm bands and freedom buttons, did express ideas and were protected as forms of free speech.

²² It is interesting to note the possible fallacy in the argument used by certain judges of the Supreme Court (footnote 21) in establishing a right of freedom of speech in Canada. Their argument begins with the statement that our constitution and Parliament is like Britain's in principle and to preserve it we must therefore have civil liberties (e.g. free speech): this means that the provincial legislatures and even parliament cannot abrogate them for to do so would be to destroy Parliament and our constitutional structure. The argument thus concludes—its opponents argue—with Canada having a very un-British constitution, that is, one in which there is no Parliamentary supremacy. But, it is submitted, one must ask the even more basic question: did the notion of Parliamentary supremacy ever really mean that Parliament was empowered to destroy the basic liberties of Englishmen? The notion of Parliamentary supremacy is founded in a peoples' reaction to other men's (kings and noblemen) disregard of their rights. Certainly, considering the English people's growing concern for, and activity to preserve, their liberties beginning with the Magna Carta, it is hard to believe that they ever really intended to give another group of men—even those supposedly representative of their interests—the power to disregard those hard-earned liberties. All that the notion of Parliamentary supremacy ever meant was supremacy only up to the point of abrogation of the fundamental liberties of the people. In any event, it is submitted that since the exact words of the preamble to the B.N.A. Act read, "a constitution similar in principle to that of the United Kingdom"; and since Canada's constitution—embodying the notion of a federal, non-unitary, government for instance—was certainly not similar "in principle" in all respects to the United Kingdom's, it was intended to be dissimilar in other respects too—to be more civil libertarian in nature for instance.

²³ *Stromberg v. California* 283 U.S. 359 (1930).

²⁴ *West Va. State Board of Education v. Barnette* 319 U.S. 624 (1934).

²⁵ *Garner v. Louisiana* 368 U.S. 157 (1961); *Brown v. Louisiana* 383 U.S. 131 (1966).

²⁶ *Davis v. Firment*—see footnote 13.

²⁷ *Burnside and Tinker cases*, footnote 13.

It is submitted that there can be no meaningful distinction drawn between different forms of apparel or the other elements of appearance such as grooming. In this respect the wearers of arm bands and freedom buttons were fortunate in that they sought to communicate messages of peace and civil rights which reminded the courts of the purposes of the traditionally protected picketing and sit-ins. But this is not to say that other aspects of personal appearance symbolize nothing.

Unconventional dress and grooming, for instance, is a most effective, visible and cogent, way of communicating one's ideas and expressing one's objections to the *status quo*. It is a very real symbol. The wearing of long hair and "mod" clothing is youth's protest against the well-worn, and perhaps out-moded, politics, economics and morality of the establishment—which more often than not is the older generation—that controls the political power and purse-strings of society. It is an especially appropriate form of protest for youth because in their politically and economically subservient position, it is a relatively cheap and effective means of communicating and making their ideas felt. While the protest is unconventional, less direct and more attenuated than the traditional political protests, it is, nevertheless, a protest against the policies of the establishment.

But dress and grooming is more than political protest. Unusual personal appearance is a valid vehicle of emotional release to an individual whose aims and objectives may be diffuse and personal, as well as an expression of a group activity in pursuit of goals of civil rights and peace. It is an expression of activity on the political level, but also an expression of a person's unique personality.²⁸ The establishment cannot simultaneously respect the student's personality and *unduly* deny its expression. This is the position of the Canadian Civil Liberties Association, and has been accepted by at least one Ontario school board.²⁹

It is not enough in a civil liberties discussion to show that there is a guaranteed right, and that there is an infringement of that basic right. Traditionally, no right is absolute, no protected area is completely untouchable, and certain infringements of it are regarded as warranted for the continued functioning of society.

This raises the problem of the test of reasonableness. The original basis of the traditional legal doctrine that regulation must be reasonable is the civil

²⁸ According to the American Civil Liberties Union, *CIVIL LIBERTIES* (a monthly A.C.L.U. publication) January 1966 at page 3: "personal taste in dress and grooming is another technique in self-expression". Also, footnote 29.

²⁹ Canadian Civil Liberties Association, *Submission to Newmarket District High School Board re the Suspension of Tim Cressman*, 4 pages, October 8, 1968. Tim Cressman was suspended from school for his failure to shave his beard. The submission was made (at p. 2) that: "The problem, which this situation so strikingly dramatizes, is that our educational institutions do not have sufficient respect for the Timmys of our society. If we had truly respected Timmy, this incident could never have taken place. Tim Cressman's beard is an expression of Tim Cressman's unique personality. We cannot simultaneously respect his personality and deny its expression... Since the promulgation of many of your regulations, profound changes have engulfed the youth community. The silent apathy of a few years ago has given way to a restless questioning today. If the students seek to express their questioning through strange music, placard waving, or funny hair styles, our educational institutions should respect such expression." The C.C.L.A. submitted that Tim's beard was a valid form of expression and should be respected. It was. The school board reinstated Tim with his beard.

libertarian rationale of balancing the rights of society (the norm) against the rights of the minority (individual and group abnormative preferences).³⁰ Unfortunately, many courts have employed the test of reasonableness automatically as a simple vague rule without a civil libertarian purpose, with the result that the test has degenerated into a judicial smoke screen for the courts: it has often been used as an excuse for not examining the merits and constitutional issues of particular cases.³¹ Awareness of this fact has prompted at least one writer³² to advocate that the normal presumption of constitutionality should not attach to a statute abridging the freedom of speech, and further has prompted him severely to criticize the test of reasonableness: the test is a grossly imprecise balancing formula and by it the balancing process tends to be arbitrary, *ad hoc*, unguided and unsafe. The test gives the judges too much scope to tamper verbally with the weights in the balancing process to suit their convenience; it does not safeguard our liberties but allows them to be balanced out of existence. The writer suggests that we use more precise statements of where the balance is to be struck between free speech and other rights. Following his suggestion and that of other authors,³³ it is submitted that the best statement or test in this regard is that of *necessity*: A regulation of free speech should be held invalid unless it is proven to be necessary for the immediate preservation of society or some basic social institution.

School authorities in particular should be limited to making regulations that are necessary to the preservation of the schools and the educational process; and where a regulation is challenged, the authorities should be required to prove that it is necessary to the educating of the students in the particular school involved. This means that the school generally should be able to demand that its students wash their hair and wear clean clothes so that their health³⁴ is not endangered; order them to have their hair tied up and to wear

³⁰ Martin Shapiro, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW*, (New Jersey, 1966).

³¹ See footnote 5(1) and 6.

³² See footnote 30.

³³ *The Personal Appearance of Students—The Abuse of a Protected Freedom* (1967) 20 ALABAMA L. REV. 104; *A Student's Right to Govern His Appearance* (1968) 17 J. PUB. L. 151; K. Smookler, *TORONTO DAILY STAR*, p. 9, January 25, 1969.

³⁴ The more interesting question is whether the school authorities can prohibit unusual attire and grooming on the ground that it is detrimental to the *mental* health of all concerned. Another reason given by the *Davis* court (footnote 13) at page 528 of the report was that long hair on males was a "gross deviation" which could lead to "dysfunction in the social adjustment of children". It is submitted that it should not be enough that there is a possibility that the deviation leads to dysfunction in the social development of children. Actual, or at least a high probability of, serious maladjustment (neurosis, psychosis etc.) should be required to be proven in any instance of deviation. Otherwise any deviation from the norm could be termed "mentally sick" behaviour and thus prohibited. It should perhaps be enough that the school authorities show that the deviation is either the effect or the cause of the maladjustment since it may be practically impossible to distinguish between the two, and because the deviation, being a serious one, should be corrected in any case.

In any event, it appears today that long hair and rather outlandish modes of dress are quite the contrary to abnormal: among the young crowds, at least, they are slowly becoming the norm.

Further, it should be remembered that psychologists have found that excessively normative behaviour can be as crippling as excessively abnormative. See footnote 38.

simple clothes in machine-labs, if to do otherwise would endanger their safety. The school should also be able to ban such things as metal heelplates, if they cause so much noise that they disturb class studies, and to order students to have their hair arranged at school so they can see and hear the teacher and the lesson. Furthermore, the school should be empowered to prohibit the wearing of any attire which because of its sparseness or flimsiness or symbolic meaning causes uncontrollable disorder and distraction in the classroom.³⁵ But, as in every case where the regulation is challenged, such disorder or distraction must be specifically proven by the authorities. Insofar as the regulations are necessary to order in the classroom, safety, health, there can be little issue. However, rules that are justified on other grounds are unreasonable and should be struck down by the courts as an attempt by the school to impose its own social standards on the students under the guise of maintaining discipline. And so, for instance, there would generally seem to be no justification for any school practice of prohibiting girls from wearing slacks and jeans.

There are many reasons why the test of necessity is a most appropriate test for school regulations, and why the test should be strictly applied. Firstly, the family is the basic unit of social instruction. For centuries parents have instilled into their own children those social beliefs, principles, and behaviour patterns which they saw fit. Regulations that are unnecessary to the aims of education unnecessarily circumvent and inhibit the parent's control, and unnecessarily interfere with the parent-child relationship. The state should not lightly intrude into the functioning of this fundamental relationship by seeking to substitute its wisdom for that of the parents. Especially is this so when the school's regulatory provisions have a substantial carry-over effect into the after-school, personal, life of the student.³⁶

³⁵ This, of course, raises the problem of the "hostile audience": the problem that any exercise of one's constitutional rights could be precluded in the name of the preservation of order simply because of others' vehement disagreement. There is no easy solution generally, nor in the school context. Perhaps the school should be required to do everything it can to impose order on the troublemakers, short of expulsion, before creating a regulation prohibiting the distracting attire or grooming. But this may be impractical, and it may be better to see if another nearby school with more liberal and open-minded students will accept without disorder the unusual appearance of the student, and to send the student there; or force him to conform if such a school cannot be found. It should not be enough for a school to contend that disruption and disorder are a possibility: it should be required to prove that they are an actuality and a continuing one that seriously disrupts classes and makes teaching virtually impossible. Students usually are able to accept the radical and the unusual even though at the beginning there may be some disturbances; they should be given an opportunity—generally of at least a week—to adjust to and accept the unconventional appearance of a nonconforming student.

³⁶ Note *Leonard v. School Committee of Attleboro* (footnote 5) where the plaintiff student was a professional musician (he had performed at the Newport Jazz Festival and at the New York World's Fair) and claimed that his image as a performer was in part based on his hair style. Despite this fact, and without citing any evidence that the plaintiff had interfered with school discipline in any way, the court upheld his expulsion. Furthermore, in the *Ferrell* case (footnote 5) the students were members of a rock-and-roll group. The school should have good reason for forcing a student to conform if his nonconformity enables him to participate in the activity he likes best when the school hours are done, and further, enables him to participate in that activity in a profit-making way.

Secondly, dress-and-grooming is not a trivial form of expression although it may seem to be upon first consideration. By this medium of protest against the stifling conformity that appears to surround them, nonconforming students are able to release their individual and group tensions. Dress and grooming act as a safety valve, in a relatively innocuous manner they provide an outlet for the release of individual and group pressures that might otherwise build up and explode into forms of destructive activity. At the very least, free choice in dress and grooming gives students a chance to feel that they are doing "their own thing" and that they are of some importance by doing it. Accordingly, the state should not unnecessarily regulate the student in this regard. The whole field of student education should be critically guarded against unnecessary control and regimentation by the government. The test of necessity is designed to do this at the judicial level.

For yet a third reason the test of necessity is appropriate. It is the best suited of any judicial rule for checking the influences of psycho-institutional censorship and normative preservation, and accordingly, for preventing us from unwittingly endorsing a "Big Brother" society whose standards are determined solely by the discretion of government administrators.

We should be acutely aware of and take every step to counter-act the phenomenon of psycho-institutional censorship³⁷—institutional thought control—which, if left unchecked, could easily destroy the creativity and independence of our youth.

Certainly some form of management and rules must exist in school as in society generally. But they should be minimal, all that is necessary to preserve and keep the system functioning. The problem is to find the golden mean between thought control and anarchy. We must allow that which is necessary, but no more than necessary, to accomplish the "civilizing" of the child, and we must be aware of confusing civilization with conformity.

Accordingly, we must also recognize the existence of the phenomenon of normative preservation and counter-act it. To a great extent normative preservation is merely another view of the phenomenon of psycho-institutional censorship. It is shown in the field of education by the attitude of many teachers and other school administrators who advocate the preservation of what suits their tastes and what is, therefore, most convenient to themselves, rather than advocate the creation of an environment that is of vital significance,

³⁷ Psycho-institutional censorship involves a conditioning of the mind to follow an established channel of thought. In its lesser state, it takes the form of "fear of disobedience". In its extreme state, fear is replaced by ignorance, blind "unquestioning obedience" to the institution, its beliefs and authorities. The latter can be likened to "prejudice", and a more specific example of the phenomenon is racial discrimination: it is not natural to man, instinctive, but is instilled into him by the institutions of which he is a part and by which he is directed. Adolf Hitler and his Nazi regime made effective use of psycho-institutional censorship in both its lesser and extreme forms, which use resulted in the destruction of 9,000,000 Jews. Certainly this fact alone should warn us against allowing the state to gain control over and actively use the forces of this phenomenon against any group of people again. An example of the phenomenon in its lesser form—also in a political context—is given by the following: In his recent non-fiction work, *THE 900 DAYS: THE SIEGE OF LENINGRAD*, (1969, N.Y.), Harrison E. Salisbury notes that: "It took a strong will to ignore all the evidence [of an impending

German attack against Russia]—but Stalin was the *khozyain*, the “master” or “landlord”. This is what serfs had called their owners, and bureaucrats customarily used the term when referring to the Soviet dictator. The men around Stalin were so dominated by him that when the crisis came, said Kuznetsov, “They were not accustomed to independent action. That was the tragedy of those hours.” “Not until a fortnight or so before the invasion did some officers begin to speak cautiously and to question what was happening. But by that time it was too late.”

Psychologists have found that excessively normative behaviour can be crippling to social development ((1968) 17 J. PUB. L. 151 at 173), and other authors have equally suggested the grave dangers inherent in conformity:

The author of *University Purpose, Discipline and Due Process*, (1966-67) 43 N.D.L. REV. 739 at 741 notes that: “To be in a university at all is to be in a situation as closely regimented as the period of basic training of a military recruit but lasting much longer.” Phillip Monypenny, Professor of Political Science at the University of Illinois, continues: “To summarize, the general character of a university as a constituent in society requires it to be less concerned with shaping its students to a predetermined pattern than with preparing them to be self-governing individuals capable of independent decision and independent pursuit of knowledge. Their experience on campus, both academic and non-academic, should be consistent with that purpose. The role of the university in the direct control of the non-classroom life of the student should be as restricted as possible. . . .”

Speaking about the suppression of freedom of expression in American secondary schools, it was noted in *FREEDOM AND ORDER IN THE UNIVERSITY*, Western Reserve University Press, (1967), at page 203-4 that such suppression “will tend to make the objecting students at once cynical and resentful, and the student body as a whole conformist.”

In the *Toronto Daily Star*, March 21, 1966, it was reported that: “Uniforms tend to create a uniformity in thinking, is the opinion of Professor F. H. Knelman of York University. ‘We must maintain certain levels of appearance, but appearance can be widely scattered over a broad field,’ he said. ‘It’s not how students look, but how they react to the educative process that matters. In a subtle sort of way, the kind of people who want to see a class in uniforms also want to see a sea of white faces. If there’s one Negro face, they want to paint out that one,’ he said.”

The danger in the phenomenon of psycho-institutional censorship is that it is a subtle, often non-express, form of thought control induced by habit and substantially self-perpetuating. In the educational system it is doubly effective and destructive because it catches the human when his mind is at a susceptible and formative stage.

if not necessary, for the welfare of students.³⁸ It will suffice to say that rules governing student appearance should not be justified as an exercise in obedience and discipline, conducted by educators who want to keep all their little ducks in a row.

The educators, should not lightly be able to suspend or expel the nonconforming student. They should be required to have the justification of necessity on their side. This will limit their economic and political power. Suspension or expulsion has very serious consequences for the student. For instance, the income of a student is correspondingly less the fewer years of school he has completed.³⁹ And consequently, by an unchecked use of its powers of suspension and expulsion, the administration could successfully defeat any challenge to its authority and values by nonconforming students by excluding them from school. This not only has the immediate effect of removing from the school sphere the influence of the dissenting student who questions the standards of the administration, but also has the lasting effect of damning the

³⁸ For one week the principals and teachers of Ontario's secondary schools took advertisements in 20 daily newspapers across the province claiming that their efforts in recent weeks in disciplining students because of their unconventional fashions had been interrupted by "the irresponsible conduct of a few students, trustees, parents and organized pressure groups." This fact was noted in the *TORONTO DAILY STAR*, October 16, 1968. The actual advertisement is reported in full in *EXCALIBUR*, The student weekly of York University, October 24, 1968, at page 5. For its conclusion the advertisement remarks: "As a group charged with the responsibility for educating the youth of Ontario, we solicit the cooperation and support of all citizens in our attempts to educate responsible citizens for a democratic society. Ontario Secondary School Teachers Federation."

In the Ferrell case (footnote 5) one student at the school testified that he thought that the coaches, athletes and teachers created whatever problems developed in regard to the long hair. This seems supported by the fact that a sizable body of students often demonstrate in favour of the conventional student who is disciplined for his appearance. Note at footnote 3 the student demonstrations that took place at the Castle Frank High School and the Danforth Technical School. The preceding amply illustrates that teachers tend to preserve the norms of their own institution, their own values and other aspects of their environment that they feel comfortable with. Footnote 38 substantiates the claim that an atmosphere that allows nonconformity is of vital significance, if not necessary, for the welfare of students. With these two things in mind, it is interesting to note further the comment in the *TORONTO DAILY STAR*, March 21, 1966: "As a parent and as principal of St. Andrew's public school, J. K. Barnard thinks uniforms are sensible. At St. Andrew's, however, only 50 per cent of the pupils wore uniforms when they were adopted five years ago, and it has dropped to 20 per cent. . . . 'Uniforms create a better atmosphere, and students do better work,' Mr. Barnard declared. 'I'm an old army man, and the uniform is a point of pride and loyalty to me.'"

The argument that orderly appearance and surroundings promote a better attitude is familiar. The distillate of the argument seems to be the proposition that discipline is a good thing. The concept of discipline, however, raises questions as to its object—i.e. discipline for what purpose? for its own sake? for the teacher's sake? for the student's sake? We have seen that it is likely to be discipline for the teacher's sake, and when we further realize that true self-discipline is an educative goal far beyond mere subservience or unthinking obedience, the insubstantiality of the teacher's "discipline" argument becomes apparent. It is simply a self-praising argument.

³⁹ *School Expulsions and Due Process*, (1965) 14 KAN. L. REV. 108, n.1. Those who feel that the connection between individual freedom and personal appearance is remote and attenuated are obviously not among those nonconformists who are threatened each year with suspension for unconventional appearance and the consequent probability of a bleak economic and social future.

dissenter to an economic and social level from which he does not have the power or influence as an adult to right the abuses and impositions of the organization that "disciplined" him.⁴⁰

When the issue comes before them, the Ontario courts, it is submitted, should scrutinize school regulations of dress and grooming closely and critically in order to prevent a significant restriction of personal liberty. They must remind themselves that many fashions which are considered proper and sensible today only several decades ago would have been considered absurd and even outlawed as being improper and indecent. They must keep pace with the changes taking place in society and realize that what might formerly have been such a severe departure from accepted customs as to cause unruly conditions in a classroom and psychological problems with students is now very acceptable. In short, however displeasing it may be to an older generation—judges included—the individual's freedom not to conform—especially the young individual's freedom to express himself as he may—must be upheld.

The area of student-regulation in Ontario, and Canada generally, is too important for the law to ignore.⁴¹ At the first opportunity, critical concern over the unnecessary regulation of the student should be shown by the courts, by the legislatures, and by Parliament. Not only is there a constitutional problem, but intimately linked with it, and that which makes the constitutional issue so important, are more practical problems: not only is an abstract possible abridgment of civil liberties involved when there is regulation of the student-citizen, but also the practical problems of the undesirable effect certain regulations can have on the life (economic, psychologic, and otherwise) of our students, the parent-child relationship, and ultimately, our whole society.

⁴⁰ In this connection, note *A Democratic Approach to Civil Liberties*, PETER H. RUSSELL, an unpublished article soon to be published in the UNIVERSITY OF TORONTO LAW JOURNAL, at page 6: "However, if as liberals we are genuinely committed to maximizing the individual's capacity for self-development, we should recognize that in our day and age it is as essential to be critical of unnecessary exercises of governmental coercion, as it is to attack avoidable sources of private coercion. Indeed, one of the liberal's key areas of concern should be precisely with those forms of government intervention in the broad fields of social welfare and education, where the objective is to provide individuals with vital economic or cultural opportunities which they would not otherwise enjoy."

⁴¹ It is hoped that the recent judicial and legislative awareness of the rights of youth will continue, and increase where necessary. In the United States an example of such awareness is the recent extension of the constitutional right of procedural due process to the juvenile courts, and to students faced with serious disciplinary sanctions such as suspension and expulsion. In *Re Gault* 387 U.S. 1 (1967) the court held that a juvenile in a court action must be given notice of the charges, advised of his right to counsel and his right to remain silent, and afforded the right of cross-examination. Also see *Kent v. U.S.* 383 U.S. 541 (1966). Though requirements vary with the case in a suspension and expulsion proceeding, due process requires notice of the specific charges and some opportunity for a hearing. A "full dress judicial hearing" is not necessary, but the "rudiments of an adversary proceeding are required." See *Dixon v. Alabama Bd. of Educ.* 294 F.2d 150, 155-59 (5th Cir. 1961); *Leonard v. School Committee of Attleboro* 212 N.E. 2d 468, 473 (1965) (Dicta). Also note the American articles on point reported at page 8, footnote 10.

The awareness of the rights of youth has been shown to some extent in Ontario. The Etobicoke School Board, just west of Toronto but unlike the school boards of Toronto,

recognizes the right of students to have a lawyer present with them at expulsion proceedings. The Ontario Legal Aid Act, S.O. 1966 c. 80 s. 13 provides that legal aid may be given to a person in a juvenile court.

The HALL-DENNIS REPORT on the aims and objectives of education in Ontario has noted that there are dangers in the dehumanizing trends of our conformity conscious educational system. In a recent address, Lloyd Dennis, co-chairman of the committee, remarked that there is "a crying need for a flexible attitude on the part of the mentors, the establishment, to develop individual freedom and responsibility."