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Williams, Peter Warren

LEGAL ISSUES CONFRONTING THE ELEMENTARY CLASSROOM TEACHER, THE DEGREE OF CONCERN OF PRESERVICE TEACHERS TOWARD THOSE ISSUES, AND GUIDELINES FOR A PRESERVICE TEACHER COURSE IN LAW

The Ohio State University

University Microfilms International 300 N. Zeeb Road, Ann Arbor, MI 48106

Ph.D. 1982
Legal issues confronting the elementary classroom teacher, the degree of concern of preservice teachers toward those issues, and guidelines for a preservice teacher course in law

Dissertation

Presented in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Graduate School of The Ohio State University

By

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* * * * *

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ACKNOWLEDGMENTS

It has been an amazing time for me at The Ohio State University, a time that I would not have missed for the world.

I want to express my sincere appreciation to, and my deep affection for, those many people who were instrumental in helping me achieve my goal.

In particular, I thank most sincerely Dr. James Kerber, my adviser, who gave of his time, his patience, his expertise, and his warm encouragement without hesitation and in huge quantities. His support, his urging to greater heights, his concern for my well-being, will never be forgotten.

I thank most sincerely Dr. Margaret Koste and Dr. Fred Staub, my committee members, for their assistance and encouragement. My life is that much more enriched because of them both.

I thank Dr. Geoffrey Gibbs of the Western Australian Academy for the Performing Arts for his interest and concern. He played a significant role in my decision to attend OSU, and he has always urged me to be more perceptive, more sensitive, and more aware than I ever thought I could be.

I thank my parents and members of my family. Their tolerance of "a wandering son and brother" and their never-ending efforts to offer support and love across the miles has meant much to me.

I thank Vince Sikarew, a friend. He has reminded me constantly of the meaning and value of perseverance, and I have achieved my goal largely because of his warm encouragement and understanding.
I thank the EMCE students who participated in the study and the
EMCE staff who helped with great enthusiasm when disaster befell the
progress of the dissertation.

Finally, I thank my fellow graduate students in Early and Middle
Childhood Education. When a day seemed most dismal, a hug or a word
of encouragement or "a cup of coffee at Jolly Donuts" with a "comrade
in arms" made the day bearable. I shall miss them all.
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CHAPTER I
INTRODUCTION

For many years, the life of the teacher was a highly regulated one. Teaching was considered a privilege, and the basic condition attaching to possession of that privilege was that the range of constitutional rights available to the citizen would not be exercised by one who chose to teach. The teacher was expected, in effect, to relinquish basic constitutional rights which were his as citizen by virtue of his status as citizen under the Constitution.

In Adler v. Board of Education, the Supreme Court gave judicial encouragement to this expectation of relinquishment of rights:

It is clear that [teachers as citizens] have the right under the law to assemble, speak, think and believe as they will. It is equally clear that [teachers as teachers] have no right to work for the state in a school system on their own terms. They may work for the school system under reasonable terms laid down by proper authorities.... If they do not choose to work under such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the state thus deprived them of any right to free speech and assembly? We think not.

This expectation of relinquishment of constitutional rights had serious repercussions for the teacher as teacher and citizen. Protections afforded by the Constitution were generally not available to the teacher, and his freedom of expression, in whatever form it might take, was severely limited. Criticism of the institution and its superiors was not tolerated and meant penalty, especially in the form of dismissal. Indeed, employment could be terminated for any reason since
government employment was perceived not as a right but as only a privilege. Custom not only regulated but proscribed a teacher's clothing and grooming habits. The concept of "teacher as model" demanded an educational process of indoctrination, not to be interrupted by the teacher's expression of his own opinion. Constitutional and other freedoms, particularly freedom of expression under the First Amendment of the Constitution, simply did not exist for those who chose to teach.

For many years, however, it was the teacher who held the key to management and discipline in his classroom. At common law the teacher stood "in loco parentis" to his students. Under the "in loco parentis" doctrine it was demanded of the teacher that he exercise care and control over his students in a manner befitting the reasonable man in like circumstances. In matters of discipline he exercised a considerable degree of discretion and authority limited only by what he himself determined to be necessary. Students were generally not viewed as "persons" under the Constitution but were seen as subject, without constitutional recourse, to the classroom teacher's broad authority and discretion.

The state, or the local school authorities if they acted consistently with state requirements, generally not only specified what subjects or topics were to be taught but also prescribed specific methods of instruction which the teacher was required to adopt and which, as a rule, he did not question. The teacher was employed to teach basic skills and to play a significant role in presenting to the students, especially in the elementary school, a value system similar to that of the community.
in which he taught. The emphasis of the educational process was firmly on the "input" of education, and little regard was had for the student as a "consumer" of education. Under such circumstances the courts were very reluctant to substitute their judgment for that of the state legislature or local school authority in matters of education.

Since the Supreme Court decision of Brown v. Board of Education, however, the courts have looked more closely at what has gone on within the four walls of the classroom. Harper and Kilari have suggested that this closer look has been chiefly concerned with the "who" of education (e.g., boards of education, superintendents, and teachers, and their roles and duties), the "what" of education (e.g., text-books, course requirements, and curricula), and the "how" of education (e.g., statutes, rules, and regulations which attempt to establish a workable, successful and accountable process of education).

Whether viewed as part of the more general movement toward increased recognition of human rights in a post-industrial age, or whether seen more narrowly as an attempt to claim specialized freedom of expression rights in the roles of teacher as teacher and citizen, and of teacher as professional educator, the attempt by teachers to establish claims to full constitutional rights and protections has not gone unheeded by the courts. In Pickering v. Board of Education, the Supreme Court argued that the premise that "teachers may constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work has been rejected". In Tinker v. Des Moines Independent Community School
The Supreme Court agreed that "First Amendment rights applied in the light of the special characteristics of the school environment are available to teachers."

The status of the student has also taken on a new hue. The *Tinker* decision extended to students the recognition that they were citizens even while in school:

> 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 obligation to the State.

The move to hold public education accountable has lead to an emphasis on the "output" of education. The courts are now faced with cases of educational malpractice as the student looks for redress for an alleged inability to function effectively in a predominantly literate society because of the negligent instruction by the school system and its teachers. And the argument that even the elementary classroom should be seen as the "marketplace of ideas" has taken on a new significance in the light of the willingness of the Supreme Court to view teachers and students as entitled to First Amendment protection within the classroom.

Increasingly, then, the classroom teacher has obligations and freedoms that can no longer be answered by recourse to his own philosophy of "I know what is best for me, my students and my classroom." He must not only reflect upon the educational needs of his charges, but he must also look beyond those needs to ascertain the legality, or illegality, of his proposed actions and instructional practices within the classroom setting.
The concept of the self-contained classroom continues to exist, however. Duke, Dunmoyer and Farmar have made note of the fact that teachers are encouraged to maintain their autonomy by handling discipline problems without resort to administrative intervention. McDaniel has urged adherence to "The Teacher's Ten Commandments" so that the teacher can operate within the limits of what is legally permissible while in a classroom setting. His "commandments" encompass such issues as First Amendment rights, student safety, and corporal punishment.

Any decision concerning classroom practice must, in effect, represent a comfortable integration of legal considerations and educational objectives. Such integration would seem, at times, difficult to achieve because of the complexities of everyday classroom life.

Statement of the Problem

One of the basic issues in education is whether the classroom teacher knows about, and understands, the legal parameters within which he must operate in the classroom setting in the light of his status of (1) teacher as teacher and citizen, (2) teacher as classroom manager, and (3) teacher as professional educator.

The College of Education at The Ohio State University graduates certifiable elementary teachers for whom there is no requirement that there be a course during the teacher-training program which might look at legal concerns of the classroom teacher. For the teacher in the field there is often inadequate provision to gain an understanding of the legal nature of any issue that might confront him in his daily routine in the classroom.
Purposes of the Study

The purposes of the study were threefold:

a) To identify, for the teacher within the elementary classroom setting, those legal issues which he might confront in his daily routine in the classroom.

b) To identify the degree of concern, of preservice, future professional teachers toward those legal issues.

c) To develop guidelines for a preservice teacher course which would attempt to introduce the law as it relates to those legal issues about which the preservice teachers were concerned.

Rationale for the Study

The teacher within the classroom setting operates within an environment in which he must be always aware of his own rights and the rights of the students under his care. The question that arises is whether the preservice teacher, who will, upon graduation, be eligible to take up a position as classroom teacher in the field, knows about, and understands, the legal parameters within which he must operate in the classroom setting.

The classroom is the meeting point of the often competing interests of the student, the state, the parents, and the teacher in the educational process. The student has a legitimate interest in the benefits of the curriculum, in avoiding proselytization by the teacher, and in maintaining his status as "person" under the Constitution. The state has legitimate interests in maintaining order and discipline in the schools, in implementing the established curriculum, and in the inculcation of societal values. The parental interest in the upbringing and education of their children has been viewed as basic in the structure of society. The teacher's interest is an interest in basic
professional and constitutional freedoms. By virtue of his choice of profession, a teacher is obliged to be active, expressive, and vocal. His "modus operandi" within the classroom is one of action and expression, and as a professional, his discretion must necessarily be wide. The boundaries of what is legal expression and action need to be clear to the classroom teacher lest the educational process be hampered by the conflicting of interests and lest the teacher's uncertainty as to what is permissible and what is not cast a "poll of orthodoxy" over the classroom.

The mere existence of a local, state, or federal law giving forth rights and protections does not mean that the teacher or the students in his classroom will receive the benefit of that law. The teacher may not know that the law exists. He may know that the law exists but simply refuse to abide by or implement it because he does not agree with it. The teacher may be reluctant, for whatever reason, to take responsibility for its full implementation. He may know the law but really not know how to implement it. Knowing the law, he may interpret it in a manner which is different from its legally acceptable interpretation. The gap between what the law says and implementation of that law within the classroom is often very, very wide.

Whatever the teacher's state of understanding or intention concerning legal requirements in his classroom, ignorance of, or refusal or inability to abide by, legal requirements that exist will have some affect for the teacher and the students in his classroom. At the very least, it would mean tension and anxiety in the classroom as a result of student or parent complaint. Indeed, as McDaniel has noted, "ours is
an age of litigation" in which parents and students stand ready to use
the courts as an avenue to seek redress against the teacher whom they
believe has done them wrong.

At most, it could result in personal liability for the teacher for
the Supreme Court held that in the specific context of school discipline,
"a school board member is not immune from liability for damages under
Section 1983 [of the Civil Rights Act] if he knew or reasonably should
have known that the action he took within his sphere of official responsi-
bility would violate the constitutional rights of the student affected,
or if he took the action with the malicious intention to cause a depriva-
tion of constitutional rights or other injury to the student."36

In *Piphus v. Carey*37, the Supreme Court held that damages accorded
under Section 1983 of the Civil Rights Act were to be governed by
principles of compensation and that the students concerned had to prove
the injury on which their claim rested; for deprivation of the "absolute"
right of due process, however, the students may have been entitled to
nominal damages. The Supreme Court's decision clearly establishes,
then, the right of students to nominal damages for deprivation of due
process and, at the same time, the Court saw proof of actual damages
arising from the deprivation as possible.38

Section 1983 of the Civil Rights Act requires a showing of action
"under color of any statute, ordinance, regulation, custom, or usage of
any State..." to support a cause of action.39 Courts are increasingly
holding that the classroom teacher's action has constituted state action
under Section 1983 in cases where a student's constitutional rights have
been infringed. The classroom teacher who has conducted an unconstitutional search of a student has been viewed as engaging in impermissible state action attracting liability under Section 1983. And in Hall v. Tawney, the court held that there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under Section 1983 of the Civil Rights Act.

There are already, of course, sources of information to which a teacher can turn in order to ascertain what the law says about a particular issue. School boards and departments of education quite often publish pamphlets and guidelines advising on the rights and responsibilities of teachers and students, and numerous legal and educational journals carry articles dealing with the law and education. But it is often difficult to obtain copies of guidelines and pamphlets - a teacher usually has to ask for a copy since it is rarely given to him. And while professional journals may cover all of the issues confronting a teacher, teachers within a system will not, it seems, increase their store of factual information about the law without a vigorous push from those outside the system. Codes of behavior and practice exist within schools and within school systems, but, in many situations they appear to be no more than codifications of existing practice without reference to the real requirements of the law.

Even if such codes and guidelines were presented as being adequate for the teacher's purposes, they cannot, by their nature, deal adequately with the many subtleties and nuances of daily classroom life. An effective classroom really depends upon the minute-by-minute exercise by the
teacher of fair, reasonable, and informed judgment in both professional and personal interactions within the classroom. The exercise of such judgment requires a teacher who is familiar with the parameters of the law as it affects daily classroom practice.

In this "age of litigation," teachers now deal with an "educated" youth, a youth who feels he knows his legal rights and who is no longer reluctant to claim the protections to which the law entitles him. The teacher-dominated, student-submissive concept is no longer acceptable to the student population, despite the often heard protest of the teacher that he alone knows what is good for his classroom and for his charges. Even though for years the teacher has known what is best for his students, the result has often been a constant struggle to maintain discipline, to teach effectively principles of responsibility and good citizenship, and to draw from students effort and productivity of the highest order.

The view has often been expressed that it will only be those students who are educated by responsible and knowledgeable school officials and who are enjoying full rights that will be more likely than not to carry out their own responsibilities, to respect the rights of others, to give of their best, in school and in adult life. The basis of recent curricular trends in law-related education has been the desire of the part of schools and communities that students come to know and appreciate the law and its requirements, but such a trend is ill-founded unless educators practice and understand that which they are preaching.

If classroom practices must reflect the law as it is, they must also anticipate the law as it might be. Issues which in the past have
not been perceived as having legal implications are increasingly viewed as the proper concern of the law. Professional malpractice within the educational arena, for example, is being continually litigated, and while the law might feel reluctant at the moment to recognize it as a legal cause of action, teachers within a classroom setting cannot ignore possible outcomes. 47

The present study is, it would seem, timely and important. Some departments within The Ohio State University have already thought in terms of courses which deal with the law as it affects education. The School of Health, Physical Education and Recreation, for example, offered a course titled "Legal Issues in Physical Education and Recreation" during the Summer Quarter of 1981. An attempt to identify legal issues for the elementary classroom teacher and to prepare guidelines for a preservice teacher program which looks at those legal issues would seem to be, at the very least, a reflection of the concern that the College of Education has for the future teachers of this country, and for the children those teachers will teach.

Assumptions, Limitations and Definitions

Assumptions

Education operates within a complex network of local, state, and federal laws, the most pervasive of which is the Constitution and its amendments. Any right granted under the Constitution cannot be legislated away by local or state authority, even though the states have primary responsibility for education. On the other hand, where a matter is considered not to be contrary to the provisions of the Constitution, local or state authority may regulate such a matter (e.g., corporal
punishment). Because this study looked at the law at the federal and state levels as it relates to classroom practice, it was assumed throughout the study that local rules and regulations were not inconsistent with state and federal law, unless the issue under examination was one of local regulation impinging upon rights and mandates granted under state or federal law.

Many of the legal issues confronting teachers within the classroom setting have come before both state and federal courts in many locations. For the purposes of this study, it was assumed that, irrespective of the location or level of the court hearing the issue, the issue was one which might arise in the elementary classroom of any teacher.

The state of Ohio falls within the jurisdiction of the federal courts of the Sixth Circuit. Decisions of federal courts of the Sixth Circuit were considered as authoritative with respect to federal matters. Decisions by federal courts within circuits other than the Sixth Circuit were assumed to be of persuasive authority where a Sixth Circuit decision was not in point. In matters of state jurisdiction, decisions of Ohio state courts were considered as authoritative. Decisions by other state courts were assumed to be of persuasive authority where an Ohio state court decision was not in point.

Limitations
The focus of this study was the teacher "within the classroom setting" and those legal issues with which he might be confronted within the classroom setting. The criteria establishing a matter as a legal issue for the purposes of this study were:

(i) the matter had been addressed by a court of law at the federal or state level; and/or
(ii) the matter had been addressed as a matter involving legal considerations by legal or educational commentators in a professional publication; and

(iii) the matter was one which had arisen, or which could arise, as an issue for the teacher within the elementary classroom setting.

"Within the classroom setting" had, as its emphasis, the elementary school classroom, and it brings the teacher into play in at least three ways:

1. The teacher as teacher and citizen.
2. The teacher as classroom manager.
3. The teacher as professional educator.

The classroom teacher must also face many other situations within the course of his employment which have a legal dimension. Because such situations would generally arise beyond the four walls of the classroom, they were not included in the study. Discrimination by race and sex in employment, a teacher's rights to procedural due process prior to suspension or dismissal from his position, and a teacher's freedom of expression and association beyond the schoolhouse gate, are indicative of issues that were not included in the study.

Federal legislation is playing an increasingly influential role in education. Federal laws, such as those relating to education of the handicapped, privacy and school records, and sex discrimination in education, affect most directly the state's administration of its educational policies and practices and were therefore excluded from the study.

Issues falling under the umbrella of intentional tort were not included in the study. Ripps has indicated that an action in tort
for false imprisonment by a student against a teacher is improbable and that there is only one reported case in the United States dealing with the issue. The issues of assault and battery are more relevant to the issue of corporal punishment in the classroom. Defamation is not in the forefront of litigation involving the teacher. While there are reported cases, they are few in number and hinge on narrow issues. Thus, these issues were not included in the study.

Definitions

For the purposes of the study, the following definitions are included:

**Defendant:** Refers to the person, party, body, or entity against whom a legal action is brought.

**Elementary:** Refers to a level of education encompassing children in Kindergarten through Grade Eight.

**His, he, him:** Refers to a person of either the male or female sex unless the context demands otherwise.

**Plaintiff:** Refers to a person, party, body or entity who initiates a lawsuit.

**School Official:** Refers to the school principal, the classroom teacher and/or the school librarian.

Summary

The legal status of the teacher and the student has undergone change over the past several decades. While the courts no longer view the teacher as a "second class citizen", they also insist that the student has rights which the teacher must respect. Teachers now deal with an "educated" youth, a youth who not only demands compensation for an infringement of his rights but also expects a teacher to practice what he preaches. In addition, teachers must also be sensitive to the law as it
might be, since possible legal outcomes will have some bearing on management and instructional practices within the classroom.

Any decision concerning classroom practice must, in effect, represent a comfortable integration of legal considerations and educational objectives. But there is no requirement that preservice teachers of the College of Education at The Ohio State University take a course which looks at the legal concerns of the classroom teacher. The purposes of the study were, therefore, threefold: (1) to identify for the teacher within the elementary classroom setting those legal issues which he might confront in his daily routine in the classroom, (2) to identify the degree of concern of preservice teachers toward those legal issues, and (3) to develop guidelines for a preservice teacher course in law which would attempt to introduce the law as it relates to those legal issues about which the preservice teachers were concerned.


5Stevens, "Balancing Speech and Efficiency," p. 223.


9Edward M. Graham has suggested that teachers simply failed to fight for their rights and that the courts traditionally refused to acknowledge any arguments based on the "constitutional rights of the teacher." "Freedom of Speech of the Public School Teacher," Cleveland State Law Review 19 (1977): 382.

10State v. Burton, 45 Wis. 150 (Wis. S. Ct.).

11Ibid.

12Stephen R. Ripps has suggested that in the matter of corporal punishment, for example, the older rule gave the teacher complete discretion as to the necessity of punishment and how it was to be administered, whereas the modern rule denies the teacher the absolute discretion to determine the necessity of the punishment and leaves as questions of fact the reasonableness and type of punishment to be administered. "The Tort Liability of the Classroom Teacher," Akron Law Review 9 (1975): 22.


17 Robert J. Harper II and Gary Kilarr, "The Law and Reading Instruction," Language Arts 54 (November/December 1977); 913.

18 See, for example, the comments of Fischer, "The Civil Rights of Teachers," p. 30, and of Hudgins and Vacca, Law and Education, pp. 181-187.


21 Ibid., p. 511.


26 Ibid., pp. 703-706.


33The lack of any clear school board guidelines regarding the use or non-use of particular teaching methods has often prompted the courts to point out that such a situation can discourage educators from being innovative and creative in their teaching and can have a chilling effect on their academic freedom. See, for example, Webb v. Lake Mills Community School District, 344 F. Supp. 791 (N.D. Iowa 1972).


41621 F. 2d 607, 611 (4th Cir. 1980).


Chester Nolte has suggested that law-related education is but one approach to prepare children for citizenship without coming into conflict with the First Amendment prohibition against the establishment of religion by the state. "Teaching Moral and Spiritual Values in Public Schools: Legal Implications," in Contemporary Legal Issues in Education, ed. M.A. McGhehey (Topeka, Kansas: NOLPE, 1979), p. 60.

Patrick D. Lynch has argued that the appropriateness of selected classroom methodologies will recur as issues in future educational malpractice actions since what is done in the classroom is at the heart of the duty of care. "Education Policy and Educational Malpractice," in Contemporary Legal Issues in Education, ed. M.A. McGhehey (Topeka, Kansas: NOLPE, 1979), p. 212. See also Peter Williams, "Reading and the Law: The Next Step May be up to Teachers," Journal of Reading 25 (November 1981): 106.

Education for All Handicapped Children Act of 1975, 20 USCA Sections 1401 et. seq.

Family Educational Rights and Privacy Act of 1974, 20 USCA Section 1232 g.

Equal Educational Opportunities Act, 20 USCA Sections 1701 et. seq.


Ibid., pp. 21-23.

Ibid., p. 24.


Courts have used the terms "school officials" and "school authorities" interchangeably to include the school principal, the classroom teacher, and other school personnel. See, for example, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 723 (1969), and Bollnie r v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).
CHAPTER II

REVIEW OF COURT CASES AND LITERATURE

Introduction

The first purpose of the study was to identify, for the teacher within the elementary classroom setting, those legal issues which he might confront in his daily routine in the classroom. The criteria establishing a matter as a legal issue for the purposes of the study were, (1) the matter had been addressed by a court of law at the federal or state level, and/or (2) the matter had been addressed as a matter involving legal considerations by legal or educational commentators in a professional publication, and (3) the matter was one which had arisen, or which could arise, as an issue for the teacher within the elementary classroom setting.

A review of publications in the area of law and education revealed likely issues, principles of law, and relevant court cases. The court cases were located, read, and analyzed. Each issue was then listed and the law relating to each issue addressed. Attention was focused on both statements of law and other statements by courts which were seen as relevant to classroom practice. Considerations which were relevant to each issue and which had been gleaned from the review of legal and educational literature were then set down.

The study had as its emphasis the teacher within the elementary classroom setting. Issues not perceived as relevant to the teacher within the classroom setting in his roles of teacher as teacher and
citizen, teacher as classroom manager, and teacher as professional educator, were excluded from the study.

Issues, Court Cases and Commentaries

1. The Teacher as Teacher and Citizen

Issue: Does the elementary classroom teacher, upon entering the classroom, forego those basic constitutional freedoms (e.g., freedom of speech, freedom of religion) to which he, as citizen, is entitled?

For many years teaching was viewed as a privilege, and the basic condition attaching to the possession of that privilege was that the range of constitutional rights available to other citizens would not be exercised by one who chose to teach. The Supreme Court's decision in Adler v. Board of Education gave judicial approval to this expectation of relinquishment of constitutional rights.

In 1968, however, the Supreme Court held that teachers were not to be viewed as "second-class citizens". In Pickering v. Board of Education, the Court noted that "the premise that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they work has been rejected". In 1969, in Tinker v. Des Moines Independent Community School District the Supreme Court added that

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers.... It can hardly be argued that ... teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

The religious freedom guarantee of the First Amendment, embracing as it does both the freedom to believe and the freedom to act, also extends to the teacher within the classroom setting.
First Amendment freedoms are not absolute, however, and may be regulated by the state. The Pickering decision acknowledged that the State has interests as an employer in regulating the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.8

The Tinker decision admitted that speech which "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the schools" or which impinged upon the rights of others would not be protected by the First Amendment.9 And while the freedom to believe under the First Amendment freedom of religion is absolute, the freedom to act is not.10

Miller11 has argued that the parameters of First Amendment protection of the teacher's expression within the classroom which are suggested by the Pickering and Tinker cases can be classified according to content and consequences of the speech:

When the content of the speech involves a matter of general public concern, either substantially correct or not knowingly or recklessly false, and the consequences of the speech are not materially and substantially disruptive of either the minimal discipline necessary for appropriate classwork or minimal organizational requirements for efficient school operations, teacher expression within the classroom will be protected.12

However, speech of the teacher which is obscene, libelous or inflammatory does not attract First Amendment protection.13

One of the difficulties in cases involving a classroom teacher's First Amendment rights is deciding at what point between mere discomfort and utter chaos the disruption to discipline or classwork becomes
important enough for the teacher's interest in constitutional freedoms to give way to the state's interests in the educational process.  

Factors which may have some bearing on considerations of content and consequence in First Amendment freedom cases are the age, type, and maturity of the students in the class, the structure of the classroom, and the extent and duration of any disruption arising out of the teacher's exercise of First Amendment rights.

**Issue:** Are comments by a teacher within the classroom on issues of public importance (e.g., the existence of a long teachers' strike) protected under the teacher's right of free speech under the Constitution?

In *Pickering v. Board of Education*, the Supreme Court held that the teacher beyond the four walls of the classroom has a constitutionally protected interest in commenting upon matters of public concern. The *Tinker decision* recognized the teacher's constitutional right to free speech and expression within the classroom. *Miller* has argued that speech within the classroom which concerns a matter of public concern is protected by the First Amendment. There may, however, be limits placed upon the teacher's right of free speech on issues of public concern in the light of the peculiar circumstances of the public school classroom.

In *Nigosian v. Weiss*, a teacher's in-class speech about a labor dispute between the school district and the local teachers' union was perceived by the court as speech on a matter of public concern. The teacher was dismissed after he and his class had expressed their opinions in the classroom about the labor dispute contrary to a rule promulgated by the principal. In balancing the teacher's interest in commenting upon an issue of public concern against the interests of the state, the court noted that the students in the class were a "captive audience
of young malleable fifth graders\textsuperscript{20}, and that expression in class about a labor dispute which had divided the community made little contribution to the educational development of the students concerned.\textsuperscript{21} The court felt that the teacher's expression could have a detrimental effect upon both the proper performance of his duties and the children in the class.\textsuperscript{22} The teacher's expression of opinion about an issue of public concern was therefore not protected under the First Amendment in this instance.

In some instances, the content of the teacher's speech may not be accurate. For example, the teacher's speech in the Pickering case\textsuperscript{23} consisted of erroneous public statements upon an issue of public concern. The Supreme Court held, however, that "absent proof of false statements knowingly or recklessly made, a teacher's exercise of his right to speak on issues of public importance" was protected by the First Amendment.\textsuperscript{24} And Miller\textsuperscript{25} has argued that in order for a teacher's in-class expression on an issue of public concern to attract First Amendment protection, it must be substantially correct or at least not knowingly or recklessly false.

Issue: Does a teacher's freedom of speech under the Constitution extend to a teacher's criticisms of co-workers or of the school administration in the classroom?

While a person "does not lose his First Amendment rights, including the right to engage in vigorous and spirited criticisms of government, because he becomes an employee of government"\textsuperscript{26} the right of a teacher to criticize co-workers or the school administration is not absolute. In holding for the teacher, the Supreme Court in Pickering v. Board of Education noted that, in the case before it, "there was no question of
maintaining either discipline by immediate superiors or harmony among co-workers.

The Court was cognizant of the fact that positions in public employment could be imagined "in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them".

In Ahern v. Board of Education, a high school teacher, in front of her class, criticized a substitute teacher and discussed the principal's refusal to meet with the class over issues of discipline. The court held that the teacher had chosen "a subject for discussion which did involve 'maintaining either discipline by immediate superiors or harmony among co-workers,' and employment relations which were the 'kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning'." The teacher's criticisms were therefore not protected by the First Amendment.

In Moore v. School Board of Gulf County, a high school biology teacher was nonrenewed after he had criticized aspects of the school administration before a class of 15 year old students. Noting that tenth grade biology students had a right and freedom not to listen and, as a captive audience, were entitled to protection from improper classroom activities, the court held that a teacher has a right "to criticize his employer and the school administration, but is limited in the exercise of that right to the extent that its exercise may not invade the classroom occupied by 15 year olds, and must be balanced
against the need for meaningful school administration". The court felt that the criticism had the potential of leading students to hold school officials and other teachers in contempt and that while the classroom may be "the marketplace of ideas", "straight criticism by a teacher of an educational system is quite a different matter than the presentation of ideas with commentary reflecting two sides of an issue, leaving a preference as to that issue left up to the individual student's discretion".

The Courts, then, have looked closely at teacher criticism within the classroom. And Miller has argued that one of the implications of the Pickering decision is that irrespective of where the speech takes place, if it has the effect of undermining a personal superior-subordinate relationship or of creating disharmony among co-workers, it is not protected by the First Amendment.

Issue: Will a teacher's freedom of speech be protected by the Constitution when the exercise of that freedom of speech in the classroom interferes with or disrupts the school curriculum (e.g., if the teacher discusses politics when he is supposed to be teaching Math)?

One of the interests of the state in the educational process is implementation of, and adherence to, the curriculum. The personal opinions of the teacher within the classroom on a matter of public concern or on any other matter may be inherently incompatible with the valid educational objectives of the school district and may also effectively impair the school's interest in curriculum implementation. In such cases, the teacher's interest in First Amendment expression must be balanced against the state's interest in curriculum control.

In Birdwell v. Hazelwood School District, a high school algebra teacher, during several algebra classes, had spent some time giving his
views about the visit of Army Recruiters to the school. The court held that because the expression of his views by the teacher constituted an attempt to disrupt the smooth operation of the educational program and to induce the military personnel to leave the school premises, his comments were not protected by the First Amendment. The teacher's expression had effectively replaced the classroom curriculum and had interfered with the school's implementation of its education program.

Discussions by the teacher in the classroom about teacher competency testing when these discussions bore no relationship to the lessons taking place at that time were also held to be beyond First Amendment protection. In Hall v. Board of School Commissioners, the court held that protection of the curriculum was a legitimate state interest. The court argued that the school board could clearly ensure that classrooms were used for teaching the prescribed curriculum rather than, as in the case before it, as a means of disseminating an education association's view on issues of teacher employment.

It has been argued that the state's interest in curriculum implementation may justify time, manner and place restrictions on the exercise of a teacher's freedom of speech within the classroom.

Issue: Does a teacher's constitutional right of freedom of expression extend to wearing a protest armband or protest button (e.g., an anti-war armband) in the classroom?

The wearing of armbands or buttons is closely akin to "pure speech" and is therefore entitled to First Amendment protection. The problem in such cases is to arrive at a balance between the interests of the teacher, as citizen, in exercising his freedom to symbolically express
his beliefs and the interests of the state in promoting the efficiency of the public service it performs through its teachers.

In James v. Board of Education, the school board argued that the school authorities' power to control the curriculum extended to controlling a teacher's speech, including the wearing of armbands, in school and that the assumptions of the "marketplace of ideas" did not apply to school-aged children, especially in the classroom where the words of the teacher may carry great weight. The court responded that there had to be some restrictions on teacher speech because of the fact that the students were a "captive" group, but that the teacher's speech could not be censored when the speech did not interfere in any way with the teacher's obligation to teach, was not coercive and did not arbitrarily inculcate doctrinaire views in the minds of students. The court noted that "any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interest of discipline and sound education are materially and substantially jeopardized, whether the charges stem initially from the conduct of students or teachers."

Miller has suggested that three factors were significant to the court's findings that the teacher's symbolic speech did not infringe on the school's interest in curriculum implementation: the conduct of the teacher was passive and unobtrusive, the conduct in no way interfered with the teacher's assigned responsibilities, and the students in the class were neither very young nor unsophisticated. It has been argued, however, that if a button provokes a classroom discussion about the
stance it advocates when the class is engaged in a lesson unrelated to the button's message or if the button is an attempt by the teacher to proselytize his students, the state's interest in curriculum control would outweigh the teacher's right of expression.50

The conduct of the teacher in the James case51 did not meet the "material and substantial disruption" test of the Tinker decision52. It has been suggested that it is not clear when the possibility of potential disruption becomes so certain as to give rise to the right to restrain a teacher's symbolic speech.53 Diamond54 has argued, however, that "reasonable forecast of disruption" are key words in evaluating if and when the suppression of First Amendment conduct is to be permitted and that in interpreting "reasonable forecast", courts have tended both to focus on a forecast based on facts, not intuition, and to consider the factual background of each particular situation.

Issue: May a teacher legally refuse, under the Freedom of Expression clause of the Constitution, to lead his class in the Pledge of Allegiance?

The refusal of the classroom teacher to recite the Pledge of Allegiance is seen by the courts as a form of expression entitled to constitutional protection, and "it matters not that the expression takes the form of silence".56 The exercise of silent expression, however, is subject to limitations, as is any other form of expression within the classroom.

A 7th/8th grade teacher's refusal to lead her class in the Pledge of Allegiance was upheld in Hanover v. Northrup.56 The court was cognizant of the fact that the teacher's behavior - she sat at the back of the room with her head lowered - had not resulted in disruption to
school activities or interference with, or denial of, the rights of other teachers and students. The court was also unconcerned by the fact that some students may have refrained from recitation of the Pledge because of the teacher's example, since the First Amendment "protects successful dissent as well as ineffective protest".

In the similar case of Russo v. Central School District No. 159, the court held that while the teacher could not be compelled to relinquish First Amendment rights, activities of the teacher which were "undisciplined, coercive, intimidating or disruptive" and which threatened the essential function of schools would not be tolerated. In the case before the court, the teacher had made no attempt either to prevent students from reciting the Pledge or to proselytize them; nor had she disrupted classes. The court noted that the students were "not fresh out of their cradles," and that because it was an appropriate function of the educational system "to instill in young minds a healthy respect for the symbols of our national government," school officials could enforce regulations whose purpose was to give effect to this legitimate state aim so long as the regulations were narrowly drawn to avoid infringing First Amendment rights.

The views of Miller, Kusma and Diamond which commented on the teacher's First Amendment right to wear armbands or buttons are also relevant to the teacher's First Amendment right to refuse to lead his class in the Pledge of Allegiance.

**Issue:** Can a teacher's grooming practices in the classroom (e.g., the wearing of a beard, the style and length of hair) be legally regulated by the teacher's employer?

Grooming practices may be viewed as a point along a "speech-conduct" continuum. Some courts have held that the decision to wear a beard is
"closely akin to pure speech" and so deserving of constitutional protection, while other courts have viewed the same decision as close to the "conduct" end of the "speech-conduct" continuum and not therefore entitled to constitutional protection. There is a practical difference, too, between grooming practices which cannot be "donned and doffed" for work or play, and clothing practices, where any rule regulating a teacher's choice of clothing affects the teacher for the duration of the school day only.69

Some courts have held that the right, for example, to wear a beard while assigned to classroom teaching is "one of those constitutionally unnamed but constitutionally protected personal liberties under the due process provisions of the federal Constitution".70 Some courts have also held that "the wearing of a beard is a form of expression of an individual's personality, and that such a right of expression, although probably not within the literal scope of the First Amendment itself is as much entitled to its peripheral protection" as other personal rights established by past Supreme Court decisions.71 First Amendment protection of grooming practices has been argued by the courts to be particularly applicable where the hairstyle or decision to wear a beard is reflective of a religious conviction, national or family heritage, or simply reflective of a personal interest in projecting a special image or character.72

Some courts have held that a rule which regulated grooming practices and which bore no relation to a valid educational objective was contrary to the substantive due process rights of the teacher.73 A rule regulating the grooming practices of teachers which was nonuniformly enforced,
or a rule which was used as an attempt to regulate teachers' grooming practices when in fact it was simply designed to regulate the grooming practices of students, has been held to be violative of a teacher's substantive due process rights and his rights to equal protection.  

This is not to say a teacher's grooming practices can never be regulated. If a teacher's grooming practices might reasonably be expected to cause disruption to discipline in the school or to encourage inappropriate dress by students, or to give rise to a health or sanitation problem, or to impair the teacher's ability to teach and his students' ability to learn, school authorities may legally regulate the teacher's grooming practices.

Where a teacher's grooming practices were not intended to convey a specific message but were simply intended as a choice of a particular style, one court has held that the teacher's choice or opinion in such circumstances does not raise an issue of constitutional significance. In the case the court held it would not review the school authorities' decision to regulate the teacher's style of appearance unless the teacher alleged discrimination against a racial or political group or unless the regulation was so extreme as to dogmatically require or totally prohibit a specific grooming practice.

The decision of Pence v. Rosenquist has argued that one of the basic assumptions of the Supreme Court decision of Kelly v. Johnson was that the citizenry at large did have some sort of "liberty" interest within the Fourteenth Amendment in matters of personal appearance. The result, argued the Court, was that the choice of one's appearance, even in the case of teachers, was an element of liberty deserving of constitutional protection.
Issue: Can a teacher's employer legally regulate what the teacher wears in the classroom (e.g., a turtleneck sweater instead of a shirt, coat and tie; the length of a teacher's dress)?

A requirement that a teacher wear a tie in class or a dress of a particular length would seem to be less of an infringement of the teacher's interest in appearing as he or she pleases than a requirement that a teacher wear short hair. Short hair cannot be "donned and doffed" for work and play as clothing can be.84

In rejecting the teacher's claim that dress length was an aspect of the Fourteenth Amendment's concept of liberty, the court, in Tardif v. Quinn85, stated that "whatever constitutional aspect there may be to one's choice of apparel generally, it is hardly a matter which falls totally beyond the scope of the demands which an employer can legitimately make for its employee."86 The court was cognizant of the fact that the teacher had not claimed dress length as a First Amendment form of expression and that her choice of apparel was effectively regulated only during school hours.87

In East Hartford Education Association v. Board of Education88, the court held that if a teacher had any protected liberty interest under the Fourteenth Amendment in his neckwear, it did not weigh heavily on the constitutional scales with the result that the relevant dress code was presumptively constitutional and justified by the school authorities' concern for respect and discipline.89 The refusal to wear a tie, the court added, was "sufficiently vague to place it close to the conduct end of the 'speech-conduct' continuum" with the result that it was not entitled to First Amendment protection.90 The court noted that as conduct became "less and less like 'pure speech', the showing of a
governmental interest required for its regulation is progressively lessened."  

Schimmel and Fischer have argued that courts will not view grooming practices and clothing practices of teachers in the same light and that, in some situations, they might be inclined to protect certain nonconforming clothing such as the wearing of a dashiki by a black teacher of African studies as directly relevant to his job and as a matter of academic freedom and racial pride.

**Issue:** Does the Freedom of Religion clause of the Constitution uphold a teacher's refusal to teach that portion of the school curriculum dealing with national days and with nationalistic observances (e.g. Thanksgiving, the Pledge of Allegiance) when the teacher feels that such days and observances are in conflict with his religious beliefs?

The state has an interest in control and implementation of the curriculum. The student has a right to receive information and the benefits of education. The teacher has an interest in constitutional freedoms. The problem is to arrive at a balance between such competing interests.

In *Palmer v. Board of Education*, a kindergarten teacher refused to instruct her class in the Pledge of Allegiance, to lead the class in certain patriotic songs, and to conduct instruction and activities concerning certain national holidays on the basis that to do so would conflict with her religious beliefs. The court affirmed the distinction between the freedom to believe, which is absolute, and the freedom to act, which is not, and upheld her dismissal. The court felt that the teacher's freedom of religion could be permissibly infringed by the compelling state interest in regulating the curriculum in the primary grades, a component of which included the inculcation of community values.
in students who were not mature enough to deal with academic freedom as protected at higher levels of education. Nor could the teacher, by the exercise of her freedom of religion, require children to submit to her views and "to forego a portion of their education they would otherwise be entitled to enjoy." The court concluded that the exercise by the teacher of her freedom of religion resulted in substantial upset to parents, teachers and students and could not therefore be protected.

Issue: A public forum, such as a sidewalk or street, is generally viewed as an avenue for the freedom of speech for all citizens. Does the public school classroom become a public forum, for the purposes of freedom of speech of all citizens, as a result of the teacher's sending home with children school-related literature?

A public forum, such as a public street or sidewalk, offers to the citizen an avenue for the exercise of his freedom of expression. Unlike the public school, streets and sidewalks were created, to some extent, for the purpose of public communication. The public school, however, is something less than a public forum.

In Buckel v. Prentice, parent groups had argued that school personnel had created a public forum out of the classroom for First Amendment purposes by permitting a wide variety of literature to be sent home to parents via students and that access to this public forum could not be denied under the First and Fourteenth Amendments to parent groups wishing students to take home to other parents printed notices and materials. The court held that the distribution via students of information concerning coming school events, home safety measures, and the like, was not indicative of the establishment of a forum for First Amendment purposes. Dissemination of such materials was seen rather as a logical and proper extension of the educational function of schools.
and did not of itself give rise to any right of access to student distribution by parents or other concerned groups.103

2. The Teacher as Classroom Manager

Issue: While the teacher has the authority to make rules for good order and discipline and for the furtherance of education in the classroom, what might be the limits to the teacher's authority in such rule-making?

The establishment of an educational program requires the formulation of rules and regulations necessary for an orderly program of classroom learning.104 While the legislature generally entrusts rule-making authority to a board of education105, it is to the teacher that the discipline of the classroom and school is customarily committed.106 The teacher also stands "in loco parentis" to the students under his care with the result that he may exercise such powers of control, restraint and correction as may be reasonably necessary to enable him to properly perform his duties as a teacher and to accomplish the purposes of education.107 And because no system of rules, however carefully devised, can meet every requirement, much must be left to the discretion of the classroom teacher.108

Despite his wide degree of discretion in rule-making, the teacher is always bound, however, by the requirement that the rules must be reasonable.109 A reasonable rule is generally one which is essential in maintaining order or discipline on school property and which measurably contributes to the maintenance of order and decorum within the education system.110 There must be a rational basis for the rule; it must be reasonable, and there must be a reasonable relationship between the rule and the furtherance of a valid educational purpose.111 The court will
not interfere with the exercise of the teacher's rule-making authority unless it has been unreasonably or illegally used.\textsuperscript{112}

Because it is not possible to draw up rules covering every incident likely to arise within the classroom, the teacher is not prohibited from taking appropriate action simply because there is no pre-existing rule on the books.\textsuperscript{113} School rules probably need not be as narrowly drawn as criminal statutes; however, if it is contemplated that serious punishment will result as a consequence of the breach of the rule, the rule must be drawn so as to reasonably inform the student of what specific conduct is prescribed.\textsuperscript{114}

Any reasonable rule adopted by a teacher which is not inconsistent with some statute or some other rule prescribed by a higher authority, such as the school board, is binding on the student.\textsuperscript{115} Proehl\textsuperscript{116} has argued, however, that a peculiar rule of one teacher which other teachers have not found necessary in the past or in like circumstances might well be held unreasonable. And if a teacher seeks to impose in his classroom a rule regarding an outside activity or matter, such as student dress or hairstyle, which may in fact have some bearing on order and decorum in school generally but which is not the individual teacher's responsibility, that rule may also be challenged as unreasonable.\textsuperscript{117}

**Issue:** Is the constitutional right to freedom of speech and expression available to the student in the classroom?

There has been some reluctance to extend full constitutional rights to children. The view has been expressed, for example, that the First Amendment rights of children are not co-extensive with those of adults.\textsuperscript{118} It has also been argued, however, that full adulthood depends upon a
recognition of, and an exercise of, constitutional rights during childhood. It has been urged that freedom of expression serves for children, as for adults, the fundamental purpose of permitting development of individual identity. The capacity and propensity for independent thought is unlikely to appear suddenly in one who has always been told what he may say. Similarly, adults will rarely be able to contribute to the pursuit of knowledge unless they can build on a foundation established during childhood. In Tinker v. Des Moines Independent Community School District, students ranging in grades from second grade to high school wore protest armbands to school. The Supreme Court held that First Amendment rights, applied in light of the special characteristics of the school environment, are available to students. 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. The student's freedom of expression is not absolute, however. The Court noted that "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the constitutional guarantee of freedom of speech. The Court noted that while the permissible exercise of First Amendment rights is not confined to "supervised and ordained discussion in the school classroom," reasonable regulation of speech-connected activities in carefully restricted circumstances was permitted. Verbal communication from student to teacher, and from student to student, which includes fighting words, lewd and obscene language or
profane and libelous language, could be regulated without infringement of the student's freedom of speech. And it is not "a First Amendment violation every time a teacher tells a student not to speak." School rules which forbid "...unnecessary discussion in the classroom and prohibit exchange of conversation between students are reasonable, even though those regulations infringe on such basic rights as freedom of speech..., because they are necessary for the orderly presentation of classroom activities."

Issue: Can a teacher legally regulate the wearing of protest armbands or buttons (e.g., anti-war armbands) by students in the classroom when the student claims that the wearing of such armbands or buttons is protected by the constitutional right of freedom of expression?

In Tinker v. Des Moines Independent Community School District, the wearing of armbands by students was viewed as symbolic speech "closely akin to 'pure speech' which ... is entitled to comprehensive protection under the First Amendment." The Court observed, however, that the expression by the students was "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" on the part of the students and that there was no evidence of interference with the work of the school or the rights of others. The Court also noted that the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, was not constitutionally permissible.

In Burnside v. Byars, the students' right to wear protest buttons was upheld because there was no evidence that the wearing of buttons would "materially and substantially interfere with the requirements
of appropriate discipline in the operation of the schools"\textsuperscript{132} and because the wearing of buttons was not "in the class of those activities which inherently distract students and break down regimentation of the classroom."\textsuperscript{133} In Blackwell v. Issaquena County Board of Education\textsuperscript{134}, however, the wearing of buttons was not protected since it resulted in disruption of classes, an unusual degree of commotion and boisterous conduct, and collision with the rights of others.\textsuperscript{135}

Something more than the mere pronouncement of school officials is generally required to establish that a form of expression will cause disruption. School officials are not required by the First Amendment to wait until disruption actually occurs, but there must be "a determination based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe".\textsuperscript{136}

At some point between chaos in the classroom and his feeling of discomfort, a teacher's interest in maintaining order and furthering education in the classroom may outweigh the interest of the student in free expression. The teacher must take into account all the facts of the situation. Factors which may have some bearing on the balancing process include the demography of the school and the likelihood of further polarization within the school as a result of the exercise of expression\textsuperscript{137}, the past experiences of the school in permitting similar forms of expression\textsuperscript{138}, the "shock" value, or lack thereof, to students of the form of expression\textsuperscript{139}, the aggressive or nonaggressive nature of the expression\textsuperscript{140}, and the relevance of the buttons or armbands to what is being taught or learned in the classroom.\textsuperscript{141} The nature of the
classroom, the age, the maturity, and type of students within the classroom, and the duration of the disturbance resulting or likely to result from the exercise of the expression may also be factors which weigh in the balancing process.\textsuperscript{142} The Tinker\textsuperscript{143} rule of "material and substantial disruption" should be treated as a flexible rule dependent upon the totality of the facts in each case.\textsuperscript{144}

**Issue:** Is a student's refusal to participate in the Pledge of Allegiance ceremony protected by the right of freedom of expression under the Constitution?

The right to refuse to participate in the Pledge of Allegiance has generally been afforded constitutional protection as a form of expression under the First Amendment. Such a right, however, is not absolute and is subject to regulation in certain situations.

In West Virginia State Board of Education v. Barnette\textsuperscript{145}, the State Board of Education had directed that students were required to participate in the flag-salute ceremony or to suffer expulsion if they refused. The Supreme Court held that such action by the Board violated the First and Fourteenth Amendment rights of those students who refused to participate. The Court noted that the refusal by the students to participate in the ceremony in no way interfered with or denied the rights of others to do so, and that the behavior of the objecting students was peaceful and orderly.\textsuperscript{146} The Court felt that it was irrelevant to the issue before the court that some people might think that participation in the flag-salute a good thing; "nor did the issue...turn on one's possession of particular religious views or the sincerity with which they are held."\textsuperscript{147} The Court concluded that the action of the Board effectively invaded "the sphere of intellect and spirit that it is the purpose of the First Amendment...to reserve from all official control".\textsuperscript{148}
The West Virginia State Board of Education case has been cited with approval or followed in Frain v. Baron, Banks v. Board of Public Instruction, Goetz v. Ansell, and Lipp v. Morris.

Issue: Can a teacher legally demand of a student who does not wish to participate in the Pledge of Allegiance on the grounds of freedom of expression under the Constitution that the student either stand in silence or leave the room while the Pledge is being recited?

The refusal to participate in the Pledge of Allegiance and to salute the flag has been seen by the courts as a form of expression entitled to First Amendment protection. In some cases, however, students have been ordered to either stand in "respectful silence" or to stand outside the classroom during recitation of the Pledge. Refusal to stand has often resulted in suspension.

The student's refusal to recite the Pledge, to stand during the Pledge, or to leave the room until its completion, was upheld in Frain v. Baron. Noting that students were claiming not only a right to non-participation but also a right to silent protest by remaining seated, the court applied the principle of the Tinker decision and held that "the student was free to select his form of expression so long as he does not materially infringe on the rights of other students or disrupt school activities." The court commented that "pedagogical opinions, or appeals to courtesy, are also inadequate grounds for coercive responses to First Amendment expression."

In Goetz v. Ansell, a student was given the option of either leaving the classroom or standing silently during the Pledge after he had refused to participate in the Pledge. The option of standing silently was viewed by the court as an act that could not be compelled
over deeply held convictions since standing "is no less a gesture of acceptance and respect than is the salute or the utterance of the words of allegiance." The court also noted that if the state could not compel participation, it could not punish nonparticipation by ordering a student to leave the classroom, an action which could reasonably be viewed as constituting a punishment.

In Banks v. Board of Public Instruction, a student was suspended for his refusal to stand during the Pledge of Allegiance. The court held that the right to differ and express one's opinion, to fully vent one's First Amendment rights, even to the extent of exhibiting disrespect for the flag and country by refusing to stand and participate in the Pledge could not be suppressed by the imposition of suspension.

In all cases, the courts recognized that there was no evidence that the exercise of First Amendment rights by the students concerned had materially disrupted classwork or had invaded the rights of others.

Issue: Can a teacher's authority to make rules for the classroom include the making of a rule which regulates the hairstyle of students in the class when a student claims that his hairstyle is a form of expression protected under the Freedom of Expression clause of the Constitution?

The Supreme Court, in Tinker v. Des Moines Independent Community School District, expressly pointed out conduct with which it was not concerned: length of skirts, type of clothing, hairstyle, and deport-ment. The exclusion of hairstyle from the immediate ambit of the decision, and the lack of any Supreme Court decision on the issue, have meant considerable judicial disagreement among lower courts as to the constitutional status, or lack thereof, of students' grooming practices. One court has noted that "[t]he question of whether the right of a male to wear long hair is a constitutionally protected right...
has inspired many erudite and scholarly pens in recent years, but ... decisions as a whole have provided nothing more than an unchartered area of conflicting adjudications".166

Courts of the First, Fourth, Fifth, Seventh and Eighth Circuits have tended to recognize the student's right to select a particular hairstyle as a constitutional right.167 Courts of the Third, Sixth, Ninth and Tenth Circuits have tended to reject such a right as having any constitutional dimension.168

In the Sixth Circuit case of Jackson v. Dorrier169, it was argued by the students that enforcement of a code regulating hair length deprived them of their freedom of expression in violation of the First Amendment. The court found that neither student had testified that his hair length was intended as an expression of any idea or point of view with the result that the First Amendment was inapplicable.170 In Mercer v. Lothamer171, the court held that the students' hairstyles within the context of the evidence of the case were not expressions of opinion of the kind anticipated to bring the issue within the pronouncements of the Tinker172 decision.173 In Gfell v. Rickelman174, the court noted that in the case before it no serious question under the First Amendment had been raised, there was no violation of the Equal Protection clause of the Fourteenth Amendment, and the argument that a right of a student to determine his own hair length was a matter of substantive due process was without merit.175

In Church v. Board of Education176, however, the Sixth Circuit court reasoned that on the facts of the case, the student's hairstyle did constitute a form of expression protected by the First Amendment.
The student had grown his hair to present a tangible, continuously visible symbol of his personal viewpoint on the Vietnam war and to symbolize the importance of dissent generally with the result that a very serious First Amendment question was raised. The court concluded that because there was no danger of violence or other impairment of school activities, the student's right of free expression could not be infringed.

The specificity and particularity of the student's purposes for growing his hair long in the Church case weighed heavily in the court's decision. Doty has argued that ethnic hairstyles, such as that adopted by Indian students, worn as part of an ethnic culture and heritage and as a clear and specific expression of that culture and heritage might be protected by the First Amendment. The wearing of such hairstyles could be distinguished from the school hair length cases on the basis that the latter constituted merely a broad symbol of general discontent or personal preference rather than a sign of particular communication.

Issue: Is the infliction of corporal punishment on a student by the classroom teacher legal in Ohio (e.g., the paddling of a student by the teacher)?

The enjoyment of the right of attending public school is necessarily conditioned on compliance by the student with the reasonable rules, regulations, and requirements of the school authorities. School officials have the power to punish a student for all acts which are detrimental to the good order and best interests of the school and for the breach of any rule which it is within the power of the school officials to adopt.
Section 3319.41 of the Ohio Revised Code provides:

A person employed or engaged as a teacher, ... in a school, whether public or private, may inflict or cause to be inflicted, reasonable corporal punishment upon a pupil attending such school whenever such punishment is reasonably necessary in order to preserve discipline while such pupil is subject to school authority.\textsuperscript{183}

In Sims \textit{v.} W aln\textsuperscript{184} it was argued that Section 3319.41 was violative of the Fourteenth Amendment. The court held that corporal punishment of a student by a teacher did not, of and in itself, run counter to the general principles of accepted law and that corporal punishment in a Fourteenth Amendment context was legal if it was reasonable.\textsuperscript{185} Because the section permitted only reasonable corporal punishment, it did not therefore offend the Fourteenth Amendment. It has been stated further that a board of education in Ohio could not prohibit the use of corporal punishment but it could establish procedures and guidelines designed to insure that its administration was reasonable.\textsuperscript{186}

In some cases, parents have indicated that corporal punishment should not be inflicted on their child without their consent, arguing that they have a right to determine what kind of control or punishment should be metered out to their child. In Baker \textit{v.} Owens\textsuperscript{187}, the court noted that the Fourteenth Amendment's concept of liberty embraced the right of parents generally to control the means of discipline of their child but that the state had a countervailing interest in the maintenance of order in schools which is served by the use of corporal punishment.\textsuperscript{188} The court concluded that so long as the force used was reasonable, school officials were free to employ corporal punishment for disciplinary purposes.\textsuperscript{189}
In discussing the right of the state to impose corporal punishment, the Supreme Court in *Ingraham v. Wright* noted that it had held in summary affirmance that parental approval of corporal punishment was not constitutionally required. In *Hall v. Tawney*, the court held that the state interest in maintaining order limited the right of particular parents unilaterally to except their children from the regime to which other children were subject and that the principle that parental rights were not implicated in corporal punishment cases applied alike to all degrees of punishment.

**Issue:** Might the constitutional prohibition against cruel and unusual punishment extend in some circumstances to prohibit corporal punishment of a student by a classroom teacher?

The Eighth Amendment of the Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It has often been argued that, irrespective of the degree of punishment inflicted, the administration of corporal punishment by a teacher to a student is cruel and unusual punishment and therefore contrary to the Constitution's Eighth Amendment.

In *Ingraham v. Wright*, the Supreme Court noted that the constitutional prohibition against cruel and unusual punishment had historically been applied to the punishment of prisoners and criminals, and that "the prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." The Court argued that school students have little need for the protection of the Eighth Amendment since "the public school remains an open institution", permitting a student's family to protest any instances of mistreatment. In addition, the common law privilege to inflict reasonable
corporal punishment, if abused, could also mean civil or criminal liability for the teacher. The Court concluded that the Eighth Amendment did not apply to the paddling of children as a means of maintaining discipline in public schools.

In Hall v. Tawney, the court concluded that the student's claim that corporal punishment was contrary to the Eighth Amendment had been foreclosed by the Supreme Court decision in the Ingraham case. Stroud has suggested further that the tone of the Supreme Court's decision would seem to indicate the applicability of the Eighth Amendment to school corporal punishment is not open to relitigation when a student alleges that state remedies are inadequate to provide redress against punishment that is other than reasonable.

Issue: When is the administration of corporal punishment to a student reasonable and therefore legal?

Section 3319.41 of the Ohio Revised Code empowers the teacher to inflict "reasonable" corporal punishment upon a student whenever such punishment is reasonably necessary to preserve discipline. The rule at common law provides that teachers may impose reasonable but not excessive force to discipline a child.

The old rule, established in State v. Pendergrass, gave the teacher complete discretion as to the necessity of punishment and how it was to be administered. The only limitations of his power were twofold: no punishment could be inflicted that was of a nature which might cause lasting injury to body or health, and the punishment could not be inflicted maliciously.

The new rule denies the teacher absolute discretion to determine the necessity of the punishment and leaves as questions of fact the
All the circumstances must be taken into account in determining whether the punishment is reasonable in a particular case. Among the most important considerations are the seriousness of the offense, the attitude and past behavior of the student, the nature and severity of the punishment, the age, size and physical strength of the child, and the availability of less severe but equally effective means of discipline.

Issue: When can a classroom teacher be held criminally liable in Ohio for the infliction of corporal punishment on a student?

In Ingraham v. Wright, the Supreme Court argued that the Eighth Amendment did not apply to cases of disciplinary corporal punishment in schools since civil and criminal remedies afforded sufficient protection to the student against the teacher who might inflict punishment that was other than reasonable.

Criminal liability can be imposed on a teacher under Section 2919.22 of the Ohio Revised Code where the teacher administers corporal punishment or other physical disciplinary measure in a cruel manner or for a prolonged period and when the punishment or discipline is excessive under the circumstances and creates a substantial risk of serious physical harm to the student. Before a teacher can be convicted under such legislation for punishing a student, it must be shown that the punishment administered was immoderate and excessive, that the teacher was activated by malice expressed or implied, and that the punishment was of such a nature as to produce or threaten to produce lasting injury. The fact that the punishment administered was of such a nature as to produce or threaten permanent injury and that it was accompanied by express or implied malice must be proved beyond a reasonable doubt.
Express malice is explained as including spite, hatred, or revenge. Implied malice is stated to be shown by a wrongful act wantonly done without just cause or excuse. If the punishment is so severe, so excessive and so cruel as to be shocking to every right-thinking person, malice will be implied.

Issue: When can a classroom teacher be held civilly liable in Ohio for the infliction of corporal punishment or a student in his classroom?

A teacher is civilly liable for the effects of "unreasonable" corporal punishment inflicted on a student. All the circumstances are taken into account in determining whether the punishment is reasonable in a particular case. Some of the most important considerations are the seriousness of the offense, the attitude and past behavior of the student, the nature and severity of the punishment, the age, size, sex and physical strength of the student, and the availability of less severe but equally effective means of discipline. The reasonableness or unreasonableness of the punishment is a question of fact.

Issue: Before he administers corporal punishment to a student, is the teacher required under the Constitution to provide the student with procedural due process (e.g., some kind of hearing where the student has the opportunity to hear the charge against him and to present his side of the facts)?

In Baker v. Owen, the court held that prior to the administration of corporal punishment, a student was entitled to at least the opportunity "to protest spontaneously, an egregiously arbitrary or contrived application of punishment." In Glaser v. Marietta, it was held that the interview with the student when he was informed by the principal of the nature of his infraction, the discussion leading to the determination of guilt or innocence, and the speedy administration of corporal
punishment were reasonable examples of due process procedures in grade school settings.221

One of the issues confronting the Supreme Court in Ingraham v. Wright222 was whether procedural due process was required before corporal punishment could be administered. The Court held that "where the school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, ... Fourteenth Amendment liberty interests are implicated."223 But in answering the question of what process was due, the Court held that traditional common law remedies which are available to protect the student from unreasonable or excessive corporal punishment were fully adequate to afford due process.224 The Court noted that even if the need for advance procedural safeguards was clear, such a requirement would not only impose undue administrative burdens on schools where the incidence of abuse is minimal, but it would also significantly burden the use of corporal punishment as a disciplinary measure, and that was a decision in which the Court wished to have no influence.225

Simpson and Dee226 have argued that the Ingraham decision did not say that due process safeguards were unnecessary in corporal punishment cases, but rather that the civil and criminal remedies offered the student in the state in which the case occurred adequate protection. Stroud227 has argued that because the Supreme Court based its decision on the adequacy of Florida law to remedy any unjustified deprivation of the student's liberty interest, in any state without adequate remedies the teacher would be required to provide the student with notice and a hearing prior to the infliction of corporal punishment.
Lines has put forward the view that none of the state remedies protect an innocent student who has been reasonably punished and that in such cases procedural due process prior to the infliction of corporal punishment would avoid the punishing of the innocent student. It has been urged that the deprivation of a student's interest is two-pronged in corporal punishment cases and that the student therefore needs a two-pronged remedy. To protect against erroneous punishment, the student needs an informal prior hearing; to protect against excessive punishment, civil and criminal remedies are needed as a deterrent. Each remedy alone is insufficient; both are needed in corporal punishment cases.

Issue: Under the Constitution, a person is generally protected from action by the State which is arbitrary, capricious and unrelated to any legitimate purpose. Is the infliction of severe corporal punishment on a student (e.g., a brutal and inhumane paddling shocking to the conscience) arbitrary, capricious, and unrelated to achieving a legitimate educational purpose and therefore contrary to the Constitution?

While the sources and parameters of substantive due process remain unclear, "if a penalty is so grossly disproportionate to the offense as to be arbitrary in the sense that it has no rational relation to any legitimate end, it may be a violation of ... substantive due process." The Supreme Court in Ingraham v. Wright refused to consider the question whether the infliction of severe corporal punishment upon public school students was arbitrary, capricious, and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process clause of the Fourteenth Amendment.

In Hall v. Tawney, an elementary school student was repeatedly struck by the teacher with a thick, five-inch wide, home-made rubber paddle. The student argued that this infliction of severe corporal
punishment violated her substantive due process rights. The court concluded that school children do have a right to ultimate bodily security based on substantive due process, an infringement of which will attract liability under Section 1983 of the Civil Rights Act.\textsuperscript{235} The court reasoned that substantive due process rights can be implicated in school disciplinary punishment cases even though procedural due process is afforded by adequate state civil and criminal remedies and even though cruel and unusual punishment is not implicated at all.\textsuperscript{236} The substantive due process right "to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court" had been recognized for persons charged with or suspected of a crime and, the court argued, should therefore be recognized for public school children under the disciplinary control of teachers.\textsuperscript{237} The test to be applied was "whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."\textsuperscript{238}

\textbf{Issue:} Where a classroom teacher verbally chastises a student in his classroom, can that teacher be held civilly liable if the verbal chastisement is considered to be other than reasonable?

While there is considerable authority setting out the teacher's liability for unreasonable corporal punishment\textsuperscript{239}, there is very little authority defining the teacher's liability for unreasonable verbal behavior. Yet, it would appear to be common practice among teachers in the elementary school to punish a child by means of verbal chastisement,
whether it be a simple admonition in a certain tone of voice or a verbal tirade of some force.

The question of civil liability for verbal chastisement of a student by a teacher arose in Wexell v. Scott\(^{240}\). An eleven year old student alleged that his teacher had humiliated, embarrassed and degraded him by calling him "worthless, undependable, incompetent." The court reasoned that if a teacher in Illinois was permitted to inflict corporal punishment in the absence of wanton and malicious conduct, the same rule should be applied in cases of verbal chastisement. The court felt that because the teacher stood "in loco parentis", disparaging comments, in the absence of malice or wantonness, would seem in some cases necessary and conducive to proper educational discipline.\(^{241}\) The teacher was therefore not civilly liable for "scolding" the student.

Stevens\(^{242}\) has argued that the analogy offered by the court between verbal and physical discipline suggests an approval of standards for verbal abuse similar to those applied in corporal punishment cases. Thus, a teacher would be civilly liable for verbal chastisement where the chastisement was unreasonable under the circumstances. In deciding the reasonableness of the teacher's chastisement, factors to be taken into account would include the tone of voice of the teacher, the age of the student, whether the chastisement was unnecessarily degrading, and how well acquainted the student and the teacher were prior to the incident. But because the teacher stands "in loco parentis" to his students, the verbal chastisement would need to be particularly outrageous before recovery of damages could be allowed.\(^{243}\)
Issue: Is it legally permissible for a classroom teacher to lower a student's grade as a means of punishing that student for a breach of discipline?

The practice of lowering a student's grade as a method of discipline has often been endorsed by school board and teacher alike. Some school districts have imposed an automatic reduction in grade for unexcused absences, particularly in high schools, and it is often claimed that, because of the nature of what is being taught, it is necessary to consider conduct and effort in grading a student's performance.

The teacher has the authority to make reasonable rules for the good order and discipline of his classroom and for the furtherance of education in his classroom. He may also exercise such powers of control, restraint, and correction as may be reasonably necessary to enable him to properly perform his duties as a teacher and to accomplish the purposes of education. The question arises as to whether the teacher can legally lower a student's grade because of misconduct.

Courts have traditionally been reluctant to intervene in the grading process. In Knight v. Board of Education, the court saw an analogy between the effect of student suspension and the need in such cases for procedural due process and the reduction of a student's grade, but felt that where a grade is dispensed by a teacher within the teacher's subjective discretion, there was no justification for court intervention. The court argued, however, that in cases where a rule provided for a grade reduction without a subjective determination by the teacher, the subsequent disadvantage the student might receive from the lower grade was a sufficient showing of damage to a property
right that at the very least he was entitled to some form of due process.\textsuperscript{251} 

In the Knight case the student argued that he had been deprived of equal protection and substantive due process because there was no rational relationship between grades and his conduct of unexcused absence.\textsuperscript{252} The court responded that in determining whether there was a rational basis between the student's conduct and the grade given, it was necessary to determine what the grades were taken to represent. Noting that most high school procedures in rendering grades in most subjects had comingled factors of pupil conduct and effort and academic achievement, the court concluded that there was a sufficiently rational connection between the grade reduction the student was given and his unexcused absences to satisfy the requirements of both equal protection and substantive due process.\textsuperscript{253}

Pepe\textsuperscript{254} has suggested that whether a student's grade can legally be lowered for misconduct, such as unexcused absences, cannot be definitely answered. Buss\textsuperscript{255}, in probing the constitutional outline of procedural due process in school discipline cases, has argued that while schools rightly have a broad discretion in all matters of academic evaluation, this does not dictate that all decisions concerning grading are exempt from judicial scrutiny. If in fact a student is given a failing grade because of misconduct rather than because of poor scholastic achievement, at the very least he has a right to determine whether he is guilty of the alleged misconduct and whether the failing grade is a reasonable sanction. Buss has claimed that this would hold particularly for elementary school students since it is during the
early years of schooling that education would seem more indispensable and concrete procedures more appropriate.256

Issue: Is a student entitled under the Constitution to any kind of procedural due process (e.g., the opportunity to hear the charge against him and the chance to tell his side of the facts) before he is suspended or expelled from school?

Conduct on the part of the student which warrants suspension or expulsion will often be conduct that arises within the classroom. While the teacher may not have the authority to impose suspension or dismissal,257 and disciplinary process resulting in the imposition of such punishments will often require not only that the teacher initiate relevant procedures to bring the process into motion but that he also be a party to the proceedings in a significant way.258

In Goss v. Lopez259, students were suspended from school for misconduct for ten days without procedural due process. The Supreme Court recognized that a student's legitimate entitlement to a public education was a property interest with the result that "[h]aving chosen to extend the right to an education to [the students, the state] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."260 The Court also noted that a student has a liberty interest in his good name and reputation and that the charge against the students, if sustained and recorded, could seriously damage their standing with fellow pupils and teachers and could interfere with later opportunities for higher employment.261 The Court held that the arbitrary deprivation of such a liberty interest without a hearing would also offend the Due Process clause of the Fourteenth Amendment.262 The Court also noted that the property and liberty interests in the case were not "de minimis"
or unworthy of concern, with the result that account had to be taken of the Due Process clause.263

In determining how much due process was due, the Court noted that the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."264 The Court stated, however, that "due process requires, in connection with a suspension of 10 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."265 The Court felt that the notice and hearing should generally precede removal of a student from school but students "whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school"266, in which case the necessary notice and hearing should follow as soon as practicable.267

The Court did not believe that procedures it had imposed were inappropriate for classroom settings. Rather, the requirements were, if anything, "less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."268 Nor was the Court insisting that "hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."269 What was required was at least "an informal give-and-take between student and disciplinarian."270 The Court felt, however, that more formal procedures may be required in cases of longer suspensions or expulsion and "in unusual situations, although involving only a short suspension."271
Issue: Is the student entitled under the Constitution to any kind of procedural due process (e.g., the opportunity to hear the charge against him and the chance to tell his side of the facts) before the classroom teacher orders him to stand outside the classroom for the morning or imposes in-school suspension for a breach of school discipline?

The Goss v. Lopez decision dealt with a specific case of a 10 day suspension. The dissenting opinion wondered, however, whether the judgment did not mean that the student was entitled to procedural due process in the case of a suspension of a mere one day's duration or even in cases where discretionary decisions, such as the grading of a student's work or the promoting of a student from one grade to another, were involved. It has been suggested that the more important question generated by the Goss decision is what other types of decisions by school officials might be subject to court supervision.

Lufler has claimed that an unintended consequence of the decision is the increased use of in-school suspension where it is argued by school officials that due process is not required by the courts and where no entry is made on a student's record. The student is simply sent to a special study room or to the principal's office or directed to sit outside the class or gym for a specified period of time. In support of a student's right to procedural due process in such cases, it has been urged that courts will look to the qualitative nature of the setting to which the student has been banished. If the location to which the student is banished means individual assistance with work and a better education than he receives in his classroom, a claim of deprivation of property interest could hardly be supported; in situations where in-school suspension means complete exclusion from the
educational process, a claim of deprivation of a property interest may be supportable with the result that the Goss principles might justifiably apply.277

In the Goss case, the majority opinion indicated the existence of a "de minimis" limitation with regard to the protection of property interests.278 No such limitation, it has been argued, was assigned with respect to the protections afforded a student's liberty interest, except, perhaps, by way of implication.279 The Court held that a student is entitled to due process protection when charges of misconduct, sustained and recorded, adversely affect a student's standing with fellow pupils or teachers or when they interfere with opportunities for higher education or employment.280 It has been suggested that the harm comes from the labeling281 and that in view of the simple requirement of a very informal notice and hearing, it is not an intolerable burden to require a teacher to explain why a child is a discipline problem or why he received a poor grade before notations to that effect are placed in school records.282

Mass283, on the other hand, has put forward the view that the impact of the Goss decision has been narrowed considerably by recent Supreme Court decisions, particularly in situations where students have sought to insulate themselves from the "stigmatizing" decisions of school officials. He has argued that the decision of Bishop v. Wood284 would seem to indicate that due process safeguards, predicated upon deprivation of liberty, would not be required unless the school publishes the information which would injure the student's reputation even though reliance by the Court upon the act of publication ignores completely
the substantial injury a student might sustain from stigmatizing reports in his permanent record which may never be published.285

Issue: Does the constitutional provision prohibiting unreasonable searches of a person by the State apply to the search of a student by the classroom teacher?

While the Supreme Court has not decided whether school students enjoy the protection of the Fourth Amendment286, it has recognized that students are "persons" under the Constitution287 and that the right to procedural due process exists in certain situations for students facing suspension or dismissal.288 The teacher, however, stands "in loco parentis" to his students and one of his duties is to take steps to protect his students from harm.289 Society, too, has some interest in the detection and prevention of crime in the school setting.

The courts have differentiated between searches by private individuals and those by government officials. The Fourth Amendment and the protections afforded thereunder apply only to searches by government agents and not to searches by private individuals.290

In Mercer v. State291, the court held that a principal who had conducted a search by asking a student to empty his pockets was acting "in loco parentis" and not for an arm of government. The search, the court concluded, was therefore the act of a private individual.

In In the Interests of LL292, the state argued that a teacher who had conducted a search of a student could not be regarded as a government agent since his primary responsibility was the education of the children assigned to his class.293 The court responded that while the teacher did have such a responsibility, a necessary adjunct to that responsibility was the maintenance of order and discipline in the schools, and that when a teacher conducted a search to maintain school
discipline, he acted on behalf of the school board whose responsibilities were derived from legislation. The court concluded that "at least where a teacher's search results in the institution of juvenile delinquency proceedings, there has been state action within the Fourteenth Amendment." Where a physical education instructor had searched a student's wallet, the court held in *State v. Mora* that he was acting as a government agent. The court stated that principals and instructors, like others employed by the State through its school boards, are responsible for public education...and are charged with the responsibility of implementing the policies of the State in this respect. By state law, a teacher is authorized to hold each pupil strictly accountable for disorderly conduct at school.... Because of the function of these school officials and their strict accountability to the State,...school officials, insofar as they are discharging their duties by enforcing State policies and regulation, are within the purview of the Fourteenth Amendment's prohibition [with the result that] students must be accorded their constitutional right to be free from unreasonable searches.

It has been suggested that the "private citizen" argument is devoid of logic and common sense and that to hold that a school official is not a state agent is inconsistent with the long-established trends of constitutional law which have found state action, for example, in school board regulations requiring students to salute the flag.

**Issue:** What constitutes a "search" of a student by a teacher for the purposes of the constitutional provision relating to searches and seizures?

A school search might range from a casual view of an open locker to the disrobing of a student, with the objects sought ranging from bubblegum to firearms. The school search is neither well-defined nor
limited, and the justification for the search may not, in the end, be very compelling at all.\textsuperscript{299}

The Supreme Court has held that a search occurs where there has been an invasion of a person's justifiable reliance on privacy.\textsuperscript{300} In Jones v. Latexo Independent School District\textsuperscript{301}, one of the issues was whether the use of sniffer dogs in the classroom constituted a search for the purposes of the Fourth Amendment. The court noted that under the plain view doctrine, school officials may seize contraband as evidence of a crime which comes within their vision as they go about their business in a legitimate fashion.\textsuperscript{302} Noting that the use of an eavesdropping device to monitor otherwise inaudible conversation constituted a search, the court felt that the use of sniffer dogs was no different since the dogs replaced rather than enhanced the perceptive abilities of school officials.\textsuperscript{303} The court concluded that all citizens "have a reasonable expectation that their privacy will not be intruded upon by electronic surveillance or sniffing dogs at the whim of the state."\textsuperscript{304}

The court in Doe v. Renfrow\textsuperscript{305} held that the use of sniffer dogs did not constitute a Fourth Amendment search. The court reasoned that because the use of sniffer dogs was to fulfill the school's duty to provide a safe, ordered and healthy educational environment, and because "students did not have a justifiable expectation of privacy that would preclude school administrators from sniffing the air around the desks with the aid of a drug detecting canine", the use of the dogs in the school was an aid to school officials and as such was not considered a search.\textsuperscript{306} The court also held that entry by school officials into each classroom for five minutes, the length of time it took officials
to conduct the "search", was not a search contemplated by the Fourth Amendment. The court felt that the presence of a uniformed police officer in the room, at the request of school officials and with an agreement that no arrests would occur, did not alter the basic function of the school officials' activities.

Conduct by school officials which has been held to constitute a search for Fourth Amendment purposes has included the search of a student's wallet, requesting a student to hand over what he had in his pocket, looking in a student's book bag, requiring students to strip to their undergarments, and conducting a nude body search.

Issue: What constitutes sufficient cause under the Constitution for a teacher to search a student for the purposes of obtaining evidence, e.g., of possession of a prohibited or stolen object?

The Constitution prohibits not all searches but only "unreasonable" searches. The courts have suggested that there can be no ready test for determining the reasonableness of a search other than the balancing of the need to search against the invasion of privacy which the search necessarily entails.

In Bellnier v. Lund, a teacher ordered students to strip to their undergarments so that their outergarments might be searched. The court noted that

in analyzing a search to determine reasonableness, the Court must weigh the danger of the conduct, evidence of which is sought, against the students' right of privacy and the need to protect them from the humiliation and psychological harm associated with such a search.... In doing so, the Court must take into account the special duties and responsibilities imposed upon school officials to provide a safe atmosphere for a student to develop, and the attendant limited powers which school officials possess in loco parentis to effectuate the maintenance of proper discipline.
In Jones v. Latexo Independent School District\textsuperscript{316}, the court held that factors to be considered in determining whether a search was reasonable were the scope of the intrusion, the manner of intrusion, the justification for the search, and the place where it is conducted.\textsuperscript{317}

One of the factors that has weighed heavily in determining whether a search is reasonable is the justification for the search. Some cases have held that nothing short of "probable cause to believe" will suffice to justify a search.\textsuperscript{318} Other cases have tended to accept a "reasonable cause" standard in situations involving a search in schools. In Bellnier v. Lund, the Court held that "while there need not be a showing of probable cause in a case such as this, there must be demonstrated the existence of some articulable facts which together provided reasonable grounds to search the student, and that the search must have been in furtherance of a legitimate purpose with respect to which school officials are empowered to act, such as the maintenance of discipline or the detection and punishment of misconduct."\textsuperscript{319} In making such an analysis, some factors which the court thought warranted consideration were the student's age, his history and record in school, the seriousness and prevalence of the problem to which the search is directed, and the exigency requiring an immediate warrantless search.\textsuperscript{320}

Courts have generally insisted that the "reasonable cause" standard allows a search by school officials only if the search is in furtherance of a legitimate school function, such as the maintenance of discipline or preservation of safety.\textsuperscript{321} If the search is for a purpose other than the furtherance of educational purposes, or if the search is a highly intrusive one, the higher standard of "probable cause" will generally apply. In Doe v. Renfrow\textsuperscript{322}, the court admitted that if the search had
been conducted for the purposes of discovering evidence to be used in a criminal prosecution, school officials may well have had to satisfy a standard of "probable cause." In M.M. v. Anker\(^3\), the court argued that as the intrusiveness of the search intensifies, the standard of "reasonable cause" is replaced by a standard of "probable cause."

It has been suggested that consent to the search excuses the requirement of "reasonable cause" prior to the search. In Jones v. Latexo Independent School District\(^3\), the court admitted that consent could excuse the "reasonable cause" standard, but argued that in the case before it the target of the search was children possessing limited experience in a threatening situation, accustomed to receiving and obeying orders and therefore incapable of exercising unconstrained free will when asked to empty their pockets. It has also been urged that consent in school search cases cannot excuse the "reasonable cause" requirement since students are aware that a lack of consent would not prevent the search and that refusal to consent may well lead to other sanctions.\(^3\)

**Issue:** Does the constitutional provision prohibiting unreasonable searches of a person by the State apply to the search of a student's desk or locker by the classroom teacher?

The Fourth Amendment encompasses searches of "persons, houses, papers, and effects." Students have argued that the Fourth Amendment's prohibition against unreasonable searches applies to searches of their lockers and desks. School officials have argued that because of the "in loco parentis" doctrine, and because of ownership of lockers and desks by the school, a search of a desk or a locker is not governed by Fourth Amendment considerations.
In People v. Overton\textsuperscript{326}, the court validated a search of a student's locker by the vice-principal of the school who had used a master key to open the locker. The court stressed the non-exclusivity of the lockers, based upon the fact that school officials possessed master keys and that each student possessed exclusivity vis-a-vis other students, not vis-a-vis school officials. The court also felt that school officials would be improperly discharging their duties of supervising students if they failed to retain control over the lockers.

In State v. Mora\textsuperscript{327}, where it was held that the Fourth Amendment was fully applicable to the classroom, the court noted that the protection of the Fourth Amendment was not restricted to dwellings and that a depository, such as a locker or desk, was safeguarded from unreasonable searches under the Fourth Amendment for evidence of a crime. In \textit{Re W}\textsuperscript{328}, in balancing the Fourth Amendment rights of students against the "in loco parentis" right of school officials, the court held that the test to be applied in locker search cases was whether the search was within the scope of the school's duties and whether the search was reasonable under the facts and circumstances of the case.

Buss\textsuperscript{329} has emphasized that the Supreme Court has consistently held that the Fourth Amendment protects people, not places. Attention must therefore be focused on whether the student has a reasonable expectation of privacy in his assigned locker or desk, not on the location and ownership of the locker or desk. Phay and Rogister\textsuperscript{330} have also argued that emphasis on the joint control of the locker by the school and student is to focus too much on the concept of property rights when the concept of property rights is not determinative of Fourth Amendment protection.
Issue: Where a classroom teacher has obtained evidence which indicates that a student has broken a school rule, and that evidence was obtained by means of an illegal search, is the teacher legally permitted to use that evidence as justification for imposing a punishment upon the student?

The student who has been the victim of an unconstitutional search by school officials has available to him state civil and criminal remedies and, increasingly, a federal cause of action under Section 1983 of the Civil Rights Act to redress the wrong. In addition, however, the wronged student has often argued that the evidence obtained by school officials as a result of an unreasonable search should not be used either in criminal proceedings or school disciplinary proceedings against him.

In Caldwell v. Connady, the court held that evidence obtained by police officers through an illegal search of a student could not be used to expel that student under a school board policy requiring expulsion for drug-related offenses. In Bellnier v. Lund, however, the court felt that whether or not the Exclusionary Rule was coextensive with the Fourth Amendment and so applicable in a criminal action based upon evidence obtained from a search by school officials was subject to speculation. The court held that the action of the teachers constituted state action, but because there was no involvement of law enforcement agents, the Fourth Amendment but not the Exclusionary Rule applied.

The only evidence available to school officials which would have justified a lowering of the student's grade because of a breach of school rules in Jones v. Latexo Independent School District was evidence obtained as a result of an unconstitutional search. The court reasoned that although the punishment was non-criminal, it was still a
deprivation, and the Exclusionary Rule had been used in the past to re­
dress Fourth Amendment violations in a variety of civil contexts.338

The court suggested that

the failure to apply a corollary of the exclusionary
rule in this context would leave school officials free
to trench upon constitutional rights of students in
their charge without meaningful restraint or fear of
adverse consequences. Excluding the use of such evi­
dence from school disciplinary proceedings will directly
and effectively deter unconstitutional conduct by
[school] officials.339

Buss340 has argued that the Exclusionary Rule should be extended
to school disciplinary proceedings since there is no reason to assume
that the alternative remedies available to the wronged student would
provide an effective deterrent to unconstitutional searches by school
officials when they have been found wanting in deterring law enforce­
ment officers. It has also been argued that when a school official
punishes someone based upon evidence obtained in violation of the Fourth
Amendment, the school official himself becomes discredited and can him­
self be likened to a law-breaker.341

Issue: Is it contrary to the Constitution for the classroom
teacher to require the reciting of a prayer or reading
of the Bible by the class during the school day?

Although the Establishment clause and the Free Exercise clause of
the First Amendment342 may in certain circumstances overlap, they forbid
two quite different types of government encroachment upon religious free­
dom. The Establishment clause is a prohibition of government sponsor­
ship of religion which requires that government neither aid nor formally
establish a religion. The Free Exercise clause prohibits absolutely the
proscription of any religious belief by the government; it requires,
however, that the government make some accommodation for the practice of
religious beliefs when it pursues ends which incidently burden religious practices.343

In Engel v. Vitale344, the reciting of a prayer was mandated but with provision for excusing students whose parents objected. The Supreme Court held that

neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment.... The Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.345

In School District of Abington Township v. Schempp346, a program of Bible reading and prayer at the beginning of each school day was held unconstitutional. The Supreme Court rejected the argument that the program had a secular purpose of "promotion of moral values" or of "perpetuation of our institutions", and held that the purpose was rather one of the advancement of religion.347 The fact that the students could absent themselves upon parental request furnished no defense to a claim of unconstitutionality under the Establishment clause.348 The fact that the religious practices were a relatively minor encroachment on the First Amendment was of no importance since "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent."349

In DeSpain v. DeKalb City School District350, a kindergarten teacher required children in her class to recite a verse which, on its face, contained no reference to God.351 The court held that the verse was a religious prayer, relying on the teacher's past practices and on expert
testimony as to the religious intent of the verse to support its holding. The court concluded that while the prayer had the secular purpose of promoting good manners and gratitude, its primary purpose was the religious act of praising and thanking the Deity. While the verse was as innocuous as could be insofar as constituting an imposition of religious beliefs on others, even the smallest breach of neutrality was not permitted.

Issue: Can a principal legally require of the classroom teacher that the teacher stop the class from reciting a prayer in the classroom when the class itself initiates the daily reciting of the prayer?

In the Schempp case, the Court noted that while the Free Exercise clause clearly prohibits "the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs". In Stein v. Oshinsky, the principal directed the classroom teacher to stop the class from reciting a prayer on its own initiative. The court ruled that the principal had acted within his authority, reasoning that school authorities were entitled to weigh the opposing wishes of parents and to bear in mind "the wisdom of having public education institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce."

Issue: Is it permissible under the Constitution for a classroom teacher to request of the class that it observe a minute of silence for "meditation or prayer" during the school day?

A statutorily prescribed period of silence "for meditation or prayer" and guidelines implementing the practice were challenged as violative of the First and Fourteenth Amendments in Gaines v. Anderson. The court noted that in order to avoid a violation of the Establishment
clause, the law must reflect a clearly secular purpose, it must have a primary effect that neither advances nor inhibits religion, and it must avoid excessive government entanglement with religion. The court concluded that, because "meditation" was not necessarily a religious exercise and because the mandated period of silence had the effect of permitting students to think about anything at all, the moment of silence could serve the legitimate secular purpose of stilling the tumult of the playground, of starting a day of study, and of turning students' minds silently toward serious thoughts and values. The statute and guidelines neither advanced nor inhibited religion since they did not mandate that students pray, nor did they mandate that students meditate; they rather maintained neutrality by compelling only silence. The statute and guidelines also avoided excessive government entanglement with religion in that they accommodated students who wanted to use the moment of silence for prayer as well as those who wished to reflect upon secular matters.

The court rejected the argument that exposure of students to the atmosphere created by the classroom violated the rights of students under the Free Exercise clause. The court noted that no student was compelled to participate in practices violating religious beliefs or exercises violating liberty of conscience. The student could reflect silently on a secular topic, or simply remain silent during the moment of silence, or pray silently during the moment of silence.

The court also rejected the claim that the statute and guidelines offended the due process rights of parents to supervise the religious up-bringing of their children. The court felt that the statute and
guidelines did not compel students to affirm a religious belief repugnant to their parents and that the parents remained free to instruct their children that they were not to pray during the period of silence.364

While at first glance it appears that prayer has no place at all in the classroom, it has been argued that a "moment of silence for prayer or meditation" offers a reasonable and acceptable means of accommodating religion in the public school classroom and could be substituted for a prayer recitation at the beginning of each school day.365

Issue: Is it permissible under the Constitution for the classroom teacher to put on display in the classroom a copy of the Ten Commandments?

Some states have attempted to require of school officials that they place a copy of the Ten Commandments on display in classrooms and in various other locations throughout the school. The courts have generally held that such requirements are violative of the First Amendment.

In Stone v. Graham366, the Supreme Court applied the traditional Establishment clause test to legislation requiring the posting of a copy of the Ten Commandments on walls of each classroom in the public schools. The court held that the statute did not serve a secular purpose even though each copy of the Ten Commandments also contained a notation avowing its secular purpose. The Court felt that the primary purpose of the statute was plainly religious in nature and that the copies would induce students to read, meditate upon, perhaps venerate and obey, the Ten Commandments, impermissible state objectives under the Establishment clause.367
The Court argued that it did not matter that the copies were financed by voluntary private contributions or that the Bible verses were posted on the wall rather than read aloud - the Establishment clause was still violated. The Court also noted that the copies were not integrated into the school curriculum as part of an appropriate study of history or of comparative religions with the result that they served no educational function. The practice of posting copies of the Ten Commandments on the walls of the classrooms was clearly violative, concluded the Court, of the Establishment clause of the First Amendment.

Issue: Can a classroom teacher be held legally liable for a physical injury suffered by a student in the classroom while the teacher was instructing or supervising the class?

At common law, to state a cause of action in negligence there must be a duty of care flowing from the actor to the person injured, a failure by the actor to exercise the appropriate standard or duty of care, injury causing damage or loss suffered by the person to whom the duty of care was owed, and conduct by the actor which was the proximate or legal cause of the injury suffered. In supervisinal and instructional situations, the courts have recognized the existence of a duty of care flowing from teacher to student.

In determining whether there has been a breach of that duty of care, the courts have looked to notions of "the reasonable man," "the exercise of reasonable care," and "foreseeability of risk," A person is liable in negligence when, owing a duty to another and without intending any wrong,
he does such an act or omits to take such a precaution that under the circumstances he, as an ordinary prudent person, ought reasonably to foresee that he will thereby expose the interest of another to an unreasonable risk of harm [and that other suffers injury. A] person is required to take into account such of the surrounding circumstances as would be taken into account by a reasonably prudent person and possess such knowledge as is possessed by an ordinary reasonable person and to use such judgment and discretion as is exercised by persons of reasonable intelligence under the same or similar circumstances.371

In Rodriguez v. Brunswick Corp,372 the court noted that a teacher's "superiority in knowledge and experience imposes responsibilities in his dealings with students which become an inherent element in measuring his compliance with the due care which is required".

In cases where a student has suffered physical injury because of negligent instruction by a teacher, the courts have looked at the sufficiency of instruction in terms of the circumstances of the case before it. Considerations of the student's size, age and skill are taken into account.373 The greater the risk involved in a learning activity, the higher the standard of care, particularly in situations where students are exposed to dangerous conditions for which they may have very little appreciation.374 The exercise of the duty of care may require the demonstration and posting of safety requirements, the review and reinforcement of safety measures, and the issuance of warnings where activities are potentially dangerous to students.375 It has also been held that a teacher may not, either by express instruction or by his own example or permission to others, teach a student to act in a manner which is unnecessary in the process of instruction and dangerous to his safety.376
In every supervisory situation in which he finds himself - in the classroom, on playground or cafeteria duty or on fieldtrips - the teacher has a duty to exercise the degree of care an ordinary prudent teacher would exercise in like circumstances. Reasonable supervision does not require constant unremitting scrutiny, nor is the teacher responsible for mere accidents. The standard of care required of a teacher in any supervisory situation is that which a teacher of ordinary prudence charged with his duties would exercise under the same circumstances.

**Issue**: If the classroom teacher leaves the class unsupervised and a student is injured by another student during the teacher's absence, is the teacher legally liable for the injury suffered?

In *Guyton v. Rhodes*, the court held that where a student was injured by a bottle thrown by another student while the teacher was gossiping in another room, the proximate cause of the injury was the sudden and unwarranted assault by another student, and there was nothing to show that the same thing would not have happened if the teacher had been present. The teacher was therefore not liable. In *Sergeman v. Jones*, the court noted that if a rule could be developed from liability cases, it was that "a teacher's absence from the classroom, or failure properly to supervise students' activities, is not likely to give rise to a cause of action for injury to a student unless, under all the circumstances, the possibility of injury is reasonably foreseeable."

A student sustained injury as a result of rowdy behavior by other students when the teacher had left the gym in *Cirillo v. City of Milwaukee*. The court stated that
it cannot be held as a matter of law that the rowdyism of the participants in the game was a superseding cause of the [student's] injury. If, under all the circumstances, the teacher's absence from the classroom is negligence, the fact that the [injured student's] conduct or that of other participants was also a substantial factor does not excuse the teacher.384

The teacher was absent from the class for 25 minutes. The court noted that it was not

inherently unreasonable to expect that teachers will be present in classes which they are entrusted to teach. This should not mean that a teacher who absents himself from a room is negligent as a matter of law. The teacher's duty is to use reasonable care. What this means depends upon the circumstances under which the teacher absented himself from the room. Relevant considerations would be the activity in which the students are engaged, the instrumentalities with which they are working,...the age and composition of the class, the teacher's past experience with the class and its propensities, and the reason for and duration of the teacher's absence.385

In some cases, students, who have been given permission to stay in the classroom during recess to work on projects, have been injured while the class was unsupervised. In Miller v. Griesel386, the court held that

what constitutes due care and adequate supervision depends largely upon the circumstances surrounding the incident, such as the number and age of the students left in the classroom, the activity in which they were engaged, the duration of the period in which they were left without supervision and the extent to which the schoolboard has provided and implemented guidelines and resources to insure adequate supervision.387

Proehl388 has argued that what is reasonable and what is foreseeable are the criteria to be applied in negligent supervision cases. He has suggested that what is foreseeable as likely to happen in an unsupervised classroom is of the wildest conjecture, but it would not seem
unreasonable to argue that the teacher who omits his duty of supervision might reasonably foresee injury resulting, especially if the absence was of some duration and the omission to perform his duty gross.

Seitz has suggested that the principle of tort law - that against the probability and gravity of risk must be balanced the utility of the type of conduct in question - might reasonably protect the teacher who allows a small group of students to remain in the classroom unsupervised so that they might complete or work on an unfinished project.

The question, however, is still one of the totality of the circumstances.

3. The Teacher as Professional Educator

Issue: It is permissible under the Constitution for a school board member or a school official (e.g., principal, teacher, librarian) to remove completely from the school library a controversial book which the classroom teacher wants to use as part of the literature program for his class?

The censorship in schools issue is a complex one having many dimensions, not the least of which is the "freedom" or "legal" issue. It is an issue that may involve, at any one time, students, parents, teachers, librarians, school officials, the clergy and citizens groups. It may also concern a book of any genre. It is also an issue over which the courts are deeply divided.

The Second Circuit view of the censorship issue is best stated by the decision in Pico v. Board of Education, Island Trees Union Free School:

Absent extraordinary circumstances, there in no uncertain or "chilling" effect attendant on a decision...to select one from among many book titles competing for limited space on the library shelf.... The everyday administration of...a school library does not, either directly or indirectly, impinge on the free exercise of ideas. In these circumstances, bare allegations that books
have been removed from the shelves of secondary school libraries by responsible officials do not make out a prima facie First Amendment violation, even if the books have a controversial reputation so that one available inference is that they were removed to prohibit the expression of the ideas they contain. Such activities, being part of the daily operation of school systems, do not directly and sharply implicate basic constitutional values. On the contrary, the activity is on its face consistent with the performance of the educational function.393

In Bicknell v. Vergennes Union High School394, it was argued that students' First Amendment rights had been violated since the school board's decision to remove a book from the library had been motivated solely by the personal tastes and values of board members. The court held that "so long as the materials removed are permissibly considered to be vulgar or indecent, it is no cause for legal complaint that Board members applied their own standards of taste about vulgarity."395 The court also rejected the claim that the board's action had denied the students due process of law noting that "whatever deprivation of rights can result from the removal of books from a school library, it is not the sort of deprivation that entitles a student or librarian to a hearing before the removal takes place."396

The Seventh Circuit Court of Appeals followed decisions of the Second Circuit in Zykan v. Warsaw Community School Corp.397 The court held that while academic freedom, including as it does the notions of a right to hear and the classroom as a marketplace of ideas, existed for secondary school students, it was subject to some limitations with the result that complaints by secondary school students contesting educational decisions had to cross "a relatively high threshold before entering upon the field of a constitutional claim suitable for federal
The court pointed out, however, that this was not to say that

an administrator may remove a book from the library as part of a purge of all material offensive to a single, exclusive perception of the way of the world. Nor can school authorities prohibit students from buying or reading a particular book or, under most circumstances, from bringing it to school and discussing it there.

The Sixth Circuit Court of Appeals took a different view of the issue of censorship in Minarcini v. Strongsville City School District. The court noted that a library is a store-house of knowledge. When created for a public school it is an important privilege created by the state for the benefit of the students of the school. That privilege is not subject to being withdrawn by succeeding school boards whose members might desire to winnow the library for books the content of which occasioned their displeasure or disapproval.

The court admitted that worn books could be replaced and that shelf space might require the disposal of some books and the retention of others, but felt that such a rationale was not the basis of the board's action in removing books from the library. The court concluded that, in the case before it, removal of the books from the library implicated First Amendment rights and that the school board could not place "conditions on the use of the library which was related solely to the social or political tastes of school board members."

The court felt that because the library was a valuable adjunct to classroom discussion, the removal of books from a school library was "a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in [the Tinker decision]." Such a burden was not minimized, the court argued, by the availability of the
book outside the school since "restraint on expression may not
generally be justified by the fact that there may be other times,
places, or circumstances available for such expression."406

In Right to Read Defense Committee of Chelsea v. School Committee
of the City of Chelsea,407 an anthology of writings was removed from
the school library. The court held that not every removal of a book
from a school library implicated First Amendment values, but where a
book was removed "because its theme and language are offensive to a
school committee, those aggrieved are entitled to seek court interven­
tion."408 The court also suggested that

when First Amendment values are implicated, the local
officials removing the book must demonstrate some sub­
stantial and legitimate government interest. [The Tinker
decision] does not require the Committee to demonstrate
that the book's presence in the library was a threat
to school discipline, but it does stand for the propo­
sition that an interest comparable to school discipline
must be at stake.409

It has been argued that freedom of selection in public school
libraries in effect represents the converging point of, and can be
supported by, three distinct lines of authority: those decisions which
establish the right to receive information, those decisions which set
down the rights of parent minorities in the educational process, and
those decisions which define the extent to which academic freedom may
or may not apply in schools.410 Niccolai411 has argued that considera­
tions to be constitutionally applied when deciding to remove books
from school libraries are the considerations of obscenity, practical
limitations, and conduct control, and that due process hearings must
take place prior to the removal of any book which is alleged by school
officials to be obscene or to have materially and substantially dis­rupted the educational process of the school.

Issue: Is it permissible under the Constitution for a school board member or school official (e.g., principal, teacher, librarian) to put a controversial book belonging to the school library on a restricted shelf in the library whereby students are permitted access to the book only with parental permission?

Decisions adopting the stance of the Court of Appeals for the Second Circuit have argued that removal of a book from the library does not prima facie implicate First Amendment values, even if the decision to remove the book was motivated by the social and moral tastes of the school officials. The courts, however, were also cognizant of the fact that any book removed from the school library had not been made completely unavailable to students.

Decisions adopting the stance of the Court of Appeals for the Sixth Circuit have rejected the argument that removal of books constituted only limited impact on the school population. They have held that restraint on expression may not be justified merely by the fact that there may be other times, circumstances, or places available for First Amendment expression. But because restrictions on free expression are not justified by the availability of other opportunities for expression, it has been argued that restricting a student's access to a book which is available to him only with parental permission would seem improper.

The suggestion has been put forward, however, that such a procedure does support parental authority in deciding what his child should or should not read. Permitting student access to a book only with parental permission allows the state to act in accordance with parental wishes.
even though such a procedure denies the status of a student as citizen with rights of his own.416

Issue: Is it permissible under the Constitution for a school board member or school official (e.g., principal, teacher, librarian) to remove (e.g., by cutting out or inking out) "objectionable" words, phrases, poems or illustrations from books placed in the school library?

In Zykan v. Warsaw Community School Corp.417, the school board required a teacher to excise certain portions of a book long used in the school. The court held that the assertion by a student that the school board had infringed upon his right to read literacy works in their entirety suggested an interference with a right of "uncertain constitutional genealogy."418

In Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea419, the court held that the First Amendment rights of students were implicated by the removal of an anthology of writings which the school committee had found distasteful. What concerned the court was the fact that had its removal by a committee hostile to its language and theme been permissible, a precedent would have been established for the removal of any other works, book by book or one page at a time. The court suggested that "it would be no less offensive to First Amendment principles for a Committee to bowdlerize an anthology by removing one poem than it would be for it to excise objectionable passages in a novel."420

Issue: Is it permissible under the Constitution for a classroom teacher to make use of religious works (e.g., the Bible, religious paintings, religious music) in his teaching in the classroom?

The Establishment clause of the First Amendment is a prohibition of government sponsorship of religion which requires that government
neither aid nor formally establish a religion.\textsuperscript{421} In \textit{School District of Abington Township v. Schempp},\textsuperscript{422} the Supreme Court therefore held that state-mandated Bible reading and recitation of the Lord's Prayer were unconstitutional. The Court, however, also observed that it may be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.... Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.\textsuperscript{423}

The constitutionality of a course of Bible study and instruction arose in \textit{Wiley v. Franklin}.\textsuperscript{424} In applying the three pronged Establishment clause test, the court looked closely at lesson plans and their content and reviewed tape recordings of lessons taught\textsuperscript{425} to conclude that at least three of the lessons violated the Establishment clause. During the course of its judgment the court observed that the ultimate test of the constitutionality of any course of instruction founded upon the Bible must depend on classroom performance. It is that which is taught in the classroom that renders a course so founded constitutionally permissible or constitutionally impermissible. If that which is taught seeks either to disparage or to encourage a commitment to a set of religious beliefs, it is constitutionally impermissible in a public school setting. If that which is taught avoids such religious instruction and is confined to objective and non-devotional instruction in biblical literature, biblical history and biblical social customs, all with the purpose of helping students gain "a greater appreciation of the Bible as a great work of literature" and source of "countless works of literature, art, and music",....no constitutional barrier would arise to such classroom instruction.\textsuperscript{426}

In \textit{Reed v. Van Hover},\textsuperscript{427} the court held that certain materials from American historical documents, such as the Declaration of Independence,
and speeches of past Presidents, could be used in public schools without violating the First Amendment even though such materials were of a religious nature. The court felt that such writings "would be lessons in the impact of religion upon the men who were leaders of our nation, and in turn, through them, upon the nation's affairs and history." The court emphasized, however, that "a program incorporating such examples into the school does require a conscientious effort on the part of teachers" to avoid violating the First Amendment.

In Florey v. Sioux Falls School District, a school board's policy and guidelines concerning religion in the curriculum and the celebration of religious holidays in schools were challenged as violative of the First Amendment. In upholding the program, the court noted that since art, literature and music associated with traditional holidays, particularly Christmas, had acquired a cultural significance that went beyond the religious sphere of life, they could be part of a school program if presented in a prudent and objective manner and as part of the cultural and religious heritage of the holiday and only if their display was temporary in nature.

Hazard has suggested that while religious works of art may be used in classes, particularly art classes, it is when art classes create religious symbols to display in hallways and lobbies of schools that a constitutional issue is likely to arise. It has been further argued that the younger the student, the more it is likely that the use of religious works in the classroom will have a primary effect of advancing religion.
Pever\textsuperscript{434} has argued that the singing of Christmas carols is religious and Christian and that children cannot sing what it is unconstitutional for them to recite. Even if some carols have taken on a significance other than a religious one, it has been suggested that less well-known carols may not have a meaning independent of their religious meaning with the result that their use in the classroom may have a primary effect of advancing religion and so be violative of the First Amendment.\textsuperscript{435}

**Issue:** Is it permissible under the Constitution for a teacher and his class to present at a school assembly a program which celebrates an event of religious significance (e.g., Christmas, Hanukkah)?

In Florey v. Sioux Falls School District\textsuperscript{436}, the policy statement and guidelines of a school board permitting the presentation of programs which celebrated events of religious significance were challenged as violative of the Establishment and Free Exercise clauses of the First Amendment. In applying the Establishment clause test which looks to secular purpose, primary effect and degree of government entanglement with religion, the court held that the program as envisaged did not violate the Establishment clause. The court emphasized that its decision would not resolve for all times, places or circumstances the question of whether Christmas carols or other music or drama having religious themes could be sung or performed by elementary school students without offending the First Amendment.\textsuperscript{437} The court noted, however, that the study of religion was not forbidden if presented objectively and as part of a secular program of education. The court felt that the term "study" included
more than mere classroom instruction; public performance may be a legitimate part of secular study. This does not mean that religious ceremonies can be performed in the public schools under the guise of "study". It does mean, however, when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content.438

The court concluded that the program as envisaged furthered a genuine secular program of education and did not offend the Establishment clause.439

In responding to the claims that the policy and guidelines offended the Free Exercise clause, the court noted that

the inevitable conflicts with the individual beliefs of some students or their parents, in the absence of an Establishment Clause violation, do not necessarily require the prohibition of the school activity. On the other hand, forcing any person to participate in an activity that offends his religious or non-religious beliefs will generally contravene the Free Exercise Clause, even without an Establishment Clause violation.440

The court noted with approval that the policy and rules expressly permitted students to be excused from activities authorized by the rules if they so chose.441

It has been argued that the young student may not be able to distinguish between religious teachings and secular education especially during religious holiday activities, with the result that the primary effect of a Christmas assembly might be to advance or inhibit religion.442 It has also been urged that to avoid a situation where the singing of religious hymns or the display of religious symbols might have a potentially significant religious effect, the assembly should be held at a time other than when the religious holiday is generally observed.443
Issue: Is the classroom teacher's decision to discuss in class or to teach about a controversial topic (e.g., the meaning of the word "queer", a controversial novel) protected by the Constitution?

While the Supreme Court has yet to provide any real guidelines as to the legal parameters of the teacher's right to teach about or to discuss a controversial topic in the elementary classroom, it has in some instances expressed both concern and admiration for academic freedom and classrooms which are the "marketplaces of ideas". Constitutional protection for the decision of the teacher to discuss a controversial topic is usually sought in the notion of academic freedom which, it is urged, derives from the First Amendment.

Lower courts have generally agreed that a teacher's decision to discuss a controversial topic, particularly in high school, is protected by the notion of academic freedom, but that there are limits to the exercise of that freedom. In Keefe v. Geanakos, a discussion about the meaning and origin of the word "motherfucker" which had appeared in an article was protected because the discussion was supported by "demonstrated educational purposes." In Parducci v. Rutland, the court held that while the discussion of a controversial novel was protected by academic freedom, the right to academic freedom was not absolute and "must be balanced against the competing interests of the society [such as the interest] in protecting the impressionable minds of the young people from any form of extreme propagandism in the classroom."

In Sterzing v. Fort Bend Independent School District, the teacher raised and discussed controversial issues with his class and was dismissed. The court noted that
the freedom of speech of a teacher must not be so lightly regarded that he stands in jeopardy of dismissal from raising controversial issues in an eager but disciplined classroom. However, it is also the teacher's duty to be exceptionally fair and objective in presenting his personally held opinion, to actively and persuasively present different views, in addition to open discussion. It is the duty of the teacher to be cognizant of and sensitive to the feelings of his students, their parents and their community.448

It has often been argued that whenever a controversial issue presented in schools is upsetting to the community, the presentation of that issue cannot be protected by the First Amendment. Thus, in Adams v. Campbell Community School District449, the court held that teachers do not have an unlimited liberty as to the structure and content of courses and that, in the community in which the school was located, school authorities did have a right to emphasize a more orthodox approach to teaching than that espoused by the teacher who had brought up controversial topics in class for discussion. The court in Dean v. Timpson Independent School District450, however, rejected such an approach. The court noted that

a particular subject or theory may not be forbidden in the classroom simply because it offends the dominant views or beliefs of a community.... To exclude a subject from the public school curriculum because it offends the community, or to discharge a teacher for objectively presenting that subject, runs counter to the spirit of the First Amendment, and poses a threat greater than the unsettling effect on the community precipitated by the student's intellectual exposure to matters that approach concepts long regarded as taboo.451

Some courts have looked to the Establishment clause of the First Amendment to protect a teacher's right to treat a controversial topic in class. In Moore v. Gaston County Board of Education452, the court held:
To discharge a teacher without warning because his answers to scientific and theological questions do not fit the notions of the local parents and teachers is a violation of the Establishment Clause of the First Amendment. It is an "establishment of religion", the official approval of local orthodoxy, and a violation of the Constitution.453

Where a state statute has prohibited the discussion of certain topics in school, the subsequent discussion of the topic by the teacher has not been protected by the First Amendment.454 But courts have generally held that teachers cannot be punished for discussing controversial topics in the classroom unless such conduct has been proscribed in clear and precise terms. In Parducci v. Rutland455, the teacher argued that, under the Due Process clause of the Fourteenth Amendment, she was entitled to prior notice that the conduct for which she was punished was prohibited. The court held that, while school officials must have broad discretion in administering schools, "no person should be punished for conduct unless such conduct has been proscribed in clear and precise terms."456 The court felt that when a teacher is forced to speculate as to what conduct is permissible and what is not, he is apt to become overly cautious in the classroom, and that was contrary to the notion of academic freedom.457

Some courts have held that "considerations which militate in favor of academic freedom...are relevant to elementary and secondary schools as well as to institutions of higher learning."458 Other courts have refused to recognize academic freedom for the elementary school teacher arguing that the governmental authority has a...responsibility towards the parental authority to insure that the learning experience in the elementary school is
consistent with the prevalent view of the community as to what are the basic values, concepts and skills [and that there] is no constitutional purpose in giving an elementary school teacher a greater power to dictate and decide what will be taught than that which is shared by all other citizens.459

Goldstein460 has put forward the view that there is neither sound constitutional analysis nor authoritative precedent to support a constitutional right of teachers to determine what they teach contrary to the wishes of school authorities. It has also been argued, however, that the elementary classroom teacher has some degree of academic freedom, particularly in situations where his classroom follows the "open" or "informal" philosophy of education.461

Issue: Is the classroom teacher's choice of teaching methodology (e.g., permitting children as part of the Language Arts program to write letters critical of the food served in the cafeteria) protected under the constitution?

Some courts have held that a teacher's choice of teaching methodology is protected by the First Amendment, but that the right to choose a methodology is not absolute. In Wilson v. Chancellor462, the court noted that "a teacher's teaching is expression to which the First Amendment applies [but that] it may be restricted, and restrictions of a teacher's expression should be judged in the light of the 'special characteristics of the school environment'." In Downs v. Conway School District463, the court applied the principles of the Tinker decision to uphold a teacher's choice of teaching methodology, concluding that the teacher's conduct in no way materially or substantially interfered with the requirements of appropriate discipline in the operation of the school. In East Harford Education Association v. Board of Education464, where a teacher argued that academic freedom extended to the style of
clothing he wished to wear while teaching, the panel majority argued that the freedom to teach in a manner of one's choice was a form of academic freedom but that the notion of academic freedom in secondary schools "may be balanced to a degree by the countervailing interest of states, acting through local school boards, to inculcate basic community values in students who may not be mature enough to deal with academic freedom as understood or practiced at higher education levels." The court noted that such a situation may mean that

public secondary school boards have considerable discretion as to the substantive content of what is taught, but there is no reason to extend this wide discretion to the teaching process itself. There is ... a sharp distinction between content of curriculum and pedagogical style.... As long as the substantive values that the school board seeks to inculcate are not subverted by the way in which a teacher wishes to communicate with students..., the teacher's freedom to choose teaching methods is entitled to be weighed in the constitutional scales.465

In Adams v. Campbell County School District466, the court argued that the teachers did have some freedom in the techniques to be employed, but that in the community in which the teacher was employed, there was justification for requiring the use of more orthodox or standard techniques. The court in Brubaker v. Board of Education467 acknowledged that the choice of teaching methodology was a component of the teacher's academic freedom, but argued that academic freedom does not make valid conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives. The court suggested that factors such as the age and sophistication of the students, the relevance of the methodology to the educational purpose, and the context and manner in which the methodology was presented would have some bearing on the inoffensiveness and necessity of the technique.468
Some courts have held, however, that the state has an almost plenary authority to regulate teaching practices. In *Mailloux v. Kiley*[^69], the court held that "when a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession or of the part of it to which he belongs, but which he merely proves is relevant to his subject and his students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith", he can be suspended or discharged if he was put on notice either by regulation or otherwise that he should not use such a method[^470]. And where an economics teacher refused to return to conventional teaching methods, the court in *Ahern v. Board of Education*[^471] held that the teacher was not invested with a constitutional right to continue in a course of behavior which contravened valid dictates of her employer regarding classroom methods.

Some courts have argued that the termination of a teacher without giving him notice that the teaching method he employed was not permitted denies the teacher due process of law[^472]. It has been further suggested that such a situation has a chilling effect upon the academic freedom of the teacher and other teachers to innovate and to develop new and more effective teaching methods which were reasonably relevant to the subject matter they were assigned to teach and that that was contrary to the First Amendment[^473].

In *Kingsville Independent School District v. Cooper*[^474], the court held that a teacher's choice of technique, even as private speech, was protected by the First Amendment. And in *Davis v. Page*[^475], the court held that a teacher's use of audiovisual equipment for educational
purposes did not interfere with the right of some children to the free exercise of religious beliefs under the First Amendment.

While the question of the application of academic freedom to the elementary classroom remains unsettled, some courts have held that the elementary classroom teacher has a First Amendment right to choose his own teaching methodology.\textsuperscript{476} And the court in \textit{Webb v. Lake Mills Community School District}\textsuperscript{477} noted that while the Supreme Court decision of \textit{Keyishian v. Board of Regents}\textsuperscript{478} was concerned with college teachers, the rationale must extend to high school and even elementary teachers. The state interest in limiting the discretion of teachers grows stronger, though, as the age of the student decreases; thus, the Fourteenth and First Amendments do not necessarily give teachers of younger students the same academic freedom that they give to teachers of college students.\textsuperscript{479}

\textbf{Issue:} Can a teacher be held liable for "educational malpractice" where a student fails to learn to read and alleges that his failure was caused by the teacher's negligent teaching?

Peter W., who had graduated from high school allegedly unable to read, contended that the school district, through its teachers, "negligently and carelessly failed to provide [him] with adequate instruction, guidance, counseling, and/or supervision in basic academic skills such as reading and writing...and to use reasonable care in the discharge of its duties to provide [him] with adequate instruction...in basic academic skills and failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances."\textsuperscript{480} It was argued that, as a direct and proximate result of the negligent acts and omissions by the school district and its teacher, Peter W. graduated from school with a fifth grade reading level and had suffered a loss of earning capacity by his inability to read and write.\textsuperscript{481}
In Peter W. v. San Francisco Unified School District, it was argued for Peter W. that the facts of the case showed the requisite duty of care flowing from the school district and its teachers to Peter W. upon three judicially recognized theories. The court rejected the argument for want of authority and because "judicial recognition of such duty in the defendant, with the consequence of his liability for its breach, is initially to be dictated or precluded by considerations of public policy." Policy considerations which precluded recognition of the duty of care in the case included the lack of a standard of care against which the defendant's conduct could be measured, the absence of a reasonable degree of certainty that Peter W. suffered injury within the meaning of the law of negligence, the non-existence of a perceptible connection between the defendant's conduct and Peter W.'s injury which might establish a causal link between them, and the danger in exposing education authorities to "tort claims - real or imagined - of disaffected students and parents in countless numbers." The court noted that classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught.... The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.
In Donohue v. Copiague Union Free School District, the court admitted that "even within the strictures of a traditional negligence or malpractice action, a complaint sounding in educational malpractice may be formally pleaded." The court held, however, that public policy considerations precluded the recognition of such a cause of action. Such considerations included the resulting interference with the responsibility for the administration of the public school system lodged by the state Constitution and statutes in school administrative agencies, and the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the student.

To state a cause of action in negligence, there must be a duty of care flowing from the defendant to the plaintiff. While the Peter W. court felt that the existence of the duty of care in that case was not supported by authority, the Donohue court suggested that if doctors, lawyers, architects, engineers and other professionals were charged with a duty owed to the public whom they served, nothing in the law precluded similar treatment of professional educators. Prosser has argued that if someone undertakes to render a service to another upon which that other relies, the actor assumes a duty to act non-negligently, and "where performance has clearly begun, there is no doubt there is a duty of care." It has been argued that in its application to education, this implies that once a teacher undertakes to provide education, a duty to educate non-negligently will be assumed.

To state a cause of action in negligence, there must also be a breach of the duty of care by a failure to adhere to the appropriate standard of care. Elson has suggested that the fact that
educators differ on issues of pedagogy no more demonstrates the non-existence of customary standards of care for educators than does the fact that doctors differing over appropriate treatments in certain situations demonstrates the non-existence of customary standards of care for the practice of medicine. He has suggested that "the education profession's legitimate claim to unique judgmental competencies and the public's reliance upon those claims justify courts holding educators accountable in negligence to a standard of carefulness and competence in decision-making that it defined by: (a) professional agreement on the limits of acceptable performance, (b) statutory and regulatory mandates, or (c) the lay tier of fact's sense of outrage."495

To state a cause of action in negligence, the plaintiff's injury must be caused in fact by the defendant's conduct.496 Lynch497 has argued that proving proximate cause is a complex problem since proof of negligence speaks to such matters as methodology, practice, skill, and application of appropriate methods and materials at the right time and based upon an estimate or diagnosis of a student's learning and ability. Both the Peter W. court498 and the Donohue court499 gave considerable weight in their decisions to the extreme difficulties involved in proving that the plaintiff's injury was caused by the defendant's conduct. But it has been argued that "whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system...or was the product of forces outside the teaching process, is really a question of proof to be resolved at trial."500 And Elson501 has pointed out that common law principles of causation in negligence cases require only that the
defendant's conduct constitute a substantial factor in bringing about the harm.

To state a cause of action in negligence, the plaintiff must also suffer injury or loss.\textsuperscript{502} The Peter W. court\textsuperscript{503} held that a failure to learn cannot be classified as an injury within the meaning of tort law. The Donohue court\textsuperscript{504}, however, held that the inability to comprehend written English would undeniably constitute injury. Elson\textsuperscript{505} has argued that there is no basis for concluding that such harm is not properly cognizable in the law of torts. The "injury" could be defined in terms of a failure to learn a given quantum of factual information, a failure to learn basic skills, or a loss of self-confidence and motivation, a harm in the affective or emotional domain of a student's personality, proof of which could come from school records and various tests.\textsuperscript{506}

Issue: Can a classroom teacher be held liable for misrepresentation where, for example, he assures the parents of one of his students that the student is progressing satisfactorily in reading when in fact the teacher knows that the student is not progressing satisfactorily, and the parents, relying on the teacher's assurance, decide not to seek remedial assistance for their child who, as a result, fails to learn to read?

In Peter W. v. San Francisco Unified School District\textsuperscript{507}, it was also argued that the defendants had falsely and fraudulently represented to the plaintiff's mother that he was performing at or near grade level in basic academic skills such as reading and writing, that the representations were false, that the defendants knew they were false or had no basis for believing them to be true, and that as a result of this intentional or negligent misrepresentation, the plaintiff
suffered damage. The court held that public policy considerations precluded acceptance of a cause of action for negligent misrepresentation. The court admitted, however, that while the complaint was insufficiently pleaded to do so, a cause of action in intentional misrepresentation could have been stated. In the lower court decision of Donohue v. Copiague Union Free School District, the dissenting opinion saw as possible in the case before it a cause of action in intentional misrepresentation.

Prosser has suggested that the elements of a cause of action in intentional misrepresentation are (a) a false representation made by the defendant, (b) knowledge or belief on the part of the defendant that the representation is false or that he has not a sufficient basis of information to make it, (c) an intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation, (d) justifiable reliance upon the representation on the part of the plaintiff in taking action or in refraining from it, and (e) damage to the plaintiff.

It has been suggested that if a teacher issues a satisfactory report about a student whom the teacher knows or should know is not progressing satisfactorily, and if the student's parents, after seeking confirmation of the report from the teacher, fail to seek remedial instruction for their child because of the teacher's reassurance that the student's progress is satisfactory, with the result that the student suffers injury, a cause of action in intentional misrepresentation may be pleaded. It has been further argued that the school practices of "social promotion" and falsification of a student's record may also give rise to causes of action in intentional misrepresentation.
Issue: Can a classroom teacher be held legally liable for a breach of a statutory duty if he fails to take a specific action or to follow a certain procedure regarding the education of a particular student in his class when that action or procedure is made obligatory for such a student by state legislation (e.g., if state law requires an evaluation of certain students in specified circumstances and the teacher fails to carry out the evaluation)?

In Donohue v. Copiague Union Free School District, it was argued that a reading of the State Constitution, which commanded that the legislature "shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated" indicated that an imposition of a duty to educate non-negligently was intended. The court rejected the contention, arguing that such a general directive "was never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education, the breach of which duty would entitle a pupil to compensatory damages."

The dissenting opinion of the lower court's decision in the Donohue case argued, however, that the school district was in breach of its statutory duty to the plaintiff. Legislation in force at the time made it mandatory for education authorities to test any student who "failed continuously." The dissenting opinion held that, despite the fact that the plaintiff's records had indicated that he was a student who had "failed continuously," the education authorities had failed to test the plaintiff with the result that they were in breach of a mandatory statutory duty flowing from the defendant to the plaintiff personally.

It has been urged that as statutes and board regulations more specifically define the relationships between students and schools by
establishing remedial programs, by dictating academic and life-skill competencies, and by setting down specific educational services which are to be provided for the handicapped student, it becomes more likely that a school district and its teachers will be held under a statutory duty to educate in accordance with such statutes and regulations.519

Elson520 has suggested that statutory and regulatory requirements concerning the education of the handicapped may be instrumental in establishing a breach of a statutory duty on the part of a teacher who has failed to provide a specific educational service determined as appropriate for the handicapped child in his class. A written evaluation which suggests that the handicapped child has some special need, and an Individualized Education Plan which states that a certain type of service is necessary to meet that need might be viewed as establishing the specific action the teacher is required to take in order to satisfy the duty of care flowing out of such statutory and regulatory requirements, a breach of which duty may result in liability for the teacher.521

4. Related Studies

While past studies have looked at different aspects of the law as it relates to education, they have tended to focus on issues other than elementary classroom practice and the law. Fontana522 analyzed federal court decisions relating to the constitutional rights of students in order to identify exactly what rights were recognized for students under the Constitution. Bean523 examined federal court decisions since 1920 in regard to the establishment of rights of elementary school pupils. The study set down those legal rights of students already established by the courts as well as trends in the area of the legal
rights of children. Studies by Gaston, Shelton, and Fink looked at the specific issues of search and seizure in secondary schools, legal aspects of male students' hair grooming policies in the public schools, and academic freedom in relation to civil rights for professional employees in the public schools.

A study by Dunoskovic attempted to identify those duties and liabilities of teachers which have been the subject of litigation in the American courts in order to determine any changing direction in judicial attitude and in order to formulate a set of guidelines designed to assist teachers to better understand their duties and liabilities. The study produced a list of 22 directly related or implied duties and liabilities of teachers, as well as a set of guidelines for each of these duties and liabilities to assist teachers in better understanding their duties and liabilities.

Some studies have looked at teachers' knowledge of legal issues. Peacock investigated teachers' knowledge of essential public school laws and school board policies in selected school districts in Southeast Texas. He found that teachers demonstrated a greater level of knowledge in the areas of teacher rights to engage in political affairs and organizations, discharge of teachers during the school year, teacher release at the end of the school year, and cancellation of teacher certificates, than in the areas of powers of the board of trustees, teacher liability for pupil injury, and teacher resignation.

Johnson attempted to determine both the minimal amount and kinds of knowledge needed by Alabama public school teachers, and the extent to which a selected sample of first year public school teachers in
Alabama possessed that minimal amount of knowledge. He concluded that the population of his study possessed insufficient knowledge of school laws and that all prospective teachers should take a course in school law.

Studies in the past, then, have not focused with great particularity on legal issues confronting the elementary classroom teacher within the classroom setting in his roles of teacher as teacher and citizen, teacher as classroom manager, and teacher as professional educator. And while some studies have urged that prospective teachers should take a course in school law, there has been no real attempt to establish guidelines for preservice teacher courses in law.

Summary

The first major purpose of the study was to identify for the teacher within the elementary classroom setting those legal issues he might confront in his daily routine in the classroom. As a result of a review of educational and legal publications and of court decisions, forty-eight issues were identified. Ten issues were listed under the category of Teacher as Teacher and Citizen, twenty-eight issues were listed under the category of Teacher as Classroom Manager, and ten issues were listed under the category of Teacher as Professional Educator.

Court cases relevant to each of the issues were read and analyzed. Attention was focused on both statements of law and other statements by courts which were seen as relevant to classroom practice. Considerations which were relevant to each issue and which had been gleaned from the review of legal and educational literature were also set down.


4Ibid., p. 568


6Ibid., p. 506

7Palmer v. Board of Education 466 F. Supp. 600 (N.D. Ill. 1979), aff'd, 603 F. 2d 1271 (7th Cir. 1979).


10Palmer v. Board of Education, 466 F. Supp. 600 (N.D. Ill. 1979); aff'd, 603 F. 2d 1271 (7th Cir. 1979).

11Miller, "Teachers' Freedom of Expression Within the Classroom," p. 837.

12Ibid., p. 856.

13See for example, Hall v. Board of School Commissioners, 496 F. Supp. 697 (S.D. Ala. 1980).


15Ibid., p. 1523 footnote 61, p. 1523 footnotes 62 and 63.


18 Miller, "Teachers' Freedom of Expression Within the Classroom," p. 853. He has suggested, for example, that one of the reasons for the First Amendment protection afforded the expression in the Tinker decision was that the wearing of armbands constituted expression about a matter of great public concern at that time, viz. the Vietnam War (p. 853).


20 Ibid., p. 760.

21 Ibid.

22 Ibid., pp. 760-761.


24 Ibid., pp. 572-574. Because the Court had found that the teacher's statements were not knowingly or recklessly false, it refused to state its view on whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had harmful effects, still be protected by the First Amendment (p. 574 footnote 6). Justice White, in his opinion, held that a teacher may be fired without violation of his First Amendment rights for "knowingly or recklessly making false statements regardless of their harmful impact on the schools. However, in the absence of special circumstances he may not be fired if his statements were true or only negligently false, even if there is some harm to the school district" (p. 584).


28 Ibid., p. 570 footnote 3. In Press v. Board of Regents of the University System of Georgia, where a librarian had criticized his superiors, the court held that his "private speech was not protected since the criticisms were personally directed to immediate superiors, and they threatened the efficiency of the University Library, not only by its content but also by the manner, time and place in which it was delivered." 489 F. Supp. 150, 156 (M.D. Ga. 1980).

30 Ibid., p. 1397. Footnotes omitted.


32 Ibid., p. 360.

33 Ibid.

34 Ibid., p. 361.

35 Miller, "Teachers' Freedom of Expression Within the Classroom," p. 854.


37 See, for example, Miller, "Teacher's Freedom of Expression Within the Classroom," pp. 884-889. Curriculum in its broadest sense encompasses not only instruction in the basic skills but may include "indoctrination in community values" as well as "instilling in young minds a healthy respect for the symbols of government." See James v. Board of Education, 461 F. 2d 566 (2nd Cir. 1972) and Russo v. Central School District No. 1, 469 F. 2d 623 (2nd Cir. 1972).

38 Miller, "Teachers' Freedom of Expression Within the Classroom," pp. 884-889.


40 Ibid., p. 621.


45 461 F. 2d 566 (2nd Cir. 1972); cert. denied, 409 U.S. 1042 (1972).

46 Ibid., p. 573.
47Ibid.

48Ibid., p. 57. See also Hall v. Board of School Commissioners, 496 F. Supp. 697 (S.D. Ala. 1980).

49Miller, "Teachers' Freedom of Expression Within the Classroom," p. 889. Miller has suggested that one of the negative implications of decisions in this area is that silent expression by a teacher in the presence of students of a young age and development may not be protected by the First Amendment (p. 889).

50"Free Speech Rights of Homosexual Teachers," p. 1352 footnote 121.

51461 F. 2d 566 (2nd Cir. 1972); cert. denied, 409 U.S. 1042 (1972).


57Ibid., p. 173.

58Ibid.

59469 F. 2d 623 (2nd Cir. 1972); cert. denied, 411 U.S. 932 (1973).

60Ibid., p. 631.

61Ibid., p. 633.

62Ibid.


64Miller, "Teachers' Freedom of Expression Within the Classroom," p. 889.


67See pp. 29-30 above.


78Miller v. School District No. 167, 495 F. 2d 658 (7th Cir. 1974).

79Ibid., p. 666.

80Ibid., p. 664.

81573 F. 2d 395 (7th Cir. 1978).

82425 U.S. 238, 96 S. Ct. 1440 (1976). The case concerned the constitutionality of regulations concerning hair length of police department personnel.
83573 F. 2d 395, 399-400 (7th Cir. 1978).


85545 F. 2d 761 (1st Cir. 1976).

86Ibid., p. 763.

87Ibid., and footnote 3.

88562 F. 2d 838 (2d Cir. 1977). The case was decided by a panel of the Court of Appeals for the Second Circuit in which judgment was given for the teacher. The full court reversed the panel's decision and upheld the school authorities' clothing code.

89Ibid., p. 861.

90Ibid., p. 858.

91Ibid.


94The right to receive information has been suggested as deriving from the student's First Amendment rights. Commentaries discussing both censorship issues in the school library context and philosophical bases of the First Amendment have argued for judicial recognition of the right to receive information and the right to know, even for the young student. See "Censoring the School Library: Do Students Have the Right to Read?" Connecticut Law Review 10 (1978): 747, and John H. Garvey, "Children and the First Amendment," Texas Law Review 57 (1979): 321.

95See, for example, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 723 (1969).

96Palmer v. Board of Education of City of Chicago, 466 F. Supp. 600 (N.D. Ill. 1979); aff'd, 603 F. 2d 1271 (7th Cir. 1979).


98Ibid., pp. 602-603.
99603 F. 2d 1271, 1274 (7th Cir. 1979).


101See, for example, "Free Speech Rights of Homosexual Teachers," pp. 1525-1526.

102410 F. Supp. 1243 (N.D. Ohio 1976); aff'd, 572 F. 2d 141 (6th Cir. 1978).


10468 Am Jur 2d, Schools Section 242. Footnotes omitted.

105See, for example, Ohio Rev. Code Ann. Section 3313.20 (Page).

10648 O Jur 2d, Schools Section 176.

10768 Am Jur 2d, Schools Section 256. Footnotes omitted.

108Ibid., Section 53. Footnotes omitted.

109Ibid., Section 242. Footnotes omitted. A rule which is so unreasonable as to be arbitrary, capricious and unrelated to any educational objective may be violative of a student's substantive due process rights. See generally 16A Am Jur 2d, Constitutional Law Section 816.

11068 Am Jur 2d, Schools Section 242. Footnotes omitted.

111Ibid.

112Ibid.

113Ibid.

114Ibid.


116Ibid., p. 733.

117Ibid. E. Edmund Reutter, Jr. has suggested that an analysis of many federal and state court cases has provided the following essentials for an enforceable rule regarding student conduct: 1. The rule must be publicized to students. 2. The rule must have a legitimate educational purpose. 3. The rule must have a rational relationship to the achievement of the stated educational purpose. 4. The meaning of the rule must be reasonably clear. 5. The rule must be sufficiently narrow in scope.
so as not to encompass constitutionally protected activities along
with those which constitutionally may be proscribed in the school
setting. 6. If a rule infringes the constitutional rights of students,
a compelling interest of the school in the enforcement of the rule must
be shown. "Student Conduct; Recent Developments in Constitutional
Law," in Contemporary Legal Problems in Education, (Topeka, Kansas:

118 One of the justices in Tinker v. Des Moines Independent
Community School District, for example, did not share the "Court's un­
critical assumption that, school discipline aside, the First Amendment
rights of children are co-extensive with those of adults." 393 U.S.

119 "Developments in the Law - The Constitution and the Family," 393 U.S.

121 Ibid., pp. 506-511.
122 Ibid., p. 513.
123 Ibid.
125 Pico v. Board of Education, Island Trees Union Free School
District, 638 F. 2d 404, 432 (2nd Cir. 1980).
126 Burnside v. Byars, 363 F. 2d 744, 748 (5th Cir. 1966).
128 Ibid., pp. 505-506.
129 Ibid., p. 508.
130 Ibid., pp. 510-511.
131 363 F. 2d 744 (5th Cir. 1966).
132 Ibid., p. 749.
133 Ibid., p. 748. The court contrasted the wearing of buttons on
collars with "carrying banners, scattering leaflets and speech-making,
all of which are protected methods of expression but all of which have
no place in the classroom."
134363 F. 2d. 749 (5th Cir. 1966).


144Karp v. Becken, 477 F. 2d 171, 174 (9th Cir. 1973). In that case, the court suggested that an additional factor to be taken into account in balancing the state's interest and the interests of the students is that because of the state's interest in education, the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner (p. 175).

145319 U.S. 624, 63 S. Ct. 1178 (1943).

146Ibid., p. 630.

147Ibid., p. 634.

148Ibid., p. 642.


There has been no Supreme Court decision on the issue of the constitutionality of school grooming codes. One Supreme Court justice, however, has commented that he could not predict that "the Supreme Court will hold that the more or less vague terms of either the Due Process Clause or Equal Protection Clause have robbed the States of their traditionally recognized power to run their school systems in accordance with their own judgment as to the appropriate length of hair for students.... Surely few policies can be thought of that States are more capable of deciding than the length of the hair of school boys." Karr v. Schmidt, 401 U.S. 1201, 1202, 91 S. Ct. 529 (1971).


Richards v. Thurston, 424 F. 2d 1281 (5th Cir. 1970); Lang v. Zopp, 476 F. 2d 180 (4th Cir. 1973); Arnold v. Carpenter, 458 F. 2d 939 (7th Cir. 1972); Bishop v. Calow, 450 F. 2d 1069 (8th Cir. 1971).
168 Zeller v. Donegal School District, 517 F. 2d 600 (3rd Cir. 1975); Jackson v. Dorrier, 424 F. 2d 213 (6th Cir. 1970); Hatch v. Goerke, 502 F. 2d 1189 (10th Cir. 1974); King v. Saddleback Junior College District, 445 F. 2d 932 (9th Cir. 1971).

169 424 F. 2d 213 (6th Cir. 1970).

170 Ibid., p. 217.


174 441 F. 2d 444 (6th Cir. 1971).

175 Ibid., p. 447.


177 Ibid., p. 541.

178 Ibid., pp. 541-542.


180 Ibid., pp. 107-108.

181 68 Am Jur 2d, Schools Section 260. Footnotes omitted.

182 Ibid., Section 257. Footnotes omitted.


185 Ibid., pp. 548-549.


188 Ibid., p. 299.


191Ibid., p. 662 footnote 22.

192621 F. 2d 607 (4th Cir. 1980).

193Ibid., p. 610. Irene Merker Rosenberg has argued that a parent's determination that corporal punishment is an inappropriate method of disciplining his child represents a complex of values with respect to child rearing that may stem from psychological, religious, idealogical and other considerations, and that to ignore parental objection to corporal punishment may effectively subvert such goals and objectives, action which is tantamount to a deprivation of parental substantive due process rights in familial primacy and child rearing. "Ingraham v. Wright: The Supreme Court's Whipping Boy," Columbia Law Review 78 (1978): 75.

194U.S. Constitution amendment VIII.


196Ibid., pp. 664-668.

197Ibid., p. 669.

198Ibid., p. 670.

199Patricia M. Lines has sharply criticized the reasoning of the majority in the Ingraham decision. She has suggested that the notion of openness of the public schools is unsupported and that traditional state remedies lack clear and objective standards and fail to operate as a deterrent. "Corporal Punishment after Ingraham: Looking to State Law," Inequality in Education 23 (September 1978): 37-51.

200621 F. 2d 607 (4th Cir. 1980).


206 Ripps, "The Tort Liability of the Classroom Teacher," p. 22.

207 Ibid.

208 Ingraham v. Wright, 430 U.S. 651, 662, 97 S. Ct. 1401 (1977); Restatement, Second, Torts Section 147, Section 150 Comments c-e (1965).


212 480 Jur 2d (Part 2), Schools Section 178.

213 Ibid. Footnotes omitted.

214 Ibid. Footnotes omitted.

215 480 Jur 2d (Part 2), Schools Section 177.

216 Ibid., Restatement, Second, Torts Section 150, Section 153.

217 See generally Ripps, "The Tort Liability of the Classroom Teacher," p. 22.


219 Ibid., pp. 301-303.


221 Ibid., p. 558.


223 Ibid., p. 674.

224 Ibid., pp. 674-680.
225*Ibid.*, pp. 680-681. It has been pointed out that the decision offers the student protection from excessive or unreasonable punishment only after the fact, and even then only if the teacher has sufficient assets to compensate the student. "*Ingraham v. Wright; Paddling the Eighth Amendment*," Ohio Northern University Law Review 4 (1977): 830.

226Robert J. Simpson and Paul O. Dee, "Unusual But Not Cruel: Policy Guidelines on Corporal Punishment," NOLPE School Law Journal 7 (1977): 185. The authors have set out guidelines to be followed in corporal punishment cases, and they have suggested that some form of due process hearing should be afforded in corporal punishment cases.


230In *Petrey v. Flaugher*, 505 F. Supp. 1087 (E.D. Ky. 1981), the court gave a brief overview of the origin and scope of the doctrine of substantive due process, indicating that courts have been reluctant to "cut new unenumerated rights out of whole cloth" and that they have experienced great difficulty in dealing with the theory of substantive due process (pp. 1088-1089). See generally 16A Am Jur 2d, Constitutional Law, Section 816.

231*Petrey v. Flaugher*, 505 F. Supp. 1087, 1091-1092 (E.D. Ky. 1981). In the case, a student had argued that his expulsion for the remainder of the school year was so excessive when weighed against his offense of smoking marijuana in school that it infringed his substantive due process rights. The court rejected the claim, holding that there was a rational basis for the action of the Board in expelling him (p. 1092). In *Mitchell v. Board of Trustees*, the court held that a school board policy providing for automatic expulsion of any student who brought a weapon to school did not infringe upon a student's substantive due process rights. 625 F. 2d 660 (5th Cir. 1980).


234621 F. 2d 607 (4th Cir. 1980).


237 Ibid., p. 613.

238 Ibid.

239 See pp. 49-51 above.


241 Ibid., p. 648.


243 Ibid., pp. 322-325.

244 See, for example, Dorsey v. Bale, 521 S.W. 2d 76 (Ky. Ct. App. 1975), where the court held that, because a school board was empowered to make rules for the "conduct" of students, it could not legally make a rule which imposed the lowering of a grade as a punishment for a breach of conduct. See also Knight v. Board of Education, 348 N.E. 2d 299 (Ill. App. Ct. 1976).


246 See pp. 37-38 above.

247 Ibid.

248 See generally 19 Am Jur POF 2d, Arbitrary or Capricious Grading of Student.


250 Ibid., pp. 302-303.

251 Ibid., p. 303.

252 Ibid.

253 Ibid, pp. 303-304.


256Ibid., pp. 585-586.

257Ohio Rev. Code Ann. Section 3313.66 (Page) invests school officials other than the classroom teacher with authority to suspend or expel. The section also sets out in detail procedures to be followed in cases of suspension and dismissal.


260Ibid., pp. 572-574.

261Ibid., pp. 574-575.

262Ibid.


265Ibid., p. 581. What the Supreme Court meant by "or less" is not entirely clear. The minority opinion felt that the majority judgment had in effect recognized "a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension" (p. 585).


267Ibid., pp. 582-583.

268Ibid., p. 583.

269Ibid.

270Ibid., p. 584.
It has been suggested that if a student is suspended at a time when even a short suspension could seriously interfere with his educational opportunities, due process procedures which are other than rudimentary may be required. "School Discipline: The Administrator's Dilemma," Willamette Law Review 15 (1978-1979): 584-585.


ibid., p. 585.

ibid., p. 597.

"Education and the Law: State Interests and Individual Rights," Michigan Law Review 74 (1975-1976): 1482. For example, Martha M. McCarthy has argued that some form of procedural due process may be required in decisions involving grouping students for instruction. She has urged that educators should prepare for legal challenges by keeping parents apprised of all placement recommendations and decisions and of the criteria upon which such decisions are made. "Court Cases with an Impact on the Teaching of Reading," Journal of Reading 23 (December 1979): 207; "Public Law 94.142 and Its Implications for Nonhandicapped Students," in Contemporary Legal Issues in Education, ed. M.A. McGhehey (Topeka, Kansas: NOLPE, 1979), pp. 138-151.


The Supreme Court held that there had been no deprivation of liberty since there had been no public disclosure of the reasons for the discharge of the policeman concerned. The reasons for the discharge had been communicated privately to the officer and had been stated in pretrial discovery only.


The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause...." U.S. Constitution amendment IV.


See, for example, Bilbrey v. Brown, 481 F. Supp. 26, 28 (D. Or. 1979).


Ibid., p. 347.

Ibid.

Ibid., p. 348.


Ibid., p. 295.


302Ibid., p. 231. Footnotes omitted.

303Ibid., p. 232.

304Ibid., p. 233.

305745 F. Supp. 1012 (N.D. Ind. 1979); aff'd in part, denied in part, 631 F. 2d 91 (7th Cir. 1980); rehearing denied, 635 F. 2d 582 (7th Cir. 1980); cert. denied, 49 U.S.L.W. 3880 (1981).


307Ibid., p. 1019.

308Ibid. The Jones court felt that the Doe court's approval of a blanket high school sniff search stemmed from an erroneous view that the sniffer dogs merely enhanced school officials in their own inspection of the school. 499 F. Supp. 223, 236 (E.D. Texas, 1980). The Doe holding has also been criticized for its "excessive reliance" on the "in loco parentis" doctrine and its insistence that a sniff of a person by a dog is somehow different in school than out of school. "The Constitutionality of Canine Searches in the Classroom," The Journal of Criminal Law and Criminology 71 (1980): 39.


310In the Interests of LL, 280 N.W. 2d 343 (Wis. Ct. App. 1979).


315Ibid., p. 53.


317Ibid., p. 233.


323607 F. 2d 589 (2nd Cir. 1979).


325"Students and the Fourth Amendment: Myth or Reality?" p. 292.


331Ibid., pp. 58-59.


Under the Exclusionary Rule, evidence obtained by law enforcement officers as a result of an unconstitutional search of a person cannot be used in subsequent criminal proceedings against that person. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).


Ibid., pp. 237-238.

Ibid., p. 239.


"Students and the Fourth Amendment: Myth or Reality?", pp. 304-307.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Constitution amendment 1.


Ibid., p. 430.


Ibid., pp. 222-224.

Ibid., pp. 224-225.

Ibid., p. 225. The Court also rejected the argument that "a religion of secular humanism" would be established in the schools unless the program was permitted to go on, but noted that "the state may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe" (p. 225).

385 F. 2d 836 (7th Cir. 1967).
Ibid., p. 837. The verse was:

We thank You for the flowers so sweet;
We thank You for the food we eat;
We thank You for the birds that sing;
We thank You for everything.

384 F. 2d 836, 837-838 (7th Cir. 1967).

Ibid., p. 839. The dissenting opinion argued that the verse with the reference to God deleted could mean that the children were expressing thanks to society and to the community for the good things of life, and it was argued that the court had no right to prohibit what it thought the children were thinking (pp. 840-842).


384 F. 2d 999 (2nd Cir. 1965).

Ibid., p. 1002.


Ibid., p. 341.

Ibid., p. 342.

Ibid., p. 344. Important to the court's reasoning was the wording of the guidelines. There was to be no directive from the teacher that students should pray or meditate; the teacher was simply required to say: "A one minute period of silence for the purposes of meditation or prayer shall now be observed. During this period silence shall be maintained and no activities engaged in." The guidelines also set down steps to be followed in responding to a student's inquiry and in cases where students violated the regulations (p. 340 footnote 4).

Ibid., p. 344.

Ibid., p. 345.


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368 Ibid., p. 194.


372 364 F. 2d 282, 284, (3rd Cir. 1966).

373 Hudgins and Vacca, Law and Education, pp. 84-85. Footnotes omitted.


383 N.W. 2d 460 (Wis. S. Ct. 1967).
384 Ibid., p. 464.
385 Ibid., p. 465.
386 N.E. 2d 701 (Ind. S. Ct. 1974).
387 Ibid., p. 707.
388 Proehl, "Tort Liability of Teachers," pp. 742-743.


392 F. 2d 404 (2nd Cir. 1980).

393 Ibid., p. 414. The court found, however, that the case before it was one which involved an "unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters," that the criteria for removal of books suffered from "excessive generality and overbreadth," and that the school officials had proceeded in an "erratic, arbitrary and free-wheeling manner," all of which meant that a prima facie case of First Amendment violation had been made out (pp. 414-417).

394 F. 2d 438 (2nd Cir. 1980).

395 Ibid., p. 441. See also Zykan v. Warsaw Community School Corp., 631 F. 2d 1300 (7th Cir. 1980).

396 Ibid. See also Zykan v. Warsaw Community School Corp., 631 F. 2d 1300 (7th Cir. 1980).

397 F. 2d 1300 (7th Cir. 1980).

398 Ibid., p. 1304.
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399Ibid., p. 1306.
400Ibid., p. 1308.
401541 F. 2d 577 (6th Cir. 1976).
402Ibid., p. 581.
403Ibid., pp. 581-582.
404Ibid., p. 582. See also Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D. N.H. 1979), where the court held that magazines removed from the library were not obscene and that the case was governed by the Minarcini decision.
405541 F. 2d 577, 582 (6th Cir. 1976). Footnote omitted.
406Ibid.
408Ibid., pp. 711-712.
409Ibid., p. 713. Footnote Omitted.
410"Censoring the School Library: Do Students Have the Right to Read?", p. 760.
412Pico v. Board of Education, Island Trees Union Free School, 638 F. 2d 404 (2nd Cir. 1980); Zykan v. Warsaw Community School District Corp., 631 F. 2d 1300 (7th Cir. 1980).
413See, for example, Zykan v. Warsaw Community School District, 631 F. 2d 1300, 1308 (7th Cir. 1980).
417631 F. 2d 1300 (7th Cir. 1980).

418Ibid., p. 1306.


420Ibid., p. 714 and footnote 18.


429Ibid., p. 57.

430464 F. Supp. 911 (D.S.D. 1979); aff'd, 619 F. 2d 1311 (8th Cir. 1980).

431619 F. 2d 1311, 1316-1317 (8th Cir. 1980).


436464 F. Supp. 911 (D.S.D. 1979); aff'd, 619 F. 2d 1311 (8th Cir. 1980).

437619 F. 2d 1311, 1319 (8th Cir. 1980).

438Ibid., p. 1316.

439Ibid., pp. 1316-1317.

440Ibid., pp. 1318-1319.

441Ibid., p. 1319.


443Ibid., pp. 1163-1164. The dissenting opinion in the Florey case felt that by sponsoring Christmas assemblies which featured programs of traditional Christmas music only during the Christmas season, the school district had in effect endorsed the beliefs of one religion. 619 F. 2d 1311, 1326 (8th Cir. 1980).


448Ibid., p. 661.

449511 F. 2d 1242 (10th Cir. 1975).


451Ibid., p. 308.


Ibid., p. 357.


F. 2d 838, 843 (2nd Cir. 1977). The en banc decision did not agree with the arguments of the panel decision (pp. 857-863).


1 F. 2d 1242 (10th Cir. 1975).

7502 F. 2d 973 (7th Cir. 1974).

Ibid., pp.983-985. See also Mailloux v. Kiley, 448 F. 2d 1242 (1st Cir. 1971).

323 F. Supp. 1387 (D. Mass.); aff'd, 448 F. 2d 1242 (1st Cir. 1971).

471456 F. 2d 399 (8th Cir. 1972).


473Ibid., p. 805.


480Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854, 856 (Cal. App. Ct. 1976). Among the acts attributed to the defendants were a failure to apprehend the plaintiff's reading disabilities and the negligent assignment of the plaintiff to classes in which he could not read the books and in which the instructors were unqualified (p. 856). See also Hunter v. Board of Education, NOLPE Notes 16 (July 1981): 4, and Hoffman v. Board of Education, 400 N.E. 2d 317 (N.Y. App. Ct. 1979).


482Ibid., pp. 857-858.

483Ibid., p. 859.

484Ibid., p. 861.

485Ibid., pp. 860-861.

Ibid., pp. 1354-1355.


Ibid., p. 745.


508Ibid.

509Ibid., pp. 862-863.


512"Educational Malpractice," p. 782.


518Ibid.


521Ibid.


E.E. Fink, Jr, "The Interpretation of Academic Freedom in Relation to Civil Rights for Professional Employees in the Public Schools" (Ph.D. Dissertation, University of Pittsburgh, 1980).


CHAPTER III

METHODOLOGY

Identification of Legal Issues

A major purpose of the study was to identify for the teacher within the elementary classroom setting those legal issues which he might confront in his daily routine in the classroom. The criteria establishing a matter as a legal issue for the purposes of the study were, (1) the matter had been addressed by a court of law at the federal or state level, and/or (2) the matter had been addressed as a matter involving legal considerations by legal or educational commentators in a professional publication, and (3) the matter was one which had arisen, or which could arise, as an issue for the teacher within the elementary classroom setting, in contrast to beyond the four walls of the classroom.

Three recent publications in the area of law and education were consulted. They were Law and Education: Contemporary Issues and Court Decisions¹, School Law², and Teachers and the Law³, 1979, 1980, and 1981 publications respectively. A review of education journals was also undertaken. These reviews suggested the categories of "teacher as teacher and citizen," "teacher as classroom manager," and "teacher as professional educator." The categories were adopted as being appropriate for the structure of the survey instrument which would attempt to establish the degree of concern of preservice teachers toward those legal issues which they might confront in the classroom setting, a second purpose of the study. The categories were also seen

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as an appropriate framework around which to establish guidelines or suggestions for a preservice teacher course in law, a third purpose of the study.

A more thorough review of the publications and of relevant articles in education journals and documents was undertaken. The review produced a list of likely issues which might be faced by the classroom teacher in his roles of teacher as teacher and citizen, teacher as classroom manager, and teacher as professional educator. The review also brought forth statements of law and lists of relevant cases.

Several reference works in law were then consulted. Relevant legal principles and case citations were taken from American Jurisprudence⁴, Ohio Jurisprudence⁵, Prosser's Handbook of the Law of Torts⁶, and West's Digests (Fifth Series)⁷.

Court cases which had been identified as being relevant were then located in the law reports. Each case was read and analyzed. Shepard's Citations were then utilized to follow each case through to its most recent citing by a court. In this manner other cases which dealt with a similar issue or which involved other but relevant legal issues which the classroom teacher had confronted, or might confront, in his daily routine in the classroom were identified. These cases in turn were read and analyzed, and Shepard's Citations were again utilized to follow relevant cases through to their most recent citing by a court. Any additional relevant case which came to light as a result was read and analyzed.

In reading and analyzing relevant cases, attention was focused on relevant principles of law enunciated by the courts and other statements by the courts which were seen as particularly relevant to the teacher
within the classroom setting in his roles of teacher as teacher and citizen, teacher as classroom manager, and teacher as professional educator.

Reference was then made to *Index to Legal Periodicals*. Articles and commentaries in law journals which were relevant to issues already identified were read. Statements by commentators which suggested implications for classroom practice were seen as particularly relevant.

Statements of legal issues which the elementary classroom teacher, within the classroom setting, might confront in his daily routine in the classroom in his roles of teacher as teacher and citizen, teacher as classroom manager, and teacher as professional educator, were then drawn up from the reviews and analyses of court decisions, statements of law, and legal and educational commentaries and articles. Ten issues were listed under the category of Teacher as Teacher and Citizen, twenty-eight issues were listed under the category of Teacher as Classroom Manager, and ten issues were listed under the category of Teacher as Professional Educator.

**Degree of Concern of Preservice Teachers**

A second purpose of the study was to identify the degree of concern of preservice, future professional teachers toward those legal issues which the elementary classroom teacher might confront in his daily routine in the classroom.

For the purposes of identifying the degree of concern of preservice teachers, a survey instrument was developed. In its final form, the instrument listed the legal issues identified in the first part of the study, grouping them under the headings of Teacher as Teacher and Citizen, Teacher as Classroom Manager, and Teacher as Professional
Educator. Each subject was asked to indicate whether he was either concerned about each issue and thought it should be covered in a preservice teacher course in law, or not concerned about each issue and did not think it should be covered in a preservice teacher course in law.

(a) Development of the survey instrument.

The instrument was field-tested on two occasions. In its initial format and without an instructions sheet, it was administered to nineteen members of a graduate level reading course in the Early and Middle Childhood Education Department of the College of Education at The Ohio State University at the beginning of the Summer Quarter, 1981. The respondents were requested not only to note how concerned they were about each legal issue, but also to comment on the content and format of the survey instrument. The comments were considered, and the instrument was then modified in the light of the comments.

Two changes were effected. (1) The categories of Teacher as Teacher and Citizen, Teacher as Classroom Manager, and Teacher as Professional Educator were rotated so that they did not appear in the same order on every instrument. (2) Several of the issues were reworded since some participants had suggested that those several issues as written were ambiguous.

The survey instrument in its modified form was then administered to thirteen members of an undergraduate Professional Introduction course offered by the College of Education at The Ohio State University for students intending to major in education. The instrument in its modified form contained an instructions sheet. Respondents were requested not only to note how concerned they were about each legal issue, but
also to comment on the content and format of the instrument. The comments were considered, and the instrument was then modified in the light of the comments.

Three changes were effected. (1) The instructions sheet was modified to more adequately explain the purposes of the study and to more personally address the subjects involved in the study. (2) Several issues were reworded in an attempt to clarify what some respondents felt was ambiguous wording. (3) The four-point scale reflecting specified degrees of concern toward each legal issue was reconstructed into a two-point scale reflecting whether a subject was either concerned about each issue and thought it should be covered in a preservice teacher course in law or not concerned about each issue and did not think it should be covered in a preservice teacher course in law. It was reasoned that a two-point scale would eliminate confusion expressed by some respondents concerning what was required of the subjects, and that such a scale would more adequately fulfill the purposes of the study.

A copy of the instrument in its final form is in the appendix.

(b) Subjects of the study.

The subjects of the study comprised students of Junior and Senior rank enrolled in courses offered by the Early and Middle Childhood Education Department of the College of Education at The Ohio State University during Autumn Quarter, 1981.

A random sample of eleven classes of Junior and Senior students enrolled in courses offered by the Early and Middle Childhood Education Department was selected from a total of sixteen classes comprising 427 students. The random sample of classes was compiled from class/course rosters which had been issued at the beginning of the Autumn Quarter.
Students undertaking student teaching were regarded as comprising two classes of the population from which the random sample of classes was taken. Students following a thematic block of courses were regarded as one class, even though they were enrolled in two or more courses as indicated on class/course rosters. For example, students in the thematic block Education Through the Arts were regarded as one class, even though they were enrolled in two or more courses during the quarter.

(c) Administration of the instrument.

The instrument in its final form was administered to members of the random sample of eleven classes during the fourth and fifth week of the Autumn Quarter. Each class was approached after permission had been granted by the class instructor, and those subjects who were present on that occasion were requested to complete the survey instrument. Two hundred sixty one subjects responded to the survey. The instruments were collected by the researcher upon their completion.

(d) Establishing the degree of concern.

Each subject was requested to indicate whether he was either concerned about each issue and thought it should be covered in a preservice teacher course in law, or not concerned about each issue and did not think it should be covered in a preservice teacher course in law. Analyses of responses, set out in table form, took the following format:
With regard to each issue listed, a total number of responses was calculated for each specified category of response. Each total number of responses was then expressed as a percentage of the total number of subjects who had responded to the survey. When a subject failed to indicate his stance toward any issue, his lack of response was defined as a "No Response."

**Guidelines for a Preservice Teacher Course in Law**

A third purpose of the study was to utilize responses to the survey instrument to develop guidelines for a preservice teacher course which would attempt to introduce the law as it relates to those legal issues about which the preservice teachers were concerned.

Guidelines for a preservice teacher course in law were drawn up on the basis of the subjects' responses to the survey instrument. The categories of Teacher as Teacher and Citizen, Teacher as Classroom Manager, and Teacher as Professional Educator were viewed as an appropriate framework around which to build such guidelines.

When more than 60% of the subjects indicated they were concerned about an issue and thought that it should be covered in a preservice teacher course in law, the issue was deemed appropriate for comprehensive
coverage, in contrast to summary coverage, in a preservice teacher course in law. The issue was set out in the guidelines in the following manner:

1. The dimension or dimensions suggested by the issue were briefly stated. For example, the dimensions of the "The teacher's grooming practices in the classroom" issue included grooming practices as a point along a "speech-conduct" continuum, practical differences between grooming and clothing practices, grooming practices as a personal liberty under due process provisions, grooming practices as First Amendment expression, grooming practices and substantive due process rights and rights to equal protection, and grooming practices as a mere choice of style.

2. References to case law relevant to each of the dimensions of the issue were set down.

3. References to the views of legal and educational commentators relevant to the issue were set down.

When more than 60% of the subjects indicated that they were not concerned about an issue and did not think that it should be covered in a preservice teacher course in law, the issue was deemed inappropriate for coverage in a preservice teacher course in law.

When more than 40% but less than 60% of the subjects indicated they were concerned about an issue and thought that it should be covered in a preservice teacher course in law, the issue was deemed appropriate for summary coverage only, in contrast to comprehensive coverage, in a preservice teacher course in law. The issue was set out in the guidelines in the following manner:
References to a case relevant to the issue were set down.

Summary

The study had three major purposes: (1) the identification of legal issues which the elementary classroom teacher might confront in his daily routine in the classroom, (2) the identification of the degree of concern of preservice teachers toward those issues, and (3) the drawing up of guidelines for a preservice teacher course in law which would cover those legal issues about which the preservice teachers were concerned. To achieve these purposes, a review of court cases and of educational and legal literature was undertaken, and statements of legal issues were drawn up. Preservice teachers were then requested to complete a survey instrument by indicating whether they were concerned about each issue and whether they thought each issue should be covered in a preservice teacher course in law. Guidelines for a preservice teacher course in law were then drawn up on the basis of responses to the survey instrument.


CHAPTER IV
FINDINGS

Identification of Legal Issues

The first major purpose of the study was to identify for the teacher within the elementary classroom setting those legal issues which he might confront in his daily routine in the classroom. The criteria establishing a matter as a legal issue for the purposes of the study were, (1) the matter had been addressed by a court of law at the federal or state level, and/or (2) the matter had been addressed as a matter involving legal considerations by legal or educational commentators in a professional publication, and (3) the matter was one which had arisen, or which could arise, as an issue for the teacher within the elementary classroom setting.

A review of court decisions and legal and educational professional publications was undertaken to identify relevant legal issues. A list of forty-eight legal issues was established. Those issues were set out both in Chapter II of this study and in this chapter in summary format under the categories of Teacher as Teacher and Citizen, Teacher as Classroom Manager, and Teacher as Professional Educator.

Degree of Concern of Preservice Teachers

A second major purpose of the study was to identify the degree of concern of preservice, future professional teachers toward those legal issues established in the first part of the study. A survey instrument was developed on which each subject was requested to indicate whether he was either concerned about each issue and thought it should be
covered in a preservice teacher course in law, or not concerned about each issue and did not think it should be covered in a preservice teacher course in law. The responses of the subjects were utilized to develop guidelines for a preservice teacher course which would attempt to introduce the law as it relates to those legal issues about which preservice teachers were concerned, a third major purpose of the study.

(a) Subjects

The survey instrument was administered to 261 subjects or 61.12 percent of a population of 427 students of Junior and Senior rank enrolled in courses offered by the Early and Middle Childhood Education Department of the College of Education at The Ohio State University. The subjects were members of a random sample of eleven out of sixteen classes.

The subjects may be described in the following manner.

<table>
<thead>
<tr>
<th>Status of Subjects</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Junior Male</td>
<td>2.30%</td>
</tr>
<tr>
<td>Senior Male</td>
<td>4.21%</td>
</tr>
<tr>
<td>Junior Female</td>
<td>19.16%</td>
</tr>
<tr>
<td>Senior Female</td>
<td>74.33%</td>
</tr>
</tbody>
</table>

100% = 261

(b) Responses of subjects.

The completed instruments were analyzed. With regard to each issue, a total number of responses was calculated for each specified category of response. Each total number of responses was then expressed as a percentage of the total number of subjects who had responded to
the survey. When a subject failed to indicate his stance toward any issue, his lack of response was defined as a "No Response."

<table>
<thead>
<tr>
<th>Issues</th>
<th>Concerned and Think It Should be Covered</th>
<th>Not Concerned and do not Think it Should be Covered</th>
<th>No Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>The teacher as teacher and citizen within the classroom.</td>
<td>79.31%</td>
<td>20.31%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The teacher's in-class comments on issues of public importance.</td>
<td>76.25%</td>
<td>22.99%</td>
<td>0.76%</td>
</tr>
<tr>
<td>The teacher's in-class criticisms of co-workers or of the school administra tion.</td>
<td>59.00%</td>
<td>41.00%</td>
<td>----</td>
</tr>
<tr>
<td>The teacher's in-class speech which interferes with or disrupts the school curriculum.</td>
<td>65.90%</td>
<td>33.72%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The teacher's wearing of armbands in the classroom.</td>
<td>41.76%</td>
<td>58.24%</td>
<td>----</td>
</tr>
<tr>
<td>The teacher's refusal to lead the class in the Pledge of Allegiance.</td>
<td>59.77%</td>
<td>40.23%</td>
<td>----</td>
</tr>
<tr>
<td>The teacher's grooming practices in the classroom.</td>
<td>65.52%</td>
<td>34.48%</td>
<td>----</td>
</tr>
</tbody>
</table>

TABLE 1

THE DEGREE OF CONCERN OF SUBJECTS TOWARD ISSUES LISTED UNDER THE CATEGORY OF TEACHER AS TEACHER AND CITIZEN
The teacher's clothing practices in the classroom.

The Freedom of Religion clause and the teacher's refusal to teach portion of the curriculum.

The classroom as a public forum for First Amendment purposes.

<table>
<thead>
<tr>
<th>Issues</th>
<th>Concerned and Think it Should be Covered</th>
<th>Not Concerned and do not Think it Should be Covered</th>
<th>No Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>The teacher's clothing practices in the classroom.</td>
<td>71.26%</td>
<td>28.74%</td>
<td>----</td>
</tr>
<tr>
<td>The Freedom of Religion clause and the teacher's refusal to teach portion of the curriculum.</td>
<td>63.98%</td>
<td>36.02%</td>
<td>----</td>
</tr>
<tr>
<td>The classroom as a public forum for First Amendment purposes.</td>
<td>63.60%</td>
<td>34.40%</td>
<td>----</td>
</tr>
</tbody>
</table>

Summary of responses. Of the ten issues listed under the category of Teacher as Teacher and Citizen, seven issues each prompted a response rate indicating that more than 60 percent of the subjects were concerned about the issue and thought that it should be covered in a preservice teacher course in law. Three issues each prompted a response rate indicating that more than 40 percent but less than 60 percent of the subjects were concerned about the issue and thought that it should be covered in a preservice teacher course in law.

TABLE 2

THE DEGREE OF CONCERN OF SUBJECTS TOWARD ISSUES LISTED UNDER THE CATEGORY OF TEACHER AS CLASSROOM MANAGER

<table>
<thead>
<tr>
<th>Issues</th>
<th>Concerned and Think it Should be Covered</th>
<th>Not Concerned and do not Think it Should be Covered</th>
<th>No Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>The limits to the teacher's rule-making authority.</td>
<td>82.38%</td>
<td>16.86%</td>
<td>0.76%</td>
</tr>
<tr>
<td>The student's freedom of speech and expression in the classroom.</td>
<td>78.93%</td>
<td>21.07%</td>
<td>----</td>
</tr>
<tr>
<td>Topic</td>
<td>Agree</td>
<td>Disagree</td>
<td>Other</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------</td>
<td>----------</td>
<td>-------</td>
</tr>
<tr>
<td>Teacher regulation of the wearing of armbands by students.</td>
<td>52.11%</td>
<td>47.89%</td>
<td></td>
</tr>
<tr>
<td>The student's refusal to participate in the Pledge of Allegiance as a First Amendment right.</td>
<td>63.60%</td>
<td>36.02%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The student's refusal to stand in silence or to leave the room during the Pledge of Allegiance.</td>
<td>63.60%</td>
<td>36.02%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The legality of the infliction of corporal punishment by a teacher in Ohio.</td>
<td>91.57%</td>
<td>8.43%</td>
<td></td>
</tr>
<tr>
<td>Teacher regulation of hairstyles of students.</td>
<td>35.25%</td>
<td>64.37%</td>
<td>0.38%</td>
</tr>
<tr>
<td>Corporal punishment and the Constitution's Eighth Amendment.</td>
<td>83.53%</td>
<td>16.09%</td>
<td>0.38%</td>
</tr>
<tr>
<td>&quot;Reasonable&quot; corporal punishment.</td>
<td>90.42%</td>
<td>9.58%</td>
<td></td>
</tr>
<tr>
<td>Criminal liability of the teacher for inflicting corporal punishment.</td>
<td>92.72%</td>
<td>7.28%</td>
<td></td>
</tr>
<tr>
<td>Civil liability of the teacher for inflicting corporal punishment.</td>
<td>93.11%</td>
<td>6.51%</td>
<td>0.38%</td>
</tr>
<tr>
<td>Corporal punishment and the matter of procedural due process.</td>
<td>82.76%</td>
<td>17.24%</td>
<td></td>
</tr>
<tr>
<td>Severe corporal punishment and substantive due process rights.</td>
<td>71.27%</td>
<td>27.97%</td>
<td>0.76%</td>
</tr>
<tr>
<td>Verbal chastisement by the teacher.</td>
<td>78.16%</td>
<td>21.46%</td>
<td>0.38%</td>
</tr>
<tr>
<td>Lowering a student's grade as a means of punishing the student.</td>
<td>61.30%</td>
<td>38.70%</td>
<td></td>
</tr>
<tr>
<td>Topic</td>
<td>Percentage for Yes</td>
<td>Percentage for No</td>
<td>Percentage for Don't Know</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------------</td>
<td>-------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>Procedural due process, the student, and suspension and dismissal.</td>
<td>88.12%</td>
<td>11.88%</td>
<td>----</td>
</tr>
<tr>
<td>Procedural due process, the student, and classroom discipline practices.</td>
<td>72.03%</td>
<td>27.59%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The Fourth Amendment and its application to searches of a student by the teacher.</td>
<td>81.61%</td>
<td>17.24%</td>
<td>1.15%</td>
</tr>
<tr>
<td>A &quot;search&quot; of a student by the teacher.</td>
<td>82.00%</td>
<td>16.85%</td>
<td>1.15%</td>
</tr>
<tr>
<td>Sufficient cause for a teacher to conduct a search under the Constitution.</td>
<td>88.89%</td>
<td>10.35%</td>
<td>0.76%</td>
</tr>
<tr>
<td>The application of the Fourth Amendment to searches by the teacher of a student's desk or locker.</td>
<td>86.60%</td>
<td>12.64%</td>
<td>0.76%</td>
</tr>
<tr>
<td>Using evidence obtained as a result of an unconstitutional search to punish a student.</td>
<td>86.21%</td>
<td>12.64%</td>
<td>1.15%</td>
</tr>
<tr>
<td>The constitutionality of a teacher's action in requiring prayer recital or Bible reading by the class.</td>
<td>52.49%</td>
<td>47.51%</td>
<td>----</td>
</tr>
<tr>
<td>The authority of the principal and the teacher to stop a class-initiated prayer recital.</td>
<td>68.20%</td>
<td>31.80%</td>
<td>----</td>
</tr>
<tr>
<td>Observing a minute of silence for &quot;prayer or meditation&quot;.</td>
<td>65.25%</td>
<td>34.48%</td>
<td>----</td>
</tr>
<tr>
<td>The constitutionality of putting on display in the classroom a copy of the Ten Commandments.</td>
<td>49.42%</td>
<td>50.58%</td>
<td>----</td>
</tr>
</tbody>
</table>
The teacher's liability for a student's injury suffered while the teacher is instructing or supervising the class.

<table>
<thead>
<tr>
<th>Concerned and Think it Should be Covered</th>
<th>Not Concerned and do not Think it Should be Covered</th>
<th>No Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>97.70%</td>
<td>2.30%</td>
<td>----</td>
</tr>
</tbody>
</table>

The teacher's liability for a student's injury suffered when the teacher leaves the class unsupervised.

<table>
<thead>
<tr>
<th>Concerned and Think it Should be Covered</th>
<th>Not Concerned and do not Think it Should be Covered</th>
<th>No Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>97.32%</td>
<td>2.68%</td>
<td>----</td>
</tr>
</tbody>
</table>

Summary of responses. Of the twenty-eight issues listed under the category of Teacher as Classroom Manager, twenty-four issues each prompted a response rate indicating that more than 60 percent of the subjects were concerned about the issue and thought that it should be covered in a preservice course in law. Three issues each prompted a response rate indicating that more than 40 percent but less than 60 percent of the subjects were concerned about the issue and thought that it should be covered in a preservice teacher course in law. One issue prompted a response rate indicating that more than 60 percent of the subjects were not concerned about the issue and did not think it should be covered in a preservice teacher course in law.

TABLE 3

THE DEGREE OF CONCERN OF SUBJECTS TOWARD ISSUES LISTED UNDER THE CATEGORY OF TEACHER AS PROFESSIONAL EDUCATOR

<table>
<thead>
<tr>
<th>Issues</th>
<th>Concerned and Think it Should be Covered</th>
<th>Not Concerned and do not Think it Should be Covered</th>
<th>No Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>The constitutionality of removal by school officials of books from the school library.</td>
<td>85.06%</td>
<td>14.94%</td>
<td>----</td>
</tr>
<tr>
<td>Issue</td>
<td>Percentage for Concerned Subjects</td>
<td>Percentage for Not Concerned Subjects</td>
<td>Percentage for Other Responses</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td>--------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>The constitutionality of placing library books on a &quot;restricted&quot; shelf.</td>
<td>78.54%</td>
<td>21.46%</td>
<td>----</td>
</tr>
<tr>
<td>The constitutionality of removing &quot;objectionable&quot; portions from library books.</td>
<td>79.31%</td>
<td>20.69%</td>
<td>----</td>
</tr>
<tr>
<td>Making use of religious works in the classroom.</td>
<td>77.01%</td>
<td>22.99%</td>
<td>----</td>
</tr>
<tr>
<td>Celebrating events of religious significance at school assemblies.</td>
<td>69.73%</td>
<td>29.89%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The teacher's decision to discuss in class or to teach about a controversial topic.</td>
<td>81.23%</td>
<td>18.39%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The teacher's choice of teaching methodology.</td>
<td>69.73%</td>
<td>29.89%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The teacher and educational malpractice.</td>
<td>90.80%</td>
<td>8.82%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The teacher and misrepresentation.</td>
<td>85.44%</td>
<td>14.18%</td>
<td>0.38%</td>
</tr>
<tr>
<td>The teacher and breach of a statutory duty.</td>
<td>84.67%</td>
<td>14.18%</td>
<td>1.15%</td>
</tr>
</tbody>
</table>

Summary of responses. Each of the ten issues listed under the category of Teacher as Professional Educator prompted a response rate indicating that more than 60 percent of the subjects were concerned about the issue and thought that it should be covered in a preservice teacher course in law.

Summary

As a result of a review of court cases and educational and legal literature, forty-eight issues were identified as being relevant to the purposes of the study. Each of the 261 subjects who responded to the
survey was asked to indicate whether he was either concerned about each issue and thought it should be covered in a preservice course in law or not concerned about each issue and did not think it should be covered in a preservice teacher course in law. With regard to each issue listed, a total number of responses was calculated for each specified category of response. Each total number of responses was then expressed as a percentage of the total number of subjects who had responded to the survey. The percentages were then utilized to develop guidelines for a preservice teacher course in law which were set out in Chapter V of this study.

Of the forty-eight issues identified in the first part of the study, forty-one issues each prompted a response rate indicating that more than 60 percent of the subjects were concerned about the issue and thought that it should be covered in a preservice teacher course in law. Six issues each prompted a response rate indicating that more than 40 percent but less than 60 percent of the subjects were concerned about the issue and thought that it should be covered in a preservice teacher course in law. One issue prompted a response rate indicating that more than 60 percent of the subjects were not concerned about the issue and did not think it should be covered in a preservice course in law.
CHAPTER V

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Summary

The first major purpose of the study was to identify, for the teacher within the elementary classroom setting, those legal issues he might confront in his daily routine in the classroom. The focus of the study was the teacher within the classroom setting, and the criteria establishing a matter as a legal issue for the purposes of the study were, (1) the matter had been addressed by a court of law at the federal or state level, and/or (2) the matter had been addressed as a matter involving legal considerations by legal or educational commentators in a professional publication, and (3) the matter was one which had arisen, or which could arise, as an issue for the teacher within the elementary classroom setting.

An initial review of recent publications and journals in the area of law and education was undertaken. As a result of this review, the categories of Teacher as Teacher and Citizen, Teacher as Classroom Manager, and Teacher as Professional Educator were set down as appropriate categories for the study. A more thorough review of those publications and journals produced a list of likely issues which the elementary classroom teacher might confront in his roles of Teacher as Teacher and Citizen, Teacher as Classroom Manager, and Teacher as Professional Educator. The review also brought forth statements of law and lists of relevant court decisions. Several reference works in law were also consulted, and the case citations were noted.
Court cases which had been identified as relevant to the issues listed were located in the law reports and each case was read and analyzed. Shepard's Citations were then utilized to follow cases through to their most recent citing by other courts and to identify similar or additional issues which were relevant to the study. Relevant articles and commentaries in law journals were read and their contents noted. In analyzing court decisions and in reviewing legal and educational publications, attention was focused both on relevant principles of law enunciated by the courts and on additional statements by courts and by commentators which were seen as being particularly relevant to classroom practice.

Statements of legal issues were then drawn up. Ten issues were listed under the category of Teacher as Teacher and Citizen, twenty-eight issues were listed under the category of Teacher as Classroom Manager, and ten issues were listed under the category of Teacher as Professional Educator.

The second major purpose of the study was to identify the degree of concern of preservice future professional teachers toward those legal issues identified in the first part of the study. A survey instrument listing the legal issues was developed and administered to a random sample of eleven out of sixteen classes comprising students of Senior and Junior rank in the Early and Middle Childhood Education Department of the College of Education at The Ohio State University. Two hundred sixty-one subjects or 61.12 percent of the population responded to the survey. A total of 427 students made up the sixteen classes from which the random sample of eleven classes was drawn.
Each subject was requested to indicate whether he was either concerned about each issue and thought it should be covered in a preservice teacher course in law or not concerned about each issue and did not think it should be covered in a preservice teacher course in law. With regard to each issue listed, a total number of responses was calculated for each specified category of response. Each total number of responses was then expressed as a percentage of the total number of subjects who had responded to the survey.

A third major purpose of the study was to develop guidelines for a preservice teacher course which would attempt to introduce the law as it relates to those legal issues about which the preservice teachers were concerned. Responses to the survey were utilized to identify those issues to be covered in such a course. When more than 60 percent of the subjects indicated that they were concerned about an issue and thought that it should be covered in a preservice teacher course in law, the issue was deemed appropriate for comprehensive coverage in a preservice teacher course in law. When more than 40 percent but less than 60 percent of the subjects indicated that they were concerned about an issue and thought that it should be covered in a preservice teacher course in law, the issue was deemed appropriate for summary coverage only in a preservice teacher course in law. When more than 60 percent of the subjects indicated that they were not concerned about an issue and did not think it should be covered in a preservice teacher course in law, the issue was deemed inappropriate for coverage in a preservice teacher course in law.

Seven issues under the category of Teacher as Teacher and Citizen, twenty-four issues under the category of Teacher as Classroom Manager,
and ten issues under the category of Teacher as Professional Educator were deemed appropriate for comprehensive coverage in a preservice teacher course in law. Three issues under the category of Teacher as Teacher and Citizen, and three issues under the category of Teacher as Classroom Manager were deemed appropriate for coverage in a summary manner only in the preservice teacher course in law. One issue under the category of Teacher as Classroom Manager was deemed inappropriate for coverage in the preservice teacher course in law.

Conclusions

The present study grew out of a belief that the elementary classroom teacher has needs and obligations that can no longer be answered by resort to his own philosophy of "I know what is best for my classroom and my students." The law is playing an increasingly influential role in the life of the teacher and student within the classroom setting. And yet it would appear that very little mention of legal issues is made in courses offered for the preservice teacher at The Ohio State University. Of the 261 subjects who responded to the survey, twenty-six subjects indicated that only small mention of the law had been made in education courses they had already undertaken.

The subjects involved in the present study indicated they were concerned enough about forty-seven out of forty-eight issues listed in the survey instrument to warrant their coverage in a preservice teacher program in law. Of those forty-seven issues, only two issues prompted responses reflecting the concern of less than 50 percent of the subjects. There appears to be, then, a real and genuine concern on the part of preservice teachers involved in the study for the legality and
constitutionality of classroom practices. Indeed, in many instances, subjects who had completed the survey instrument approached the researcher and expressed interest both in undertaking a course such as that envisaged by the present study and in obtaining current professional publications which might look at the legal concerns of the teacher.

The preservice teacher course in law envisaged by this study represents an attempt to assist future professional teachers to operate with an awareness and understanding of the law as it affects classroom practices. An understanding and awareness of the issues, their implications, and the law as it relates to those issues would more adequately prepare the future professional teacher to carry out the responsibilities of classroom teaching and classroom management in a manner which is within the parameters of what is legally permissible and in a manner which is respectful of the rights and needs of students. The point has been made that it will be those students who are educated by responsible and knowledgeable educators and who are enjoying full rights that will be more likely than not to carry out their own responsibilities, to respect the rights of others, and to appreciate the law and its requirements. A preservice teacher course in law, then, would appear to be vital and highly beneficial component of any teacher education program.

Many subjects indicated that they were not concerned about some of the issues and did not think they should be covered in a preservice teacher course in law. This included issues for which legal and educational commentators have urged considerable teacher understanding in order to avoid serious legal consequences. While it was not the purpose of this study to explain this apparent lack of concern, it could be
argued that such a situation is simply an expression in different terms of the need for a course which might, at the very least, attempt to turn out classroom teachers who are legally aware.

Guidelines for a Preservice Teacher Course in Law

The third major purpose of the study was to establish guidelines for a preservice teacher course in law which would attempt to introduce the law as it relates to those legal issues about which the preservice teachers were concerned. The categories of Teacher as Teacher and Citizen, Teacher as Classroom Manager, and Teacher as Professional Educator were viewed as an appropriate framework upon which to establish the guidelines.

References to page numbers and footnotes refer to page numbers and footnotes in Chapter II of this study.

Structure: A series of 4 seminars, or a mini-course comprising 4 sessions.

Session 1: Teacher as Teacher and Citizen
Session 2: Teacher as Classroom Manager
Session 3: Teacher as Classroom Manager
Session 4: Teacher as Professional Educator

Seminar/Session 1
Teacher as Teacher and Citizen

(a) Comprehensive Coverage

Issue: The teacher as teacher and citizen within the classroom (pp. 21-23).

Dimensions: Teaching as a privilege; consequences of teaching as a privilege; change in status from teacher as a "second-class citizen" to one possessing rights in the classroom; freedom of religion rights; rights as not absolute.

Case Law: pp. 21-22 footnotes 207; p. 22 footnotes 8-10, 13.

**Issue:** The teacher's in-class comments on issues of public importance (pp. 23-24).

Dimensions: Teacher's rights beyond classroom walls to comment on matters of public concern; teacher's free speech rights within the school environment; balancing the interests of the state and of the teacher; status of erroneous public statements upon issues of public concern.


**Issue:** The teacher's in-class speech which interferes with or disrupts the school curriculum (pp. 26-27).

Dimensions: State's interest in adherence to curriculum; personal opinions of teacher as incompatible with school's educational objectives.


Commentators: p. 26 footnote 38; p. 27 footnote 43.

**Issue:** The teacher's grooming practices in the classroom (pp. 20-22).

Dimensions: Grooming practices as a point along a "speech-conduct" continuum; practical differences between grooming and clothing practices; grooming practices as a personal liberty under due process provisions; grooming practices as First Amendment expression; grooming practices and substantive due process rights and rights to equal protection; grooming practices as a mere choice of style.

Case Law: p. 31 footnotes 69-74; p. 32 footnotes 75-83.

Commentators: p. 30 footnote 68.

**Issue:** The teacher's clothing practices in the classroom (pp. 32-34).

Dimensions: Practical difference between clothing practices and grooming practices; dress length falling beyond Fourteenth Amendment's concept of liberty; clothing practices as close to the conduct end of "speech-conduct" continuum.

Case Law: p. 33 footnotes 84-91

Commentators: p. 34 footnote 92.
**Issue:** The Freedom of Religion clause and the teacher's refusal to teach portion of the curriculum (pp. 34-35).

Dimensions: Balancing the interests of the state, student and teacher; freedom to believe which is absolute, freedom to act which is not.

Case Law: p. 34 footnote 95; pp. 34-35 footnotes 96-100.

Commentators: p. 34 footnotes 93-93.

**Issue:** The classroom as a public forum for First Amendment purposes (pp. 35-36).

Dimensions: Street as a public forum; school as something less than a public forum; sending literature home as not indicative of establishment of public forum.


Commentators: p. 35 footnote 101.

(b) Summary Coverage Only

**Issue:** The teacher's in-class criticisms of co-workers or of the school administration (pp. 24-26).


**Issue:** The teacher's wearing of armbands in the classroom (pp. 27-29).


**Issue:** The teacher's refusal to lead the class in the Pledge of Allegiance (pp. 29-30).


Seminar/Session 2
Teacher as Classroom Manager

(a) Comprehensive Coverage

**Issue:** The limits to the teacher's rule-making authority (pp. 36-37).

Dimensions: The teacher as rule-making authority; teacher and "in loco parentis" doctrine; need for wide teacher discretion; requirement of reasonableness; rule must be drawn so as to reasonably inform; requirement of rule consistency; reasonableness requirement and a peculiar rule; the essentials of an enforceable rule.

Commentators: p. 37 footnotes 115-117.

**Issue:** The student's freedom of speech and expression in the classroom (pp. 37-39).

**Dimensions:** First Amendment rights of children compared to, and as a precursor to, rights of adults; First Amendment rights of students in schools; student's freedom of expression as not absolute; rules forbidding unnecessary classroom discussion.


Commentators: p. 38 footnote 119.

**Issue:** The student's refusal to participate in the Pledge of Allegiance as a First Amendment right (pp. 41-42).

**Dimensions:** Refusal to participate in Pledge as First Amendment right; First Amendment right as not absolute; relevance of appeals to courtesy and sincerity of refusal.

Case Law: pp. 41-42 footnotes 145-148; p. 48 footnotes 149-152.

Commentators: -----

**Issue:** The student's refusal to stand in silence or to leave the room during the Pledge of Allegiance (pp. 42-43).

**Dimensions:** The right to select form of expression; relevance of pedagogical opinions and appeals to courtesy; imposing penalties with regard to exercise of First Amendment rights; First Amendment rights as not absolute.


Commentators: -----

**Issue:** The legality of the infliction of corporal punishment by a teacher in Ohio (pp. 45-47).

**Dimensions:** Authority of teacher to inflict corporal punishment under legislation; corporal punishment and Fourteenth Amendment; powers of board of education in regulating corporal punishment; parental wishes and corporal punishment.

Commentators: p. 47 footnote 193.

**Issue:** Corporal punishment and the Constitution's Eighth Amendment (pp. 47-48).

Dimensions: Corporal punishment as cruel and unusual punishment; historical view of Eighth Amendment; alternative remedies available to student; forceful nature of Supreme Court's views.


**Issue:** "Reasonable" corporal punishment (pp. 48-49).

Dimensions: Legislation and "reasonable" corporal punishment; common law and "reasonable" corporal punishment; the old rule and the new rule; factors determining reasonableness of corporal punishment.


Commentators: p. 48 footnotes 205-207.

**Issue:** Criminal liability of the teacher for inflicting corporal punishment (pp. 49-50).

Dimensions: Criminal remedies as protection for student; criminal liability and Ohio legislation; elements needed for conviction.


Commentators: ----

**Issue:** Civil liability of the teacher for inflicting corporal punishment (p. 50).

Dimensions: Civil remedies as protection for student; civil liability for "unreasonable" corporal punishment; factors determining civil liability.


Commentators: p. 50 footnote 217.

**Issue:** Corporal punishment and the matter of procedural due process (pp. 50-52).
Dimensions: The opportunity to protest arbitrary punishment; implication of Fourteenth Amendment rights and the right to a hearing; common law remedies and the right to a hearing; adequacy of state remedies and the need for a hearing; the innocent student and reasonable corporal punishment.


Issue: Severe corporal punishment and substantive due process rights (pp. 52-53).

Dimensions: Origins and parameters of substantive due process; severe corporal punishment and substantive due process; a right to ultimate bodily security; a test for determining whether severe corporal punishment infringes substantive due process rights.


Commentators: ----

Issue: Verbal chastisement by the teacher (pp. 53-55).

Dimensions: Verbal chastisement as a classroom practice; verbal chastisement and unreasonable corporal punishment; verbal chastisement and "in loco parentis" doctrine; analogy between verbal and physical punishment; factors determining reasonableness of verbal chastisement.

Case Law: p. 54 footnotes 239-241.


Issue: Lowering a student's grade as a means of punishing the student (pp. 55-57).

Dimensions: Relevance of student grades to student behavior; teacher's powers of control, restraint and correction; grades as part of teacher's subjective discretion; grades outside of teacher's subjective discretion; grades and rights to equal protection and substantive due process; grades and the right to a hearing.


(b) Summary Coverage Only

**Issue:** Teacher regulation of the wearing of armbands by students (pp. 39-41).

**Case Law:** p. 39 footnotes 127-130.

**Seminar/Session 3**
**Teacher as Classroom Manager**

(a) Comprehensive Coverage

**Issue:** Procedural due process, the student, and suspension and dismissal (pp. 57-59).

**Dimensions:** Teacher's involvement in suspension and dismissal and procedural due process; procedural due process and suspension for ten days or less; property and liberty interests and procedural due process; what process is due and how much process is due; classroom practice and appropriateness of due process procedures.

**Case Law:** p. 57 footnote 257; pp. 57-59 footnotes 259-271.

**Commentators:** p. 57 footnote 258; p. 58 footnote 263; p. 59 footnote 271.

**Issue:** Procedural due process, the student, and classroom discipline practices (pp. 59-61).

**Dimensions:** Procedural due process and other classroom practices; procedural due process and in-school suspension; procedural due process and a student's liberty interests; impact of Supreme Court decisions.

**Case Law:** p. 59 footnotes 272-274; p. 60 footnotes 278, 280; p. 61 footnote 284.

**Commentators:** p. 59 footnote 275; pp. 59-60 footnotes 276-277; p. 60 footnotes 279, 281; pp. 60-61 footnotes 283-285.

**Issue:** The Fourth Amendment and its application to searches of a student by the teacher (pp. 61-62).

**Dimensions:** The student as "person" under the Constitution; the teacher and "in loco parentis" doctrine; a search by private individual and a search by government official; the teacher as government official; status of "private individual" argument.

**Case Law:** p. 61 footnotes 287-291; p. 62 footnotes 292-297.
Commentators: p. 62 footnote 298.

**Issue:** A "search" of a student by the teacher (pp. 63-64).

Dimensions: The form of a school search; search as invasion of justifiable reliance on privacy; a search and use of sniffer dogs in classroom; search of classroom where police officers present; actions held to be searches; criticisms of the Doe case.

Case Law: p. 63 footnotes 300-304; pp. 63-64 footnotes 305-308; p. 64 footnotes 309-313.

Commentators: p. 63 footnote 299; p. 64 footnote 308.

**Issue:** Sufficient cause for a teacher to conduct a search under the Constitution (pp. 64-66).

Dimensions: Reasonable and unreasonable searches; reasonableness and a balancing of interests; factors having a bearing on reasonableness of search; "probable cause" and "reasonable cause"; factors having a bearing on "reasonable cause"; "probable cause" replacing "reasonable cause" in certain situations; consent to search; consent and ability of children to consent.


Commentators: p. 66 footnote 325.

**Issue:** The application of the Fourth Amendment to searches by the teacher of a student's desk or locker (pp. 66-68).

Dimensions: Fourth Amendment encompassing search of desk or locker; Fourth Amendment and ownership of locker; balancing Fourth Amendment rights and "in loco parentis" rights.


**Issue:** Using evidence obtained as a result of an unconstitutional search to punish a student (pp. 68-69).

Dimensions: Remedies available for unconstitutional search; the Exclusionary Rule; the Exclusionary Rule and illegal searches by school officials; a corollary of the Exclusionary Rule and school discipline; the Exclusionary Rule as a deterrent to impermissible action by school officials.

Commentators: p. 68 footnote 331; p. 69 footnotes 340-341.

**Issue:** The authority of the principal and the teacher to stop a class-initiated prayer recital (pp. 71-72).

**Dimensions:** State action and the Free Exercise clause; a majority's impermissible use of state machinery to practice its beliefs.


Commentators: ---

**Issue:** Observing a minute of silence for "prayer or meditation" (pp. 72-73).

**Dimensions:** The Establishment clause and the Supreme Court's test; the nature of "meditation"; applying the Supreme Court's test to the prescribed period of silence for meditation or prayer; the Free exercise clause and the prescribed period of silence for meditation or prayer; the prescribed period of silence for prayer or meditation and parental due process rights; a moment of silence for prayer or meditation as an acceptable means of accommodating religion in the classroom.


Commentators: p. 72 footnote 365.

**Issue:** The teacher's liability for a student's injury suffered while the teacher is instructing or supervising the class (pp. 74-76).

**Dimensions:** The elements of a common law cause of action in negligence; the "reasonable man," the exercise of "reasonable care," and the "foreseeability or risk"; implications of a teacher's superiority in knowledge and experience; negligent instruction by the teacher; factors determining sufficiency of instruction; negligent supervision by the teacher; the exercise of reasonable care in supervisory situations.


Commentators: ---

**Issue:** The teacher's liability for a student's injury suffered when the teacher leaves the class unsupervised (pp. 76-78).
Dimensions: Leaving the class unsupervised while gossiping; the foreseeability of injury; the teacher's duty to use reasonable care; considerations affecting what is "reasonable care"; permitting students to work on projects during recess without supervision and factors affecting what is "reasonable care" in such circumstances; the reasonableness of expecting injury when a class is unsupervised; balancing probability and gravity of risk against utility of teacher's conduct.


Commentators: pp.77-78 footnotes 388; p. 78 footnote 389.

(b) Summary Coverage Only

Issue: The constitutionality of a teacher's action in requiring prayer recital or Bible reading by the class (pp. 70-71).


Issue: The constitutionality of putting on display in the classroom a copy of the Ten Commandments (pp. 73-74).

Case Law: pp. 73-74 footnotes 366-369.

Seminar/Session 4
Teacher as Professional Educator

(a) Comprehensive Coverage

Issue: The constitutionality of removal by school officials of books from the school library (pp. 78-81).

Dimensions: The dimensions of the censorship issue: removal of books as not constituting a First Amendment violation; removal of books based on personal tastes and values of board members; removal of books as not constituting violation of students' due process rights; limitations to school officials' authority regarding purge of library materials and students' bringing of books to school; removal of books as constituting a First Amendment violation; irrelevance of availability of books outside the school; balancing First Amendment rights and government interests; freedom of book selection as the converging point of lines of judicial authority; considerations permitting book removal; due process hearings and book removal.

Commentators: p. 78 footnotes 390-391; p. 81 footnotes 410-411.

**Issue:** The constitutionality of placing library books on a "restricted" shelf (pp. 81-82).

**Dimensions:** Removal of books constituting limited impact; restrictions of expression and availability of other opportunities for expression; practice of placing books on "restricted" shelf as supporting parental authority in deciding what child should read.

**Case Law:** p. 82 footnotes 412-414.

Commentators: p. 82 footnotes 415-416.

**Issue:** The constitutionality of removing "objectionable" portions from library books (pp. 82-83).

**Dimensions:** Excising pages, phrases, poems and illustrations; the right to read literary works in their entirety as a right of "uncertain constitutional genealogy"; removing one page at a time as offensive to First Amendment principles as excising objectionable passages in a novel.

**Case Law:** p. 83 footnotes 417-420.

Commentators: ----

**Issue:** Making use of religious works in the classroom (pp. 83-85).

**Dimensions:** The Establishment clause and government sponsorship of religion; the study of the Bible or of religion as constitutionally permissible; the constitutionality of a course concerning the Bible as depending upon classroom performance; using American historical documents as lessons in the impact of religion upon American leaders; permissible use of Christmas art, music and literature in the classroom; displaying religious artifacts in school hallways; the effect of religious artifacts on the young child; Christmas carols and their place in schools.

**Case Law:** pp. 83-84 footnotes 422-423; p. 84 footnotes 424-426; pp. 84-85 footnotes 427-429; p. 85 footnotes 430-431.


**Issue:** Celebrating events of religious significance at school assemblies (pp. 85-87).
Dimensions: The Establishment clause and the Supreme Court's test as applied to celebrating events of religious significance; "study" as including public performance; the Free Exercise clause and celebrating events of religious significance; the effects of celebrating events of religious significance on the young child; avoiding significant religious effects.

Case Law: pp. 86-87 footnotes 436-441.

Commentators: p. 87 footnotes 442-443.

Issue: The teacher's decision to discuss in class or to teach about a controversial topic (pp. 87-90).

Dimensions: The Supreme Court's concern and admiration for academic freedom and classrooms as "marketplaces of ideas"; academic freedom as an aspect of the First Amendment; balancing the right of academic freedom and the interests of society; discussing controversial topics which offend the dominant views of the community; discussing controversial topics and the Establishment clause; discussing controversial topics and the due process clause of Fourteenth Amendment; academic freedom and the elementary school classroom.


Commentators: p. 90 footnotes 460-461.

Issue: The teacher's choice of teaching methodology (pp. 90-93).

Dimensions: Teaching methodology as an aspect of the First Amendment; First Amendment rights as not absolute; balancing teacher's interests and the state's interest; teaching methodology distinguished from content of curriculum; plenary authority of the state to regulate teaching methodology; regulation of teaching methodology by the state and due process of law; regulation of teaching methodology and chilling effect on academic freedom; choice of teaching methodology as private speech; choice of teaching methodology and the elementary school teacher.


Commentators: p. 92 footnote 470; p. 93 footnote 479.
Issue: The teacher and educational malpractice (pp. 93-97).

Dimensions: The duty of care flowing from educators to student; recognition of duty of care and considerations of public policy; elements of a cause of action in educational malpractice; the duty of care, teachers and other professionals; breach of the appropriate standard of care, teachers and other professionals; proving proximate cause; failure to learn as injury under tort law.


Commentators: pp. 95-96 footnotes 494-495; p. 96 footnotes 497, 501; p. 97 footnotes 505-506.

Issue: The teacher and misrepresentation (pp. 97-98).

Dimensions: Negligent misrepresentation and public policy considerations; intentional misrepresentation as a possible cause of action; elements of a cause of action in intentional misrepresentation; actions constituting intentional misrepresentation.


Commentators: p. 98 footnotes 512-514.

Issue: The teacher and breach of a statutory duty (pp. 98-100).

Dimensions: The State Constitution and a statutorily imposed duty to educate non-negligently; omission to follow specific legislative provisions as constituting breach of statutory duty; liability for breach of statutory duty as possible in the future; breach of a statutory duty and educating the handicapped child.


Commentators: p. 99 footnote 519; p. 100 footnotes 520-521.

An overview of the proposed preservice teacher course in law is set out in Table 4.
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<td>The Freedom of Religion clause and the teacher's refusal to teach portion of the curriculum.</td>
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<td>The teacher's in-class criticisms of co-workers or of the school administration.</td>
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<td>The teacher's wearing of armbands in the classroom.</td>
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<td>The teacher's refusal to lead the class in the Pledge of Allegiance.</td>
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<th>SESSION 2</th>
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<td>2.</td>
<td>The limits to the teacher's rule-making authority.</td>
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<td>The student's freedom of speech and expression in the classroom.</td>
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| Teacher regulation of the wearing of armbands by students. |
3. Procedure due process, the student, and suspension and dismissal.
   Procedural due process, the student, and classroom discipline practices.
   The Fourth Amendment and its application to searches of a student by the teacher.
   "Search" of a student by a teacher.
   Sufficient cause under the Constitution for a teacher to conduct a search.
   The application of the Fourth Amendment to searches by the teacher of a student's desk or locker.
   Using evidence obtained as a result of an unconstitutional search to punish a student.
   The authority of the principal and the teacher to stop a class-initiated prayer recital.
   Observing a minute of silence for "prayer or meditation".
   The teacher's liability for a student's injury suffered while the teacher is instructing or supervising the class.
   The teacher's liability for a student's injury suffered when the teacher leaves the class unsupervised.

4. The constitutionality of removal by school officials of books from the school library.
   The constitutionality of placing library books on a "restricted" shelf.
   The constitutionality of removing "objectionable" portions from library books.
   Making use of religious works in the classroom.
   Celebrating events of religious significance at school assemblies.
   The teacher's decision to discuss in class or to teach about a controversial topic.
   The teacher's choice of teaching methodology.
   The teacher and educational malpractice.
   The teacher and misrepresentation.
   The teacher and breach of a statutory duty.

The constitutionality of a teacher's action in requiring prayer recital or Bible reading by the class
The constitutionality of putting on display in the classroom a copy of the Ten Commandments.
A preservice teacher course in law might also include an overview of the legal system, instruction in use of a law library, exposure to legal and educational publications covering legal issues in education, and introductions to legal personnel in educational and other professional associations. If it is important that the future professional teacher have some awareness of legal issues he might confront in his daily routine in the classroom, it would appear to be as equally important that he be aware of avenues of assistance available to him once he is in the field.

Recommendations for Further Research

The first major purpose of the study was to identify for the elementary classroom teacher those legal issues he might confront in his daily routine in the classroom. An issue has often come to the fore as a result of the gathering of momentum of social trends. The "creation-evolution" issue, for example, has become more visible as an issue due, it would seem, to the current wave of conservative thought and practice. And as the issue is increasingly litigated before the courts, guidelines for educational practice will evolve. Any future study, then, which attempts to identify legal issues confronting the classroom teacher should ensure, through a comprehensive review of educational and legal literature, that the most recent of issues are identified.

In fulfilling the purposes of the study, the law relevant to the issues identified in the first part of the study was set down. The law, however, is never static and the limits of its application are rarely met. In many instances, an issue falling under federal jurisdiction has not been uniformly answered by lower federal courts, and it is only when the Supreme Court rules on that issue that the matter is
authoritatively answered for all federal circuits. The issue of removal of library books from the school library by a school board member, for example, has been addressed by lower federal courts without any real agreement as to the constitutional status of the school board member's actions. The Supreme Court has made it known, however, that it will address that issue in the near future. Any future study, then, which addresses the law as it affects the classroom teacher must be cognizant of such movement in the law so that the most recent of court rulings are not excluded from the study.

A second major purpose of the study was to identify the degree of concern of preservice, future professional teachers toward those legal issues identified in the first part of the study. Because of the circumstances under which the study was conducted, the matter of reliability and validity of the survey instrument was not addressed by the researcher. Before the survey instrument is used in any future study, it would be appropriate for the researcher concerned to incorporate into the methodology of the study provision for establishing reliability and validity of the instrument.

The present study concerned itself with preservice teachers of Junior and Senior status who were enrolled in courses offered by the Early and Middle Childhood Education Department of the College of Education at The Ohio State University. No attempt was made to draw comparisons between those subjects who had commenced student-teaching and those students who had not commenced student-teaching. It is conceivable, however, that subjects undertaking student teaching may feel very differently about the issues than those students who had not commenced
student teaching. It is also conceivable that a survey of practicing teachers may indicate a very different degree of concern than that indicated by the subjects of the present study. A future study might attempt to establish comparisons between different groups within a population of preservice teachers or between preservice and practicing teachers.

In reviewing many of the issues for the present study, it was obvious that there is little agreement about the status of those issues. The matter of academic freedom in the elementary classroom, for example, has prompted considerable discussion both before the courts and by legal and educational commentators. But the matter of academic freedom involves questions of both a legal and an educational viewpoint and cannot be adequately addressed by one viewpoint only. There is a drastic need, it would seem, for the integration of legal and educational research so that issues such as academic freedom in the elementary classroom might be holistically examined and more realistically answered.

There are many issues that will arise beyond the four walls of the classroom but which may well have a significant bearing on the status, the rights, and the liabilities of one who chooses to teach. For example, educational literature has recently addressed the matter of literacy and the voucher system. It seems likely that the adoption of a voucher system would redefine the teacher-student relationship to the extent that the legal nature of that relationship is fundamentally changed. A future study may choose to explore implications of the matter of literacy and the voucher system for the educator.
Commentators have generally agreed that the parameters of collective bargaining for the teaching profession have not yet been drawn. One of the many questions that remains unanswered is whether the constitutional rights of teachers can legally be bargained away in a collective bargaining agreement. Recent cases before the courts, for example, have left undecided the matter of whether the teachers' right of academic freedom can be bargained away by the provisions of a collective bargaining agreement. As an item for further research, such an issue promises to be of some consequence.

It would seem appropriate to offer one final recommendation for further research. The present study looked at the law of the American judicial system, and no attempt was made to develop any comparison between American law and the law as it might affect teachers under other jurisdictions. In the past, however, Australian courts have sometimes looked to American judicial precedent for guidance on how best to solve a legal dilemma new to the Australian context but already addressed by American case law. The present study would seem to provide a possible framework and a suitable unit of comparison for any future study which might look at the Australian classroom teacher and the law as it affects Australian education. There is much to be learned from the American experience.

Summary

There is much to be explored in the area of the law and education. The lives of the students and the teacher within the classroom are increasingly impacted by both case law and legislation. In addition, radical approaches to the providing of education and to the defining
of teachers' rights would appear to suggest fundamental changes to the legal status of the teacher and the student. Future studies which might attempt to address the legal implications of such matters would be of considerable benefit to education and to the law.
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APPENDIX
SURVEY INSTRUMENT
PURPOSES OF THE STUDY

The purposes of the study are:

a) to determine the degree of concern felt by you, as a preservice teacher, toward those legal issues which you might confront within the elementary classroom setting in your roles of teacher as teacher and citizen, teacher as classroom manager, and teacher as professional educator;

b) to draw up guidelines for a preservice teacher course in law in the light of whether or not you are concerned about the issues and think they should be covered in such a course.

INSTRUCTIONS

Set out on the following pages are legal issues which you, as an elementary classroom teacher, might confront within your classroom. Each issue has been addressed by a court of law or by an author in a publication. Each issue is also one which has arisen, or which could arise, within the classroom setting.

1. Read each issue.

2. Determine whether you are: either (a) concerned about each issue and think it should be covered in a preservice teacher course in law,

   or  

   (b) not concerned about each issue and do not think it should be covered in a preservice teacher course in law.

3. Place in the appropriate location a check which accurately reflects your stance.

Please note: The words 'he', 'his', and 'him' are used in the generic sense only.
**TEACHER AS TEACHER AND CITIZEN**

<table>
<thead>
<tr>
<th>Question</th>
<th>I am concerned about the issue and think it should be covered in a preservice teacher course in law.</th>
<th>I am not concerned about the issue and do not think it should be covered in a preservice teacher course in law.</th>
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<tr>
<td>Does the elementary teacher, upon entering the classroom,</td>
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<td>forego those basic constitutional freedoms (e.g., freedom of speech,</td>
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<td>freedom of religion) to which he, as citizen, is entitled?</td>
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<td>Are comments by the teacher within the classroom on issues of public</td>
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<td>importance (e.g., the existence of a long teachers' strike) protected</td>
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<td>under the teacher's right of free speech under the Constitution?</td>
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<td>Does a teacher's freedom of speech under the Constitution extend to a</td>
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<td>teacher's criticisms of co-workers or of the school administration in</td>
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<td>the classroom?</td>
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<td>Will a teacher's freedom of speech be protected by the Constitution when</td>
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<td>the exercise of that freedom of speech in the classroom interferes with</td>
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<td>or disrupts the school curriculum (e.g., if the teacher discusses</td>
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<td>politics when he is supposed to be teaching Math)?</td>
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<tr>
<td>Does a teacher's constitutional right of freedom of expression extend</td>
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<td>to wearing a protest armband or protest button (e.g., an anti-war armband)</td>
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<td>in the classroom?</td>
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<td>May a teacher legally refuse, under the Freedom of Expression clause of</td>
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<td>the Constitution, to lead his class in the Pledge of Allegiance?</td>
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<tr>
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<td>Can a teacher's grooming practices in the classroom (e.g. the wearing of a beard, the style and length of hair) be legally regulated by the teacher's employer?</td>
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<tr>
<td>Can a teacher's employer legally regulate what the teacher wears in the classroom (e.g. a turtleneck sweater instead of a shirt, coat and tie; the length of a teacher's dress).</td>
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<tr>
<td>Does the Freedom of Religion clause of the Constitution uphold a teacher's refusal to teach that portion of the school curriculum dealing with national days and nationalistic observances (e.g. Thanksgiving, the Pledge of Allegiance) when the teacher feels that such days and observances are in conflict with his religious beliefs?</td>
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<tr>
<td>A public forum, such as a sidewalk or a street, is generally viewed as an avenue for the freedom of speech for all citizens. Does the public school classroom become a public forum for the purposes of freedom of speech of all citizens as a result of the teacher's sending home with children school-related literature?</td>
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</table>
### Teacher as Classroom Manager

<table>
<thead>
<tr>
<th>Issue</th>
<th>Concerned</th>
<th>Not Concerned</th>
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</thead>
<tbody>
<tr>
<td>While the teacher has the authority to make rules for good order and discipline and for the furtherance of education in the classroom, what might be the limits to the teacher's authority in such rule-making?</td>
<td>I am concerned about the issue and think it should be covered in a preservice teacher course in law.</td>
<td>I am not concerned about the issue and do not think it should be covered in a preservice teacher course in law.</td>
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<tr>
<td>Is the constitutional right to freedom of speech and expression available to the student in the classroom?</td>
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<tr>
<td>Can a teacher legally regulate the wearing of protest armbands or buttons (e.g. anti-war armbands) by students in the classroom when the student claims that the wearing of such armbands or buttons is protected by the constitutional right of freedom of expression?</td>
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<td>Is a student's refusal to participate in the Pledge of Allegiance ceremony protected by the right of freedom of expression under the Constitution?</td>
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<tr>
<td>Can a teacher legally demand of a student who does not wish to participate in the Pledge of Allegiance on the grounds of freedom of expression under the Constitution that the student either stand in silence or leave the room while the Pledge is being recited?</td>
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<tr>
<td>Can a teacher's authority to make rules for the classroom include the making of a rule which regulates the hairstyle of students in the class when a student claims that his hairstyle is a form of expression protected under the Freedom of Expression clause of the Constitution?</td>
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<tr>
<td>Question</td>
<td>I am concerned about the issue and think it should be covered in a preservice teacher course in law.</td>
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<tr>
<td>Is the infliction of corporal punishment on a student by the classroom teacher legal in Ohio (e.g. the paddling of a student by a teacher)?</td>
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<tr>
<td>Might the constitutional prohibition against cruel and unusual punishment extend in some circumstances to prohibit corporal punishment of a student by a classroom teacher?</td>
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<td>When is the administration of corporal punishment to a student reasonable and therefore legal?</td>
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<td>When can a teacher be held criminally liable in Ohio for the infliction of corporal punishment on a student?</td>
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<tr>
<td>When can a teacher be held civilly liable in Ohio for the infliction of corporal punishment on a student?</td>
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<tr>
<td>Before he administers corporal punishment to a student, is the teacher required under the Constitution to provide the student with procedural due process (e.g. some kind of hearing where the student has the opportunity to hear the charge against him and to present his side of the facts)?</td>
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</table>
I am concerned about the issue and think it should be covered in a preservice teacher course in law.

I am not concerned about the issue and do not think it should be covered in a preservice teacher course in law.

Under the Constitution a person is generally protected from action by the State which is arbitrary, capricious, and unrelated to any legitimate purpose. Is the infliction of severe corporal punishment on a student (e.g., a brutal and inhumane paddling shocking to the conscience) arbitrary, capricious, and unrelated to achieving a legitimate educational purpose and therefore contrary to the Constitution?

Where a classroom teacher verbally chastises a student in his classroom, can that teacher be held civilly liable if the verbal chastisement is considered to be other than reasonable?

Is it legally permissible for a classroom teacher to lower a student's grade as a means of punishing that student for a breach of discipline?

Is a student entitled under the Constitution to any kind of procedural due process (e.g., the opportunity to hear the charge against him and the chance to tell his side of the facts) before he is suspended or expelled from school?

Is the student entitled under the Constitution to any kind of procedural due process (e.g., the opportunity to hear the charge against him and the chance to tell his side of the facts) before the classroom teacher orders him to stand outside the classroom for the morning, or imposes in-school suspension, for a breach of school discipline?
<table>
<thead>
<tr>
<th>Does the constitutional provision prohibiting unreasonable searches of a person by the State apply to the search of a student by the classroom teacher?</th>
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<tr>
<td>What constitutes a &quot;search&quot; of a student by a teacher for the purpose of the constitutional provision relating to searches and seizures?</td>
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<td>What constitutes sufficient cause under the Constitution for a teacher to search a student for the purposes of obtaining evidence e.g. of possession of a prohibited or stolen object?</td>
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<td>Does the constitutional provision prohibiting unreasonable searches of a person by the State apply to the search of a student's desk or locker by the classroom teacher?</td>
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<tr>
<td>Where a classroom teacher has obtained evidence which indicates that a student has broken a school rule, and that evidence was obtained by means of an illegal search, is the teacher legally permitted to use that evidence as justification for imposing a punishment upon the student?</td>
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<td>Is it contrary to the Constitution for the classroom teacher to require the reciting of a prayer or reading of the Bible by the class during the school day?</td>
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<td>Can a principal legally require of the classroom teacher that the teacher stop the class from reciting a prayer in the classroom when the class itself initiates the reciting of the prayer?</td>
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<td>Is it permissible under the Constitution for the classroom teacher to request of the class that it observe a minute of silence for &quot;meditation or prayer&quot; during the school day?</td>
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<td>Is it permissible under the Constitution for the classroom teacher to put on display in the classroom a copy of the Ten Commandments?</td>
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<td>Can a classroom teacher be held legally liable for a physical injury suffered by a student in the classroom while the teacher was instructing or supervising the class?</td>
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<td>If the classroom teacher leaves the class unsupervised and a student is injured by another student during the teacher's absence, is the teacher legally liable for the injury suffered?</td>
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<tr>
<td>Is it permissible under the Constitution for a school board member or school official (e.g., principal, teacher, librarian) to put a controversial book belonging to the school library on a restricted shelf in the library whereby students are permitted access to the book only with parental permission?</td>
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<tr>
<td>Is it permissible under the Constitution for a school board member or school official (e.g., principal, teacher, librarian) to remove (e.g., by cutting out or by inking out) &quot;objectionable&quot; words, phrases, poems, or illustrations from books placed in the school library?</td>
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<td>Is it permissible under the Constitution for a classroom teacher to make use of religious works (e.g., the Bible, religious paintings, religious music) in his teaching in the classroom?</td>
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<td>Is it permissible under the Constitution for a teacher and his class to present at a school assembly a program which celebrates an event of religious significance (e.g., Christmas, Hanukkah)?</td>
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<td>Is the classroom teacher's decision to discuss in class or to teach about a controversial topic (e.g. the meaning of the word &quot;queer&quot;, a controversial novel) protected by the Constitution?</td>
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<td>Is the classroom teacher's choice of teaching methodology (e.g. permitting children as part of the Language Arts program to write letters critical of the food served in the school cafeteria) protected under the Constitution?</td>
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<td>Can a teacher be held legally liable for &quot;educational malpractice&quot; where a student fails to learn to read and alleges that his failure was caused by the teacher's negligent teaching?</td>
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<td>Can a classroom teacher be held legally liable for misrepresentation where, for example, he assures the parents of one of his students that the student is progressing satisfactorily in reading when in fact the teacher knows that the student is not progressing satisfactorily, and the parents, relying on the teacher's assurance, decide not to seek remedial assistance for their child who, as a result, fails to learn to read?</td>
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<tr>
<td>Can a classroom teacher be held legally liable for a breach of a statutory duty if he fails to take a specific action or to follow a certain procedure regarding the education of a particular student in his class when that action or procedure is made obligatory for such a student by state legislation (e.g. if state law requires an evaluation of certain students in specified circumstances and the teacher fails to carry out the evaluation)?</td>
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</table>
Would you please provide the following information by placing a check in the appropriate location.

<table>
<thead>
<tr>
<th>Rank/Status</th>
<th>Age: 16--20</th>
<th>Sex: Male</th>
<th>Senior</th>
<th>21--25</th>
<th>Female</th>
<th>26--30</th>
<th>31--35</th>
<th>other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Junior ______</td>
<td>__________</td>
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<tr>
<td>Senior ______</td>
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Have you completed your required block of Student Teaching?  
YES ______  
NO ______  
I am doing Student Teaching now ______

Have you ever taken a course which looked at legal issues in education?  
YES ______  
NO ______

If YES, give brief details:

THANK-YOU!!