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Constitutional Problems Surrounding the Implementation of "Anti-Gang" Regulations in the Public Schools

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COMMENTS

CONSTITUTIONAL PROBLEMS SURROUNDING THE IMPLEMENTATION OF "ANTI-GANG" REGULATIONS IN THE PUBLIC SCHOOLS

I. INTRODUCTION

Recent media reports, as well as historical study, demonstrate that our nation's public schools face an epidemic of violence, fear, and drug-use which threatens to extinguish the effective operation of these institutions. This Comment addresses several of the constitutional questions raised by both recent proposals and historical efforts designed to deal with these problems. As an introductory caveat, this Comment will not directly address the impact that "anti-gang" regulations may have on students' rights of expression, nor will it address, except in a cursory fashion, the broad-based topic of search and seizure in the public school setting. It is also important to keep in mind that various state constitutional provisions can have an effect on many of the issues raised below.

This Comment begins with a discussion of gang problems within the public schools. The statistical increase in school crime and the historical observations of several leading commentators in the educational field demonstrate that problems of drugs and violence in the schools will continue to increase until effective coping methods are developed. These problems are not exclusive to metropolitan school districts; they have begun to invade schools in both rural districts and smaller urban communities.

This Comment discusses several specific proposals designed to deal with reducing gang-related problems. Initially, this Comment examines regulations designed to create a "neutral" (or "disciplined") environment through restrictions on the clothing and hairstyles of students. These types of regulations are not new to the judicial forum. Significant litigation concerning "dress codes" arose during the 1960s and early 1970s. Despite the history of these laws, the Supreme Court has not settled upon any clear approach to their constitutionality. The Court's refusal to grant certiorari to resolve this species of litigation has resulted in the promulgation of several approaches for challenging these codes. The potential success of any particular challenge can vary greatly depending upon the jurisdiction in which it is brought.

Another species of cases, which achieved notoriety during the 1920s and 1930s, is particularly applicable to the gang problem. These decisions addressed school policies punishing public school students who belonged to certain social clubs and "secret societies". Although these laws were upheld with near uniformity, several enlightening limitations were dictated by the courts.

Cases dealing with the discipline of students for their conduct away from the school are also of interest. The courts have given these cases disparate treatment, but some of the resulting decisions are particularly demonstrative of the underlying constitutional issues. Similar disciplinary programs could be effective in curbing gang membership, drug-use, and other objectionable conduct among the student body.

Several regulations have been proposed or enacted to reduce the problems of violence and drug use in the public schools. These range from the common (e.g., "closed campus" rules), to the innovative (e.g., blanket fingerprinting of students), to the excessive (e.g., mandatory drug testing of the entire student body). This Comment discusses several examples of regulations to illustrate the conflicting interests presented when these methods are applied in the school setting. In addition to constitutional challenges levied against the substance of a regulation, a variety of challenges may be directed against the particular punishment imposed. The approved forms of punishment can have a significant impact on the constitutionality of an otherwise permissible regulation. Also, the effectiveness of these sanctions bears consideration when examining the "reasonableness" of an overall regulatory scheme, as well as the requirements necessary to provide violators with "due process".

This Comment concludes with a discussion of the author's view of "gang-related" problems in our country's public schools, how these may best be addressed, and what the probable constitutional ramifications may be.

II. HISTORY OF GANG VIOLENCE AND THE PROBLEMS TODAY

The problem of violence in our public schools is apparent. For nearly twenty years it has grown in both scope and visibility. The magnitude of gang violence, and its impact on the educational process, is clear from any brief survey of the history of our school systems:

> On the first day of school in January 1970 in the Washington, D.C. public schools, a fifteen-year-old junior high school student was shot and killed by another student. At least three other incidents involving guns occurred in Washington's junior high schools on the same day. In February 1970 the *New York Times* reported on the heroin

> "epidemic" in New York City's public schools. According to the newspaper report, heroin is used and pushed in many junior high schools and in virtually every high school in the city.... There is no reason to assume that these problems of drugs and violence in public schools are isolated in either time or location.[1]
>
> The threat of physical violence is a shadow darkening the halls and grounds of public schools across the nation. During the last 10 to 15 years this shadow has grown at an alarming rate.... Educational programs are disrupted and impoverished by the high cost of security in schools gripped by violence....
>
> Students are brutally attacked by gangs for conforming to school standards or simply being too good at school work.... In Philadelphia, it was reported that fear of attack by other students is a major factor contributing to a dropout rate that exceeds 30 percent.[2]
>
> Crime that occurs inside schools, particularly violent crime, became an issue of increasing concern in the 1970s, as indicated by congressional hearings, special conferences, and a number of research studies, as well as media coverage and public opinion polls of the decade. The concern and debate over crime in schools continues in the 1980s ....[3]

A 1975 government survey concluded that seven percent of all violent crimes committed by youths occurred in school. It also noted that nine out of ten students, comprising seventy-eight percent of "in-school" victims, never reported incidents to police, primarily out of a fear of reprisal.[4]

Several noted commentators, supported by repeated studies, have concluded, particularly in recent years, that a significant portion of the problems of school violence are attributable to the recent resurgence of youth gangs:

> Particularly in the larger urban schools, the gang is a growing influence in the juvenile violence picture. Young people banding to-

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1. WILLIAM G. BUSS, LEGAL ASPECTS OF CRIME INVESTIGATION IN THE PUBLIC SCHOOLS 1 (1971) (citations omitted); *see also* ELMER WELLS, VANDALISM AND VIOLENCE-INNOVATIVE STRATEGIES REDUCE COST TO SCHOOLS 7-8 (1971) (noting 50-75% of teacher's time is spent on discipline; 75,000 teachers per year injured so as to require medical attention; dramatic increase in school violence).

2. JOHN R. BAN & LEWIS M. CIMINILLO, VIOLENCE AND VANDALISM IN PUBLIC EDUCATION; PROBLEMS AND PROSPECTS 1-2 (1977).

3. Joan McDermott, *Crime in the School and in the Community*, *in* SCHOOL SAFETY LEGAL ANTHOLOGY 34, 34 (1985). It is interesting to note that the author of this piece, originally written in 1984, claims that there has been no real increase in school crime during the 1980s, and that the public outcry on the issue outweighs the actual problem.

4. Richard E. Isralowitz, *Juvenile Violence in the School: An Examination of the Problem*, 33 JUV. & FAM. CT. J., Nov. 1982, at 32-34.

> gether on the streets are now bringing their feuds and antagonisms into the classrooms.... One Los Angeles high school reported eight gangs operating in the building. The Crips, one of the largest, had more than 1,000 members in two schools.... [Y]outh gangs [operate] not only in the senior high schools but in the junior-high and elementary schools as well.[5]

The expansion of youth gangs has often been tied to problems within the particular community:

> Gang activity in the schools mirrors that carried out in the adjacent community. Although most street gang members have always been of school age, gang activity and violence on school campuses were uncommon in the past.... Now we find many incidents where gang activity has disrupted the educational process and threatened the safety of students and teachers.... The problem begins in the elementary schools and grows to serious proportions in secondary schools. Schools are a good meeting place for gangs and often serve as a base for their activity.[6]

Even if one rejects the premise that school violence and drug-use arise primarily from the prevalence of youth gangs, basic juvenile crime statistics demonstrate that these problems cannot be addressed solely on an "individual" level. "One of the most significant conclusions which emerges from the study of juvenile crime is that it is not a solitary activity. The vast majority of juvenile offenses are committed in groups, not by single individuals."[7]

The expansion of gang influence in our schools has reached a point where it threatens the educational mission. With rival gangs adopting school property as "turf", commentators have compared the territorialization within schools to that which occurs in prison courtyards.[8] In an effort to deal with these problems, school districts have discussed, and adopted, a

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5. LESTER DAVID & IRENE DAVID, VIOLENCE IN OUR SCHOOLS 10-11 (1980). This source also notes that school violence is not limited to large, urban schools. Several incidents are detailed, including those at a rural Missouri school, a Virginia high school, and schools in Hawaii. *Id.* at 1-2.

6. ROBERT K. JACKSON & WESLEY D. MCBRIDE, UNDERSTANDING STREET GANGS 26-27 (3d ed. 1989).

7. James William Coleman, *Deviant Subcultures and the Schools, in* VIOLENCE AND CRIME IN THE SCHOOLS 139, 140 (Keith Baker & Robert J. Rubel eds. 1980). Among the studies discussed was one by Gold & Reimer (1972), which found 92% of boys and 97% of girls who reportedly smoked marijuana, did so in groups. Erickson "found the rates of group participation to be between 70 percent and 80 percent for theft, drinking, and narcotics use, and only slightly lower for violent offenses such as armed robbery and fighting." *Id.*

8. Francis A.J. Janens, *The Social Organization of the High School: School Specific Aspects of School Crime, in* SCHOOL CRIME AND DISRUPTION 21, 33 (Ernest Wenk & Nora Harlow eds., 1978) noted:

variety of approaches—both old and new. It is the constitutionality, as well as the effectiveness, of the regulations which will be examined below.

III. HAIRCUTS AND DRESS CODES

One of the most publicized segments of "anti-gang" regulation has been the regulation of student dress and hairstyle. At first glance, one would not think this to be a troublesome area of regulation because of the extensive case law on similar matters during the 1960s and 1970s. This, however, is not the case. A discussion of student dress codes (a term often used loosely to encompass regulations of both attire and hairstyle) must necessarily entail a two-pronged analysis. First, we examine whether a right to govern one's own appearance even exists, and, if so, what caliber of constitutional right we are dealing with. Second, after having defined some basic right, we examine specific constitutional language which may prohibit or limit the particular restriction of this "right".

A. Defining a Constitutional Right to Govern One's Appearance

A variety of approaches have been taken to derive and define the "right" to govern one's own appearance. Some jurisdictions have denied the basic existence of such a right.[9] In *Massie v. Henry*,[10] for example, Judge Boreman, in dissent, found the majority's confusion over the source of a right to govern one's own appearance "indicative that there is none."[11] Although the Supreme Court's repeated denial of certiorari in cases uphold-

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> The physical size of the large urban school . . . made it impossible for students to relate to the school as a totality. Student groups, sorted by ethnicity, established control over particular stairwells in the school and even over "turfs" on the sidewalks outside in much the same manner as prisoners set up "courts" or territories in prison yards. These territorial claims not only reduce interaction among ethnic groups, but also provide a source of potential conflict and violence.

Id. at 33 (citations omitted).

> Interestingly, the territories of "turfs" claimed by student groups are not often the focus of violence. The crimes which occur there tend to be victimless crimes such as drug use or selling rather than violence which would bring "heat" and jeopardize the availability of the student-controlled space.

Id. at 36 n.8. Walter B. Miller "pointed out that the traditional view of schools as *neutral turf* had dissolved into a new picture of schools as being 'owned' by rival gangs in Los Angeles and other large cities." ROBERT J. RUBEL, THE UNRULY SCHOOL 29 (1977).

9. *See* New Rider v. Bd. of Educ., 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973) (no basic constitutional right is involved in regulation of the length of a student's hair); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), *cert. denied*, 409 U.S. 989 (1972) (no constitutional right to hairstyle).

10. 455 F.2d 779 (4th Cir. 1972).

11. *Id.* at 784 n.1 (Boreman, J., dissenting).

ing dress codes might be read to reflect a similar view, a corresponding body of law invalidating such restrictions has also gone without review.[12]

Another approach, more commonly taken by the courts, views the right to govern one's own appearance as a "minor" right which may be impinged upon by reasonable regulation that addresses a legitimate state interest.[13] For courts applying this methodology, regulation of student dress will be constitutional if it is reasonably calculated to prevent disruption or interference. No showing of actual effects (e.g., prevention of violence) is required. A third category of cases has analogized students' right to dress freely with other *fundamental freedoms*, such as the right of free speech,[14] which require the showing of a compelling state interest as a condition to any infringement on that right.

Still other courts have advocated a "middle-line" approach which recognizes a constitutional right to a "lesser proportion". Practically, this "hybrid" approach is usually a poorly disguised, or poorly performed, application of the rational basis test. Under this view, the school must articulate an actual purpose for the regulation, as well as demonstrate the interference that will occur with the educational process in the absence of the restriction in question.[15] In *Sims v. Colfax Community School District*,[16] the District Court for the Southern District of Iowa expressed this approach by revoking the presumption of constitutionality for statutes which seek to infringe upon an individual's right to "express his identity and personality."[17] In *Olesen v. Board of Education of School District No. 228*,[18] the District Court for the Northern District of Illinois upheld an anti-gang regulation which prohibited male students from wearing earrings, noting that such a "message" of "individuality" was not within the protected scope of the First Amendment.[19]

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12. See, *e.g.*, New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), *cert. denied*, 409 U.S. 989 (1972); Olff v. East Side Union High Sch. Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1973); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

13. Leonard v. School Comm. of Attleboro, 212 N.E.2d 468 (Mass. 1965); Contreras v. Merced Union High Sch. Dist. (unreported) (E.D. Cal. Dec. 13, 1968); *see also* John D. Ingram & Ellen R. Domph, *The Right to Govern One's Personal Appearance*, 6 OKLA. CITY U. L. REV. 339, 349-50 (1981).

14. Crews v. Cloncs, 303 F. Supp 1370 (S.D. Ind. 1969), *rev'd*, 432 F.2d 1259 (7th Cir. 1970).

15. *See* Massie v. Henry, 455 F.2d 779 (4th Cir. 1974); Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972), *overruled by* Zeller v. Donegal Sch. Dist. Bd. of Educ., 517 F.2d 600 (3d Cir. 1975); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

16. 307 F. Supp. 485 (S.D. Iowa 1970).

17. *Id.* at 488.

18. 676 F. Supp. 820 (N.D. Ill. 1987).

19. *Id.* at 822.

The approach applied often seems based upon the nature of the underlying regulation and the challenge brought against it. However, as a general rule, the state has no great burden when attempting to prescribe certain clothing and hairstyles for the student body as long as the regulation in question meets a basic test of "reasonableness". This results primarily from the assumption that "anti-gang" dress codes foster safety in the school (i.e., a compelling state interest),[20] unlike the dress codes of the 1960 and 1970 cases, which addressed general concerns of school decorum.

B. Challenges to Dress Codes and Haircut Guidelines

Even if we work under a basic presumption that there is some constitutional right to govern one's own appearance, it becomes clear that courts have failed to take any consistent approach towards identifying the source of such a right. Rather, the results have been a muddled series of cases and commentaries which delineate a variety of constitutional challenges which can be levied against dress codes. The following subsections detail many of the more prominent challenges.

1. First Amendment Right of Free Expression

Under the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*,[21] students appeared to enjoy some basic right of "expression" under the First Amendment after the Court imposed a limitation on the state's ability to restrict student dress. This was interpreted to require the State to show that material and substantial interference to the educational process would result in the absence of the regulation in question.[22]

As a result of later opinions, such as *Hazelwood School District v. Kuhlmeier*,[23] which permit regulations which are "reasonably related to legitimate pedagogical concerns,"[24] the effectiveness of this type of challenge

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20. JACKSON & MCBRIDE, *supra* note 6, at 27 ("Depending on the type of gang and the school atmosphere, the member may wear identifiable gang clothing and accessories. Various types of jackets, hats, scarfs or earrings are but a few of the items used."). For a discussion of the importance of gang clothing to members of the gang, as well as the various types of gang clothing and hairstyles, see generally *id.* at 59-83; *see also No Right to Wear Gang Garb,* L.A. DAILY J., Feb. 28, 1990, at 6, col. 1 ("To knowingly wear clothing that will provoke violence is like falsely crying 'Fire'! in a crowded theater.").

21. 393 U.S. 503 (1969).

22. Crossen v. Fatsi, 309 F. Supp 114, 116-17 (D. Conn. 1970).

23. 484 U.S. 260 (1988).

24. *Id.* at 273. Note again that a full discussion of the impact of freedom of speech and expression rights on dress code regulations is beyond the scope of this Comment. For such a discussion, see Lynda M. Grandinetti, *Twenty-Five Years Later: Schools and School Districts—*

has been almost entirely eliminated. There is also case law which implies that student dress fails to satisfy the "conduct as speech" threshold.[25] Suffice it to say, any regulation *designed* to retard gang activity in the public school setting will pass muster under the present test.[26]

2. Ninth Amendment Rights Retained by the People

An argument often advanced against the constitutionality of dress codes is based upon the Ninth Amendment to the United States Constitution. It is asserted that the right to govern one's appearance falls within the personal liberty reservation of the Ninth Amendment. This right has been recognized in varying degrees in cases ranging from 1891 to the present day.[27] The success of constitutional challenges under this theory will depend significantly upon state constitutional provisions and grants of regulatory authority. Also, it is important to note that this line of argument is often confused with other constitutional challenges, particularly those based on the *Griswold*[28] decision, or on due process principles.

3. The Fourteenth Amendment Right of Privacy: *Griswold* Revisited

The principles discussed in *Griswold v. Connecticut*[29] have also arisen in challenges to dress regulations. The basic argument which is made (generally in a dissenting opinion or law review article) is that the unenumerated

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Discipline of Students—Committee may Compel a "Proper Haircut" as Part of Mode of Dress, 25 NEW ENG. L. REV. 215 (1990).

25. Conduct intended to be protected speech requires a basic demonstration that it conveys a particularized message, as well as its likelihood to be understood by those who view it. Spence v. Washington, 418 U.S. 405, 410-11 (1974). *Olesen* held that the message of individuality conveyed by the wearing of an earring was not within the protected scope of the First Amendment. *See* Olesen v. Bd. of Educ., 676 F. Supp. 820, 821-22 (N.D. Ill. 1987). Also, "the First Amendment does not necessarily protect an individual's appearance from all state regulation." *Id.* at 822.

26. The Los Angeles Journal reported that:

> Administrators at area high schools are telling students what they can't wear to campus, and some of the kids don't like it. They're saying predictably, that their First Amendment rights are being violated. They're wrong. This is not a case of school officials imposing some vague notion of propriety by banning over-the-collar hair or bell-bottom pants . . . . the issue today is public safety, and the concern is with the violence that can be provoked by wearing of gang symbols and colors.

No Right to Wear Gang Garb, *supra* note 20.

27. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . . "); *see also* Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971); Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Kelly v. Johnson, 425 U.S. 238, 251-52 (1976) (Marshall, J., dissenting).

28. Griswold v. Connecticut, 381 U.S. 479 (1965).

29. 381 U.S. 479 (1965).

"right of privacy" discussed in *Griswold* and *Roe v. Wade*,[30] encompasses some right to govern one's own appearance, or "manner of presentation to the world."[31] Despite the novel nature of this argument, most courts have rejected it, often noting that one's appearance is *public*, and cannot logically be protected under a right of privacy.[32]

4. Fourteenth Amendment Right to Due Process: Vagueness

The most common and consistent challenge to dress code restrictions is a claimed denial of the Fourteenth Amendment right to due process through the regulation's vagueness, and its resulting failure to give students notice of what the dress code specifically requires. In *Meyers v. Arcata Union High School*,[33] for example, a school policy indicating that "extremes of hair styles are not acceptable" was found to be vague and uncertain. The court's decision was based primarily on a perception that the term "extreme" lacked specific meaning, rather than the school's "constitutional" authority to regulate student dress. The court noted that whether a style "was 'extreme' was neither determinable nor predictable by anyone except the vice-principal."[34]

"Vagueness" challenges may still be effective attacks against anti-gang dress regulations, but they beg the underlying questions: Is the right to govern one's own appearance protected by the Constitution and, if so, to what extent? Such questions will remain despite adjustments in dress code language.

5. Fourteenth Amendment Right of Equal Protection

Challenges to dress codes grounded in the equal protection clause of the Fourteenth Amendment have been primarily based on sex discrimination. Most of the haircut and dress restrictions which prompted the past litiga-

30. 410 U.S. 113 (1973).

31. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (notice the similarity to right to be let alone), *overruled by* Katz v. United States, 389 U.S. 347 (1967); Zeller v. Donegal Sch. Dist., 517 F.2d 600, 614 (3d Cir. 1975) (Seitz, C.J., dissenting); Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971); *Id.* at 1078 (Lay, J., concurring); Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Parker v. Fry, 323 F. Supp. 728, 731-33 (E.D. Ark. 1971); *see also* J. Harvie Wilkinson & E.G. White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 610 (1977); Ingram & Domph, *supra* note 13, at 352-53.

32. Karr v. Schmidt, 460 F.2d 609, 614 (5th Cir. 1972) ("A regulation restricting the length of hair restricts privacy not at all. Hair is, of course, worn for all the world to see."); Richards v. Thurston, 424 F.2d 1281, 1283-84 (1st Cir. 1970).

33. 75 Cal. Rptr. 68 (1969).

34. *Id.* at 75.

tion applied to either boys (e.g., prohibitions against shoulder-length hair), or to girls (e.g., prohibitions against wearing slacks), exclusively. Some courts have found that these regulations necessarily lack reasonableness.[35] As one commentator put it: "To say that there is a need to regulate the length and style of a male student's hair, but not a female's, is ludicrous."[36]

It is interesting to note how similar challenges are applicable in the gang context. Proscriptions against gang hairstyles may run afoul of the equal protection clause if they are specific to gender or race. Dress restrictions may also pose equal protection problems, which may extend beyond a "gender," if they are addressed to the dress of members of particular racial gangs. For example, "[t]he uniform or dress of Hispanic gangs is an easily recognized standard. Most gang members adopt a basic dress style: sparkling white T-shirts, thin belts, khaki pants with split cuffs, a black or blue knit cap (beanie) or a bandanna tied around the forehead similar to a sweatband."[37] Even if these regulations are not discriminatory in their enforcement, they will certainly be so in their inception if they hope to be effective. This can lead to challenges based on the legislative purpose behind these restrictions, as well as the rights of these students to be let alone (discussed below). When dress codes are targeted on the basis of gender or race, the state will have the burden of demonstrating an actual compelling interest served by these regulations, as well as their actual effectiveness.[38] However, at least one court has flatly rejected this argument in the context of an anti-gang regulation which prohibited male students from wearing earrings.[39]

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35. *See* Miller v. Gillis, 315 F. Supp. 94, 101 (N.D. Ill 1969) (rejecting safety as a basis for restricting hair length of male students since no corresponding "protection" was employed to address similar problems presented in the case of women's hair length).

36. Ingram & Domph, *supra* note 13, at 362.

37. JACKSON & MCBRIDE, *supra* note 6, at 34.

38. *See generally* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (discussing gender-classifying regulations); Fullilove v. Klutznick, 448 U.S. 2758 (1980) (discussing regulation which distinguished on basis of race); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (challenge to an admissions program which distinguished applicants based on race).

39. Olesen v. Board of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987). The court stated:

> Olesen must show that the gender-based classification does not substantially relate to a legitimate government objective. . . . The Board members and Bremen's administrators have recognized that the wearing of earrings by males generally connote gang membership. While girls may be gang members, they symbolize their affiliation in other ways—ways that are also prohibited by the school policy.

Id. at 823 (emphasis added) (citation omitted).

6. Right to Be Let Alone

Student dress codes can also be challenged as violative of the students' right to be let alone. This methodology is applicable on several different levels. The constitutional challenge may arise because of the applicability of "anti-gang" regulations to students who are not directly "associated" with gang problems in the schools, but fit a general "profile". In this context, the "right to be let alone" deals with the significance of varying constitutional rights based on one's appearance, associations, or habits. It has particular impact when the regulation's justification and constitutionality are specifically tied to a desire to address gang problems in the public schools rather than general concerns over school decorum. It is significant to note, however, that racial and gender linkage can contribute directly to a regulation's effectiveness, while minimizing unnecessary infringement on the personal liberty of the student body at large.

The right to be let alone is most frequently raised in conjunction with Fourth Amendment challenges to unreasonable searches and seizures.[40] One example of this right arising in the aforementioned context occurred in *Sibron v. New York*.[41] In that case, the Supreme Court concluded that an "inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by police upon an individual's personal security."[42] Aside from the implications that this challenge has to search and seizure cases in a school setting, this challenge also has ramifications in the area of school dress regulation. Individuals may dispute the constitutionality of restrictions that are imposed on them because they fall within a particular class of the population (e.g., blacks, males, gang members, or even public school students in general). The more restrictive the class definition becomes, the greater the resulting intrusion on the individual's right to be let alone. This should factor accordingly into any balancing of the regulation's justifications against its infringement on the individual rights of the targeted segment of students, as well as the student body at large.

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40. *See generally* Debra R. Schultz, Note, *"The Right to be Let Alone": Fourth Amendment Rights and Gang Violence,* 16 W. ST. U. L. REV. 725 (1989).

41. 392 U.S. 40 (1968).

42. *Id.* at 62. The right to be let alone has its origins deep in American history. In Olmstead v. United States, 277 U.S. 438, 478 (1928), Justice Brandeis, dissenting, noted:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. at 478 (Brandeis, J., dissenting).

The applicability of the right to be let alone is not limited solely to non-gang students who fall within a general membership profile or other "target" groups. This right has also been asserted by gang members themselves, specifically those who are not known participants in "objectionable conduct".[43] Analogous to the Court's assertions in *Sibron*[44] is the basic ideal that our free society must reject the idea that individual rights and protection can be forfeited because of one's associations. The status and impact of this ideal under the current judiciary is, at best, unclear.

7. "No Reasonableness" Arguments: The Last Resort

Several courts have avoided a discussion of the validity of dress codes under any of the aforementioned challenges, especially those derived from the right of privacy.[45] Instead, many regulations have been invalidated because of their failure to meet a general test of reasonableness. This analysis is often coupled with a discussion of the regulation's effectiveness in addressing its perceived purpose. One particularly sharp example of this type of reasoning occurred in *Scott v. Board of Education*.[46] In *Scott*, a challenge was levied against a school board's power to proscribe the wearing of slacks by young women. The court, recognizing the board's "implied power to regulate dress for reasons of safety, . . . order and discipline," found no reasonable relation to these goals inherent in the proscription of women's slacks:

> The simple facts [sic] that it applies only to female students and makes no differentiation as to the kind of slacks mandates a [finding of the rule's invalidity], for those facts [sic] make evident that what is being enforced is style or taste and not safety, order or discipline. A regulation against the wearing of bell-bottomed slacks by students, male or female, who ride bicycles to school can probably be justified in the interest of safety, as can, in the interest of discipline, a regulation against slacks that are so skin-tight and, therefore, revealing as to provoke or distract students of the opposite sex. . . . Such regulations are valid because they relate the prohibition to an area within the Board's authorized concerns; the flat prohibition of all slacks is invalid precisely because it does not.[47]

Courts have also shown some tendency towards applying a general reasonableness test after tying it to some specific right or freedom, such as

43. *See* Tom Morganthau, et al., *The Drug Gangs*, NEWSWEEK, Mar. 28, 1988, at 20-27.
44. *Sibron*, 392 U.S. 40.
45. *See, e.g.*, Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970).
46. 305 N.Y.S.2d 601 (1969).
47. *Id.* at 606.

those discussed above. Few courts either view the "right" to govern one's own appearance as one of such fundamental nature that there must be a showing of some compelling state interest to justify infringement, or reject the existence of such a right altogether; most courts, finding the existence of some right, under one guise or another, look only to the *reasonableness* of the regulation in addressing some particular state objective. Courts have, however, differed over what constitutes "reasonableness", and whether the state, or the student, has the burden of justifying, or discrediting, the regulation.[48]

IV. PROHIBITIONS AGAINST GANG MEMBERSHIP

Aside from the regulation of student dress, "anti-gang" regulations may also be designed specifically to curb student membership in these organizations. Historical support exists to justify such regulations, even the extreme action of expelling known gang members from public schools entirely. Two distinct lines of case law support this analysis. First, there are a number of early cases dealing with the regulation of student membership in public school fraternities and sororities. Additionally, a substantial amount of law addresses the right of school officials to regulate student conduct away from the public school. This latter discussion is of particular interest because regulation, under its guidelines, can be addressed not only to gang membership, but also to student drug-use or other deviant conduct.[49]

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48. *See generally* Ingram & Domph, *supra* note 13, at 363-72; *see also* W.E. Shipley, Annotation, *Validity of Regulation by Public School Authorities as to Clothes or Personal Appearance of Pupils*, 14 A.L.R. 3d 1201 (1967).

49. An excellent example of how multifaceted anti-gang regulations attack gang activity, gang membership and recruitment, and gang "presence" in the school (i.e., through dress, etc.) was detailed in Olesen v. Board of Education, 676 F. Supp. 820, 821-22 (N.D. Ill. 1987). The policy stated:

> *Policy of the Board of Education of School District No. 228, Cook County, Illinois Prohibiting Gangs and Gang Activities* (Adopted on 4-24-84) This Board of Education feels that the presence of gangs and gang activities can cause a substantial disruption of or material interferences with school and school activities. A "gang" as defined in this policy is any group of two or more persons whose purposes include the commission of illegal acts. By this policy, the Board of Education acts to prohibit existence of gangs and gang activities as follows:
>
> No student on or about school property or at any school activity:
>
> 1. Shall wear, possess, use, distribute, display or sell any clothing, jewelry, emblem, badge, symbol, sign or other things which are evidence of membership or affiliation in any gang
>
> 2. Shall commit any act or omission, or use any speech, either verbal or non-verbal (gestures, hand-shakes, etc.) showing membership or affiliation in a gang
>
> 3. Shall use any speech or commit any act or omission in furtherance of the interests of any gang or gang activity, including, but not limited to:

A. Historical Development-Prohibition of Social Clubs

After the turn of the century, particularly during the 1920s, regulations prohibiting student membership in a variety of fraternal organizations began to appear. Although many of these regulations were challenged, the courts upheld their validity with near unanimity. However, several cases do place limitations on the school's authority to punish students for membership in these organizations.[50] The youth gangs troubling our schools today raise many of the concerns discussed in these cases, and a brief survey of this area of law is instructive.

Before addressing these cases, it is important to understand what is constitutionally required in the area of education. Although the United States Constitution provides no right to an education, the deprivation of such a right, once it has been established "by an independent source such as state statutes or rules," must satisfy the provisions of the Due Process Clause of the Fourteenth Amendment.[51] Within this basic framework, the judiciary has specifically recognized that school boards have an "inherent power" to prohibit organizations which "have a deleterious influence and are found to be inimical to the best interest of the school."[52] However, in *Wright v. Board of Education*,[53] the Supreme Court of Missouri bucked the trend by holding such a rule invalid. The court found that adopting a regulation penalizing students who were members of "fraternities and secret organizations" was beyond the authority of the school board. The court indicated that its decision turned on a failure of the Missouri Board of Education to demonstrate the rule's "reasonableness".[54] However, some commentators have implied that the holding in this case was based less upon the constitu-

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a. soliciting others for membership in any gangs

b. requesting any person to pay protection or otherwise intimidating or threatening any person

c. committing any other illegal act or other violation of school district policies

d. inciting other students to act with physical violence upon any other person.

50. *See generally* R.A. Vinluan, Annotation, *Regulations as to Fraternities and Similar Associations Connected with Educational Institutions*, 10 A.L.R. 3d 389 (1966).

51. Goss v. Lopez, 419 U.S. 565, 572-73 (1974); *see also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972), *overruled by* Perry v. Sinderman, 408 U.S. 593 (1972).

52. Holroyd v. Eibling, 188 N.E.2d 797, *appeal dismissed*, 186 N.E.2d 200 (Ohio Ct. App. 1962); *see also* Antell v. Stokes, 191 N.E. 407 (Mass. 1934); Steele v. Sexton, 234 N.W. 436 (Mich. 1931); Coggins v. Bd. of Educ., 28 S.E.2d 527 (N.C. 1944); Burkitt v. School Dist. No. 1., 246 P.2d 566 (Or. 1952); Wilson v. Abilene Indep. Sch. Dist., 190 S.W.2d 406 (Tex. Civ. App. 1945); Wayland v. Bd. of Sch. Directors, 86 P. 642 (Wash. 1906).

53. 246 S.W. 43 (Mo. 1922).

54. *Id.* at 45.

tionality of the regulation, and more upon the statutory scheme which defined the board's authority.[55]

Social club restrictions varied in scope and approach. Courts often referred to these variations when justifying the regulation. The penalties imposed upon violating students ranged from exclusion from extracurricular activities to expulsion if students failed to terminate their memberships. Some courts did place limits on the scope of these regulations. In *State ex rel. Stallard v. White*,[56] for example, an Indiana court concluded that although the school could discriminate against members during the admissions process, it could not require the renunciation of prior membership. *Wilson v. Abilene Independent School District*[57] noted that membership prohibitions could not be extended over periods of school vacation since this amounted to an unnecessary infringement on parental authority.

Many basic constitutional challenges were put forth against these regulations, only to be summarily rejected by the courts.[58] Courts were careful to distinguish fraternities and sororities in public high schools from religious organizations and fraternal societies noting that the latter groups foster education and are not charged with acts inimical to it.[59] A perceived lack of "redeeming value", coupled with a threat to the educational function of the school, could justify the use of comparable methods to curtail gang membership in the public schools. The "benefits" of forcing gang membership underground in the school setting must be balanced against the cost to society of denying educational benefits to gang members. As will be discussed subsequently, exclusion or seclusion of problem students may actually, though indirectly, inflame the problems in our schools and in our society at large.

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55. R. A. Vinluan *supra* note 50, at 392; *see also* Sutton v. Bd. of Educ., 138 N.E. 131 (Ill. 1923).

56. 82 Ind. 278 (1882).

57. 190 S.W.2d 406 (Tex. Civ. App. 1945).

58. *See* Satan Fraternity v. Board of Pub. Instruction, 22 So.2d 892 (Fla. 1945) (due process, equal protection, right to assemble); Bradford v. Board of Educ., 121 P. 929 (Cal. 1912) (Fourteenth Amendment challenge to denial of right to attend public school).

59. *Satan Fraternity*, 22 So.2d at 894. *But see* Robinson v. Sacramento City Unified Sch. Dist., 53 Cal. Rptr. 781 (1966) (although challenge to regulation in case of sorority membership rejected, court notes positive aspects of memberships: "High School fraternities, sororities and clubs undoubtedly accomplish good, mostly to those who belong to them, giving them a sense of security, a feeling of being wanted. But the school board has said the harm these societies do outweighs the good, that they are inimical to the government, discipline and morale of the pupils."). *Id.* at 789.

B. Regulation of Student Conduct Away from School Grounds

Historically, school authorities have had great discretion in governing the conduct of students away from the school.[60] Still, some of these regulations have been invalidated; for example, a 7:00 to 9:00 P.M. study curfew was rejected as "a usurpation of authority not conferred upon [trustees and teachers] by law."[61] The underlying test of constitutionality for such disciplinary rules is one of reasonableness. Some modification of this general rule is necessary where the conduct in question involves the exercise of an enumerated constitutional right (e.g., free speech). However, this distinction is not of particular concern under our current discussion.[62]

If we assume, arguendo, that gang activities, including violence, crime, and drug use, have a direct and immediate effect on the discipline or general welfare of the school and that the disciplinary regulations imposed for participation in this conduct are reasonable, then such regulations will undoubtedly be upheld against constitutional challenges.[63] The first of these assumptions is not hard to reach when we note the correlation between gang activity in public schools and their adjacent communities.[64] Also, the severity of the conduct to be controlled can be balanced against the form of discipline visited on the student. These policies, especially when designed and enforced with the cooperation of local law enforcement and social agencies, can provide excellent weapons against the security threat which gangs pose to the public school system.[65]

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60. *See* Caldwell v. Cannady, 340 F. Supp 835 (N.D. Texas 1972) (discipline upheld for drug use away from school); O'Rourke v. Walker, 128 A. 25 (Conn. 1925) (authorizing punishment of bully who assaulted students on their way home). *But see* Howard v. Clark, 299 N.Y.S.2d 65 (Supp. Ct. 1969) (suspension for drug possession away from school held outside authority of school as established by state statute).

61. Hobbs v. Germany, 49 So. 515, 516-17 (Miss. 1909) ("While in the teacher's charge, the parent would have no right to invade the schoolroom and interfere with him in its managements. On the other hand, when the pupil is released, and sent back to its home, neither the teachers nor directors have the authority to follow him thither, and govern his conduct while under the parental eye.").

62. For examples of cases discussing exercise of First Amendment rights, see Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 966 (5th Cir. 1972) (publication of underground newspaper); Woods v. Wright, 334 F.2d 369 (5th Cir. 1964) (peaceful demonstrations).

63. These issues are discussed in Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555 (Iowa 1972).

64. JACKSON & MCBRIDE, *supra* note 6, at 26-27.

65. *See generally* Ernest C. Blount, Model Guidelines for Effective Police-Public School Relationship (1985); PETER D. BLAUVELT, EFFECTIVE STRATEGIES FOR SCHOOL SECURITY (1981); RUBEL, *supra* note 8.

V. OTHER REGULATIONS ADDRESSING VIOLENCE AND DRUG-USE

> The *necessary* condition for school crime . . . is a social climate that permits a perpetrator-victim relationship to be created and to persist. In attempting to prevent school crime our task is to identify the factors which bring about a school social climate conducive to crime and to alter these in an effort to produce a more desirable social climate.[66]

A. Types of Regulations

The following subsection will survey some of the other forms that "anti-gang" regulations have taken, and some regulations that have been proposed.

1. Security Guards and Undercover Officers

To address school security concerns in the 1970s, many public schools began establishing extensive security programs. These efforts concentrated on placing security officers in the schools. These officers were typically deputized by local law enforcement, and would act as the police liaison to the school. The officer's presence was primarily designed to promote cooperation between the police and the public school. Security officers also performed a deterrent function within the school.[67]

Today, safety-related problems in our school systems have grown beyond the point where they can be effectively addressed by security officers.[68] "Many school officials feel that tough security programs are a necessity in the face of intolerable levels of disorder in schools."[69] New, preventative tactics have been proposed and implemented within various school systems as a result of this status.

Many schools have adopted a "Big Brother" approach to attack school violence. The school board of Texarkana, Texas, for example, approved a surveillance camera system to deal with violence in its schools. Additionally, teachers are given tape recorders to record threats and other distur-

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66. James Garbarino, *The Human Ecology of School Crime: A case for small schools, in* SCHOOL CRIME AND DISRUPTION, *supra* note 8, at 155 (emphasis in original).

67. Blount, *supra* note 65, at 53-61.

68. BUSS, *supra* note 1, at 18-21; *see also* Fred Kline, *Duke v. Violence*, L.A. DAILY J., June 19, 1980, at 4, col. 4 ("Los Angeles school board now operates the third or fourth largest police force in Los Angeles County.").

69. *See* Mark Thompson, *School Officials Use Tough Tactics to Curb Disorder*, L.A. DAILY J., Oct. 28, 1985, at 1 (this editorial goes on to quote Peter Mehas, Fresno County School District lobbyist: "If you are going to make us responsible for these children, for God's sake give us the ability to do it effectively.").

bances. Interestingly, the board intended the major effect of this program to be psychological deterrence.[70] This kind of regulatory focus can have a special impact upon the examination of claims of "moderation" within the educational environment.[71]

Still other districts have turned to student infiltration as a method of curbing school violence:

> Sometimes problems are so bad that school districts resort to undercover policemen posing as students. . . . [S]uch undercover work had been going on for years [in New York City] and had to be increased because of fights, assaults, arson, bombings and other disorders. The agents register as students, attend classes and take part in school activities, but the principal does not always know they are in his school.[72]

As gang problems escalate, questions concerning these types of programs will focus on whether or not they have reached a point of diminishing returns where sheer costs force schools to turn away from draconian efforts, and towards social programs designed to do more than facially address the public schools' problems.[73] Also, concern exists about the overall effect these efforts may have on the educational process.[74]

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70. BUSS, *supra* note 1, at 29; *see also* BAN & CIMINILLO, *supra* note 2, at 27 ("Schools are increasingly turning to security hardware in their fight against school crime. Where violence and vandalism are most pronounced, there have been installed electronic burglar or intrusion alarm systems.").

71. *See infra* notes 99-100 and accompanying text.

72. WELLS, *supra* note 1, at 37; *see also* Thompson, supra note 69, at 1 ("One of the most effective tactics is the use of youthful undercover officers to infiltrate high school campuses in an effort to make drug purchases.").

73. Daniel L. Duke & Adrienne M. Meckel, *Disciplinary Roles in American Schools*, *in* VIOLENCE AND CRIME IN THE SCHOOLS, *supra* note 7, at 101, 104.

74. DAVID & DAVID, *supra* note 5, at 11-12. The authors discuss several methods adopted by schools to address vandalism and violence:

> Many have hired special guards. Some are armed and wear easily distinguishable uniforms. Others are unarmed and wear street clothes. Surveillance and intruder-detection devices have been installed in many buildings. Some schools have installed closed-circuit television systems and visitors must identify themselves to office personnel before the locked doors are buzzed open. Walkie-talkies, panic button[sic]s, and pocket transmitters are also used. In other schools, devices like those in airports screen students and visitors for concealed weapons. Another effective security measure is the use of gates within gates. An individual enters a cubicle and cannot move into another unless the gate is unlocked.
>
> Educators say these techniques have succeeded in cutting down crime but they do not like them. Many observers question whether a prison-like atmosphere, even when it is effective in reducing crime, can in the long run be compatible with good education and preparation for life as a responsible adult.

2. Of Dogs and Detectors: Searches and Drug Tests

In recent years, much attention has focused upon the constitutionality of searches in the public school setting, as well as upon corollary questions related to mandatory student drug testing.[75] As previously mentioned, this is a broad topic which cannot be properly addressed in the following few paragraphs.[76]

As a generalization, most of the concern surrounding school searches deals with the applicability of the Fourth Amendment's prohibition against unreasonable searches and seizures. Often times the "reasonableness" of a search will depend on its underlying circumstances.[77] Despite recent concern over the issue of searches at school, "[t]here are still no bright line tests for determining that a drug search, absent individualized suspicion, will survive judicial scrutiny."[78] Recent commentary has also focused upon whether the "reasonableness" test is still applicable.[79]

Several cases have discussed the use of a dog sniff in establishing probable cause prior to a search. Even these cases are not clear, for the resulting search may still go too far.[80] Consistency is essential, possibly incorporating other problems mentioned throughout this subsection, before effective programs, having long-term success in dealing with the problems of violence and drug use in the school environment can be developed.

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75. *See* Thompson, *supra* note 69, at 18.

> The Becton Regional High School in New Jersey proposed to help its students stay off drugs by administering urinalysis tests to all 516 students starting classes this fall. Positive results would not be used in criminal prosecutions but rather to help determine which students needed help in solving drug problems, school officials said. But the New Jersey Civil Liberties Union filed suit to block the planned tests and a state judge granted a temporary restraining order . . . .
>
> In this case, Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist., 510 A.2d 709, 712 (N.J. Super. Ct. Ch. Div. 1985), a permanent injunction was granted from which the school district appealed. The school district withdrew its pending appeal in Spring, 1986.

See also Jenifer L. Wilhem, Comment, *Drug Testing in Public Schools: Can it Survive the "Reasonableness" Test?*, 14 U. DAYTON L. REV. 687 (1989)

76. *See generally* New Jersey v. T.L.O., 469 U.S. 325 (1985); Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759 (S.D. Tex. 1989); Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985); People v. Scott, 34 N.Y.2d 483 (1974).

77. Robert A. Boonin, *The Constitutional Constraints in Dealing with Drug Abuse in the Schools*, 1989 MICH. B. J. 1080.

78. *Id.* at 1086.

79. *See* Wilhelm, *supra* note 75, at 687.

80. *See* M.M. v. Anker, 607 F.2d 588 (2d Cir. 1979) (strip search requires probable cause, not just "reasonable grounds").

3. Fingerprinting

In re Fingerprinting of M.B.[81] provides unique precedent for determining the permissible scope of interference with students' rights when dealing with problems of violence. In that case, the court upheld the fingerprinting of all twenty-two male members of a particular school's eighth-grade class as reasonable under the dictates of the Fourth Amendment. The key factual basis supporting this action was the discovery of a class ring near the body of a homicide victim. This investigative technique has been compared with the standards laid down in *Davis v. Mississippi*[82] and *Terry v. Ohio*,[83] and was found to be a reasonable extension of their principles. The potential implications of *M.B.* become apparent when considered in light of recent scientific developments such as D.N.A. testing.[84]

4. Closed Campuses

Although the concept of the closed campus is not a novel one, a notable resurgence of its application has occurred in recent years. It is important to recognize that a great portion of the incidents occurring on school property are not caused by that particular school's students. James J. Hamrock, supervisor of guidance for the San Francisco schools, commented that attacks on teachers, and violence in the schools, "has a lot to do with the number of loiterers on the street and the number of people who go into buildings and threaten people and create problems for administrators and teachers. One of the biggest problems is drifters who go from school to school to create problems."[85]

The case law seems to indicate that a school can prohibit students from leaving the campus during the school day.[86] Several collateral measures are also being employed to restrict public access to the schools. Some schools have established student "welcoming committees" which meet school visitors as they enter school grounds. All visitors are required to wear tags, labels, etc., which identify them as such. These programs have reported

81. 309 A.2d 3 (N.J. 1973); *see also* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 566 (2nd ed. 1987).

82. 394 U.S. 721 (1969).

83. 392 U.S. 1 (1968).

84. For a discussion of the interaction of *Terry*, *Davis*, and *M.B.*, and their relation with the right to be let alone, see Schultz, *supra* note 40, at 732-33.

85. BUSS, *supra* note 1, at 11.

86. *See* Richardson v. Braham, 249 N.W. 557 (Neb. 1933); Fitzpatrick v. Board of Educ., 284 N.Y.S.2d 590 (Sup. Ct. 1967).

success in reducing the number of unauthorized visitors, while making legitimate visitors feel welcome.[87]

B. Conclusions

While many of the aforementioned systems provide an effective way of controlling aspects of the school violence and drug problems, several significant questions should be addressed prior to their implementation. To what degree are we willing to sacrifice students' privacy and personal freedoms to ensure safe schools? To what extent will our schools be converted from forums of education, designed to encourage expression and free thought, into zones of martial law where mediocrity flourishes and excellence stagnates? To what extent will students accept restrictions on their rights and freedoms before they lash back at the school system? These are some of the concerns which should be considered in assembling effective "safe school" regulatory policies.

VI. CHALLENGES TO PUNISHMENTS

As previously discussed when dealing with dress code regulation, many of the potential challenges to these "anti-gang" regulations turn upon a test of reasonableness. In this context, the type of punishment visited upon violators may have a significant impact upon the court's determination. The following subsections examine several punishment forms employed by public schools to enforce "anti-gang" regulations. Also discussed, albeit briefly, is their effectiveness. Although effectiveness usually does not directly factor into a court's determination of a school board's reasonableness in enacting these types of regulations, it must be considered and understood if we hope to properly address the problems of school violence and drug-use.

A. Types of Punishments

The following subsections survey several penalty options available to school officials. Although this list is not exclusive, it contains the main tools used by school officials to discipline students.

1. Extracurricular Participation

Many school regulations, for example, the early social club proscriptions and those which sought to discipline conduct occurring away from

87. *See* DAVID & DAVID, *supra* note 5, at 17-18; Jacqueline Scherer, *School-Community Linkages: Avenues of Alienation or Socialization*, *in* SCHOOL CRIME AND DISRUPTION, *supra* note 8, at 106, 108.

school, make *compliance* a requirement of student eligibility to participate in extracurricular events.[88] The penalty under these types of statutes has met little constitutional resistance, except in the First Amendment's arena. Due in large part to the relatively mild nature of this penalty, any balancing tends to tip towards the regulation's validity.

In a practical sense, however, the right to participate in clubs, activities, and ceremonies can be of great importance to public school students. This can enhance the underlying regulation's effectiveness in controlling gang-related problems. As opposed to a suspension, a punishment which concludes when its term expires, extracurricular prohibition generally continues until the motivating regulation is complied with. This continuation can allow dissension to fester within the school's student body. The possibility of student backlash is an important factor to consider when assessing the effectiveness of anti-gang regulations. When examining the potential for student backlash to school regulations, student perceptions, not the constitutionality of the particular regulations, are of greatest significance.

2. Expulsion and Suspension

The most common penalties for violating school regulations are expulsions and prolonged suspensions. Constitutional problems can arise because of the severity of these penalties. Several courts have noted that certain due process rights, which are not constitutionally mandated with lesser forms of punishment, attach to prolonged suspensions.[89]

These forms of punishment, like the segregation method discussed subsequently, tend to offer no benefit to the overall social welfare of disciplined students. Particularly, students who are disciplined by suspension or expulsion are, statistically, already behind in school; suspension or expulsion causes these students to fall further behind. As a result of the suspension, it becomes more burdensome for that student to keep up with the class. A student who feels inferior among the rest of the class may choose to continue with incorrigible conduct rather than risk failure in the classroom.[90]

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88. Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W. 2d 555 (Iowa 1972) (student ineligible for sports due to being in a car with beer can); Wayland v. Board of Sch. Directors, 86 P. 642 (Wash. 1906) (exclusion from athletic, literary, military, musical, and similar groups as penalty for membership in high school fraternity).

89. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (ten days suspension is not *de minimis*; due process right cannot be ignored: "It also appears from our cases that the timing and context of notice and nature of the hearing will depend on appropriate accommodation of the competing interests involved."). *Id.* at 579 (citations omitted); Valentine v. Independent Sch. Dist., 174 N.W. 334 (Iowa 1919) (upheld student exclusion from graduation ceremony for refusing to wear cap and gown despite lack of formal rule as such to provide students with notice).

90. *See* BAN & CIMINILLO, *supra* note 2, at 73-76.

3. Alternative Programs—Segregation Method

Several different school programs have been developed to deal with problem students. As an alternative to expulsion, particularly in the case of students with delinquent histories, students are often placed in alternative programs. The idea is to remove problem students from the mainstream educational process, where they were a disruptive influence, and place them into an environment where their individual problems can be addressed.[91] The usual result is unfortunately quite different. Instead of helping these children, many commentators claim that the schools are abandoning them. These students, who generally suffer from learning deficiencies, are placed into classes which are more disruptive than usual, and where they are given less reinforcement to support their own educational growth.[92] Also, few students ever successfully return from these alternative programs into the mainstream educational system.[93]

The debate over the appropriate way to treat incorrigible students certainly cannot be resolved overnight, but significant improvements in the current system are necessary if the schools are to properly deal with this rapidly growing segment of the student population. A comprehensive program designed to successfully address the problems of gang violence and juvenile drug-use must inevitably entail an overhaul of the current alternative educational system. The failure to rehabilitate delinquent students will revisit society at large when the problem graduates from the school, and into the community.

B. Effectiveness of Punishments

If we hope to eliminate the kinds of problems that this Comment has discussed, it is essential that there be a firm understanding of the disadvantages associated with any particular regulation in addition to the effectiveness which that regulation will have in accomplishing its intended purpose. The following subsections detail several criticisms that have been levied against the punishment models previously discussed.

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91. Coleman, *supra* note 7, at 147-48. *See also* BAN & CIMINILLO, *supra* note 2, at 7-8, 72; *Sensible Step for Safety*, L.A. DAILY J., Jan. 21, 1985, at 4, col. 1 ("While the number of students who use and sell drugs or carry and even use weapons on campus is small, they contribute seriously to disorder in schools here and around the country.").

92. *See generally* BAN & CIMINILLO, *supra* note 2; Jack Hruska, *Obsolescence of Adolescence*, *in* SCHOOL CRIME AND DISRUPTION, *supra* note 8, at 65-78; Garbarino, *supra* note 66, at 156-59.

93. *See infra* notes 97-98 and accompanying text.

1. Do They Cause Dissension?—A Shift Toward Protest

It would be a mistake to discuss the restriction of such things as student dress without mentioning the substantial number of educators who criticize the effectiveness of these regulations. "How to discipline young people effectively is a great concern of teachers and school administrators. Making the punishment fit the crime without exacerbating an already difficult situation can be touchy. Observers have noticed that offenders who feel they are being treated unfairly may be pushed into worse behavior."[94]

This form of educational backlash is nothing new. It has been discussed since at least the early 1970s: "Secondary school disruptions were frequently seen to develop from some pupils' feelings of lack of certain basic freedoms which they felt should fairly be theirs."[95] There is also substantial statistical evidence which supports this theory:

> The notion that deprivation of freedom facilitates conflict has been examined under varying degrees of structure or regulation in dormitories, intentional communities, monasteries, prisons, and boarding schools. In these structured settings, it was found that the greater the perceived deprivation of freedom was, the greater the reported violence.
>
> Why do schools continue to pursue corrective policies that perpetuate student violence and vandalism? The principal reason is that they cannot deal effectively with the real source of the problem: the place of young people in society.[96]

2. The "Segregated" Circle-Perpetuation of Problems

Students responsible for school disruptions have historically been relegated to "special classes" designed to segregate them from the student-body at large:

> A few disruptive students can make it quite impossible for the majority in the school community to carry on normal educational functions. On the other hand, throwing disruptive students out of school is likely to increase delinquent behavior in the wider community and to produce a nucleus of very real "outside agitators" who return to the school building or its periphery for purposes of further disruption.[97]

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94. DAVID & DAVID, *supra* note 5, at 9.

95. RUBEL, *supra* note 8, at 89.

96. Robert L. David & Alan Jay Lincoln, *School Crime, Power, and the Student Subculture*, *in* SCHOOL CRIME AND DISRUPTION 75, 84-85 (1978) (footnote omitted).

97. WELLS, supra note 1, at 44.

Once students fall into these classes, they seldom get back into the mainline educational stream:

> [Students] who are unable to satisfy themselves with preparing to live feel useless, alienated, cut off from many of their peers and from the society which can find for them no alternative to attending school. Frequently, the response of these outcast youth [sic] is to wreak havoc on that society, and especially on those social institutions which most directly and personally reject or frustrate them. School crime is one result. There are others—drug abuse, delinquency, youthful rebellion and suicide.[98]

One critical determination is whether the educational system owes these students anything more. If the educational system continues to ignore these students, dismissing them as incorrigibles, it is, in effect, classifying them as less deserving of our best educational efforts. If this is to be the case, then the current problems of violence in our school systems will be only precursors to later problems that will develop in the community when these students inevitably give up on an educational system that has given up on them.

3. The Moderation of Education

A final concern, touched upon briefly in the earlier treatment of specific "anti-gang" regulations, is the effects which these various regulations and punishments may have upon the overall educational system. School systems can arguably achieve dramatic educational improvement by removing their more disruptive elements, whether through expulsion, suspension, or segregation.[99] However, if the problems underlying school violence are not directly addressed, new disruptive elements within the school may emerge to replace those removed, thus perpetuating current problems.

There is also concern that stringent regulations may cause an overall chilling effect within the school's environment, retarding the educational process. The risk of this effect is especially high where a school's program is designed primarily to promote psychological deterrence.[100] The creative and the innovative may have to be stifled to maintain certain minimum standards within the public school system, but this effect highlights the importance we should place on the individual freedom of students. It also points out an inherent weakness in current constitutional tests, which place

98. Hruska, *supra* note 91, at 65.

99. WELLS, *supra* note 1, at 44.

100. *See generally supra* notes 67-74 and accompanying text.

emphasis on the reasonableness of a regulation's underlying legislative purpose, rather than on its effectiveness in satisfying that purpose.

VII. CONCLUSIONS

Several important conclusions can be drawn from this study of public school regulations. First, although many of the issues raised by anti-gang regulations are not new, the constitutionality of these regulations is neither fixed, nor certain. For example, as recently as 1984, a Texas dress code was challenged by a student who had been told he would not be able to participate in commencement ceremonies unless he altered his hairstyle. This case was settled before a court had the opportunity to adjudicate the issues involved.[101] Although the Supreme Court, as it is currently composed, would arguably uphold most school regulations in this area, how they would reach such a decision, in light of the concerns which have been previously discussed, is at least debatable.

Regardless of the uncertain constitutionality of anti-gang regulations, no firm resolution to the questions discussed is likely to occur in the near future. One notable fact contributing to this status is the likelihood that these kinds of cases will generally be decided through unpublished decisions. A further limiting factor on the frequency of such published decisions is the limited financial resources available to inner city youths, and the likelihood that expelled or suspended gang members would waive potential constitutional challenges due to apathy and inaction.

Something must be done to allow public schools to return to their role as educational institutions, rather than havens for crime. We must determine the extent to which we will sacrifice personal liberty for public safety, the effectiveness of that sacrifice, and whether this status will be in accordance with the educational mission of our public schools.[102] This issue is especially pronounced for school districts in small cities and rural areas where gang problems are just beginning to emerge. Should the reasonableness of "anti-gang" regulations depend upon whether they are preemptive or responsive? None of these questions have simple, nor necessarily consistent, answers. In the end, they will have to be decided on the basis of personal moral and political values. However, we cannot hope for either

101. Stuart M. Wise, *Threat of Suit Ends Dyed-locks Deadlock*, 6 NAT'L L. J. 59 (June 11, 1984); *see also* Olesen v. Board of Educ., 676 F. Supp. 820 (N.D. Ill. 1987); Grandinetti, *supra* note 24.

102. *See Sensible Step for Safety*, *supra* note 91, at 4, col. 1 ("Privacy is important to children and teenagers and should be respected. Yet it must also be weighed against the danger of allowing drugs or weapons to be smuggled into school, a danger that many teachers face every day.").

effective or safe education, in the long-term, unless all of the issues considered in this paper are discussed and debated in tandem.

As Ernest Blount noted: "If crime exists in our schools, it is there because we have chosen to permit it. Crime will cease to be a problem when we elect to end it."[103]

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103. Blount, *supra* note 65 (in dedication).