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THE IMPACT OF CONSTITUTIONAL RIGHTS OF STUDENTS ON IN LOCO PARENTIS IN THE ADMINISTRATION OF ELEMENTARY AND SECONDARY PUBLIC EDUCATION

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THE IMPACT OF CONSTITUTIONAL RIGHTS OF STUDENTS ON IN LOCO PARENTIS IN THE ADMINISTRATION OF ELEMENTARY AND SECONDARY PUBLIC EDUCATION

By

Carol K. Houltram Hayner

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This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation Advisor Joseph E Bryson

Committee Members John Humphrey

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Date of Acceptance by Committee

HAYNER, CAROL K. HOULTRAM. The Impact Of Constitutional Rights Of Students On In Loco Parentis In The Administration Of Elementary And Secondary Public Education. (1985) Directed by Dr. Joseph E. Bryson. 142 pp.

The advent of constitutionally protected rights for students brought about a new role for elementary and secondary public school administrators. Representing the parent, the state and the Constitution of the United States requires that administrators have an understanding of the bases of authority and the limitations of authority for these sometimes conflicting roles.

The three bases of authority for public school administration are: the parents, the state, and the Constitution of the United States.

The purpose of this study is to clarify and distinguish the changing bases of authority for student governance and discipline in elementary and secondary public school administration. This dissertation traces the history of the concept of in loco parentis from the Hammurabian period to the present, presents significant case law demonstrating the concept of in loco parentis in American education from 1833 to present, analyzes and interprets landmark Supreme Court decisions which established constitutionally protected rights for juveniles and for students, and demonstrates the impact of these constitutionally protected rights on the diminishing concept of in loco parentis in the administration of elementary and secondary public schools. The study identifies

constitutional issues in the establishment of first, fourth and fourteenth amendment rights of students. Substantive and procedural due process issues are presented.

The study concludes that 1) the establishment of constitutionally protected rights of students diminished in loco parentis authority in public elementary and secondary school administration; 2) the in loco parentis role of the educator changed; 3) the underlying bases of authority for elementary and secondary public school administration continue to be defined and redefined by the Courts; 4) Landmark cases define the extension of constitutionally protected rights to students; 5) public school administration in student governance and discipline changed with the implementation of due process procedures; 6) courts will intervene in matters of public school administration if an individual's constitutionally protected right has allegedly been denied.

The concept of in loco parentis continues as a basis of authority in public school administration but is diminished and redirected by the establishment of constitutionally protected rights of students. Courts may intervene if an individual's constitutionally protected rights have allegedly been denied.

Administrators should be aware of the alterable nature of the law so that they know the significance of the living constitution and can assume roles of leadership in the protection of constitutional rights of students.

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CHAPTER I

INTRODUCTION

A. Overview

In the past twenty years, Supreme Court decisions have brought about a revolution in the administration of the public schools. School administrators had formerly answered to the parent and to the state. Representing some "average" parent meant that administrators actually represented the cultural mores of a particular community. The underlying basis of authority for governance and discipline was the concept of in loco parentis. Administrators were empowered to take great latitude in disciplining children.

Societal changes brought a diversity of viewpoints before the public. Disputes between parents and teachers/administrators became more frequent. It became increasingly difficult for administrators to represent the view of some idealized parent. As disputes between administrators or school systems and parents entered the courts, it became

obvious that some clearer definition of the rights and responsibilities of students was necessary.

The involvement of the Supreme Court in the arena of constitutionally protected rights of students extended the bases of authority for public school administration. Public school administration now has three bases of authority: the parent, the state and the Constitution of the United States. The administrator actually gets his authority from each base. But when one base of authority conflicts with another there is a hierarchy in the bases of authority. The courts may intervene if there is a violation of the constitutionally protected rights of students.

The study investigates the concept of in loco parentis and its use as a basis of authority for public school administrators. The study presents significant case law which established constitutionally protected rights of students. The case law demonstrates the diminishing use of the concept of in loco parentis as a basis of authority for administrators in areas of student governance and discipline.

Conflict exists in the society between those who favor the expansion of civil rights for students and those who advocate a return to discipline based on the authority of the parent. The issues at stake in this controversy parallel those in the society at large. Administrators fall at varying places along the continuum between

expansion of rights for students and elimination of student rights. The administrator is sometimes caught in the conflict when parental or state authority conflict with the constitutional rights of students.

If administrators are to function intelligently it is essential that they understand the bases of their authority.

B. Statement of Problem

Public school administrators must assume a variety of roles. These roles put the administrator in the position of representing the parent, the state and the Constitution of the United States.

The phrase in loco parentis describes the position of school officials when acting in the place of parents. The phrase usually applies to the areas of student governance and discipline and student care and safety while the pupil is under the jurisdiction of the school. William Giesselmann summarizes the in loco parentis position of the school administrator:

> Under the in loco parentis doctrine, the school administrator assumes a measure of legal responsibility for the care and safety of each student under his or her supervision. Actions concerning student care and safety must conform to those which a reasonable and prudent person would have taken in the same circumstances.[1]

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[1]William Paul Giesselmann, In Loco Parentis And Its Application To The School Program: A Legal Guide For Administrators (The University of Alabama, 1977), p. 233.

The duty of supervision owed to the pupil and the concomitant right of school personnel to maintain discipline arise the in loco parentis concept. The duty of supervision in the educational process is the logical extension of the common law parental duty to protect. The standard of care owed by school personnel to a student are generally comparable to the parental standard of care. The law provides that people charged with care and custody give the same type of care as that which the individual is no longer able to receive. The courts have been steadily constructing a higher standard of care owed to students by school personnel by expanding the areas of negligence in which the educator may be held liable to the student.[2]

Current judicial interpretation considers the school administrator as an agent of state government. Giesselmann concludes that the following legal guidelines relate to the exercise of administrative authority concerning student governance and discipline. Subject to these guidelines, school officials have both a right and duty under in loco parentis to regulate and control student conduct within the school environment:

> (1) actions must be based upon maintenance within the school of a proper atmosphere for learning;

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[2]Emma Jane Hirschberger, A Study Of The Development Of The In Loco Parentis Doctrine, Its Application And Emerging Trends (Pittsburgh, Pennsylvania: University of Pittsburg, 1971), pp. 249-250.

> (2) rules, regulations, and all administrative procedures Concerning student governance and discipline must demonstrate recognition of student constitutional rights and related student respon sibilities; (3) substantive and procedural due process must be afforded all students in the school; and (4) curtailment of student rights must be based upon proof that specific exercises of such rights will materially interfere with or substan tially disrupt maintenance within the school of a proper atmosphere for learning.[3]

Administrators act as agents of the state with regard to a student's right to free speech (Tinker v. Des Moines Independent Community School District)[4] and due process (Goss v. Lopez).[5] Administrators are also representatives of the state when they engage in searches of students and their possessions (New Jersey v. T.L.O.).[6] The recent T.L.O. decision made it very clear that the in loco parentis doctrine did not justify infringement of Fourth Amendment rights, i.e. the prohibition of unreasonable search and seizure.[7]

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[3]Giesselman, op. cit., pp. 232-233.

[4]Tinker v. Des Moines Indep. Community School Dist., 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

[5]Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

[6]New Jersey v. T.L.O., No. 83-712, U. S. January 15, 1985 in 53 LW 4083.

[7]George T. Rogister, Jr. and Ann L. Majestic, "New Jersey v. T.L.O.: The Supreme Court Applies The Fourth Amendment To Public Schools" (Raleigh, North Carolina: Tharrington, Smith & Hargrove, January, 1985), p. 3.

School administrators must safeguard the constitutionally protected rights of students. While state legislatures possess plenary power in establishing and operating public schools, the power is restricted only by federal and state constitutional mandates. School personnel must keep in mind the scope of the states' authority to regulate educational activities. If courts have prohibited a given school practice under the Federal Constitution (e.g. racial discrimination), the state or its agents cannot enact laws or policies that conflict with the constitutional mandate unless justified by a compelling governmental interest. This means that states may not enact laws or policies that conflict with the United State Constitution. Any exception to this must be justified by a compelling governmental interest, e.g. freedom of speech was a protected constitutional right as long as there was no evidence of material and substantial disruption of the normal operation of the school.[8]

Representing the parent, the state and the Constitution of the United States requires that administrators have an understanding of the bases and limitations of authority.

The advent of constitutional protected rights for students brought a new dimension to public school

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[8]Martha M. McCarthy and Nelda H. Cambron, Public School Law: Teachers' and Students' Rights (Boston: Allyn and Bacon, Inc., 1981), p. 318.

administration. Constitutionally protected rights of students limited the authority of public school administrators. When there is conflict between state or local regulations and constitutionally protected rights, the matter may be resolved in federal courts.

C. Questions To Be Answered

There is a need to clarify and distinguish the bases of authority for the multiple and sometimes conflicting roles that administrators assume in American public education.

In order to identify the legal authorities which are the bases for public school administration, there is a need to review the *in loco parentis* doctrine, significant case law regarding that doctrine, the Constitution of the United States, and the impact of recent case law on public school administration.

The following questions will be addressed in order to determine the impact of constitutional rights of students on *in loco parentis* in the administration of elementary and secondary public education.

1. Did the establishment of constitutionally protected rights for students by the judiciary diminish the authority of *in loco parentis* doctrine in the administration of public elementary and secondary schools?

2. What are the major judicial decisions which established constitutionally protected rights of students?
3. What are the significant legal issues in balancing necessary school authority in carrying out the state's compelling interest in education with students' constitutional rights?
4. What are the significant constitutional issues concerning the students' constitutionally protected rights versus the concept of *in loco parentis*?
5. What are the significant legal issues concerning public school administrators and teachers acting *in loco parentis*, representing the interests of the state, and protecting the civil rights of the individual?

D. Scope Of The Study

This is a historical study of legal decisions which have influenced elementary and secondary public school administration student governance and discipline.

These legal decisions place public school administrators in three roles

1. acting *in loco parentis*;
2. representing the State;
3. insuring constitutionally protected rights.

This study describes the extent to which each of these bases of authority is limited by the evolution of case law.

Discussion of the in loco parentis doctrine is limited to student governance and discipline in elementary and secondary public schools.

Litigation which clarifies in loco parentis doctrine or defines constitutional protected rights of students is limited to decisions of State Supreme Courts, Federal District Courts, Federal Courts of Appeals and the Supreme Court prior to June 1, 1985.

The assumptions of the researcher in this study include the following:

1. This topic is an important one to research;
2. Constitutional rights of students should be extended;
3. Schools socialize students to accept existing norms and promote some change.

This study is limited to literature relating to the in loco parentis doctrine published prior to June 1, 1985.

E. Methods, Procedures, And Sources Of Information

The basic research technique of this historical research study is to examine and analyze the available references concerning the concept of "in loco parentis" as it related to control of pupils and discipline in the public schools and the changes in law brought about by

provision of constitutional protected rights of students.

In order to determine a need for such research, a search of Dissertation Abstracts was made for this topic. Journal articles related to the topic were located through such sources as Reader's Guide to Periodical Literature, Education Index, and the Index to Legal Periodicals.

General research summaries were found in the Encyclopedia of Educational Research, various books on school law, and in a review of related literature obtained through a computer search from Education Resources Information Center (ERIC).

State Supreme Court, Federal District Court, Federal Court of Appeals and Supreme Court cases related to the topic were located through use of Corpus Juris Secundum, American Jurisprudence, the National Reporter System, and the American Digest System. The Current Law Index and Index to Legal Periodicals helped identify significant court cases. Court cases were also found by examining case summaries contained in the 1983 -1985 issues of the NOLPE School Law Reporter. All of the cases were read and placed in categories corresponding to legal aspects of in loco parentis in public schools and and legal issues involving constitutional protected rights.

F. Definition Of Terms

Common law.

As distinguished from the law created by the

enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiguity, or from the judgements and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense,[9] particularly the ancient unwritten law of England.

Corporal Punishment.

Physical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment of or inflicted on the body. The term may or may not[10] include imprisonment, according to the context.

Discipline.

Instruction, comprehending the communication of knowledge and training to observe and act in accordance with rules and orders. Correction, chastisement,[11] punishment, penalty, rules, and regulations.

Due process of law.

Law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights.[12]

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[9]Henry Campbell Black, Black's Law Dictionary, 5th ed. (St. Paul, Minnesota: West Publishing Company, 1979), pp. 250-251.

[10]Ibid., p. 306.

[11]Ibid., p. 417.

[12]Ibid., p. 449

In loco parentis.

In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities.[13]

Liability.

It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely.[14]

Negligence.

The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.[15]

Privilege.

A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption. A right, power, franchise, or immunity held by a person or class, against or beyond the course of the law.[16]

Procedural law.

That which prescribes method of enforcing rights or obtaining redress for their invasion; machinery for carrying on procedural aspects of civil or criminal action; e.g. Rules of Civil, Criminal, and Appellate Procedure, as adopted by the Federal and most state courts.[17]

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[13]Ibid., p. 708

[14]Ibid., p. 823

[15]Ibid., p. 903.

[16]Ibid., p. 1077.

[17]Ibid., p. 1083.

Procedure.

The mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. That which regulates the formal steps in an action or other judicial proceeding; a form, manner, and order of conducting suits or prosecutions.[18]

Right.

As a noun, and taken in the abstract sense, means justice, ethical correctness, or consonance with the rules of law or the principles of morals. As a noun, and taken in a 'concrete' sense, a power, privilege, faculty, or demand, inherent in one person and incident upon another.[19]

Search.

An examination of a man's house or other buildings or premises, or of his person, or of his vehicle, aircraft, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged.[20]

Seizure.

The act of taking possession of property, e.g., for a violation of law or by virtue of an execution. Term implies a taking or removal of something from the possession, actual or constructive, of another person or persons.[21]

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[18]Ibid., p. 1083

[19]Ibid., p. 1189.

[20]Ibid., p. 1211.

[21]Ibid., p. 1219.

Substantive.

"An essential part or constituent or relating to what is essential."[22]

G. Significance of Study

Public school administration requires the administrator to serve in various roles. The administrator at times represents the state; at other times the administrator represents the parents; still at other times the administrator may represent the constitutional protected rights of students.

This study clarifies and distinguishes the bases of authority for student governance and discipline. Constitutional interpretations and case law are not static. The development of constitutional rights of students added a new basis of authority for public school administrators.

As Dee Schofield points out in Student Rights and Student Discipline, the courts, especially since the 1954 Supreme Court decision in Brown v. Board of Education, have come to the fore in the continuing struggle to define rights of students and implicitly define the relationship between student and school. The ascendancy of courts in matters relating to student rights and discipline results not only from the inability of legislative bodies to come

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[22]Ibid., p. 1281.

to terms with issues, but also from attention to civil liberties evident in the past two decades.[23]

Joseph Bryson in addressing the 1983 Law and Sports Conference at Guilford College refers to federal judges and to a much less extent state judges as the "new breed of education philosophers" and emphasized that it is those federal courts which have been the makers and shapers of much of the education philosophy since the late Sixties.[24]

H. Design Of The Study

The study is divided into three major parts: the review of the literature, the discussion of the legal cases establishing *in loco parentis* and cases establishing constitutionally protected rights of students, and the conclusions.

Chapter two reviews literature relating to the development of the concept of *in loco parentis*. It includes an historical perspective of the concept. This chapter uses case law to trace the concept of *in loco parentis* as a basis of authority in American education.

Chapter three provides a historical and legal framework for the establishment of constitutionally protected rights of

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[23]Dee Schofield, *Student Rights and Student Discipline* (Arlington, Virginia: National Association of Elementary School Principals, 1975), p. 10.

[24]Joseph Bryson in *Law and Sports Conference Proceedings* (Greensboro, North Carolina: Guilford College, June 6-10, 1983), pp. 44-45.

students. The discussion of two major influences in the society i.e. the Civil Rights Movement and the Student Protest Movement provides information on societal changes which influenced the courts and the court's influence on the societal changes. This chapter contains a general listing and discussion of recently litigated court cases which impact on public school administration and treat the concept of in loco parentis. It includes a narrative discussion of the major legal issues relating to the concept of in loco parentis and the change which was brought about by constitutionally protected rights of students and the impact on public school administration.

Chapter four reviews and analyzes selected court decisions establishing constitutionally protected rights of students provided by the first, fourth and fourteenth amendments to the Constitution of the United States. This chapter discusses the United States Supreme Court landmark cases influencing changes in public school administration as a result of constitutionally protected rights of students.

The concluding chapter of the study summarizes the information from the review of the literature and the analysis of the selected court cases and draws conclusions. Questions asked in the introductory part of the study are reviewed and answered in this chapter. Conclusions are indicated and programmatic recommendations are recorded.

CHAPTER II

REVIEW OF THE LITERATURE

A. Introduction

The concept of in loco parentis can be traced to Hammurabi. This chapter provides an overview of this concept. This historical background shows how the concept of in loco parentis became a significant concept in English Common Law.

American Law had its roots in English Common Law. The application of the concept of in loco parentis to American Schools was significant in the early development of the schools as an underlying basis of authority for teachers and administrators in matters concerning student governance and discipline.

This chapter includes an historical perspective of the concept of in loco parentis and selected cases which demonstrate the in loco parentis concept as a basis of

authority. A selection of comments by educators is included in order to illustrate the influence of constitutional rights on the interpretation of in loco parentis as a basis of authority.

B. Historical Perspective on the Development of the Concept of In Loco Parentis

Hammurabi's Code
Roman Law
Concept of Patria Potestas
Concept of Tutor
Concept of Guardian (Patroni Loco)
Evolution of English Common Education

Hammurabi's Code

The concept of in loco parentis is a legal concept which can be traced from the Hammurabian period to the present. Hammurabi's Code was one of the first recorded legal codes. The father's control over his children was unlimited until their marriage. The father could dispose of their labor and even of their persons for profit. Daughters might be given in marriage, as religious, or as concubines. The father was the head of the household and thus had specified rights.[1]

Parents were assumed to have a natural right to control and exercise authority over offspring unless limited by local custom or codes of law. As man developed

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[1]Robert Francis Harper. The Code of Hammurabi King of Babylon About 2250 B.C. (Chicago: The University Press, 1904), p.2.

and recorded his laws, parental rights began to be abrogated.

Roman Law

The first Roman recorded legislation, the Twelve Tables, after years of evolutionary process emerged about the middle of the fifth century B.C.[2] This legislation demonstrated that the Romans were one of the first nations to formally modify parental power through governmental action and law.

Buckland points out that beginning with the Twelve Tables, over 800 leges and plebiscita were recorded in the space of 500 years. Even excluding those of temporary political interest, a vast collection of laws remains.[3]

Early Roman law gave the father absolute, control over his children. He had the essential right of ownership. This included the right to use the son's services, the right to part with them and the right to kill the child. Gradually the father ceased being a proprietor, or owner and became the natural protector and guardian of his children.[4] According to Moran, the Emperor Hadrian

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[2]Hans Julius Wolff, Roman Law, An Historical Introduction (Norman, Oklahoma: The University of Oklahoma Press, 1951), p. 55.

[3]William W. Buckland, The Main Institutions of Roman Private Law (Cambridge: The University Press, 1983), p. 1.

[4]W. A. Hunter, Roman Law, 4th ed. (London: Sweet and Maxwell, 1903), p. 192.

modified parental power to the extent of reducing infanticide. During Hadrian's reign, a wise maxim prevailed: "patria potestas in pietate debet, non in atrocitate consistere." (Parental powers ought to consist in devotion, not in harshness.)[5] Eventually, the concept of paternal supremacy was reduced; it was however, never wholly abandoned.

Concept of Patria Potestas

Patria potestas is a latin term meaning the power of the father. Historically it refers to the power wielded by the father over his family.

The doctrine of patria potestas limited to some extent the absolute authority of Roman parents. Patria potestas was the name for the rights enjoyed by the head of a Roman family over his legitimate children. Roman citizens prided themselves in the authority that they had over their children. A child who was an heir had no power until the time that the father would recognize his power.[6]

Concept of Tutor

Tutor is a latin term meaning guardian. The tutor concept grew out of the patria potestas practice and became an important legacy of Roman law to Western Civilization

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[5]Kaye Don Moran, An Historical Development of The Doctrine Loco Parentis With Court Interpretations In the United States (University of Kansas, 1967), p. 14.

[6]Ibid., p. 15.

and to American law. The tutor contrasted with potestas. While he power of pater-familias was natural ownership, the tutor's powers resulted from a position of trust established for the exclusive benefit of the pupillus. The primary purpose of the protection given by the tutor was to safeguard the property of his ward in the interests of successors. The tutor was not allowed to reap any personal advantage from his relationship with his ward or pupil. The tutor dealt primarily with the child and his property. A father could by law will a tutor for his children so that their interests would be looked after properly.[7]

Concept of Guardian (Patroni Loco)

The purpose of the guardian or patroni loco was to educate and look after children. Moran pointed out that important principles evolved from Roman law:

> 1) Parents had a duty to educate their children; 2) parents had the right to delegate their authority to another person, as tutor or guardian (patroni loco) for the purpose of educating and looking after their children; and 3) parents, when delegating their authority to a second person, delegated the right to chastise or punish their children. These legal principles have survived through the ages with minor changes to the Christian era and English common law.[8]

The delegation of authority to a second person and of the right to chastise their children has great

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[7]Ibid., pp. 17-19.

[8]Ibid., pp. 24-25.

significance in the evolution of the concept of *in loco parentis*. The limitations which are placed on this delegation of authority constitute the bases of concern for much of the litigation discussed in this study.

Evolution of English Common Education

Sir William Blackstone's *Commentaries on the Laws of England* provides the earliest recorded legal phrase *in loco parentis* applied to the teacher-pupil relationship. This four volume treatise by Sir William Blackstone, published in 1765, became the basic textbook for the training of several generations of American lawyers necessitating innumerable American editions.[9]

Blackstone analyzed the legal contemplation of the parent-child relationship dividing the duties of parents toward legitimate children into three categories of maintenance, protection, and education. Blackstone also discussed the relationship of parental duties to parental power:

> The power of parents over their children is derived from the former consideration, their duty: this authority being given them partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.[10]

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[9]Emma Jan Hirschberger, *A Study of The Development of The In Loco Parentis Doctrine, Its Application And Emerging Trends* (University of Pittsburgh, 1971), p. 36.

[10]William Blackstone, *Commentaries on The Law of England* (Portland, Thomas B. Wait and Company, 1807), p. 451.

Blackstone used the term loco parentis for the first time when he discussed the power of a father:

> He may also delegate part of this parental authority during his life, to the tutor or school-master of his child; who is then in loco parentis, and has such a portion of the power of the parents committed to his charge, viz. that of restraint and correction as may be necessary to answer the purposes for which he is employed.[11]

Hirshberger concluded that this appears to be the legal foundation of the in loco parentis concept of the teacher-pupil relationships in the law. In assigning in loco parentis status to the school teacher, Blackstone applied a basic principle of common law-the importance of the customs and practices of the people. Hirschberger documented customs and practices from the sixth century to the middle of the eighteenth century.[12]

Summary

Important principles were established by Roman law concerning the power of the parent. Of greatest importance was the fact that parents had a right and a responsibility to raise their children, to chastise them when necessary and to provide for their future in terms of property and succession. Under Roman law parents had the right to appoint another adult to act as a tutor or guardian for their children. Roman law was an important basis for the

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[11]Ibid.

[12]Hirschberger, pp. 38-39.

concept of in loco parentis i.e. the basis for the legal delegation of parental authority.

The importance of English common law to the concept of in loco parentis was the fact that since guardianship and in loco parentis originated together, one was tied to the legality of the other. The right of the parent to delegate his authority led to the delegation of parental rights to tutors and became allied with the right of punishment.

C. Selected Cases Demonstrating the History of the Concept of In Loco Parentis as a Basis of Authority in American Education

While Blackstone's Commentaries on the Laws of England established the legal foundation of the in loco parentis concept of the teacher-pupil relationship, Chancellor James Kent's Commentaries on American Law in 1827 cemented it into the American legal system. Writing early in a period of rapid development of the American system of public education, Kent had a great influence on the development of school law during the nineteenth century. While Lord Blackstone in speaking of the delegation of a portion of the power of the parent to the teacher conveyed a somewhat limited concept of transfer, Chancellor Kent speaks of the delegation to the teacher of all the powers allowed by law to the parent, thus conveying a total concept of transfer of parental power.[13]

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[13]Ibid., pp. 59-62.

Case law in the United States demonstrates in loco parentis concept as it has applied to American public elementary and secondary schools.

Two early cases which did not use the term in loco parentis but which were based on the right of the teacher to administer corporal punishment were Commonwealth v. Fell[14] (1833) and State v. Pendergrass[15] (1837).

Judge Gaston in giving the opinion of the North Carolina Supreme Court in State v. Rachel Pendergrass (1837) discussed the power which the law grants to school-masters and teachers with respect to the correction of their pupils comparing that power to the power of parents:

> One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.[16]

This early case in addition to confiding in school-master and teachers a discretionary power in the infliction of

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[14]Commonwealth v. Fell, 11 Haz. PA. Reg. 179 (1833).

[15]State v. Pendergrass, 19 N. C. 348 (1837).

[16]Ibid., pp. 365-366 (1837).

punishment upon their pupils also clarified the limits of the power:

> When the correction administered, is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely, we think, on the qui animo with which it was administered. Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and like all others intrusted with a discretion, he cannot be made penally responsible for error of judgement, but only for wickedness of purpose.[17]

The court determined that school-masters and teachers would not be criminally responsible unless there was permanent injury to the child or the punishment was inflicted to gratify the teacher or master's own evil passions:

> But the master may be punishable when he does not transcend the powers granted, if he grossly abuse them. If he use his authority as a cover for malice, and under pretence of administering correction, gratify his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice as an individual not invested with judicial power[18].

Two distinct lines of authority exist in the United States with respect to the role of a parent or a person in loco parentis in the administration of corporal punishment. One view makes the teacher the arbiter or the judge of the nature and amount of punishment; the other view stresses that courts deciding these cases hold that both the

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[17]Ibid., pp. 366 - 367.

[18]Ibid., p. 367.

reasonableness of, and the necessity for, the punishment is to be determined by a jury, under the circumstances of each case.

State v. Pendergrass was a landmark case in establishing the precedent that unless permanent injury results or the act was done in malice, the teacher is protected by in loco parentis:

> The minority view which is the older view, in this country, stems from the Pendergrass case..... This view holds that unless permanent injury results from the teacher's act or unless the act was done with malice, the defendant is within the protection of the in loco parentis rule. The Pendergrass formula makes the teacher the arbiter or the judge of the nature and amount of punishment.
>
> Under the Pendergrass rule, the teacher stands in a quasi-judicial capacity. The teacher is not liable for an error in judgement; he is not liable even if it might appear to a jury that the punishment was not in line with the offense.[19]

Stevens v. Fasset, (1847) was the first appellate court to apply the loco parentis phrase to the teacher-pupil relationship.[20] In this Maine Case Calvin Fasset, who was over twenty-one and had put himself under the instruction of a master at the public town school, was permitted by the instructor to occupy the desk and seat appropriated for the instructor, but for no specified time. On being requested to leave the desk, and having refused,

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[19]Hirschberger, p. 121.

[20]Stevens v. Fasset, 27 Me 275(1874).

the teacher obtained the aid of the plaintiff, who was an agent of the district, and upon express refusal of Calvin to leave the desk, the plaintiff, with the assistance of the master, attempted by force to remove him, but the force though properly exerted for such a purpose, was ineffectual. This was an action for a malicious prosecution because of the defendant's having obtained two warrants against the plaintiff, for assault and battery.[21]

The rationale for punishment is significant:

> If the teacher is authorized to inflict corporeal punishment for the purpose of securing obedience to his reasonable rules and commands, and thereby to render the school, what it is contemplated by the law that it shall be, it follows that he has the right to direct, how and when each pupil shall attend to his appropriate duties, and the manner in which they shall demean themselves, provided, that in all this, nothing unreasonable is demanded. It cannot be contended, that as the teacher has responsible duties to perform, he is not entitled to the reasonable means by which to perform them.[22]

The court reasoned that if a person presents himself as a pupil and is accepted as such, he cannot claim the privileges of a pupil without accepting the responsibilities of the pupil. Thus if he is disobedient, he is not exempt from the liability of punishment.[23]

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[21] Ibid.

[22] Ibid., p. 281 (1847).

[23] Ibid., pp. 281 - 282.

The court clarified the in loco parentis position when it discussed the common law right of the parent to keep the child in order and obedience:

> He may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education. He may delegate also a part of his parental authority during his life, to the tutor or school-master of his child, who is then in loco parentis, and has such portion of the power of the parent, committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purpose for which he is employed.
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> "The rights of parents (over their children,) result from their duties. As they are bound to maintain and educate their children, the law has given them the right to such authority; and in support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." "The power allowed by law to the parent over the person of the child, may be delegated to a tutor or instructor, the better to accomplish the purposes of education." 2 Kent's Com. 169 & 170.[24]

Several rules emerged from this case:

1. A person over twenty-one is subject to the authority of the teacher because he has chosen to be a pupil.
2. The teacher has the right to use reasonable physical force against a pupil to require obedience to his lawful commands under the in loco parentis doctrine.

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[24]Ibid., pp. 279 - 280.

3. A teacher must maintain order and discipline in order to perform his duties.
4. A teacher has the right to use the assistance of another against a pupil in circumstances in which he is empowered to act.
5. A court officially recognizes the authority of a public school teacher on the same basis as if he had been directly employed by the parents.[25]

Cooper v. McJunkin[26] (1853) was the first corporal punishment case in which the state supreme court used the phrase in loco parentis. In this case the court imposed more restrictions on the use of corporal punishment by further defining the conditions which constitute reasonable punishment i.e. the cause must be sufficient, the instrument used must be suitable to the purpose, and the manner and extent of the correction should be distinguished with the kindness, prudence and propriety which become the station of in loco parentis.

The court considered teachers acting in loco parentis stating:

> Teachers should, therefore understand that whenever correction is administered in anger or insolence, or in any other manner than in

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[25]Hirschberger, p. 69.

[26]Cooper v. McJunkin, 4 Indiana 290 (1853).

> moderation and kindness, accompanied with that affectionate moral suasion so eminently due from one placed by the law 'in loco parentis'--in the sacred relation of parent--the Courts must consider them guilty of assault and battery, the more aggravated and wanton in proportion to the tender years and dependent position of the pupil.[27]

In Lander v. Seaver[28], (1859) the court addressed the concept of the school-master standing in loco parentis, invested with all the authority and immunity of the parent. The court discussed the power of control and correction invested in the parent by nature and necessity. According to the court, the power springs from the natural relation of parent and child. It is felt as a duty rather than a power. The court reasoned that parental power is little liable to abuse, because it is continually restrained by natural affection, the tenderness of a parent for his offspring, and acting rather by instinct than reasoning.

The court however distinguished the power of the school-master as one in which there is no such natural restraint. Thus, according to the court, he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection.

The court clarified its position:

> The law, as we deem it to exist, is this: A school-master has the right to inflict reasonable corporeal punishment. He must exercise reasonable

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[27]Ibid.

[28]Lander v. Seaver, 32 Vt. 114, Am. Dec. 161-162 (1859).

> judgement and discretion in determining when to punish, and to what extent. In determining upon what is a reasonable punishment, various considerations must be regarded, the nature of theoffense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size, and strength of the pupil to be punished.[29]

The court determined that if there is any reasonable doubt whether the punishment was excessive, the master or teacher should have the benefit of the doubt.

Lander v. Seaver, brought about the emergence of three legal principles:

1) that a teacher may punish a pupil for an offense after he returns home, if the misbehavior bears directly upon the school or the teacher
2) that the teacher is not a public officer with certain juridicial and discretionary powers
3) that the correct loco parentis concept is a limited delegation of parental power to the school teacher.

This case also made the teacher liable to the pupil in a civil action as well as a criminal action, nlike the parent who was liable in a criminal action only.[30]

People v. Curtis,[31] (1931) was significant because it distinguished the development of two lines of authority in

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[29]Ibid., p. 163.

[30]Ibid., pp. 73-80.

[31]People v. Curtis, 300 P. 802 (1931).

cases involving in loco parentis. This California case involved an appeal from the judgement and the order denying the motion for a new trial. The appellant, a teacher in the public schools, had been found guilty in a trial by a magistrate, without a jury, and judgment and sentence imposed upon the defendant that she pay a fine of $100, or in default of the payment, that she be imprisoned in the county jail in proportion of one day's imprisonment for every $10 of the fine.

The court distinguished the first line of authority:

> In the absence of statutory provisions, the common-law rule seems to be that a parent or a teacher (who stands in loco parentis) may inflict reasonable (or moderate) corporal punishment upon a child. Upon this phase of the law there seems to be no disagreement among the authorities. But when we come to the question of the quantum of punishment, or rather of the determination of the reasonableness of the punishment inflicted, we find two distinct lines of authority. One group makes the teacher the arbiter, and declares all punishment to be reasonable which does not result in disfigurement of or permanent injury to the child, and which is not inflicted maliciously. The locus classicus on this subject seems to be State v. Pendergrass, 19 N. C. (2 Devereux & Battle's Law) 365, 31 Am. Dec. 416.[32]

The court discussed a second line of authority in the in loco parentis rule:

> The second group of cases, and the one which, to our mind, expresses the most enlightened view--a view more consonant with modern ideas relating to the relationship between parents or those standing in their place and children--refuses to make the

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[32] Ibid.

> teacher the sole arbiter. The courts deciding these cases hold that both the reasonableness of, and the necessity for, the punishment is to be determined by a jury, under the circumstances of each case.[33]

The court specified the sources of authority for this more enlightened view:

> While some authority is cited tending to support the theory that where the punishment falls short of maiming or disfiguring the body, or seriously injuring or endangering life and health, the judgment of the parent is final, and he cannot be held to answer unless it is proved that the punishment was maliciously inflicted-the leading case in support of this doctrine being State v. Jones, 95 N. C. 588, 50 Am. Rep. 282-yet the great weight of American authority seems to be that whether or not the parent, guardian, or schoolmaster has administered unreasonable, unnecessary, and cruel punishment to a child under his care is a question of fact to be determined by the jury.[34]

The minority view of the in loco parentis rule had held that the person administering the punishment is the judge, thus making the teacher the judge of when to punish and how much punishment to administer. In a modern view

> the great weight of American authority, seems to be that whether or not the parent, guardian or schoolmaster had administered unreasonable, unnecessary, and cruel punishment to a child under his care is a question of fact to be determined by the jury.[35]

The basic distinction between the two rules appears to be that the teacher is not the sole judge of the necessity

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[33]Ibid., p. 803.

[34]Ibid.

[35]Hirschberger, p. 125.

for and the quantum of punishment in the newer or more modern rule.

The majority view of the in loco parentis rule holds that a parent or person in loco parentis must not exceed the bounds of moderation and unreasonableness in inflicting corporal punishment. Acts that are judged cruel merciless, unreasonable and immoderate are unlawful.

Guerrieri et ux. v. Tyson et al.[36] (1942) was a case in which public school teachers immersed a 10 year old pupil's hand with infected finger in scalding water against his will and held it there for about 10 minutes causing intense pain and necessitating 28 days hospital treatment and permanent disfigurement of the hand. The teachers were liable for damages resulting where treatment was not immediately necessary and there emergency.

This case is of significance to this study because it more narrowly defined the parameters of legally defensible delegated parental authority:

> Under the delegated parental authority implied from the relationship of teacher and pupil, a teacher may inflict reasonable corporal punishment on a pupil to enforce discipline (Harris et al. v. Galilley, Appellant, 125 Pa. Super. 505, 189 A. 779) but there is no implied delegation of authority to exercise her lay judgment, as a parent may, in the matter of the treatment of injury or disease suffered by a pupil. Treatment of the minor plaintiff's hand was not necessary in this

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[36]Guerreri v. Tyson, 24 A. 2d 469 (1942).

> case; defendants were not acting in an emergency. The defendants were not school nurses and neither of them had any medical training or experience. Whether treatment of the infected finger was necessary was a question for the boy's parents to decide. The status of a parent, with some of the parent's privileges, is given a school teacher by law in aid of the education and training of the child (see Act of May 18, 1911, P.I. 309,§ 1382) and ordinarily does not extend beyond matters of conduct and discipline.[37]

This case set a legal precedent concerning the limits of in loco parentis authority:

> Though public school teacher stands in "loco parentis" to pupil and, under delegated parental authority implied from relationship of "teacher and pupil", may inflict reasonable corporal punishment on pupil to enforce discipline, there is no implied delegation of authority to exercise her lay judgement as a parent may in matter of treatment of injury or disease suffered by pupil.[38]

Cases litigated on the issue of use of corporal punishment or physical restraint against a pupil have become legal landmarks. These cases defined the fundamental legal relationship of teacher and pupil as one in which the teacher stands in loco parentis.

Two cases which dealt with restraint were Calway v. Williamson, (1944) and Andreazzi v. Rubano, (1958). Calway v. Williamson,[39] (1944) determined that the test for reasonable acts of restraint against a pupil are the same

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[37]Ibid.

[38]Ibid., 468.

[39]Calway v. Williamson, 130 Conn. 575, 36A. 2d 377 (1944).

rules which are applicable in corporal punishment cases with in loco parentis as the legal foundation of both practices. In Andreazzi v. Rubano,[40] (1958), the Court inferred that a school board rule regulating the use of corporal punishment does not affect the right of the teacher to use restraint to enforce discipline.

State v. Straight[41] (1959) is significant to this study because it discusses two interpretations of law discussed earlier in the 1931 People v. Curtis decision. This case is an appeal from a judgment of conviction on a jury verdict for the crime of assault in the third degree. The defendant had been charged with assault in the second degree and the conviction of the lesser crime was found by a jury. The jury and the court fixed punishment for the maximum of third degree assault, six months in jail and a fine of $500.

The defendant was a rural Montana school teacher who had been caring for a cousin's three minor children. The 29 month old baby allowed the one year old to get out of the automobile while the defendent was in the home of someone to pick up Beulah straight's oldest daughter. The temperature outside was twenty degrees below zero. The

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[40]Andreazzi v. Rubano, 145 Conn. 280, 141 A. 2d. 639 (1958).

[41]State v. Straight, 347 P. 2d 489.

fingers on both hands of the one year old were severely frozen. Because of what must have been considered by the defendant as bad behavior of the 29 month old the defendant spanked or beat the 29 month old with his belt.

Evidence presented to the jury showed that the child had been beaten and his body was bruised and black and blue. The physician testified that he had found bruises two inches long and one inch wide on the child's chest and lower abdomen; his buttocks and legs were bruised and his penis scratched and swollen and his scrotum scratched.[42]

The defendant offered no testimony whatever. The court questioned whether one standing in loco parentis is entitled to a presumption of innocence or whether the prosecution should be required to prove either permanent injury or implied malice. The alternative to this procedure would be to allow the jury to determine whether the person standing in loco parentis "wilfully, wrongfully and unlawfully" assaulted the child, without giving the defendant the benefit of the presumption that his acts are correct and not requiring the prosecution to provide permanent injury or malice.[43]

Both views receive support in many jurisdictions. The view that the prosecution must prove permanent injury or

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[42]Ibid.

[43]Ibid.

malice follows:

> "One standing in loco parentis, exercising the parent's delegated authority, may administer reasonable chastisement to a child or pupil to the same extent as the parent himself; and to fasten upon him the guilt of criminality he must not only inflict on the child immoderate chastisement but he must do so malo animo, with legal malice or wicked motives, or else he must inflict on him some permanent injury."[44]

The court notes the opposite and more enlightened view:

> ---the more enlightened view--a view more consonant with modern ideas relating to the relationship between parents or those standing in their place and children--refuses to make the teacher the sole arbiter. The courts deciding these cases hold that both the reasonableness of, and the necessity for, the punishment is to be determined by a jury, under the circumstances of each case.[45]

The court supported the People v. Curtis rule:

> A parent, teacher, baby-sitter or anyone else standing in loco parentis is not given unlimited discretion in the mode or degree of chastisement under our statute. Some cases in other jurisdictions go so far as to say that one standing in loco parentis acts in a quasi judicial capacity and has almost unlimited discretion regarding the punishment of the child entrusted to his care. This court expressly disapproves of this view.[46]

The Court also determined that the jury was properly left to decide this question without giving the defendant the benefit of a presumption that his actions were necessary and reasonable under the circumstances. The defendant

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[44] Ibid.

[45] Ibid.

[46] Ibid.

is protected in that the prosecution must show that his actions were unreasonable in manner and immoderate in degree.

The judgment was affirmed.

D. Selected Comment Demonstrating the Diminishing Use of In Loco Parentis as a Basis of Authority in American Public Education

This section reviews a more recent comment on the concept of in loco parentis and its diminishing use as a basis of authority in American public education.

Robert Phay examined "the long-recognized right of parents to decide educational issues that affect their children and then the doctrinal bases for the independent assertion by children of their own rights."[47] Supreme Court cases which established a constitutional basis upon which to predicate parental prerogatives, i.e. Meyer v. Nebraska,[48] (1923), Pierce v. Society of Sisters[49] (1925), Wisconsin v. Yoder[50] (1972) are inconsistent with a line of cases that locates in the child specific, constitutionally protected rights, i.e. Brown v. Board of Education[51]

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[47]Robert E. Phay, "Due Process and the Public Schools in the Seventies and Eighties," School Law Bulletin 13,4 October, 1982 p. 3.

[48]Meyer v. Nebraska, 262 U. S. 390 (1923).

[49]Pierce v. Society of Sisters, 268 U. S. 510 (1925).

[50]Wisconsin v. Yoder, 406 U. S. 205 (1972).

[51]Brown v. Board of Education, 347 U. S. 483 (1954).

(1954), Tinker v.Des Moines Independent Community School District[52] (1969), Goss v. Lopez[53] (1975).

Phay discussed early recognition of the child's constitutional rights in the Supreme Court decision of In Re Gault[54] (1967) in which the Court held that minors may not be denied basic procedural due process in proceedings that might result in their incarceration:

> The critical importance of the Gault holding and those related to it is that they locate the due process rights in the child himself. They endow the child with rights that the law is bound to protect regardless of the parents' wishes, and they replace the state's parens patriae function (guard over disabled persons such as minors) with the child's own substantive rights. Thus Gault and its successors began extending constitutional protection to minors, a process continued and expanded by a series of cases in the educational context.[55]

Thomas A. Gunn addressed issues regarding changes in the basis of authority for the use of corporal punishment in a 1974 article in the Baylor Law Review. He reviewed common law doctrine which defined teacher's authority as a partial delegation of parental authority:

> During the early period of our educational system, the doctrine of in loco parentis was a viable theory upon which the use of corporal punishment was based. As long as the relationship

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[52]Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969).

[53]Goss v. Lopez, 419 U. S. 565 (1975).

[54]In re Gault, 387 U. S. 1 (1967).

[55]Phay, p. 5.

> between parent and teacher was consensual, the parent controlled the use of corporal punishment by selection of the person who would hold disciplinary control over his child. Also, the parent could terminate the selection if he became dissatisfied with the teacher. But, when a parent sends a child to school because the law so directs, he delegates no such power to the teacher. To suggest that the parent delegates unrestricted power, especially when he objects to corporal punishment, is a questionable proposition. A closer examination of the doctrine of in loco parentis is mandated in order to determine its current viability as a justification for corporal punishment.[56]

Gunn concluded that corporal punishment should not be classified as a special type of discipline requiring no constitutional safeguards. He concluded that in loco parentis was invalid as a basis of authority but argued for a true parental consent as a basis of authority for administration of corporal punishment in the public schools:

> The doctrine of in loco parentis has been the traditional justification for granting school authorities the right to inflict physical punishment on students within their tutelage. However valid the concept of in loco parentis may have once been, such validity has now ceased. No longer should a Latin phrase continue to vest such broad discretion in school authorities. The recognition that parents are possessed of a fundamental right, and indeed an obligation, to bring up their children as they see fit, mandates that parental rights take precedence over a doctrine that is no longer viable. In order to insure that parental rights to control children are protected in the area of corporal punishment, such physical punishment should not be administered without prior parental consent. Only the requirement of parental

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[56]Thomas A. Gunn, "In Loco Parentis and Due Process: Should These Doctrines Apply to Corporal Punishment?", Baylor Law Review 26, 679 (1974).

approval prior to the infliction of corporal can completely guarantee the fundamental rights of parents to direct the upbringing of their children.[57]

Case law has established some procedural protections in the administration of corporal punishment but has moved even further from the parental consent orientation.

Cynthia Denenholz Sweeney in a study of substantive issues involving corporal punishment in public schools reviewed the doctrine of in loco parentis as a basis for the teacher's right to administer corporal punishment; parents delegated part of their right to discipline to the school. She demonstrated changes in this voluntary delegation of authority to punish children in a public school:

> The justification for the imposition of corporal punishment, however, has shifted from the doctrine of in loco parentis to a view more in line with modern compulsory education law: to maintain group discipline and educate the schoolchild properly, the state itself may impose reasonable corporal punishment. The infliction of physical punishment also may be based upon parental consent or upon statutory authority. Most states statutorily authorize the teacher or principal to administer moderate corporal punishment, at least in certain situations.[58]

This study emphasized the changing bases of authority for administration of corporal punishment in public schools.

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[57]Ibid., p. 685.

[58]Cynthia Denenholz Sweeney, "Corporal Punishment in Public Schools: A Violation of Substantive Due Process?" The Hastings Law Journal 33, 1247 May 1982.

Sweeney argued that by asserting that students retain their rights while at school, Tinker[59] and Goss[60] established that there are constitutional limits to school officials' authority to administer discipline.[61]

Hogan and Schwartz in their study of "The Fourth Amendment and the Public Schools" demonstrate how public schools are not exempt from the fourth amendment because of the in loco parentis authority over school children. The determination of the standard of reasonableness depends on the balancing process which requires a balancing of the need to search against the invasion which the search entails. The authors concluded:

> The following general conclusions emerge from this study. First, the traditional view, that the teacher or school administrator is a "quasi-parent" (in loco parentis) is inappropriate for the modern, compulsory public school context. School officials represent the state, and not the student's parents, when conducting a search, and therefore they cannot claim parental immunity form the fourth amendment. Second, the potential harm to the entire academic community from such unsettling elements as narcotics and weapons in the hands of juveniles requires some easing of the fourth amendment's search restrictions. Yet, a school search must always be reasonable, that is, it must be "justified as its inception" and "permissible in its scope." Finally, state courts that want to require a more demanding standard for school searches may still do so but must base their decisions on state

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[59]Tinker v. Des Moines Independent School District, 393 U. S. 503 (1969).

[60]Goss v. Lopez, 419 U. S. 565 (1975).

[61]Sweeney, p. 1251.

constitutions and statues, and not purport to apply the Constitution.[62]

Hirschberger, in A Study of The Development of The In Loco Parentis Doctrine, Its Application and Emerging Trends (1971) concluded that the judicial interpretation of the concept of in loco parentis has evolved into the process by which the courts control the activities and the development of the American educational process.[63]

Two of Hirschberger's conclusions have significance for this study:

> The concept, in loco parentis, appears to have been extended to the nature and authority of the school itself in legal contemplation. American courts evaluate the legality of school board rules and regulations which govern students in the light of the in loco parentis functions of the school. As the school board is the legal arm of the State in the educational process, court interpretation of its in loco parentis authority has blended with the in loco parentis authority of the state, parens patriaee. The courts of the United States at both the state and federal levels have consciously guarded against the unlawful extension of the in loco parentis authority of the school as a creature of the State into the area of parental control of the child.[64]

Giesselmann, in his study In Loco Parentis and Its Application To The School Program: A Legal Guide for Administrators, focused on legal concepts and litigation

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[62]John C. Hogan and Mortimer D. Schwartz, "The Fourth Amendment and The Public Schools," Whittier Law Review, 7,2 (Spring, 1985), p. 547.

[63]Hirschberger, p. 246.

[64]Ibid., pp. 250-251.

concerning student-administrator relationships relative to student governance and discipline and student care and safety. His principal findings which related to student governance and discipline were:

> 1. The phrase in loco parentis describes the position of the school officials when acting in the place of parents concerning student governance and discipline and student care and safety while the pupil is under the jurisdiction of the school.
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> 2. Former perceptions concerning the in loco parentis positions of school officials relative to student governance and discipline have been replaced by a current judicial interpretation which considers the school administrator as an agent of state government. The following legal parameters, thus, relate to the exercise of administrative authority concerning student governance and discipline: (1) actions must be based upon maintenance within the school of a proper atmosphere for learning; (2) rules, regulations, and all administrative procedures concerning student governance and discipline must demonstrate recognition of student constitutional rights and related student responsibilities; (3) substantive and procedural due process must be afforded all students in the school; and (4) curtailment of student rights must be based upon proof that specific exercises of such rights will materially interfere with or substantially disrupt maintenance within the school of a proper atmosphere for learning.
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> 3. Subject to the above legal parameters, school officials have both the right and duty under in loco parentis to regulate and control student conduct within the school environment.[65]

Roy E. Howarth, writing in Phi Delta Kappa in 1972, reflected concern about denying the traditional prerogative of in loco parentis and "the forced shift in teacher role

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[65]Giesselmann, pp. 232-233.

from in loco parentis to something resembling a quasi-legal dossier producer."[66] A section of this article is included to reflect the types of concerns that educators and administrators voiced concerning the changing bases of authority in public schools:

> I submit that not a small part of teacher militancy is directly attributable to the marginal legal position that the teacher now occupies in the public schools. He no longer may identify himself with in loco parentis role in a given community without fear of recrimination from a parent who, under the auspices of the ACLU or some such group, will prosecute him for violation of some particular right. Traditional breaches of discipline which required only a short conference or even a detention period after school have been reinterpreted as meddlesome and repressive. It is interesting to note how language concerning student behavior has changed. One speaks today not of copying from another source, but of plagiarism and copyright laws; not of gossip and disrespect, but of libel and slander; not of violating school rules, but of trespassing and vandalism; not of conference and detention, but of hearing, misdemeanor, and felony; not of suspension or, in the extreme, expulsion, but of judgement, suit, and injunction; not of a "rumble," but of disturbing the peace or inciting to riot. These terms, indeed, reflect the real shift in student-teacher relationships that has been imposed upon the schools by the legal-minded and which work to destroy professional responsibility for educating the whole child as it has been traditionally understood.
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> The solutions to the above problem - if there are solutions - must be found in a new evaluation of the in loco parentis concept. As a parent, I expect of the school some help in educating my child in more than just intellectual ways. As a teacher, I question my obligation to teach the "whole child" in the light of today's litigation. Perhaps the legal-minded will find a way to define

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[66] Roy E. Howarth, "On The Decline of In Loco Parentis," Phi Delta Kappan, 53, 10 (June, 1972), p. 627).

> the real quality of adolescence that they so desire to protect by placing hedges about school prerogatives. They, themselves, certainly must have sprung from the head of Solomon, uncorrupted by the evils of American education, to have seen so clearly how youth might be reared exclusively according to the prescriptions of constitutional law.[67]

The late 1960's and the 1970's brought dramatic change in students rights. The American Civil Liberties Union provided students with a view of in loco parentis:

> School officials often try to justify their interference in the students' private lives on the grounds that they are empowered to act in loco parentis. In other words, they say that parents, simply by sending their children to school, delegate their power to control the children's conduct to school officials, who can then act in place of parent.[68]

E. Summary

The review of the literature demonstrates that the concept of in loco parentis had as its basis early Roman law. This law emphasized that parents had a right and a responsibility to raise their children, to chastise them when necessary and to provide for their future in terms of property and succession. The right of the parent to delegate his authority led to the delegation of parental rights to tutors or schoolmasters and became allied with the right of punishment.

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[67] Ibid, p. 628.

[68] Alan H. Levine and Eve Cary, The Rights of Students - The Basic ACLU Guide to A Students Rights (New York: Avon Books, 1977), p. 12.

English common law emphasized three duties of parents toward legitimate children: maintenance, protection and education. Blackstone's use of the term loco parentis appears to be the legal foundation of the in loco parentis concept of the teacher-pupil relationships in the law.

Case law in the United States demonstrated the in loco parentis concept as it applied to American public elementary and secondary schools.

Early case law gave school masters and teachers great discretionary power in the infliction of punishment upon their pupils. School masters and teachers were not held criminally responsible unless there was permanent injury to the child or proof of gratification of evil passions of the teacher.

Later case law expressed a more enlightened view in regard to the relationship between parents and those standing in their place and children. The Courts held that the reasonableness of, and necessity for punishment is to be determined by a jury considering the circumstances of each case.

CHAPTER III

LEGAL AND HISTORICAL DEVELOPMENT OF CONSTITUTIONALLY PROTECTED RIGHTS OF STUDENTS

Its Impact and *In Loco Parentis*

A. Introduction

Elementary and secondary public school administration changed dramatically in the last twenty years. Administration of American public elementary and secondary schools changed as the bases of authority changed. The concept of *in loco parentis* diminished as a source of authority in public schools as students were extended constitutionally protected rights. States were forced to examine the hierarchy of the bases of authority with constitutionally protected rights of students taking precedence over state mandates in education. Dr. Joseph Bryson and Elizabeth Detty discussed how the federal courts got involved in issues determining jurisdiction in education:

> ...two principal ways through which federal courts obtain jurisdiction in litigation involving public education: (1) alleged violation of constitutionally protected right, privilege, or immunity of an individual; and (2) validity questions of state

or federal statutes under the United States Constitution.[1]

What are some of the significant changes that took place in the society and how did the Supreme Court reflect and sometimes serve as the catalyst for political and societal change? A major influence changing public school administration was the extension of constitutional rights to students. This can be seen more clearly by looking at the substantive issues which resulted in the extension of various constitutional rights and at the extension of procedural protections. Prior to 1969, public school students had no constitutionally protected rights.

This chapter focuses on two selected influences in the society: the Civil Rights Movement and the Student Protest Movement. Numerous other major changes in the society influenced the direction of the law e.g. immigration, growth of technology, population explosion, and World War II. A study of these movements provides an understanding of the societal changes which influenced the courts. The Supreme Court initiated societal change through decisions which demanded great changes in society. These movements provide a framework for analyzing the changes in the bases of authority for public school administration.

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[1]Joseph E. Bryson and Elizabeth W. Detty, The Legal Aspects of Censorship of Public School Library and Instructional Materials (Charlottesville, Virginia: The Michie Company, 1982), p. 72.

B. Impact of the Civil Rights Movement

The Civil Rights Movement was a campaign for the equality of American Blacks during the 1950's and 1960's. The primary emphasis of the movement was to attain voting rights, access to public accomodations, and economic opportunities for Blacks.

In the early 1950's, Blacks in the United States remained second-class citizens with great disparity of opportunity in politics, education, economy, housing and public accomodations. World War II military service, urbanization of American Blacks, and migrations to Northern cities brought renewed concern for equal rights for Blacks.

> The 1950's began to bring a measure of prosperity and optimism to the industrially developed world and a massive amount of money was spent by the great powers, especially the U. S., first to contain the chaos left by the war, then to improve the general quality of life both at home and abroad.[2]

Factions in the country were ready for dramatic societal change. One of the areas of great concern was equality for Blacks. The courts had determined that schools could be "separate but equal." This did not satisfy Blacks because the schools were separate but inherently unequal.

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[2]Harold G. Shane "Global Developments And Educational Consequences," The Future of Education: Policy Issues and Challenges ed. Kathryn Cirincione-Coles (Beverly Hills, California: Sage Publications, Inc.), 1981, p. 261.

The concept of separate but equal had come from Plessy v. Ferguson[3] (1896) which had provided for "separate but equal schools which were more separate than equal.

Beginning in the 1930's the Supreme Court had begun to concern itself with this "separate but equal" doctrine, but in the area of higher education e.g. Sweatt v. Painter[4] (1950) and McLaurin v. Oklahoma State Regents For Higher Education[5] (1950). In May 1954 in Brown v. Board of Education[6], the Supreme Court declared separate schools inherently unequal.

> This historic Brown decision began with the resolve of Thurgood Marshall and his associates to challenge not just unequal facilities, but segregation itself. Their efforts materialized in the landmark decision which declared that black children in America shall no longer be forced to attend school separately from white children. For some, this decision represented the dawn of a new era, offering aspiration and challenge, hope and faith to some people, bringing despair and anxiety to others. Small wonder that this historic event has been hailed as the greatest piece of legislation in the U. S. Supreme Court's history; one author stated that on Monday, May 17, 1954, the Court did more for justice than all of its predecessors. Small wonder, too, that the decision precipitated charges that the Supreme Court had usurped the powers of the Congress and the States to amend the

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[3]Plessy v. Ferguson, La, 16 S Ct 1138, 163 U.S. 537, 41 L Ed 256.

[4]Sweatt v. Painter, 339 U.S. 629 (1950).

[5]McLaurin v. Oklahoma State Regents For Higher Education, 339 U.S. 637 (1950).

[6]Brown v. Board of Education of Topeka Kansas et al. 347 U. S. 483, 74 S. Ct. 686 (1954).

> Constitution, and warnings that the High Court must be curbed. Somewhere between these extremes was the viewpoint that if men of good will would look carefully at the logic, economics, sentiments, emotionalism, and morality involved in the question, there was a good chance that the great change envisaged in Brown could be brought about without racial conflict and with no decline in the effectiveness of the public school program. It is doubtful, however, that at the time of the Brown decision, this viewpoint was held by a wide spectrum of the American public.[7]

Jones summarizes the 1954 Brown decision:

> The Brown decision in 1954 was the culmination of a series of court battles to outlaw racial segregation in the public schools of the United States of America. It stands as a symbol of a new era of liberation movements in the United States. Indeed the Brown decision embodied the concept and spirit of the 14th Amendment adopted in 1868, which was destined to affect virtually every aspect of Americans' relationships with each other. The effects of Brown reached some one hundred sixty million people. There were eight million white and two and one-half million black children of school age in those states primarily affected by the decision. This meant that for about 40 per cent of all school children in the United States, future adjustment was at stake. Any decision which affects so large a group, 160 million people, is bound to have far-reaching social, political, and educational implications.[8]

In Brown II[9] in 1955 the Court ordered that Blacks be admitted to public schools on a racially non-discriminatory

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[7]Leon Jones. From Brown To Boston: Desegregation in Education 1954-1974. Volume I: Articles and Books. (Metuchen, N.J.: The Scarecrow Press, Inc., 1979), pp. 54-55.

[8]Ibid, p.7.

[9]Brown v. Board of Education of Topeka, Kansas et al. 349 U. S. 294 (1955).

basis "with all deliberate speed". State and local authorities adopted delaying schemes which ultimately resulted in intervention by the federal government through use of federal marshals and federal troops.

The Report of the President's Commission on Campus Unrest emphasized:

> ...that throughout the sixties, black college students played a central role in the civil rights movement. After four black students from North Carolina Agricultural and Technical College staged an historic sit-in at a segregated lunchcounter in Greensboro, North Carolina, in February 1960, the spread of sit-ins and other civil rights activities aroused the conscience of the nation and encouraged many students to express their support for civil rights through nonviolent direct action.[10]

Sit-ins, wade-ins, freedom rides, boycotts, demonstrations, marches began to gain public acceptance. Some experts date the culmination of the Civil Rights Movement with the march on Washington, August 28, 1963.

> Over two hundred thousand citizens massed in front of the Lincoln Monument in Washington, D. C., demonstrating to the nation that blacks were no longer willing to remain outside the American mainstream. Civil rights leader Martin Luther King, Jr. insisted that the time had come for American democratic idealism to become a reality for black Americans. This event influenced the passage of the Civil Rights Act of 1964, and may have had a pronounced effect on desegregation in education.[11]

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[10] The Report of the President's Commission on Campus Unrest (New York: Arno Press, 1970), P. 21.

[11] Jones, I, p. 21.

Jones discussed the impact of the Civil Rights Movement:

> Although the Civil Rights Movement had a positive effect on school desegregation efforts, it was not specifically aimed at ameliorating the plight of those in the public school system. Nevertheless, the Civil Rights Movement has been credited as having been foremost among the nation's out-of-court factions influencing school desegregation efforts. The effectiveness of the Civil Rights Movement, though, began to wane immediately following congressional passage of the Civil Rights Act of 1964. And the diminishing impact of the Civil Rights Movement was quickened by the untimely death of Malcolm X and, later, of Dr. Martin Luther King, Jr.
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> The Civil Rights Act of 1964 legitimized the entry of federal initiative in the school desegregation arena. But it took some time for the impact of the federal thrust to be reflected in the proportion of black students attending school with white students.[12]

In 1957 Congress passed the first civil rights law in eighty years. Martin Luther King, Jr. had been involved with a bus boycott in Montgomery, Alabama. In 1957 he organized the Southern Christian Leadership Conference (SCLC) in Atlanta. Its tactics were adapted from the Congress of Racial Equality (CORE) which had been founded in Chicago in 1942. King also helped organize the Student Non-Violent Coordinating Committee (SNCC). SNCC was formally organized at Shaw University in Raleigh. This organization selected and trained members to endure verbal and physical abuse without resorting to violence.

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[12]Ibid, p.3.

Economic pressures were brought to bear with the Civil Rights Act of 1964 with provisions against discrimination or forfeiture of federal funds.

The significance of the Civil Rights Movement for the purpose of this study is 1) By renewing the focus on civil rights, it made possible an atmosphere in which civil rights for students became a possibility; 2) Federal Court intervention in the implementation of desegregation in the public school gave the courts more involvement in what was happening in public schools; 3) The tactics employed in the Civil Rights Movement were used in the student protest movement.

C. The Student Protest Movement

The impact of student unrest on American society was pervasive. A sense of the power of the student protest movement is tantamount in the evaluation of the movement by the President's Commission on Campus Unrest:

> If this trend continues, if this crisis of understanding endures, the very survival of the nation will be threatened. A nation driven to use the weapons of war upon its youth is a nation on the edge of chaos. A nation that has lost the allegiance of part of its youth is a nation that has lost part of its future. A nation whose young have become intolerant of diversity, intolerant of the rest of its citizenry, and intolerant of all traditional values simply because they are traditional has no generation worthy or capable of assuming leadership in the years to come.[13]

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[13] The Report of the President's Commission on Campus Unrest, p. 5.

The Commission summarized the student protest movement as a "crisis of understanding" focused on three major questions: racial injustice, war, and the university itself. The Commission reviewed America's history of common values, sympathies and dedication to a system of government which protects diversity and emphasized the "grave danger of losing what is common among us through growing intolerance of opposing views on issues and of diversity itself".[14]

> A "new" culture is emerging primarily among students. Membership is often manifested by differences in dress and life style. Most of its members have high ideals and great fears. They stress the need for humanity, equality, and the sacredness of life. They fear that nuclear war will make them the last generation in history. They see their elders as entrapped by materialism and competition, and as prisoners of outdated social forms. They believe their own country has lost its sense of human purpose. They see the Indochina war as an onslaught by a technological giant upon the peasant people of a small, harmless, and backward nation. The war is seen as draining resources from the urgent needs of social and racial justice. They argue that we are the first nation with sufficient resources to create not only decent lives for some, but a decent society for all, and that we are failing to do so. They feel they must remake America in its own image.
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> But among the members of this new student culture, there is a growing lack of tolerance, a growing insistence that their own views must govern, an impatience with the slow procedures of liberal democracy, a growing denial of the humanity and good will of those who urge patience and restraint, and particularly of those whose duty it is to enforce the law. A small number of students have turned to violence; an increasing number, not terrorists themselves, would not turn even arsonists and bombers over to law enforcement officials.

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[14] Ibid, p.4.

> At the same time, many Americans have reacted to this emerging culture with an intolerance of their own. They reject not only that which is impatient, unrestrained, and intolerant in the new culture of the young, but even that which is good. Worse, they reject the individual members of the student culture themselves. Distinctive dress alone is enough to draw insult and abuse. Increasing numbers of citizens believe that students who dissent or protest-even those who protest peacefully-deserve to be treated harshly. Some even say that when dissenters are killed, they have brought death upon themselves. Less and less do students and the larger community seek to understand or respect the viewpoint and motivations of others.[15]

Howard Becker emphasized that we cannot understand a complex event involving many groups by analyzing the origins of the behavior of just one group. Understanding the phenomena of campus unrest in the 1960's is a complex problem with numerous bases and far reaching implications. Becker looked at the problem of the campus power struggle in 1970 and stated:

> The troubles have been building for a long time, at least since the end of World War II when the college population began to swell with the increasing proportion of the college-age group who went to college. The change in numbers, and the change in the kinds of people recruited as students and faculty, broke down existing accommodative patterns on many campuses. Veterans refused to wear beanies and abide by other hallowed campus traditions which new faculty and administrators were just as glad to give up. Faculty, whose bargaining position improved with every jump in the college population and in available research funds, refused to accept what they now came to see as an ill-paid, subservient and degraded position. They demanded and got better. Well-established patterns of cooperation between deans and presidents, on the one hand, and

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[15]Ibid., pp. 4-5.

> campus leaders in the student government and in the informal consortia of fraternities that often ran them, on the other, eroded as student numbers increased beyond what that system could successfully contain. Faculty and administration involvement in defense research angered students whose politics questioned the morality of that research. None of these things happened in a day. Together, they produced a situation in which a lot of people were unhappy about a lot of things.[16]

The President's Commission On Campus Unrest, in examining the background of student protest, pointed out that student discontent in America did not begin at Berkeley in 1964, or with the civil rights movement in the early 1960's:

> The history of American colleges during the early 19th century is filled with incidents of disorder, turmoil, and riot. These disturbances generally arose over poor food, primitive living conditions, and harsh regulations. Even today, such traditional complaints still spark many more campus protests than is generally realized. But though 19th century campus turbulence occasionally reflected a rebellion against the dominant Puritan religious ethic of the colleges of the time, student discontent here, unlike that in Europe, was largely apolitical.
>
> This pattern began to change during the early years of the 20th century, when the first important radical political movement among American college students-the Intercollegiate Socialist Society-emerged. When the ISS flourished, it had more members, measured as a proportion of the total student population, than the Students for a Democratic Society (SDS) had in the late 1960's. During the 1920's, there were campus protests against ROTC, denunciations of the curriculum for its alleged support of the established system, and attacks on America's "imperialistic" foreign

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[16]Howard S. Becker, ed. Campus Power Struggle (n.p.: Transaction Books, 1970), pp. 5-6.

> policy. During the Depression, there was still greater student discontent. Polls taken during the 1930's showed that a quarter of college students were sympathetic to socialism and that almost 40 per cent said they would refuse to take part in war. There were many student strikes against war, a few disruptions, and some expulsions.
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> Thus, it is not so much the unrest of the past half-dozen years that is exceptional as it is the quiet of the 20 years which preceded them. From the early 1940's to the early 1960's, American colleges and universities were uncharacteristically calm, radical student movements were almost non-existent, and disruptions were rare. The existence of this "silent generation" was in part a reflection of the Cold War. But as the tensions of the Cold War lessened, students felt less obliged to defend Western democracy and more free to take a critical took at their own society. Once again the American campus became a center of protest.[17]

The report goes on to state that reemerging campus activism was reformist in its aims and nonviolent in its tactics; it pursued its goals by means of moral and political persuasion. Obviously it did not persist in this form. In the autumn of 1964 a critical series of events at the University of California at Berkeley transformed campus activism. The Berkeley revolt did not explode in a vaccum; it was preceded by a chain of events during the late 1950's and early 1960's which helped to revive campus activism. The most important development was the civil rights movement. The peace movement, based on an abhorrence of nuclear weapons, was another important element in the

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[17] The Report of the President's Commission on Campus Unrest, pp. 20-21.

background of student activism.[18]

The events at Berkeley in the autumn of 1964 "defined an authentic political invention-a new and complex mixture of issues, tactics, emotions, and setting-that became the prototype for student protest throughout the decade".[19]

In brief, the events at Berkeley were these: In the summer of 1964, the university administration began enforcing an old rule which prohibited political groups from collecting money or soliciting memberships on campus. Until then, such activity had been allowed in one area at the edge of the campus. Campus activists found themselves deprived of their familiar turf. Incensed, they decided to violate the new prohibition, and university officials summarily suspended eight of them.

On October 1, campus police arrested a nonstudent activist for trespassing. When they attempted to remove him in a campus police car, students spontaneously formed a sit-in which prevented the car and the occupants from moving for 32 hours. The crowd broke up when the university agreed not to press charges. For the next two months, the issue of what political activity would be permitted on campus remained unsettled. The matter of university discipline was also unsettled. After a series of hearings,

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[18]Ibid, pp. 21-22.

[19]Ibid, p. 22.

the university announced that six of the eight suspended students would be penalized only by suspension up to that time, and the other two would be placed on probation for the remainder of the semester. A week later, the same two students were informed that new disciplinary actions had been initiated because of their activities on October 1.

After Thanksgiving vacation, the protest resumed. Leaders of the Free Speech Movement (FSM), which was formed by campus groups of all political persuasions to defend the right to organize on campus, began a large, two-day sit-in at the administration building. The sit-in came to an end when Governor Edmund G. Brown called in the police; hundreds were arrested and there were many charges of police brutality.

Before the police intervention, the FSM actions were supported by a small fraction of the Berkeley student population-perhaps a total of 2,500. The police action and mass arrests mobilized huge numbers of students and faculty in support of the FSM goals. Classes and other activities came to a halt in an unprecedented strike against the university.

In many respects, the Free Speech Movement succeeded. By January, the Chancellor had taken a "leave of absence," and the rules governing student political activity on campus had been liberalized. The campus slowly returned to a normal routine. Beneath the appearance of normalcy, some

things were no longer the same. The happenings at Berkeley had altered the character of American student activism in a fundamental way.[20]

Mario Savio was the leader of the Free Speech Movement on the Berkeley campus. In an interview with a New York Times Magazine correspondent Savio stated:

> It is a distortion, and too bad, that the university does not stand apart from the society as it is. It would be good to return to an almost totally autonomous body of scholars and students. But what we have now is that the Pentagon, the aircraft companies, the farm interests and their representatives in the Regents consider the university as a public utility, one of the resources they can look on as part of their businesses.[21]

The most distinctive aspect of the Berkeley invention, according to the President's commission was its success in combining two impulses that had been separate in student disruption:

> The high spirits and defiance of authority that had characterized the traditional school riot were now joined to youthful idealism and to social objectives of the highest importance.[22]

This intense feeling and vigorous political activism provoked reactions and overreactions that promised to keep the whole movement alive.

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[20] Ibid, pp. 23-24.

[21] New York Times Magazine, February 14, 1965, p. 89.

[22] The Report of the President's Commission on Campus Unrest, p. 28.

A New York Times Magazine article emphasized the interplay of the various characteristic influences of the 1960's. Among these are prosperity, the baby boom, alienation, and drug culture:

> A similar mood of irrationality, of vaporous but paralyzing apprehension, stalks all our institutions in a time of unmatched material prosperity and individual well-being. Young people, in particular, study the unemployment statistics and decide that society is in a conspiracy to provide security for the older generation at the expense of the youngsters outside waiting to get in. Education is the magic carpet over the hurdles that make the dropout the shutout in our society. But, even at this most distinguished of universities, bigness robs many students of individual dignity or purpose. This feeling helps explain the spread of drug addiction and senseless crime among many well-to-do youngsters. All are part of an alienation that turns even affluence and security into worthless prizes.[23]

Seymour L. Halleck in the article "Hypotheses of Student Unrest" emphasized the diversity of explanations of student unrest in order to demonstrate the intellectual futility of searching for simple explanations of a highly complex phenomena. He categorized the various hypotheses of student unrest: critical hypotheses, sympathetic and neutral. Critical hypotheses imply that something is wrong with those students who protest or withdraw:

. Permissiveness Hypothesis - student unrest is a result of too much permissiveness in rearing children.

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[23] New York Times Magazine, February 14, 1965, P. 91.

- Responsibility Hypothesis - youth have become unwilling to assume responsibility for their own behavior.
- Affluence Hypothesis - affluence creates a sense of restlessness, boredom and meaninglessness in youth.

Hypotheses which put the student in a favorable light he termed sympathetic:

- Two Armed Camps Hypothesis - the world is divided into two large camps which compete with each other idealogically, politically and militarily.
- War in Vietnam Hypothesis - the Vietnam conflict has been a major factor influencing students.
- Deterioration in the Quality of Life Hypothesis - overpopulation, mass production, anonymity, overcrowding, pollution are demonstrative of a deterioration in the quality of life and student unrest is the response to this denial of a way of life.
- Political Hopelessness Hypothesis - mass society is immutable to change.
- Civil Rights Hypothesis - the Civil Rights Movement made students aware of historical injustice and served as a training ground for radicalism.

Neutral hypotheses reside in changes in our highly complex society:

- The Technology Hypothesis - rapidly expanding technology creates an atmosphere in which past,

present and future lose their inter-relatedness.

. The Media Hypothesis - media influences the character structure of youth by prematurely confronting them with the harsh truths and realities of life.

. The Overreliance on Scientism Hypothesis - the restless student takes the message of science, rationality and perfection too literally.

These hypotheses and others demonstrate the intellectual futility of searching for simple explanations of student unrest.[24]

These hypotheses demonstrate a variety of explanations for student unrest. The variety and scope of the explanations for student unrest demonstrate that there are no simple explanations. Critical hypotheses imply something is wrong with students who protest. Sympathetic hypothesis imply that something is wrong in the society. Neutral hypotheses emphasize the significance of change on students. These hypotheses viewed in their entirety demonstrate the complexity of the student unrest.

Student unrest in the society became a catalyst for change. The student protest movement was nationwide. It became a training ground for civil rights activists. It

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[24]Seymour L. Halleck, "Hypotheses of Student Unrest," Student Activism in America, ed. Julian Foster and Durevard Long (New York: William Morrow and Company, Inc.), 1970, pp. 105-122.

created more awareness in the society on individual rights and a better understanding of how to protect and defend those rights.

Certainly with the emphasis on First Amendment rights in the student protest movement it was just a matter of time before the issue became central in the public schools. Burnside v. Byars (1966) was an early inroad into constitutional rights for students. Students wore "freedom buttons" to school in Philadelphia, Mississippi. When an announcement was made to the entire student body that the buttons were not permitted, students defied the dictate and wore the buttons again. Given an option to remove the buttons or be sent home, several refused and were suspended. Three parents instituted injunctive proceedings against the school officials to enjoin them from enforcing the regulation on the grounds that it was unreasonable and abridged their children's First and Fourteenth Amendment freedom of speech. This case is significant because it recognized rights but stipulated that exercise of such rights could "not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school".[25]

This implicit extension of rights was soon to be clarified by the Supreme Court.

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[25]Burnside v. Byars, 363 F. 2d, 749.

In 1967 the Supreme Court extended constitutionally protected rights to juveniles in the case of Gerald Gault. The Court ruled that when juvenile court proceedings could result in incarceration of a minor, certain constitutional safeguards must be provided.[26]

With the student protest movement waxing strong at institutions such as Berkeley, University of Michigan, Tufts, Yale, Ohio State University, University of Kansas, University of Washington, University of Chicago, CCNY, University of Wisconsin, Stanford et al. it was inevitable that the first amendment right of freedom of expression for public school elementary and secondary students would be an issue to be resolved. The Supreme Court did not deal with this issue until Tinker v. Des Moines Independent Community School District (1969) when the Court determined that school officials do not possess absolute authority over their students. The Court extended constitutional rights to students when it stated:

> Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they must respect their obligations to the state.[27]

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[26]In re Gault, 387 U. S. 1, 18L. Ed. 2d 527, 87 S. Ct. 1428.

[27]Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 511, 89 S.Ct. 733, 21 L.Ed. 2d 740 (1969).

D. Diminishing Impact of In Loco Parentis in 1970's and 1980's

Constitutionally protected rights for students diminished the authority of *in loco parentis* doctrine in elementary and secondary public school administration. The diminishing authority of *in loco parentis* is demonstrated in a discussion of these ideas:

> Constitutional rights for students replaced *in loco parentis* as basis of authority with regard to specific rights.
> Major Cases established and defined specific constitutional rights.
> Certain Legal Issues were identified in balancing necessary school authority with student's constitutional rights.
> a. Substantive Issues
> b. Procedural Issues
> Significant constitutional issues had to be resolved in order to determine the extent of students' constitutionally protected rights v. the concept of *in loco parentis*.
> Recent *in loco parentis* cases demonstrate a more "enlightened" rule.

1. Constitutional rights for students replaced *in loco parentis* as basis of authority with regard to specific rights.

a. First Amendment right of freedom of speech gave students the right to protest whereas *in loco parentis* administrative doctrine may or may not have allowed any dissent.[28] There were no inherent protections of freedom of speech for students.

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[28]Tinker v. Des Moines Independent Community School District 393 U.S. 503, 21 L. Ed. 2d at 731 (1969).

b. The Fourteenth Amendment application of rights to students required that a student could not be deprived of property without due process of law.[29] Since a student held a property interest in an education, this meant that a protection was established for students to keep them in school. In loco parentis public school administration had allowed administrators great liberty in representing the parent or representing an adult standard in keeping with the mores of the particular community.

c. The application of the Fourth Amendment's prohibition of unreasonable search and seizure of students attending public elementary and secondary schools limited the power of public school administrators. Justice White applied the Fourth Amendment prohibition on unreasonable searches and seizures to public school officials when he stated:

> In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, We hold that it does.[30]

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[29]Goss v. Lopez 419 U.S. 565, 95S.Ct. 729, 42 L. Ed. 725 (1975).

[30]New Jersey v. T.L.O., 105 S. Ct. at 739 (1985).

Justice White in delivering the opinion of the Court in New Jersey v. T.L.O. discussed the in loco parentis argument used by a few courts as a basis of authority for teachers and administrators as if their authority is that of the parent, not the State, and as if it were not subject to the limits of the Fourth Amendment. Justice White stated:

> Such reasoning is in tension with contemporary reality and the teachings of this court. We have held school officials subject to the commands of the First Amendment, see Tinker v. Des Moines Independent Community School District 393 U.S.503 (1969), and the Due Process Clause of the Fourteenth Amendment, see Goss v. Lopez, 419 U.S.565 (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.[31]

d. The very basis of authority of in loco parentis is called into question by the Court since the Court has recognized that "the concept of parental delegation" as a source of authority is not entirely "consonant with compulsory education laws."[32] This was emphasized again in New Jersey v. T.L.O. (1985).

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[31]New Jersey v. T.L.O., 105 S.Ct. 741.

[32]Ingraham v. Wright, 430 US 651, 662 (1977).

> Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather they act in furtherance of publicly mandated educational and disciplinary policies. See, e.g., the opinion in State ex rel. T.L.O., 94 N. J., at 343, 463 A. 2d, at 934, 940, describing the New Jersey statutes regulating school disciplinary policies and establishing the authority of school officials over their students. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the state, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.[33]

Mary Hatwood Futrell, President of the National Education Association, in a 1985 article discussed the T.L.O. ruling. The question in point was: Does the Fourth Amendment prohibition against unwarranted searches apply to students in the school setting? The Supreme Court clearly answered that students are protected against unreasonable searches and seizures by public school officials. School officials have a right to initiate a student search if they have "reasonable grounds."

> The key phrase here is "reasonable grounds." These words point to what I am convinced is the vital center of the T.L.O. ruling: the rejection of the in loco parentis doctrine. Had the Court affirmed this doctrine-which extends the full range of parental authority to school officials and lets these officials act in place of parents-it would have granted

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[33] New Jersey v. T.L.O., 105 S. Ct. 741.

> schools power that is not appropriately theirs. Public schools would have been immunized against the need to respect students' Fourth Amendment rights. In its ruling, the Court took special care to keep the line between parental authority and school authority firm and distinct. The in loco parentis doctrine, it argued, "is in tension with contemporary reality."[34]

Benjamin Sendor in assessing New Jersey v. T.L.O. stated that the ruling is significant not only for what the Supreme Court decided, but for what it did not decide. The Court decided that the Fourth Amendment limits the search power of all government officials from police officer to school authorities. The Court rejected the argument that school officials are shielded from the constraints of the Fourth Amendment because of their in loco parentis role. Applying the Fourth Amendment to searches by school authorities leads to the standards that govern these searches, viz. the need to balance the duty of school officials to maintain discipline against the privacy interests of students. The Court ruled that school officials do not need to obtain search warrants before searching students since the Fourth Amendment imposes on school

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[34]Mary Hatwood Futrell, "A Ruling For Learning," Education Week, February 20, 1985, p. 6.

administrators a lower standard of "reasonableness" to justify student searches. Unanswered questions for Sendor were:

> 1. Must a school official have "individualized suspicion" of misconduct by one or more students before searching those students? The court expressly declined to answer that question, but most courts that have used the "reasonableness" analysis adopted by the Supreme Court have imposed the requirement that school searches must result from suspicion about an individual student--not, say, about a group of students in general. What's more, the Supreme Court itself hinted in its decision that departures from that requirement should be the exception, not the rule.
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> 2. Does the standard of "reasonableness" apply to searches of lockers, desks, and other school property provided to store school supples? Most courts have dispensed with the reasonableness standard when school officials notify students in advance that such areas are subject to searches without warning or reason, but the Supreme Court expressly sidestepped this issue, too.
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> 3. Is a higher level of suspicion required to justify the controversial practice of strip searches? Most courts have required both a higher level of suspicion and a charge of serious misconduct, amounting to an emergency, to justify such an extraordinarily intrusive search, but the Supreme Court did not address the question.
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> 4. Is a higher level of suspicion required to justify a search in cooperation with or instigated by the police? Once again, the Supreme Court did not address the question, but some courts have required probable cause to justify such searches.

5. If a search violates the rule of reasonableness; will the evidence seized will be admissible in court? Will it be admissible in a school disciplinary hearing? Most courts have excluded such evidence from court proceedings but ruled it admissible in school disciplinary proceedings, yet the Supreme Court declined to rule on this issue.[35]

2. Major cases established and defined specific constitutional rights for students.

First amendment rights extended freedom of speech to students and gave them the right to freedom of expression providing they did not cause substantial disruption to the school. Fourteenth amendment rights brought due process protections for students. Fourth amendment rights brought protections concerning search and seizure.

These cases are discussed at length in Chapter IV, but are discussed here to show how initial landmark cases established constitutionally protected rights of junveniles i.e.

a. In re Gault (1967) defined constitutional safeguards which must be provided when juvenile court proceedings could result in a minor's incarceration in an institution.[36]

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[35]Benjamin Sendor, "That heralded high court ruling on student searches leaves crucial questions unanswered," American School Board Journal (April, 1985), pp. 24-25.

[36]In re Gault, 387 US 1, 18 L Ed 2d 527, 87 S. Ct. 1428.

b. Tinker v. Des Moines (1969) upheld the status of students as "persons" under the constitution.[37]

c. Goss v. Lopez (1975) expanded procedural rights of students faced with short-term suspensions by requiring notice and an opportunity to be heard prior to suspension.[38]

d. Baker v. Owen (1975) limited constitutional protection if students are afforded certain procedural safeguards prior to the administration of corporal punishment.[39]

e. Ingraham v. Wright (1977) upheld constitutionality of corporal punishment in schools,[40] but

f. New Jersey v. T.L.O. (1985) held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officials.[41]

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[37]Tinker V. Des Moines Indep. Community School Dist., 393 U. S. 503, 89 S. Ct. 733, 21 L Ed 2d at 740 (1969).

[38]Goss v. Lopez, 419 U. S. 565, 955, Ct. 729, 42 L. Ed 2d 725 (1975).

[39]Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), aff'd, 423 U.S. 907, 96 S.Ct. 210, 46 L.Ed. 2d 137 (1975).

[40]Ingraham v. Wright, 430 US 651, 662 (1977).

[41]New Jersey v. T.L.D., No 83-712 in 53 LW 4083.

3. Certain legal issues were identified in balancing necessary school authority with students' constitutional rights.

The most significant legal issues involve substantive and procedural due process. The substantive issues center on the definition of substantial disruption of or material interference with school activities and the definition of the property and the liberty interest. Procedural issues result in the clarification of procedural due process.

a. Substantive Issues

What constituted material and substantial interference with the operation of the school and the rights of other students became a significant issue once students were extended constitutionally protected rights. The state could not impair these rights without a compelling reason.

1) Tinker v. Des Moines (1969) held that it is unconstitutional to suspend students for the peaceful wearing of arm bands or for other symbolic expression of opinion unless it can be shown that material and substantial disruption of the school's routine did or would occur.[42]

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[42]Tinker v. Des Moines Indep. Community School Dist., 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

2) Grayned v. City of Rockford (1972) determined that limitations on expressive conduct must be narrowly tailored to to serve a substantial legitimate governmental interest. Substantial disruption must be imminent to validate an official ban on picketing, and the judgment as to the likelihood of disorder must be made on an individualized basis and not by means of broad classifications, especially not by means of classifications based on subject matter.[43]

b. Procedural Issues

The Fourteenth Amendment prohibits states from impairing a person's life, liberty, or property interest without due process of law. Once constitutionally protected rights were extended to students at issue was what the liberty and property interest were and what form the due process would take.

1) Property and Liberty Interests

(a) In Goss v. Lopez (1975) the Court determined that students have a

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[43]Grayned v. City of Rockford, 408 U. S. 104, 33 L Ed 2d 233, 92 S Ct 2295.

"property" interest in public education. Although there is no constitutional provision guaranteeing free public education, the fact that the State provides its children with such an education creates a constitutionally protected interest.

(b) In Goss v. Lopez (1975) the court determined that students have a "liberty" interest in their reputations. Since a suspension could damage that interest, due process protections will be provided.[44]

(c) In Baker v. Owen (1975) the court determined that

(1) although parents have a Fourteenth Amendment liberty interest in the control of the rearing and education of their children, this right does not preclude the state's use of reasonable punishment in order to achieve the legitimate goal of order in the schools;

(2) the child's Fourteenth Amendment liberty interest in freedom from

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[44]Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed 2d 725 (1975).

arbitrary infliction of even minimum corporal punishment mandates that some procedural safeguards be afforded to the child.[45]

2) Definition of Due Process

(a) In Goss v. Lopez (1975) the Court determined that suspensions ordered and statutes permitting students to be suspended without notice and hearing are unconstitutional. Students who are suspended for up to ten days must be accorded the following prior to the suspension: oral or written notice of charges, an explanation of the evidence if the student denies the charges, a hearing that includes an opportunity to present the student's view of the incident.[46]

(b) In Wood v. Strickland (1975) the Court determined that the administrator must act in accord with the settled law and with the constitutional rights of those affected by official action in order to be

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[45]Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), aff'd, 423 U.S. 907, 96 S.Ct. 210, 46 L.Ed. 2d 137 (1975).

[46]Goss v. Lopez, 419 U. S. 565, 95 S Ct 729, 42 L Ed 2d 725 (1975).

immune from a law suit for damages. If a school official acts out of ignorance or in disregard to settled law he/she may be sued.[47]

(c) Baker v. Owen (1975) the court affirmed that a statute allowing reasonable corporal punishment for the purpose of maintaining order in the schools is constitutional if it is administered in accordance with certain procedural protections viz.

(1) Except for acts of misconduct that are so anti-social or disruptive as to shock the conscience, corporal punishment may not be used unless the student has first been warned that the conduct for which he is being punished will occasion its use and unless other means have first been used to modify the student's behavior.

(2) A second teacher or other school

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[47]Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1974).

official must be present at the time the punishment is inflicted and must be informed, prior to its infliction and in the student's presence, of the reason for the punishment. This affords the student an informal opportunity to raise his objection to arbitrary punishment.

(3) The school official who administered the punishment must provide, on parental request, a written explanation of his/her reasons for punishment and the name of the second official who was present.[48]

4. Significant constitutional issues had to be resolved in order to determine the extent of students' constitutionally protected rights v. the concept of in loco parentis.

a. The most significant constitutional issue was whether or not juveniles would be afforded constitutional rights. Significant issues in the courts have been whether it was determined that school officials were acting parens patria-in the

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[48]Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), aff'd 423 U.S. 907, 96 S.Ct. 210, 46 L.Ed. 2d 137 1975).

interest of the state, acting in loco parentis-in the place of the parent or protecting a constitutional interest. Justice Fortas, in delivering the opinion of the Court In re Gault (1967) argued that juvenile proceedings were supposedly not adversarial, and that the state was proceeding as parens patriae:

> The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historical credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interest and the person of the child.[49]

Justice Fortas stated:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.[50]

b. Another significant constitutional issue was whether or not students would be afforded constitutional rights. Justice Fortas expressing the view of seven members of the Court in Tinker v. Des Moines Independent

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[49]In re Gault, 387 US 1, 18 L ed 2d 540, 87 S Ct 1428 (1967).

[50]Ibid., 541

School District (1969) stated:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State.[51]

Justice Potter Stewart concurred with the Tinker decision but expressed a reservation:

> I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.[52]

E. Summary

Changes in the society brought about changes in the bases of authority of elementary and secondary public school administration. The Civil Rights Movement and Student Protest Movement heightened the awareness of some in the society to individual rights. The media played a significant part in the societal change. Protest took place not just in major cities and at universities but came into the homes of millions of Americans thru media coverage. The emphasis on individual rights was pervasive.

The Civil Rights Movement in the 1950's and 1960's with its emphasis on voting rights, access to public

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[51] Tinker, op. cit 21 L Ed 2d 740.

[52] Ibid.

accomodations, and economic opportunities for Blacks brought a renewed focus on civil rights into the American mainstream. Desegregation of the schools brought increased Court involvement in the operation of public schools. Tactics employed in this movement were used by many in the student protest movement.

The Student Protest Movement focused on racial injustice, war, and the university. Campus activism brought a resurrgence of emphasis on first amendment rights. It was only a matter of time before this became a central issue in elementary and secondary public schools.

These movements brought about significant changes in the society. They set the tone for changes in attitudes in the Court concerning the rights of students. Landmark cases in the 1960's and 1970's established specific constitutionally protected rights of students. Even as the Court began to shift to a more conservative stance, the change in the underlying basis of authority had already been established. The Court was committed to the constitutional rights of students and decided limitations were placed on in loco parentis as a basis of authority in public schools.

CHAPTER IV

REVIEW OF SELECTED COURT DECISIONS ESTABLISHING CONSTITUTIONAL PROTECTED RIGHTS OF STUDENTS

A. Introduction

This chapter presents a review of landmark decisions and other significant court decisions which relate directly to the definition and interpretation of constitutional protected rights of students as they related to the first, fourth, and fourteenth amendments. The landmark United State Supreme Court decisions are reviewed because they clarify the changing definition of constitutional rights of students. An overview is presented for each category and specific facts and judicial decisions are given. Discussion of each case is presented as it pertains to the category to which it applies. Categories and cases are listed below:

B. Selected Cases Determining First Amendment Rights

Overview

Freedom of Expression
Burnside v. Byars (1966).

Tinker v. Des Moines (1969).

Pico v. Board of Education, Island Tree Union Free School District (1980).

Freedom of Assembly
Grayned v. City of Rockford (1972).

C. Selected Cases Determining Fourteenth Amendment Rights

Due Process Applications
In Re Gault (1967)
Goss v. Lopez (1975)
Baker v. Owen (1975)
Ingraham v. Wright (1977)

D. Selected Cases Determining Fourth Amendment Rights

Search and Seizure
Picha v. Wielgos (1976).
New Jersey v. T.L.O. (1985).

B. Selected Cases Determining First Amendment Rights

Overview

The United States Supreme Court has traditionally been reluctant to interfere in school matters related to the rights and responsibilities of students. A major reason for this orientation is the strong belief of the judiciary in the American tradition of local control over the schools.[1]

The flag saluting cases of the early forties were not to be followed by another landmark decision in student rights

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[1]Perry A. Zirkel, Ed., A Digest of Supreme Court Decisions Affecting Education (Bloomington, Indiana: Phi Delta Kappa, 1978), p. 32.

for 26 years.[2] The West Virginia case was important relative to early judicial recognition of the substantive due process rights of students.

Public educational institutions are not enclaves immune from First Amendment rights. These rights must be applied in light of the special characteristics of the school environment. School authorities are not exempt from the operation and limitations of the First Amendment.

The Courts, must balance First Amendment rights against the state's interest in preserving and protecting its educational process.[3]

The first amendment to the United States Constitution affords pervasive rights to citizens. The Supreme Court has extended these rights to students. Students in school, as well as out of school, are persons under the federal Constitution and possess fundamental constitutional rights.[4]

Students have the same rights and enjoy the same privileges as adults and do not shed them when they enter the school grounds. These rights are not necessarily coextensive with adults. The exercise of First Amendment

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[2]Minersville School District v. Gobitis, 310 U. S. 568 (1940). Reversed by West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1934).

[3]16A C.J.S. 467, p 510.

[4]16A C.J.S. 469, p. 513

rights may be circumscribed by reasonable rules and regulations which are necessary for the orderly administration of the school system. Thus, students must exercise their First Amendment rights without materially and substantially interfering with appropriate discipline in the operation of the school and must not collide with the rights of others.[5]

Freedom of Expression

This section focuses on judicial interpretations of students' rights to freedom of expression.

Burnside v. Byars

363F. 2d 744(1966)

Facts:

Several students at Booker T. Washington High School in Philadelphia, Mississippi wore "freedom buttons" to school which had been obtained from the Council of Federated Organizations. The buttons were circular, approximately 1½ inches in diameter with the words "One Man One Vote" around the perimeter and "SNCC" inscribed in the center. Mr. Montgomery Moore, Principal, announced to the entire student body that they were not permitted to wear such buttons in the school house or in their various classes since the buttons "didn't have any bearing on their education, would cause commotion."[6]

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[5]16A C.J.S. 469, p. 514

[6]Burnside v. Byars, 363F. 2d, pp. 746-747.

Despite the announcement on September 21, 1964, three or four children appeared at school wearing the button. All had an opportunity to remove the buttons and remain at school but three children elected to keep them and return home. The following day all returned without their buttons. On September 24, 1964 a teacher reported that 30 or 40 children were displaying the buttons and that it was causing a commotion. Mr. Moore then assembled the children in his office, reminded them of the announcement and gave them a choice of removing the buttons or being sent home. The great majority elected to return home and Mr. Moore suspended them for one week. Mr. Moore delivered a letter to each parent concerning the suspension, and all parents agreed to cooperate except Mrs. Burnside, Mrs. English and Mrs. Morris.

Whereupon injunctive proceedings were instituted against the school officials to enjoin them from enforcing the regulation. Appellants contended that the regulation forbidding "freedom buttons" on school property was an unreasonable rule which abridged their children's First and Fourteenth Amendment freedom of speech. Appellees contended that the regulation was reasonable in maintaining proper discipline in the school and that the District Court did not abuse its discretion in declining to issue a preliminary injunction.

Decision:

The Fifth Circuit Court of Appeals held that a student may express opinions on controversial issues in the classroom, cafeteria, playing field, or any other place, as long as the exercise of such rights does "not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[7]

Discussion:

The appellate court invalidated a regulation that prohibited students from wearing freedom buttons while attending school. The court concluded that the wearing of these buttons did not hamper the school in carrying out its regular schedule of activities. Nor were the rights of other students impaired. Only a mild state of curiosity was evident among the students. The court, noting that the right to communicate a matter of vital public concern is protected by the First Amendment, held that the students were merely exercising this right by wearing buttons to express an idea. In another case on the same day in the Fifth Circuit Court of Appeals, the court denied students this form of expression. The reason for the apparent reversal was that in Blackwell v. Issaquena County Board of Education[8] the button wearers cfreated disturbances within

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[7]Ibid., p. 749.

[8]Blackwell v. Issaquena County Board of Education 363F. 2d 749 (5th Cir. 1966).

the school by harrassing students who did not take part in this form of expression.

Thus, it appears that courts will sanction regulations that place constraints on students' freedom of expression but only in situations where disruption reasonably can be predicted as a result of the expression.[9]

Tinker v. Des Moines Indep. Community School District, 393 U. S. 503, 89 S. Ct. 733, 21L. Ed. 2d 731 (1969)

Facts:

As part of a plan formulated by a group of adults and students in Des Moines, Iowa, two public high school students and one junior high student, wore black armbands to their schools to publicize their objections to the hostilities in Vietnam and their support for a truce, despite the fact that they were aware that a few days previously school authorities had adopted a policy or regulation that any student wearing an armband to school would be asked to remove it and if he refused would be suspended until he returned without the armband. As a result these students, John F. Tinker, John's sister Mary Beth Tinker and Christopher Eckhardt, were all sent home and suspended from school until they could come back without their armbands. The petitioners, through their fathers, filed a complaint in the United State District

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[9]McCarthy and Cambron, pp. 262-263.

Court of the Southern District of Iowa, praying for an injunction restraining the school authorities from disciplining the petitioners, and seeking nominal charges. After an evidentiary hearing the District Court dismissed the complaint, upholding the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of discipline. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed without an opinion.

Decision:

The United State Supreme Court reversed and remanded. Justice Fortas expressed the view of seven members of the court that the wearing of armbands in the circumstances of the case was entirely divorced from actually or potentially disruptive conduct by those participating in it, and as such was akin to "pure speech" and entitled to comprehensive protection under the First Amendment, and that the school regulation prohibiting students from wearing armbands violated the students' rights of free speech under the First Amendment where there was no evidence that the authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school.

Discussion:

Justice Fortas made a clear assertion concerning the First Amendment rights of school children:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[10]

This clearly judicially recognized students' constitutional rights to freedom of speech and expression. This was the beginning of a new era in students' rights:

> Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect, just as they must themselves respect their obligations to the state.[11]

Pico v. Board of Educ., 474 F. Supp. 387 (E.D.N.Y. 1979), rev'd. and remanded, 638 F. 2d. 404 (sd Cir. 1980)

Facts:

Two school board members from the Island Tree Union Free School District attended a meeting of a conservative group Parents of New York United (PONYU) concerning objection able books used in the public schools. The books were labeled as anti-semitic, filthy and irrelevant. The Island Tree Union Free School board members checked the high school card catalog and located several of the objectionable books.

The school board appointed a committee of professionals to review the questionable books, but the recommendations of the appointed committee were not followed. Nine

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[10]Tinker v. Des Moines Indep. Community School District 393 U. S., at 506, 89S. Ct., at 737.

[11]Ibid., p. 511 or p. 740.

books were removed from the library and the classrooms. The school board then insisted that the nine books not be assigned as required or as optional reading, but could be discussed in class.

A class action suit was filed by students, parents, and friends of students alleging that students' First Amendment right was violated by the removal of the books.

Decision

The federal district court ruled that the school board had acted within the scope of power and had not violated the constitutional rights of students. On appeal, the second Circuit Court of Appeals acknowledged that substantial evidence suggested that the school board was politically and religiously motivated in removing the books. Board policies, insisted Justice Sifton, were "pretexts for the suppression of free speech."[12] Joseph Bryson points out in Censorship Of Public School Library And Instructional Material: "In reality, the book(s) conflicting ideology-shocking the conscience and jarring the emotions-issues never became part of the discussion."[13]

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[12]Pico v. Board of Educ. 638 F. 2d 404 (2d Cir. 1981).

[13]Joseph E. Bryson and Elizabeth W. Detty, The Legal Aspects Of Censorships Of Public School Library And Instructional Materials (Charlottesville, Virginia: The Michie Co. 1982), pp. 131-132.

The district court decision was reversed and the case remanded for trial, but the school board appealed the Second Circuit Court's decision to the United States Supreme Court. On June 25, 1982, the Supreme Court affirmed the Second Circuit Court of Appeals decision.

Discussion:

Thus, on June 25, 1982, the Supreme Court (in a five-four decision) acknowledged that school children not only have the right to First Amendment self-expression but also the First Amendment right to receive information and ideas. The Pico majority (Justice Brennan, Marshall, Stevens, Blackmun and White) were especially concerned with school board members who predicate policy on personal, political and religious ideology. The Pico minority (Justices Burger, Powell, O'Connor, and Rehnquist) acknowledged that school children have the right to First Amendment self-expression but would grant greater responsibility to school boards in selecting library materials.[14]

Freedom of Assembly

Peaceful demonstrations in public places, subject to reasonable regulation, are protected by the First Amendment. In the following case the Supreme Court considered the question of how to accomodate First Amendment rights with the special characteristics of the school environment.

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[14] Ibid., pp. 132-134.

Grayned v. City of Rockford
408 U.S. 104, 33L. Ed. 2d. 222, 92 S. Ct. 2294.

Facts:

Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford Illinois. Black students had first presented their grievances to school administrators. When the principal took no action on complaints, a public demonstration of protest was planned. On April 25, 1969, approximately 200 people-students, family members and friends gathered next to school grounds. Appellant Richard Grayned, whose brother and twin sisters attended the school, was part of this group. The demonstrators marched on a sidewalk about 100 feet from the school building which was set back from the street. Many carried signs summarizing the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights Negro counselors." Others made the "power to the people" sign with their upraised and clenched fists. Evidence regarding noise was contradictory.

Grayned was one of 40 police arrested. He was tried, convicted of violating the Rockford antipicketing ordinance which outlawed demonstrations near schools in session except peaceful labor picketing and the Rockford antinoise ordinance which prohibited disturbing a school session by willfully making a noise or diversion while on adjacent or

private grounds. Since Grayned challenged the constitutionality of each ordinance, he appealed to the Supreme Court of Illinois. He claimed the ordinances were invalid. The Illinois Supreme Court affirmed the conviction.[15]

Decision:

On appeal, the United State Supreme court reversed with respect to the antipicketing ordinance, but affirmed with respect to the antinoise ordinance. The Court held that the antipicketing ordinance violated the equal protection clause because it made an impermissible distinction between labor picketing and other peaceful picketing. The Court held that the antinoise ordinance was neither unconstitutionally vague nor was it overbroad in restricting First Amendment freedoms.

Justice Thurgood Marshall in an opinion expressing the views of seven members of the Court stated:

> Just as Tinker made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public."[16] But in each case, expressive activity may be prohibited if it 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'[17]

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[15]46 Ill 2d 492, 263 NE2d 866.

[16]Tinker v. Des Moines School District, 393 U.S., at 513, 21 L.Ed. 2d at 741.

[17]Grayned v. City of Rockford, 408 U.S. 104, 33 L Ed. 2d. 222, p. 233, 92 S. Ct. 2294.

Justice Marshall stated:

> Rockford's anti noise ordinance goes no further than Tinker says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights.[18]

Discussion:

Picketing involves expressive conduct within the protection of the First Amendment. Limitations on picketing must be narrowly tailored to serve a substantial legitimate governmental interest to be valid under the Fourteenth Amendment. Substantial disruption must be imminent to validate an official ban on picketing.

On June 26, 1972 the Supreme Court acknowledged the right of citizens to peaceful picketing on public grounds declaring the antipicketing ordinance in violation of the equal protection clause. At the same time the Court determined that the antinoise ordinance was constitutional since it protected the school from noisy demonstrations that disrupt but the antinoise ordinance did not impose a restriction on expressive activity.[19]

The Court was almost unanimous in its decision. Seven members (Marshall, Brennan, Stewart, White, Burger, Powell, and Rehnquist) agreed with the total decision. Justice

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[18]Ibid., p. 234.

[19]Ibid, pp. 234-235.

Harry A. Blackmun joined in the opinion as to the peaceful picketing and concurred in the result as to the antinoise ordinance. Justice William O. Douglas joined in the opinion as to the picketing but dissented as to the antinoise on the ground that the demonstrator could not constitutionally be convicted, because he was not noisy, boisterous or rowdy at the demonstration.

C. Selected Cases Determining Fourteenth Amendment Rights

Due Process Applications

Traditionally Due Process did not apply to public schools as it did to other agencies. The United States Supreme Court had been reluctant to interfere in school matters. That changed in the late sixties. The Gault decision in 1967, through not a school decision, opened the door to renewed interest by the Court in the rights and responsibilities of students. The Court proceeded to hand down nine decisions in this area in the next ten years.

Due process is a major limitation on the exercise of administrative authority to insure constitutional rights to all citizens. Two aspects of due process are: procedural concerns and substantive concerns.

The cases discussed below are significant because they represent a general expansion by the Court of procedural safeguards to various private liberty and property interests.

The Fourteenth Amendment to the Constitution of the United States provides that no state shall "deprive any person of life, liberty or property without due process of law...."[20] Cases discussed here make that "property" right apply to public education. The Fourteenth Amendment also provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[21] The Fourteenth Amendment requires that protection of the law be extended equally to all persons.[22]

In re Gault, 387 U.S. 1 (1967)

Facts:

A fifteen year old boy, Gerald Francis Gault, was taken into custody as a result of a complaint that he had made an obscene phone call. After several hearings at which the boy was not represented by legal counsel and was not allowed to confront the complaining witness, the juvenile court sentenced him to a maximum of six years in a state school for juvenile delinquents. An adult found guilty of the same act would have had a maximum penalty of two months imprisonment and a $50 fine. There was no

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[20]United States Constitution, Amendment XIV, Section 1.

[21]Ibid.

[22]Leroy J. Peterson, Richard A. Rossmiller, and Marlin M. Volz, The Law And Public School Operation, 2d ed. (New York: Harper & Row, Publishers, Inc., 1978), pp. 6-7.

provision for appeal of juvenile court decisions. The boy's parents challenged the validity of a state juvenile court statute which allows a child to be incarcerated yet denies him basic constitutional rights. The Superior court dismissed the petition and theSupreme Court of Arizona affirmed. On appeal, the Supreme Court of the United States reversed.[23]

Decision:

On May 15, 1967, Justice Abe Fortas delivered the opinion expressing the views of five members of the Court (Fortas, Douglas, Warren, Brennan, Marshall). Justice Hugo Black concurred but expressed the view that the procedure followed was invalid becuase it violated the Fifth and Sixth Amendments and not because it was "unfair." Justice Byron R. White concurred and joined the opinion except that he would not reach issues as to self-incrimination, confrontation and cross-examination. Justice John M. Harlan concurred in part and dissented in part stating that Juvenile Court proceedings must have the essential elements of fundamental fairness-notice, counsel, and a record-but that imposition of requirements regarding self-incrimination, confrontation, and cross-examination should be deferred. Justice Potter Stewart dissented on the ground

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[23]In re Gault, 387 US 1, 18 L Ed 2d 527, 87 S. Ct 1428.

that while a state must accord every person due process of law, the constitutional restrictions applicable to adversary criminal trials should not be applied to juvenile proceedings.

The court ruled that when juvenile court proceedings could result in the incarceration of a minor, certain constitutional safeguards must be provided:

1. timely and adequate written notice of charges must be given to the minor and his/her parents or guardian
2. parents or guardians must be informed of their right to legal counsel and if they are unable to afford a lawyer, counsel will be appointed by the court to represent them
3. the constitutional privilege against self incrimination applies to these proceedings
4. absent a valid confession, a child has a right to cross examine hostile witnesses and to present his/her own witnesses[24]

Discussion:

This landmark case marked the beginning of constitutional protected rights for juveniles. Though it was not a school case, per se, by extending constitutional protected rights to juveniles, it led the way for tremendous change in public school administration.

For the first time, amendments to the Constitution of the United States applied to those under, as well as over, the age of eighteen.

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[24]Zirkel, p. 37.

This case related directly to the Fourteenth and Fifth Amendments. Children faced with a loss of liberty must be afforded procedural safeguards required by the due process clause of the Fourteenth Amendment which protects citizens and, as a result of this case, juveniles against state action impairing life, liberty, or property without due process of law. The Fifth Amendment creates a right against self incrimination in criminal issues and this was extended to juvenile proceedings.

Goss v. Lopez,

419 US 565, 42L Ed 2d 725, 95SC+729

(1975)

Facts:

An Ohio statute empowered the principal of an Ohio public school to suspend a pupil for misconduct for up to ten days or to expel him; in either case the principal must notify the parents within twenty four hours and state the reasons for the action. Suspensions arose out of a period of widespread student unrest in the Columbus Public School System during February and March, 1971. In class action brought by Ohio public school students in the United States District Court for the Southern District of Ohio, the named plaintiffs alleged that they had been suspended from public high school in Columbus, Ohio, for up to ten days without a hearing. The action was brought against the Columbus Board of Education and various administrators of the school

system for deprivation of constitutional rights. The complaint sought a declaration that the Statute was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their right to an education without a hearing of any kind, in violation of the procedural due process clause of the Fourteenth Amendment. It also sought to enjoin public school officials from issuing future suspensions pursuant to the statute and to require them to remove references to past suspensions from the records of the students in question. A three-judge District Court granted the relief sought by the plaintiffs.

Decision:

On direct appeal to the United State Supreme Court, the Court affirmed. Justice Byron R. White expressed the view of five members of the court (White, Douglas, Brennan, Stewart, and Marshall) holding that the Ohio statute, insofar as it permitted up to ten days suspension without notice or hearing, either before or after the suspension, violated the due process clause and that each suspension was therefore invalid. Justices Powell, Burger, Blackmun, and Rehnquist dissented expressing the view that the majority decision opened avenues for judicial intervention in the operation of the public schools that may affect adversely the quality of education and that a student's interest in education is not infringed by a suspension within the limited period prescribed by Ohio law.

Two significant aspects of this decision involved explanation of students' property and liberty interest. Although there is no constitutional provision guaranteeing free public education, the fact that the state has provided its children with such an education creates a constitutionally protected interest. Justice White wrote that the authority possessed by the State to prescribe and enforce standards of conduct in its schools, although it is broad, must be exercised consistently with constitutional safeguards.

> Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[25]

The Due Process clause forbids arbitrary deprivations of liberty:

> If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.[26]

The Court, having determined that due process applies, went on to determine what process is due. Rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school were defined:

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[25]Goss v. Lopez, 42 L Ed 2d 734-735.

[26]Ibid., p. 735.

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[27]

There need be no delay between the notice and the subsequent hearing. Constitutional requirements may be met by an informal discussion which includes the necessary elements. Unless the student's continued presence in the school poses a threat to persons, property, or the academic program, the required procedures shall precede suspension. If it becomes necessary to remove a student immediately, the notice and hearing must follow within a reasonable time. Long suspensions or expulsions for the remainder of the school term or permanent expulsions may require more formal procedures.[28]

Discussion:

This decision had great impact on the role of the disciplinarian in a public school. No longer could he/she assume to be acting in loco parentis. This decision more clearly defined the adversarial role of the school administrator protecting the interests of the school v.s. the student having his/her own constitutionally protected

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[27] Ibid., p. 739.

[28] Ibid., pp. 739-740.

interests. In effect, this finished in loco parentis as a legal defense for school disciplinarians. In loco parentis continued to have meaning in some school settings, especially where a standard of safety was concerned, but became archaic in matters of school discipline as a result of this decision.

Baker v. Owen,

395 F. Supp. 294 (1975)

Facts:

A sixth grade student, Russell Carl Baker, and his mother, Virginia Baker, brought and action against a school principal and others, claiming that their constitutional rights were violated when the student was given corporal punishment by his teacher over his mother's objections and without procedural due process. The student, Russell Carl Baker, was paddled on December 6, 1973 for allegedly violating his teacher's announced rule against throwing kickballs except during designated play periods. Mrs. Baker had previously requested of the principal and certain teachers that her son not be corporally punished, because she opposed it on principle. Nevertheless, shortly after his alleged misconduct her son received two licks in the presence of another teacher and in the view of other students.

Mrs. Baker alleged that the administration of corporal punishment after her objections violated her parental right

to determine disciplinary methods for her child. Russell Carl charged that the circumstances in which the punishment was administered violated his right to procedural due process and that the punishment in this instance was cruel and unusual. They challenged the constitutionality of North Carolina General Statues§ 115-146 claiming it was unconstitutional insofar as it allowed corporal punishment over parental objection and absent adequate procedural safeguards.[29]

A Three-Judge District Court, Craven, Circuit Judge, held:

> We hold that fourteenth amendment liberty embraces the right of parents generally to control means of discipline of their children, but that the state has a countervailing interest in the maintenance of order in the schools, in this case sufficient to sustain the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes. We also hold that teachers and school officials must accord to students minimal procedural due process in the course of inflicting such punishment. We further hold that the spanking of Russell Carl in this case did not amount to cruel and unusual punishment[30]

The United States District Court acknowledged the constitutional stature of parental rights:

> We agree with Mrs. Baker that the fourteenth amendment concept of liberty embraces the right of a parent to determine and choose between means of discipline of children, but few constitutional rights are absolute. Our inquiry does not end with

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[29]Baker v. Owen 395 F. Supp. 296 (1975).

[30]Ibid.

> the conclusion that Mrs. Baker has such a right but we must go on to consider the nature and extent of the state's interest in school discipline. Sometimes the rights of citizens that find protection within the Constitution are overborne by a countervailing and greater state interest. We think that is the situation here-whether the test to be applied is that of a compelling state interest or simply of a rational and legitimate interest in maintaining order and discipline in the public schools. We embark upon the traditional analysis, aware that to apply the compelling interest test merely encapsulates the result and that "no state law has ever satisfied this seemingly insurmountable standard."[31]

The court rejected Mrs. Baker's suggestion that this right is fundamental, and that the state can punish her child corporally only if it shows a compelling interest:

> We do not read Meyer and Pierce to enshrine parental rights so high in the hierarchy of constitutional values. In each case the parental right prevailed not because the Court termed it fundamental and the state's interest uncompelling, but because the Court considered the state's action to be arbitrary, without reasonable relation to an end legitimately within its power.[32]

In regard to Mrs. Baker's claim that corporal punishment is unconstitutional, the Court ruled:

> So long as the force used is reasonable-and that is all that the statute here allows-school officials are free to employ corporal punishment for disciplinary purposes until in the exercise of their own professional judgment, or in response to concerted pressure from opposing parents, they decide that its harm outweighs its utility.[33]

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[31] Ibid., p. 299.

[32] Ibid.

[33] Ibid., p. 301

The Court also determined that the punishment administered was not cruel and unusual.

The Court assumed the task of fashioning due process procedures in order to accomodate "the child's interest and the state's unquestioned interest in effective discipline":

> First, except for those acts of misconduct which are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed before-hand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means-keeping after school, assigning extra work, or some other punishment-will insure that the child has clear notice that certain behavior subjects him to physical punishment. Second, a teacher or principal must punish corporally in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; the requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment. And finally, an official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.[34]

Ingraham v. Wright
430 U.S. 651, 51 L.Ed 2d 711, 97 S.Ct. 1401

Facts:

Parents of two students in a Dade County, Florida junior high school instituted an action against certain

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[34]Ibid., pp. 302-303.

school officials alleging a violation of their Eighth and Fourteenth Amendment rights based on disciplinary paddling incidents. The plaintiffs sought damages and injunctive and declaratory relief, and their evidence indicated that pursuant to Florida law, they were subject to disciplinary paddling without prior notice and a hearing, and that the paddlings were so severe as to keep one of them out of school for eleven days as to deprive the other of the full use of his arm for a week. The District Court dismissed the complaint on the grounds that there was no constitutional basis for relief. A panel of the United States Court of Appeals for the Fifth Circuit originally voted to reverse (498 F 2d 248), but upon rehearing, the Court of Appeals vacated its prior judgement and affirmed the District Court's judgement (525 F2d 909). On certiorari, the United State Supreme Court affirmed.

Decision:

Justice Lewis F. Powell delivered the opinion of the Court. The Court held that the disciplinary paddling of public school students did not constitute cruel and unusual punishment in violation of the Eighth Amendment since 1) the Eighth Amendment was designed to protect those convicted of crime and did not apply to disciplinary punishment of public school children and since 2) extension of the cruel and unusual punishment clause to ban the paddling of school children was not justified because public schools

were open to public scrutiny and were supervised by the community, and because teachers and administrators were subject to the legal restraints of the common law whereby punishment exceeding that which was reasonably necessary could result in both civil and criminal liability under state law. The Court also held that though corporal punishment in public schools implicated a constitutionally protected liberty interest under the due process clause of the Fourteenth Amendment, nevertheless the due process clause did not require prior notice and a hearing before the disciplinary paddling of a student since 1) the traditional common law remedies under state law were fully adequate to afford due process, and 2) even if the need for advance procedural safeguards were clear, imposing a constitutional requirement of prior notice and a hearing would significantly burden the use of corporal punishment as a discipline measure and would entail an intrusion into an area of primary educational responsibility, whereas the risk of error that might result in violation of substantive was regarded as minimal in view of the law incidence of abuse of corporal punishment by school authorities, the openness of the public schools and the common law safeguards.

Discussion:

It is of significance to this study that Justice Powell in delivering the opinion of the Court stated:

> Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view-more consonant with compulsory education laws-that the State itself may impose such corporal punishment as is reasonably necessary "for the proper education of the child and for the maintenance of group discipline." 1 F. Harper & James, Law of Torts ¶ 3.20, p. 292 (1956)[35]

This is a more conservative opinion than many of the cases presented earlier in this study and yet it demonstrates moving away from the in loco parentis doctrine as a basis of authority.

D. Selected Cases Determining Fourth Amendment Rights Search and Seizure

This section concerns the Fourth Amendment's prohibition of unreasonable search and seizure as it relates to students attending public elementary and secondary schools. The cases discussed in this section are significant because they clarify student rights which are protected by the Fourth Amendment; Picha v. Wielgos (1976) is significant because it clarifies the constitutional right not to be searched by school officials who are in contact with the police unless the search is justified in terms of the state interest of maintaining order, discipline, safety, supervision, and education of students within the school. The court also clarified that student has a constitutional right not to have the police cause a search in the absence

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[35]Ingraham v. Wright, 430 U.S. 662.

of probable cause. New Jersey v. T.L.O., (1985) is of significance because it clarifies that searches of students conducted by public school officials be reasonable but that they need not be supported by probable cause; it is sufficient to suspect that the search will turn up evidence of violation of law or rules of school as long as the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of age and sex of the student and the nature of the infraction.

Picha v. Wielgos, 410 F Supp. 1214 (1976)

Facts:

In November, 1973, the defendent school principal Raymond Wielgos, received a phone call which led him to suspect that the plaintiff and two other girls in the school possessed illegal drugs. The principal, advised by the superintendent to call the police, did so. When the police arrived, each of the girls was separately searched by the school nurse and the school psychologist in order to establish whether any of the three students possess drugs. No drugs were found in the searches. A conflict exists in the testimony as to the plaintiff's state of undress at each particular point of the search and as to the duration of the search. The plaintiff, Renee Picha, brought this 42 U.S.C.§ 1983 suit against the three school officials and the two policemen on the theory that in the course of the incident her civil rights were violated.

> Illinois and many other states have statutes which confer upon school officials the status of in loco parentis regarding their students. 122 Ill. Rev. Stats. §§ 24-24, 34-84a. Illinois has held that this status creates certain advantages for school officials regarding the standard of common law tort intent which must be applied in litigation brought against them by students. At least in situations which a school official's role of keeping discipline is at issue, he cannot be liable in tort for mere negligence, but must act in wanton disregard of the safety of his students.[36]

Judge Flaum stated:

> The only area of ambiguity is exactly what sort of behavior by the teacher is to be deemed related to "discipline" so as to pick up the extra in loco parentis latitude in tort usually afforded only to parents. The Illinois Supreme Court has suggested that a school official's role in appraising danger to the student body where information indicated that one of the students had a gun comes under the statutory in loco parentis banner. In Re Boykin, 39 Ill. 2d 617, 237 N.E. 2d 460, 462 (1968). It thus appears to be the state law in Illinois that a principal has the same latitude, in tort, to search a student for something believed to be dangerous to the student or the study body, as would the student's actual parent.[37]

The question raised was whether the Illinois doctrine could provide a limitation of 42 U.S.C. 1983 Tort liability analogous to what it has done with the common law tort liability of teachers as expressed by the statute. The issue ultimately is one of the supremacy clause and of the obligation of the states to refrain from enacting laws which smother constitutional rights. The court clarified:

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[36]Picha v. Wielgos, 410 F. Supp. 1214 (1976).

[37]Ibid.

> The activities of a principal cum parent must be considered as the activities of a state official, giving rise to the constraints which flow from the Bill of Rights. A natural parent could oblige his child to salute the flag in the morning at 8:00 a.m., on penalty of loss of breakfast and dinner, without being subject to a civil rights suit. A schoolteacher, however, could not enforce the same commandment without violating the student's First Amendment rights. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).[38]

In addressing the loco parentis question, the Court stated:

> Most federal cases have not addressed the loco parentis question in determining whether interferences with constitutional rights can take place in school settings. One that did indicated that regulations for students' length of hair did not relate automatically to the disciplinary function accorded to the in loco parentis authority of the relevant state statute:
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> > It is clear that the in loco parentis section of the Pennsylvania School Code (24 P.S.§ 13-1317) was never intended to invest the schools with all the authority of parents over their minor children, but only such control as is necessary to prevent infractions of discipline and interference with the educational process.[39]
>
> Cases that have not explicitly considered the in loco parentis status that may be supplied by statute have made exactly the same analysis, allowing school officials a latitude as against the civil rights of students which takes into account the disciplinary, and educational concerns that inhere in a school setting. For that reason, these cases may be deemed to have already deferred as

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[38] Ibid.

[39] Axtell v. LaPenna, 323 F. Supp. 1077, 1080, W.D. Pa. 1971.

> much to school authority as they would in the event of law comparable to that in Illinois or Pennsylvania. Following that perspective, 42 U.S.C. § 1983 may be deemed in conflict with any broader construction of in loco parentis authority, a conflict which state law must lose by virtue of the Supremacy Clause of the Constitution.[40]

The Court continued to clarify the issues of constitutionally protected activity by discussing Tinker v. Des Moines (1969) and concluding that any activity which is constitutionally protected must meet some comparable standard before it can be inhibited by school officials.[41]

In discussing Goss v. Lopez (1975) the Court noted the similar treatment of the due process standard. Justice Byron R. White expressed the view of the majority (White, Douglas, Brennan, Stewart, and Marshall):

> The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with other constitutional safeguards.[42]

Thus the Court stated: "...it is evident that the in loco parentis authority of a school official cannot transcend constitutional rights."[43] The Court pointed out that common law authority does have an impact on the application of constitutional doctrine to the rights of students.

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[40] Ibid.

[41] Ibid.

[42] Goss v. Lopez, 419 U.S. at p. 574, 95 S.Ct. at p. 736, 42 L.2d. 2d at p. 734.

[43] Picha v. Wielgos.

At the time of the search, students in public schools were not relieved of the protection of the fourth amendment except to the extent that a compelling state interest in the maintenance of school activities, particularly discipline, required. Where the interest in making the search competed with the privacy interest of the individual, the scope of the search had to be appropriately limited in order to be constitutionally permissible.

Discussion:

When Renee Picha was searched, she had a constitutional right not to be searched by school officials who were in contact with the police unless the extent of the intrusion occasioned by the search was justified in terms of the State interest of maintaining the order, discipline, safety, supervision, and education of students within the school. The Court held that she had a constitutional right not to have the police cause a search in the absence of probable cause that she possessed an illegal material at the time of the search.

Public officials have no immunity from civil rights liability when they disregard settled constitutional rights. This case is significant because it clarifies specifically the hierarchy of bases of authority for public school administrators. While it recognizes Statutory Codification of in loco parentis, it demonstrates clearly that constitutionally protected rights of students supercede that authority.

New Jersey v. T.L.O
105 Ct. 733 (1985)

Facts:

A teacher at a New Jersey high school upon discovering the 14 years old freshman respondent and her companion smoking cigarettes in a school laboratory in violation of a school rule, took them to the Principal's office, where they met with the Assistant Vice Principal. When respondent denied that she had been smoking and claimed that she did not smoke at all, the Assistant Vice Principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and also noticed a package of cigarette rolling papers commonly associated with the use of marijuana. He then searched the purse thoroughly and found some marihuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed respondent money, and two letters that implicated her in marijuana dealing. The State brought delinquency charges against respondent in the Juvenile Court, which, after denying respondent's motion to suppress the evidence found in her purse, held that the Fourth Amendment applied to searches by school officials but that the search in question was a reasonable one, and adjudged respondent to be a delinquent. The appellate Division of the New Jersey Superior Court affirmed the trial court's finding that there had been no Fourth Amendment violation.

It vacated the adjudication of delinquency and remanded on other grounds. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse, holding that the search of the purse was unreasonable. The Supreme Court reversed (94 N.J. 331, 463 A. 2d 934, reversed). Argued March 28, 2984-Reargued October 2, 1984-Decided January 15, 1985.[44]

Decision:

Justice Byron R. White delivered the opinion of the Court (White, Burger, Powell, Rehnquist, and O'Conner). Justice Harry A. Blackmun concurred in the judgement. Justice William J. Brennan, Jr. joined by Justice Thurgood Marshall concurred in part and dissented in part. Justice John Paul Stevens concurred in part and dissented in part in which Justice Marshall joined and in part.

The Court determined that the Fourth Amendment requires that searches of students conducted by public school officials be reasonable but not that such searches be supported by warrant or probable cause. The search of student by a school official is reasonable under Fourth Amendment if there are reasonable grounds for suspecting that search will turn up evidence of student's violation of either law or rules of school, and if measures adopted are reasonable related to objectives of search and not

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[44]New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

excessively intrusive in light of age and sex of student and nature of infraction. The teacher's report that student had been observed smoking in laboratory in violation of school rules provided reasonable suspicion justifying school official's decision to open student's purse to look for cigarettes. The officials' observation of cigarette rolling papers in purse gave rise to reasonable suspicion that student was carrying marijuana and justified further search of purse for contraband.[45]

Discussion:

The significance of this case is that the Supreme Court recognized that public school students are entitled to all the protections of the constitution but that these rights must be modified because of the school's need to maintain an orderly and safe educational environment. The Court made it very clear that in loco parentis doctrine does not remove authorities from Fourth Amendment coverage. The Court decided that school officials are agents of the state when they engage in searches of students and their possessions.

The Court also eased the restrictions to which searches by public authorities are ordinarily subject. The Court held that school authorities need not obtain warrants before conducting a student search. Probable cause will

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[45]Ibid.

not be required. The validity of the search will depend on reasonableness. The Court established a standard for reasonableness.

E. Summary

These landmark decisions defined and interpreted constitutional protected rights of students. Decisions to date have extended rights for students based on interpretations of the first, fourteenth and fourth amendments. First amendment freedom of speech cases determined that students could express opinions on controversial issues at school as long as they did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[46] The Supreme Court extended these rights to students. Tinker set the precedent for comprehensive protection under the First Amendment allowing the wearing of armbands.[47]

The definition of due process procedures to public education resulted from a series of Supreme Court decisions extending the Constitutional protection of the Fourteenth Amendment to students. Cases interpreting fourth amendment rights of students clarified protected rights. Prior to

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[46]Burnside v. Byars, 363 F. 2d, 749.

[47]Tinker v. Des Moines Indep. Community School District, 393 U.S., at 506, 89 s. Ct., at 737.

the Supreme Court decisions interpreting these rights, students had no constitutional protection from unreasonable search and seizure.

This chapter demonstrates the changing nature of the law and the significance of the living constitution. Supreme Court interpretations of Constitutional law determine the definition and consequent extension of rights.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

A. Introduction

Throughout the history of American public elementary and secondary education, the concept of in loco parentis has been a source of authority for public school teachers and administrators in matters of governance and discipline. This source of authority empowered the teachers and administrators to act in the interest of the parents. The significance of providing constitutional rights to students was that the authority which administrators had formerly held was limited by the constitution. Students had their own rights and administrators had a responsibility not to infringe upon those rights. Explicit limitations on the authority of administrators provided protections for students. Extension of rights to students also emphasized the fragile nature of assuming that administrators were representing parents in matters of discipline. Disputes between parents, students and administrators became more common.

The Tinker (1969) case was the landmark case which first established constitutionally protected rights of public school students. Constitutionally protected rights of students brought about change so great that it shook the foundations of the concept of in loco parentis.

In the process this change brought a radical change in the administration of the public schools.

B. Summary

As a guide to the educational and legal research, five questions were formulated and listed in Chapter I of this study. Most of the answers are contained in Chapters III and IV.

1. The first question in Chapter I was: Did the establishment of constitutionally protected rights for students by the judiciary diminish the authority of in loco parentis doctrine in the administration of public elementary and secondary schools?

   Constitutionally protected rights of students diminished the authority of in loco parentis doctrine in public elementary and secondary school administration.

   a. First Amendment right of freedom of speech gave students the right to protest whereas in loco parentis administrative doctrine did not necessarily allow any dissent.

   b. The Fourteenth Amendment application of rights

to students required that a student not be deprived of the property interest in an education without due process of law. In loco parentis public school administration had allowed administrators great liberty in representing the parent. If there were some dispute with a parent concerning the disciplining of a child, it was possible not to represent that particular parent but some adult standard more in keeping with the mores of a particular community. Constitutionally protected due process provided specific protections for the rights of students.

c. Finally, application of the Fourth Amendment's prohibition of unreasonable search and seizure of students attending public elementary and secondary schools limited the power of public school administrators. No longer could unreasonable searches or seizures take place in the name of representing the parent.

2. The second question posed was: What are the major judicial decisions which established constitutionally protected rights of students?

The major decisions were discussed at length in Chapter IV. These decisions established and defined constitutionally protected rights of students. First amendment protected students'

right of freedom of speech. Fourteenth amendment provided due process protections for students in order to protect their property interest in an education. The fourth amendment provided protection against unreasonable search and seizure. Of greatest significance were the initial cases establishing constitutionally protected rights of juveniles i.e. In re Gault and of students i.e. Tinker v. Des Moines.

3. The third question proposed was: What are the significant legal issues in balancing necessary school authority in carrying out the state's compelling interest in education with students' constitutional rights?

Significant legal issues involved substantive and procedural due process. The substantive issues centered on the definition of substantial disruption of or material interference with school activities and the definition of property and the liberty interest. Procedural issues resulted in the clarification of procedural due process.

a. Substantive Issues

One significant issue was the definition of what constituted material and substantial interference with the operation of the school. The definition of the rights of students became

a significant issue once students were extended constitutionally protected rights.

b. Procedural Issues

The Fourteenth Amendment prohibited states from impairing a person's life, liberty, or property interest without due process of law. Once constitutionally protected rights were extended to students their liberty interest and property right emerged as the issue. The definition of due process procedures became an important issue which was frequently litigated.

4. The fourth question listed in Chapter I was: What are the significant constitutional issues concerning the students' constitutionally protected rights versus the concept of in loco parentis?

   a. The most significant constitutional issue was whether or not juveniles should be afforded constitutional rights.

   b. Another significant constitutional issue was whether or not students should be afforded constitutional rights.

5. The final question in Chapter I is: What are the significant legal issues concerning public school administrators and teachers acting in loco parentis, representing the interests of the state, and protecting the civil rights of the individual?

a. Conflicting roles emerged when public school administrators and teachers acted in the interest of the parent, the state, and the constitution. When these conflicts were not resolved to the satisfaction of the public by the public schools, they would be resolved by the courts.

b. The very basis of authority of in loco parentis was questioned since the court has recognized that parental delegation of authority to the schools was not entirely consonant with compulsory education laws.

C. Conclusions

Based on an analysis of judicial decisions, the following general conclusions can be made concerning the impact of constitutional rights of students on in loco parentis in the administration of elementary and secondary public education.

1. The establishment of constitutionally protected rights of students has diminished in loco parentis authority in public elementary and secondary school administration.

2. The in loco parentis role of the educator changed when an adversarial role was established by extending rights to students which heretofore were not rights. Administrators could no longer assume they

were representing the parents in matters of discipline. Sometimes parents did, in fact, disagree with administrators.

3. Public school administration moved from a somewhat stable philosophy supported by customs and practices of acting in loco parentis to an ever changing concept of public school administration which continues to be defined and redefined by the courts.
4. Landmark cases have defined the extension of constitutionally protected rights of students.
5. Significant landmark decisions have influenced elementary and secondary public school administration in student governance and discipline by dictating due process procedures.
6. Courts will intervene in matters of public school administration if an individual's constitutionally protected right has allegedly been denied.

D. Recommendations

The purpose of this study was to clarify and distinguish the bases of authority for student governance and discipline in public school elementary and secondary administration by demonstrating the changes brought about by the establishment of constitutionally protected rights of students. In the course of the study it has become obvious that the role of the administrator in elementary

and secondary public education is a complex one. The administrator represents the parent, the state and the Constitution of the United States. The study has demonstrated that the increased involvement of the courts in the administration of elementary and secondary public schools enhanced the complexity of the role of the administrator.

1. Recommendations for Educators

   a. Educators should be informed and up to date with respect to constitutional issues and legal developments affecting schools. Ignorance of the law is no longer an acceptable excuse for arbitrary or capricious policies. Educators must make sure they are aware of students rights which are protected by the Constitution so that they do not violate these constitutionally protected rights. Every educator, whether administrator or teacher, needs to be informed about constitutionally protected rights of students.

   b. Teacher training institutions and graduate schools of educational administration should include the study of the influence of Law in Education in the curriculum for teachers and administrators. Certainly, in addition to being well informed about the constitutional

rights of students, it is essential that educators understand the alterable nature of the Law so that they know the significance of the living Constitution and keep themselves well informed on current interpretations of the Law.

2. Recommendations for Further Studies

Constitutional rights have been extended to students. Very little has been done to investigate the impact of these rights on schools. This writer recommends areas for further studies:

a. Investigate the extent to which constitutionally protected rights operate in certain schools--a comparative study among schools.

b. Assess the knowledge of school administrators on constitutionally protected rights of students. Compare regions, states, systems or graduates from specific institutions.

c. Assess the curriculum content of various teacher training programs or educational administration programs to determine adequacy of instruction on the impact of Law in Education.

d. Assess students in teacher education and administrative educational programs to determine levels of understanding of constitutionally protected rights.

E. Concluding Statement

This study discussed the changing bases of authority in the administration of elementary and secondary public education. The study emphasized the significance of the Courts in bringing about a change from *in loco parentis* as a basis of authority to constitutionally protected rights of students.

The public school administrator should know the origin of authority for administrative actions. This will enable administrators to act with authority. Understanding the constraints on *in loco parentis* and state authority by constitutionally protected rights of students is essential.

Essentially this means that administrators are no longer free to act on behalf of the parent if the action conflicts with constitutionally protected rights. The constitutionally protected rights of students set the limits to the authority of public school administrators.

The administrator may assume a variety of roles in elementary and secondary public school administration. The complex nature of education leadership demands that public school administrators be well informed. Administrators must also be well informed if they hope to reduce the probability of litigation involving the schools.

By providing constitutionally protected rights to students, the courts have changed public school administration. The impact of law in education is extensive.

If administrators are concerned with freedom and democracy, they must concern themselves with providing an atmosphere in the schools whereby students can consider conflicting ideologies openly and can learn to express themselves freely.

The function of the school in the society is of great importance. Schools are demeaning to the extent that they remain instruments of social control. The extension of individual rights to students is congruent with a democratic society.

Administrators have an obligation to protect the constitutional rights of students. Administrators who are concerned with promoting a free and democratic society will promote the extension of constitutional rights to students.

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