Collective Bargaining and Academic Freedom in Lower Education: A Practical Inquiry

Charles C. Read†

The growth of teacher unionization in primary and secondary schools has made collective bargaining and arbitration important factors for the advancement or limitation of academic freedom. The article summarizes the current judicial and arbitral decisions regarding academic freedom in lower education, analyzes the factual circumstances which have proved to be pivotal, and presents various bargaining and litigation strategies. Future problem areas of academic freedom are also examined.

I

INTRODUCTION

In 1965, a probationary teacher assigned to his high school psychology class Aldous Huxley's *Brave New World*, a book which appeared on the county school board's list of approved supplementary reading. The parent of one student objected to the contents of the book, and, as a result of the incident, the school board decided not to renew the teacher's contract for the next school term. The federal district court and the court of appeals upheld the board's decision.¹ In 1973, another probationary teacher read to his high school creative writing class a short story he had written. The narrative ended with the words, "white mother-fuckin' pig." The school board declared that such conduct by the teacher constituted legal cause for refusing to renew the teacher's employment contract. The California Supreme Court disagreed and ordered the teacher rehired.²

In 1966, the Supreme Court of Minnesota declared, "Public employees do not have collective bargaining rights in the same sense that

† A.B. 1971, Harvard College; J.D. 1975, University of California, Los Angeles. Member of the California Bar.

private or industrial employees enjoy them."3 But in September 1975, the California Legislature, following the lead of several other states, authorized its school boards and duly recognized teacher organizations to engage in collective bargaining and to agree, if they wished, to binding arbitration of disputes.4 Strikes by California teachers are not mentioned in the legislation; so presumably even agreements reached as the result of work stoppages will be valid and binding.5

As these comparisons suggest, two revolutions have begun to sweep through the nation's lower education school systems.6 The first revolution has been largely judicial; the second, political. But both have fundamentally altered the terms and conditions of employment for teachers. In fact the two developments are often embodied in the employment controversies of single individuals—non-conformist teachers who are also labor organizers.7 Legal and educational commentators have not been unaware of these twin struggles for academic freedom and collective bargaining in lower education.8 However, there has

---

4. CAL. GOV'T CODE §§ 3540-49.3 (West Supp. 1976). The act allows teachers to form employee organizations which, if selected by a majority of teachers in an appropriate unit, will become the exclusive bargaining agent for that unit. Section 3544. A school board must negotiate in good faith with such an organization on wages, hours of employment and other terms and conditions of employment. Sections 3543.2, 3543.5. Final and binding arbitration is specifically allowed as one item in board-teacher agreements. Section 3548.5. The act is to be administered by the Educational Employees Relations Board. Sections 3541, 3541.3.
6. For the most part, this paper will restrict itself to teachers in public schools at the primary (grades kindergarten through 8) and secondary (grades 9 through 12) levels. Some attention will also be given to teachers in public junior colleges (also called "community colleges"), which provide vocational instruction and curriculum equivalent to the first two years of a four-year college program. For convenience, this collection of educational periods and institutions is referred to herein as "lower education."
7. See, e.g., Cook County College Teachers v. Byrd, 456 F.2d 882 (7th Cir.), cert. denied, 409 U.S. 848 (1972) (activist union teachers terminated; stated reasons included their prohibition of student opinion in classroom and teaching without "intellectual content"); Knarr v. Board of School Trustees, 317 F. Supp. 832 (N.D. Ind. 1970), aff'd, 452 F.2d 649 (7th Cir. 1971) (union activist probationary teacher terminated for, inter alia, use of classroom as personal forum).
been remarkably little written to connect the two phenomena. It is this gap which the present article seeks to fill.

Collective bargaining in public education is the broader and more thoroughly studied subject; hence this article will concentrate upon an examination of the growth and limits of lower education academic freedom. Because its development has been largely judicial, the intention is to demonstrate how lessons learned in the judicial arena can be applied to academic issues in collective bargaining negotiations and arbitral disputes.

Although much remains unclear about academic freedom in lower education, it is well established that courts have balanced as many relevant factors as have been brought to their attention in deciding whether particular teacher conduct should be protected. Once a balancing test is decreed, other legal doctrines become far less important.


9. The case law concerning academic freedom in the context of the secondary school classroom is particularly tentative and the courts have not approached a consensus regarding the substantive scope of the "freedom."


Judge Wyzanski has speculated that the new right of academic freedom may be "subject to state regulatory control which is . . . merely reasonable" and that "the secondary school teacher's constitutional right in his classroom is only to be free from discriminatory religious, racial, political and like measures." Mailloux v. Kiley, 323 F. Supp. 1387, 1391-92 (D. Mass. 1971). Even such a limited right would usually require careful judicial balancing of factual circumstances in order to determine its applicability in any one case, given the breadth of terms such as "religious," "racial," and "political."
than the factual record established by the opposing parties. Accordingly, this article will first present the categories of factual circumstances usually found most relevant in academic freedom judicial decisions. Thereafter, the article will discuss strategies which can be employed by teachers and their employers in their respective efforts to tilt the representation, bargaining, or arbitral balance in their favor. Finally, the article will engage in some speculation regarding areas in public education labor relations in which future claims of academic freedom might be implicated.\(^{11}\)

## II

### The Judicial Origins of Academic Freedom in Lower Education

Like the concept of a university with which it was first associated, the principle of academic freedom originated in Germany.\(^{12}\) It has been variously defined as "the right to teach, inquire, evaluate and study;"\(^{13}\) the right to preserve the classroom as a marketplace of ideas;\(^4\) or the right of teachers to comment as other citizens do on matters of public interest.\(^5\)

11. A word must be said as to what this article does not cover. Teacher classroom conduct which raises religious questions under either the establishment or free exercise clauses of the first amendment is not detailed herein; see Comment, Religious Rights of Public School Teachers, 23 U.C.L.A. L. Rev. 763 (1976). Although teacher and student academic freedom rights have been linked since Tinker (see note 10 supra), that connection will be severed in this paper, except to the degree student rights affect teacher rights. Also, no effort will be made to consider in detail teacher discharges undertaken solely because of nonpedagogical behavior outside the classroom which has only a theoretical impact inside the classroom. See Burton v. School Dist., 512 F.2d 850 (9th Cir.), cert. denied, 96 S.Ct. 69 (1975) (teacher discharged for homosexuality under unconstitutionally vague "immorality" statute); Miller v. School Dist., 495 F.2d 658 (7th Cir. 1974) (bearded teacher); Petit v. Board of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 365 (1973) (primary teacher advocated sexual freedom and practiced aberrant sex acts); Morrison v. Board of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (teacher involved in single incident of noncriminal homosexual conduct); Finot v. Board of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (bearded teacher); In re Grossman, 127 N.J. Super. 13, 316 A.2d 39 (1974) (primary teacher underwent sex change operation). See generally Comment, Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct, 61 CAL. L. Rev. 1442 (1973).


The American legal authority for the right has always been traced broadly to the first amendment's guarantee of freedom of speech. See id. at 1073; Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (dicta). But refinements have made it clear that a teacher's professional right of academic freedom is to be distinguished from the same teacher's personal right of free expression, although both derive from the same first amendment source. See note 85 and accompanying text infra.


With few exceptions, early judicial recognition of academic freedom concerned professors at institutions of higher education. Judicial protection for teachers in lower education was first extended to conduct which clearly occurred outside the classroom and had only a theoretical impact on the teachers' professional duties and responsibilities. The next step for judicial involvement was the resolution of educational controversies generated by nonpedagogical classroom conduct or appearance. Statutes calling for judicial review even of probationary teacher terminations and dismissals gave courts increased opportunities to evaluate the educational philosophies of school administrators and

16. The two most important exceptions to the evolutionary pattern of academic freedom from higher education to lower education are Meyer v. Nebraska, 262 U.S. 390 (1923) (state law which prohibited teaching foreign language material before ninth grade declared invalid), and Epperson v. Arkansas, 393 U.S. 97 (1968) (state law which prohibited any teaching of evolutionary theory declared invalid). But neither case was determined on modern academic freedom grounds. Meyer was a substantive due process decision while Epperson eschewed the academic freedom approach in favor of establishment clause analysis. See 86 HARV. L. REV. at 1342 n.10 (1973).

17. As late as 1968, it was firmly stated:
At the elementary and secondary levels of education there is no strong tradition of intellectual freedom comparable to that which has characterized the development of the college and university.
Developments in the Law—Academic Freedom, supra note 8, at 1050. See also Teacher Classroom Flexibility, supra note 8, at 1521.

Another source of public school teachers' academic freedom can be found in state tenure laws, often expanded by judicial interpretation. "Tenure" can be described as that employment security resulting from a prohibition against discharge except for certain specified reasons and usually only after notice, hearing, and judicial review. The degree to which tenure alone ensures true academic freedom, however, depends on the liberality with which the statutory reasons for dismissal are interpreted by courts. Compare Board of Educ. v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953) with Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972) (both construing statutory standard of "fitness to teach").


19. See, e.g., Board of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974) (pregnant teacher cannot constitutionally be dismissed due to fear of "giggling school-children"); Andrews v. School Bd., 507 F.2d 611 (5th Cir. 1975) (unwed pregnant teacher could not be dismissed without showing of her proselytizing); James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972) (classroom teacher has constitutional right to wear war protest arm band); Finot v. Board of Educ., 250 Cal. App. 2d, 58 Cal. Rptr. 520 (1967) (California classroom teacher has constitutional right to wear beard). But cf. Miller v. School Dist., 495 F.2d 658 (7th Cir. 1974) (probationary classroom teacher can be terminated for wearing beard absent additional racial, religious or other invidious discrimination); In re Grossman, 127 N.J. Super. 13, 316 A.2d 39 (1974) (classroom teacher's sex change can be basis for finding of unfitness to teach). It is important to note that properly speaking, none of the above teachers was asserting a right of academic freedom but rather the Pickering right of a teacher to enjoy the same free speech and conduct privileges as any citizen or employee of government. See Pickering v. Board of Educ., 391 U.S. 563 (1968).
school boards.\(^{20}\) It remained only for provincial boards and principals and talented but unorthodox teachers to compel courts to take cognizance of some constitutional right to academic freedom in lower education.\(^{21}\) Although doubts continue to be voiced about the propriety of

---

20. Since tenured teachers constitutionally must be accorded prior notice of the reasons for discharge and a hearing regarding those reasons, the major importance of recent statutory changes has been to provide increased employment security to probationary teachers (i.e., nontenured teachers who are not otherwise classified as substitute or temporary teachers). Requirements of notice, reasons for dismissal, and a hearing subject to judicial review for probationary teachers have brought to the courts disputes involving the youngest and often least traditional teachers. On the generally expansive trend in judicial review of these cases in California, see Comment, The Scope of Judicial Review of Probationary Teacher Dismissal in California: Critique and Proposal, 21 U.C.L.A. L. Rev. 1257 (1974). Although somewhat obsolete, Coan, Dismissal of California Probationary Teachers, 15 HAST. L.J. 284 (1964) provides a good indication of the steady progression in overall statutory protection for California's probationary teachers.

In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court held that a nontenured state university professor could be terminated without stated reasons or the opportunity for a hearing. A companion case, Perry v. Sindermann, 408 U.S. 593 (1972), imposed de facto tenure status where none officially existed and held that the fourteenth amendment required that the tenured plaintiff college teacher be told the reasons for his non-retention and given the opportunity for rebuttal at a hearing. Court review would thereafter be available.

The New Jersey Supreme Court in Donaldson v. Board of Educ., 65 N.J. 236, 320 A.2d 857 (1974) held that a nontenured teacher is entitled as a matter of state law to a statement of reasons for contract non-renewal. In so holding, the court ruled that Board of Education v. Roth does not limit rights based on state law and that the court's jurisdictional authority to review all administrative actions justified its creation of procedural safeguards not required under the United States Constitution to avert possible abuses of discretion and to insure administrative fairness.

The California Supreme Court, meanwhile, invoked its state constitution to require judicial review of probationary teacher terminations on an expansive, "independent judgment" basis when a teacher claims he or she is being terminated for the exercise of constitutionally protected rights. Bekiaris v. Board of Educ., 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972). See generally Note, Procedural Due Process Protection for Probationary Teachers' First Amendment Rights: Bekiaris v. Board of Education, 24 HAST. L.J. 1227 (1974). In Turner v. Board of Trustees, 16 Cal. 3d 818, 548 P.2d 1115, 129 Cal. Rptr. 443 (1976), the same court ruled that probationary teaching status was not itself a "vested right" and thus a board determination not involving Bekiaris constitutional problems is judicially reviewed only to determine whether the board's decision is supported by "substantial evidence."


A responsible teacher must have freedom to use the tools of his profession as he sees fit. If the teacher cannot be trusted to use them fairly, then the teacher should never have been engaged in the first place.

Some commentators have argued that the extension of academic freedom to lower education is the judicial response to new concepts of how children should be taught. "A teacher can no longer view himself as simply the conveyer of that body of knowledge so
courts functioning as school boards, the concern of the present inquiry is what standards the "judicial school boards" employ in evaluating teachers. It is these standards which may in the future become relevant to negotiations and arbitration.

III

FACTORS FOUND RELEVANT TO CLAIMS OF ACADEMIC FREEDOM

A. What Overall Educational Theory Does the Court Endorse?

There are at least three broad theories of the purpose of primary and secondary education which courts have recognized and attempted to implement in their teacher dismissal decisions. The first is the most traditional, and thus most likely to discourage unconventional teacher conduct; it will be termed here the exemplar theory.

Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching "the best that is known and thought in the world," training by established techniques, . . . indoctrinating in the mores of the surrounding society.

The second theory derives from the venerated first amendment concept of a marketplace of ideas. The marketplace theory predictably is applied most often to secondary education, and even within the high school it is usually restricted to humanities or social science classes rather than the physical sciences or mathematics. The marketplace obviously and universally valuable that there is no need to do anything but present it."


22. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.


24. But see Right to Teach, supra note 8, at 1181-82 n.41.

can be defined not just as the single classroom but as the entire educational experience, continuing for several years.\(^{26}\) The marketplace can include several grade levels, insofar as certain subjects, such as English and history, are repeated from year to year. The marketplace can be the institution's entire faculty, among whom can be found diverse viewpoints:

Harmony among public employees is undoubtedly a legitimate governmental objective as a general proposition . . . however, as we have seen, government has no interest in preventing the sort of disharmony which inevitably results from the mere expression of controversial ideas.\(^{27}\)

Under this theory, emphasis is placed on the need for balance in the presentation of any disputed ideas within the relevant marketplace.\(^{28}\)

The third theory values discipline very little and views classroom controversy as a useful if not necessary teaching technique. This open classroom theory is directly at odds with the exemplar theory:

If standards of taste of future generations are to be elevated it will not be accomplished by those who seek to sweep distasteful matters under the rug, or by self-embarrassed school trustees who discharge as unfit those who would bring the problem out in the open for discussion.\(^{29}\)

---

\(^{26}\) In fact, this is the context in which the term was first applied to education, i.e., the university educational experience. See Keyishian v. Board of Educ., 385 U.S. 589 (1967).

\(^{27}\) Los Angeles Teachers Union v. Board of Educ., 71 Cal. 2d 551, 561, 455 P.2d 827, 833, 78 Cal. Rptr. 723, 729 (1969). But see Hibbs v. Board of Educ., 392 F. Supp. 1202 (D. Iowa 1975) where a community college faculty, constrained to reduce the number of teachers, was permitted to retain the teacher it “liked better”, even if the losing teacher was rejected at least partially because of his anti-war activities and unorthodox classroom exercises.

\(^{28}\) It must . . . be [a] teacher's duty to be exceptionally fair and objective in presenting his personally held opinions, to actively and persuasively present different views, in addition to open discussion. Sterzing v. Independent School Dist., 376 F. Supp. 657, 661 (S.D. Tex. 1972), vacated on other grounds, 496 F.2d 92 (5th Cir. 1974).

\(^{29}\) Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 1112, 102 Cal. Rptr. 421, 431 (1972) (Sims, J., concurring). See also Teacher Classroom Flexibility, supra note 8:

The maintenance of order in classroom and school is not a sufficient prerequisite to quality education; equally necessary is the maintenance of that degree of teacher classroom flexibility which will enable the teacher to capitalize on those opportunities to convey the skills of perception, analysis and creativity, even though the method he chooses may be offensive to some and temporarily disruptive.

*Id.* at 1544-45 (emphasis in original).

It is usually within the conceptual framework of one of the above theories that courts engage in their balancing of the factual circumstances surrounding controversial teacher conduct. Hence endorsement or repudiation of these theories should be considered by parties in representation, bargaining or arbitral disputes.

B. Factual Inquiries Used in Academic Freedom Disputes

Some aspects of teacher classroom conduct are almost universally recognized as relevant to judicial proceedings. It is for this reason that the same factors are likely to surface in bargaining sessions and certainly in education arbitration. Broadly speaking they fall into one or both of two major lines of investigation: Has there been a threat to or impairment of discipline? Has there been a threat to or actual disruption of the teaching process?30

1. The Setting in Which the Incident Occurred

The age and general background of the school children affected is one such recognized factor.31 Generally, the older the children, the wider the range of discretion accorded their teacher.32 Presuming most late high school students to be adjusted or at least inured to vulgarity, courts have refused to allow dismissal of teachers of such children who have used off-color but not obscene expressions or who taught from materials containing this kind of language.33

[Lindros] could not properly convey the fury of the young black at the apparent condescension of a white man in attending the funeral except by the use of an expletive. The outrage of the black had to be mirrored in language that outraged.

_id._ at 535 (emphasis in original).

30. These are the two major state interests recognized by Tinker v. School Dist., 393 U.S. 503, 513 (1968) as justifying infringement of constitutionally protected rights in the sphere of lower education. This approach has also been adopted by California courts in evaluating statutory standards of teacher conduct. See Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 1110, 102 Cal. Rptr. 421, 429-30 (1972).

31. The age of the students exposed to the conduct being litigated was commented upon in every case discussed in this paper. Race was mentioned when only nonwhite students or nonwhite teachers were involved. See, e.g., Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972), and Robbins v. Board of Educ., 313 F. Supp. 642 (N.D. Ill. 1970).

32. [A]s a practical matter, rarely are the courts willing to hypothesize any detriment to the moral well-being of children beyond the lower grades. The Right to Teach, _supra_ note 8, at 1188.

The "relevance" of the controverted material or conduct to the established curriculum of the class in which it occurs is always significant to courts. But unlike the pupils' age, the analysis of this factor is less susceptible to generalization. First, the conduct complained of may be portrayed in different ways. Second, the nature of the "established curriculum" may be equally fungible. For example, a discussion about Vietnam-era draft resistance could be an anti-military tirade or a dispassionate inquiry into psychological motivation. And the sociology class in which the discussion occurs could be portrayed as the study of classical social theory anchored to a textbook or as a free-wheeling exploration of modern human behavior. Despite this range, relevance can easily be determinative in egregious cases, for example, the mathematics teacher who lectures at length about contemporary politics.

Also important as an evaluative factor is the teacher's method of presenting the controversial material. Even assuming an apparently mature student group and relevance to the regular curriculum, courts have approved dismissals when the teacher's conduct suggests attack, incitement, coercion or propagandization of the students. Of significance here is whether the teacher was responding to inquiries freely made by the students, whether the teacher was attempting to mask his or her personal opinion as generalized truth or established school policy, whether the teacher acknowledged and developed opinions.

34. As with age, the relevance of any material presented to students was discussed in every teacher case cited in this article.
contrary to his or her own,\textsuperscript{39} and how the teacher reacted to student disagreement with his or her position.\textsuperscript{40}

Probably the most enigmatic factor used in judicial balancing in academic freedom cases is that of prior notice. On occasion, the existence of prior notice has clearly been significant. In \textit{Birdwell v. School District},\textsuperscript{41} plaintiff teacher was dismissed because he led protests against the presence of ROTC recruiters on the high school campus, despite the fact that the principal had previously told him: "[It is] my responsibility . . . to determine who is on campus and who is not. You are not involved in this and you're not to pursue it any farther [sic]."\textsuperscript{42} In \textit{Clark v. Holmes},\textsuperscript{43} the teacher was advised when he signed his second one-year contract that he counseled students rather than sending them to the official school counselors, that he overemphasized sex in his lectures, and that he belittled other members of the faculty. The teacher defended his conduct and continued it through the second year, at the close of which he was terminated. The court upheld the termination.\textsuperscript{44}

In general, however, the existence of prior notice is seldom determinative. More frequently, the courts have held that there was no notice\textsuperscript{45} or that what notice a teacher had was impermissibly vague or contradictory. In \textit{Webb v. School District},\textsuperscript{46} the question of notice was crucial and complicated. Plaintiff teacher was hired as the high school's drama coach, fully aware that the prior coach had left the job after staging two plays, \textit{Brigadoon} and \textit{I Remember Mama}, which contained swearing and drinking scenes which offended at least some members of the community. On taking the job, plaintiff was again warned about plays with swearing and drinking scenes. Plaintiff thereafter produced

\begin{itemize}
  \item \textsuperscript{39} See \textit{Birdwell v. School Dist.}, 352 F. Supp. 613, 621 (E.D. Mo. 1972), \textit{aff'd}, 491 F.2d 490 (8th Cir. 1974) where the district court stated, "[t]hrough [plaintiff-teacher] the policies of the school board and the principal were to be put into effect; his position was not that of a policy maker." The court described the teacher's actions in opposing a high school policy permitting ROTC recruitment as bearing, "the unmistakable appearance of having been designed to limit competition in the 'marketplace of ideas' that is the school . . . ."
  \item \textsuperscript{40} \textit{Id.} See \textit{also Moore v. Board of Educ.}, 357 F. Supp. 1037, 1038 (W.D.N.C. 1972).
  \item \textsuperscript{41} 352 F. Supp. 613 (E.D. Mo. 1972), \textit{aff'd}, 491 F.2d 490 (8th Cir. 1974).
  \item \textsuperscript{42} \textit{Id.}, at 617.
  \item \textsuperscript{43} 474 F.2d 928 (7th Cir.), \textit{cert. denied}, 411 U.S. 972 (1972).
  \item \textsuperscript{44} \textit{Id.}, at 930-31.
  \item \textsuperscript{46} 344 F. Supp. 791 (N.D. Iowa 1972).
\end{itemize}
a play with two drinking scenes but informed the superintendent in advance and was told by him to use her own judgment. Plaintiff also allowed the students to use profanity during rehearsals of another play; the language was overheard by a fellow teacher. The court found that if there was a rule in existence with respect to profanity and drinking scenes in plays, the superintendent's statement of the rule was impermissibly "vague and ambiguous."47

It is odd, then, to have nearly unanimous agreement that prior notice is relevant but also to find many courts expressly reserving the question of whether a specific prior notice of prohibition would make subsequent dismissal for violation constitutional.48 Yet it must be added that the cases are in general agreement that some types of misconduct are sufficiently outrageous that no formal notice is needed to alert the teacher to the likelihood or certainty of punishment.49

Those factors discussed above—character and age of the students affected, the relevance of the controverted conduct to the established curriculum, and the existence of prior notice of policy or prohibition—are all presumed by courts to be factual circumstances known or knowable by the teacher at the outset of the course of conduct. The remaining factors are also chiefly factual but concern the subsequent, reasonably foreseeable effects of the incident.

2. Effects of the Incident

First and foremost among post-incident factors, of course, is the reaction caused by the conduct. Such reaction can be, but often is not, divided into two parts: First, what was the immediate response of the students exposed to the teacher's conduct; and second, what was the response of other teachers, administrators, parents, the community at

47. Id. at 801.

48. See, e.g., id.: "The Court need not reach the question of whether the rule stated by Superintendent Mitchell was constitutionally invalid . . . ."; Parducci v. Rutland, 316 F. Supp. 352, 357 (M.D. Ala. 1970): "[T]his Court does not feel any necessity to comment upon the advisability of requiring school administrators to promulgate rules and regulations . . . ."; River Dell Educ. Ass'n v. Board of Educ., 122 N.J. Super. 350, 357, 300 A.2d 361, 365-66 (1973): "If the memo [were more specifically drawn], the argument for disruption would be more substantial." But see Lindros v. Governing Bd., 9 Cal. 3d 524, 544, 510 P.2d 361, 375, 108 Cal. Rptr. 185, 198-99 (1973): "Certainly there is no rule of law, statutory or otherwise, which would require advance publication of elaborate regulations and guidelines anticipating all possible infractions or misconduct which a probationary teacher might commit." (Burke, J., dissenting).

large, and the students after exposure to these reactions of these other
groups? In answering such questions, courts reveal to what extent they
believe classroom discipline is the *sine qua non* of education. For some
courts (and school boards) the threat of impaired discipline, whenever
and however occurring, is sufficient to justify teacher dismissal.

In a situation of potential disruption, there is no requirement in the
law that the proper authorities must wait for the blow to fall before
taking remedial measures.  

Other courts and commentators (and fewer school boards) have taken a
less reflexive attitude, requiring that substantial impairment of the edu-
cational process as well as mere disruption be shown before teacher
punishment is merited.

Closely tied to the question of a disruptive student reaction is the
factor of parental and community reaction. Many litigated incidents
arise only after parents learn of the classroom conduct through the
hearsay report of their children. Some courts have accorded great
weight to parental reaction on the theory of community control of the
public schools. Others have held that the parental response is signifi-

In *Nigosian v. Weiss*, 343 F. Supp. 757 (E.D. Mich. 1971), a teacher was dismissed
solely because he violated a broad ruling that there should be no classroom discussion of
the current labor dispute between the school district and the teachers. The court
expressly found that the board's ruling was based on a reasonable fear of disruption
which it had a duty to prevent. *Nigosian*, however, is not strictly an academic freedom
case since the teacher tried to align his actions with those in *Pickering v. Board of Educ.*, 
391 U.S. 563 (1968), an out-of-classroom conduct case.

51. See note 29 & accompanying text supra. Although *Tinker v. School Dist.*, 393
U.S. 503 (1969), and the cases citing it on the issue of disruption, *supra* note 10, tended
to focus on traditional notions of a breakdown in discipline or the threat of physical
harm, other decisions have suggested that impermissible disruption can take the form of
embarrassment to the pupils, *Pyle v. School Bd.*, 238 So. 2d 121, 123 (Fla. App. 1970),
(1974). See also *A Search for Standards, supra* note 8, at 869-70:

Disturbance of the educational process, the criterion *Tinker* defined in physical
terms, occurs when the teacher's expression has so disturbed or upset the
student that he is unable to be mentally receptive to instruction and reacts in a
quiescent, withdrawn or sullen manner as well as when he reacts in a boister-
ous or hysterical manner.

52. A parent and the school authorities have a right to expect that children
are not going to be exposed to comments, discussion, and personal opinions
of a teacher on sex who had not been certified to teach such subject in classes
which do not relate to such subjects.

*State ex rel. Wasilewski v. Board of School Directors*, 14 Wis. 2d 243, 270, 111 N.W.2d
*The Right to Teach, supra* note 8, at 1185.

Although not at all advocating community or parental control of teacher conduct,
one teacher union official indicated that he considers any substantial parental protest of
teacher behavior to be indicative of a serious teacher problem—more so than protests
from fellow teachers or administrators. Interview with Donald Baer, Executive Director,
United Teachers Los Angeles (UTLA), Los Angeles, California, February 1975. A
cant but only if the classroom situation and student response are also found troublesome. Still other courts have politely but firmly discounted the opposition of parents and the community to controversial teacher conduct which otherwise appears educationally meritorious.

The last consistently utilized factor in the academic freedom balance is the experience, reputation and post-incident behavior of the teacher. Was the teacher qualified to deal with the subject matter of the controversy? What is the overall professional record of the individ-

Conservative school board member has said that if the principle of community control of the public schools is not upheld in the disciplining of teachers, then the community will cease to support its schools altogether and instead resort to private institutions where parental control is unquestioned. Interview with Lyman Newton, Member, Pasadena School Board, Los Angeles, California, February 1975. One school board attorney postulated that any teacher whose conduct evidences a failure to appreciate the sensitivities of the surrounding community has displayed a prima facie lack of judgment. This presumption is not unfair, he maintained, because any competent teacher knows of many noncontroversial methods of reaching a given educational objective for every one controversial method. Interview with Allen B. McKittrick, Deputy County Counsel, Los Angeles County, California, February 1975.

53. In Sterzing v. Independent School, 376 F. Supp. 657 (S.D. Tex. 1972), vacated on other grounds, 496 F.2d 92 (5th Cir. 1974), parental reaction to plaintiff's use of controversial subjects (e.g., Vietnam War, race relations) prompted the administration to dismiss the teacher. While expressing solicitude for one particular parent ("This is a normal, genuine and healthy concern of a parent and one that a teacher must recognize and diplomatically deal with." Id. at 662), the court found the administration had acted "without the benefit of first-hand knowledge of what was going on in [plaintiff's] classroom." Id. at 661.

54. "With the greatest of respect to . . . parents, their sensibilities are not the full measure of what is proper education." Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969). In Williams v. Board of Educ., 388 F. Supp. 93 (S.D.W. Va. 1975), the court dismissed a suit by parents against the classroom use of certain textbooks which allegedly defamed the nation and the Christian religion. And in Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974), the court turned away parental religious objections to a board's decision to use audio-visual equipment in classes and to provide a health course. The court in Davis indicated that in balancing parental concerns with school board expertise, discretion had to remain with the board. Id. at 405-06. See also Controversy in the Classroom, supra note 8, at 1054 (parental opposition is not an educational consideration) and Teacher Classroom Flexibility, supra note 8, at 1520:

Quality education attempts to prepare the student for an adult life which may or may not be spent in the local community, and which certainly will include personal and societal problems which no one in the offended community or anywhere else can fully anticipate.

55. Of course, this question is closely related to the issue of the relevance of the controverted conduct or material to the subject matter in which the teacher specializes and which presumably he or she is in fact teaching. See notes 34-35 and accompanying text supra. Additionally, courts have taken notice of any general intellectual and academic legitimacy which disciplined teachers have been able to demonstrate. Consider especially Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972), where the court detailed the educational authorities which the teacher relied upon in allowing her pupils to write and thereafter discuss "anything they wanted to," whereupon the students wrote and discussed their pornographic essays and poems. Id. at 1103, 102 Cal. Rptr. at 425.
al? As the ramifications of the episode began to become apparent, what was the response of the teacher? The objective of these questions is to determine whether the claim of academic freedom is being made by a "troublemaker" or "firebrand" or by a conscientious educator who at worst may have attempted a bold experiment and failed. Contrition and subsequent cooperation with objecting administrators and parents are significant factual elements.\(^5\)

Of uncertain relevance is the employment status of the offending teacher, i.e., whether he or she is a probationary or tenured teacher. The weight of opinion is that in a pure claim of academic freedom, this distinction should remain irrelevant,\(^5\) but where the court interprets statutory or contract standards, employment status may yet be significant.\(^5\) The practical reality is that the greater a teacher’s statutory or

The importance of professional support from academic authorities for a teacher’s controversial conduct was explicitly recognized in the rule formulated by Judge Wyzanski for use in evaluating such behavior:

> When a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession but which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith, the state may suspend or discharge a teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by regulation or otherwise that he should not use that method.


On the other hand, there is a deep-seated suspicion among some courts and school authorities that it is precisely the brightest and most innovative teachers who constitute the greatest danger in terms of unauthorized conduct:

> [A] teacher exerts considerable influence in molding the social and moral outlook of his students by his own precept, deportment, and example. This is especially true of a popular and effective teacher . . . .

State ex rel. Wasilewski v. Board of School Directors, 14 Wis. 243, 258, 111 N.W.2d 198, 207 (1961) (Martin, C.J., concurring).\(^56\)


57. “The absence of tenure does not afford the state an added interest which would justify the regulation of a teacher’s classroom activities.” The Right to Teach, supra note 8, at 1193. Accord, Moore v. Board of Educ., 357 F. Supp. 1037, 1039 (W.D.N.C. 1973). Donald Baer, Executive Director, United Teachers Los Angeles, favors a new teacher evaluation system which would give a teacher minimal job security (without a right to union representation in case of discharge) during a probationary period; thereafter a kind of super-tenured status would attach with full union protection. Interview with Donald Baer, supra note 52. Such a system would inevitably create a de facto dichotomy in academic freedom.

58. This may be the only vitality remaining in Parker v. Board of Educ., 237 F. Supp. 222 (D. Md.), aff’d, 348 F.2d 464 (4th Cir. 1965), cert. denied, 382 U.S. 1030 (1966). Parker was a probationary teacher whose contract was not renewed for the
contract protection, the greater will be that teacher's intellectual inde-
pendence. 59

IV
TEACHER AND BOARD STRATEGIES TO EXPAND OR
RESTRICT THE EMERGING RIGHT OF ACADEMIC FREEDOM

Because the claim or defense of lower education academic freedom
remains in its formative stage, opportunities are still open to both sides
in labor controversies to influence decision-makers and each other on
this issue. In this section the article assays some promising strategies
for each side in either expanding or curtailing the right of academic
freedom. It is important to remember that a basic strategy will always
consist of resisting goals sought by one's opponents whether in the
context of union elections, bargaining, or arbitration.

A. Teacher Strategies

Any realistic teacher labor tactic must first recognize that almost all
enabling legislation contains restrictions on the subject matter of collec-
tive bargaining—restrictions which usually appear to go to the heart of
any effort to expand lower education academic freedom. 60 A practical

---

59. Compare Hetrick v. Martin, 480 F.2d 705, 709 (6th Cir. 1973) (nontenured
state university professor not rehired: "academic freedom . . . does not encompass
the right of a nontenured teacher to have her teaching style insulated from review")
(probationary teacher who used obscenity in short story read in class must be retained;
such conduct is not legal cause "relating solely to welfare of school and pupils" in words
Cal. Rptr. 421, 430 (1972), in which the court subsumed in its inquiry into a teacher's
"fitness to teach" whatever academic freedom that teacher may enjoy.

60. Some states attempt to protect school board prerogatives by statutes which
provide that board management rights are non-negotiable. See, e.g., New Hampshire:
N.H. REV. STAT. ANN. § 98-C:7 (Supp. 1973)
The state retains the exclusive right through its department heads and ap-
pointing authorities . . . (a) to direct and supervise employees, (b) to ap-
point, promote, discharge, transfer or demote employees, (c) to lay off un-
necessary employees, (d) to maintain the efficiency of government operations,
(e) to determine the means, methods and personnel by which operations are
to be conducted . . .

solution to this initial stumbling block is the creation of elaborate consultative procedures—even in areas of conceded board discretion—within or based upon provisions of the collective bargaining agreement. Consider the following example:

The involvement of teachers in the decisionmaking process is vital . . . . This involvement must be meaningful . . . . This section shall be subject to arbitration.\footnote{61}

If a board, bound by the above provision, makes an unpopular decision, it may be subject to attack in arbitration on procedural grounds alone. Such an indirect approach to problems of managerial discretion is familiar to arbitrators.\footnote{62}

An alternative teacher strategy designed to conceal the nonarbitral academic freedom element in certain types of disputes is the characterization of a board action which threatens teacher classroom autonomy

---

A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.


Those subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation include:

(a) The right to hire, direct, assign or transfer an employee, but excluding the right to assign or transfer an employee as a form of discipline.

(b) The right to reduce in force or lay off any employee because of lack of work or lack of funds . . . .

(c) The right to determine:
   (1) Appropriate staffing levels and work performance standards . . . .
   (2) The content of the workday . . . .
   (3) The quality and quantity of services to be offered to the public . . . .
   (4) The means and methods of offering those services.

The new California teacher collective bargaining law, \textit{Cal. Gov't Code} §§ 3540-49.3 (West Supp. 1976) assures at § 3543.2 that teacher representatives have the "right to consult on the definition of educational objectives, the determination of the content of courses and curriculum and the selection of textbooks . . . .", but the statute goes on to declare, "[a]ll matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting or negotiating . . . ."

Despite such legislation and restrictive language in collective bargaining agreements, it is useful to remember that "[a]s a practical matter . . . to some degree almost anything is negotiable." Metzler, \textit{The Need for Limitations upon the Scope of Negotiations in Public Employment I}, 2 J. Law & Educ. 139, 145 (1973). \textit{See also} note 91 and accompanying text, infra.


not as an attack on academic freedom but rather as the employer's unilateral change of basic working conditions. Such a controversy is also traditionally cognizable in arbitration and often resolved in the employee's favor.

The next crucial bargaining goal for teachers—and again one often stymied by legislative limitations—is fixing the scope of arbitration to include all forms and degrees of teacher discipline and discharge. Fortunately, arbitration is very well suited to protests of board actions which teachers believe threaten their academic freedom but which do not involve severe or even apparent punishment. Teacher transfers, class assignments, and department chairman selections all can easily mask disputes regarding academic freedom. In comparison to arbitration, judicial review—if available at all—is cumbersome, time consuming and expensive. And to expand avenues of relief in actual discharge cases, teacher negotiators should attempt to make any utilization of arbitration optional and nonexclusive of traditional judicial forums.

63. For example, a teacher who is philosophically opposed to a new standardized test might attack not the test itself but the administrative burdens and time involved in giving and correcting it.

64. See, e.g., Milwaukee Sewerage Comm'n and Milwaukee Dist. Council, 76-1 CCH LAB. ARB. AWARDS ¶ 8055 (1975) (Fleischli, Arbitrator).

65. See, e.g., Adcock v. Board of Educ., 10 Cal. 3d 60, 513 P.2d 900, 109 Cal. Rptr. 676 (1973), in which the California Supreme Court ruled that a school board could not transfer a teacher if it were an administrative sanction based on teacher conduct protected by the first amendment. Id. at 66, 513 P.2d at 904, 109 Cal. Rptr. at 680.

66. One four-year study in Michigan found no arbitrations of tenured teacher dismissals, and reasoned that “this is covered by the tenure statute evidently to the satisfaction of the parties.” Masters, The Arbitrability Issue in Michigan Public School Disputes, 28 ARB. J. 119, 126 (1973). In California and other states providing substantial statutory protection for probationary teachers as well (see notes 4 & 5 supra), the above reasoning would apply to tenured and nontenured teacher dismissals. Compare also the termination review procedures for state employees in Iowa and Maine (negotiated remedies exclusive) with that for Florida (terminated employee has option of negotiated or statutory remedies): IOWA CODE ANN. § 20.18 (Supp. 1976) (“An agreement with an employee organization which is the exclusive representative of public employees in an appropriate unit may provide procedures for the consideration of public employee grievances. . . . Public employees of the state shall follow either the grievance procedures provided in a collective bargaining agreement, or in the event that no such procedures are so provided, shall follow grievance procedures established pursuant to [statute].”); ME. REV. STAT. ANN. tit. 26, § 979-K (1964) (“An agreement between a bargaining agent and the public employer may provide for binding arbitration as the final step of a grievance procedure, provided that any such grievance procedure shall be exclusive and shall supersede any otherwise applicable grievance procedure provided by law.”); FLA. STAT. ANN. § 447.401 (Supp. 1976) (“A career service employee shall have the option of utilizing the civil service appeal procedure or a grievance procedure established [by negotiation] . . . but such employee cannot use both a civil service appeal and a grievance procedure.”).

tion may not foreclose federal courts from considering the same claims of deprivation of constitutional rights as come before arbitrators.\textsuperscript{68}

If teachers are successful in making discipline and discharge subject to arbitral review, their next task will be to provide the arbitrator with as wide a perspective as possible in his or her evaluation of teacher behavior. First, any arbitrator will look to the standards explicitly provided in the collective bargaining agreement. From the teacher viewpoint, the most restrictive standard would be that incorporated in the traditional phrase "just cause."\textsuperscript{69} In the industrial context where the phrase originated, "just cause" has acquired a long history of arbitral elaboration. In the private sector, however, the phrase generally has not been viewed as incorporating constitutional concepts of individual rights. Arbitrators have been loath to import case law when pondering the meaning of any contract provision.\textsuperscript{70} Thus, use of a just cause standard alone would not fully exploit arbitration for the advancement of academic freedom.

However, a "just cause" standard can be combined with additional language for more innovative effect. This could be accomplished by including a requirement that the bargaining agreement be interpreted "in a manner consistent with the legal system of the state or country"\textsuperscript{71}

\textsuperscript{68} Gardner-Denver held that a private sector employee was not foreclosed from pursuing a Title VII action in federal court even though an arbitrator already had denied his claim of employer racial discrimination. \textit{Id.} at 49. Teachers deprived of their civil rights would bring federal court civil actions under 42 U.S.C. § 1983 (1970). Nevertheless, the reasoning of \textit{Gardner-Denver}, that certain constitutional rights should enjoy plenary protection in multiple forums, is analogous. \textit{Id.} at 57.

\textsuperscript{69} See, e.g., contract between Detroit Bd. of Educ. and Detroit Fed'n of Teachers (eff. July 1, 1975), art. XIII, § F ("No employee shall be discharged or disciplined unjustly"), \textit{reprinted in BNA GOV'T EMP. REL. REP.} (Reference Vol.) 81:1001, 1014.

\textsuperscript{70} F. ELKOURI & E. ELKOURI, \textsc{How Arbitration Works} (3d ed. 1973) [hereinafter ELKOURI & ELKOURI] indicate that arbitrators are inclined to give "very serious consideration" only to definitive rulings of the U.S. Supreme Court or a state's highest tribunal, and that "arbitrators are less likely to honor conflicting lower court decisions." \textit{Id.} at 339. Note however that in some states, rulings on academic freedom have come in the context of judicial interpretations of specific statutes (\textit{i.e.}, state tenure acts). Arbitrators are increasingly receptive to the goal of conforming their decisions to settled statutory meanings. \textit{Compare} the arbitral decisions cited in \textit{id.} at 331 n.34 with those cited in \textit{id.} at 332 n.35.


The contract between New York City Bd. of Educ. and New York City Fed. of Teachers (effective Sept. 9, 1972), art. X, § C, \textit{reprinted in BNA GOV'T EMP. REL. REP.} (Reference Vol.) 81:1581, 1599, may have the same effect reached from negative construction:

The arbitrator . . . shall be without power or authority to make any decision:

1. Contrary to, or inconsistent with, or modifying or varying in any way, the
or so as not to "deny or restrict to any teacher rights he may have under [state] laws or other applicable laws and regulations." It can be argued that this kind of incorporation by reference clause is particularly appropriate in a collective bargaining agreement governing public employees. It only recognizes the willingness of each side to respect constitutional and statutory as well as contractual law, in order to give aggrieved parties remedies within the arbitral context, avoiding lengthy and expensive recourse to the courts.

Some teacher groups have not been satisfied with the above provisions and have had enough bargaining power to secure more explicit guarantees of academic freedom. Often, however, the price for such recognition is an equally explicit reservation of board rights:

Teachers shall have freedom in classroom presentations and discussions to introduce fairly all sides of reasonably controversial issues which are relevant to the basic content of the course. The basic content of a course and provisions for its implementation shall be the responsibility of the Board.73

Aside from attempting to insert language in the contract which can be construed in favor of the teachers, teacher representatives involved in academic freedom arbitrations may wish to pursue claims of management departures from past practices74 and procedurally defective disci-

terms of this agreement or of applicable law or rules or regulations having the force and effect of law.


73. Contract between Board of Educ. of Anne Arundel County and Teachers Ass'n of Anne Arundel County, art. 2, § L, reprinted in BNA GOV'T EMP. REL. REP. No. 574, at X-4.

Regarding the fate of an undiluted guarantee, consider Board of Educ. v. Rockaway Township Educ. Ass'n, 120 N.J. Super. 564, 295 A.2d 380 (1972). The parties had a collective bargaining agreement which read in part:

The Board and the Association agree that academic freedom is essential . . . .

Free discussion of controversial issues is the heart of the democratic process. . . . Whenever appropriate for the maturation level of the group, controversial issues may be studied in an unprejudiced and dispassionate manner.

Id. at 567, 295 A.2d at 382 (emphasis deleted). When a teacher planned to conduct a discussion of abortion with his seventh grade humanities class, he was denied permission, and the Association attempted to enforce the grievance procedure to settle the dispute. The court found "that if the contract is read to delegate to a teacher or teacher's union the subject of courses of study, the contract in that respect is ultra vires and unenforceable." Id. at 570, 295 A.2d at 385.

74. ELKOURI & ELKOURI, supra note 70, devote an entire chapter to this subject and begin it by saying, "Unquestionably, custom and past practice constitute one of the most significant factors in labor-management arbitration." Id. at 389.

Of course the arbitral notion of past practice can work against the teacher who departs from established school procedures, relying on new judicial suggestions of protected conduct—suggestions which may not have been recognized by the teacher's school district or community.
ACADEMIC FREEDOM

In general, however, teachers face an uphill battle in arbitration when they directly argue for the freedom of "professional discretion," if it is not firmly established in the collective bargaining agreement.

Teachers who oppose the use of quantified and standardized educational testing as a yardstick of instructional performance may be

---

75. See, e.g., Elkouri & Elkouri, supra note 70, at 630-32, 641-43; Grand Blanc School Dist. and Grand Blanc Educ. Ass'n, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 35-DN-10 (1972) (Howlett, Arbitrator) (teacher "encouraged" display of obscenities in classroom; suspension improper because imposed before completion of grievance procedure); Cranston School Comm. and Cranston Teachers Ass'n, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 34-DKN-2 (1972) (Jacks, Arbitrator) (teachers invited prostitute to speak to high school class; reprimand improper because of board's failure to provide grievants with "fair hearing" and because contractual provision guaranteeing academic freedom coupled with five year existence of approved special class dealing with controversial and sensitive areas did not give the teachers fair warning of possible discipline); Owendale-Gagetown Bd. of Educ. and Owen-Gage Educ. Ass'n, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 39—D-18 (1972) (Roumel, Arbitrator) (imposition of additional year of probationary status unjustified on grounds of teacher's profanity in class, textbook selection and personal appearance; disciplinary "just cause" standard not met because conduct had continued for two years with no board objections); Highland Park School Dist. and Highland Park Fed'n of Teachers, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 69-16 (1975) (Herman, Arbitrator) (teacher could not be reprimanded for sending letter home with pupils complaining of crowded classrooms; board had not made clear that failure to follow administrative procedures would result in discipline). But cf. Warren Woods Pub. School and Warren Woods Educ. Ass'n, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 52-ADW-2 (1974) (Croty, Arbitrator) (teacher properly reprimanded for placing baby rattle around the neck of pupil; board had right to expect teacher to exercise good judgment in student discipline without specific statements forbidding the use of baby rattles around the necks of eight year old students who failed to complete work assignments).

See generally the discussion at text accompanying notes 93-113 infra regarding board efforts to perfect the prior notice element of disciplinary procedures.

76. See, e.g., Paw Paw Pub. Schools and Paw Paw Educ. Ass'n, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 66-5 (1975) (Edwards, Arbitrator) in which the arbitrator ruled the board could require teachers to wear neckties. He did not reach the constitutional issue, stating: "Legal issues are better resolved in a court of law and not in arbitration... the Arbitrator is confined to interpret the terms of the collective bargaining agreement and not to enforce applicable federal or state statutory or constitutional law." Compare the successful teacher grievance in Milford Board of Educ. and Milford Educ. Ass'n, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 57-B-9 (1974) (Fallon, Arbitrator) in which the arbitrator upheld the right of teachers to wear long hair. Although the arbitrator cited Tinker v. School Dist., 393 U.S. 503 (1969), he also emphasized that he was only interpreting a collective bargaining clause on academic freedom which granted teachers "full rights of citizenship." See also Ann Arbor Board of Educ. and Ann Arbor Educ. Ass'n, AM. ARB. ASS'N ARB. IN THE SCHOOLS, No. 70-11 (1975) (Bloch, Arbitrator) upholding a teacher suspension after several warnings for telling students in his typing class that they should transfer if they would be offended by his religious comments. The arbitrator found that the teacher's comments amounted to religious proselytization which was specifically forbidden by contract, and that the board's action did not deprive the grievant of his contractual right to academic freedom.

77. See generally B. Hoffman, The Tyranny of Testing (1962); Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68
ignoring a useful aid to teacher classroom autonomy. To the degree reliable testing indicates student progress in all academic areas, the teacher whose students can meet or exceed projected test results should be deemed to have met the troublesome burden of showing no impairment of educational progress.

It is sometimes possible to compare the achievement of pupils under one teacher with those under others—and thereby to evaluate the comparative effectiveness of the teacher and his teaching methods—on the basis of both objective tests during or at the close of the year and later performance in higher grades or higher level courses. Currently, such reliability is strongest at the lowest grade levels, but is also well established in secondary school subjects such as mathematics and the physical sciences.

There are two drawbacks to reliance upon even perfectly fair tests. First, they measure long term educational results, whereas the most controversial teacher incidents often occur instantaneously. The teacher summarily relieved of duty has no long term opportunity thereafter to show that one day's idiosyncrasy had no deleterious academic effects. But for the teacher whose overall classroom methods are disputed or who is terminated at year's end for his or her "entire record," testing results could be influential. The second drawback to reliance on testing is the expected retort of the board that the teacher is not hired merely to produce acceptable test results but also to inculcate certain values and attitudes in the students: A board does not bargain for a classroom of


Developments in the Law—Academic Freedom, supra note 8, at 1099.

Interview with Joseph Zeronian, Associate Superintendent for Business, Pasadena City Schools, Pasadena, California, February 1975. The Iowa Tests of Basic Skills are probably the most widely used standardized evaluations of learning progress in the primary grades. At the secondary level, there are generally two basic educational tracks: vocational and college preparatory. Pupil performance in vocational fields can be tested through skills examinations and success in job placement. Students applying to colleges and universities take standardized tests administered through the American College Testing Service or the College Entrance Examination Board (CEEB). CEEB has also developed "achievement tests" in certain subject areas, and "advanced placement examinations," which guide college officials in deciding when to grant college credit for high school courses. These examinations are particularly well suited to aid in comparing teacher competence vis-à-vis other teachers in the same school or district or throughout the nation.

For example, the probationary teacher not rehired at year's end in Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) had a superlative teaching record except for the single incident, assigning a Kurt Vonnegut short story to her class, which caused her termination. The teacher's principal testified that but for the single controversial act, he would have retained her. Id. at 354.
ACADEMIC FREEDOM

Marxist mathematicians. 81

Nevertheless, teacher representatives may attempt to flex their bargaining muscle by pressing for a provision establishing "a strong presumption of competence" in favor of any controversial teacher whose students consistently perform at or above standardized levels of performance.

Students are one important constituency in the educational community with an uncertain status in the courts and no clear representation at all in educational labor schemes. Thus it could be important for teacher representatives and individual teachers to emphasize their concern for students in union elections and bargaining and arbitral disputes. When this has been attempted in the judicial arena, however, courts having little faith in the independence of young students have interpreted such efforts as a strategy to corrupt students by making them blind partisans or silent pawns. In Jergeson v. Board of Trustees, 82 the principal apparently selected 30 of the plaintiff's students to participate in an evaluation of the teacher's performance. Although the dissent pointed out that nearly two-thirds of the sample thought the teacher's influence was "beneficial," the majority of the court believed the answers to this question simply showed that the teacher had substantial success in getting his students to accept his beliefs. 83

It must be clear before a teacher engages in controversial conduct that he or she is trying to "represent" students. Preferably, the teacher should establish and observe a policy of respect for student opinion and sensitivities, with provisions for alternate assignments where unorthodox material is involved. 84

81. Interview with Lyman Newton, supra note 52. Mr. Newton admitted that he would be "less concerned" about the unorthodox teacher who nevertheless clearly taught traditional academic materials with documented success. But he maintained that in general, the more radically a teacher departs from established patterns of teaching, the less likely that teacher is to have pedagogical success in the standard curriculum.

The California Supreme Court has described a teacher's role as an exemplar of morality, democratic values, and general civic virtue—wholly separate from his or her duty to impart academic knowledge:

[T]he calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration. . . .


83. Id. at 496 (Gray, C.J., dissenting).

84. These kinds of safeguards were noted approvingly by courts in Keefe v.
Teachers in past academic freedom cases have sometimes mistakenly portrayed their first amendment claims as resting upon their rights to free speech as ordinary citizens. The same posture can be wrongly taken in a bargaining or arbitral environment. Courts have rightly pointed out that a teacher's personal rights of free speech often clash with the state's and students' interests in achieving the best education. But the teacher may largely eliminate that conflict by resting his privilege on his professional status as an educator, whose right to academic freedom is asserted on behalf of students' educational interests. The key to this type of presentation is that any teacher conduct inside the classroom must be defensible from the student viewpoint. The relevant question is, if the teacher is allowed the liberty in question, will the students benefit educationally thereby, and if so, how many of the students?

A final strategy for fashioning an academic freedom claim can be prior teacher interaction with parents. As with students, the value of such interaction is dependent upon its being an established practice before any disputed incidents occur and its appearance as a settled policy of teachers and their unions. Particularly in the case of parents, thought might be given by teacher groups to parental organization endorsements prior to union elections, parental participation ex officio in developing


85. The major authority in this area, Pickering v. Board of Educ., 391 U.S. 563 (1968), is not useful for the argument of academic freedom. In Pickering a teacher was dismissed for out-of-classroom statements he made regarding matters of public concern. The court's holding that the school board was not justified in dismissing the teacher was solidly based on traditional constitutional principles of individual rights of free speech. The plaintiff, Pickering, sought to obtain the same liberties as those enjoyed by other citizens, despite and not because of the fact he was a teacher.


bargaining positions, or the use of parents' testimony in arbitrations involving controversial classroom conduct. Of course, even a pro-student and pro-parent posture may not resolve disputes which boards will maintain are contests between their notions of education and those of teachers. In a direct confrontation on this issue, whether in courts or arbitration, teachers must still expect to lose more often than not.

B. Board Strategies

Just as teachers begin their efforts to exploit labor legislation for gains in academic freedom with built-in limitations, boards start from a position of legislative protection in their efforts to resist such expansion. For boards of education, the controversies over collective bargaining language will usually involve resisting teacher suggestions for specific provisions. Nevertheless, boards are not without offensive opportunities relative to academic freedom. One device is the insertion in an agreement of a strong management prerogative clause, of which the following is an example:

The Board reserves all rights and powers conferred upon it by the Constitution and laws of the State... and of the United States except as limited by this Agreement.

Second, boards with superior bargaining leverage may counter teacher efforts to import developing constitutional law into the agreement with provisions such as the following:

The arbitrator shall have no authority to interpret any State or Federal

88. Dr. Zeronian, interview supra note 79, stressed that in his opinion, middle and upper income parents are primarily concerned that their children's teachers not work at "cross-cultural purposes," i.e., that children not be presented with sharp conflicts in basic beliefs (morality, patriotism, civility, etc.). He theorized that lower income parents, in contrast, are most worried about their children's acquiring educational fundamentals. If that is accomplished, such parents will not object to the inculcation of whatever values the teacher selects. If this reasoning is correct, then parental contact is of greater importance when the teacher is dealing with a wealthier community.

89. "[E]ach choice between conformity and diversity is itself affected by a variety of factors, and local school boards need the freedom to make diverse choices for themselves." Miller v. School Dist., 495 F.2d 658, 667 (7th Cir. 1974). "[Plaintiff] was invested by the Constitution with no right . . . to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board . . . ." Ahern v. Board of Educ., 456 F.2d 399, 403-04 (8th Cir. 1972). "[A] teacher has a right to express her views with reference to . . . the evaluation of school programs . . . . On the other hand, . . . for an orderly and intelligent administration of any program time necessarily must be limited in which debate can be had, then decisions must be made and followed . . . ." Irby v. McGowan, 380 F. Supp. 1024, 1030 (S.D. Ala. 1974).

law when the compliance or non-compliance therewith might be involved in the consideration of a grievance.\textsuperscript{91}

A third and often overlooked restrictive tool for boards of education is a narrowly drawn submission agreement from which an arbitrator draws his authority and scope of decision.\textsuperscript{92}

Without question, however, the paramount labor strategy for boards may be summed up in two words: \textit{prior notice}. If, with a specific prohibition or requirement, a board cannot prevail against the disobedient teacher, it will be because the rule was improper under the collective bargaining agreement or illegal under law. Existence of adequate prior notice will force this ultimate issue in any controversy. When this occurs, boards of education will likely remain the superior power:

It should require no argument to support the proposition that the [board] as the ultimate employer of the teacher on behalf of the citizens of the district, has the right to control the teacher by promulgating the standards of conduct which it deems appropriate. These standards may allow broad discretion or may be explicit.\textsuperscript{93}

This authority of the "employer" to enforce his notice standards also finds ample support in arbitration decisions.\textsuperscript{94}

Of course it must be admitted that no board will be able to anticipate even the majority of incidents which may give rise to a claim

\textsuperscript{91} Contract between San Diego Unified School Dist. and San Diego Teachers Ass'n, art. VIII, § 7(d), reprinted in San Diego Unified School Dist. and San Diego Teachers Ass'n, at 33 (1974) (Jones, Arbitrator) (copy on file in the offices of Industrial Relations Law Journal). Despite the quoted language, the arbitrator found that a state requirement that a teacher be allowed to inspect and comment upon negative remarks placed in her personnel file was "contractually absorbed" by the standard of reasonableness imposed on all Board rules by the collective agreement.

It would clearly be unreasonable were the Board to adopt or administer rules that are not in compliance with that [statutory] disclosure-commentary requirement. This being so, powers of an arbitrator relative to issues of file disclosure are not circumscribed or in any way limited or, for that matter, even affected by art. VIII, § 7(d).

\textit{Id.}


\textsuperscript{94} See, e.g., Providence School Comm. and Providence Teachers Union, AM. ARB. ASS’N ARB. IN THE SCHOOLS, No. 69-11 (1975) (Overton, Arbitrator) in which the arbitrator ruled that an English teacher could not make up her own final examination. Apparently decisive was the English department's long established practice of giving a standardized examination with questions which had been contributed by all teachers, including the grievant.
of academic freedom.95 Further, the strength of teacher unions may prevent adoption of highly specific, restrictive policies.96 Nevertheless, there are several types of prior notice which can be implemented unilaterally or through bargaining sessions.

The first type is an announcement by the board of the school district’s overall philosophy regarding teacher discretion in the classroom. To be sure, nearly every board has passed broad, platitudinous declarations on this subject;97 often such declarations can come back to haunt a board attempting to discipline a teacher who took literally terms such as “spirit of inquiry” or “balanced presentation.”98 In a carefully drafted “notice of philosophy,” a board should take cognizance of the competing theories regarding the optimal educational atmosphere, and then establish its preference in the collective bargaining agreement.99 In the context of litigation or arbitration, such a statement is not likely to be determinative, but it may provide the decision-maker with information as to the educational theory which the board wishes to implement wherever possible.100 If the board does not provide guidance on this

95. The task of drafting thoroughgoing regulations on this subject has been likened to the judicial and legislative search for a workable, constitutional definition of obscenity. Interviews with Donald Baer, supra note 52, and Roger Segure, Associate Executive Director, United Teachers Los Angeles, Los Angeles, California, February 1975.
96. One school administrator stated that most districts would be happy to enact as many regulations as possible but that the political power of teachers’ groups, nationwide and statewide as well as within individual districts, is now much greater than that of local boards. Interview with William Sharp, Assistant Superintendent, Los Angeles Unified School District, Los Angeles, California, February 1975. Indeed union leaders in Los Angeles forthrightly stated that teachers’ organizations would oppose any efforts to draft specific standards for teacher classroom conduct. In the absence of such codes, they said, every incident of attempted teacher discipline can be litigated on its individual merits. If the teacher prevails, boards shun similar attempts at discipline; if the teacher loses, the next case can probably be distinguished on its facts. Interviews with Donald Baer, supra note 52, and Roger Segure, supra note 95.
97. Citizenship Education. The electorate, in order to discharge its responsibilities intelligently, must examine all points of view regarding an emergent problem and must arrive at its own several judgments by critical analysis of all the facts. The schools occupy a unique role in that their primary responsibility is to prepare informed, capable and conscientious citizens.

98. See 86 Harv. L. Rev. 1341, 1350 (1973) wherein it is suggested that a teacher might perceive the need to balance students’ understanding of Shakespeare with a reading of works by Henry Miller.
99. The following might be a helpful draft of a statement of philosophy for a board which wished to retain as much control over its teachers as possible:

While recognizing that there is a wide range of creditable educational theories, this district retains the philosophy that control of educational policies, methods of teaching, and curriculum remain in the hands of the board and its representatives as specifically appointed and empowered.
100. See notes 23-29 & accompanying text supra.
fundamental question, a judge or arbitrator may feel free to select his or her own preferences.¹⁰¹

The second kind of notice which a board is advised to develop pertains to administrative procedures, to be utilized when a teacher contemplates conduct out of the ordinary. Obviously, this mechanism cannot be employed in all instances, but it can operate effectively in the most frequently recurring problem areas: classroom use of unauthorized books, articles, films or speakers.¹⁰² Recent conversations with teachers suggest that the use of unauthorized supplementary curriculum, particularly films and guest speakers, creates most academic freedom controversies in the public schools.¹⁰³

However, courts have been wary of invoking the formal “exhaustion of administrative remedies” doctrine in academic freedom cases.¹⁰⁴ Similarly, any prior restraint procedures will have to function strictly in good faith; they cannot be used to “pocket veto” teacher requests nor can they be used discriminatorily. It has been asserted that this is the result, if not the purpose, of a clearance procedure for guest speakers instituted in the Los Angeles school system after a teacher invited a member of the United Farm Workers Union to address his largely Chicano class. Thereafter, all speaker invitations were required to be approved by the central administrative office of the district, a procedure which necessarily eliminates spontaneous invitations to individuals who are able or willing to visit the campus only on the spur of the moment.¹⁰⁵

Since the administrative mechanisms here would be prior restraints upon teachers, at the very least the standards of Freedman v.

---

¹⁰¹ One commentator has welcomed this vacuum in the belief that the courts not only will but should fill it:

"[I]t will be the courts' function to analyze the objectives of the public school system—to create a sort of conceptual framework within which the balancing process is to take place." The Right to Teach, supra note 8, at 1196.


¹⁰³ Interviews with Robert Salley, high school social science department chairman, Pasadena City Schools, Pasadena, California, and Robert Unruh, United Teachers Los Angeles, Los Angeles, California (UTLA), February 1975.


¹⁰⁵ Interview with Robert Unruh, supra note 103.
Maryland should be observed. In the education context, these standards have been described as: (1) specification of the manner of submitting the proposed conduct or curriculum for approval, (2) specification of a time limit within which a decision must be rendered, and (3) provision for adversary proceedings and appeal.

The third type of advisable notice would outline and implement the "marketplace of ideas" concept. These rules could cover the more spontaneous incidents where prior approval is impractical. Teachers who choose to discuss controversial issues would be required not only to elicit opposing student viewpoints, but also to present such conflicting ideas themselves if no student response is forthcoming. Approximately equal time for opposing views could also be mandated. If all of the above were instituted, it is conceivable that a board could forbid a teacher from revealing which of the several viewpoints he or she personally favored. The only plausible reason for upholding the last, admittedly major restriction, would be that a teacher's identification of his or her personal preference is only psychologically—rather than intellectually—persuasive. This is due to the admitted influence a lower education teacher can have over even his or her most intelligent students.

The fourth notice opportunity for boards occurs after the first unacceptable classroom incident. The teacher's supervisor should hold a semi-formal conference with the teacher, indicating specific disapproval of the conduct in question, offering the teacher the opportunity to obtain clarification from higher authorities, and exacting the teacher's promise that no similar incident will arise in the future.

In developing all of the above notices, the greater the degree of teacher involvement and approval, the stronger the presumption of fairness attaching to the noticed rules. Thus, the first reprimand and conference might well be with the teacher's department chairperson rather than the principal or an alarmed member of the board.

107. Eisner v. Board of Educ., 440 F.2d 803, 805 (2d Cir. 1971) (The first two standards were part of the court's holding; the third was indicated in dicta).
108. Cf. State ex rel. Wasilewski v. Board of School Directors, 14 Wis. 2d 243, 255-56, 111 N.W.2d 198, 206, (1961), cert. denied, 370 U.S. 720 (1962). See also note 87 & accompanying text supra. It must be acknowledged, however, that the weight of authority is against this last restriction on teacher opinion. See, e.g., Sterzing v. Independent School Dist., 376 F. Supp. 657, 661 (S.D. Tex. 1972), vacated on other grounds, 496 F.2d 92 (5th Cir. 1974) (teacher has constitutional right to express his opinion on relevant subject provided it is done in "exceptionally fair and objective" manner); Moore v. Board of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973).
109. Any effort to dismiss a teacher is doomed unless school officials have built a long and detailed record of contact, advice and warning between the teacher and the administration. Interview with Allen McKittrick, supra note 52.
110. The issue of involving teachers in the disciplining of other teachers is highly
If constitutional prior notice is widely disseminated by boards, teacher conduct in defiance thereof can be portrayed as *insubordination* rather than an exercise of academic freedom. The major problem for boards with noticed rules is subsequent board conduct tending to show estoppel. For example, if certain words are forbidden in classroom conversation yet appear in library books, many courts or arbitrators will find the prohibition nullified by conduct.  

A similar result can occur if administrative procedures are only occasionally employed or warnings are diluted to salve tender feelings. A board may even find that its own consultants or approved refresher courses for teachers contradict established policy. This occurred recently in Los Angeles when a teacher created a political bulletin board in his classroom—an idea suggested to the teacher during an advanced education course he took and for which he received salary credit from the school district. Taken to arbitration, the district failed in its attempt to discipline the teacher when he allowed students to add unflattering captions to a picture of former President Nixon. The obvious lesson to be learned is that constant review of all noticed procedures is essential.

**V**

**FUTURE AREAS LIKELY TO INVOLVE CLAIMS OF ACADEMIC FREEDOM**

This section presents a number of actual or hypothetical educational problems in which parties are likely to make a claim of academic freedom or are likely to try to rebut such a claim. Each is an area which might be affected intentionally or unintentionally by the development of mature educational labor relations.


112. In Webb v. School Dist., 344 F. Supp. 791 (N.D. Iowa 1972), an originally explicit board policy, directly communicated to the teacher in question, became so obsfuscated and emasculated that it was held to constitute no notice at all. See the further discussion of this case at notes 46-47 & accompanying text supra.

113. Interview with Roger Segure, *supra* note 95.
A. The Alternative and Fundamental Schools

For some time, educational commentators have been suggesting implementation of the "open classroom." Although applicable theoretically to any grade level, the development has been most extensively applied on a campus-wide level in the so-called "alternative high school." In such a school, curriculum requirements are greatly relaxed; students and teachers are encouraged to explore whatever subject matter appears relevant to their mood and the topics of the day. Obviously, teachers (and students) at an alternative school enjoy a presumption of academic freedom considerably greater than their counterparts at a conventional school. Especially when both types of schools coexist within the same district, conventional school teachers have potential complaints. Judicially, they may claim denial of equal protection under the fourteenth amendment. Any compelling state interest in restricting teacher freedoms has been dealt a severe blow by the very existence of the alternative school, where such control has been consciously abandoned by the board. Regardless of the judicial ramifications, teachers might argue in bargaining sessions that there be unrestricted teacher transfer between such educational "tracks." For the moment, most districts with alternative schools have evaded the problem by locating enough teachers to staff alternative schools with willing volunteers. But what will happen when job openings at the alternative school are fewer than the number of teachers wishing to work there? Districts with these different types of schools may have to resort to bargaining for waivers of academic freedom rights from teachers who are compelled to teach in conventional schools by virtue of pupil distribution.

Such waivers could not be in the usual contract terms, to the effect that the teacher will abide by all duly promulgated school district policies. Rather, the provision should meet the exacting requirements for an enforceable constitutional waiver:

---

114. See generally sources cited in Teacher Classroom Flexibility, supra note 8. "A very real change is taking place... owing in large part to a theory of teaching commonly referred to as 'open' or 'informal' education." The Right to Teach, supra note 8, at 1181.

115. The alternative schools of Los Angeles and Santa Monica, California are extensively discussed in Los Angeles Times, Mar. 16, 1975, § XI, at 1, 4, 5, 9.

116. In fact in Los Angeles some alternative schools are located within a normally functioning high school campus. Id.

117. Widely divergent schools are also being encouraged by the federal funding of experimental voucher schemes in which parents and students are free to choose from among a number of competing schools with different educational philosophies and facilities. N.Y. Times, May 25, 1975, § I, at 1, col. 2.

118. This is at least the case in the Pasadena schools. Interview with Alan Burt, elementary school principal, Pasadena City Schools, Pasadena, California, February 1975.
Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.\textsuperscript{118}

In Pasadena, California, the above problem may also be encountered from the opposite end of the educational spectrum. In addition to conventional and alternative schools, that city's board has established "fundamental schools." As the name implies, these schools' curriculum is carefully supervised and explicitly limited to traditional subject matter; discipline of both students and teachers is stressed. Pasadena school officials claim that the fundamental school concept is an unqualified success. Only budgetary constraints have prevented them from opening several additional fundamental school campuses.\textsuperscript{119} The Pasadena innovation was the subject of articles in national magazines,\textsuperscript{120} which stimulated many inquiries from school boards around the country, according to Pasadena administrators.\textsuperscript{121}

Currently, teacher and pupil assignment to the fundamental schools is on a voluntary basis. But if pupil (or more accurately, parent) demand for fundamental education increases, it is conceivable that teachers will have to be moved from conventional or even alternative schools into fundamental schools, where a considerably different academic code of conduct will be imposed upon them. And even a volunteer fundamental teacher may choose to engage in conduct which he or she believes to be "fundamental" but which the administration does not. Is the presumption of academic freedom or insubordination to be any different at a fundamental than a conventional school or alternative school? Has a teacher, by the act of voluntary transfer to the former, waived whatever academic freedom right he or she may have had?

In many states no school district can contract with its teachers to provide less job security than that provided by statute. However, a court could sidestep this problem by manipulating concepts of board discretion and prior notice to reach the same result: reducing teacher freedoms at fundamental schools, perhaps even where teacher transfers were not voluntary.\textsuperscript{122} Negotiating sessions may be the best forum in which to air this issue.

\textsuperscript{118} Brady v. United States, 397 U.S. 742, 748 (1970). As to whether such a waiver could be valid under any circumstances, see the discussion at note 122, infra.
\textsuperscript{119} Interviews with Alan Burt, supra note 117, Lyman Newton, supra note 52, and Willard Craft, Acting Assistant Superintendent for Elementary and Secondary Education, Pasadena City Schools, Pasadena, California, February 1975.
\textsuperscript{120} Time, May 6, 1974, at 65-66; McCall's, Aug. 1974, at 53.
\textsuperscript{121} Interviews with Alan Burt, supra note 117, Lyman Newton, supra note 52, and Willard Craft, supra note 119.
\textsuperscript{122} A California Teachers Association attorney is of the opinion that no teacher's
B. Academic Freedom Determined By Student Status

As mentioned earlier, courts have frequently noted that the older and the more sophisticated the pupils, the greater the latitude which can be accorded their teacher in both instructional method and course content. But what effect does this distinction have on the teacher of unsophisticated students? Must he or she refrain from potentially inflammatory material simply because there is a greater likelihood such students will misunderstand it? Do the students so deprived of controversial but educationally valuable material have a valid claim of denial of equal protection?

In *Hetrick v. Martin,* a probationary English professor was not rehired at Eastern Kentucky State University. The teacher had made remarks in her classes relative to the Vietnam War. The school's administrators "considered the students as generally unsophisticated and as having 'somewhat restrictive backgrounds,' and for this reason apparently expected the teachers to teach on a basic level, to stress fundamentals and . . . to 'go by the book.'" The teacher's termination was upheld.

In recent academic freedom cases involving vulgar or inflammatory language, the courts have permitted the language particularly when the students are acknowledged to be familiar with the controversial terms. It may be argued that such decisions conceal courts' assumptions that poor children or children of racial minorities are more tolerant of or accustomed to sordid speech than middle or upper class children. Teacher unions have an opportunity to help resolve or at least alleviate the nascent constitutional problems of the disadvantaged student through concerned support for student rights and educational development in bargaining and arbitration.

waiver of academic freedom will be enforced by a court. This lawyer further indicated that even a volunteer teacher at a fundamental school gives up none of his or her statutory or constitutional protection by moving to such a school. Interview with Horace Wheatley, Assistant General Counsel, California Teachers Association (CTA), Los Angeles, California, February 1975.

123. See notes 31-33 & accompanying text supra.
125. *Id.* at 707. *See also* Irby v. McGowan, 380 F. Supp. 1024, 1030 (S.D. Ala. 1974) where a high school teacher was terminated for failing to cooperate in what she alleged was the district's policy of "social passing," *i.e.*, advancements of all pupils to the next grade level without regard to individual achievement levels.
127. See text and accompanying notes 82-84, supra.
C. Disciplining of Students

To what extent is a teacher's method of disciplining a student an adjunct of academic freedom? As boards themselves have maintained for many years, little meaningful education can occur in the totally undisciplined classroom. Is a teacher therefore free to adopt a corrective technique that might be disfavored or even prohibited by the board? Can school authorities attempt to impose sanctions upon a teacher because he or she appears to be overly dependent on whatever disciplinary procedures the school provides—or if the teacher deliberately bypasses those procedures in order to punish the student personally?

One example in Los Angeles county involved a ghetto classroom situation. The teacher was challenged by a student who used vulgar expressions; the teacher rebuked him in the street vernacular. A school board is now attempting to discharge this teacher, citing among other charges, his classroom use of obscenity.\(^\text{128}\)

Traditionally, such an incident was viewed as a problem of teacher competence or simple insubordination. It now may have an overlay of academic freedom significance, that is, the exercise of professional discretion in the development of an optimal educational environment. To the extent teachers in negotiations, arbitration or litigation can carve out recognized areas in which they may exercise such discretion, discipline may increasingly be viewed as yet another facet of academic freedom.

D. Counseling of Students

Like student discipline, counseling of students by teachers may also be defended as a necessary corollary of academic freedom. Many teachers logically claim that their ability to educate is directly dependent on their ability to win the trust and friendship of their students. To this end, such teachers may become deeply involved in the personal problems of their students, without the knowledge or approval of parents or school counselors, who presumably are traditionally or professionally prepared for such tasks.

In one actual case, a teacher instructed students who were mentally retarded. He had found in many years of teaching that such children need and respond to physical contact with their teacher. Such actions brought him into violation of board policy against the touching of any student.\(^\text{129}\)

Another teacher persisted in giving highly personal advice to his students—although only upon their request—on such issues as

\(^\text{128}\). Interview with Horace Wheatley, supra note 122.

\(^\text{129}\). Id.
premarital sex and abortion. He maintained that if he had rejected such requests for assistance, his effectiveness as a teacher would have been greatly diminished.\textsuperscript{130}

In \textit{Clark v. Holmes},\textsuperscript{131} a nontenured college biology instructor was terminated after refusing to obey his superior's suggestion that he send his students to the school's counselors instead of providing his own advice. Although the teacher replied that "it was proper for a teacher to hold himself out as a personal confidant of his students,"\textsuperscript{132} he also attempted to bring himself under the protection of \textit{Pickering v. Board of Education}\textsuperscript{133} rather than assert a right of academic freedom.\textsuperscript{134} The court in \textit{Clark} found no violation of the first amendment in his termination. Once again, teachers' freedom to counsel students might be an appropriate bargaining subject.

\textbf{E. Non-Academic Curriculum Imposed Upon a Teacher}

Most of the academic freedom cases which have reached the courts have concerned attempted \textit{prohibitions} of teacher classroom conduct. A board may also \textit{require} certain affirmative acts by classroom teachers. Although no teacher can be compelled to salute the flag,\textsuperscript{135} can a mathematics teacher be required to discuss the evils of drug abuse as part of a schoolwide effort to curtail student drug use? This might be an especially difficult issue if the math teacher reasonably believed that the subject would receive adequate attention in more appropriate classes, if he regarded the campaign as a politically inspired public relations effort by the school board, or if he sincerely thought equal time should be provided for the viewpoint espousing legalization of certain drugs.

The problem of compulsory curriculum is likely to be more frequent if a board insists on formalizing the "social education" (\textit{i.e.}, good citizenship, patriotism, capitalism, etc.) as well as the academic education it expects its teachers to provide.

One commentator has written:

\textquote{[I]t seems likely that the state lacks the authority to compel a teacher to engage in classroom activities completely unrelated to any legitimate educational objective.}\textsuperscript{136}

130. \textit{Id.}
131. 474 F.2d 928 (7th Cir. 1972), cert. denied, 414 U.S. 972 (1973).
132. 474 F.2d at 930.
134. See note 85 supra.
136. \textit{The Right to Teach}, supra note 8, at 1191. The remark appears to beg the question; given the exceedingly broad mandate enjoyed by most public school boards, what activities are "completely unrelated"? The only cited authority for the statement is
The same commentator goes on to suggest that since a teacher has no right to proselytize in the classroom, "it would seem that the state cannot require its teachers to proselytize."  Although such mutuality has immediate appeal, it is simply not an accurate description of public school authority except perhaps in matters concerning religion. Schools proselytize freely on many subjects, including patriotism and anti-communism. Perhaps a teacher's best protection against this kind of board effort is the recognition in a collective bargaining agreement that even the lower education teacher is a professional within the classroom. An arbitrator then would not necessarily have to wait for judicial clarification to decide that the chores of a propagandist are inconsistent with the responsibilities of the professional educator.

VI
CONCLUSION

This article has made an attempt to summarize the current judicial and arbitral decisions defining—or more appropriately suggesting—a right of academic freedom for teachers in lower education. At least the bare concept and term, "academic freedom," is now entrenched in our law and increasingly found in employment agreements between school boards and teachers. Thus attention is properly turned to the day-to-day implications of such a right for the operation of American public schools. Whatever answers judges or arbitrators provide in this emerging area, they will turn for guidance to educational authorities—teachers and boards of education—who must be prepared with cogent answers. Their responses will necessarily be infused with self-interest, but arbitrators and courts of law are likely to listen more closely to the side which better seems to speak for the concerns of the pupils.

Russo v. School Dist., 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); see text at note 135 supra.

137. The Right to Teach, supra note 8, at 1193.