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Emerging Rights of High School Students: TheLaw Comes of Age

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problems of defining, preventing, and compensating consumers for fraud. Legislative action is necessary. Second, Florida has taken only the first steps toward effective consumer protection. The cooling-off bill, the Uniform Deceptive Trade Practices Act, the Federal Trade Commission Act, and the Unfair Trade Practices and Consumer Protection Act all have significant limitations. A more comprehensive definition of fraud and a better system of compensating defrauded consumers is necessary if the Florida consumer is to be provided adequate recourse against the unscrupulous seller.

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EMERGING RIGHTS OF HIGH SCHOOL STUDENTS: THE LAW COMES OF AGE

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.[1]

Student unrest is a sign of the times. Much of this unrest can be traced directly to the schools, which are symbolic of oppressive authority to some students and contribute to their disaffection with the social structure.[2] Many students seeking avenues of self-expression have turned to the courts. The primary questions reflected in the resulting deluge of litigation concern the enumeration, definition, and extent of particular rights possessed by students, and the degree of control permitted the schools in regulating these rights.[3]

1. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 512 (1969), *quoting* Shelton v. Tucker, 364 U.S. 479, 487 (1960).

2. For an analysis of the sociological factors contributing to the student revolution *see* Brammer, *The Coming Revolt of High School Students,* 18 N.A.S.S.P. BULL. 13 (Sept. 1968); Saxby, *Student Unrest and the Law,* 18 CLEVE.-MAR. L. REV. 429 (1969).

3. *See An A.C.L.U. Statement: Student's Rights in Academic Freedom in the Secondary Schools,* EDUCATION DIGEST, Dec. 1968, at 19. *See also* Van Alstyne, *The Judicial Trend Toward Student Academic Freedom,* 20 U. FLA. L. REV. 290 (1968). A good collection of the earlier articles in this area is found in STUDENT'S RIGHTS AND RESPONSIBILITIES (J. Blair ed. 1968).

Secondary schools,[4] reluctant to relinquish their supervisory powers in favor of the students' personal liberties, have traditionally grounded their authority in the doctrines of *in loco parentis*[5] and the view that education is a privilege.[6] Recently the courts have begun to systematically reject these doctrines where they have been used to justify absolute control of the students.[7] The burden of clearly showing the reasonableness and necessity for regulation of the students' conduct has been shifted to the schools by the courts.[8]

The trend toward judicially restricting school authority reflects a judicial recognition that each child, in a social system where the state provides free schools, has a *right* to the equal enjoyment of education.[9] Students may not be required to surrender their rights as citizens "at the schoolhouse gate."[10] The purpose of this note is to examine the rights enjoyed by public school children and, with emphasis on *Tinker v. Des Moines Independent Community School District*,[11] to trace the evolution of these rights through the courts.[12]

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4. The term "secondary schools" will be used to indicate state schools above the elementary level, *i.e.*, grades 7 through 12. Definitional problems arise because the rights of secondary school students may differ in degree if not in kind from those enjoyed by college students. Generally, state colleges and universities now recognize and accept the constitutional freedoms of speech, press, association, personal appearance, and the right to procedural due process. *See, e.g.*, UNIVERSITY OF FLORIDA HANDBOOK, UNIVERSITY REGULATIONS OF STUDENT CONDUCT 91 (1968); *Joint Statement on Rights and Freedoms of Students*, AAUP BULL. 258 (Summer 1968).

5. The school stands in the shoes of parents for the purposes of discipline and character development. John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924).

6. The theory behind this argument is that education is a privilege rather than a right, and the privilege may be withheld at the discretion of the state. Satan Fraternity v. Board of Pub. Instruction, 156 Fla. 222, 22 So. 2d 892 (1945); *see* Speiser v. Randall, 357 U.S. 513 (1958).

7. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1922); Buttney v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Goldberg v. Regents of the Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). The Supreme Court in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), said: "In our system state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." *Id.* at 511. In an earlier case the Court stated, as a caveat to the doctrine of *in loco parentis*, that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." Kent v. United States, 383 U.S. 541, 555 (1966). For a discussion of the conflict between parent and school over student regulation, *see* Conyers v. Glenn, 243 So. 2d 205 (2d D.C.A. Fla. 1971).

8. *E.g.*, Frain v. Barron, 307 F. Supp. 27 (E.D.N.Y. 1969).

9. Conyers v. Glenn, 243 So. 2d 205 (2d D.C.A. Fla. 1971); Scott v. Board of Educ., 61 Misc. 2d 333, 305 N.Y.S.2d 601 (Sup. Ct. 1969). *But see* Estay v. Lafourche Parish School Bd., 230 So. 2d 443 (La. Ct. App. 1969).

10. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969).

11. 393 U.S. 503 (1969). *See* Comment, *Freedom of Expression in Student Demonstrations*, 22 U. FLA. L. REV. 168 (1969).

12. The scope of this note has been limited to the area of substantive rights. For a discussion of procedural due process requirements *see* Note, *The Procedural Rights of Public School Children in Suspension-Placement Proceedings*, 41 TEMP. L.Q. 349 (1968). Several recent cases have considered the application of due process requirements to actions taken by school officials. *See* Black Students *ex rel.* Shoemaker v. Williams, 317 F. Supp.

First Amendment Freedoms

The first amendment has been the most thoroughly explored source of relief for students aggrieved by school regulations. In 1923 the Supreme Court struck down a Nebraska law that prohibited the teaching of a foreign language to pupils below the eighth grade level.[13] Although not basing its decision on a specific right enunciated in the first amendment, the court referred to the rights of teachers to teach and the right of students to learn — the right "to acquire useful knowledge."[14] In 1943 the Court invalidated a school board regulation providing for compulsory flag salute.[15] In the recent case of *Epperson v. Arkansas*[16] the Court invalidated a law prohibiting the teaching of evolution in public schools. These cases clearly extended the protection of the first amendment to school children.[17]

This extension culminated in the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District.*[18] Two public high school students were suspended for wearing black armbands to school to protest the war in Viet Nam. The Supreme Court held that the students' form of passive expression was indeed protected by the first amendment as "closely akin to pure speech."[19] The Court recognized that freedom of speech is not absolute — that in the face of imminent danger to a legitimate interest of the state the freedom could be lawfully restricted.[20] The Court also noted that the state has a definite interest in maintaining order in its schools.[21] In *Tinker,* however, the state failed to sustain the burden of proving that such interest was threatened by a "material and substantial interference with schoolwork or discipline."[22]

1211 (M.D. Fla. 1970) (holding that a public school board could not suspend students for ten days without first providing them a hearing); Banks v. Board of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970) (holding, *inter alia,* that although a hearing was required it need not be held *prior* to suspension); Canney v. Board of Pub. Instruction, 231 So. 2d 34 (1st D.C.A. Fla. 1970) (holding, *inter alia,* that a hearing held subsequent to suspension did not violate Florida's administrative procedure act).

13. Meyer v. Nebraska, 262 U.S. 390 (1922); *accord,* Bartels v. Iowa, 262 U.S. 404 (1923).

14. 262 U.S. at 399. This right may not be abridged by legislative action that is "arbitarary or without reasonable relation to some purpose within the competency of the state to effect." *Id.* at 400.

15. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see* Banks v. Board of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970).

16. 393 U.S. 97 (1968).

17. The Supreme Court's position was expressly stated in *In re* Gault, 387 U.S. 1 (1967), where it was declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13.

18. 393 U.S. 503 (1969).

19. *Id.* at 505.

20. *Id.* at 507. *See also* United States v. O'Brien, 391 U.S. 367 (1968); Dennis v. United States, 341 U.S. 494 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); De Jong v. Oregon, 299 U.S. 353 (1937).

21. 393 U.S. at 509.

22. *Id.* at 511. On this point the Court approved and expressly adopted the rationale of the Fifth Circuit in Burnside v. Byars, 363 F.2d 744 (1966).

The *Tinker* decision balances the school's duty to maintain discipline and order against the right of the student to exercise his first amendment freedoms in such a way as not to interfere with the rights of others.[23] This balance is a factual question to be determined on a case-by-case basis. The burden lies on the school to prove that its anticipation of disturbance was reasonably founded, that the disturbance would be something more than minimal, and that the disturbance would come from those seeking to exercise their rights rather than from those reacting to the speech[24] or those who would deprive them of the exercise of that right.[25] It is not enough for the school to argue that the intentional disobedience of any rule promotes disorder or that a court's role in invalidating the rule will interfere with school discipline.[26] It is also insufficient to argue that the ideas proposed are unsuitable for other students to hear or that the school administration wishes to avoid the unpleasantness that may accompany an unpopular viewpoint.[27]

A further limitation on the power of the school to restrict expression is the principle that a public official may not broadly suppress speech under the guise of regulating conduct.[28] Where sufficient need for regulation of expression is shown, such regulation may not be overly broad or vague but must be done only with narrow specificity.[29] The schools need not, however, provide the narrow, negative type of behavioral code typical of criminal laws.[30]

Tinker arose in the factual context of a student demonstration, an area that has produced much litigation.[31] Where students have materially interfered with the operation of the school by physically blocking buildings[32] or by causing actual general disruptions[33] their suspensions have been upheld.

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23. 393 U.S. at 507.

24. *Cf.*, Cooper v. Aaron, 358 U.S. 1 (1958).

25. 393 U.S. at 508-09.

26. Griffin v. Tatum, 300 F. Supp. 60, 65 (M.D. Ala. 1969).

27. 393 U.S. at 509.

28. Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 323 (1968). For a discussion of sanctions resulting from combined "speech" and "nonspeech" *see* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

29. NAACP v. Button, 371 U.S. 415, 433 (1963). Thus, the first amendment "chilling effect" doctrine, Dombrowsky v. Pfister, 380 U.S. 479 (1965), and the fourteenth amendment "void for vagueness" doctrine, Connally v. General Constr. Co., 269 U.S. 385 (1926), also apply to the regulation of students by public schools. Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

30. Esteban v. Central Missouri State College, 415 F.2d 1077, 1089-90 (8th Cir. 1969); Buttny v. Smiley, 281 F. Supp. 280, 284 (D. Colo. 1968).

31. *See* Annot., 31 A.L.R.3d 864 (1970).

32. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); *cf.* Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir.), *cert. denied*, 394 U.S. 905 (1969).

33. Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (students wearing freedom buttons harassed other students with boisterous conduct); Brown v. Greer, 296 F. Supp. 595 (S.D. Miss. 1969) (students used abusive language toward administrators and struck two faculty members); *cf.* Byrd v. Gary, 184 F. Supp. 388 (E.D.S.C. 1960) (students attempted to organize a milk boycott in the school cafeteria).

Where the demonstration has been peaceful or passive, however, the resulting sanctions by the schools, at least since the *Tinker* decision, have generally been nullified by the courts.[34]

In the recent federal district court case of *Frain v. Baron*[35] several junior and senior high school students refused to stand during the pledge of allegiance as required by New York statute. They also refused to leave the room as permitted by school policy because they viewed exclusion from the room as a punishment for their exercise of constitutional rights. In effect they urged "not only a right of non-participation but a right of silent protest by remaining seated."[36] The district court, basing its decision on *Tinker,* ruled that since no disruption was imminent the students could exercise their right of quiet protest without fear of punishment.[37] This decision implies that a school may be considered a "proper forum" for expression by demonstrating students,[38] an implication that leads to the conclusion that a school may not bar demonstrations on school grounds simply because it would be inconvenient for school administrators.[39]

Student publications have brought several students into the courts. Prior to *Tinker* at least one court had recognized the student's right to publish his opinions and had invalidated the school's punishment for this form of expression.[40] Since *Tinker,* one decision has upheld disciplinary measures taken against students who, after distributing literature berating the student body for apathy and failure to seize school buildings, urged them to "stand up and fight."[41] Another recent decision, *Vought v. Van Buren Public Schools*[42]

34. *E.g.,* Aguirre v. Tahoka Independent School Dist., 311 F. Supp. 664 (N.D. Texas 1970) (holding that students could not be suspended for violating a regulation against the wearing of armbands where this form of expression was not accompanied by any disturbance on the part of the wearer).

35. 307 F. Supp. 27 (E.D.N.Y. 1969).

36. *Id.* at 31.

37. *Id.* at 32; *accord,* Banks v. Board of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970).

38. The "proper forum" doctrine originates from the Supreme Court's decision in Adderley v. Florida, 385 U.S. 39 (1966). The Court there reasoned that reasonable restrictions could be placed on the exercise of otherwise constitutionally protected freedoms when the exercise of these freedoms was sought in places and manners not recognized as normal forums for such freedoms. Upholding the trespass convictions of students who demonstrated on the outside yard of a jail, the Court declined to follow the first amendment pleas of the students but instead held that a jail was not a proper place for the exercise of freedoms of expression since the jail had not been dedicated to the open use of the public and was not therefore a reasonable place for the exercise of such freedoms. *Id.* at 47-48.

39. *See* Schneider v. New Jersey, 308 U.S. 147 (1939), in which the Court stated: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163.

40. Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot,* 402 F.2d 515 (5th Cir. 1968).

41. Norton v. Discipline Comm. of E. Tennessee State Univ., 419 F.2d 195 (6th Cir. 1969). The Court distinguished *Tinker* by finding that in the present case the officials reasonably forecast disturbances, sought to prevent imminent disorders, and were justified in their efforts to "nip such action in the bud and prevent it in its inception." *Id.* at 199.

42. 306 F. Supp. 1388 (E.D. Mich. 1969).

upheld a regulation against student possession of obscene literature. The court viewed such possession as within the *Tinker* exception of "speech or action that intrudes upon the work of the schools or the rights of other students."[43] In *Zucker v. Panitz*,[44] however, the district court held that the principal's censorship of a paid anti-war editorial in the school newspaper violated the student's first amendment freedom of the press. Similarly, in *Scoville v. Board of Education*[45] the court found the threat of disruption insufficient to justify punishment for an editorial that made derogatory statements about the school administration. It has also been held that schools may not require predistribution approval of all written material.[46] Such approval, the court said, would be a classic example of the unconstitutional prior restraint prohibited in *Near v. Minnesota*.[47] Clearly, the *Tinker* decision has produced a change in the development of the law in this area.[48]

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43. *Id.* at 1392.

44. 299 F. Supp. 102 (S.D.N.Y. 1969).

45. 425 F.2d 10 (7th Cir. 1970).

46. Eisner v. Stamford Bd. of Educ., 314 F. Supp. 832 (D. Conn. 1970). Courts have not been the only source of relief for students. In Goodman v. Board of Educ., 10 N.O.L.P.E. School L. Rptr. 13 (Sept. 1969), the New Jersey Commissioner of Education invalidated a regulation prohibiting distribution of printed material without prior approval by the school administration. He ordered school officials to develop guidelines that would "seek to accommodate *the maximum degree of freedom of expression* by means consistent with the good order of the school." *Id.* (emphasis added).

47. 283 U.S. 697 (1931).

48. A related area of first amendment litigation has arisen from school bans on addresses by off-campus speakers on school premises. Although most decisions have concerned college regulations and may have limited applicability to the public school situation, the rationale behind their holdings merits careful consideration. Typical of the post-*Tinker* litigation is the case of Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969), where a three-judge federal court invalidated the exclusion of speakers who were political candidates, convicted felons, or advocates of the violent overthrow of the Government. The court held such regulations must be "narrowly drafted so as to suppress only that speech which presents a 'clear and present danger' of resulting serious substantive evil," which the school has the power to prevent. *Id.* at 971. The danger must be "engendered by what the speaker himself says or does. . . . law enforcement officers must quell the mob, not the speaker." *Id.* at 977. *See* Cooper v. Aaron, 358 U.S. 1 (1958), where at the request of the school board the Court proceeded to set up what it considered valid speaker regulations and ordered them to be applied in the state's institutions of higher learning. *Id.* at 17-20.

Notable in the *Stacy* decision is the court's recognition of the freedom of association. Most cases dealing with school or state regulation of fraternities have generally upheld the power of the state to limit the students' freedom of association. *See* Annot., 10 A.L.R.3d 389 (1966). In some instances the regulation is by state statutes, *see, e.g.*, FLA. STAT. §§232.39-.40 (1969), which was held by the Florida supreme court in Satan Fraternity v. Board of Pub. Instruction, 156 Fla. 222, 22 So. 2d 892 (1945), not to violate due process, right of assembly, right of association, equal protection of the laws, or any other constitutional liberty. Whether the regulation completely prohibits the secret society, *e.g.*, Hughes v. Caddo Parish School Bd., 57 F. Supp. 508 (W.D. La. 1944), *aff'd per curiam*, 323 U.S. 685 (1944), or declares any kind of participation by school children to be unlawful, *e.g.*, Robinson v. Sacramento City Unified School Dist., 245 Cal. App. 2d 278, 53 Cal. Rptr. 781 (1966), the courts have deferred to the authority of the school administration, *e.g.*, Satan Fraternity v. Board of Pub. Instruction, 156 Fla. 222, 22 So. 2d 892 (1945). *See also* Waugh v. Board of Trustees of the Univ. of Mississippi, 237 U.S. 589 (1915). The question is open as to the

"Penumbra" Freedoms

Many of the freedoms sought to be exercised by students are not expressly stated in the Constitution and might appropriately be called "penumbra freedoms." These rights — principally the right to privacy — are said to emanate from the specific provisions of the Bill of Rights.[49] In this area the Supreme Court has recognized a right of students to study German in a private school,[50] the right to educate one's children as one chooses,[51] and the freedom to teach.[52] The penumbra doctrine has also been used to invalidate school regulations in the areas of personal grooming,[53] student marriage and pregnancy,[54] and off-campus activity.[55] A great majority of the earlier cases deferred to the wisdom of the school or the state legislature unless the regulation was completely unreasonable.[56] Whether based upon a state statute[57] or upon the inherent power of the schools to regulate their students, such regulations were traditionally upheld.[58]

School bans against the wearing of long hair by male students have been the most active area of litigation over regulation of student appearance. High schools typically prohibit any "extreme" styles,[59] and in order to avoid vagueness some have even issued detailed specifications for hairdos.[60] Prior to the *Tinker* decision, these provisions were successfully challenged in only a few cases.[61] Of the pre-*Tinker* decisions upholding hair regulations, the case most

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possible effect of the *Tinker* decision in this area, but in light of the prior pronouncements by the Supreme Court, little retreat from this position may be expected.

49. The designation of these as "penumbra" rights comes from Mr. Justice Douglas' celebrated opinion in Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

50. Meyer v. Nebraska, 262 U.S. 390 (1923).

51. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

52. Epperson v. Arkansas, 393 U.S. 97 (1968). In a different context, the Supreme Court has stated: "[T]he state may not, consistently with the *spirit* of the First Amendment, contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (emphasis added, citations omitted).

53. Notes 67-74 *infra* and accompanying text.

54. Notes 77-85 *infra* and accompanying text.

55. Notes 86-91 *infra* and accompanying text.

56. *See* Annot., 14 A.L.R.3d 1201 (1967).

57. *E.g.*, Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468, 14 A.L.R.3d 1192 (1965); Fla. Stat. §§232.25-.27 (1969).

58. *But see* Valentine v. Independent School Dist., 191 Iowa 1100, 183 N.W. 434 (1921). The court said it was unreasonable, arbitrary, and an abuse of discretion for the school board to require a student to wear a cap and gown in graduation exercises as a condition precedent to receiving a diploma.

59. *E.g.*, Duval County, Fla. School Board, Policy on Street Dress 2 (1969): "Hair may not be worn in 'extreme' styles and must remain well groomed."

60. *E.g.*, Alachua County, Fla., School Board, Memorandum (Aug. 28, 1969): "Hair cuts acceptable for school will be as follows: Sideburns — neatly trimmed no longer than the lobe of the ear; back of the neck must be seen; hair must be short enough on the forehead to see the complete eyebrows at all times. Ears must be exposed."

61. *E.g.*, Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969); Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969); Zachary v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967); Ferrell v. Dallas Independent Community School Dist., 261 F. Supp. 545 (N.D. Texas 1966), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

often cited is *Leonard v. School Committee of Attleboro.*[62] Even though the student argued that his long hair was necessary to his success as a musician, the court in that case held the regulation to be within the school board's discretion as long as any rational basis existed for the regulation. The court accepted the school's contention that unusual hairstyles could disrupt proper classroom atmosphere. Another federal case upholding the school's position is *Ferrell v. Dallas Independent Community School District,*[63] in which the court, although admitting that hairstyles may be a constitutionally protected mode of expression, held that hairstyles were subject to reasonable regulation in furtherance of a substantial state interest.[64] Another pre-*Tinker* decision, *Davis v. Firment,*[65] said the wearing of long hair could not come within the protection of the first amendment freedom of speech because to be symbolic speech the hair must "symbolize a specific idea or viewpoint."[66]

Since the decision in *Tinker,* however, the majority of cases dealing with the rights of students to wear long hair have been decided in favor of the student.[67] The recent federal district court case of *Braxton v. Board of Public Instruction of Duval County,*[68] for example, held that personal grooming could be protected as expression within the scope of the first amendment.[69] Similarly, it can be reasoned that the right to groom himself in the manner he selects is an essential element of the student's personality, and this expression of personality must be respected by the state.[70]

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62. 349 Mass. 704, 212 N.E.2d 468, 14 A.L.R.3d 1192 (1965).

63. 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).

64. Notable in *Ferrell* is Justice Douglas' dissenting opinion to the denial of certiorari (this being the only pronouncement by a Supreme Court Justice on the question of long hair): "It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause a person can be denied education in a public school because of the length of his hair. I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the idea of 'life, liberty, and the pursuit of happiness' expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course *freedom of expression and a wide zone of privacy.* I had supposed those guarantees permitted idiosyncracies to flourish, especially when they concern the *image of one's personality and his philosophy* toward government and his fellow men." 393 U.S. 856 (1968) (emphasis added).

65. 269 F. Supp. 524 (E.D. La. 1967), *aff'd,* 408 F.2d 1085 (5th Cir. 1969).

66. 269 F. Supp. at 527.

67. The leading Florida case is the recent decision in Conyers v. Glenn, 243 So. 2d 205 (2d D.C.A. Fla. 1971). In his opinion Judge Mann strongly states that hair styles and other such matters of personal grooming are not the proper subject of school regulations. *Id.* at 208. *Accord,* Dawson v. Hillsborough County School Bd., 322 F. Supp. 286 (M.D. Fla. 1971). *But see* Canney v. Board of Pub. Instruction, 231 So. 2d 34 (1st D.C.A. Fla. 1970).

68. 303 F. Supp. 958 (M.D. Fla. 1969); *accord,* Boyle v. Scapple, ____ F. Supp. ____ (D. Ore. 1970) (high school student may not be prohibited from wearing mustache). *See* Lucia v. Dugan, 303 F. Supp. 112 (D. Mass. 1969).

69. "[W]here . . . [the beard] is worn as 'an appropriate expression of his heritage, culture and racial pride as a black man' its wearer also enjoys the protection of first amendment rights." 303 F. Supp. at 959; *accord,* Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967).

70. *E.g.,* Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969); Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis.), *aff'd,* 419 F.2d

Having concluded that choice of hair styles is protected by the Constitution, the courts have considered the circumstances under which schools may qualify this right. The rationale in *Tinker* suggests that a reasonable expectation of material and substantial disruption must exist before schools will be justified in proscribing long hair.[71] In some cases the schools have been able to satisfy this burden of proof.[72] Other decisions, however, have invalidated the regulations because the school failed to establish an interest sufficient to justify them.[73] The trend is to hold the school to a strict burden of justifying the regulation, and not to defer to the discretion of school authorities as in the past.[74] Furthermore, the "void for vagueness" doctrine has also been employed to invalidate overly restrictive grooming regulations.[75] For instance, in *Meyer v. Arcata Union High School District*[76] the trial court held that the school rule stating "extremes of hair styles are not acceptable" was unconstitutionally vague.

The *Tinker* tests of substantial interest and material disruption would seem to be equally applicable when dealing with the exclusion of married or pregnant students from the public schools.[77] Virtually all of the earlier cases hinged on the reasonableness of temporary or permanent exclusion.[78] Rules

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1034 (7th Cir. 1969); Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969).

71. *See* Sims v. Colfax Community School Dist., 307 F. Supp. 485, 488 (S.D. Iowa 1970).

72. *E.g.*, Wood v. Alamo Heights Independent School Dist., 308 F. Supp. 551 (W.D. Tex. 1970); Brick v. Board of Educ., 305 F. Supp. 1316 (D. Colo. 1969); Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969).

73. Cordova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970); Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969). In Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969), the court rejected as insufficient the following justifications asserted by the school to permit regulation: (1) that boys' long hair cause them to comb their hair in class and to pass combs, both of which are distracting; (2) it causes boys to be late for class because they linger in the restrooms to comb their hair; (3) it causes an unpleasant odor as the hair is often unclean; and (4) it causes the boys to be reluctant about engaging in physical education. *Id.* at 61. Also, in Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969), the court rejected arguments that: (1) long hair created a health hazard, (2) extremes in grooming have the natural and intended effect of disrupting discipline in the schools, and (3) it is the necessary responsibility of schools to see that students dress neatly and develop good grooming habits. *Id.* at 710-11. Similarly, in *Sims* the court found inadequate the school's contention that regulation of hair might promote good citizenship by teaching respect for authority and instilling discipline. 307 F. Supp. at 488. In another instance, relief came in the form of an administrative decision by the New Jersey Commissioner of Education who held that, where it was stipulated that the pupil's hair style caused no disruption of school activities, his suspension for violating the school's code for pupil appearance was improper and could not be sustained. Sylvester v. Board of Educ., 10 N.O.L.P.E. SCHOOL L. RPTR. 13 (Sept. 1969).

74. *Compare* Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969), *with* Ferrell v. Dallas Independent Community School Dist., 261 F. Supp. 545 (N.D. Texas 1966), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

75. Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970). *Contra*, Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970).

76. 269 Cal. App. 2d 549, 556, 75 Cal. Rptr. 68, at 74 (1969).

77. *See generally* Annot. 11 A.L.R.3d 996 (1969).

78. *Id.*

requiring that married students be permanently excluded have generally been held invalid as an unreasonable exercise of the school board's discretion.[79] Regulations requiring temporary exclusion have met with varied success.[80] Regulations prohibiting participation in extra-curricular activities have been regularly upheld as reasonable,[81] as have those requiring that pregnant students withdraw at least temporarily.[82] The recent decision in *Perry v. Grenada Municipal Separate School District*[83] may indicate the impact of *Tinker* in this area. A regulation that permanently excluded unwed mothers from the public schools was challenged as a violation of the Civil Rights Act of 1964.[84] The court, relying in part on *Tinker,* but without reaching the first amendment question, found this to be "invidious discrimination" and therefore prohibited by the equal protection clause of the fourteenth amendment.[85]

One other problem area is the regulation of student conduct after school hours. It is not uncommon to find school authorities exerting substantial influence over their pupils twenty-four hours a day. Illustrative are regulations against long hair on males, since one who must cut his hair for school must wear it short the rest of the day. These regulations and similar ones often exceed the statutory authority granted the school[86] as well as encroaching on the domain of parental authority.[87] Some courts have recognized that the state's power is limited to actual school time and have invalidated regulations that banned out-of-school clubs[88] and dress requirements.[89] Similarly, it has been held that schools may not punish students for conduct away from the school grounds[90] or suspend or expel students solely on the basis that they have been arrested or indicted.[91] The future litigation in this

79. *Cf.* Nutt v. Board of Educ., 128 Kan. 507, 278 P. 1065 (1929); Alvin Independent School Dist. v. Cooper, 404 S.W.2d 76 (Tex. Civ. App. 1966).

80. *Compare* Anderson v. Canyon Independent School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967), *with* Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957).

81. *E.g.,* Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Estay v. La Fourche Parish School Bd., 230 So. 2d 443 (La. Ct. App. 1964).

82. State *ex rel.* Idle v. Chamberlain, 39 Ohio Op. 2d 262, 175 N.E.2d 539 (C.P. Butler County, 1961).

83. 300 F. Supp. 748 (N.D. Miss. 1969).

84. 42 U.S.C. §1983 (1964).

85. 300 F. Supp. at 752.

86. FLA. STAT. §232.25 (1969) establishes: "[E]ach pupil enrolled in school shall . . . *during the time he is attending or is presumed by law to be attending school, and during the time he is on the school premises,* be under the control and direction of the principal or teacher in charge of the school. . . ." (Emphasis added.)

87. Notes 67-76 *supra* and accompanying text.

88. Wright v. Board of Educ., 295 Mo. 466, 246 S.W. 43 (1922). *Contra,* Wilson v. Abiline Independent School Dist., 190 S.W.2d 406 (Tex. Civ. App. 1945).

89. Jones v. Day, 127 Miss. 136, 89 So. 906 (1921).

90. *Cf.* Woods v. Wrights, 334 F.2d 369 (5th Cir. 1964) (injunction granted preventing disciplinary measures against students for participating in civil rights demonstration); Matter of Rodriguez, Comm'rs Decision No. 8015 (M.), *noted in* 10 N.O.L.P.E. SCHOOL L. RPTR. 13 (Sept. 1969) (possession of narcotics).

91. Howard v. Clark, 59 Misc. 2d 327, 299 N.Y.S. 2d 65 (Sup. Ct. 1969) (arrested and charged with criminal possession of hypodermic instruments); Matter of Rodriquez, Comm'rs

area may well follow the trend of *Tinker* and require a showing that actual or expected disruption *in school* will result from the out-of-school activity.

Conclusion

The impact of *Tinker* in the area of students' first amendment rights is just beginning to be felt.[92] Although the few cases decided by federal courts since *Tinker* have been exploratory and largely cases of first impression, they already outnumber all similar federal cases prior to 1969. What has heretofore been settled law is now undergoing substantial change directed toward the recognition of students' constitutional rights as equal to those of the adult citizenry. Accepting the special circumstances of the school-student relationship, many courts have readily given *Tinker* broad application in all areas of school law. Whether this becomes, as Justice Black predicts, a new era of permissiveness[93] rests with the school boards themselves. If they accept the new student freedoms as a positive source for improving administrator-student relations, the delicate responsibility of educating the nation's youth will be given a new direction. Regardless of the reception given by school authorities, however, a judicial trend toward the protection of students' rights unmistakably exists.

Peter Dearing

Decision No. 8015 (NY), *noted in* 10 N.O.L.P.E. School L. Rptr. 13 (Sept. 1969) (indicted for possession and sale of narcotics). *But see* Furutani v. Ewigleben, 297 F. Supp. 1163 (N. D. Cal. 1969) (denied injunction to prevent college from conducting disciplinary hearing pending outcome of criminal actions).

92. One author has suggested that a law school course be taught on the legal aspects of students' rights. Van Alstyne, *A Suggested Seminar in Student Rights*, 21 J. Legal Ed. 547 (1969).

93. 393 U.S. at 518 (dissenting opinion).