March 1974

Education

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Recommended Citation

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https://doi.org/10.15779/Z38W178

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ment may be preventive detention. Whether the court will apply the Underwood rationale to these areas is unclear. On the one hand, Underwood could portend a revolution in bail in California and perhaps the demise of the money-bail system as it now operates. On the other hand, if the application of the Underwood rationale is limited to the specific aspect of bail presented in that case, the continued existence of crowded pretrial detention centers will testify to the court’s failure to honor its ringing conclusion in Underwood that “the detention of persons dangerous to themselves or others is not contemplated within our criminal bail system, and if it becomes necessary to detain such persons, authorization therefore must be found elsewhere, either in existing or future provisions of the law.”

Robert Allan Goodin

V

EDUCATION

A. Legislative and Constitutional Standards for Refusing to Rehire Probationary Teachers

Lindros v. Governing Board of the Torrance Unified School District.1 “[T]o stress ‘the relationship between good creative writing and personal experience,’” Stanley M. Lindros instructed his tenth-grade English students to prepare a short story describing “a personal emotional experience.”2 At the request of several students, he read one of his own short stories in class, a story which ended with the words “White-mother-fuckin Pig.” Eight months later the school district governing board notified Lindros, a probationary teacher,3 that he...

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71. 9 Cal. 3d at 350, 508 P.2d at 724, 107 Cal. Rptr. at 404.


2. Id. at 527, 510 P.2d at 362, 108 Cal. Rptr. at 186.

3. In California, certificated employees (primarily teachers) are classified as either permanent, probationary, or substitute-temporary. A probationary teacher is a “contract employee,” and a permanent teacher is a “regular employee” for statutory purposes. Cal. Educ. Code § 13345.10 (West Supp. 1974). School district governing boards classify as probationary employees those certificated personnel who have not been designated permanent employees or substitute employees. Id. § 13334 (West 1969).

Significant differences exist between permanent and probationary school district employees. For instance, permanent teachers hold seniority over probationary employees in case of layoffs due to reduced student population. Id. § 13447 (West Supp. 1974). In addition, special safeguards exist for immediate suspension and for midyear dismissal of permanent employees. Id. §§ 13404-05, 13407-08.

A probationary teacher may be dismissed during the year only for the same causes and by the same procedural rules as apply to midyear dismissal of tenured teach-
After an administrative hearing, the board adopted the hearing officer's report and determined that the reading of the short story was sufficient cause for refusal to reemploy. Lindros sought a writ of mandate to require the board to continue his employment. The superior court denied the writ, and was affirmed on appeal. The California Supreme Court reversed, ruling that reading his composition did not constitute "cause" for termination under California Education Code section 13443. The court dismissed as makeweight a second charge that Lindros had on one occasion improperly allowed his pupils to leave class early.

After detailing the circumstances of Lindros' dismissal, the court ruled that whether the alleged misconduct constituted cause under the statute was a question of law. It then concluded that Lindros' acts did not constitute cause, noting that by reading his composition to the students, he had pursued a bona fide educational purpose and had not adversely affected the welfare of the school or the pupils. The court also relied heavily upon the reading being only a single incident wherein material had been presented "in the absence of any prior reasonable notice that such use would be deemed impermissible by the school authorities." Upon examining the second charge involving the early dismissal of students, the court found that this minor violation was not the true reason for the board's refusal to rehire Lindros and that the incident failed to establish cause for purposes of section 13443.

\[\text{CALIFORNIA SUPREME COURT}\]

\[\text{577}\]

\[\text{1974}\]

\[\text{CAL. EDUC. CODE} \ § 13443 (West Supp. 1974).}\]
Lindros is a constitutionally and educationally correct decision. However, in arriving at that decision, the court judicially amended the statutory language it purported to employ. Specifically, it changed the definition of “cause” under section 13443 while professing to decide this case in the same manner it had earlier ones.

This Note first examines the redefined cause test and the factors which the court considered in ruling that Lindros' conduct did not constitute cause. The court's self-delegation of responsibility to determine the real cause for Lindros' nonretention is then analyzed as a departure from established administrative procedure, but approved for its practical effects.

Finally, the Note suggests that the right to terminate any teacher for the classroom use of an objectionable phrase, in the absence of specific promulgated standards forbidding such conduct, can be dealt with adequately only when analyzed in the context of free speech and due process. If so, the proper approach is to recognize and treat such cases as constitutional in nature, and not susceptible to treatment under otherwise applicable statutory definitions of cause. In addition to discussing the court's avoidance of constitutional issues involving the first and fourteenth amendments, the Note presents approaches and possible solutions which other courts have suggested.

I. A CHANGED TEST FOR CAUSE UNDER SECTION 13443

a. The old and new tests: toward adverse impact on the school's or pupils' welfare

A school board's power to decline renewal of a probationary teacher for cause only has remained essentially unchanged since the original statute regulating this process was enacted in 1935.15 The

15. See note 8 supra. The statutory language concerning the conclusiveness of the board's decision and necessary relationship to the welfare of the schools and students has remained virtually unchanged since 1935. See ch. 697, § 1 [1935] CAL. STAT. 1895 (formerly SCHOOL CODE § 5.682). The original assembly bill contained a provision equating the cause required for refusing to rehire a probationary teacher with cause required for discharge of a permanent teacher, but this was deleted in the bill's final form. A.B. 1382, introduced January 25, 1935. The standards for dismissal of a tenured teacher are: immoral or unprofessional conduct, dishonesty, incompetency, evident unfitness for service, physical or mental condition impairing the ability to instruct or associate with children, persistent violation of or refusal to obey school regulations, conviction of a felony or of any crime involving moral turpitude, and knowing membership in the Communist Party. CAL. EDUC. CODE § 13403 (West Supp. 1974). The constitutionality of several of these provisions has been questioned. See, e.g., Note, 61 CALIF. L. REV. 302, 307 n.34 (1973).

While a distinction between probationary and permanent teachers may easily be drawn from the legislative history of section 13443, such a rule is difficult to support on policy grounds. Although a tenured teacher's proprietary interests and expectations may well be greater than those of a teacher with one year's experience at a school,
supreme court set the standard for judicial review of cause under section 13443 in *Griggs v. Board of Trustees:*16 "Where the cause for dismissal found by the board can reasonably be said to relate to the 'welfare of the school and the pupils thereof,'" the reviewing court could not disturb the board's decision.17 *Griggs* allowed the court to order reinstatement only where the board had acted in excess of jurisdiction, without a fair trial, without substantial evidence supporting its decision, or in a prejudicial abuse of discretion.18 The *Griggs* standard was reiterated more recently in *Bekiaris v. Board of Education*19 and in several appellate court cases.20 Under a literal application of such a test, the board's decision not to retain Lindros would probably have withstood judicial review.

In *Lindros* the court implied that it was applying the *Griggs* rule. In fact, it substantially altered it.21 Instead of asking whether the stated cause logically related to the school's welfare, the court determined whether the facts as found by the board "reasonably could be said to have adversely affected the welfare of the school or its pupils."22 Thus the court introduced the element of adverse impact into the standard of judicial review. In addition to adopting this "adverse effect" test, the court took account of mitigating circumstances which it felt might excuse any minimal harm shown.23

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17. *Id.* at 96, 389 P.2d 725, 37 Cal. Rptr. at 197.
18. *Id.*
19. 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972).
21. Justice Burke properly noted this in his dissent to the court's opinion. 9 Cal. 3d at 542 n.1, 510 P.2d at 373 n.1, 108 Cal. Rptr. at 197 n.1.
22. *Id.* at 533, 510 P.2d at 366, 108 Cal. Rptr. at 190.
23. The mitigating factors considered by the court included the teacher's good faith use of material which had serious educational value (9 Cal. 3d at 535, 510 P.2d at 368, 108 Cal. Rptr. at 192), lack of reasonable notice that the conduct would be considered improper (*Id.* at 537-38, 510 P.2d at 369-70, 108 Cal. Rptr. at 193-94), the presence of similar language in books in the school library and school-sponsored plays (*Id.* at 536-37, 510 P.2d at 368-69, 108 Cal. Rptr. at 192-93), the teacher's ready agreement not to use such language in the classroom in the future (*Id.* at 530, 510 P.2d at 364, 108 Cal. Rptr. at 188), the board's failure to act on the alleged misconduct for eight months (*Id.*), the teacher's immunity from criminal prosecution for his be-
Whether the court's new test is a more correct interpretation of the standard for judicial review implied in the statute is open to serious question. The exact meaning of the language, "the cause shall relate solely to the welfare of the schools and the pupils thereof," perhaps is too ambiguous to form the basis for judging a school board decision regarding teacher retention. If so, adverse impact might be both a more administrable test and one which is consistent with a legislative intent to protect a probationary teacher from arbitrary dismissal.

The dissent in Lindros, however, offered a quite different interpretation of the legislative intent embodied in section 13443. Justice Burke suggested that the legislature wanted court review of a school board decision only to determine that the board had not used grounds pertaining solely to the teacher's private life or personal appearance. Two California courts of appeal have relied on a similar legislative intent in deciding that unless it could be shown that a physical characteristic such as obesity or age related to the effectiveness of the individual as a teacher, reemployment could not be denied on the basis of that characteristic alone. Thus, in the dissent's view, use of intemperate language in conversing with neighbors could not be cause under section 13443, but classroom use of such language would "obviously" relate to the students' welfare and would clearly constitute cause for which the statute would allow nonretention by the school board.

In light of this possibility for different interpretations of the legislative intent, the majority's decision may be a justifiable attempt to prod the legislature to elucidate further the limits of the protection to be provided probationary teachers against dismissal by nonretention. The legislature can now accept the Lindros cause test—whether the teacher's conduct adversely affected the welfare of the school or its pupils—or it can redraft the statute. The court may have based its decision to reinstate Lindros on statutory rather than constitutional behavior (Id. at 536-37, 510 P.2d at 368-69, 108 Cal. Rptr. at 192-93), and his otherwise excellent record as an English instructor (Id. at 527, 510 P.2d at 362, 108 Cal. Rptr. at 186).

24. Id. at 544, 510 P.2d at 374, 108 Cal. Rptr. at 198.
26. 9 Cal. 3d at 541, 510 P.2d at 372, 108 Cal. Rptr. at 196.
grounds precisely to force this result. In addition, by giving the statu-
tory language concrete meaning, the court strictly construed the statute
and protected it from possible void-for-vagueness attack under the first
amendment.27

b. Lessening the difference between job protection for probationary
and permanent teachers

The majority opinion in Lindros has also substantially narrowed
the legislatively mandated gap between protections for probationary
and tenured teachers.28 Indicating a legislative intent to place tenured
teachers in a more secure position, different statutes govern reasons
and procedures for nonretention of the two types of instructors.29 In
an earlier case, Keenan v. San Francisco Unified School District, the
California Supreme Court noted that "the probationary teacher . . .
may be dismissed for much less cause than that justifying charges
against a permanent teacher."30 Yet in Lindros, the court effectively
established the same standard of cause for nonretention of probation-
ary teachers as it earlier had applied to dismissal of teachers with per-
manent status.31

In Board of Trustees v. Metzger,32 the school board had sought
dismissal of a permanent teacher because he had made classroom use
of a poem containing objectionable language and slang references to
male and female sexual organs, along with photographs of a nude
couple. The court considered whether the teacher's conduct "adversely
affected" the welfare of the students and such mitigating factors as
good faith educational purpose and the lack of adequate prior notice.
Indeed, the court's opinion in Lindros is so strikingly similar to that in
Metzger that the Lindros decision might have been a conscious attempt
to fuse the gap between the rights of probationary and tenured teachers.

27. For example, the New York Court of Appeals successfully protected that
state's minors obscenity law from invalidation due to vagueness by giving the statute
States Supreme Court noted the Alabama high court's attempts to perform a similar
task in Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). See also R.
28. For a discussion of legislative intent to afford greater protection to permanent
teachers, see note 15 supra.
29. See note 3 supra.
30. 34 Cal. 2d 708, 214 P.2d 382 (1950).
31. Board of Trustees v. Metzger, 8 Cal. 3d 206, 501 P.2d 1172, 104 Cal. Rptr.
452 (1972); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal.
Rptr. 175 (1969). In Metzger, the court considered adverse effect and mitigating cir-
cumstances including the isolated nature of the incident, lack of prior adequate notice,
and the teacher's good faith educational purpose before concluding that the teacher's
conduct did not constitute "immoral conduct" and "evident unfitness for service." 8
Cal. 3d at 210-11, 501 P.2d at 1174-76, 104 Cal. Rptr. at 454-56.
32. 8 Cal. 3d 206, 501 P.2d 1172, 104 Cal. Rptr. 452 (1972).
Strong reasons exist for eliminating the distinction between the rights of each type of teacher when the issue is constitutional protection of academic freedom and right to notice. However, judicial revision of a statute written to insulate school boards from review of their decisions not to rehire probationary teachers would seem an improper means to achieve this goal.

c. Adverse effect and mitigating circumstances

While the court stated in Lindros that its duty was to determine whether the teacher's conduct could reasonably be said to have affected adversely the students' welfare, the court also commented that "'cause' under section 13443 requires that the teacher must have failed to exercise such reasonable judgment as would be expected of a member of his profession under the same circumstances." Proving that certain conduct caused harm could be quite different from proving that the conduct was unreasonable under the circumstances.

In deciding that there had been no adverse effect from the use of the questioned phrase, the court noted that there was no disruption in classroom activities following the reading of the composition, and that no students or parents registered any complaints regarding the incident. The court also stated that it was understandable that the students were not shocked or startled by the use of such language since increasing use and tolerance of such speech is a part of modern life. Thus, adverse reaction was used to measure harm. Since there was no adverse reaction to the material, the board could not show harm to the school or the students. Then, in deciding that Lindros exercised reasonable judgment in the circumstances, the court relied heavily on two mitigating factors. First, his good faith use of a teaching method which had serious educational value was demonstrated by his purpose in reading the short story. Lindros had originally written the composition, entitled The Funeral, as a rough draft for a television play. In reading it to his students, Lindros hoped to demonstrate expressive writing techniques, and the words in question were used for a definite literary objective. As the court noted, "[t]he writer of 'The Funeral' could not properly convey the fury of the young black at the apparent condescension of a white man in attending the funeral.

33. See note 15 supra.
34. 9 Cal. 3d at 533, 510 P.2d at 366, 108 Cal. Rptr. at 190.
35. Id. at 538, 510 P.2d at 370, 108 Cal. Rptr. at 194.
36. Id. at 530, 510 P.2d at 364, 108 Cal. Rptr. at 188.
37. Id. at 536, 510 P.2d at 368, 108 Cal. Rptr. at 192.
38. Id. at 536-37, 510 P.2d at 368-69, 108 Cal. Rptr. at 192-93.
39. Id. at 535-36, 510 P.2d at 368, 108 Cal. Rptr. at 192.
except by the use of an expletive.” Although it is not emphasized in the decision, the court could also have been giving weight to another educational purpose: the employment of unorthodox teaching methods in order to stimulate students whose motivation is at a low level. Secondly, the court noted that Lindros had not received reasonable notice that his conduct would be deemed impermissible. The court pointed out that the school's administrators had promulgated no clear statement of the standards governing selection of classroom material, and that similar language could be found in the books readily available in the school library. In addition there was evidence that students had attended school-sponsored plays in which similar words had been used.

In resting its decision on both the lack of harm, as measured by reactions of students and parents, and the presence of mitigating factors, the court implied in Lindros that mitigating circumstances could be used to excuse teacher conduct which had adversely affected the students' welfare, at least where only minimal harm was shown. However, the court should have been more specific about the interdependence of these factors. For instance, it is unclear whether Lindros would validate a teaching method used for a bona fide educational purpose and which had not adversely affected the students' welfare even though the teacher had disobeyed a specific school rule prohibiting such a technique. This interdependence among harm, educational value, and notice is complex, and the use of Lindros as precedent is severely undermined by the court's lack of clarity on this issue.

The court's use of mitigating factors also leaves unclear what importance should be attached to them when the charges brought against a probationary teacher are unrelated to freedom of expression in the classroom. For example, a school board might seek nonretention of a probationary teacher by alleging lack of courtesy in contacts with co-

40. Id. at 535, 510 P.2d at 368, 108 Cal. Rptr. at 192.
41. This concept formed the basis of the decision in Oakland Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1st Dist. 1972), which ordered reinstatement of a tenured teacher who had encouraged her class, composed of students with poor communications skills, to write compositions on anything they wished. She was dismissed for copying and distributing the compositions, which contained numerous blatant references to sex and drugs, as part of a class discussion on how proper spelling and grammar facilitate communication. The court in Olicker noted that books such as H. Kohl's 36 Children (1967) had led the teacher to explore alternative methods for reaching her unreceptive students. Id. at 1103-04, 102 Cal. Rptr. at 425.
42. See note 23 supra.
43. 9 Cal. 3d at 537, 510 P.2d at 369, 108 Cal. Rptr. at 193.
44. Refusing to obey school rules is a measure of cause for dismissal of tenured teachers. See note 15 supra.
45. See text accompanying notes 137-46, 148-62 infra.
workers or poor judgment in handling student problems. It is difficult to ascertain from the Lindros decision whether the teacher would have a defense to such charges based on the fact that he was not warned prior to nonretention that his performance was less than satisfactory in these areas.46

Although its decision relied heavily on Lindros' educational purpose and lack of prior reasonable notice, the court also noted the presence of certain other mitigating factors. For instance, the court seemed to value Lindros' written, signed promise to avoid future use of such "vulgar" material in his classes.47 However, the court did not consider the possibility that a teacher might refuse to sign such an agreement. As a result, it is unclear whether the court felt that a refusal to sign the agreement would, by itself, constitute noncooperation justifying nonretention for cause48 of a teacher asserting first amendment rights. Much of the debate over constitutionally protected academic freedom centers directly on the extent to which a school administration can dictate classroom content. By not dealing with these first amendment issues, and by praising Lindros' submission to school authority, the court may have, in the long run, disserved California teachers' interests in free speech.49

The court also mentioned Lindros' background and overall effectiveness as a teacher, stating that "[p]etitioner's record attested to his eminent qualifications for the position."50 The court noted his experience as a priest, chaplain, counselor, and secondary teacher, and his varied educational attainments. These biographical facts easily could have been used to paint a very different picture.61 The court

46. Before terminating a permanent teacher on charges of "unprofessional conduct" or "incompetency," the school board must show that it gave written warning to the teacher that his or her performance was in need of improvement. The notice must be given 90 days before bringing charges. Furthermore, specific instances must be detailed so the teacher has an opportunity to correct faults and overcome grounds for such a charge. CAL. EDUC. CODE § 13407 (West Supp. 1974). Compare this with the less stringent standard applied to probationary teachers, outlined in note 3 supra.

47. 9 Cal. 3d at 530, 510 P.2d at 364, 108 Cal. Rptr. at 188. However see text accompanying note 85 infra.

48. See notes 15, 44 supra.

49. See discussion of this aspect of the constitutional protection of academic freedom in text accompanying notes 78-85 infra.

50. 9 Cal. 3d at 527, 510 P.2d at 362, 108 Cal. Rptr. at 186.

51. The court's predisposition toward petitioner was indicated by the statement, "he had [also] studied for, or obtained, advance degrees in philosophy, theology, and the communication arts." Id. at 527, 510 P.2d at 362, 108 Cal. Rptr. at 186. A hostile court could have characterized the same record as showing petitioner was a man
went on to cite the “above average” teacher evaluations Lindros had received in the areas of subject matter mastery and rapport with students. Since the court does not refer to this background information in its argument, it is impossible to determine what weight it attached thereto. However, it seems that if the court felt it was totally irrelevant, it would not have mentioned either the qualifications or evaluations. The court moves out of its area of competence when it uses such factors. To obtain such information, it must rely on school records which may include appraisals made by the persons who caused petitioner's dismissal, or someone with whom the teacher had personal difficulties. Moreover, a teacher's relative effectiveness should be irrelevant to protection against arbitrary dismissal. A teacher's professional incompetence may well be an adequate basis for nonretention, but it should be disregarded when the issue concerns only the avowed harm in a single classroom incident involving possibly constitutionally protected activity. By the same token, an excellent teacher should receive no greater constitutional protection than a mediocre one.

II. IS DETERMINATION OF THE “REAL REASON” FOR DISMISSAL A JUDICIAL FUNCTION

The board allegedly terminated Lindros because in addition to classroom use of his composition, he dismissed students without proper authorization on one occasion so they could return needed books to the library. Adopting the hearing officer's findings, the board stated that the charges “’separately and collectively’ constituted sufficient cause” under the statute. The court cursorily rejected this second reason for nonretention, in effect ignoring the standards for judicial review it had itself declared applicable—the governing board must decide whether cause for nonretention appears, and factual conclusions of the board which are supported by substantial evidence must be accepted by the court. Under constitutional doctrine, however, the court legitimately could have considered whether this second charge was merely a subterfuge to buttress an impermissible reason not to reemploy.

who had enrolled in several courses of study only to drop them and try something else, a man who had been unable to develop stable relationships with women and had fled to the priesthood, and a man with a checkered employment history who was not clearly dedicated to the teaching profession.

52. Id. at 527, 510 P.2d at 362, 108 Cal. Rptr. at 186. The court makes no mention of the petitioner's ratings in other evaluation areas.

53. See discussion of constitutional aspects in text accompanying notes 78-114 infra.

54. Id. at 532, 510 P.2d at 366, 108 Cal. Rptr. at 190.

55. Id. at 534, 510 P.2d at 367, 108 Cal. Rptr. at 191.

56. Id. at 533, 510 P.2d at 366, 108 Cal. Rptr. at 190.
a. Departure from the substantial evidence test

In *Bekiaris*, the court had said that in appraising an allegation of cause it was required to accept as true “evidentiary facts shown by substantial evidence.” However, the court did not use the standard of substantial evidence to judge the second basis for nonretention alleged in *Lindros*. Rather, the court noted that “it was not conclusively established that Lindros violated any school rule,” and that the hearing officer’s findings of fact “contain ambiguities.” Nowhere did the *Lindros* majority conclude that the hearing officer’s and board’s determinations were not supported by substantial evidence, as required by *Griggs* and *Bekiaris*. The court was again rewriting the standard of judicial review, providing greater protection for the teacher against arbitrary school board action.

b. Sufficiency of the cause

Section 13443 states that sufficiency of cause for refusing to rehire a probationary teacher is a matter for the school governing board alone to determine, and in *Griggs* the court had reiterated this limit on judicial review, stating, “the reviewing court may not consider whether the facts found are sufficiently serious to justify dismissal.” However, in *Lindros*, the court found that even if proven, the charges brought in connection with the second incident were not serious enough to have warranted the board’s decision not to rehire the petitioner. The court stated, “to assume that the Torrance Board would have refused to rehire Lindros based solely on the incident . . . stretches the credible.” Thus the court, in fact, decided that an “unrepeated infraction of a minor regulation” was insufficient cause under the statute. It thereby usurped a function the legislature had expressly delegated to the school board. In labeling the second charge a “mere makeweight,” the court obviously felt that dismissal for such a minimal infraction would be too harsh a result. While this conclusion is
laudable from common sense and social policy perspectives, it appears in clear contradiction to the legislative delegation of authority in section 13443.

The court legitimately could have determined that the real reason for the board's nonretention decision was the teacher's constitutionally protected reading of the objectionable phrase and then treated the second charge as a subterfuge by the board. This approach was employed in *Bekiaris* where the court remanded the case for a new determination by the school board on the question of whether, absent official dissatisfaction over the teacher's exercise of constitutional rights, he would have been dismissed.67 While maintaining the governing board's power to determine the sufficiency of cause under section 13443, such an approach prevents the use of minor infractions as support for a dismissal when, in fact, the cause is constitutionally protected conduct.

III. CONSTITUTIONAL CONSIDERATIONS

In deciding that Lindros' conduct did not rise "to the level of a legal cause for severance of a teacher,"68 the court relied in part on four recent United States Supreme Court decisions.69 The court recognized that these decisions (involving criminal convictions) did not "legitimize the general use of offensive language in the classroom . . . ."70 Nevertheless, it appears that the court interpreted the California statute the way it did to avoid the "serious constitutional questions which arise when school authorities seek to curb the academic freedom of teachers . . . ."71

Since in *Lindros* the court could have achieved petitioner's reinstatement by utilizing first and fourteenth amendment analysis, and in view of the weaknesses of the statutory claim for reinstatement elucidated above, the court's avoidance of constitutional considerations seems unfortunate. The remainder of this Note will explore possible resolutions to the *Lindros* problem through use of the first and fourteenth amendments.

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67. *Bekiaris* v. Board of Educ., 6 Cal. 3d 575, 593, 493 P.2d 480, 491, 100 Cal. Rptr. 16, 27 (1972). The court in *Lindros* cites *Bekiaris* for the proposition that a teacher is entitled to have a judicial determination of the true reason for dismissal, but noted that in the instant case it was dealing with statutory rights instead of the constitutional protections present in *Bekiaris*. 9 Cal. 3d at 540, 510 P.2d at 371, 108 Cal. Rptr. at 195.

68. 9 Cal. 3d at 537, 510 P.2d at 369, 108 Cal. Rptr. at 193.


70. 9 Cal. 3d at 537, 510 P.2d at 369, 108 Cal. Rptr. at 193.

71. *Id.* at 537 n.8, 510 P.2d at 369 n.8, 108 Cal. Rptr. 193 n.8.
It is necessary first, however, precisely to define and distinguish the factual issue posed in the case. Lindros' conduct involved classroom use of objectionable language containing political overtones as an innovative teaching technique which had not been specifically prohibited by school rules. Lindros thus differs from other recently decided academic freedom cases. Lindros was not overtly stating political views nor was he attempting to introduce subject matter which

72. Petitioner Lindros had standing to raise first and fourteenth amendment protections. California requires that a probationary teacher be dismissed for cause only and must be provided a hearing to challenge the validity of the nonretention decision. Thus, the Lindros fact situation is not analogous to that in Board of Regents v. Roth, 408 U.S. 564 (1972), where the Supreme Court ruled that a probationary teacher had no property interest in contract renewal because under Wisconsin law he could be dismissed at the end of a school year without a need for stated cause or a hearing. Indeed Lindros' standing to raise first amendment issues would be considerably stronger than those of the teacher in Perry v. Sindermann, 408 U.S. 593 (1972). In that case, decided the same day as Roth, the court held that a probationary teacher should be allowed the opportunity to prove that his college had a de facto tenure policy even though he lacked a formal contractual or statutory right to continued employment.

73. The choice of "objectionable" rather than "obscene" to characterize Lindros' language is a purposeful one, designed to avoid the many side issues of a discussion of that characterization. While not agreeing on the definition of obscenity, the United States Supreme Court has said, "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." Miller v. California, 413 U.S. 15, 23 (1973). In Miller, the Court ruled that obscenity standards should be determined by the local community, and not on a national basis. 413 U.S. at 31-34. The fact that Lindros' students were minors further complicates the "obscenity" issue, as a more stringent standard of acceptability could be invoked in such an instance. Ginsberg v. New York, 390 U.S. 629 (1968).

74. In Lindros' short story, The Funeral, the black character's use of the words "White-mother-fuckin' Pig" was obviously more than an attempt to insult the story's narrator with obscenity. The black man was simultaneously making a political statement about racism and the white power structure in this country. The court touched on this fact by referring to "the fury of the young black at the apparent condescension of a white man in attending the funeral. . . ." 9 Cal. 3d at 535 at 535, 510 P.2d at 368, 108 Cal. Rptr. at 192.

Had The Funeral merely made reference to a "white pig" without the accompanying expletive, perhaps the court would not have dodged the first and fourteenth amendment issues. Political expression is subject to much greater protection than "obscenity." Compare Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) and Terminello v. Chicago, 337 U.S. 1 (1949) with Miller v. California, 413 U.S. 15 (1973). Indeed, when the California court encountered nonobscene free expression by a teacher soon after deciding Lindros, it found such conduct to be constitutionally protected. Adcock v. Board of Educ., 10 Cal. 3d 60, 510 P.2d 900, 109 Cal. Rptr. 676 (1973) (permanent teacher could not punitively be transferred from one school to another for constitutionally protected criticism of school administration).

75. See, e.g., James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972) (teacher wearing black armband in school to protest United States involvement in Vietnam was engaging in protected activity); Russo v. Central School District No. 1, 469 F.2d 623 (2d Cir. 1972) (teacher's right to remain silent during class pledge of allegiance to the American flag upheld). However, a teacher cannot use the classroom as a podium for indoctrinating his or her own beliefs. James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972). For a good discussion of the reasons for treating a teacher's "academic speech" no differently than political expression in the classroom, see Note, Secondary
the state explicitly had banned. The primary constitutional issues raised by Lindros, then, are the teacher’s substantive first amendment right to choose an innovative teaching method, and the teacher’s procedural right not to be discharged without prior notice that such a method could be grounds for dismissal.

a. Federal court approaches to academic freedom and notice

Within the last five years, several lower federal courts have encountered fact situations similar to Lindros. In appraising objectionable language in the classroom absent prior notice of impropriety these courts have reached two separate, but related, conclusions. The first two federal decisions concluded that a teacher’s use of methods which serve a demonstrated educational purpose is within the protection of the first amendment, and such methods or materials cannot be censored by a school board. In Keefe v. Geanakos, for example, the First Circuit stated that it would be demeaning to the true concept of education to protect students from exposure to the word “motherfucker.” The court noted that although some parents might be offended by such a term, such was not a proper or relevant guide.79

In Parducci v. Rutland, a federal district court similarly ruled that by dismissing a teacher for using a short story by Kurt Vonnegut, the school had made “an unwarranted invasion of her First Amendment right to academic freedom.”81 The judge carefully reviewed the material which the teacher had assigned to her students, finding that objecting school authorities had misread the story’s theme; its slang words were less “ribald than many of those found in Shakespeare’s plays,” and such material was not inappropriate for high school juniors.83 Using the approach of the Supreme Court in Tinker v. Des...
Moines Independent Community School District, the court further noted that the teacher's conduct was "not such that 'would materially and substantially interfere with' reasonable requirements of discipline in the school."  

While the courts in Keefe and Parducci mentioned the absence or inadequacy of school standards prohibiting the conduct for which the teacher was dismissed, the decisions would seem to rest more firmly on first amendment protections than on due process grounds. Since in both cases the teachers stated that they would not honor the school authorities' requests that the material not be used in future classes, the cases can be read to support the proposition that even where a teacher has adequate notice that certain conduct is forbidden, he or she may still successfully assert a first amendment claim.

The conclusion reached by other federal courts has stressed due process instead of first amendment protections. In Mailloux v. Kiley, the Court of Appeals for the First Circuit found that while it was uncertain whether the teacher's conduct was clearly protected by the first amendment, the teacher could be reinstated on the due process ground that he had not received prior adequate warning of impermissibility. The teacher in Mailloux wrote the word "fuck" on the blackboard and asked for volunteers to define it in a class discussion of taboo words. At trial, both the teacher and school committee introduced expert testimony on the educational value and appropriateness of the particular method used. There was little doubt that the method had relevance to the subject being taught, but the expert opinion was divided on

85. 316 F. Supp. at 356.
86. 418 F.2d at 362.
88. In Keefe, the court said that it preferred not to rest its decision on due process grounds alone for fear that doing so might diminish its "principal holding" that the school authorities were wrong in their evaluation of the appropriateness of the conduct in question, and that the "chilling effect" of permitting rigorous censorship overrides the accepted principle of some regulation of classroom speech. 418 F.2d at 362, 363.
89. The court in Keefe noted that while the teacher told school authorities that he could not in good conscience agree not to use the offending word again, the record showed that he had not used it since the initial confrontation with the authorities. 418 F.2d 361. However, in Parducci, the teacher first told the principal that she had a professional obligation to teach the story and then tendered her resignation when a school official warned her that the incident might cause her dismissal. 316 F. Supp. at 354.
90. District Judge Wyzanski, in Mailloux, reached the opposite conclusion in dicta, suggesting that the school committee could suspend the teacher until he agreed to cease using such methods. 323 F. Supp. at 1393.
91. 448 F.2d 1242 (1st Cir. 1971).
92. Id. at 1243.
the appropriateness of the particular word chosen to implement it.\textsuperscript{94} This testimony obviously influenced the court's refusal to reinstate the teacher on first amendment grounds alone.

It may be argued that by relying on due process grounds, the First Circuit in \textit{Mailloux} retreated from the \textit{Keefe} rationale. The \textit{Mailloux} opinion implies that a court should defer to school rules governing choice of classroom materials if those rules are not "impermissibly vague" and the teacher is on notice that his conduct would violate such rules.\textsuperscript{95} At the same time, however, the court reaffirmed the approach it had used in \textit{Keefe}, stating that the propriety of regulations of sanctions for a teacher's speech "must depend on such circumstances as the age and sophistication of the students, the closeness of the relationship between the specific technique used and some concededly valid educational objective, and the context and manner of presentation."\textsuperscript{96}

In \textit{Webb v. Lake Mills Community School District},\textsuperscript{97} the only reported federal decision confronting issues and facts similar to \textit{Lindros} since \textit{Mailloux},\textsuperscript{98} a high school English teacher was removed from her post as drama coach after directing plays which contained drinking scenes and some profanity.\textsuperscript{99} The court ruled that the school's failure to give her prior notice\textsuperscript{100} that this teaching method was not allowed denied her due process of the law, and that the firing was "in direct reprisal to her proper exercise of academic freedom—her freedom to employ methods of teaching reasonably relevant to the subject matter she was employed to teach."\textsuperscript{101} Apparently wishing to put definite limits on the scope of the teacher's freedom of expression, the court stated in the same paragraph that school authorities would be justified

\textsuperscript{94} The Circuit court said, "We are not of one mind as to whether plaintiff's conduct fell within the protection of the First Amendment." 448 F.2d at 1234. "Experts of significant standing" had supported the appropriateness of the teacher's conduct but the trial court concluded that the teaching method was "not shown to be regarded by the weight of opinion in his profession as permissible." 323 F. Supp. at 1387.

\textsuperscript{95} 448 F.2d at 1234.

\textsuperscript{96} Id.

\textsuperscript{97} 344 F. Supp. 791 (N.D. Iowa 1972).

\textsuperscript{98} In an unreported decision, Sterzing v. Pt. Bend Independent School Dist., Civ. No. 69-H-319 (S.D. Tex., May 5, 1972), \textit{summarized in} D. Rubin, \textit{The Rights of Teachers} 34-36 (1972), the court reinstated a high school civics teacher who had been dismissed for insubordination. The teacher had angered parents by teaching a six-day unit on race relations which the court termed "something approaching fair treatment of the various viewpoints on controversial issues." Because, as experts testified, the teaching method served a demonstrated educational purpose, his conduct was protected by both freedom of speech and due process rationales.

\textsuperscript{99} The plays were \textit{Brigadoon} and \textit{I Remember Mama}. 344 F. Supp. at 795.

\textsuperscript{100} The school authorities claimed notice had been given in informal discussions with the teacher. \textit{Id.} at 800.

\textsuperscript{101} \textit{Id.} at 805.
in proscribing all "vulgarity" in the classroom.\textsuperscript{102} Thus while expressed in first amendment language, the \textit{Webb} holding was, in fact, made on due process grounds.\textsuperscript{103}

Although the conclusions differ, the four federal decisions in this area share a similar approach. Each court carefully examined the facts to determine whether the teacher had received prior adequate notice of the impermissibility of the conduct which brought dismissal. In addition, each court, either by itself or with the help of expert testimony,\textsuperscript{104} made an evaluation of the content of the speech in question to determine whether the teacher's method or the material used was relevant to a demonstrated educational purpose.\textsuperscript{105} Other circumstances which the federal courts in these cases deemed relevant to the teacher's free speech and due process claims included an examination of the students' school environment—whether the students had been exposed to the objectionable terminology in books, plays, or common usage\textsuperscript{106}—and a consideration of the students' degree of sophistication in terms of age or grade level.\textsuperscript{107} The entire approach is very similar

\textsuperscript{102} Id. The court also said that it would not hold, on the basis of the teacher's testimony alone, "that the use of such vulgarity as 'son of a bitch' or 'damn' is so necessary to the proper teaching of drama that a formal or informal regulation proscribing its use would be repugnant to the Constitution." \textit{Id.} at 803.

\textsuperscript{103} This is borne out by the fact that the larger part of the opinion is an examination of the adequacy or inadequacy of notice given the teacher.

\textsuperscript{104} In \textit{Webb}, \textit{Parducci}, and \textit{Keele}, each court essentially decided whether the materials were relevant to a court-defined educational purpose based on its own visceral reactions. In \textit{Mailloux}, the district court referred to expert opinion in making its rulings. 323 F. Supp. 1387, 1389-92 (D. Mass.) \textit{aff'd}, 448 F.2d 1242 (1st Cir. 1971) (on due process grounds). Each of these approaches has pitfalls. Without expert testimony, a teacher is at the mercy of the judge's own educational philosophy on what constitutes a bona fide educational objective and what could be considered reasonable means to achieve such a purpose. Relying on experts, however, may weaken the case of a teacher with a particularly untraditional approach. As Judge Wyzanski noted in \textit{Mailloux}, "we do not confine academic freedom to the conventional teachers or to those who can get a majority vote from their colleagues." \textit{Id.} at 1391. The costs and time involved in arranging for expert witnesses would also increase the burden on a teacher alleging violation of constitutional rights.

\textsuperscript{105} This inquiry into the content of the speech is akin to that performed by courts in cases involving state regulation of obscenity. There, the court reads the controversial material and makes an independent judgment measured against a judicially determined standard. In such cases the standard is

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.


\textsuperscript{106} 418 F.2d at 362; 344 F. Supp. at 802; 323 F. Supp. at 1389; 316 F. Supp. at 357-58.

\textsuperscript{107} See text accompanying note 96 supra.
to that employed by the court in Lindros, although the California court based its holding on statutory grounds.

b. Possible resolutions of the Lindros dilemma

1. Constitutional grounds evaded

Set against the background of these four federal decisions, the court could easily have granted relief in Lindros as a means of vindicating constitutional interests in academic freedom and due process. The court's reluctance to base its decision on constitutional grounds\(^{108}\) appears all the more inexplicable in view of its reliance on the same factors which have characterized academic freedom and due process discussions in analogous situations. The Lindros opinion stresses the petitioner's lack of reasonable notice that his conduct was impermissible,\(^{109}\) just as the federal courts did in the four decisions discussed above. Similarly, Lindros' pursuit of a bona fide educational objective in an appropriate, nondisruptive manner\(^ {110}\) was central to the court's decision, just as these factors had been key in the first amendment rulings of Keefe\(^ {111}\) and Parducci.\(^ {112}\)

While the court in Lindros did make footnote reference\(^ {113}\) to all four federal decisions, it did not stress them as clear precedent for protecting a teacher's academic freedom and due process interests. The court's sidestepping of the thorny constitutional issues raised by petitioner Lindros is not only puzzling but disappointing, for the decision will shed little light on a number of unresolved questions in this area of law."}\(^ {114}\) By resting its decision, at least in part, on notice considera-

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\(^{108}\) The constitutional claims on the first and fourteenth amendments were brought before the court as issues on appeal by petitioner Lindros. Lindros v. Governing Board, 103 Cal. Rptr. 188 (2d Dist. 1972), vacated, 9 Cal. 3d 524, 510 P.2d 361, 108 Cal. Rptr. 185 (1973).

\(^{109}\) 9 Cal. 3d at 537-38, 510 P.2d at 369-70, 108 Cal. Rptr. at 193-94.

\(^{110}\) Id. at 535, 510 P.2d at 368, 108 Cal. Rptr. at 192.

\(^{111}\) 418 F.2d at 361-62.

\(^{112}\) 316 F. Supp. at 356.

\(^{113}\) 9 Cal. 3d at 537 n.8, 538 n.10, 510 P.2d at 369 n.8, 370 n.10, 108 Cal. Rptr. at 193 n.8, 194 n.10.

tions, the court implied that it would favor formulation of better guidelines or express rules on teacher classroom conduct by school authorities. However, the court did not indicate how these should be developed or what form they should take. The court also left open the question of what weight it would give to such school regulations in a case where a teacher disobeyed them and asserted a first amendment claim. Finally, the court failed to answer the difficult question of whether a probationary teacher in California is entitled to the same free speech and due process protections as are given to permanent teachers.

2. Possible constitutional approaches

(a) Interest identification and balancing. In Lindros and the federal cases discussed earlier, competing values clash. State and local authorities wish to maximize control over curriculum content and instructional methods. Teachers want freedom of speech in their classrooms along with protection against arbitrary dismissal. Students, under the authority of school officials, teachers, and parents, are caught in the middle. At least two possible constitutional approaches are appropriate in such a context. One, a modified "clear and present danger" test, as exemplified by Tinker v. Des Moines Independent Community School District, will be discussed later. Under another approach, interests of opposing parties are identified and balanced. Whether this balancing process vitiates or enhances first amendment protection is open to question. Since some courts will use this approach, however, it is important as a practical matter to explore its applicability to the situation at hand. As the first step in this approach, the interests of the state, parents, students, and teachers must be identified.

The state's interest in controlling classroom content derives from its power to regulate public education and compel student attendance. First, it has an interest in setting minimum curricular requirements and allocating state resources to meet them so that all students will be

115. See text accompanying notes 42 supra.
118. "The balancing test assures us little, if any, more freedom of speech than we should have had if the first amendment had never been adopted." Frantz, The First Amendment in the Balance, 71 YALE L.J. 1424, 1443 (1962).
119. For purposes of this discussion the term "state" encompasses local school governing boards. School boards may also represent parents' interests since the parents elect the members of, and can sit on, those boards. See text accompanying notes 123-24 supra.
equipped with the basic skills necessary to support themselves. Secondly, an indoctrination function—providing all citizens with a common core of values—has also been recognized as an important state interest. The state also has an interest in minimizing disruptions to protect school property. Additionally, school authorities may be concerned with presenting a public image of successfully instructing students in proper behavior. Finally, insofar as the state acts in loco parentis to minors, it could also assert its interest in protecting students from immoral influences. Whole most of the interests of the parents or community in what transpires in the classroom seem to be included in or identified with the state interests set out above, there may be occasions in which these interests do not entirely coincide. For instance, some minority communities have called for community control of schools because they feel that the state is impressing values and aspirations upon the children which parents perceive as totally misplaced. Thus there would seem to be both state interests and separable parental interests in controlling classroom techniques and subject matter.

The teacher has several interests in the use of unorthodox materials and methods in the classroom. One of these is the need to motivate and communicate with students as successfully as possible. Another is maintaining order to ensure a teacher's personal safety and mental well-being. *Oakland Unified School District v. Olicker*, where a teacher was reinstated after dismissal for use of a lesson which involved references to sex and drugs, is illustrative:


122. The state may also have a legitimate interest in dismissing a teacher who has been criminally indicted and faces a time-consuming legal battle. One court has even justified dismissal where the school authorities feared the teacher would be indicted. Governing Bd. v. Brennan, 18 Cal. App. 3d 396, 95 Cal. Rptr. 712 (1st Dist. 1971) (probationary teacher not rehired because she executed an affidavit attesting to her long and beneficial use of marijuana). This state interest is not present in *Lindros* since he could not have been indicted for a criminal offense.


Defendant was hired . . . to teach reading and social studies . . . [to] poor readers. . . . [in the eighth grade]. . . . [O]ften there were fights among the students.

In order to overcome the hostilities the students had towards their lessons and towards each other, and to obviate the necessity of effecting discipline by the principal but to achieve it in the classroom, defendant sought to give the students assignments that were not only more pleasing to them but were also designed to bring them together.

Defendant [tried] an experiment which involved telling the students that they could write about anything they wanted and they need not be concerned about grammar, spelling and punctuation. . . . [S]he was surprised at the interest the class had shown in being permitted to write about anything they wanted, because, usually, when they were instructed to write a composition on a specific subject they would refuse.\textsuperscript{125}

The purpose of this lesson was to stimulate class discussion on the importance of spelling in written communication.\textsuperscript{126}

This type of experimentation is founded on basic precepts of contemporary, nontraditional educational theory. Central to such an approach is the recognition that standard instructional methods and authoritarian discipline have failed to educate many children.\textsuperscript{127} Unorthodox methods which interest students may often be more successful in helping them learn fundamental skills.\textsuperscript{128} In addition, when students are motivated to participate in the learning process, discipline problems diminish.\textsuperscript{129} Perhaps ironically, a teacher who asserts a first amendment interest in using innovative teaching techniques could be simultaneously furthering the state's interests in having students learn basic skills in an atmosphere of order. Similarly, an instructor employing traditional methods may thwart those state goals.

The teacher may also feel a duty to present views which are alternatives to state-sanctioned treatment or coverage of a particular sub-

\textsuperscript{125} Id. at 1102-03, 102 Cal. Rptr. at 424-25.
\textsuperscript{126} Id. at 1104, 102 Cal. Rptr. at 425.
\textsuperscript{127} Increasingly, significant numbers of students and adults see the dominant school methods as destructive of intellectual curiosity and emotional growth. . . . Many young people are bored, apathetic, or even hostile toward school, and even with all the systems of discipline . . . they don't seem to learn very much; certainly, few acquire a deep and honest desire to learn. . . . In the past few years, this sort of critique has grown in volume and is heard coming from . . . the Ford Foundation, the [United States Department of Health, Education and Welfare] Office of Education, the Carnegie Corporation, and the National Education Association.


\textsuperscript{128} Id. See also G. DENNISON, THE LIVES OF CHILDREN: THE STORY OF THE FIRST STREET SCHOOL (1969); E. RICHARDSON, IN THE EARLY WORLD (1964).

ject matter. While the school must see to it that the teacher does not unduly impose his or her own biases and viewpoints upon the students, the teacher also has a responsibility to see that students are not given an unbalanced viewpoint by an inadequate prescribed curriculum. Presenting alternative views may take two forms: exposing students to a subject omitted from the curriculum, or introducing a second side to issues which have been presented to students in a biased manner by the school's approved instructional materials.

Recognition of this interest may be simply a form of acknowledging the more generalized interest which a teacher can assert in maintaining the classroom as a place to engender thoughtful debate among students. The best way to help young minds develop intellectually may well be to nurture freedom of expression in the classroom. The chilling effect of rigorous censorship, referred to so often in first amendment cases, is certainly to be feared in this context. While unrestricted freedom of expression has not been accepted in the classroom, it is obvious that there is a stronger need for fostering creativity, open discussion, and critical thinking in this forum than in many others.

130. Emerson and Haber, The Scopes Case in Modern Dress, 27 U. Chi. L. Rev. 522, 526-28 (1960); Nahmod, Judicial Review, supra note 114, at 1509.

131. As one commentator explained:

"[W]hen the school board refuses to open an issue up to any presentation—for example, by excluding any discussion of the American Indian from a course in American history—this lack of presentation is implicitly the adoption of an approach capable of rebuttal—the insignificance of the Indian in America."

"Political" Expression, supra note 75, at 1350.

In Lindros the school curriculum may not have included discussions of racial issues or drug problems which petitioner felt were in need of recognition. In Lindros' short story, The Funeral, the narrator attended the funeral of a student who had died of a heroin overdose. 9 Cal. 3d at 527, 510 P.2d at 362, 108 Cal. Rptr. at 186.

132. Stereotyped representations of certain groups of people would illustrate this. For example, a teacher using a school-assigned textbook which portrayed women only as mothers, nurses, and elementary school teachers might feel a duty to present a more balanced view of the various functions women perform in contemporary society.

133. The students' interests in this situation grow out of their captive status in the scheme of compulsory education. Irrespective of the statutory mandate of attendance until a certain age, however, as a practical matter, a high school diploma is a necessary prerequisite to many employment and higher educational opportunities. Therefore, the students have an independent interest in learning. Nahmod, Judicial Review, supra note 114, at 1494. This may include an interest in exposure to particular areas of knowledge as well as being free from heavy-handed indoctrination by persons in positions of authority over them. Id. at 1504. The students' interests will certainly be affected no matter how the balance is struck between the teacher and the school administration.

134. Id.

135. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). In the words of Judge Wyzanski, "Our national belief is that the heterodox
Thus, assuming that the teacher is imparting the basic curricular content which the school has mandated for a certain grade level, use of innovative methods which help students learn and minimize discipline problems does not conflict with, but, in fact, furthers state interests. This leaves the state and parental interests in propagating traditional moral and dominant community values and maintaining an appropriate public image to be weighed against the teacher's interest in using unorthodox materials. In *Lindros* this would have required striking a balance between the school's moral judgment on the propriety of using "White-mother-fuckin Pig" against the teacher's interest in choosing the best means to teach a lesson in creative writing.

While the state has an interest in maintaining a public image of effective teaching, it does not have a legitimate interest in projecting a misleading image. The confidence the school inspires in the community must be genuine. Thus the teacher's interest in using an innovative method to reach students is greater than the state's interest in propagating a false impression of orderly educational success.

The remaining state interest, protection of students' moral values, is too vague to be balanced easily against a teacher's interest in using a certain method. If the state is allowed to assert a broad morality interest, it will always prevail over the teacher. The state's morality interest could become a smokescreen for punishing antimajoritarian expression. Judicial management of an asserted interest in moral values would also be difficult: the school would have to show that the students' moral values had been threatened by the teacher's conduct; in defense to dismissal, the teacher might demonstrate that the asserted values had already been challenged through earlier exposure. Measurement of the effect on students' values could range from a manageable examination of school library books to an unwieldy exploration of students' homes and extracurricular influences. Aside from these practical problems, it can be argued that the best way for a school to inculcate moral precepts is by open discussion, not by censorship.

Balancing of interests necessarily entails a close examination of the particular facts in a case. A decision in one case cannot offer clear guidelines on dissimilar fact situations. Where the teacher's and the state's interests merge, as in a desire to promote learning, the interests of the teacher—an expert who must be responsive to his or her par-

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as well as the orthodox are a source of individual and of societal growth." Mailloux v. Kiley, 323 F. Supp. 1387, 1391 (D. Mass.) aff'd, 448 F.2d 1242 (1st Cir. 1971) (on due process grounds).

136. As Justice Holmes said, "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which (people's) wishes safely can be carried out." Adams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).
ticular students' needs—should be afforded the determinative weight in judging the appropriateness of educational methods. However, courts might not always assume such a stance, and teachers would risk tenuous freedom of speech guarantees under a balancing approach.

(b) The harm test: adverse impact and disruption under Lindros. A modified clear and present danger approach may obviate some of the difficulties encountered above. As the court effectively ruled in Lindros, restriction of a teacher's freedom of expression in the classroom can be justified only if the school can show that harm had resulted from that expression. The Lindros adverse impact test is similar to that used in Tinker, where the Supreme Court found that the censored speech activity had not materially or substantially interfered with the requirements of order and discipline in the school.137 Although Tinker involved students' political expression, the case has been used as precedent for constitutional protection of teachers' speech.138

Before exploring definitions of harm, it is necessary to clarify what the court's functions are under such a test. The court makes a threshold inquiry on notice: Did the notice given to the teacher concerning the forbidden conduct satisfy applicable due process considerations? If it did not, the court's examination ends there, with reinstatement of the teacher.139 If the teacher received adequate advance notice of proscription, the court must answer a second question: Did the school or pupils suffer demonstrable harm as a result of the teacher's action? A negative answer to this question also leads to reinstatement of the teacher. However, upon the showing of an adverse impact, the court must define precisely the nature and degree of the harm suffered in or-


In Tinker the Court pointed out that, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506.

The California Supreme Court also applied the Tinker rationale ruling that a permanent teacher could not be punished for criticizing school administration policies, in a case decided just four months after Lindros. Adcock v. Board of Educ., 10 Cal. 3d 60, 513 P.2d 900, 109 Cal. Rptr. 676 (1973). Although Adcock could also be distinguished from Lindros in that it involved overt political speech that impinged on, but did not deal directly with classroom teaching methods, quite possibly the court avoided discussion of a teacher's constitutional rights in Lindros because they anticipated being able to make a strong constitutional decision in Adcock that would be unclouded with the "obscenity" aspects of Lindros. Thus, Lindros eliminates many of the differences in grounds for dismissal between probationary and permanent teachers and Adcock affirms strict first amendment protection for permanent teachers. See text accompanying notes 28-33 supra. Freedom of speech protection for probationary teachers can be inferred from Adcock and Lindros together.

der to weigh it against the academic freedom interests asserted by the teacher. Before this final step, which involves careful examination of the appropriateness of the teaching method employed, the court has no need to examine the content of the teacher's expression.140 Only at this stage is it proper for the court to ask if the word or material used was reasonably relevant to a bona fide educational objective or, perhaps more to the point in Lindros, if it was obscene141 and therefore not to be exposed to minors.

"Harm" should connote disruption as a direct result of the teacher's actions,142 and extending beyond resultant controversy.143 Disruption could occur in a personal or in an institutional sense. Students might be disrupted personally by the shock of hearing or reading language they had never read or heard before.144 The school could suffer institutional disruption if most students walked out of class, or made such vociferous complaints to the school administration or parents that a significant interference with normal school functions occurred. The Court suggested in Tinker that interference with classwork or threats or acts of violence on school premises would constitute disruption for purposes of curtailing freedom of speech in school.146

Under Tinker, the school can still restrict speech when there is reasonable anticipation that disruption will soon occur.146 Lindros does not undercut the school's ability to avoid disruption but does properly restrict the school's ability to dismiss a teacher based only on retrospective fears of what might have happened in the classroom. Thus Lindros' adverse impact test should be narrowed to a disruption test under Tinker.

Use of the disruption test is probably the best solution in cases such as Lindros. Both the teacher and the school board, given their possibly conflicting positions, are afforded protection of their interests.

140. The courts in Lindros, Mailloux, Keefe, Webb and Parducci all examined the content of the disputed speech before they decided the question of harm. This necessarily interjected personal value judgments as well as avoidable judicial assessment of the relevance of the material to bona fide educational purposes.

141. The Supreme Court's definition of obscenity appears at note 105 supra. Presumably this standard would have to be modified for minors. Ginsberg v. New York, 390 U.S. 629 (1968).

142. In Webb, students walked out of classes, not to object to their teacher's actions, but to protest the school board's censure of her. 344 F. Supp. at 798 (N.D. Iowa 1972).

143. See Nahmod, Judicial Review, supra note 114, at 1507.

144. Such a measure of disruption was employed in Lindros. See text accompanying notes 37-38 supra.


146. The school's anticipation of disruption must be more than "undifferentiated fear or apprehension of disturbance." Id. at 508.
Those interests are balanced not in the abstract, but only after harm has been shown. *Lindros* was a step toward such a test, but one that should have been framed in familiar constitutional doctrine.

(c) *Due process considerations: formulation of standards and first amendment problems.* In addition to questions of freedom of expression however resolved, there is a due process problem in dismissing a teacher for conduct which the teacher did not know was forbidden. As the court noted in *Parducci*, "When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious . . . ."147 None of the legitimate state interests is promoted by a school board's denial of notice to a teacher. In fact, if the school is sincere in wanting to forbid certain conduct, it would take all steps possible to inform teachers of such a policy. If the first amendment allows school authorities to restrict a teacher's classroom conduct,148 it can only be when the teacher is fully informed in advance and in detail of those restrictions. To suggest, as did the dissent in *Lindros*, that the teacher "'should have known'" his conduct was impermissible149 imposes an unreasonable duty of clairvoyance.

In order for a teacher to have notice of what conduct is forbidden, some practical mechanism for creating standards must exist. Moreover, the standard must be specific enough to survive judicial scrutiny on due process grounds.150 Informal suggestions,151 general rules,152 and codes of ethics153 do not suffice.

One way to formulate workable standards in this area might be through the collective bargaining process between school boards and teacher organizations. The Winton Act,154 which guarantees California school employees the right to join and be represented by organiza-

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147. 316 F. Supp. at 357.
148. Most commentators agree that the authorities do have such power. See, e.g., Nahmod, *Judicial Review, supra* note 114. But see River Dell Educ. Assn. v. River Dell Bd. of Educ., 122 N.J. Super. 350, 300 A.2d 361 (1973) (a teacher's statements wherever made are to be treated no differently than those of any other citizen).
149. 9 Cal. 3d at 544-45, 510 P.2d at 375, 108 Cal. Rptr. at 199 (citing the decision of the trial court).
150. Due process requirements are more stringent when first amendment rights are involved. NAACP v. Button, 371 U.S. 415, 432 (1963).
152. Keefe v. Geanakos, 418 F.2d 359, 362-63 (1st Cir. 1969). The school regulation in *Keefe* read: "Teachers shall use all possible care in safeguarding the health and moral welfare of their pupils, discountenancing promptly and emphatically: vandalism, falsehood, profanity, cruelty, or other forms of vice. *Id.* at 362 n.10.
tions of their choice,155 states as one of its purposes, "to afford certificated employees a voice in the formulation of educational policy."156 The Act is supposed to strengthen employee-employer relations "through the establishment of uniform and orderly methods of communication" between the two parties.157 Certainly a primary topic for communication should be development of standards for acceptable classroom materials and methods. Indeed, such issues fall within the legislatively defined scope of bargaining.158 A "blacklist" of terms and tactics to be avoided in the classroom could be drawn up as part of the "meet and confer"159 process. Similarly, a committee composed of administrators, teachers, and possibly student and parent representatives could screen reading materials for classroom use. Standards mutually agreed upon by teacher representatives and the administration, if adequately publicized, could form a workable solution to the due process problems in this area.

However, censorship in the form of "blacklisting" or screening itself raises grave doubts under the first amendment.160 The state may, in effect, be conditioning employment on relinquishment of constitutional rights.161 Moreover, when such procedures are permitted, they must be made subject to stringent procedural safeguards which would

155. The Act also guarantees individual rights to deal with the employer and to refrain from joining an employee organization. CAL. EDUC. CODE § 13080 (West Supp. 1974).
156. Id.
157. Id.
158. The Education Code provides in relevant part: [The] employer . . . shall meet and confer with representatives of employee organizations representing certificated employees upon request with regard to procedures relating to the definition of educational objectives, the determination of the content of courses and curricula, the selection of textbooks, and other aspects of the instructional program to the extent such matters are within the discretion of the public school employer or governing board . . . . Id. § 13085 (emphasis added). However, final decisions rest with the governing board. Id. § 13088.

"Meet and confer" means a "mutual obligation to exchange freely information, opinions, and proposals; and to make and consider recommendations under orderly procedures in a conscientious effort to reach agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations." Id. § 13081(d). Procedures also exist for dealing with persistent disagreements between the employer and employees. Id. § 13081(e). The word "procedures" in section 13085 replaced the phrase "all matters." Ch. 1412, § 4, [1970] Cal. Stat. 2681. It is possible that this change represents a significant retrenchment with respect to the scope of subject matter to be covered in the bargaining process which the statute contemplates.

159. For the definition of "meet and confer," see note 158 supra.

160. Academic freedom is protected by the first amendment, "which does not tolerate laws that cast a pall of orthodoxy over the classroom." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

be beyond the capabilities of most school administrations. It would seem that facts like those in *Lindros* create a "catch 22"—providing adequate notice by creating specific lists of forbidden materials and methods could easily run afoul of the first amendment, but general proscriptive guidelines would fail to inform a teacher which conduct would be penalized, and he or she would have a strong claim that the vague regulations failed to meet due process requirements.

Nevertheless, it appears that that best way to protect the interests of the parties may still be to allow the collective bargaining process to resolve these difficulties. The approach taken by the federal cases referred to above and, to an extent by, *Lindros* necessitates an unsatisfactory role for the court. Appellate review on a case-by-case basis requires the court to decide de novo the appropriateness of particular materials and methods used by a teacher. Aside from the practical problems of properly allocating judicial resources, this places the court in the position of dictating educational policy without any guarantee of competency. While court review of the solutions proposed by collective bargaining would still be available, more weight should be accorded to resolutions based on private bargaining than to state regulations imposed on teachers.

**CONCLUSION**

In *Lindros*, the California Supreme Court effectively preempted the school governing board's function of determining what constitutes "cause" for nonretention of probationary teachers. The court changed the test of cause from the language of Education Code section 13443, "relating to the welfare of the school or its pupils," to a new requirement that the board show an adverse impact on the school's or pupils' welfare to justify nonretention. In doing this, the court contradicted legislative intent that a school board have broad discretion in this area. In addition, the court improperly judged the sufficiency of the cause for Lindros' dismissal. By reinterpreting section 13443, the *Lindros* opinion became judicial legislation. In the process, the decision significantly narrowed the gap between the protections of permanent and probationary teachers and offered a narrow construction of the statute insulating it from future constitutional attack.

Reinstatement of a teacher who used an innovative, nondisruptive method to achieve a good educational objective, without notice that the school board disapproved of such conduct, could have rested squarely on constitutional grounds. As several federal courts have ruled, a high