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THE SCOPE AND SOURCES OF SCHOOL BOARD AUTHORITY TO REGULATE STUDENT CONDUCT AND STATUS: A NONCONSTITUTIONAL ANALYSIS

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"The secret of education lies in respecting the pupil."

Ralph Waldo Emerson.

The New York City Board of Education,¹ along with a number of other school boards,² provides in its bylaws for the expulsion of

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¹ See Board of Education of New York City, By-laws § 90, Para. 3(c) (1964), as supplemented through June 30, 1967. This bylaw provides that marriage constitutes a "cause" for which a pupil may be "discharged" from the public schools. I have been advised by the Law Society of the Board of Education that "the general practice has been that where a pupil is found to be married, such pupil is discharged." Letter from G. Gary Sousa, Law Society to Board of Education of City of N.Y., to the author, Jan. 5, 1968, on file at Biddle Law Library.

² See W. IVINS, STUDENT MARRIAGES IN NEW MEXICO, SECONDARY SCHOOLS, 1952-53, at 26-30, UNIV. OF NEW MEXICO PUBLICATIONS IN EDUCATION, No. 5 (1954); Atkyns, *School Administrative Policy Related to Motherhood, Pregnancy, and Marriage*, FAMILY COORDINATOR, April 1968, at 69; L. G. Carroll, The Status of Married Students in the North Carolina Public High Schools 1960 (unpublished Ed. D. Thesis, Duke University); Burchinal, *Research on Young Marriage: Implications for Family Life*, in TRENDS IN FAMILY RESEARCH 508 (1960); Burchinal, *School Policies and School Age Marriages*, in TRENDS IN FAMILY RESEARCH 43 (1960); Cavan & Beling, *A Study of High School Marriages*, 20 MARRIAGE & FAMILY LIVING, Aug. 1958, at 293; Ivins, *Student Marriages in New Mexico Secondary Schools: Practices and Policies*, 22 MARRIAGE AND FAMILY LIVING, Feb. 1960, at 71; Landis & Kidd, *Attitudes and Policies Concerning Marriage Among High School Students*, 18 MARRIAGE AND FAMILY LIVING, May 1956, at 128; Lissivoy & Hitchcock, *High School Marriages in Pennsylvania*, PA. SCHOOL Bd. ASS'N BULL., June 1963, at 31; Sperry & Thompson, *Marriage Among High School Students*, 45 BULL. NAT'L ASS'N OF SECONDARY-SCHOOL PRINCIPALS, Nov. 1961, at 100.

The term "school board" is used throughout this article as a generic term for the operating body of the local school district. The name applied to this body varies from

married students from the public schools. Other boards do not attempt to expel married students, but rather exclude them from participation in extracurricular activities.³ Pregnant students⁴ and mothers⁵ (wed

state to state, and may even vary within a state. For example, the general term for the school board in Pennsylvania is the "board of school directors," but in Philadelphia and Pittsburgh they are termed "board of public education." PA. STAT. ANN. tit. 24, §§ 3-301 to 3-302 (Supp. 1967). Other terms used for school boards include "district board of school trustees" (Maryland) and "school committee" (Massachusetts and Rhode Island).

³ See studies cited note 2 *supra*.

⁴ Studies of school board policy in regard to pregnant students indicate that the vast majority of school boards exclude pregnant students from attendance at regular schools. A significant number exclude them at the time pregnancy is discovered, while others defer this to a later stage. See Atkyns, *supra* note 2, at 69-73; Carroll, *supra* note 2, at 93-99; Burchinal, *Research on Young Marriage: Implications for Family Life*, *supra* note 2, at 517; Burchinal, *School Policies and School Age Marriage*, *supra* note 2, at 44-45; Ivins, *Student Marriages in New Mexico Secondary Schools: Practices and Policies*, *supra* note 2, at 73; Landis & Kidd, *supra* note 2, at 133-134; Lissovoy & Hitchcock, *supra* note 2, at 32; Thompson, *supra* note 2, at 103; TIME, Feb. 10, 1967, at 63-64. See also LOS ANGELES CITY SCHOOL DIST. DIV. OF SECONDARY ED., BULL. No. 45, Aug. 28, 1967; Letter from Edward D. Brady, Director, Socially Maladjusted Children, Chicago Board of Education, to Mr. James W. Coffey, Jan. 3, 1968, on file at Biddle Law Library; SCHOOL DIST. OF PHILADELPHIA, DEP'T OF SUPERINTENDENCE, DIV. OF PUPIL PERSONNEL AND COUNSELLING, BULL. No. 51, June 13, 1947, as supplemented March 29, 1948, and File No. 440, Oct. 29, 1968. But see Resolution No. 1967-43 of the Maryland State Board of Education, regarding By-law 720:3, adopted July 26, 1967. The only study of school board policy in regard to unwed pregnant students that I have found is Atkyns, *supra* note 2, which concludes that unmarried pregnant students are more often excluded from school than are their married sisters. *Id.* at 71. This more restrictive attitude toward unwed mothers-to-be is consistent with Burchinal's findings that girls pregnant before marriage are excluded at an earlier stage of pregnancy than girls whose marriage precedes their pregnancy. See Burchinal, *School Policies and School Age Marriage*, *supra* note 2, at 44; Burchinal, *Research on Young Marriage: Implications for Family Life*, *supra* note 2, at 517. The only specific school policy that I have found which articulates this more restrictive attitude is that of Los Angeles. See LOS ANGELES CITY SCHOOL DIST., DIVISION OF SECONDARY EDUC. BULL., *supra*. In addition, L. G. Carroll reports that the detailed policy, adopted by the Winston-Salem, N.C., school board, concerning married and pregnant students,

is not concerned with pregnancies out of wedlock. According to the Superintendent, these cases will be handled under state laws which give school officials the authority to dismiss students because of immoral action.

Carroll, *supra* note 2, at 127. See also 3A N.C. GEN. STAT. §§ 115-47 (1966).

Note, however, that Maryland's rule is that "a girl who is pregnant, either married or unmarried, who has not completed her high school education may elect to remain in the regular school program and shall not be involuntarily excluded from any part of this program." Resolution No. 1967-43 of the Maryland State Board of Education, *supra* (emphasis in the original).

⁵ School board policies toward mothers, wed or unwed, have not been the subject of extensive sociological study. Burchinal's study of Iowa school board policies toward married mothers indicated twice as many school boards (34%) excluded mothers who became pregnant before marriage as excluded those who married before pregnancy. Burchinal, *School Policies and School Age Marriage*, *supra* note 2, at 44-45. See also L. G. Carroll, *supra* note 2, at 97, 121, 125-127.

The only study I have found that purports to examine school board treatment of unwed mothers is Atkyns, *supra* note 2. However, this very short and sketchy study does not differentiate their treatment from the treatment of married mothers or the treatment of married students without children. The policy of the Philadelphia School Board is that girls who have been excluded for pregnancy are eligible for readmission upon presentation of a medical certificate from their physician or clinic "indicating that they are physically able to return to school." SCHOOL DIST. OF PHILADELPHIA, DEP'T OF SUPERINTENDENCE, File No. 440, Oct. 29, 1968. See also BULL. No. 51, *supra*, note 4.

and unwed), fraternity members,⁶ and boys with long hair⁷ are subject to similar sanctions.

The school boards generally cannot point to any specific statutory provision to sustain these actions.⁸ Rather, authority is sought in the broad school board enabling act, which typically provides:

The board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules.⁹

It does not seem clear that exclusion or expulsion for the reasons mentioned above is within this general grant of power to school boards. Surprisingly, this appears not to have been of major concern to school boards that have promulgated such rules or to courts that have reviewed them. Neither the school boards nor the courts have attempted to develop any consistent theory of school board rule-making power over pupil conduct or status.

Decision-making by bodies charged with the administration of public education is one of the most significant areas of law in terms of its effect on the lives of individuals and groups in our society. Yet prior to *Brown v. Board of Education*,¹⁰ it was an area of law virtually

⁶ See *Wilson v. Board of Educ.*, 233 Ill. 464, 84 N.E. 697 (1908); *Wright v. Board of Educ.*, 295 Mo. 466, 246 S.W. 43 (1922); *Coggins v. Board of Educ.*, 223 N.C. 763, 28 S.E.2d 527 (1944); *Wilson v. Abilene Independent School Dist.*, 190 S.W.2d 406 (Tex. Civ. App. 1945); *Wayland v. Hughes*, 43 Wash. 441, 86 P. 642 (1906); A. FLOWERS & E. BOLMEIER, *LAW AND PUPIL CONTROL* 11-43 (1964); note 8 *infra*.

⁷ See *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir.), *cert. denied*, 89 S. Ct. 98 (1968); *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967); *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965); *Haircuts, the Schools and the Law*, *EDUC. AGE*, Sept.-Oct., 1966, at 32; Howard, *Student Dress, School Policies and the Law*, *EDUC. DIG.*, May 1967, at 35; Comment, *Personal Appearance of Students—The Abuse of a Protected Freedom*, 20 ALA. L. REV. 104 (1967).

⁸ Of this group, only rules prohibiting membership in fraternities are ordinarily sanctioned by specific legislation. A number of states have passed statutes which specifically prohibit high school fraternities. Some of these statutes expressly command the school to expel fraternity members. See *Waugh v. Board of Trustees*, 237 U.S. 589 (1915); *Sutton v. Board of Educ.*, 306 Ill. 507, 138 N.E. 131 (1923); *Lee v. Hoffman*, 182 Iowa 1216, 166 N.W. 565 (1918); *Burkett v. School Dist.*, 195 Ore. 471, 246 P.2d 566 (1952). Other statutes prohibit fraternities and specifically empower, but do not command, school boards to expel fraternity members. See *Hughes v. Caddo Parish School Bd.*, 57 F. Supp. 508 (W.D. La. 1944), *aff'd*, 323 U.S. 685 (1945); *Robinson v. Sacramento City Unified School Dist.*, 245 Cal. App. 2d 278, 53 Cal. Rptr. 181 (Dist. Ct. App. 1966); *Steele v. Sexton*, 253 Mich. 32, 234 N.W. 436 (1931); *cf. Satan Fraternity v. Board of Public Instruction*, 156 Fla. 222, 22 So. 2d 892 (1945); *Holroyd v. Eibling*, 116 Ohio App. 440, 188 N.E.2d 797 (1962).

The cases cited in note 6 *supra* involve school board rules against high school fraternities that are not based on explicit statutory authority. It is this last group with which this article is concerned.

⁹ IOWA CODE § 279.8 (1966).

¹⁰ 347 U.S. 483 (1954).

ignored by the legal profession.¹¹ Since that time, courts, lawyers, and legal writers have wrestled extensively with problems of racial segregation¹² and religious observances in the public schools,¹³ and, to a lesser extent, procedural regulations in school discipline.¹⁴

Even this contemporary concern, however, has been limited almost exclusively to issues of the constitutionality of educational policy. This emphasis on constitutional issues—an emphasis not unique to education law—has resulted in an almost complete neglect of important statutory and common-law issues concerning the scope and function

¹¹ A review of the standard casebooks and texts on administrative law and local government reveals little or no coverage of educational decision-making. As far as I know, there are no "education law" casebooks or textbooks designed for law school use. I understand that Professors Bickel and Simons, however, teach a course in education law at the Yale Law School for which they have prepared material. I am currently giving an education law seminar at the University of Pennsylvania Law School and have prepared materials on education law for the University of Pennsylvania Law School Reginald Heber Smith Community Lawyer Fellowship Program. There are a number of books that are used in schools of education for law courses. See, e.g., R. DRURY & K. RAY, *PRINCIPLES OF SCHOOL LAW* (1965); N. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* (rev. ed. 1955); A. FLOWERS & E. BOLMEIER, *LAW AND PUPIL CONTROL* (1964); E. FULBRIGHT & E. BOLMEIER, *COURTS AND THE CURRICULUM* (1964); R. HAMILTON & P. MORT, *THE LAW AND PUBLIC EDUCATION* (2d ed. 1959); A. REZNY, *LEGAL PROBLEMS OF SCHOOL BOARDS* (1966). (It should be pointed out that, with the exception of Dean Hamilton, all of these authors are principally involved in education, not law.)

Writing in 1964, Lavern L. Cunningham, a professor of education, remarked: "We educationalists find it most amusing to observe the contemporary discovery of local school systems by political and social scientists. It is as if thirty-five thousand local units of government have popped up unexpectedly." Cunningham, *Community Power: Implications for Education*, in *THE POLITICS OF EDUCATION IN THE LOCAL COMMUNITY* 27, 33 (R. Cahill & S. Hencley eds. 1964). Professor Cunningham, I think, would be equally amused to observe the contemporary discovery, or lack of discovery, of local school systems by lawyers, courts, and legal thinkers.

¹² See, e.g., *Goss v. Board of Educ.*, 373 U.S. 683 (1963); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd per curiam*, 380 F.2d 385, *cert. denied*, 389 U.S. 840, 965 (1967); *Bell v. School City*, 324 F.2d 209 (1963); *cert. denied*, 377 U.S. 924 (1964); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. REV. 1147 (1966); Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U. L. REV. 157 (1963); Rousselot, *Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West: The Emerging Role for Private Constitutional Litigation*, 35 GEO. WASH. L. REV. 698 (1967).

¹³ See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); J. LODER, *RELIGION AND THE PUBLIC SCHOOLS* (1965); Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1; Bruton, *Education, Religion and the Bill of Rights Today*, in *CURRENT LEGAL CONCEPTS IN EDUCATION* 63 (L. Graber ed. 1966); Sutherland, *Establishment Accord—ing to Engel*, 76 HARV. L. REV. 25 (1962).

¹⁴ See, e.g., *Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961); Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406 (1957); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 L. IN TRANSITION Q. 1 (1965); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1128-57 (1968); Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963).

of school board decision-making in the total societal scheme.¹⁵ Indeed, more than neglect has been the result. A preoccupation with constitutional issues has distorted both the constitutional and non-constitutional questions involved. For example, the issue of the power of a school board to prohibit extreme hair and dress styles often has been joined as freedom of expression versus state power,¹⁶ distorting both the first amendment and the legislative delegation of power to school boards. This article is an attempt to ameliorate this situation by exploring the nonconstitutional limits of the power of school boards to make rules governing pupil conduct and status.¹⁷

I. TRADITIONAL VIEWS OF SCHOOL BOARD POWER

A. Geographic and Temporal—"In Loco Parentis"

Recent decisions reviewing the validity of school board rules concerning student conduct or status have not contained any serious analysis of the derivation and scope of school board regulatory power. Authority for school board action, if questioned at all, is commonly found in the general enabling act.¹⁸ Yet this has not always been true, and in the past courts have struggled to demarcate the limits of this power. One line of cases, following Blackstone's concept that the instructor acts *in loco parentis*, has viewed school board power as deriving from parental authority. Under this view, the school has plenary parental power over pupils while they are in school;¹⁹ con-

¹⁵ See Van Alstyne, *supra* note 14; Comment, 17 J. PUB. L. 151 (1968).

¹⁶ See, e.g., *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967); *Finot v. Pasadena City Bd. of Educ.*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (Dist. Ct. App. 1967) (teacher's right to wear beard); Brickman, *Civil Liberties and Uncivility in School*, 95 SCHOOL & SOCIETY, Feb. 18, 1967, at 102; Comment, *The Personal Appearance of Students*, *supra* note 7; Comment, 17 J. PUB. L. 151 (1968); *Is Long Hair a Civil Right?* N.Y. Times, Oct. 16, 1966, § 4 at 11, col. 3. Compare the current litigation in *Perry v. Grenada Municipal Separate School Dist.*, Civil No. WC6736 (N.D. Miss. 1967), involving the exclusion of an unwed mother from school. As of this writing a preliminary injunction was denied by Judge Clayton in a memorandum opinion (December 27, 1967) that discussed only constitutional issues. The papers in the case also indicate that the plaintiff relies almost exclusively on constitutional issues. This litigation also illustrates another aspect of the current fixation with constitutional issues—the tendency to resort to federal courts whenever possible. See also *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir.), *cert. denied*, 89 S. Ct. 98 (1968).

¹⁷ This does not mean that the type of considerations relevant to a determination that a certain activity is constitutionally protected so as to be beyond the power of the government to regulate are not relevant to a determination that, under a given statutory scheme, an activity is to be regulated (if at all) only by the general legislature and not by educational administrative organs. Evidence of this will be seen throughout this article.

¹⁸ See, e.g., *Board of Directors v. Green*, 259 Iowa 1260, 1262, 147 N.W.2d 854, 857 (1967); *State ex rel. Thompson v. Marion County Bd. of Educ.*, 202 Tenn. 29, 34, 302 S.W.2d 57, 59 (1957).

¹⁹ See *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557 (1933); *McLean Independent School Dist. v. Andrews*, 333 S.W.2d 886 (Tex. Civ. App. 1960); *Flory v. Smith*, 145 Va. 164, 134 S.E. 360 (1926).

versely, the school has no power over them once they return to the home, the domain of the real parent.²⁰

A clear statement of the rule that school boards have plenary parental power over pupils while they are actually attending school appears in the 1933 Nebraska case of *Richardson v. Braham*.²¹ A school board regulation prohibited high school students from leaving the school grounds during the school day of 9:00 A.M. to 3:05 P.M. "except such students as live quite close to the high school building, and whose parents request in writing that they be permitted to go home."²² The regulation was challenged by a group of parents in an action brought to enjoin its enforcement. Prior to the adoption of the regulation a number of students had patronized a private cafeteria adjacent to the school grounds. The school district itself operated a cafeteria in the school building. In upholding the rule the court stated:

During school hours . . . general education and the control of pupils who attend public schools are in the hands of school boards, superintendents, principals and teachers. This control extends to health, proper surroundings, necessary discipline, promotion of morality and other wholesome influences, while parental authority is temporarily superseded.²³

The Florida Supreme Court has written in a similar vein in upholding the expulsion of a college student:

As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand *in loco parentis* and in their discretion may make any regulation for their government which a parent could make for the same purpose²⁴

The fact that a particular school board rule governs conduct that takes place at school rather than away from school may well be significant in determining its validity.²⁵ Yet, the view that the school

²⁰ See *Hobbs v. Germany*, 94 Miss. 469, 49 So. 515 (1909); *State ex rel. Clark v. Osborne*, 24 Mo. App. 309 (1887); *Dritt v. Snodgrass*, 66 Mo. 286 (1877). An in-school/out-of-school dichotomy would leave in doubt the question of control over pupil behavior en route to and from school. Some states have passed statutes specifically giving the school authorities the same power over the pupils on the way to and from school as they have over pupils in school. See, e.g., N.J. REV. STAT. § 18A:25-2 (1968); PA. STAT. ANN. tit. 24, § 13-1317 (1967); VA. CODE ANN. § 22-72(2) (1964). In other jurisdictions, courts have had to solve the problem without legislative guidance. See *O'Rourke v. Walker*, 102 Conn. 130, 28 A. 25 (1925); *Jones v. Cody*, 132 Mich. 13, 92 N.W. 495 (1902); *Deskins v. Gose*, 85 Mo. 485 (1885); cf. *Clery v. Booth* [1893] 1 Q.B. 465.

²¹ 125 Neb. 142, 249 N.W. 557 (1933); see cases cited *supra* note 19.

²² 125 Neb. at 143, 249 N.W. at 558.

²³ *Id.* at 145-46, 249 N.W. at 559.

²⁴ *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1924).

²⁵ See text accompanying notes 38-41 *infra*.

board has plenary power over pupils in school is an oversimplification and distortion of the *in loco parentis* doctrine.

The classic statement of the doctrine comes from Blackstone:

[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *vis.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.²⁶

Three things should be noted about this statement. First, Blackstone's language of "restraint and correction" is consistent with the fact that the *in loco parentis* doctrine has traditionally been cited as a justification for the use of reasonable force to punish what might be called "unquestionably wrong" pupil conduct, rather than as a justification for the regulation, through school rules, of conduct about which reasonable men might differ. In other words, the doctrine traditionally has been used to justify the corporal *form* of punishment rather than the underlying basis for the punishment.²⁷ Second, Blackstone stated that a parent "may" delegate his authority to a schoolmaster, thus resting the doctrine on a voluntary delegation by the parent rather than a legal displacement of parental authority.²⁸

These two points, however, do not seem significant in an age of compulsory and public education. Whether the power is properly termed *in loco parentis* authority or something else, it is clear that school authorities are not restricted to punishing pupils only for those activities that all men would condemn. There is no doubt that state educational codes delegate to school boards the power to make some debatable rules of student conduct. In making these rules school authorities are not restricted to fulfilling parental desires: the duty of public school authorities to educate and protect the children placed in their charge gives them the authority to adopt rules of conduct necessary to carry out that duty even though a parent may object to the application of a particular rule to his child.²⁹

²⁶ 1 W. BLACKSTONE, COMMENTARIES *453. See Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1367-72 (1963).

²⁷ See *Guerrieri v. Tyson*, 147 Pa. Super. 239, 241, 24 A.2d 468, 469 (1942); Note, *supra* note 26, at 1367-68, and cases cited therein; Comment, 55 CALIF. L. REV. 911, 916 and cases cited therein; RESTATEMENT (SECOND) OF TORTS §§ 147-55 (1965).

²⁸ Cf. *Drake v. Thomas*, 310 Ill. App. 57, 33 N.E.2d 889 (1941); RESTATEMENT (SECOND) OF TORTS § 153(1) (1965).

²⁹ RESTATEMENT (SECOND) OF TORTS § 153 (1965) states:

Power of Parent to Restrict Privilege.

(1) One who is in charge of the control, training, or education of a child solely as the delegate of its parent is not privileged to inflict a punishment

However, it is significant that Blackstone's statement does not support a doctrine that school authorities *completely* displace parental authority during the school day. The Blackstonian *in loco parentis* theory gives the school authorities only that "portion of the power of a parent . . . as may be necessary to answer the purposes for which he is employed."

A 1916 Texas case recognizes this principle in the following terms:

Generally speaking, it must be said that the superintendent, principal, and board of trustees of a public free school, to a limited extent at least, stand, as to pupils attending the school, in *loco parentis*, and they may exercise such powers of control, restraint, and correction over such pupils as may be reasonably necessary to enable the teachers to perform their duties and to effect the general purposes of education.³⁰

Other courts have also recognized that the *in loco parentis* doctrine, properly understood, does not mean that school authorities displace parents as to all schoolhouse activities.³¹ An interesting example

which the parent has forbidden or to punish the child for doing or refusing to do that which the parent has directed the child to do or not to do.

(2) One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, notwithstanding the parent's prohibitions or wishes.

It should be noted that this section is concerned only with discipline for the good of the offending child. Section 154 makes it clear that, even in a private school, authorities can discipline a child contrary to his parent's wishes where it is necessary "for the education and training of the children as a group." However, as to the training and education of the individual child, the *Restatement* retains the voluntary nature of the Blackstonian rule as to private schools, but rejects it as to public schools. Moreover, this rejection is not limited to compulsory school law attendance, concerning which it could be said that, as far as is necessary to educate the child, the legislature has decided that school authorities do displace parental authority. Rather the *Restatement* rejects the delegation theory as to both compulsory and voluntary public school attendance. See Comment *d*. Although the rationale for this is not stated clearly in the Comment, it appears to be based on the principle that a parent cannot avail himself of the facilities of a public school and then deny that institution the power to perform the function for which it was created. Cf. *Samuel Benedict Memorial School v. Bradford*, 11 Ga. 801, 36 S.E. 920 (1900); *Stuckey v. Churchman*, 2 Ill. App. 584 (1878); *Kidder v. Chellis*, 59 N.H. 473 (1879); *Commonwealth ex rel. School Dist. v. Bey*, 166 Pa. Super. 136, 70 A.2d 693 (1950). But cf. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (Dist. Ct. App. 1921); *Trustees of Schools v. People ex rel. Van Allen*, 87 Ill. 303 (1877); *Rulison v. Post*, 79 Ill. 567 (1875); *State ex rel. Kelly v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *State ex rel. Sheibley v. School Dist.*, 31 Neb. 552, 48 N.W. 393 (1891).

³⁰ *Hailey v. Brooks*, 191 S.W. 781, 783 (Tex. Civ. App. 1916).

³¹ See *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (1921); *Trustees of Schools v. People ex rel. Van Allen*, 87 Ill. 303 (1877); *Rulison v. Post*, 79 Ill. 567 (1875); *State ex rel. Kelly v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N.W. 373 (1891); *Guerrieri v. Tyson*, 147 Pa. Super. 239, 23 A.2d 468 (1942); *State ex rel. Bowe v. Board of Educ.*, 63 Wis. 234, 23 N.W. 102 (1885).

is the 1942 Pennsylvania case of *Guerrieri v. Tyson*,³² concerning a statute that expressly provided:

Every teacher in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.³³

In *Guerrieri*, a student developed an infected finger while in school. His teacher sought to treat it and in so doing aggravated the infection, permanently disfiguring the student's hand. Despite the broad language of the statute, the court rejected it as a defense to the resultant assault and battery action on the grounds that the statute should be construed as limiting the grant of parental authority to school administrators to those powers necessary to the effectuation of the school's purposes. The court stated:

Under the delegated parental authority implied from the relationship of teacher and pupil, a teacher may inflict reasonable corporal punishment on a pupil to enforce discipline . . . but there is no implied delegation of authority to exercise her lay judgment, as a parent may, in the matter of the treatment of injury or disease suffered by a pupil. . . . Whether treatment of the infected finger was necessary was a question for the boy's parents to decide. The status of a parent, with some of the parent's privileges, is given a school teacher by law in aid of the education and learning of the child [citing the Pennsylvania statute] and ordinarily does not extend beyond matters of conduct and discipline. There is nothing in the teacher-pupil relationship between the defendants in this case and the minor plaintiff which can relieve them from responsibility for their acts.³⁴

The *Restatement of Torts, Second*, codifies this rule in the following language:

One who is charged only with the education or some other part of the training of a child has the privilege of using force or confinement to discipline the child only in so far as the privilege is necessary for the education or other part of the training which is committed or delegated to the actor.³⁵

One who is in charge of the training or education of a group of children is privileged to apply such force or impose

³² 147 Pa. Super. 239, 24 A.2d 468 (1942).

³³ PA. STAT. ANN. tit. 24, § 13-1317 (1962), as amended, (Supp. 1967).

³⁴ 147 Pa. Super. at 241, 24 A.2d at 469.

³⁵ RESTATEMENT (SECOND) OF TORTS § 152 (1965).

such confinement upon one or more of them as is reasonably necessary to secure observance of the discipline necessary for the education and training of the children as a group.³⁶

These two sections read together embody the rule that the *in loco parentis* authority of a school over a student is limited to the purpose of the school's existence: the student's education or the education of the group of which the student is a member.³⁷

The converse of the oversimplified *in loco parentis* doctrine of plenary school board power while the student is in school is that school boards have no power over a pupil once he returns home. The case most often cited for this rule is *Dritt v. Snodgrass*,³⁸ an 1877 Missouri decision. A school board rule prohibiting pupils from attending social parties during the school year was challenged when the parents of a high school pupil expelled for violation of the rule brought suit for damages against the school board. The Missouri Supreme Court affirmed a demurrer to the declaration on the grounds that a suit for damages was not the proper remedy.³⁹ A majority of the court, however, went on to state:

When the schoolroom is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school, he may be punished or even expelled, under proper circumstances; for his conduct when at home, he is subject to domestic control. The directors, in prescribing the rule that scholars who attend a social party should be expelled from school, went beyond their power, and invaded the right of the parent to govern the conduct of his child, when solely under his charge.⁴⁰

As with the *in loco parentis* doctrine itself, the rule stating that the school board has no power over a pupil's conduct at home embodies

³⁶ RESTATEMENT (SECOND) OF TORTS § 154 (1965).

³⁷ See also RESTATEMENT (SECOND) OF TORTS § 153, Comment *d* (1965) providing that:

no order of the school board or other body in charge of the public schools can confer upon the school authorities any privilege in excess of those stated in this Topic.

³⁸ 66 Mo. 286 (1877).

³⁹ In refusing to hold the school board members personally liable in damages for illegally expelling a student the court stated:

School directors are elected by the people, receive no compensation for their services, are not always or frequently men who are thoroughly informed as to the best modes of conducting schools.

Id. at 293. Four of the 5 judges indicated in a concurring opinion that plaintiff could have recovered had malice been alleged and proven.

⁴⁰ *Id.* at 298.

some valid principles, but is nevertheless an oversimplification of the issue. Just as the courts have recognized that not all schoolhouse conduct is subject to school control, so they have recognized that not all outside conduct is free from school control.⁴¹

An early case upholding school sanctions applied to out-of-school conduct is the 1859 Vermont case of *Lander v. Seaver*.⁴² Young master Lander, while in the company of some other pupils, was driving his parents' cows past his teacher's house an hour and a half after school had ended and was heard (presumably by his teacher) referring to his teacher as "Old Jack Seaver." The following day Old Jack whipped him for the reference, and Lander brought an assault and battery action. A judgment for the teacher was reversed on the grounds that the jury charge on excessive force was erroneous. In the course of its opinion, however, the court upheld a jury charge that corporal punishment was permissible under the circumstances. After noting the general rule that school authorities lack power to act in regard to out-of-school activities, the court stated that there was an exception to this rule for outside activity that "has a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination."⁴³

⁴¹ Courts have upheld school sanctions against students for engaging in such outside school activities as (1) writing and publishing a poem satirizing school rules, *State ex rel. Dresser v. District Bd.*, 135 Wis. 619, 116 N.W. 232 (1908); *cf.* *Wooster v. Sunderland*, 27 Cal. App. 51, 148 P. 959 (Dist. Ct. App. 1915). *But cf.* *Murphy v. Board of Directors*, 30 Iowa 429 (1870). *See generally* *Morrison v. City of Lawrence*, 186 Mass. 456, 72 N.E. 91 (1904). (2) Joining a high school fraternity, *Wilson v. Board of Educ.*, 233 Ill. 464, 84 N.E. 697 (1908); *Coggins v. Board of Educ.*, 223 N.C. 763, 28 S.E.2d 527 (1944); *Wayland v. Hughes*, 43 Wash. 441, 86 P. 642 (1906); *cf.* *Webb v. State Univ.*, 125 F. Supp. 910 (N.D.N.Y. 1954); *Isrig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946); *Antell v. Stokes*, 287 Mass. 103, 191 N.E. 407 (1934). *But see* *Wright v. Board of Educ.*, 295 Mo. 466, 246 S.W. 43 (1922). *But cf.* *Stallard v. White*, 82 Ind. 278 (1882); *Wilson v. Abilene Independent School Dist.*, 190 S.W.2d 406 (Tex. Civ. App. 1945). (3) Becoming intoxicated in town on Christmas day, *Douglass v. Campbell*, 89 Ark. 254, 116 S.W. 211 (1909). (4) Getting married, *Board of Directors v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967); *State ex rel. Baker v. Stevenson*, 27 Ohio Op. 2d 223, 189 N.E.2d 181 (1962); *State ex rel. Thompson v. Marion County Bd. of Educ.*, 202 Tenn. 29, 302 S.W.2d 57 (1957); *Kissick v. Garland Independent School Dist.*, 330 S.W.2d 708 (Tex. Civ. App. 1959); *Starkey v. Board of Educ.*, 14 Utah 2d 227, 381 P.2d 718 (1963); *cf.* *Cochrane v. Board of Educ.*, 360 Mich. 390, 103 N.W.2d 569 (1960). *But see* *Nutt v. Board of Educ.*, 128 Kan. 507, 278 P. 1065 (1929); *Board of Educ. v. Bentley*, 383 S.W.2d 677 (Ky. Ct. App. 1964); *McLeon v. State ex rel. Colmer*, 154 Miss. 468, 122 So. 737 (1929); *Anderson v. Canyon Independent School Dist.*, 412 S.W.2d 387 (Tex. Civ. App. 1967). (5) Becoming pregnant, *State ex rel. Idle v. Chamberlain*, 39 Ohio Op. 2d 262, 175 N.E.2d 539 (1961). (6) Engaging in illicit sexual conduct, *Sherman v. Inhabitants of Charlestown*, 62 Mass. (8 Cush.) 160 (1851); *cf.* *Perry v. Grenada Mun. Separate School Dist.*, Civ. No. WC6736 (N.D. Miss. Dec. 27, 1967). *But cf.* *Nutt v. Board of Educ.*, 128 Kan. 507, 278 P. 1065 (1929).

⁴² 32 Vt. 114 (1859).

⁴³ *Id.* at 120. Earlier in its opinion the court stated the general rule that school authority ends when the pupil arrives home. The court, however, went on to say that the exception of outside action that has a direct tendency to injure the school was a rule "[b]y common consent and by the universal custom in our New England schools" *Id.* at 121. No authority was cited for this statement. The only case I have

Thus, school board power cannot be demarcated absolutely on any in-school/out-of-school dichotomy. Under the Blackstonian *in loco parentis* doctrine, properly understood, school board authority must be demarcated on more subtle distinctions derived from the functions that society has given the school board to perform.

B. School Boards: Local Government or State Administrative Agencies?

The Blackstonian common-law conception of school authority was based on the view that parental authority was given up to the school. This doctrine predated extensive state involvement in public education. Today's school board is not a private agency designed to fulfill parental desires, but rather a public agency operating under a legislative delegation of authority.⁴⁴

Many attempts have been made to classify local school boards either as legislative organs of local government or as administrative agencies of state government. The proponents of the local government theory emphasize that the vast majority of school boards in this country are popularly elected, that membership comes from the local citizenry, and that we have a strong historical tradition of local autonomy in public education.⁴⁵ Those who prefer to consider the

found decided before *Lander* that supports this exception is *Sherman v. Inhabitants of Charlestown*, 62 Mass. (8 Cush.) 160 (1851), discussed in text accompanying notes 102-04 *infra*. This does not, of course, mean that there was no such customary school board practice or general community understanding. Compare text accompanying note 143 *infra*.

⁴⁴ One preliminary question is whether this legislative delegation preempts the common-law *in loco parentis* authority. No court or legal writer has ever adequately explored this issue, and cases in which the courts state that school boards have only the powers statutorily granted to them, *see, e.g.*, *Cray v. Howard-Winneschick Community School Dist.*, 260 Iowa —, 150 N.W.2d 84 (1967); *Independent School Dist. v. Mattheis*, 275 Minn. 383, 147 N.W.2d 374 (1966), exist alongside cases which recognize an *in loco parentis* basis for school board authority, *see* notes 19-37 *supra* and accompanying text.

The two lines of development may be reconciled on the ground that while the statutory delegation of school board authority is exclusive, the statutory scheme must nevertheless be read against the background of the common-law rules. However, for purposes of this article, it is not necessary to answer this question definitely. Both doctrines reach the same result as to the criteria for determining the validity of school board regulatory power.

⁴⁵ *See* R. CAMPBELL, L. CUNNINGHAM & R. MCPHEE, *THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS* 80-109, 157-85 (1965); Cunningham, *supra* note 11; Eliot, *Toward an Understanding of Public School Politics*, 53 AM. POL. SCI. REV. 1032 (1959). A 1962 study by the United States Office of Education found that, in districts enrolling 1200 or more pupils, nearly 86% of the school board members were elected. A. WHITE, *LOCAL SCHOOL BOARDS: ORGANIZATION AND PRACTICES* 8 (1962). A somewhat lesser percentage (73%) were elected in the larger school districts, *i.e.*, those enrolling more than 25,000 pupils. *Id.* A survey of the current state statutes indicates that in 31 states all local school boards are elected, in 4 states and the District of Columbia all school boards are appointed, and in 14 states there is a mixed system with some local boards elected and some appointed. In the mixed states the usual pattern is for the larger city boards to be appointed and the others elected. One state, Hawaii, does not have local school boards. *Id.*

school board as the agency of state government charged with administering public education in a given geographic section emphasize the state's plenary legal power over the organization, powers, and functions of the local boards.⁴⁶

As with other questions of characterization it is essential to bear in mind the purpose for which the characterization is made. The writers and courts attempting the classification may be dealing with such distinct and disparate issues as the application of a mechanic's

⁴⁶ See R. DRURY & K. RAY, *supra* note 11, at 7, 103-06; R. HAMILTON & P. MORT, *supra* note 11, at 116; Edwards, *The Place of the Public School in Our Governmental Structure*, in CURRENT LEGAL CONCEPTS IN EDUCATION 29 (L. Garber ed. 1966).

Although the statutory schemes vary somewhat, the basic outline of the structures of public education in the states is quite uniform. Each state constitution contains a provision for public education, generally one commanding the state legislature to establish and maintain a public system of education. R. DRURY & K. RAY, *supra* note 11, at 7. See the Iowa statute quoted in the text at p. 375 *supra*. This broad delegation of rulemaking power to local school boards is responsible for the fact that the overwhelming majority of decisions in the subject area of this study—the school-pupil relationship—are made by such local school boards. This extensive allocation of power to local school boards is consistent with the historical pattern of public education in this country. For a good discussion of this history see R. CAMPBELL *et al.*, *supra* note 45. This pattern does not, of course, mean that public education is exclusively the province of the local boards. As discussed below in the text, local autonomy has always existed at the will of and within the limits set by the state. In our century the federal government has exercised an increasing degree of involvement with public education. See *id.* at 20-46. Education, then, like many other public activities in our society, is subject to the power and influence of local bodies and the state and federal governments. Also, within the state system there are a number of agencies other than local school boards involved in public education decision making. There are often statutory provisions on such things as school boundaries and financing. Reference has already been made to statutes concerning high school fraternities, see note 8 *supra*.

Each state in this country also has a central state administrative authority with jurisdiction over education. Indeed, in most states there are two such agencies, a state board of education (existing in 48 of the 50 states) and a chief state school officer, usually denominated the state superintendent of education (existing in all 50 states). In the 24 states where the state superintendent of education is appointed by the state board of education, he is an employee of the state board, as with a local district superintendent of schools, and authority resides in the state board. However, in the other states the state superintendent is either elected (21 states) or appointed by the governor (5 states), and has authority independent of the state board of education. The line of demarcation between these two authorities is usually unclear. See R. CAMPBELL *et al.*, *supra* note 45, at 50-79. With the notable exception of recent decisions in hair and dress cases by the New Jersey State Board of Education (*Pelletreau v. Board of Educ.*, Sept. 6, 1967), and the New York Commissioner of Education (*In re Dalrymple*, March 14, 1966), and a rule concerning pregnant girls adopted by the Maryland State Board of Education (Resolution No. 1967-43, re Bylaw 720:3, July 26, 1967), all of which will be discussed below, these central agencies have not been a significant factor in decision making in the area of school-pupil relations. See generally, on the powers and duties of central agencies, R. CAMPBELL *et al.*, *supra* note 45, at 47-79; R. HAMILTON & P. MORT, *supra* note 11, at 19-21, 83-115.

Twenty-seven states also have an intermediate unit of public education administration, *i.e.*, a unit between the local school board and the state agencies. See generally R. CAMPBELL *et al.*, *supra* note 45, at 110-39. Again, however, this unit has not had significant influence on the subject area of this article.

Finally, among formal decision-makers in public education, are the professional educational staff from the superintendent down through the classroom teachers. This group does have a significant effect on decisions in the area of school-pupil relations.

The basic policy decisions in this area, however, are made by the school boards either by rule or by adjudicating the results of staff action against a pupil. Therefore, staff action generally either implements prior board policy, or has been ratified by board adjudication. Thus, we return to the fact that the primary policy maker in the area of school-pupil relations is the local school board.

lien law to a school board,⁴⁷ the application of local zoning ordinances to school buildings,⁴⁸ the validity of the delegation of taxing power to school boards,⁴⁹ the allocation of power to reorganize school districts,⁵⁰ the application of the "one-man, one-vote" principle to school board elections,⁵¹ or the obligation of the school board to be responsive to the electorate.⁵² Obviously the formulation of a single, all-embracing characterization of the school board, either as a legislative local government agency or as an administrative branch of the state government structure would becloud sound analysis and create more problems than would be solved. The classification, if made at all, must be based on the purposes for which it is made.⁵³

However, a choice need not be made between these two competing characterizations in order to determine the proper demarcation of the scope of school board substantive power over pupil conduct and status.⁵⁴ Whether the school board is viewed as an agency of state government or as a local government unit, its function is the same—operating the public school system within a delimited geographic area. The overwhelming weight of authority in this country is to the effect that, subject to the powers granted to the federal government, sovereign governmental power resides in the state, not in any of its political subdivisions.⁵⁵ A local government unit with general functions, for example, a municipal government, is one to which the legislature has

⁴⁷ *Commissioner of Pub. Instruction v. Fell*, 52 N.J. Eq. 689, 29 A. 816 (1894). See also *Florman v. School Dist.*, 6 Colo. App. 319, 40 P. 469 (1895).

⁴⁸ *City of Bloomfield v. Davis County Community School Dist.*, 254 Iowa 900, 119 N.W.2d 909 (1963); *Roman Catholic Diocese v. Ho-Ho-Kus Borough*, 42 N.J. 556, 202 A.2d 161 (1964). For a discussion of cases on this issue as well as other issues involving the classification of school boards, see Fox, *The Authority of the Municipality to Control and Support Public School*, in *CURRENT LEGAL CONCEPTS IN EDUCATION* 163 (L. Garber ed. 1966).

⁴⁹ *Moore v. Pittsburgh School Dist.*, 338 Pa. 466, 13 A.2d 29 (1940); *Wilson v. School Dist.*, 328 Pa. 22, 195 A. 90 (1937).

⁵⁰ *Kies v. Lowrey*, 199 U.S. 233 (1905); *School Dist. v. Zediker*, 4 Okla. 599, 47 P. 482 (1896). See also *Buttolph v. Osborn*, 119 Vt. 116, 119 A.2d 686 (1956); *R. HAMILTON & P. MORT*, *supra* note 11, at 588-614.

⁵¹ *Compare Sailors v. Board of Educ.*, 387 U.S. 105 (1967), and *Comment*, 21 VAND. L. REV. 153 (1967), with *Avery v. Midland County*, 390 U.S. 474 (1968).

⁵² See *Buttolph v. Osborn*, 119 Vt. 116, 119 A.2d 686 (1956); *Eliot, Toward an Understanding of Public School Politics*, 53 AM. POL. SCI. REV. 1032 (1959); *Shannon, School Board Communications*, in *LEGAL PROBLEMS OF SCHOOL BOARDS* 53, 77 (A. Reznay ed. 1966); N. MASTERS, R. SALISBURY & T. ELIOT, *STATE POLITICS AND THE PUBLIC SCHOOLS* 1-5 (1964).

⁵³ See Fox, *supra* note 48, for a good discussion of the authority of municipal government over school boards which recognizes this principle and correctly states that the touchstone for decision must be legislative intent. See also *Wilmore v. Annear*, 100 Colo. 106, 65 P.2d 1433 (1937).

⁵⁴ The fact of popular election, however, does have significance in deciding some of the issues involved in determining the basic criteria for the exercise of school board power; see text accompanying notes 66-68, 177 *infra*.

⁵⁵ J. FORDHAM, *LOCAL GOVERNMENT LAW* 40-50 (1949).

delegated extensive legislative power over local matters.⁵⁶ Clearly, however, legislatures have not delegated such general legislative power to school boards.⁵⁷ Under a local government characterization, a school board is a special local unit created to regulate matters of concern to public education, not a general local government unit with general legislative power over youths in its geographic territory.⁵⁸ Thus, whether viewed as an instrument of state educational policy or as a special-function local government unit, a school board's charge is limited to the regulation of public education.

II. A FUNCTIONAL ANALYSIS OF SCHOOL BOARD POWER

Both the *in loco parentis* doctrine and the doctrine of legislative delegation of authority lead to the same result: a school board has that power, and only that power, over student conduct and status which is properly related to its function of educating the pupils in its charge. This function may be divided into two main categories:

1. Education per se, and
2. Serving as a host to the pupils.

Obviously, the primary function of the public school system is educating its pupils.⁵⁹ Yet in terms of the concerns of this article, the ancillary, host function is more significant. Education takes place in buildings that must be maintained in good repair. Children are educated in groups and must be protected from harm from each other while they are congregated together.

A necessary condition to the validity of a school board rule is that it serve the education per se or host functions. However, the determination that a rule meets this requirement does not end the inquiry into its validity. Basic to our societal and governmental structures is the assumption that certain areas of conduct, if subject to any governmental regulation at all, should be regulated by the legislature. These are usually areas, such as teenage marriage, that require a delicate balancing of complex societal values. This does not mean that the legislature can never delegate to subordinate bodies the authority to regulate these areas. It does mean, however, that broad, vague statutory grants of power to such bodies should not readily be

⁵⁶ *Id.* at 367-68.

⁵⁷ *E.g.*, Iowa Code § 279.8 (1966), quoted in text accompanying note 9 *supra*, which speaks of "pupils," not "children."

⁵⁸ J. FORDHAM, *supra* note 55, at 25-31. See also *Barth v. School Dist.*, 393 Pa. 557, 143 A.2d 909 (1958).

⁵⁹ A part of the education per se function is that of creating and maintaining a proper educational atmosphere. See note 93 *infra*.

interpreted as including such a delegation of authority. The presumption of our societal and governmental systems often require that these delegations be explicit.⁶⁰

Furthermore, broad statutory grants of rulemaking power to school boards should not be read as legislative permission to promulgate any and all rules related to the functioning of the educational structure regardless of the effect that such rules might have on other societal interests. School boards that make and enforce rules do not operate in isolation, and, particularly at the fringe of school board authority, school rules may collide with those of other decision makers, public and private. When this occurs, a school board rule cannot be found valid simply because it serves a valid school board function. The contrary rule of the other decision maker may also serve a purpose appropriate to its function. It therefore becomes necessary to determine which has primacy in each particular case. In the absence of a specific

⁶⁰ See *Mathews v. Board of Educ.*, 127 Mich. 530, 86 N.W. 1036 (1901) (Moore, J., dissenting); *Wright v. Board of Educ.*, 295 Mo. 466, 246 S.W. 43 (1922); *State ex rel. Kelly v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914) (Letton, J., concurring); cf. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting):

So far as national law is concerned a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts. I deem a requirement as to the invasion of a person to stand on very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious economic and fair conduct of litigation. . . .

. . . And so I conclude that to make the drastic change that Rule 35 sought to introduce would require explicit legislation.

This argument is a variant of the classic delegation doctrine, which is premised on the theory that, in our governmental structure, certain policy decisions must be made by the sovereign representative legislature and that the legislature cannot avoid this responsibility by passing it on to administrators. For discussions of the classic delegation doctrine see K. DAVIS, *ADMINISTRATIVE LAW* §§ 2-01 to 2-16 (1958); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-86 (1965). The doctrine may have only minimal vitality today; see K. DAVIS, *supra*; L. JAFFE, *supra*. But see *United States v. Robel*, 389 U.S. 258, 269 (1967) (Brennan, J., concurring); *Zemel v. Rusk*, 381 U.S. 1, 20 (1965) (Black, J., dissenting); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953). It has never been employed to invalidate the delegation of a general rulemaking power to school boards. Yet the underlying premise that our social and governmental structures assume that certain areas of conduct, if regulated at all by government, should be regulated at the legislative level, still has validity. At the very least, therefore, the delegation doctrine should remain vital as a principle of statutory construction. General grants of power to school boards should not be construed to enable them to make decisions of the type that are generally reserved for the legislature. An act should not be construed as delegating such power to school boards unless the terms of the delegation are explicit. See generally *Zemel v. Rusk*, 381 U.S. 1, 27 (1965) (Goldberg, J., dissenting); *Kent v. Dulles*, 357 U.S. 116 (1958); A. BICKEL, *THE LEAST DANGEROUS BRANCH*, 156-169 (1962); Freedman, *Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. PA. L. REV. 145, 153-57 (1966); cf. L. JAFFE, *supra*, at 72-73, 79. This analysis of the delegation doctrine is based on some of the same premises and seeks some of the same objectives as the Supreme Court's use of the void-for-vagueness doctrine in state administrative cases; see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1966). Compare the use of both doctrines by Mr. Justice Brennan in his concurring opinion in *United States v. Robel*, 389 U.S. 258, 269 (1967). See also A. BICKEL, *supra*, at 149-153.

legislative directive as to primacy, the determination must be made through an examination of the total statutory scheme (not just the education code) and the background of societal traditions against which the legislature has enacted this scheme.

A. *Education Per Se*

As indicated above, there are extremely few court decisions concerning the validity of coercive school rules that turn on whether or not the rule is related to the child's education. The host function is much more important for this purpose. Yet, a full discussion of school board power must deal with its power to make coercive rules as a direct part of its educational function.

The only case that I have found which squarely faces the issue whether a given rule is part of a school's basic educational function is *State ex rel. Bowe v. Board of Education*,⁶¹ decided in Wisconsin in 1885. In that case a long-standing rule required

each pupil of sufficient age and bodily strength, upon returning from the play-ground at recess, to bring with him a stick of wood fitted for stove use, to supply the stoves with fuel in the rooms occupied by such pupils, and to keep the rooms warm and comfortable.⁶²

Relator's son was suspended for not bringing in his stick of wood. In an action to compel his reinstatement, the court held the rule invalid; indeed, the court was shocked that any teacher or school board would think the rule valid. It had "nothing to do with the education of the child. It is nothing but manual labor, pure and simple, and has no relation to mental development."⁶³

This court's limited view of the scope of the educational function would be open to great attack today. We have accepted both bodily and social development as legitimate aims of education. As Professor Ernest Brown has written,

There are disputes about methods, and disputes about particular goals and purposes, but there is little dispute within [a very] wide . . . spectrum of persons responsible for education . . . about the comprehensive responsibility of the educational process, or about the idea that education is more than "instruction in the classroom."⁶⁴

⁶¹ 63 Wis. 234, 23 N.W. 102 (1885).

⁶² *Id.* at 235-36, 23 N.W. at 103.

⁶³ 63 Wis. at 237, 23 N.W. at 103.

⁶⁴ Brown, *Quis Custodiet Ipsos Custodes?*—*The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 11.

Typically, courts have had to define the scope of school board authority to act for education per se in cases involving expenditures for equipment and facilities, such as athletic fields, or involving the institution of optional curricular offerings. In these cases, the courts have been virtually unanimous in upholding the school boards' actions.⁶⁵

The sole issue in these cases is a pocketbook one, and whether this is viewed as involving an increase in total expenditure or an allocation of limited resources among competing programs,⁶⁶ the courts are correct in viewing school board power broadly in this respect.⁶⁷ The taxpayer's pocketbook concern finds protection in the representative, locally responsible nature of the school board. There is no need for judicial intervention. Despite the increased flow of federal and state aid to public education, the basic source of funds is still local

⁶⁵ As to equipment and facilities, *see, e.g.*, *Alexander v. Phillips*, 31 Ariz. 503, 254 P. 1056 (1927); *In re Bd. of Pub. Instruction*, 160 Fla. 490, 35 So. 2d 579 (1948); *Dodge v. Jefferson County Bd. of Educ.*, 298 Ky. 1, 181 S.W.2d 406 (1944); *McNair v. School Dist.*, 87 Mont. 423, 288 P. 188 (1930); *Kay County Excise Bd. v. Atchison, T. & S.F. Ry.*, 185 Okla. 327, 91 P.2d 1087 (1939); *Galloway v. School Dist.*, 331 Pa. 48, 200 A. 99 (1938). *But see Wilson v. Graves County Bd. of Educ.*, 307 Ky. 203, 210 S.W.2d 350 (1948). As to curricular offerings, *see Security Nat'l Bank v. Bagley*, 202 Iowa 701, 210 N.W. 947 (1926); *E. FULBRIGHT & E. BOLMEIER, supra* note 11, at 10-78, and cases cited therein. The *Kay County* case involved a provision of the Oklahoma Education Code that empowered school boards "to incur all expenses, within the limitations provided by law, necessary to carry out and fulfill all powers herein granted." After discussing the various possible meanings of the word "necessary" the court concluded:

The vesting of broad powers and discretion in the board of education of independent school districts by the 1937 act, above quoted, points readily to the thought that the Legislature did not intend to so restrict such board as to limit expenses only for things indispensable to the maintenance and operation of its public school system; and we conclude that such expenses as are convenient, useful, appropriate, suitable, proper, or conducive to the desired ends of the general program, and to the conduct of such school system, are authorized to be incurred thereunder, in the discretion of the board, unless otherwise restricted by law.

185 Okla. at 328-29, 91 P.2d at 1089.

⁶⁶ This must be distinguished from the situation in which the school board seeks to spend funds for purposes prohibited, not merely to themselves, but to all branches of the government, *e.g.*, expenditures for religious purposes. It should also be distinguished from the situation in which there is a dispute among government agencies as to which agency is the appropriate one to promote the proposed program.

⁶⁷ Indeed, the wide range of school board discretion as to expenditures has been held to be applicable to spending, not only for curricular purposes, but also for non-curricular educational aids. For example, in *Moseley v. Dallas*, 17 S.W.2d 36 (Tex. Comm. App. 1929), the court upheld the decision of the Dallas School Board to maintain health clinics in those schools providing free examinations to students whose parents had no objections. The clinics also administered emergency first aid but treatment was limited to that service. In the taxpayer suit to enjoin the expenditure of funds for the clinics, the court emphasized the voluntary nature of the examinations, the limited nature of nonconsensual treatment, and the fact that the board of health was in agreement with the school board policy. As a result, the sole issue for determination was whether the school board should spend taxpayers' money for these purposes. The court had little trouble in holding the expenditure proper on the grounds that knowledge of a pupil's physical condition aids the school authorities in educating him. *See also State ex rel. Stoltenberg v. Brown*, 112 Minn. 370, 128 N.W. 294 (1910); *Hallett v. Post Printing & Pub. Co.*, 68 Colo. 573, 192 P. 658 (1920). *But see McGilvra v. Seattle School Dist. No. 1*, 113 Wash. 619, 194 P. 817 (1921).

taxation, and the expenditure of these funds involves no interest other than that common to all the school district's residents as taxpayers.⁶⁸

There are other considerations involved, however, in cases where a school board adopts coercive rules of conduct in order to instill societal values in its pupils. Certainly, instilling such values is an accepted part of the educational function, and may include not only the presentation of information, but also a certain degree of indoctrination.⁶⁹ Yet, there is still a difference, for example, between conducting a course in "Marriage and Family Living," in which the dangers of teenage marriage are discussed and even inveighed against, and excluding married students from school or from extracurricular activities as a means of inducing the other pupils to believe that teenage marriage is undesirable. The former is the traditional mode of education through instruction, or indoctrination by persuasion; the latter is an attempt to instruct or indoctrinate students by imposing sanctions on pupils who violate those rules embodying the values sought to be imparted—values, often, in an area of delicately balanced legislative judgments.⁷⁰ Moreover, the parents who disagree with the

⁶⁸ In general, the cases that support school board expenditures and curricular offerings do not explicitly rely on the fact that the school board is an elected body. However, there are a few exceptions. See *Kay County Excise Bd. v. Atchison*, T. & S.F. Ry., 185 Okla. 327, 91 P.2d 1087 (1939) (state education law evinces an "evident purpose of strong recognition of local self-government and responsibility"); *Security Nat'l Bank v. Bagley*, 202 Iowa 701, 210 N.W. 947 (1926) (addition to curriculum of bank saving plan upheld; court noted that it was especially to interfere with such school board decision since "matters of school administration are kept very closely in the hands of the people themselves"); cf. *Moseley v. Dallas*, 17 S.W.2d 36 (Tex. Comm. App. 1929) (that board was elected is recited in statement of facts but not relied on in the opinion). Even a broad definition of education does not, of course, mean that the school board can spend money for all purposes. See, e.g., *McGilvra v. Seattle School Dist. No. 1*, 113 Wash. 619, 194 P. 817 (1921), where the court struck down a school board's plan for a medical clinic providing extensive services, including dental and surgical operations, for all school children whose parents were unable to pay for services elsewhere. The school board was elected, but the court made no mention of this fact in its opinion. See also *Barth v. School Dist.*, 393 Pa. 557, 143 A.2d 909 (1958), in which the court held invalid an agreement between the Philadelphia School Board and the City of Philadelphia to establish jointly a Youth Conservation Commission for the purpose of organizing, formulating, operating and financing a program to curb juvenile delinquency in Philadelphia. The court struck down the agreement on the ground that the school board's participation in the program was beyond its educational function. It should be noted that the Philadelphia school board is an appointed and not an elected board, although the court did not mention this in the opinion. The significance of this fact in *Barth* may be lessened, however, by the fact that the school board was acting in concert with the elected municipal officials of the city.

⁶⁹ See, e.g., B. BAILZON, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* 14 (1960); J. DEWEY, *DEMOCRACY AND EDUCATION* 11, 20, 321 (1961); N. MCCLUSKEY, *PUBLIC SCHOOLS AND MORAL EDUCATION* (1958).

⁷⁰ In addition to the general presumption against inferring delegation to school boards of decision-making power in areas usually left to legislative judgment, there is also a more specific rule prohibiting the delegation to administrative agencies of power to prescribe or impose punishment. As stated by the United States Supreme Court in *Lyshe v. Lederer*, 259 U.S. 557, 562 (1921):

And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be

indoctrination can counter-indoctrinate at home; but parents whose children have been coerced into following a course of conduct, or who have been penalized for their actions, cannot counter so readily.

Of course, in deciding whether a "Marriage and Family Living" course should be taught, and what its content should be if it is taught, school authorities cannot escape making delicate value judgments. This may, indeed, be a partial explanation of the prevalence of elected school boards in this country.⁷¹ Yet the value judgments involved in such decisions are of different dimensions than those involved in punishing student action that does not conform to a value system prescribed by a school board. Forced conformity to a social value system is the function of the representative, general legislature. Although we usually elect our school boards, as we do our state legislatures and municipal governments, we do not elect them to perform this general legislative function.⁷² Moreover—to return to the example

enforced through the secret bindings and summary action of executive officers. The guarantee of due process of law and trial by jury are not to be forgotten or disregarded.

See 1 COOPER, *STATE ADMINISTRATIVE LAW* 87-88 (1965); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 109-115 (1965); Schwartz, *1952 Survey of New Growth Basis—Administrative Law*, 27 N.Y.U. L. REV. 928-29 (1952); Schwartz, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943).

⁷¹ It is impossible to state with any certainty the historical reasons for the elective nature of most school boards in this country. The control of public education from 1642, the date of the famed Massachusetts School Ordinance, until well into the middle of the 19th century, was in the hands of general local government, with no separate educational agency. See R. CAMPBELL, *supra* note 45, at 85-88, 157-60. This seems to have been an expression of the desire for popular control of education which has persisted to this day. *Id.* at 104-09, 184-87. This may be explained in part by the desire to maintain community control over expenditures, but in addition, important social values are at stake when the school authorities determine curricular and other matters of educational policy. See *id.* at 84-85; Eliot, *supra* note 52, at 1036-39. In Iowa, this concern for popular control over education is reflected in a statute allowing the electorate to vote directly at a regular election on matters such as choice of textbooks or subjects to be taught. IOWA CODE ANN. tit. 12, § 278.1 (Supp. 1968). While we are presently witnessing an increasing federal and state influence on local school policy making, we are simultaneously observing a resurgence of interest in community control of educational policy, particularly in large urban school districts which are made up of different communities.

⁷² Compare *Sailors v. Board of Educ.*, 387 U.S. 105 (1967), with *Avery v. Midland County*, 390 U.S. 474 (1968). Although school boards may be selected through the political process, most people do not regard their members as politicians.

[T]he dogma has evolved that public education must occupy a position above the political conflicts that are waged over other public services, and educators are supposed to abide by the maxim that politics and education do not mix. In the eyes of the public, schools and their operations are removed, or should be removed, from the arenas where other governmental decisions are made. A candidate for a position on the local district school board, for example, often escapes the stigma of a politician. Instead he is viewed as a good citizen who is serving his community. True, if elected, he becomes a part of a local governmental agency, but he becomes a part of an agency set apart or perhaps set above other political units.

N. MASTERS, R. SALISBURY & T. ELIOT, *supra* note 52, at 3-4. See also Cunningham, *supra* note 11; Eliot, *supra* note 52, at 1032; R. CAMPBELL, *supra* note 45, at 83-85. This statement was written before the recent upsurge of interest in community

of teenage marriage—the legislature has adopted a statutory scheme that, within limits, leaves the question to private decision making by the students and their parents. The imposition of sanctions by a school board is an invasion of this legislatively sanctioned, private decision-making scheme.

This analysis does not imply that school boards may never employ coercive rules as a device for education per se, that is, as a device to educate students by instilling in them the belief that certain conduct is disapproved by the school and is, therefore, somehow wrong. It does mean that there is a strong presumption against the validity of such rules, which can only be overcome by showing that, in a particular situation, the educational need for such a device outweighs the opposing factors involved.⁷³ Thus, where married students are excluded from school in order to teach other students that teenage marriage is undesirable, it seems clear that the opposing values far outweigh a school board's interest in education per se. This exclusion forces the students and their parents to choose between marriage and education. Thus the exclusion operates as an invasion of a legislatively sanctioned, private decision-making scheme and, in addition, runs counter to the state policy norm of universal public education.⁷⁴ Finally, the school

control of education in urban areas, yet it refers to areas where there has always been community control, at least in theory. While this community control may be sufficient to support a governmental scheme involving educational expenditure and the traditional educational policy decisions, it is inconsistent with a scheme of plenary legislative power to make social decision. Moreover, school district boundaries are not drawn in terms of appropriate community decision-making units, but rather in terms of educationally functional units. According to a survey by the United States Bureau of the Census, the boundaries of only about 1/6 of all school districts coincide with those of any other unit of local government. BUREAU OF CENSUS, PUBLIC SCHOOL SYSTEMS IN THE UNITED STATES 1961-62, at 2 (1962). See generally R. CAMPBELL, *supra* note 45, at 100-09.

⁷³ Between the two poles of curricular offerings and compulsory rules of conduct, are school board rulings making it mandatory for students to take specific courses. In light of the analysis offered here, it is not surprising that courts are split over whether school boards have such power. Compare *State ex rel. Kelly v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (1921); *Trustees of Schools v. People ex rel. Van Allen*, 87 Ill. 303, (1877); *State ex rel. Sheibley v. School Dist.*, 31 Neb. 552, 48 N.W. 393 (1891); *Morrow v. Wood*, 35 Wis. 59 (1874), with *Mitchell v. McCall*, 273 Ala. 604, 143 So. 2d 629 (1962); *Sewell v. Board of Educ.*, 29 Ohio St. 89 (1876); *Kidder v. Chellis*, 59 N.H. 473 (1879); *Samuel Benedict Memorial School v. Bradford*, 111 Ga. 801, 36 S.E. 920 (1900); *Ruff v. Fisher*, 115 Fla. 247, 155 So. 642 (1934) (dissenting opinion). Required courses involve coercion of students and interference with parental desires concerning the education of their children. Yet this coerced exposure to ideas is different from coerced adherence to norms of conduct. (But see *Mitchell v. McCall*, *supra*, where compulsory physical education was really a type of compelled conduct rather than exposure). As such, it is a lesser invasion of the parental prerogative. Even more significant, it is in keeping with the traditional function of education. Compare the discussion in note 29 *supra*.

⁷⁴ The most obvious illustration of this norm is the existence of compulsory attendance laws in all states with the exception of Mississippi, South Carolina, and Virginia (local option). It is significant that even these 3 states had such laws until 1955 when they were repealed apparently in response to school desegregation. For a

board's education per se interest here is quite weak. Disapproval of teenage marriage can be expressed through traditional instructional techniques. Allowing married students to attend school would not undercut this instruction since this would not appear to the students to be a manifestation of school approval of teenage marriage. In no way would the school board appear responsible for the marriage. The student did not get married on the school grounds, and, indeed, a school board could prohibit a marriage ceremony from taking place on its grounds.⁷⁵ The student arrived at school with a particular status: being married. The school is in no way responsible for that status; it merely accepts it, without approval.

At the opposite pole from the exclusion of married students would be a school rule forbidding students from mutilating American flags on school grounds during school hours, as a coercive device to instill respect for flag and country. Here the educational interest is quite strong and the countervailing factors minimal. The rule prevents an act from taking place on school grounds during school hours. The failure of the school board to impose sanctions against the act might well be taken by the student body as an approval of it. Performing the act at school may also increase its effect by providing an audience,

compilation of state compulsory school laws, see A. STEINHILBER & C. SOKOLOWSKI, *STATE LAW ON COMPULSORY ATTENDANCE* (1966). In addition to compulsory attendance laws there are state constitutional and legislative provisions that provide for universal public education. Every state constitution except that of Connecticut has a provision concerning public education. Virtually every one of these provisions authorizes the legislature to establish and maintain a system of free, public education. A number of these provisions explicitly state that these free public schools shall be open to all children in the state. For excerpts from the state constitutional provisions on public education, see E. BOLMEIER, *THE SCHOOL IN THE LEGAL STRUCTURE* 66-75 (1968). Finally, pursuant to these constitutional mandates, state legislatures have established public schools which, in accordance with statutes, are usually open to all resident children between certain ages, with only narrowly drawn exceptions. *E.g.*, N.Y. EDUC. LAW § 3202 (McKinney 1953):

A person over five and under twenty-one years of age is entitled to attend the public schools maintained in the district or city in which such person resides without the payment of tuition.

As indicated by the New York statute the ages during which a child *may* go to school are much more inclusive than those during which he *must* go to school. In most states the compulsory attendance requirement is from 7 to 16. The permissive age normally begins at age 6 and extends to age 21. Thus the norm of universal public education is not limited to compulsory education, but includes all students who are "entitled," *i.e.*, have a positive legal right, to attend school. See A. STEINHILBER & C. SOKOLOWSKI, *supra*, at 12. As stated by the California Supreme Court in *Ward v. Flood*, 48 Cal. 36, 50, 17 Am. R. 405, 410 (1874):

The advantage or benefit thereby vouchsafed to each child, of attending public school is therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right—a legal right—as distinctively so as the vested right in property owned is a legal right, and as such is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor.

See also, *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

⁷⁵ See note 76 *infra* and accompanying text.

of fellow school-children, that the actor might otherwise be denied. Furthermore, the rule's restrictions on the freedom of students and their parents is not great.⁷⁶ The rule merely prohibits students from engaging in one particular activity during a specified part of the day. Students are free, so far as this rule goes, to desecrate flags at other times. The balance, therefore, is clearly on the side of the power of the school board to adopt and enforce such a rule.

To generalize from these examples, the presumption against coercive education per se rules can be overcome only where the educational interest in such a rule clearly outweighs the countervailing factors. The educational interest is apt to be quite strong when the rule prohibits an affirmative act from taking place on school grounds during school hours. In such a case, inaction on the part of the school board may be interpreted by students as approval of, or at least condonation of, the act. In these situations, the opposing factors are also likely to be weak, as the students are deprived only of an opportunity to commit an act during a limited part of the day. But where the school board seeks to punish a student for an act committed outside school, or a status with which he enters school, the educational interest wanes and the countervailing factors wax.

Before leaving this discussion, let us explore four situations that fall on the continuum between the married student and flag mutilation cases: (1) exclusion of married students not from school entirely, but only from extracurricular activities, as a "punitive action, designed to humiliate and ridicule the . . . students before their classmates so as to discourage other marriages";⁷⁷ (2) exclusion from school of unwed mothers as a device to teach other students that premarital sex is unwise; (3) coercion of students to make a gesture of respect towards the flag as a device to instill patriotism in the students, and (4) enforcement of hair and dress regulations in order to instill the virtues of good grooming, modesty, and good taste.

⁷⁶ All 50 states and the District of Columbia prohibit desecration of the flag. The statutes are collected in *Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 324-46 (1967). In addition, a recent federal statute prohibits such desecration. Act of July 5, 1968, Pub. L. No. 90-381, 82 Stat. 291. The constitutionality of the New York statute is presently before the Supreme Court. *People v. Street*, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967), *prob. juris. noted*, 392 U.S. 923 (1968).

The criminality of the act, while emphasizing the polarity between this example and the preceding one, is not necessary for the conclusion reached. On the analysis presented here, a school could equally well prohibit hanging the President in effigy on school grounds during school hours.

⁷⁷ The Attorney General of Michigan, who intervened on behalf of the student, stated that the school board admitted this to be the sole basis for its rule excluding married students from extracurricular activities in the case of *Cochrane v. Board of Educ.*, 360 Mich. 390, 391, 103 N.W.2d 569 (1960).

While courts generally have stricken down school rules that suspend or expel married students,⁷⁸ they have generally upheld rules that exclude married students from extracurricular activities.⁷⁹ The basis for this distinction seems to be a view that, whereas school attendance itself is a "right," participation in extracurricular activity is a mere "privilege." As stated by the Supreme Court of Utah:

We have no disagreement with the proposition advocated that all students attending school should be accorded equal privileges and advantages. But the participation in extracurricular activities must necessarily be subject to regulations as to eligibility. Engaging in them is a privilege which may be claimed only in accordance with the standards set up for participation. It is conceded, as plaintiff insists, that he has a constitutional right both to attend school and to get married. But he has no "right" to compel the Board of Education to exercise its discretion to his personal advantage so he can participate in the named activities.⁸⁰

In this, as in other areas, a "right-privilege" dichotomy is an oversimplification that hinders, rather than helps, analysis.⁸¹ Whether

⁷⁸ See *Board of Educ. v. Bentley*, 383 S.W.2d 677 (Ky. 1964); *McLeod v. State ex rel. Colmer*, 154 Miss. 468, 122 So. 737 (1929); *Carrollton-Farmers Branch Independent School Dist. v. Knight*, 418 S.W.2d 535 (Tex. Civ. App. 1967); *Alvin Independent School Dist. v. Cooper*, 404 S.W.2d 76 (Tex. Civ. App. 1966); cf. *Nutt v. Board of Educ.*, 128 Kan. 507, 278 P. 1065 (1929). But see *State ex rel. Thompson v. Marion County Bd. of Educ.*, 202 Tenn. 29, 302 S.W.2d 57 (1957) (expulsion for remainder of term following marriage held reasonable); cf. *State ex rel. Idle v. Chamberlain*, 39 Ohio Op. 262, 175 N.E.2d 539 (1961) (mandatory withdrawal during pregnancy held reasonable).

⁷⁹ See *Board of Directors v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967); *State ex rel. Baker v. Stevenson*, 27 Ohio Op. 2d 223, 189 N.E.2d 181 (1962); *Kissick v. Garland Independent School Dist.*, 330 S.W.2d 708 (Tex. Civ. App. 1959); *Starkey v. Board of Educ.*, 14 Utah 2d 227, 381 P.2d 718 (1963). But cf. *Cochrane v. Board of Educ.*, 360 Mich. 390, 103 N.W.2d 569 (1960) (lower court decision upholding school board affirmed by an equally divided court, voting 4 for reversal on the merits, 3 for affirmance on the merits, and 1 for affirmance on ground of mootness). Note that the decisions that have upheld exclusion of married students from extracurricular activities have not been based primarily on an education per se rationale, but on the rationale of the host function discussed in text accompanying notes 112-19 *infra*.

⁸⁰ *Starkey v. Board of Educ.*, 14 Utah 2d 227, 381 P.2d 718, 721 (1963) (footnotes omitted).

⁸¹ Compare the discussion and cases cited at notes 64 & 65 *supra* and accompanying text. See also 1962 OHIO ATT'Y GEN. REP. No. 2998. But see *State ex rel. Baker v. Stevenson*, 27 Ohio Op. 2d 223, 189 N.E.2d 181 (1962). See generally *Mathews v. Board of Educ.*, 127 Mich. 530, 86 N.W. 1036 (1901).

Whether [a student's access to public school] be called a "right" or "privilege" cannot be important, for in either view it was secured to the relator, and to his children as well, by the positive provisions of law, and was to be enjoined upon such terms and under such conditions and restrictions as the lawmaking power, within constitutional limits, might impose.

Id. at 538, 86 N.W. at 1039 (quoting from *State ex rel. Adams v. Burdge*, 95 Wis. 390, 399, 70 N.W. 347, 349 (1897); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961); see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). A similar attempted distinction between exclusion from school and exclusion only from extracurricular activities ap-

participation in extracurricular activities is termed a right or a privilege, it is an integral part of the education that a public school offers its students.⁸² Students cannot be excluded from these activities except for reasons consistent with the state's legal structure viewed as a whole, and the place of school board decision-making in that structure. Of course, complete exclusion from school differs from exclusion only from a limited number of school activities, both in the effect on the student and in the relative infringement on the state policy norm of universal public education. Yet, the issue remains whether these differences should produce a difference in result.

In terms of the education per se function, I do not think they should. All school programs are typically subject to eligibility regulations. Exclusion of a student—by reason of his married status—from any school activity can be justified only if (1) the student's marriage renders him uniquely unfit to participate in the given activity,⁸³ or (2) the lesser infringement of the student's freedom of action tips a delicate balance in favor of the validity of the regulation. In the case of marriage, as has already been argued, the balance is hardly delicate: the school's educational interest is quite weak, and the legislature has expressly left the sensitive question of teenage marriage to the private decision of the students and parents concerned.

Similarly, the exclusion of unwed mothers from school as an education per se device results in punishment for an act, premarital sex, that took place outside the school premises, or for a status, being an

appears to have been operative in school board decisions concerning high school fraternities. A number of states regulate membership in these fraternities through legislative enactments, and expulsions pursuant to these statutes have been universally upheld; see authorities cited note 8 *supra*. Courts have split on the power of school boards to prohibit fraternities without specific statutory authority. For cases upholding school board action, see *Wayland v. Hughes*, 43 Wash. 441, 86 P. 642 (1906); *Wilson v. Board of Educ.*, 233 Ill. 464, 84 N.E. 697 (1908); *Coggins v. Board of Educ.*, 223 N.C. 763, 28 S.E.2d 527 (1944); *Wilson v. Abilene Independent School Dist.*, 190 S.W.2d 406 (Tex. Civ. App. 1945); cf. *Isrig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946). See also *Antell v. Stokes*, 287 Mass. 103, 191 N.E. 407 (1934). However, in *Wright v. Board of Educ.*, 295 Mo. 466, 246 S.W. 43 (1927), the Missouri Supreme Court, in a well considered opinion, held such a board rule invalid. See also *State ex rel. Stallard v. White*, 82 Ind. 278 (1882); *Wilson v. Abilene Independent School Dist.*, *supra* at 412, where the court held "that the attempt on the part of the Board to extend such regulations to cover the period during which the school was in summer vacation would be an undue invasion of parental authority." Despite the prevalence of anti-fraternity statutes that provide for the expulsion of fraternity members, none of the nonstatutory cases involve school board rules that attempt to exclude students from school altogether. Rather they all punish fraternity members by excluding them solely from extracurricular activities, such as holding class offices, and receiving academic honors. But cf. *Antell v. Stokes*, *supra*. As with exclusion of married students from such activities, the validity of these rules cannot be based on the student's lack of a right to participate in these events and activities. Such rules can only be upheld as a legitimate exercise of school board power if made in pursuance of a proper educational objective. See text accompanying notes 118-19 *infra*.

⁸² Cf. *Lee v. Macon County Bd. of Educ.*, 283 F. Supp. 194, 197 (M.D. Ala. 1968).

⁸³ I can think of no such situations, with the possible exception of the fraternity members running for school office, discussed in note 119 *infra*.

unwed mother, with which the student entered the school. The educational interest is as weak here as with the married student. The unwed mother has the same interest as the married student in access to education. However, as in the flag case, there is not as great an invasion of areas left by the legislature to individual choice as there is with married students. The legislature has not expressly left the decision whether to engage in premarital sex to private decision making. Indeed, statutes often make such conduct illegal. Nevertheless, the presumption against education per se rules and the strong policies favoring universal public education still outweigh the weak educational interest.

The United States Supreme Court, in *Board of Education v. Barnette*,⁸⁴ struck down a state requirement that students salute the flag on the ground that such a requirement compelled a declaration of belief in violation of the first amendment, as applied to the states through the fourteenth amendment. In so holding, the Court acknowledged that the state may require teaching by instruction in and study of those aspects of our history and of the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.⁸⁵ The Court found the compulsory flag salute, however, to be of a different order entirely.

Here . . . we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether the slow and easily neglected route to aroused loyalty constitutionally may be short-cut by substituting a compulsory salute and slogan.⁸⁶

Barnette, of course, involved a state statute rather than a school board rule compelling a flag salute, and its constitutional holding is not directly relevant to the problem at hand. Yet, the Court's view that there is a qualitative difference between course instruction in values and compelled obedience to those same values is a view generally felt in our society, and it supports the presumption against school board power to compel obedience to value norms through coercive education per se rules.

Constitutional considerations aside, then, the problem is whether this presumption is overcome by educational need. Unlike the married student and unwed mother cases, we are not here confronted by out-of-

⁸⁴ 319 U.S. 624 (1943).

⁸⁵ *Id.* at 631 (quoting dissent in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 604 (1940)).

⁸⁶ 319 U.S. at 631 (footnotes omitted).

school conduct or status. The failure to salute the flag takes place in school. Unlike mutilation of the flag, however, this conduct is passive rather than active. This difference is significant for two reasons. First, the aura of school approval is thereby lessened. The school does not provide a forum for extraordinary action on the part of the student; rather, the student is the captive of the school, and seeks only to be let alone. Second, this rule imposes greater restraints on the individual student's freedom of choice than does a rule prohibiting the desecration of a flag at school. The student who wants to mutilate the flag has only to refrain from doing so for that period of time he must spend in school. The affirmative act of saluting the flag is irrevocable. On balance, it would appear that the school board, even aside from constitutional problems, does not have power under its education *per se* function to require a student to salute the flag.⁸⁷

This leaves hair and dress regulations, sought to be justified as a means of instilling the virtues of good grooming, modesty, and good taste. It is interesting to note that in the recent spate of hair and dress cases,⁸⁸ virtually no school board has placed reliance on the education

⁸⁷ *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), the earlier case in which a compulsory flag salute was upheld by the Court over only one dissent, involved a local Pennsylvania school board ruling rather than a state statute. A federal district court enjoined enforcement of the school board's rule, holding that it violated both the Pennsylvania Constitution and the fourteenth amendment to the Federal Constitution. The court touched upon the state law problem, whether such a school board ruling was within the statutory power of the board, but did not really decide that issue. 21 F. Supp. 581, 587-88 (E.D. Pa. 1937) (motion to dismiss denied), 24 F. Supp. 271 (E.D. Pa. 1938) (injunction granted). On appeal the judgment was affirmed. 108 F.2d 683 (3d Cir. 1939). The circuit court's opinion is not clear as to the basis of the affirmance, but the lack of reference to the Pennsylvania Constitution indicates that it was based solely on the Federal Constitution. There is no discussion of the state statutory law problem in the court of appeals' opinion. The court of appeals, however, in distinguishing three *per curiam* Supreme Court decisions that had upheld the constitutionality of statutory compulsory flag salute, did rely upon the fact that *Gobitis* involved only a school board ruling.

In each [of these cases], both the State legislature declared, and the highest state court affirmed, a policy of flag saluting. By reason of this legislative and judicial determination, the connection between an omission to salute the flag and the commission of an injury to the public weal, becomes legally and factually closer [citations omitted]. But here there is no such declaration or affirmance of policy. The legislature of Pennsylvania has gone no further than to prescribe the teaching of civics.

Id. at 693. In light of this background, it is surprising that neither Mr. Justice Frankfurter's majority opinion nor Mr. Justice Stone's dissent discusses any state law issues. Indeed, the majority opinion states, without explanation or citation, that "[t]he case before us must be viewed as though the legislature of Pennsylvania had itself formally directed the flag-salute for the children of Minersville." 310 U.S. at 597. But see *Board of Educ. v. Barnette*, 319 U.S. 624, 650 (Frankfurter, J., dissenting): "We are not reviewing merely the action of a local school board." The opinion in *Gobitis* then goes on to rest upon the inadvisability of judicial interference with this hypothetical "legislative judgment."

⁸⁸ In light of the number of recent cases on the subject of school control of hair and dress and the general ferment concerning the issue, it is startling to note that there are only a handful of hair and dress cases predating the 1960's. See *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923) (upholding a school board resolution that stated: "The wearing of transparent hosiery, low-necked dresses or any style of

per se function as a justification for such regulations. Rather, reliance is put on the argument that atypical dress is disruptive of the educational process, a justification derived from the host function.⁸⁹ For purposes of this analysis, however, let us assume that an education per se rationale is employed as the basis for regulations concerning the length of boys' hair and girls' skirts. Regulations concerning the length of boys' hair are only a shade removed from regulations excluding married students from school or extracurricular activities. Although no legislature has ever *expressly* delineated this concern as one of private choice, such decisions in our society have traditionally been left to individuals. Long hair is a preexisting condition with which the student enters school and for which the school does not appear responsible. Denying a boy the opportunity to wear long hair in school is a major invasion of his freedom of choice. Flags can be mutilated outside of school, but hair cannot be long outside of school and short in school.⁹⁰ On the education per se rationale, therefore, the balance is clearly against school board power to dictate the length of boys' hair.

Short skirts present a more difficult question. As some educators have recognized, dress regulations, short of those directed against obscene or clearly inappropriate dress (such as bathing suits) may not be educationally sound.⁹¹ They would seem to violate the wise counsel of Emerson in the quotation with which this article began. Yet, the

clothing tending toward immodesty in dress, or the use of face paint or cosmetics is prohibited"; and upholding the enforcement of such resolution by expulsion of an 18-year-old girl who came to school with talcum powder on her face); *Valentine v. Independent School Dist.*, 187 Iowa 555, 174 N.W. 334 (1919), 191 Iowa 1100, 184 N.W. 134 (1921) (invalidating a rule providing that a high school senior could not receive a diploma unless she wore a cap and gown to commencement, but stating that the student could be precluded from commencement itself—and forced to receive the diploma privately—if she did not wear cap and gown); *Antell v. Stokes*, 287 Mass. 103, 191 N.E. 407 (1934) (upholding a ban against fraternity sweaters); *Jones v. Day*, 127 Miss. 136, 89 So. 906 (1921) (construing a rule requiring high school students to wear khaki uniforms in school to apply at all times to boarders, but not to day students when under parental control); *Stromberg v. French*, 60 N.D. 750, 236 N.W. 477 (1937) (upholding a rule against metal heel plates, discussed in text accompanying notes 94-95 *infra*). See also *Matheson v. Brady*, 202 Ga. 500, 43 S.E.2d 703 (1947); *McCaskill v. Bower*, 126 Ga. 341, 54 S.E. 942 (1906); *Colorado ex rel. Lamme v. Buckland*, 84 Colo. 240, 269 P. 15 (1928); *Connell v. Craig*, 33 Okla. 591, 127 P. 417 (1912); cf. the 1874 decision of the New York State Superintendent of Public Education holding that a local school board has no power to expel a child of 9 because her mother refused to comply with a school rule as to the mode in which the child's hair should be arranged, cited in *In re Dalrymple*, 5 N.Y. Ed. Dep't REP. 113, at 116-17 (1966).

⁸⁹ See notes 147-57 *infra*, and accompanying text.

⁹⁰ *But see Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir.), *cert. denied*, 89 S. Ct. 98 (1968), resting affirmance of such a regulation partly on the availability of wigs. 392 F.2d at 704.

⁹¹ See *Friedenberg, Ceremonies of Humiliation in School*, EDUC. DIG., Nov. 1966, at 35; *Garratt, The Battling Teenagers*, 45 OHIO SCHOOLS, Sept. 1967, at 26, 46; cf. *Howard, Student Dress, School Policies and the Law*, EDUC. DIG., May 1967, at 35. See generally E. FRIEDENBERG, *COMING OF AGE IN AMERICA* (1965).

question is not whether such regulations are wise, but whether the school board has the power, in connection with its interest in education per se, to impose reasonable dress regulations.⁹²

Short skirts, like long hair, are a preexisting condition with which the student enters the school building. Thus, there is less of a sense of school responsibility for, or approval of, such conduct than there is, for example, in the one-shot act of mutilating a flag. On the other hand, skirts can be quickly changed for out-of-school activity; hair cannot. In addition, dress—unlike hairstyle—is not a concern that has traditionally been considered one exclusively reserved for private decision making. Laws restricting wearing apparel to preserve modesty are not unknown in this country, and admission to public places is often conditioned on the wearing of “appropriate” dress. This is still a close case, but on balance I would conclude that school boards do have the power to adopt reasonable restrictions on dress as an education per se device.⁹³

In concluding this discussion of the school board’s education per se function, it is well to remember that this function has rarely been relied upon to sustain school board rules, nor has this function ever been the sole, or even the primary basis for sustaining such a rule. This undoubtedly reflects the general distaste in our society for coercive education per se rules except those regulating affirmative student conduct that takes place on school grounds, conduct for which there is

⁹² Although this article is concerned with the scope of school board substantive rulemaking power, it must be remembered that even when the board adopts a rule within that power, the rule cannot be upheld where it is “unreasonable.” Thus, even though one might hold that a school board could adopt rules governing dress in school, a rule against girls’ wearing slacks might well be considered unreasonable where it was applied to exclude from school a girl who wore otherwise unobjectionable slacks in 6-degree weather because she had been ill, had to walk over a mile to school, and the school itself was so constructed as to require her to walk outdoors to go from one class to another. Indeed the application of such a rule was struck down by the New York Commissioner of Education. *In re Dalrymple*, 5 N.Y. ED. DEP’T REP. 113, at 116-17 (1966).

⁹³ The issue of dress appropriate to place and occasion raises the problem of a school board rule designed to create or maintain a proper educational atmosphere. As stated in note 59 *supra*, this power is so related to education per se as to be really a part of that function.

Those acts or conditions which the school authorities would want to discourage as education per se tend to be those that the school authorities would also want to discourage as not being a part of a good educational atmosphere. Each of the cases discussed under education per se herein could be rephrased in terms of educational atmosphere. The interests involved in the two concepts are also the same so long as the good “educational atmosphere” relates to incremental additions to learning atmosphere, not to activities that threaten actual disruption of the educational process. It is in the sense of incremental additions to learning that I am using the term “educational atmosphere,” and, when used in that sense, I see no need for an analysis distinct from the education per se discussion in the text. When the situation involves disruption of the educational process, however, other factors become operative. These factors are similar to those analyzed under the host function and thus will be discussed later in the article.

a sense of immediate school board responsibility and approval unless disapproved.

B. *The Host Function*

Unlike the education per se rationale, various components of the host function have been employed by school boards to justify regulation of pupil conduct and status. The most basic of these components would seem to be protection of the physical plant. For example, the North Dakota Supreme Court upheld the validity of a school board prohibition against the wearing of metal heel plates partly on the ground that these plates caused more than normal wear on the school floors.⁹⁴ But even this rule, serving the basic host function, caused the court considerable concern. It was upheld only after the court found that the interest of the boy and his parents in his wearing the metal plates was relatively insignificant.⁹⁵

An even more striking example of the narrowness of a school board's power to act to protect the physical plant is the judicial denial, absent explicit statutory authority, of the power of a school board to coerce the payment of damages for destruction of its property by careless students. In the 1880 Iowa case of *Perkins v. Independent School District*,⁹⁶ a student playing ball in the schoolground unintentionally, but carelessly, batted the ball through a window. A school board rule required the student to pay for the damage. Perkins did not pay and was indefinitely excluded from school. In an action for reinstatement the court was called upon to decide "whether defendants, as school directors, had authority to promulgate and enforce the rule under which plaintiff was excluded from school."⁹⁷ The court saw no power in the school board to exclude students in order to secure payment of a sum of money, and answered the question in the negative.⁹⁸ *Perkins*

⁹⁴ *Stromberg v. French*, 60 N.D. 750, 236 N.W. 477 (1931). There was also the element of disruptive noise caused by the plates.

⁹⁵ The court noted that there was evidence that heel plates were a fad rather than a matter of practical advantage, *id.* at 753, 236 N.W. at 478, and that there was "no hardship or indignity imposed upon the plaintiff or his son by [the rule]." *Id.* at 756, 236 N.W. at 480. Under these circumstances the court found that the school interests in protecting the floors and preventing disruptive noise were more important than those of the parent. In so doing the court recognized that "in most instances, the right of the parent is paramount, but sometimes the interests of the public generally require that the parent shall give way." *Id.* at 756, 236 N.W. at 480.

⁹⁶ 56 Iowa 476, 9 N.W. 356 (1880).

⁹⁷ *Id.* at 479, 9 N.W. at 357.

⁹⁸ In the words of the court:

It will be observed that plaintiff was guilty of no breach of discipline or of any offense against good order.

By an accident and without any evil purpose he broke a window-glass. The rule requires him to pay the damage done and in default thereof authorizes

has been followed by two other courts.⁹⁹ Thus, even the most basic component of the host function has been limited in light of other societal values.

School board power to promulgate coercive rules in order to safeguard students in its charge has also been so limited. There is no doubt that, even without explicit statutory authority, a school board may exclude from school any person with a contagious disease. But despite some authority to the contrary, the predominant rule is that, absent the existence of smallpox in the community or other factors showing a clear and imminent danger of a smallpox outbreak, a school

the directors to exclude him from the school. We may admit that he ought to pay the damages and is liable therefor but we think his omission to perform this duty cannot be punished by expulsion from the school. The State does not deprive its citizens of their property or their liberty, or of any rights, except as a punishment for a crime. It would be very harsh and obviously unjust to deprive a child of education for the reason that through accident and without intention of wrong he destroyed property of the school district. Doubtless a child may be expelled from school as a punishment for a breach of discipline or for offenses against good morals, but not for innocent acts.

In this case the plaintiff was expelled not because he broke the glass, but because he did not pay the damage sustained by the breaking. His default in this respect was no breach of good order or good morals. The rule requiring him to make payment is not intended to secure good order but to enforce an obligation to pay a sum of money.

We are clearly of the opinion that the directors have no authority to promulgate or enforce such a rule.

Id. at 479-80, 9 N.W. at 357.

⁹⁹ *State v. Vanderbilt*, 116 Ind. 11, 18 N.E. 266 (1888); *Holman v. School Trustees*, 77 Mich. 605, 43 N.W. 996 (1889). In *Holman*, as in *Perkins*, the sanction for nonpayment was exclusion. In *Vanderbilt*, the sanction was corporal punishment. At first impression the results of these cases are quite troublesome. There is no doubt that school boards can protect the physical premises and take action to obtain redress for damages incurred. These three cases also assumed that the pupils involved would be civilly liable in tort for the damage negligently caused. But the sanction of exclusion used by the school boards in *Perkins* and *Holman* runs counter to the norm of universal access to tuition-free public education. See Opinion of Attorney General of Oregon, 32 OP. ATT'Y GEN. 444 (1966); *Morris v. Vandiver*, 164 Miss. 476, 145 So. 228 (1933). Moreover, that type of severe sanction is not in accord with the limited means the law now accepts to coerce the payment of civil debts. This may have been what the *Perkins* court was referring to when it stated that "[t]he state does not deprive its citizens of their property or their liberty, or of any rights, except as punishment for a crime." 56 Iowa at 479, 9 N.W. at 357.

Vanderbilt, on the other hand, did not involve exclusion from school but only corporal punishment. This might be the type of limited sanction that the school board is empowered to employ, even without more explicit statutory authority, in aid of its function of maintaining school property or, pursuant to its interest in education per se, as a means of teaching the need to pay one's just debts. Cf. *Bolding v. State*, 23 Tex. App. 172, 4 S.W. 579 (1887); RESTATEMENT (SECOND) OF TORTS § 153 (1965), quoted in note 29 *supra*. *Vanderbilt* could, however, be read as a recognition of the fact that the parents, rather than the child, are the persons actually controlling payment, and that the child is being corporally punished for a default beyond his control. Cf. *State v. Mizner*, 50 Iowa 145 (1878) (impermissible to punish student who does not know reason for punishment).

Recognizing the problem discussed here, a number of states have passed statutes holding parents liable for their children's defacement of school property, and providing for suspension of the child until payment is made. For cases upholding or construing such statutes, see *Board of Educ. v. Hansen*, 56 N.J. Super. 567, 153 A.2d 393 (1959); *General Ins. Co. of America v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Lamro Independent Consol. School Dist. v. Cawthorne*, 76 S.D. 106, 73 N.W.2d 337 (1955).

board may not exclude an unvaccinated child from school without explicit statutory authority to do so.¹⁰⁰ The decision whether to vaccinate a child may be a particularly sensitive one involving parental control of medical treatment and, sometimes, religious principles. While even these interests may be overridden by the exercise of state police power through a legislative enactment, absent such an explicit legislative delegation of this power to a school board, the general function and role of the school board do not encompass it. In the absence of a grave emergency, such as the imminent outbreak of serious disease, the balancing of public and private interests involved in a compulsory vaccination rule is a task for the legislature.¹⁰¹

As the Illinois Supreme Court stated in 1897:

While school directors and boards of education are invested with power to establish, provide for, govern and regulate public schools, . . . they have no authority to exclude children from the public schools on the ground that they refuse to be vaccinated, unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of small-pox. Undoubtedly, also, children infected with or exposed to small-pox may be temporarily excluded or the school be temporarily suspended; but, like the exercise of similar power in other cases, such power is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases. No one would contend that a child could be permanently excluded from a public school because it had been exposed to small-pox, or that the school could be permanently

¹⁰⁰ See *Burroughs v. Mortenson*, 312 Ill. 163, 143 N.E. 457 (1924); *Potts v. Breen*, 167 Ill. 67, 47 N.E. 81 (1897); *Mathews v. Board of Educ.*, 127 Mich. 530, 86 N.W. 1036 (1901); cf. *Hammond v. Hyde Park*, 195 Mass. 29, 80 N.E. 650 (1907); *State ex rel. O'Bannon v. Cole*, 220 Mo. 697, 119 S.W. 424 (1909); *Hutchins v. School Comm.*, 137 N.C. 68, 49 S.E. 46 (1904); *Duffield v. School Dist.*, 162 Pa. 476, 29 A. 742 (1894); *Glover v. Board of Educ.*, 14 S.D. 139, 84 N.W. 761 (1900). But see *Booth v. Board of Educ.*, 70 S.W.2d 350 (Tex. Civ. App. 1934); *Staffel v. San Antonio School Bd.*, 201 S.W. 413 (Tex. Civ. App. 1918). Similarly, the prevailing rule is that, absent explicit statutory authority, boards of health have no power to require vaccination of school children unless there is an imminent danger of a smallpox outbreak. See *Potts v. Breen*, *supra*; *Osborn v. Russell*, 64 Kan. 507, 68 P. 60 (1902); *Rhea v. Board of Educ.*, 41 N.D. 449, 171 N.W. 103 (1919); *State ex rel. Adams v. Burdge*, 95 Wis. 390, 70 N.W. 347 (1897); cf. *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900); *State ex rel. Freeman v. Zimmerman*, 86 Minn. 353, 90 N.W. 783 (1902); *State ex rel. Cox v. Board of Educ.*, 21 Utah 401, 60 P. 1013 (1900); *State ex rel. Lehman v. Partlow*, 119 Wash. 316, 205 P. 420 (1922). But see *State v. Martin*, 134 Ark. 420, 204 S.W. 622 (1918).

¹⁰¹ Courts have been unanimous in upholding the validity of rules providing for the exclusion of unvaccinated children from school, even absent an imminent danger of smallpox, where such exclusion was pursuant to a statutory requirement, see, e.g., *Abeel v. Clark*, 84 Cal. 226, 24 P. 383 (1890); *Spofford v. Carleton*, 238 Mass. 528, 131 N.E. 314 (1921); *N. EDWARDS*, *supra* note 11, at 574-75, and cases there cited; *A. FLOWERS & E. BOLMEIER*, *supra* note 11, at 94-97 and cases there cited, or to a statute explicitly delegating to the school board the power to decide to exclude non-vaccinated children, see *Board of Educ. v. Maas*, 56 N.J. Super. 245, 152 A.2d 394 (1959); cf. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

closed because of the remote fear that the disease of small-pox might appear in the neighborhood, and that if the school should then be open and children in attendance upon it the public would be exposed to the contagion. And upon the same line of reasoning, without a law making vaccination compulsory, or prescribing it, upon the grounds deemed sufficient by the legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned.¹⁰²

Sometimes analogized to the protection of children from the carriers of contagious disease is the protection of children from the carriers of moral pollution. The classic case in this area is the 1851 Massachusetts case of *Sherman v. Inhabitants of Charlestown*.¹⁰³ Miss Sherman was expelled from the Charlestown public schools on grounds that she was immoral. More specifically, the school board maintained that, with a named man, she engaged in "a continued course of open and notorious familiarities, and actual illicit intercourse, and that for hire and reward."¹⁰⁴ There was, however, no allegation of any misconduct in school. Nor was there any allegation that Miss Sherman's out-of-school conduct was such that it disrupted the educational process in any way. Rather, the exclusion was justified by the school board and upheld by the courts solely as a means of protecting Miss Sherman's classmates from contact with her polluting influence. In the words of the court, it is as proper a purpose of the school administrators "to preserve the pure-minded, ingenuous and unsuspecting children of both sexes, from the contaminating influence of those of depraved sentiments and vicious propensities and habits, as from those infected with contagious diseases."¹⁰⁵

This rationale has been used to justify the suspension of a boy for being "drunk and disorderly" on Christmas day in the streets of the town in violation of an Arkansas town ordinance,¹⁰⁶ as well as the

¹⁰² *Potts v. Breen*, 167 Ill. 67, 75, 47 N.E. 81, 84 (1897). The reference to the "state board" in the quotation is to the state board of health which had also promulgated a rule excluding unvaccinated children from school. See note 99 *supra*. There have been cases in which boards of health have sought to have unvaccinated children excluded and school boards have refused to exclude them. When this has occurred and the board of health does have the power to adopt its rule (*i.e.*, there is an imminent danger of smallpox, *see* note 100 *supra*), the courts have held that the school board must defer to the board of health and exclude the children. *See State ex rel. Horne v. Bail*, 157 Ind. 25, 60 N.E. 672 (1901); *Board of Trustees v. McMurry*, 169 Ky. 457, 184 S.W. 390 (1916); *People ex rel. Hill v. Board of Educ.*, 224 Mich. 388, 195 N.W. 95 (1923).

¹⁰³ 62 Mass. (8 Cush.) 160 (1851).

¹⁰⁴ *Id.* at 162.

¹⁰⁵ *Id.* at 167.

¹⁰⁶ *Douglass v. Campbell*, 89 Ark. 254, 116 S.W. 211 (1909).

1922 expulsion of an eighteen-year-old girl from a Michigan normal college for smoking in public off campus and for riding in cars while seated on boys' laps.¹⁰⁷ Under the same rationale, school boards have formulated policies, often upheld by courts, prohibiting married students,¹⁰⁸ pregnant students,¹⁰⁹ and unwed mothers¹¹⁰ from participating in school activities or even from attending school at all. Recently, a federal district judge in Mississippi, in denying a preliminary injunction to prevent the exclusion of an unwed mother from school, put forth the following justification for the rule:

Obviously, the policy not to admit unwed mothers as students in this school system [and the related policy to expel pregnant students] is based upon what this court judicially knows to be a belief held by a large segment of the people in this area (perhaps, by a majority) that it is sinful, or immoral for unwed people to engage in sexual intercourse and that an unwed mother is not a fit associate for teenage children in a public school or elsewhere. The fact of such motherhood demonstrates such sinful, or immoral conduct.

. . .

. . . By analogy, plaintiff's situation could well be likened to that of a typhoid carrier who otherwise is an acceptable student in every way. The only real difference is that the carrier is one who acquired that status without fault, while plaintiff's status is the result of her own wrongdoing. Medical opinion and enlightened public opinion agree that the presence of a typhoid carrier as a student in a public school would present a threat to the health of all other students, the faculty and staff. Public opinion, enlightened or not, in the Grenada School territory, identified an unwed

¹⁰⁷ *Tanton v. McKenney*, 226 Mich. 245, 197 N.W. 510 (1924).

¹⁰⁸ See notes 1-2, 78-79 *supra*.

¹⁰⁹ See note 4 *supra*. *State ex rel. Idle v. Chamberlin*, 12 Ohio Misc. 44, 175 N.E.2d 539 (C.P. 1961), is the only case I have found concerning the suspension of pregnant students. In that case the court upheld a school board rule requiring pregnant students to "withdraw" from school attendance "immediately upon knowledge of pregnancy." In so doing, the court rejected the opinion of the Attorney General of Ohio that the school board was not empowered to make such a rule. See also the opinion of the State Law Department of Maryland as expressed in a letter from Thomas G. Pullen, Jr., State Superintendent of Schools to the School Superintendents of Maryland, Mar. 31, 1964 and Resolution No. 1967-43 of the Maryland State Board of Education, re: Bylaw 720:3, adopted July 26, 1967.

¹¹⁰ See note 5 *supra*. School board policies toward mothers, wed or unwed, have not been the subject of either extensive judicial decision or sociological study. In *Alvin Independent School Dist. v. Cooper*, 404 S.W.2d 76 (Tex. Civ. App. 1966), the court held that the school board had no power to adopt a rule excluding mothers from school. In this case, the child was apparently conceived in wedlock, but the court did not seem to give any weight to that fact in its opinion. In *Nutt v. Board of Educ.*, 128 Kan. 507, 278 P. 1065 (1929), the court held that a school board could not exclude a married mother as such from school even though her child had been conceived out of wedlock. But see *Perry v. Grenada Mun. Separate School Dist.*, Civ. No. W.C. 6736 (N.D. Miss., Dec. 27, 1967).

mother of school age as a threat to the moral health, particularly of all other teenage school girls.¹¹¹

If the issue is whether it is a permissible function of a school board to guard its students from serious moral pollution as it guards them from serious physical disease, the court's argument is a valid one. Students are compelled to congregate in school, and the school administration may appropriately protect them from the dangers of this close contact. Protection from serious moral disease would seem as important as protection from serious physical disease. But this is not conclusive. Board power to protect against physical disease and danger through the promulgation of coercive rules is not unlimited. Exercise of that power is valid only where the interests of the host function clearly outweigh the other social interests involved.¹¹² This same limitation, of course, applies to school board power to exclude the carriers of moral pollution.

As examples, let us take the exclusion from school of married students and of unwed mothers. Some school administrators have attempted to justify exclusion of married students, in part, on the grounds that other children should not be exposed to married students, who presumably engage in sexual intercourse and who thus might stimulate premarital sexual activity in their fellow students.¹¹³ Such action against married students not only penalizes conduct authorized by the legislature but also seriously restricts the private decision making of students and their parents, and runs counter to the policy norm of universal public education. Therefore, as in the case of danger of physical disease, absent statutory authorization to the contrary, a school board should be able to exclude married students, if, and only if, the presence of such a student creates a clear and imminent danger of serious harm to the moral health of his fellow students.¹¹⁴

¹¹¹ *Perry v. Grenada Mun. Separate School Dist.*, Civ. No. W.C. 6736 (N.D. Miss., Dec. 27, 1967).

¹¹² This test is met only where there is an imminent and clear danger of serious disease. See text accompanying notes 101-02 *supra*. Thus the imminent danger criterion is essential primarily for the determination that the school interest of protecting its charges from danger prevails over the other interests involved. However, it also has the secondary effect of lessening the invasion of other interests; the imminent danger test will usually result in a temporary, not a permanent, restriction of a child's right to attend school. See *Mathews v. Board of Educ.*, 127 Mich. 530, 536, 86 N.W. 1036, 1037 (1901).

¹¹³ See, e.g., the views expressed in *School Dist. v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967); *Cochrane v. Board of Educ.*, 360 Mich. 390, 103 N.W.2d 569 (1960); L. G. Carroll, *supra* note 2, at 187-210; W. Ivins, *supra* note 2, at 57-58; Landis & Kidd, *supra* note 2, at 132-33; Sperry & Thompson, *supra* note 2, at 103-04.

¹¹⁴ It could be argued that, in this area, the legislative scheme preempts the school board, so that under no circumstances could the board restrict the attendance or participation of married students. See *Cochrane v. Board of Educ.*, 360 Mich. 390, 103 N.W.2d 569 (1960); *Alvin Independent School Dis. v. Cooper*, 404 S.W.2d 76 (Tex.

Protection against moral pollution also may be used to justify exclusion from school of unwed mothers.¹¹⁵ It may be argued that such a rule is quite different from that excluding married students. Of course, there are differences. There is no legislative pronouncement that premarital sexual relations are a subject for private decision making. Indeed, such conduct is frequently made criminal. Nevertheless, there is still the countervailing norm of universal public education. As stated by the Kansas Supreme Court in upholding the right of a mother to attend school when her child was conceived out of wedlock but born after her marriage:

The public schools are for the benefit of children within school age, and efficiency ought to be the sole object of those charged with the power and privilege of managing and conducting the same, and while great care should be taken to preserve order and proper discipline, it is proper also to see that no one within school age should be denied the privilege of attending school unless it is clear that the public interest demands the expulsion of such pupil or a denial of his right to attend. On the record submitted here, we are of the opinion the evidence was insufficient to warrant the board in excluding plaintiff's daughter from the school of Goodland. It is the policy of the state to encourage the student to equip himself with a good education. The fact that the plaintiff's daughter desired to attend school was of itself an indication of character warranting favorable consideration. Other than the fact that she had a child conceived out of wedlock no sufficient reason is advanced for preventing her from attending school. Her child was born in wedlock and the fact that her husband may have abandoned her should not prevent her from gaining an education which would better fit her to meet the problems of life.¹¹⁶

Moreover, while condemning premarital sex, society does not completely reject the unwed mother. On the contrary, many states have instituted extensive programs designed to aid her. This social scheme of aid and rehabilitation of the unwed mother may be impeded by her

Civ. App. 1966) ; *McLeod v. Colmer*, 154 Miss. 468, 122 So. 737 (1929). Yet such a rule would seem to go too far in limiting school board power under the statutory grants of power to operate the schools. The state legislature has said that teenage marriages are permissible. Yet, they have not said that under all circumstances married teenagers can attend public school. While there are usually some specific statutory bases for exclusion from school based on age, residence, or ability to learn, as the cases cited throughout this article show, these specific statutory bases for exclusion have not been held to be exclusive. Under its general grant of power a school board may still exclude others when it is performing a valid function that is deemed to prevail over the other social interests involved.

¹¹⁵ See *Atkins*, *supra* note 2, at 71.

¹¹⁶ *Nutt v. Board of Educ.*, 128 Kan. 507, 509, 278 P. 1065, 1066 (1929).

exclusion from school.¹¹⁷ In terms of the host function, therefore, I would conclude that, in the words of the Kansas court, it is "clear that the public interest demands the expulsion" of unwed mothers only if their presence presents a clear and imminent danger of serious harm to their fellow students.

This again brings us to a variant of the married student's situation: exclusion not from school entirely, but only from extracurricular activities. Three arguments could be advanced to support this partial exclusion in cases in which a total exclusion is not justified. The first relates to a different type of moral pollution than we have been discussing. School boards have sometimes tried to guard against the danger that other students might decide to emulate married students by getting married themselves, a danger that is said to increase when married students are permitted to attain such high status positions as star athlete and class president.¹¹⁸ The question arises whether it is

¹¹⁷ See generally C. VINCENT, UNMARRIED MOTHERS 6-30 (1961). Remember that I am here speaking of involuntary exclusion from school of the unwed mother who wants to attend school. As the court stated in *Nutt v. Board of Educ.*, 128 Kan. 507, 278 P. 1065 (1929), "The fact that the plaintiff's daughter desired to attend school was of itself an indication of character warranting favorable consideration." *Id.* at 509, 278 P. at 1066; cf. *Board of Educ. v. Bentley*, 383 S.W.2d 677, 678 (Ky. 1964). For discussion of the role of the school in relation to the "delinquent" child, see Moore, *The Schools and the Problems of Juvenile Delinquency*, 7 CRIME & DELINQUENCY 201-212 (1961). One of the major difficulties with a rule excluding all unwed mothers from school is its lack of discrimination; cf. *Board of Educ. v. Bentley*, *supra* at 680 ("[t]he fatal vice of the regulation lies in its sweeping, advance determination that every married student, regardless of circumstances, must lose at least a year's schooling."). Not all unwed mothers are alike, either in the reasons for their status or the value of school to them. See Clothier, *The Unmarried Mother of School Age as Seen by a Psychiatrist*, 39 MENTAL HYGIENE 631 (1955). However, the differences between the experiences and obligation of mothers (wed or unwed) and other students may be such as to support the view that the compulsory school laws do not apply to mothers, and thus they can choose not to attend if they so desire. I have found no authority on this precise issue, but there is some case support for the view that the compulsory school laws do not apply to married students. *In re State ex rel. Goodwin*, 214 La. 1062, 39 So.2d 731 (1949); *State v. Priest*, 210 La. 389, 27 So.2d 173 (1946); *In re Rodgers*, 234 N.Y.S.2d 172 (Fam. Ct. 1962). But see *State v. Gans*, 168 Ohio St. 174, 151 N.E.2d 709 (1958). Without any apparent statutory (see 24 P.S. §§ 13-1330 to -1334 (1962)) or judicial authority, the Philadelphia school board has adopted the following rule:

In the event that a girl [who had been excluded from school because she was pregnant] may not wish to return to school, and it is thought that readmission will lead to social maladjustment, it would be inadvisable to force her to return. For each such case, consideration should be given to the girl's physical condition, her economic status, ability to profit by further education, and the likelihood of sound social adjustment. It may be advisable to send the girl to another school rather than the one formerly attended.

SCHOOL DIST. OF PHILADELPHIA, BULL. No. 51, *supra* note 4. For a good argument that "delinquent" children should not be "allowed" to stay out of school and a recognition of the fact that the attitude of the school significantly affects a child's "voluntary" decision to stay out of school, see Greenstone, *Getting the Returnee Back to School*, 7 CRIME & DELINQUENCY 249-254 (1961). Again, however, the issue of involuntary exclusion from school is quite different than that of exemption from the compulsory school laws. An involuntary exclusion must meet the requirements set forth in the text.

¹¹⁸ See *Cochrane v. Board of Educ.*, 360 Mich. 390, 394, 103 N.W.2d 569, 571 (1960); *State ex rel. Baker v. Stevenson*, 27 Ohio Op. 2d 223, 226, 189 N.E.2d 181, 185 (1962).

properly a part of the school board's host function to attempt to guard against this emulation through the exclusion of married students from these activities.

This is not an easy case, but I would conclude that a school board cannot exclude married students from extracurricular activities in order to prevent emulation of their status even if there is a clear and imminent danger of such emulation. The state legislature has explicitly authorized teenage marriage with parental consent. The possibility that students might be persuaded to take this perfectly legal step is not the type of serious moral pollution that would justify a coercive school board rule forcing the student to choose between marriage and a full education.

The second argument is that the greater informality involved in extracurricular activities—particularly sports—creates a greater danger of moral pollution in the sense of stimulation of premarital sexual activities than does classroom contact. That is, the threat of moral pollution in the locker room may be clear and imminent, whereas the threat of moral pollution in the classroom may not. If this is so, then the criteria for the determination of the primacy of a valid school function are met and the school board has power to promulgate a rule excluding married students from such extracurricular activities.

Finally, the two types of exclusion do differ in the seriousness of their effect on the student in question, and the infringement of the statutory norm of universal public education. It may be argued, therefore, that an exclusion from extracurricular activities may be upheld even where there is no clear and imminent threat of serious moral harm to other students growing out of participation in such activities. In attempting to prevent serious moral pollution through school activities the school board is pursuing a valid function. The strict requirement of a clear and imminent threat is not necessary to the validity of the function but serves to demarcate those situations in which the importance of the effectuation of the school board function is sufficient to outweigh the fact that the school board rule affects and invades other societal interests and the areas of other decision makers.

This balance is altered when the effect of the rule is not to exclude the married student totally from school but only from extracurricular activities. A board, therefore, should have the power to exclude married students from extracurricular activities if there exists a *reasonable likelihood* that participation of these students in such activities would lead to the serious moral pollution of their classmates that the board has a right to prevent. While this standard is less stringent than that required for exclusion of students from school completely, it is not a

meaningless standard. It requires the factual existence of a reasonable likelihood of serious moral contamination. It is not satisfied by school board conjecture or vague reference to possible bad influences.¹¹⁹

The host function not only requires the protection of the majority of students from the harmful influence of individual students, but also requires the protection of students from risks created because school attendance has brought a large group of children together in one place. Thus, rules prohibiting students from driving their cars on school grounds during school hours can easily be justified as a means of protecting student pedestrians from harm.¹²⁰ This aspect of the host

¹¹⁹ I have not read any marital exclusion cases in which the facts (at least as stated in the opinion) even approach this reasonable likelihood standard. Another area in which school boards apparently have felt a difference between exclusion from school entirely and exclusion only from extracurricular activities is that of membership in high school fraternities. See notes 6 & 81 *supra*. In this regard there is a specific argument addressed to the prohibition of fraternity members running for school office. The contention is made that when allowed to run for class office the block voting of fraternity members results in their having power out of proportion to their numbers. See *Holroyd v. Eibling*, 174 Ohio St. 296, 188 N.E.2d 797 (1962). If this is in fact true, may the school deny fraternity members the right to run for office? While I have very serious doubts about the wisdom of such a rule, I think that it is valid. The school board has both education per se and host functions involved in the electoral process for school officers which should be sufficient to justify the rule on a showing that there is, in fact, a reasonable likelihood of substantial disproportionate control of school offices by fraternity members. I am fortified in this view by the idea that a school board could conclude that to some extent, at least, the educational value that a student derives from holding class office may be obtained by a fraternity member in his fraternity participation.

¹²⁰ *McLean Independent School Dist. v. Andrews*, 333 S.W.2d 886 (Tex. Civ. App. 1960). In this case the school board adopted a rule that "children driving automobiles to school shall park same in parking lot when they arrive at school and shall not move same until 3:45 P.M. unless by special permission" Plaintiff's daughter was suspended when, following her parent's instructions, she persisted in parking a block away from school and driving home at lunch time. The trial court ordered reinstatement, finding the rule invalid as an unauthorized regulation of streets and highways. The court of civil appeals reversed, holding that "the actions of school authorities in promulgating rules to insure the proper conduct and decorum of students" would be upheld unless a clear abuse of power or discretion were shown. *Id.* at 888-89. The court concentrated on the need to protect the elementary school pupils in playgrounds adjacent to the school parking lot and noted the board's desire to prevent student joy rides through town during noon recess.

This protection of elementary school children is clearly a valid school board function that should prevail over arguments asserting board interference with the wishes of parents or the affairs of the agency in charge of highway regulation. Yet the rationale does not really explain the *McLean* rule. This rule not only prohibited those who parked in the lot from moving their cars, but also prohibited all driving at noon recess. The court questioned whether the rule by its terms did apply when the student parked a considerable distance from the school and then used the car at recess.

Technically they might not be "driving automobiles to school" but would still be guilty of the principal acts the school authorities testified the regulation was passed to prohibit, viz., driving their automobiles at the noon recess. We would respectfully suggest that the purpose sought to be accomplished might be more specifically stated in the following language: "School children shall not be permitted to drive automobiles during the lunch period nor anytime after they arrive at school each day until they leave at — P.M. (the time school is dismissed for the day), unless by special permission of the school authorities."

Id. at 891. This suggested modification of the rule cannot be based on the rationale of preventing harm to the small children. The basis for this rule can only be the protection of the student driver himself, the protection of other students who ride with

function also appears to be the basis for the general peacekeeping role that schools have performed in regard to student misconduct on school grounds and en route to and from school. In general, school authorities have been held to have the power to discipline students engaged in fighting, the use of foul language, and similar activities during these periods.¹²¹

The Connecticut Supreme Court, in the 1925 case of *O'Rourke v. Walker*,¹²² explicitly recognized this function. A student who lived

the student driver, or the protection of the rest of the community. The protection of the student himself is not a valid school board function, *see* text accompanying notes 132-44 *infra*. Student driving is subject to state licensing requirements and parental permission. Although the activity takes place during the "school day" it is during the noon recess and its regulation is not functionally related to education. The rule as applied to student drivers could only be sustained on an improper, non-functional *in loco parentis* theory, *see* text accompanying notes 21-37 *supra*. Protection of the student driver's companion is a more substantial school board function as the companion is forced to meet with the driver at school and thus the school provides his opportunity to go joy riding. Protecting this student from this temptation may be analogized to protecting him from physical or moral disease. Yet a rule against the use of cars prevents their constructive as well as their destructive use. It may very well be that the passenger's parents do not want to prohibit him from riding in a car at recess. In the instant case the school board rule should be applied only in cases where it supports parental wishes and not where it displaces them. *Cf. Jones v. Cody*, 132 Mich. 31, 92 N.W. 915 (1902) and text at notes 129-34 *infra*. Finally, there is the issue of preventing harm to the rest of the community. While I have found no cases supporting such a function, it seems valid for a school to minimize the risk of harm to a neighborhood caused by having a school in its midst. *See* RESTATEMENT (SECOND) OF TORTS, § 152 Comment a, at 270 (1965), stating that school authorities are privileged "to prevent the school from becoming a nuisance to the neighborhood." *Id.* at 271. Thus, in order to prevent congestion or monopolization of available on-street parking in the area, the school board could adopt a rule requiring that all those who drive to school park in the lot. (This is part of the rule in *McLean*, although it is not dealt with in the opinion, and was deleted from the court's suggested modification of the rule.) Similarly the prohibition against moving cars from the parking lot at recess might be supported as a reasonable means of preventing traffic congestion. However, this rationale would not seem to embrace the *McLean* rule, which prohibited any driving during the school day. The dangers of such driving are those normally associated with teenage driving and are not related in any way to school attendance. General highway regulation and control of teenage driving are not within the power granted to the educational authorities.

¹²¹ *See O'Rourke v. Walker*, 102 Conn. 130, 128 A. 25 (1925); *Deskins v. Gose*, 85 Mo. 485 (1885); *Cleary v. Booth*, [1893] 5 Q.B. 263.

This peacekeeping role is sometimes stated as a function of school authorities to prevent the disruption of educational programs. *Deskins v. Gose*, *supra* at 489. Yet the usual quibbling and fighting of school children, particularly when it occurs during recess or en route to and from school, seldom does disrupt the educational process. Rules in this area are more appropriately related to the protection of students who must gather together in class and walk to and from school at stated times. The court in *Deskins* indicated that fighting on the way home would disrupt the educational processes because it would tend to "engender hostile feelings between scholars . . . and [destroy] that harmony and good will which should always exist among scholars" *Id.* This rationale, however, would apply to all fighting among children who attended the same school, no matter when or where the scuffling occurred. Such a connection with the school seems too tenuous to allow displacement of parental authority or the authority of general governmental law enforcement bodies, and the *Deskins* court itself very clearly limited its holding to fighting on the way home from school. *But see Hutton v. State*, 23 Tex. Ct. App. R. 386, 5 S.W. 122 (1887); *Cleary v. Booth*, *supra* at 264 (dictum).

¹²² 102 Conn. 130, 128 A. 25 (1925); *see Satariano v. Sleight*, 54 Cal. App. 2d 278, 129 P.2d 35 (1942). *But cf. Kerwin v. County of San Mateo*, 176 Cal. App. 2d 304, 1 Cal. Rptr. 437 (1959); *Price v. York*, 24 Ill. App. 2d 450, 164 N.E.2d 617 (1960).

near the school frequently stood outside his house and "abused" young girls on their way home from school. After repeated complaints by the girls' parents, the principal applied corporal punishment to the boy. In a civil assault and battery action brought by the boys' mother, the court upheld the principal's use of reasonable and moderate punishment. On appeal, the student argued that no school regulations could control the conduct of a pupil once he had reached his home after school. This argument was based on the school-home dichotomy of the *in loco parentis* theory of school control.¹²³ The court rejected this argument, on the grounds that protection of students en route from school was not only a proper school board concern, but a positive duty since it was only because of their school attendance that the girls found it necessary to walk by plaintiff's house.¹²⁴

Thus, the court correctly saw the school's protection of the children in its care from harm caused by others as a legitimate aspect of the host function. Such protection is appropriately related to education in that the students are where they are because of school attendance. The statutory delegation of authority to school boards to educate does not mean that educators may act as general law enforcement agencies for youth.¹²⁵ As is true of all its authority, a

¹²³ See text accompanying notes 19-20 *supra*.

¹²⁴ The court stated that the offending boy's parents could not be depended on to protect the girls from harm, as not all parents are sufficiently concerned with the harm to others caused by their children. Nor, according to the court, could the general law enforcement authorities be relied upon since childhood fighting and like activities are often considered too trivial to be handled by general law enforcement. See also *People v. Overton*, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *vacated and remanded on other grounds*, 89 S. Ct. 252 (1968), in which the court sustained a police search of a high school student's school locker for marijuana on the grounds that the school authorities had consented to the search. The court stated that the relationship between school authorities and the student is unique:

The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.

It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age increases the danger. Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.

Id. at 362-63, 229 N.E.2d at 597-98, 283 N.Y.S.2d at 24-25.

¹²⁵ But see Kitsuse & Circourel, *The High School's Role in Adolescent Status Transition*, in *EDUCATION IN URBAN SOCIETY* 70, 76 (B. Chandler, L. Stiles & J. Kitsuse eds. 1962):

As a consequence of compulsory attendance regulations, the school with which the adolescent and, consequently, his family are affiliated becomes one of the first institutions to which reports of misconduct are referred. The school, for

school board's law enforcement authority must be functionally related to education.¹²⁶ In addition, this law enforcement aspect of the host function usually involves the protection of children from harm inflicted by their schoolmates. The school has brought the group of children together, and thus the school is responsible for preventing the harm to some that might be caused by others.¹²⁷

A slightly different situation exists where school attendance presents a risk that the individual student may harm himself. A Michigan school board passed a rule requiring "pupils . . . to go directly to their homes at the close of school at noon and at night, unless required or specially permitted by their teachers to remain."¹²⁸ The owner of a nearby candy store protested and brought an action to have the rule declared invalid. The Michigan Supreme Court upheld the rule in *Jones v. Cody*,¹²⁹ stating:

It is not only the legal right, but the moral duty, of school authorities, to require children to go directly from school to their homes [and since the state requires children to attend school] [t]he least that the State can in reason do

example, is the agency to which police, shopkeepers, civic organizations, welfare agencies, and parents report on pupil behavior.

This article is a well written critique of the too pervasive effect of modern schools on adolescents. See also E. FRIEDENBERG, *COMING OF AGE IN AMERICA* (1965); E. FRIEDENBERG, *THE VANISHING ADOLESCENT* (1959). For a discussion of the more affirmative possibilities of school assistance in the problem of juvenile delinquency, see Moore, *supra* note 117, at 201-262.

¹²⁶ The school board has no general power to punish for misconduct not functionally related to education. See text accompanying notes 59-60 *supra*. Thus, even the moral pollution cases, notes 103-19 *supra* and accompanying text, recognize that a school cannot exclude a child as punishment for his nonschool offense, but can only do so to protect the other children from his polluting influence. The question arises, though, of the correct test of possible moral pollution. In the case of both married students and unwed mothers we employed a strict test of "clear and imminent danger" of moral pollution. This was deemed appropriate in the married student's case because the school board was acting in opposition to the statutory schemes permitting marriage and providing free education for all children. Even with the unwed mother's case, our society is sufficiently ambiguous as to the enforcement of laws against premarital sex and generally looks upon the unwed mother as in need of help so as to call for employment of the same standard. In the case of a clear breach of societal standards—*e.g.*, where a student has been convicted of grand larceny—there is no doubt that society wants to and does punish that offense. It would seem, therefore, that the only interest invaded by exclusion from school of such a student is that of free public education. Standing alone this might support only a lesser exclusionary standard such as a reasonable likelihood of moral pollution. Although I am not certain as to the correct result, I incline to the strict test even in the grand larceny case. Societal treatment of a delinquent juvenile is, in theory at least, rehabilitative and not punitive. Thus, society's official position after the offense has been committed is essentially the same in regard to the juvenile thief as it is to the teenage unwed mother—*i.e.*, how best to aid the individual. Depriving him of the rehabilitative tool of public education on the "reasonable likelihood" that he may corrupt fellow students does not seem in keeping with this position.

¹²⁷ Moreover, the school cannot rely upon other agencies of control to prevent such harm, see note 124 *supra*.

¹²⁸ *Jones v. Cody*, 132 Mich. 13, 14, 92 N.W. 495 (1902).

¹²⁹ *Id.* at 13, 92 N.W. at 495.

is to throw every safeguard possible around the children who in obedience to the law are attending school.¹³⁰

Plaintiff in the case, it should be noted, was not the parent of a student, but rather a nearby merchant who suffered economic injury as a result of the school rule. This would justify the court's assumption that the school board here was acting to further parental wishes rather than to displace parental authority. Viewed in this light, the decision is clearly correct. The store owner has no right to demand that the students be permitted to go into his store.¹³¹ The school board clearly has the power to promulgate and enforce a rule, in accord with parental desires, to protect students from school-connected hazards.

If, however, such a rule conflicts with parental wishes, a different analysis is required.¹³² Displacement of parental authority in this case cannot be viewed as a legitimate concern of the education per se function.¹³³ Nor can it be seen as a valid exercise of the host function. Primary responsibility for a child's spending and eating habits rests with the parents. While the school is connected to the candy store by physical proximity, the school is not responsible for its activities—the store cannot be called a "school-created hazard." That a child must pass a candy store on the way home from school does not give the school board power to supplant parental authority to determine whether or not the child frequents the store.¹³⁴

¹³⁰ *Id.* at 16, 92 N.W. at 496.

¹³¹ See *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557 (1933); *Bozeman v. Morrow*, 34 S.W.2d 654 (Tex. Civ. App. 1931). But see *Hailey v. Brooks*, 191 S.W. 781 (Tex. Civ. App. 1916).

¹³² It has been assumed for purposes of this discussion that the school board's displacement of parental authority was justified to assure the well-being of this particular child, and not that of other children. It would seem that no other children are involved if one parent allows his child to go into a candy store. Yet, the fact that one child can go into the store may produce the popular refrain: "If Johnny can do it, why can't I?" among the other children. Nevertheless the school board should not be permitted to keep Johnny out of the store in order to enforce the desires of the parents of the other children. This would go beyond the supporting role the school board takes on when it promulgates rules with which all parents are in agreement, and would coerce Johnny's parents in order to aid the other parents' control of their children. While the case might be stated as analogous to those in which a child is excluded from school because he might seriously morally pollute the other children, I do not think the school board could coerce Johnny and his parents in this case even if it could be shown that there was a clear and imminent danger that other children would violate their parent's wishes and accompany Johnny into the candy store. While there might be a clear and imminent danger of this result the harm involved does not even approach that involved in the risk of serious physical disease or moral pollution. The school's need to protect its students is minimal and the primary interest involved remains the freedom of Johnny and his parents.

¹³³ See text accompanying notes 61-93 *supra* for a discussion of the scope of the education per se function.

¹³⁴ The cases that uphold school prohibitions against students leaving the school for lunch appear to be contrary to the analysis suggested on the text. In the first case, *Flory v. Smith*, 145 Va. 164, 134 S.E. 360 (1926), parents sought to enjoin the enforcement of a school regulation that "[l]eaving the campus between the hours of

More difficult is the problem whether the school board, as the purveyor of services, some of which create hazards for school children, has the power to restrict access to these services in order to reduce the risks to the most vulnerable students presented by such school-created hazards. While it seems clear that a school board could refuse to provide facilities for a high school football team because the board members felt that football was too dangerous,¹³⁵ it is not equally certain that once the school provides the facility it may exclude a particular student from active participation. Assume that the school does maintain a football team but excludes the following students from participation:

- (a) those with low grades;
- (b) those who, in the opinion of the school doctor, are not physically well enough to participate without serious risk of harm to themselves; and
- (c) married students.

Assume further that all such students are excluded on the ground that it is not in their own best interest to participate. The student with low grades should not waste time playing football when he should be

9 a.m. and 3:35 p.m. is strictly prohibited" In upholding the rule, the court did not discuss the question of school board power to adopt the rule or any reasons for its promulgation; instead it spoke in general terms of judicial deference to the board's exercise of power delegated to it by the legislature, and was mainly concerned with rejecting plaintiffs' contention that the regulation denied them a "property right." This opinion was relied on in *Richardson v. Braham*, 125 Neb. 42, 249 N.W. 557 (1933), which upheld a similar rule on a nonfunctional *in loco parentis* theory with some suggestion of an education per se rationale. More recently, a Kentucky school rule providing that "no one, while in school, shall be allowed to enter the restaurant of Mr. Russell or any other business establishment in the town without permission from 8:15 a.m. until 3:00 p.m." was sustained. *Casey County Board of Educ. v. Luster*, 282 S.W.2d 333 (Ky. 1955). There the court said: "Teachers and officials . . . who in a general way stand *in loco parentis* to their pupils, are better qualified to judge . . . the wisdom of such rules and regulations than are the courts. . . . The courts will not interfere unless it appear [school officials] have acted arbitrarily or maliciously." *Id.* at 334. The court spoke too of the children's table conduct, apparently employing an education per se analysis. Lastly, the court seemed to approve a purpose of the rule to insure the school cafeteria's economic profit. This should be contrasted with *Hailey v. Brooks*, 191 S.W. 781 (Tex. Civ. App. 1916), where the court enjoined enforcement of a rule prohibiting students to purchase food and school supplies from plaintiff merchant. The court there rejected the school authorities' nonfunctional *in loco parentis* theory of complete control over students during the school day. Moreover, the court said the allegation of an enforced boycott, if proven, would state an antitrust cause of action. Unfortunately, *Hailey* has not been followed even in Texas. See, e.g., *Bozeman v. Morrow*, 34 S.W.2d 654 (Tex. Civ. App. 1931); *Bishop v. Houston Independent School Dist.*, 29 S.W.2d 312 (Tex. Comm. App. 1930). See also *Fitzpatrick v. Board of Educ.*, 54 Misc. 2d 1085, 284 N.Y.S.2d 590 (Sup. Ct. 1967) (upholding a rule prohibiting students from leaving the school for lunch on grounds that the "commotion and noise [of their leaving] would interfere with those who were left in the building to study") For an interesting picture of life in a school cafeteria see E. FRIEDENBERG, *COMING OF AGE IN AMERICA* 30-32 (1965).

¹³⁵ *Kinzer v. Directors of Independent School Dist.*, 129 Iowa 441, 105 N.W. 686 (1906).

studying.¹³⁶ The rationale behind the exclusion of the physically unfit student is obvious. Married students are excluded because the obligations of marriage are so demanding and time-consuming as to preclude this diversion.¹³⁷

In each of these cases, the school board is asserting a right not to allow its instrument, the football team, to be used in a way it considers harmful to the student. In each of these cases, however, this action intrudes on the decision-making powers of others. Is it for the school board to budget the time of poor students and married students? Is it for the school board to override the decision of the boy and his parents that the benefits of playing football outweigh the risk to his physical health?

These are hard questions, and I don't know any easy answers. Nor have the cases provided any answers. Indeed, the questions haven't been asked.¹³⁸ There are, however, some cases that may be helpful in analyzing these problems. There is no doubt that school authorities can assign homework and adopt reasonable rules to compel its completion.¹³⁹ But while recognizing the assignment of homework as a proper function of school administrators, courts have been virtually unanimous in striking down school board rules directed at enforced study hours outside school or restrictions on other out-of-school activities in order to promote study. In the leading case of *Dritt v. Snodgrass*,¹⁴⁰ a majority of the court stated that a school board rule prohibiting students from attending social parties during the school year was invalid.¹⁴¹ *Dritt* was followed in the Mississippi case of *Hobbs v. Germany*,¹⁴² which invalidated a school board rule requiring

¹³⁶ This assumed rationale for scholastic eligibility requirements for interscholastic sports is just that—an assumption. In the leading work on high school athletics, C. FORSYTHE, *ADMINISTRATION OF HIGH SCHOOL ATHLETICS* 72-74 (1954), it is pointed out that in virtually all school areas there are scholastic eligibility requirements. However, the author never adequately explains the basis for such requirements. It is probable that such rules stem from the assumption stated above, a desire to increase scholarship with the carrot of participation in athletics, and a view that an athletic hero should not provide a bad example to others. See *Cochrane v. Board of Educ.*, 360 Mich. 390, 413-14, 103 N.W.2d 564, 580-81 (1960). See also C. FORSYTHE, *supra*, at 61-62.

¹³⁷ See *School Dist. v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967); *Cochrane v. Board of Educ.*, 360 Mich. 390, 103 N.W.2d 564 (1960).

¹³⁸ In this regard it is of interest that the leading work on high school sports discusses the purpose of eligibility regulations primarily in terms of the need for uniform standards for competing teams. C. FORSYTHE, *supra* note 136, at 58-96. The prevailing lack of sensitivity to the important educational policy decisions involved in interscholastic sports is also highlighted by the very minimal role in formulation of athletic policy that Forsythe grudgingly gives the school boards. *Id.* at 166-67.

¹³⁹ See *Blading v. State*, 23 Tex. Ct. App. R. 172, 4 S.W. 579 (1887).

¹⁴⁰ 66 Mo. 286 (1877).

¹⁴¹ See also *State ex rel. Clark v. Osborne*, 24 Mo. App. 309 (1887). But cf. *Magnum v. Keith*, 147 Ga. 603, 95 S.E. 1 (1918).

¹⁴² 94 Miss. 469, 49 So. 515 (1909).

all students to remain in their homes and study from 7:00 P.M. to 9:00 P.M. Despite the importance of study to the educational process, the court refused to construe the general Mississippi school statutes as giving the school board power to regulate a child's specific use of time when he is out of school. This was too great a displacement of parental authority.

It does not follow from this, however, that the school board cannot deny the use of its football facilities to a poor student in order to encourage him to use such time in study. The board seeks to protect an interest—if not *the* interest—central to the educational process—study. While the school prohibits the use of its facilities as a diversion from study, it does not deny the student's use of outside facilities. Nor does it require the student to engage in study at specific times. Thus, exclusion of the poor student from the football field would appear to be a valid exercise of the host function.

The only difference between the exclusion of the poor student and the exclusion of the physically weak or married student lies in the interest the school protects when it denies the student the right to play football. In one case this interest is the student's health; in the other, the success of his marriage. In neither of these cases is the interest central to the educational structure; indeed, these interests normally are not even proper concerns of the structure. Nevertheless, when the school board decides whether or not to provide specific services, it is proper for it to consider the conflict with other social interests that may be involved. Thus, the school board may refuse to sponsor interscholastic football because it is too dangerous a game. The general denial of interscholastic football is a decision that has general repercussions in the community and, thus, is subject to effective political control. It is noncoercive and invades no interests other than that of the entire community in having the school provide certain activities.

On the other hand, the denial of football to a specific individual is not subject to such community control. When the denial is based on the determination of the physical attributes of an individual, and an assessment of the risks as compared with the advantages playing football will have for that individual, the board is making a judgment usually left to the child and his parents. Yet, the school is not a neutral bystander. It provides football facilities and can hardly be faulted for desiring that these facilities not be used to cause serious harm to its students. Indeed, the community's sense of the school board's responsibility to those students willing to risk serious injury would no doubt condemn the board if, at the insistence of the boy and his parents, the student was allowed on the field and was in fact

injured. Such public attitudes should be recognized as part of the background against which school board powers are delegated.¹⁴³

In addition to the school board's responsibility to the individual health risk, there is the need to protect the other players from harm in terms of the guilt feelings likely to result if the sickly student is actually injured. In light of these considerations it would seem that the better view is to recognize the school authorities' right to keep a student off the football field, despite the wishes of the boy and his parents, where the school authorities reasonably conclude that there is a substantial risk of serious bodily injury to the student if he plays.

Exclusion of married students in order to further the success of the marriage is, like the exclusion of the physically weak student, essentially paternalistic in nature.¹⁴⁴ The purpose is the same in both cases—the protection of an interest unrelated to the educational structure. But determining what activities impede or facilitate a healthy marital relationship is much more complex and difficult than determining what activities may present a substantial risk of serious physical harm to an individual. Our society is naturally reluctant to commit the former decisions to public bodies, particularly when such decisions are peripheral to their main function. In addition, the relationship between school football and the protected interest of physical health is direct and immediate. There is no such obvious causal connection between football and the breakdown of a student's marriage.¹⁴⁵ Nor need the school board be concerned with the protection of fellow players. Therefore, the school board, acting under a typical general statute, does not have the power to exclude a married student from playing football on grounds that to do so would divert him from spending the time necessary to make his marriage work.

¹⁴³ Also indicative of this feeling is the almost universal acceptance of school-board-imposed physical requirements for interscholastic athletic competition. See C. FORSYTHE, *supra* note 136, at 58-60, 65-72. For example, Forsythe quotes the following from Frederick Ravel Rodgers:

The single eligibility rule which scholastic athletic associations may properly enforce is the presentation of a medical certificate of physical competence by each player before he may engage in games scheduled by the [athletic] association. The wisdom of this requirement is so obvious that it should not have to be classified as a rule. Any local administrators who, in the past, have omitted this precautionary measure should immediately take steps to protect their pupils from avoidable strains, and themselves from blame by this requirement.

Other eligibility rules ought to be abolished by interscholastic athletic associations
Id. at 58-59.

¹⁴⁴ See *School Dist. v. Green*, 259 Iowa 1260, 1268, 147 N.W.2d 854, 859 (1967).

¹⁴⁵ If the combined effect of football and marriage impairs the married student's grades he may be excluded from football on scholastic grounds, just as the non-married student is excluded.

The last school board function ancillary to its primary function of education per se is that of protecting the educational process itself from disruption. This may be classified as part either of the education per se or of the host function. This function often overlaps, and is sometimes confused with, the function of protecting the students who gather together for school purposes, yet, analytically these two should be viewed separately.

While some earlier cases have upheld school regulations on the ground that they prevented disruption of the educational process,¹⁴⁶ it was not until the recent spate of cases involving haircut, dress, and other personal appearance rules that the notion of protecting instruction from distraction and commotion became a significant basis for upholding coercive rules governing student conduct that invade the interests of other authorized decision makers.¹⁴⁷

For example, in the 1965 Massachusetts case of *Leonard v. School Committee*,¹⁴⁸ the court upheld the suspension of a pupil for failure to comply with the board's rule concerning the proper length of hair on the grounds 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. Thus as with any unusual, immodest, or exaggerated mode of dress, conspicuous departures from accepted customs in the matter of haircuts could result in the distraction of other students.¹⁴⁹

Similarly, a federal district court in Texas upheld the validity of a school rule against long hair:

Since confusion and anarchy have no place in the classroom school authorities must control the behavior of their students. If the student's dress is lewd or his appearance is a studied effort to draw attention to himself, his presence is disruptive—such behavior is no different than verbal rudeness.¹⁵⁰

¹⁴⁶ See, e.g., *Deskins v. Gose*, 85 Mo. 485 (1885); *Hutton v. State*, 23 Tex. Ct. App. R. 386, 5 S.W. 122 (1887); *Lander v. Seaver*, 32 Vt. 114 (1859); *State ex rel. Dresser v. Dist. Bd.*, 135 Wis. 619, 116 N.W. 232 (1908); cf. *Fitzpatrick v. Board of Educ.*, 54 Misc. 2d 1085, 284 N.Y.S.2d 590 (Sup. Ct. 1967).

¹⁴⁷ See note 88 *supra*.

¹⁴⁸ 349 Mass. 704, 212 N.E.2d 468 (1965).

¹⁴⁹ *Id.* at 709-10, 212 N.E.2d at 472.

¹⁵⁰ *Ferrell v. Dallas Independent School Dist.*, 261 F. Supp. 545, 550 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 89 S. Ct. 98 (1968). See also *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967); *Akin v. Riverside Unified School Dist.*, 262 Cal. App. 2d 187, 68 Cal. Rptr. 557 (Ct. App. 1968). The court's reference to "verbal rudeness" seems to express a judgment concerning proper etiquette as well as an explanation of disruption. This appears to indicate the court's view that the rule against long hair may be part of an education per se function. Later in the opinion

Contrary to these decisions, however, is the 1967 ruling of the State Board of Education of New Jersey.¹⁵¹ That ruling involved the expulsion from school of a fifteen-year-old student whose long hair violated a school board regulation.¹⁵² In defending the action of the school vice-principal in expelling the student, the school board stated that "these guidelines were laid down for the purpose of preventing extremes in appearance and dress for the purpose of preventing disruption to the educational process in the school system in the judgment of the administration and the faculty" ¹⁵³

On appeal to the State Board of Education the local school board produced testimony that there was some jeering and occasional derogatory remarks when long-haired boys were called upon to recite. The State Board also noted that there was evidence indicating a tendency of other students to isolate themselves from the boys who wore their hair longer than was customary.

As the State Board of Education properly recognized, "It is essential to the orderly process of education that local boards concern themselves with the conduct of the students in their schools where such conduct constitutes a threat to the educational process." ¹⁵⁴ However, it was "not satisfied that the record demonstrates that long-haired males present a significant threat to orderly discipline in the schools. The evidence does not indicate that the reaction of the other students was so grave as to be beyond control by the exercise of ordinary[,] simply disciplinary measures." ¹⁵⁵ The Board therefore

the court refers specifically to the socializing function of education. 261 F. Supp. at 551. While the overwhelming majority of commentators and courts have viewed hair and dress restrictions as part of the board's function to prevent disruption of the educational process, *see* the cases and articles cited herein and in notes 7 & 16 *supra*, some educators have tried to support hair and dress rules on an education per se rationale. *See* N.Y. Times, *supra* note 16; Brickman, *supra* note 16. For a discussion of this approach, *see* notes 88-93 *supra*, and accompanying text, *But see* the statement of New York City Superintendent of Schools, Bernard E. Donovan, that "a program of education rather than punitive action" is the proper approach to hair and dress, in N.Y. Times, Nov. 13, 1966, at 9, col. 5. *See also* Howard, *supra* note 7. Although there has been no judicial approval of this rationale, some educators have also based the validity of hair and dress regulations on the assertion that good grooming is causally related to good school behavior. *See* Bliss, *What's Proper for School Wear? Weary Educators Urge Uniforms*, Phila. Inquirer, May 29, 1966 (Today's World Magazine), at 8, col. 2; Compton, *Personal Appearance in Relation to High School Girls' Scholastic Achievement and Social Behavior*, 42 J. SECONDARY EDUC. 166 (1967); Handel, *Can We Outlaw Fad Clothing*, 77 SCHOOL EXECUTIVE 68 (1957); Manch, *Effective Ways of Regulating Student Dress*, 41 BULL. NAT'L ASS'N SEC-ONDARY SCHOOL PRINCIPALS 144 (1957).

¹⁵¹ *Pelletreau v. Board of Educ.* (N.J. State Bd. of Educ., Sept. 6, 1967).

¹⁵² "[H]air must be trimmed neatly and be in keeping with the general style of the time. Extremes in hair length (covering the ears, the eyebrows, and the nape of the neck) are inappropriate in this school." *Id.* at 2.

¹⁵³ *Id.* at 2.

¹⁵⁴ *Id.* at 5.

¹⁵⁵ *Id.*

concluded that the portion of the regulation involved in this proceeding was invalid.¹⁵⁶

This decision is in accord with the analysis suggested here. The State Board recognized that the local school board performs a proper function when it acts to protect the educational process from distraction and disruption. However, it also recognized that this results in school board control over student dress and appearance, an area ordinarily left to private and parental decision making in our society. Furthermore, a restriction on hair length while in school is a significant invasion of this private decision making. Finally, expulsion or suspension of an offending student runs counter to the norm of universal public education. Therefore, the school board action could not be based on the suspicion of possible disruption. Rather, it could only be based on a showing of a clear and imminent danger to the educational process.¹⁵⁷

JUDICIAL REVIEW OF SCHOOL BOARD DECISIONS

Discussion thus far has focused on the limits of school board power under a general legislative delegation of authority to promulgate and enforce rules for the governance of the school system. I now turn to the question who is to determine and enforce limitations on school board power. The school board, of course, is primarily responsible for determining the limits of its power. It is essential that school boards be aware of the nature of their functions and of the appropriate criteria on which they can rely to decide that the school interest overcomes that of other institutions in the society.

Yet, under our legal system, the courts are still responsible for making the final determination. It is they who must construe and enforce the relevant statutes. As Professor Jaffe has written, "a major premise" of Anglo-American jurisprudence is that "the judiciary

¹⁵⁶ The state board acted in this case as a reviewing court rather than as an administrative policy maker. The opinion is based on the proposition that the school board has the policy making power in this area and could only be overturned if it acted beyond its legal power. For a similar decision of a state education office acting as would a reviewing court, see *In re Dalrymple*, 5 N.Y. ED. DEP'T REP. 113, at 116-17 (1966). See also the rule of the Delaware State Board of Education, promulgated Nov. 22, 1967, quoted in a letter from Kenneth C. Madden, Sec'y and State Superintendent of Schools to Gilbert N. Cantor, Esq., Nov. 27, 1967, on file in Biddle Law Library. For a recent court decision reaching a result similar to that of the New Jersey State Board of Education, see *Myers v. Arcata Union High School Dist.*, Civ. No. 45522 (Calif. Super. Ct., Humboldt County, Nov. 1966).

¹⁵⁷ This article is not concerned with the constitutional arguments that have been raised against hair and dress regulations. See *Ferrell v. Dallas Independent School Dist.*, 89 S. Ct. 98 (1968) (Douglas, J., dissenting from denial of certiorari); *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967); *Finot v. Pasadena City Bd. of Educ.*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (Dist. Ct. App. 1967); Comment, *The Right to Dress and Go to School*, 37 U. COLO. L. REV. 492 (1965); Comment, 17 J. PUB. L. 151 (1968).

is the ultimate guarantor of legality.”¹⁵⁸ “There is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures.”¹⁵⁹

Unfortunately, courts frequently do not function in this way. Rules suspending married students from school or excluding them from extracurricular activities have been upheld as not “clearly arbitrary and unreasonable.”¹⁶⁰ This test, at best, assumes that the school board has the power to adopt rules restricting the access of married students to educational facilities. Yet the assumption is the crucial issue that must be faced, for in the absence of a specific statutory delegation of authority to regulate the status of married students, these rules, to be valid, must perform a proper educational function. Further, these regulations are valid only if the requirements of the educational function are determined to take precedence over the other social interests involved.

As an exercise in proper judicial review of school board action, let us take the situation presented in the 1967 Iowa case of *Board of Directors v. Green*.¹⁶¹ The court there was called upon to determine the validity of a school regulation excluding married students from participation in extracurricular activities. Plaintiff Green had been a regular player on the school basketball team, but, pursuant to this

¹⁵⁸ L. JAFFE, *supra* note 60, at 154.

¹⁵⁹ *Id.* at 321. For a full discussion of this issue, see *id.* at 152-96, 232-60, 320-94, 546-653. It is true, of course, that the court's role as guardian of legality does not mean that all issues defined as “legal” must be decided by the court independent of the prior administrative determination. See, e.g., *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). See generally JAFFE, *supra* note 60, at 546-94. *Hearst* and *O'Leary*, however, both involved the application of a broad legal standard to a specific, and relatively narrow, factual situation. Where the issue is one of more general statutory construction in order to ascertain the broad statutory limits in which administrative discretion can operate, courts do, and should, make independent legal determinations. See, e.g., *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1941). This is the situation regarding (1) the determination that the general enabling statute delegates coercive rulemaking power to school boards only with respect to matters in which the primary interest is a proper function of the educational structure; (2) the determination of the proper functions of the educational structure; and (3) the determination of the general criteria by which the finding is made that in the specific case, the educational function is paramount to the other social interest involved, e.g., that married students can only be excluded from school if the failure to exclude them would present a clear and imminent threat of harm to the moral health of the other students or to the functioning of the educational process.

¹⁶⁰ See, e.g., *Board of Directors v. Green*, 259 Iowa 1260, 1267, 147 N.W.2d 854, 858 (1967) (a “clearly arbitrary and unreasonable” test); *State ex rel. Thompson v. Marion County Bd. of Educ.*, 202 Tenn. 29, 34, 302 S.W.2d 57, 59 (1957); cf. *Fitzpatrick v. Board of Educ.*, 54 Misc. 2d 1085, 284 N.Y.S.2d 590 (Sup. Ct. 1967); *Leonard v. School Comm.*, 349 Mass. 704, 709, 212 N.E.2d 468, 472 (1965) (“Here, accordingly, we need only perceive some rational basis for the rule requiring acceptable haircuts to sustain its validity. Conversely, only if convinced that the regulation of pupils' hair styles and length could have no reasonable connection with the successful operation of a public school could we hold otherwise.”)

¹⁶¹ 259 Iowa 1260, 147 N.W.2d 854 (1967).

rule, was excluded from playing during his senior year because of his marriage the previous summer. He brought a bill in equity to enjoin the school board from enforcing the rule. Apparently, there had been no school board hearing on adoption of the rule or on its application to plaintiff Green. However, in the course of his suit for injunctive relief the board gave the following reasons for adoption of the rule:

1. Married students assume new and serious responsibilities. Participation in extracurricular activities tends to interfere with discharging these responsibilities.
2. A basic education program is even more essential for married students. Therefore, full attention should be given to the school program in order that such student may achieve success.
3. Teenage marriages are on the increase. Marriage prior to the age set by law should be discouraged. Excluding married students from extracurricular activities may tend to discourage early marriages.
4. Married students need to spend time with their families in order that the marriage will have a better chance of being successful.
5. Married students are more likely to drop out of school. Hence, marriage should be discouraged among teenage students.
6. Married students are more likely to have undesirable influences on other students during the informal extracurricular activities.
7. The personal relationships of married students are different from those of non-married students. Non-married students can be unduly influenced as a result of relationships with married students.
8. Married students may create school moral and disciplinary problems, particularly in the informal extracurricular activities where supervision is more difficult.¹⁶²

Using the functional analysis proposed, a court would reject the coercive education per se or anti-emulation rationales of reason number

¹⁶² *Id.* at 1268, 147 N.W.2d at 858-59. Seven of these reasons fall into the following categories:

A. Number 3 consists of (1) discouraging teenage marriage as a coercive education per se device, or (2) excluding married students to prevent emulation by other students.

B. Numbers 1, 2 and 4 deny participation in extracurricular activities to prevent diversion of the married student's time from more important matters.

C. Number 6 and 7 see the married student as posing a threat to the moral health of those students forced to associate with him.

D. Number 8 is based on both a concern for the protection of the students from moral pollution and the protection of the educational structure from interference and disruption.

three.¹⁶³ Reason number five, however, presents an interesting variant. It is based on the school board's desire to discourage teenage marriage because of its detrimental effect on the students concerned, and is thus similar to the straight coercive education per se or emulation rationale of number three. However, the detrimental effect of teenage marriage on the student is limited here to the alleged high dropout rate of married students. This is related to the educational structure. The earlier analysis in this paper had concluded that school authorities can deny a student the right to participate in extracurricular activities because he has low grades. The rationale for this was that the school could act so as not to divert the poor student's attention from scholarship. Such action was deemed central to the educational function. Is reason number five analogous to that situation? In my view the answer is no. It is true that the aim of the rule is the same as the one denying a poor student the right to engage in sports—that is, the aim is to aid the student's scholarship. The difference, however, is in the means. Reason number five consists of a coercive school rule aimed at deterring student marriages in order to promote scholarship. As such it seriously invades the statutory scheme of private decision-making and is therefore much more closely analogous to rules that attempt to set specific home study periods or preclude home social activities as a means of encouraging study, than it is to one that denies a student the right to play football in order to help his scholarship. The former rules have long ago been rejected as beyond the power of a school board under a general enabling statute.¹⁶⁴

For the reasons also discussed earlier in this paper, exclusion based on reasons number one, two, and four are beyond the power of a school. A court employing the functional analysis, however, would conclude that reasons six, seven, and eight are legitimate aspects of the host function, relating to the moral health of the students who gather in the schools and to the efficient and smooth operation of the educational structure.

Some courts, having determined that the school board was purporting to base its rule on a proper school board concern, have concluded that their review function is terminated or, at best, is limited to the "reasonableness" or "nonarbitrariness" of the rule.¹⁶⁵ But the

¹⁶³ See notes 69-75, 118 *supra* and accompanying text; note 162 *supra*.

¹⁶⁴ See notes 140-42 *supra* and accompanying text.

¹⁶⁵ For cases where the court has concluded that their review function is terminated at that point, see, *e.g.*, *Sherman v. Inhabitants of Charlestown*, 62 Mass. (8 Cush.) 160 (1850) (immoral conduct); *Wayland v. Hughes*, 43 Wash. 441, 86 P. 642 (1906) (Greek letter societies). For cases where the court has limited its review to a determination of the "reasonableness" of the rule, see, *e.g.*, *Board of Directors v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967); *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965); *Fitzpatrick v. Board of Educ.*, 54 Misc. 2d

analysis suggested here requires further judicial inquiry. The fact that the school board is acting out of a proper interest is a necessary but not a conclusive element in determining the validity of a rule. General enabling acts should not be construed to allow school board regulation of all matters properly of concern to them regardless of any conflict with other social interests. Rather, the general enabling acts should be construed to allow school board regulation to predominate over other social concerns if, and only if, the school board interest is the paramount one involved.

The courts are the allocators of societal power under the totality of the legal scheme as they construe it. As Professor Jaffe has so well stated:

The constitutional courts are the acknowledged architects and guarantors of the integrity of the legal system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built. In a society so complex, so pragmatic as ours, unity is never realized, nor is it necessary that it should be. Indeed there is no possibility of agreement on criteria for absolute unity; what is contradiction to one man is higher synthesis to another. But within a determined context there may be a sense of contradiction sufficient to create social distress; and it is one of the grand roles of our constitutional courts to detect such contradictions and to affirm the capacity of our society to integrate its purposes. The statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law, the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the common law, and the ultimate guarantees associated with the Constitution.¹⁶⁶

The courts, therefore, in fulfilling this role must set general criteria to determine when the school interest is paramount. The suggested criteria would support a determination that reasons six and seven support the conclusion of the primacy of the school interest only if the determination is also made that the participation of married students in extracurricular activities presents a reasonable likelihood

1085, 284 N.Y.S.2d 590 (Sup. Ct. 1967); *State ex rel. Idle v. Chamberlain*, 12 Ohio Misc. 44, 175 N.E.2d 539 (1961); *State ex rel. Thompson v. Marion County Bd. of Educ.*, 202 Tenn. 29, 302 S.W.2d 57 (1957).

¹⁶⁶ JAFFE, *supra* note 60, at 327. See also *id.* at 589-92.

of serious harm to the moral health of other students or to the efficient operation of school activities.¹⁶⁷

This, then, poses the hard question: Who is to determine the existence or nonexistence of such a reasonable likelihood of harm—the school board or the court? Although school boards usually do adopt rules in meetings formally open to the public, the cases indicate that the factual and inferential bases of the rules are not usually propounded or recorded at such meetings. Nor are such reasons given when action is taken against an individual student for failure to comply with a particular rule. Thus, at the time legal action is brought to challenge the rule, there is usually no alternative to a full judicial hearing on the factual and inferential bases of the rule.¹⁶⁸

The need for a judicial hearing, however, does not mean that the court should disregard prior school board determinations. The fact that there is no record does not necessarily mean there was no factual information used by the board in making its determination. There are two primary sources of information available to a school board that do not require the taking of testimony. The first is the professional staff of the educational structure. This staff usually includes psychologists and trained guidance counselors as well as teachers, principals and members of the administrative hierarchy. The second is the board members themselves, drawn from the local community, and—at least if they are an elected body—responsive to that community. The factual determination that a married student's presence threatens other students' moral health, or the functioning of the educational structure, is closely related to both educational expertise and community mores.

¹⁶⁷ If the issue were total exclusion of married students from school it would be framed in terms of a *clear and imminent threat* of serious harm to the moral health of the other students or to the efficient operation of the school.

¹⁶⁸ The majority of cases concerning coercive school board rules arise through the nonstatutory review methods of mandamus, *see, e.g.*, Mathews v. Board of Educ., 127 Mich. 530, 86 N.W. 1036 (1901); State *ex rel.* Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957), or injunction, *see, e.g.*, Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965); Wright v. Board of Educ., 295 Mo. 466, 246 S.W. 43 (1922). Where corporal punishment is the sanction for violation of the rule the method of review is usually a damage action for assault and battery, *see, e.g.*, O'Rourke v. Walker, 102 Conn. 130, 128 A. 25 (1925); Lander v. Seaver, 32 Vt. 114 (1859); *cf.* State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888) (criminal assault and battery prosecution); Guerrieri v. Tyson, 147 Pa. Super. 239, 24 A.2d 468 (1942) (assault and battery action for compensation for medical treatment). In the few cases that have raised the issue, the courts have rejected damage actions as a remedy for a wrongful exclusion from school, *see* Douglass v. Campbell, 89 Ark. 254, 116 S.W. 211 (1909); Dritt v. Snodgrass, 66 Mo. 286 (1877); *cf.* Learock v. Putnam, 11 Mass. 499 (1873). *But cf.* Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965); MASS. GEN. LAWS ch. 76, § 16 (1953). For an extremely unusual and attenuated situation in which a court passed on the validity of a school rule, *see* Bolding v. State, 23 Tex. Crim. App. 172, 4 S.W. 579 (Ct. App. 1887). *See also* State v. Gans, 168 Ohio St. 174, 151 N.E.2d 709 (1958). For general discussion of these methods of review of administrative action, *see* JAFFE, *supra* note 60, at 152-260.

In passing on the facts adduced at the judicial hearing the court should, therefore, take into account the prior determination of the school board based on the institutional information available to it.¹⁶⁹ What weight the board determination should bear is another problem. In other contexts, authorities have spoken of a "presumption of correctness" of administrative action.¹⁷⁰ Another formula might look to whether, on the facts adduced at the judicial hearing, the school board could reasonably have found the requisite "reasonable likelihood of harm."

The difficulty with any one of these tests lies in the wide range of the school board decision-making process.¹⁷¹ This discussion began on the assumption that the school board used the proper legal criteria in arriving at its decision. This assumption would seem contrary to fact in most cases today. Where the school board does not act on its view that a reasonable likelihood of harm exists, no deference should be given to its nonexistent prior determination of this question.¹⁷² Even where it appears that the school board might have addressed itself to the proper issue, uncertainty whether it did or not should diminish the judicial deference due to its possible determination. Finally, even where it is certain that the issue was determined by the board, the importance and validity of the assumption as to the expertise of the school administration and the representativeness of the school board members may differ from school system to school system and from issue to issue even within the same system.¹⁷³ The best test would seem to be one providing that, in the absence of a factual hearing at the school board level, a court must find that, on the record taken as a whole, there is the requisite reasonable likelihood of harm. The record taken as a whole should include the fact that the school board did make a prior determination on this point. The significance of this prior determination must depend on the circumstances of each case.¹⁷⁴

¹⁶⁹ See generally *People v. Walsh*, 244 N.Y. 280, 155 N.E. 575 (1927); JAFFE, *supra* note 60, at 186-92, 622-23; Comment, 70 HARV. L. REV. 698 (1957).

¹⁷⁰ See Comment, 70 HARV. L. REV. 698, 703 (1957).

¹⁷¹ Compare the discussion in *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950), *vacated and remanded*, 340 U.S. 474 (1951), *rev'd*, 190 F.2d 429 (2d Cir. 1951).

¹⁷² Deference is due only to a finding actually made. School board expertise is irrelevant where it has not been exercised. Cf. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Moreover, if the court upholds a rule solely because the school board could have made the finding when the school board has not made the finding, it is upholding the rule when the requisite finding has never been made by any finder—court or school board.

¹⁷³ See *Board of Educ. v. Clendenning*, 431 P.2d 382 (Okla. 1967); cf. *Joynt v. King*, 6 App. Div. 2d 234, 176 N.Y.S.2d 776 (1958).

¹⁷⁴ Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Where there has been a school board fact finding hearing, either at the rule-making or adjudicatory stage¹⁷⁵ there is no need for a judicial hearing *de novo*. The court can act on the basis of the record made at the school board hearing. Judicial review should then be limited to a determination whether, on the basis of this record as a whole, there is substantial evidence to support the school board's finding of a reasonable likelihood of harm.¹⁷⁶ This is still quite different from upholding a school board rule on the ground that, in some abstract way, it was reasonable (or indeed, not unreasonable) for the school board to adopt the rule in question. The test advocated here requires the court to define and focus upon the precise issue the school board must determine—here, the reasonable likelihood of serious harm. Only if the school board's determination of that issue is found to have been reasonable is the school regulation upheld as a valid exercise of school board power.

¹⁷⁵ The school boards are generally given power to make "rules and regulations," see, e.g., MICH. STAT. ANN. § 15-3614 (1959), and virtually all cases with which this power is concerned involve sanctions imposed for violations of preexisting school rules. There are, however, a few cases in which there was no preexisting rule and the student contended that his discipline was, therefore, invalid; see *Murphy v. Board of Directors*, 30 Iowa 429 (1870); *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965); *State ex rel. Dresser v. District Bd.*, 135 Wis. 619, 116 N.W. 232 (1908); cf. *State ex rel. Baker v. Stevenson*, 27 Ohio Op. 2d 223, 189 N.E.2d 181 (C.P. 1962); *Frantz v. Board of School Directors*, 41 D & C 2d 211 (Pa. C.P. 1964). See generally *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

¹⁷⁶ The statement that school board power rests on the fact of the existence of a reasonable likelihood of harm to the appropriate concerns of the educational structure immediately conjures up visions of the "jurisdictional fact" doctrine of *Crowell v. Benson*, 285 U.S. 22 (1932). As a rigid, logical doctrine of judicial review, the jurisdictional fact doctrine has been properly discredited, see 4 K. DAVIS, *supra* note 60, at § 29.09; JAFFE, *supra* note 60, at 640-48; Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055 (1932). Yet, as Professor Jaffe has demonstrated, the jurisdictional fact doctrine remains viable when viewed as a functional device to isolate those cases in which the statutory or constitutional scheme involved contemplates a greater than usual degree of judicial control of administrative fact finding. JAFFE, *supra* note 60, at 624-53.

When Professor Jaffe's functional jurisdictional fact analysis is applied to the statutory scheme involving school board promulgation of coercive rules against married students based on a finding that the presence of married students creates a reasonable likelihood of causing serious harm to the moral health of the other students or to the proper functioning of the educational process, we find that this fact is necessary to the exercise of school board power, and that it demarcates the school board's interest and the competing legislative interests involved in the student's freedom to marry, subject only to parental approval, as well as his right to full enjoyment of public educational opportunities. It might also be argued that the natural inclination of school administrators, as of other administrators who are given a specific task, is to emphasize the efficient operation of the educational structure at the expense of these other legislative interests. There is also the fact that exclusion of married students from extracurricular activities involves interests of personal liberty of which courts have traditionally been protective. Cf. *St. Joseph's Stock Yards Co. v. United States*, 298 U.S. 38, 78-79 (Brandeis, J., concurring); *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

On the other side of this balance, however, is the fact that the determination of harm to children or to the educational structure is not the type of determination that courts feel competent to make. It involves a whole complex of psychological, socio-

CONCLUSION

We have travelled a long path in discussing the validity of school board rules. Ultimately, of course, the issue is one of statutory construction. Where the delegation of authority to the board is through a broad enabling statute, a school board's power must be limited to that required by its function of administering public education. Within this power are a number of legitimate school board functions, and all valid exercises of school board power must be an expression of an appropriate school board function. Even if an appropriate function is being served, however, board action may still invade areas of decision making delegated to other groups. In order for the school board to prevail, it must be determined that in a particular situation effectuation of the school board function is paramount.

Under our system, the ultimate responsibility for determining the validity of school board rules rests with the judiciary. As a result, courts are called upon to make difficult determinations that necessarily merge into areas of educational policy, judgments they are naturally reluctant to make. Yet, absent more definite legislative standards in educational enabling acts, this is a task they must continue to perform.¹⁷⁷

logical and educational factors that need expertise for their resolution. The staff of the educational structure provides this expertise, and the school board relies on this staff in reaching its decision.

Second, the need for the generalist to counterbalance the natural inclination of the educational staff to maximize educational efficiency at the possible cost of other social interests is met in substantial part by the composition of the lay school board itself. The school board traditionally has not been, and should not be, composed of educational experts. Rather it is a group of laymen, usually elected, who bring the viewpoint of the generalist to the staff information and opinions presented to it. Its decisions, therefore, are responsive to and reflect societal values other than those of the educational structure per se.

On balance, therefore, I would conclude that where the school board has held a factual hearing, the court should not itself have to make the finding that there is a reasonable likelihood of serious harm in order to support the school board decision. It is sufficient for the court to say that the school board reasonably concluded that this exists.

¹⁷⁷ Cf. *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D.D.C. 1967); *JAFFE, supra* note 60, at 320-27.