black arm bands by school authorities who had previously permitted the wearing of other political symbols, such as the Nazi Iron Cross, on school premises.[15] Does *Tinker* allow school authorities to prohibit *absolutely* the wearing of any and all political symbols; or is *Tinker* premised on a view of school premises as an educational public forum that constitutionally precludes the absolute prohibition of peaceful student protest?

CONTENT OF PROTEST

1. *Protest of Educational Policy.* Because *Tinker* permits arm bands as a vehicle of protest, it is helpful in analyzing the content of student protest to discuss hypothetical situations which involve protest similarly communicated. Assume, therefore, that students wear arm bands broadly protesting educational policies regarding the curriculum, faculty-student relations, or discipline. Absent the finding of disruption required by *Tinker,* the crucial question becomes one of distinguishing this kind of silent, passive expression of opinion from the political expression in *Tinker.* It could be argued that such protest should be treated more restrictively since it, unlike the expression in *Tinker,* is directly related to the internal workings of the school. Permitting it might therefore have an ultimately, though perhaps not immediately apparent, deleterious impact on school discipline.

This argument, however, ignores the students' obvious self-interest in communicating their grievances to school authorities in a dramatic but peaceful way. It also ignores the beneficial impact such criticism has upon the school authorities themselves who may be receiving useful suggestions.[16] In addition, though students arguably have other means of protesting educational policies—for example, through their parents or, as could have been done by plaintiffs in *Tinker,* by wearing arm bands off school premises—the availability of other alternatives is constitutionally less relevant in "pure speech" cases than where conduct is involved.[17] Furthermore, the relevant audience is not the same when these alternatives are pursued. This kind of silent expression of opinion on a school policy should therefore merit protection comparable to that accorded worn symbols of political protest.

Einhorn v. Maus,[18] a 1969 Pennsylvania District Court decision, supports this conclusion. This case involved high school students who had, contrary to a school order, worn arm bands reading "Humanize Educa-

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[15] 393 U.S. at 510-11.

[16] *See Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1130 (1968).

[17] This is implicit in the outcome in *Tinker. See also* United States v. O'Brien, 391 U.S. 367, 376 (1968).

[18] 300 F.Supp. 1169 (E.D. Pa. 1969).

tion" at their graduation ceremonies. There was no disorder of any kind. Finding no evidence of irreparable harm, the court denied the students' motion for preliminary injunction to restrain the school authorities from communicating to colleges and future employers, without opinion, a factual account of what occurred. Yet the court in strong dictum indicated its view of the students' protest:

> An expression of opinion by students through the medium of arm bands in an orderly demonstration is constitutionally protected and cannot be circumscribed. [citing *Tinker*] The students here demonstrated in an orderly manner and simply publicized their views upon the humanizing of education by wearing arm bands.[19]

2. *Protest of School Rules.* Closely related to protest of educational policy is student protest against specific school rules. Assume that students wear arm bands reading "No Notes" which is interpreted by everyone to oppose compliance with the formal requirements necessary for a student's absence to be excused. It could be argued, as held in *Scoville v. Board of Education,*[20] that because of the lesser maturity and intellectual level of high school students as compared to adults, these words themselves constitute "an immediate advocacy of, and incitement to, disregard of school administrative procedures."[21] In *Scoville,* two high school students were expelled for their distribution on school premises of an underground newspaper to various students and faculty. The Court of Appeals first noted the objectionable contents of the newspaper, including, *inter alia,* a criticism of school attendance regulations as "utterly idiotic and asinine" and a suggestion to students that they "destroy" all school administration "propaganda." It then held that the students were properly expelled for "gross disobedience or misconduct,"[22] even in the absence of any inquiry by the court into the existence of disturbance, commotion or disruption.

Absent such an evidentiary inquiry, this decision, as it bears on the students' protest of school rules, is clearly wrong. As pointed out by Judge Kiley, dissenting in *Scoville:*

> The district court here did not attempt to balance the competing interests of plaintiffs in the free exercise of their constitutional rights against Illinois' interest in conducting and maintaining an orderly, effective school system. The district court's decision was

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[19] *Id.* at 1170-71.

[20] 286 F.Supp. 988 (N.D. Ill. 1968) *aff'd,* 415 F.2d 860 (7th Cir. 1969), (2-1 decision, Kiley, J., dissenting), *petition for rehearing granted,* Nov. 13, 1969, letter from Paul M. Lurie, counsel for the plaintiffs, to the author, Nov. 20, 1969. On April 1, 1970, the Seventh Circuit Court of Appeals, *en banc,* reversed and remanded to the District Court for an evidentiary hearing. Telephone conversation with Paul M. Lurie, April 9, 1970.

[21] 286 F.Supp. at 992.

[22] This is the statutory standard in Illinois for expulsion or suspension from public school. ILL. REV. STAT. ch. 122, § 10-22.6 (1967).

made on the basis that the complaint "on its face" was sufficient to show that the state interest weighed so heavily in the scale that it was unnecessary to take any evidence on the factors needed in striking a balance between the competing interests. In *Tinker*, . . . evidence was taken and the appropriate balance struck on an evidentiary basis.[23]

Scoville could possibly be reconciled with *Tinker* by reading into *Scoville* an *implicit* evidentiary finding by school authorities of the result of the students' protest. A recent Supreme Court decision, however, casts considerable doubt upon an implicit finding of "immediate advocacy" and "incitement" in the absence of concrete supportive evidence. *Brandenburg v. Ohio*[24] involved the conviction of a member of the Ku Klux Klan for violating Ohio's criminal syndicalism statute. He had made inflammatory speeches attacking Negroes and Jews, and urged that his listeners take action against these groups. Reversing the conviction, the Court held that the first amendment forbids states from punishing advocacy of force or of law violation except where the advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite it. In applying this dual test, the Court considered the content of the advocacy, the size and nature of the audience, and the audience response. *Brandenburg*, therefore, would seem to require, as read with *Tinker*, a similar factual inquiry by school authorities into what is likely to happen in light of the surrounding circumstances and not merely what is the student's present intention.[25]

Dickey v. Alabama State Board of Education,[26] a seminal decision upholding a college student's right to freedom of expression, supports this interpretation. The editor of a college newspaper protested the president's refusal to allow him to criticize the state legislature's views on campus speakers by inserting the word "CENSORED" in the place where his editorial usually appeared. It was an unwritten school rule not to allow any criticism in the school newspaper of the state legislature and other state officials. As a result, the student was expelled. The court in *Dickey*,

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[23] 415 F.2d at 864.

[24] 395 U.S. 444 (1969) (per curiam).

[25] *But cf.* Jones v. State Bd. of Educ., 279 F.Supp. 190 (M.D. Tenn. 1968), *aff'd* 407 F.2d 834 (6th Cir. 1969). This decision upheld the expulsions of three college students. It was alleged that one had promoted unrest on campus by distributing literature for that purpose and that the other two had shown gross disrespect for university officials by calling them names in public and had also disrupted orderly meetings. The Supreme Court, after granting the first student's petition for writ of certiorari, but denying those of the other two, 90 S. Ct. 145 (1969), reversed its decision on the first petition and refused to hear the case, 38 U.S.L.W. 3317 (U.S. Feb. 24, 1970).

[26] 273 F.Supp. 613 (M.D. Ala. 1967), *vacated as moot, sub nom.* Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

applying the then *Burnside v. Byars*[27] standard of material and substantial interference with school discipline, found that there was no factual relation between school discipline and the student's action and, accordingly, reinstated him.

Following this reasoning, student protest of school rules by symbols worn on school premises should be permitted in the absence of material and substantial interference with school discipline. The wide gap between wearing a symbol protesting a school rule and actually not complying with the rule strongly argues for punishing the act itself if and when it occurs. Moreover, the difficulty of distinguishing this protest of specific rules from protest of educational policy would indicate that they often serve the same beneficial function, as mentioned, for the students as well as school authorities.

3. *Protest of Personnel.* Assume that students wear arm bands which personally attack a particular teacher. Two recent reported cases deal with this type of high school students' criticism of school personnel. *Schwartz v. Schuker*[28] involved a suspended high school student who had been caught attempting to distribute on school premises an underground newspaper which called the principal "King Louis" and "a big liar" and accused him of "racist views and attitudes." The student had been ordered previously by the principal not to attempt such distribution because the principal had seen an earlier issue which, in the court's view, "contained four letter words, filthy references, abusive and disgusting language and nihilistic propaganda."[29] The court determined that the activity for which the student had been suspended went further than the actual or threatened dissemination of a newspaper containing this kind of criticism standing alone. Specifically it found that he had, despite the principal's warning, brought copies onto school premises; he had, when asked to surrender them, not only refused, but instructed another student to do the same; he had, even after suspension, appeared in school and boasted of his defiance; and his parents had actively encouraged the student to defy school authorities. It is instructive, however, that the court did not attempt to base its decision on grounds of disruption of school operations, although the record indicated some disruption had in fact occurred.[30] Instead, the court characterized these activities as "gross disrespect and contempt for the officials of an educational institution."[31]

In *Scoville* the underground newspaper distributed on school premises included a personal attack on the senior dean, who was accused of having a

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[27] 363 F.2d 744 (5th Cir. 1966). *See* note 7 *supra.*

[28] 298 F.Supp. 238 (E.D.N.Y. 1969).

[29] *Id.* at 240.

[30] The student was part of a students' strike movement at a time when there were city-wide riots by students protesting the lengthened school day. *Id.* at 239.

[31] *Id.* at 242.

"sick mind." The District Court treated this personal attack and the students' protest of school rules as together constituting "gross disobedience or misconduct." On appeal to the Seventh Circuit Court of Appeals, a possible distinction between protest directed against rules and protest directed against personnel was suggested, again by Judge Kiley in his dissenting opinion: "The column . . . is critical of the Dean's disciplinary policies. There should not be much cause for alarm about that criticism. However, the column attributed a 'sick mind' to the Dean. *This reflects a disrespectful, tasteless attitude toward authority.*"[32]

While the concept of disrespect found in these two cases is not well articulated, it suggests that courts might accept the argument that the state has an interest in respect for authority in its schools. Under such a view, this interest could serve as the basis for prohibiting such personal attacks on school premises even in the absence of material and substantial interference with school discipline. The Supreme Court in *Ginsberg v. New York*[33] indirectly supports this position. It held that a state may prohibit the sale to minors of material deemed obscene as to them but not to adults. The Court based its decision on two considerations: first, the state may constitutionally support parental authority to direct the rearing of children in their household;[34] and second, the state has an independent interest in the well-being of its youth.[35]

By accepting this argument, a court could apply similar considerations to a minor's respect for authority on school premises. Both parents and the state have a significant interest in promoting respect for authority: parents, for stability in the home, and the state, for the proper functioning of its schools. A court could assert that there is little pretense that the "sick mind" criticism, for example, will improve the educational system; on its face it is designed to hold up school personnel in a light which provokes contempt and disrespect among other students, causing an erosion of authority which can undermine the discipline of the school. Passive expressions of opinion which personally attack personnel might therefore be prohibited under this view, even in the absence of disruptive effect, on the ground that they weaken a state and parental interest in respect for authority. Furthermore, such student protest, passive though it may be, could be held to affect a school's discipline adversely in the same way that the public dissemination of defamatory words constitutes the injury to the defamed individual. As Professor Thomas Emerson expressed it in the defamatory situation: "[T]he harm to the individual interest is more likely to be direct and immediate in its impact, and irremediable by

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[32] 415 F.2d at 864-65 (emphasis added).
[33] 390 U.S. 629 (1968).
[34] *Id.* at 639.
[35] *Id.* at 640.

resource to regulation of the subsequent conduct stimulated by the expression."[36]

However, applying *Ginsberg's* rationale to respect for authority is misconceived because obscenity, unlike disrespect for authority, has consistently been denied first amendment protection.[37] This "disrespect" argument would also allow school authorities to prohibit such personal attacks even in the absence of disruption. To that extent it conflicts with the *Tinker* test of material and substantial interference with discipline as well as the required evidentiary inquiry. Furthermore, the plaintiffs in *Tinker*, because they disobeyed a school rule prohibiting black arm bands, could be considered disrespectful of authority. Although *Schwartz* and *Scoville* suggest that personal attacks can be treated more restrictively than other protest for first amendment purposes, they do not clearly articulate the standards for this so-called disrespectful protest. Given the difficulty of establishing logically consistent standards and the possibility of misuse by school officials who may interpret every criticism as "disrespectful," a "disrespect" test could prohibit and chill legitimate protest.

For example, suppose students wear arm bands criticizing a certain teacher as "incompetent." This kind of criticism may impair school discipline by promoting disrespect no less than an accusation that a teacher has a "sick mind." Yet, it also functions as a public assessment of the teacher's capabilities. Because the troublesome element in this criticism is the attendant publicity on school premises, perhaps the availability of a less publicized alternative may serve as grounds for forbidding such protest on school premises. The students directly involved could go to speak to the teacher himself or to the principal, or ask their parents to do so.

The relevant audience, however, is not the same if any one of these alternatives is followed. Furthermore, students have always criticized their teachers among themselves, if not publicly, on school premises. It would be inconsistent to allow symbolic protest where it is oriented more towards general policies and at the same time be more restrictive where a matter, such as the competence of their teacher, immediately concerns the students. Thus, even though no reported case deals with the prohibition of an attack on a teacher's competence, it is proposed, on balance, that school authorities may constitutionally prohibit such criticism *only* in the absence of material and substantial interference with school discipline. Such protest, like the protest against general policies and specific school rules, may well be helpful to school authorities as well as to the students involved. It is also related to the educational function of the high school.

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[36] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 921 (1963).

[37] *See* Roth v. United States, 354 U.S. 476 (1957) and note 51 *infra*; *see generally* Krislov, *From Ginzberg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153.

The "sick mind" protest to which Judge Kiley objected in *Scoville* can serve a similar educational function if disseminated for the purpose of criticizing a teacher whom students consider sadistic. An accusation that a principal has "racist views and attitudes" and is a "big liar," as in *Schwartz*, might also serve such a useful, though controversial, function in the high school. This suggests that a distinction in terms of educational function between personal attacks against school personnel and other protest against personnel is not tenable for first amendment purposes. The fact that such protest is not politely phrased should not preclude first amendment protection under *Tinker*. As Professor Charles Wright has argued with respect to the college campus: "[S]peech cannot be punishable on campus simply because it is vigorous or uncomplimentary . . . [I]t is perfectly clear that the first amendment did not enact Mrs. Emily Post's book of etiquette."[38] Therefore, even personal attacks against school personnel which might be considered disrespectful should not be prohibited absent an evidentiary finding of disruptive effect.

Schwartz illustrates the danger of expansion inherent in the concept of respect for authority. There the court not only characterized as disrespect the personal attacks against the principal. It also included the student's peaceful disobedience of the principal's order not to bring underground newspapers to school and his refusal to surrender them at the principal's request. The court was clearly wrong, for under its rationale, students, such as the plaintiffs in *Tinker*, could be punished for disrespect because of their non-compliance with an unconstitutional school rule.[39]

Contrary to this analysis is a recent Sixth Circuit decision which applied a concept of disrespect to college students. *Norton v. East Tennesse State University Discipline Committee*[40] involved the suspension of college students who had distributed literature on campus calling the administration "despots" and various "obscenities" and urging the student body to seize

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[38] Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1057 (1969).

[39] Similarly, disobedience is not, in itself, relevant to the validity, under the first amendment, of a school rule prohibiting student expression. *See* Crews v. Cloncs, 303 F.Supp. 1370, 1376 (S.D. Ind. 1969) which, while upholding a school rule regulating length of hair, emphasized that the disruption found resulted from the student's wearing of long hair and not from his flaunting a school rule.

Even if there could be understandable and constitutional standards for disrespect, it would not follow that a high school regulation prohibiting "disrespect" is, standing alone, constitutional. *Cf.* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), *aff'g* 295 F.Supp. 978 (W.D. Wis. 1968) (holding unconstitutionally vague a university regulation prohibiting student "misconduct"). *But cf.* Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969), *petition for cert. filed*, 38 U.S.L.W. 3256 (U.S. Jan. 2, 1970) (No. 1026) (upholding, *inter alia*, college regulations providing generally that students must adhere to commonly accepted standards of conduct.)

[40] 419 F.2d 195 (6th Cir. 1969), *petition for cert. filed*, 38 U.S.L.W. 3241 (U.S. Dec. 29, 1969) (No. 1011).

campus buildings and to "stand up and fight." There was no evidence taken regarding any disruption resulting from this literature. In upholding the suspensions, the court found that the literature not only exhorted students to engage in disorderly and destructive behavior, but was also calculated to subject the administration to "ridicule and contempt." As the dissent pointed out,[41] there is serious question in light of *Tinker* and *Brandenburg* as to the propriety of the court's basing its decision on the literature's contents alone.

4. *Obscenity.* Any analysis of the content of high school student protest would be intellectually and empirically sterile without at least preliminary consideration of obscene and libelous protest. Assume that students wear arm bands reading "fuck education"[42] on school premises. In considering whether this kind of protest can be prohibited, *Ginsberg*[43] is an appropriate starting point. There, the Court expressed concern with a minor's exposure to obscene material through a non-parent. This concern could constitutionally permit school authorities to prohibit obscenity on school premises even in the absence of disruption. *Ginsberg* may be read narrowly to permit only a *legislative*[44] determination of obscenity and not any other. Nevertheless, courts which are confronted with the question of alleged obscenity on school premises could hold that such a determination may constitutionally be made by school authorities acting as agents of the state.[45]

Yet while this argument indicates that school authorities can prohibit obscenity on school premises, it avoids the difficult problem of determining what actually constitutes obscenity for high school students. Indeed, even the majority in *Ginsberg* assumed, without discussion, that the "girlie" literature before it was obscene for minors and considered

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[41] Judge Celebrezze, dissenting in *Norton*, stated: "This record nowhere suggests that the time, place or manner of speech used by the students applies [sic] any basis for the disciplinary suspensions they received." *Id.* at 205.

[42] The author has represented students who were suspended from a public high school in the Chicago area for distributing an underground newspaper called "Gadfly" on school premises. Prominently displayed on its front page was the phrase "up against the wall mother fucker" as well as an editorial referring to the school superintendent as "our beloved Fuehrer."

[43] 390 U.S. 629 (1968). See discussion in text accompanying note 33 *supra*.

[44] Defendant in *Ginsberg* was convicted for violating New York Penal Law § 484-h (1965) which prohibited the sale to minors of magazines containing "nudity . . . harmful to minors." The terms "nudity" and "harmful to minors" were elaborately defined by the statute.

[45] *See generally* Green, *Obscenity, Censorship and Juvenile Delinquency*, 14 U. TORONTO L. REV. 229 (1962) (a pre-*Ginsberg* argument for an age classification system regulating the exposure of minors to obscenity). For the argument that obscenity is not harmful to children, *see* Kuh, *Obscenity: Prosecution Problems and Legislative Solutions*, 10 CATH. L. REV. 285, 294 (1964); P. Kronhausen, PORNOGRAPHY AND THE LAW (1959); and E. Glueck & S. Glueck, DELINQUENTS IN THE MAKING (1952).