

PROPOSAL FOR A "LAWFUL" PUBLIC SCHOOL CURRICULUM: PREVENTIVE LAW FROM A SOCIETAL PERSPECTIVE

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Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.¹

INTRODUCTION

Preventive law has been defined as "that part of law . . . concerned with minimizing the risk of legal trouble and maximizing legal rights . . . at a time when transactional and similar facts are being considered and made."² Arguably, much of the practice of law is preventive to some extent. Proper estate planning prevents a distribution of wealth contrary to the intentions of the testator; proper contract drafting prevents misunderstanding and possible court intervention; litigation itself prevents illegal self-help measures. Preventive law also has found merit within the field of education law, serving to keep teachers and administrators in the classroom rather than in the courtroom.³ However, many of the derivative benefits of preventive education law have yet to be realized. Viewing the law as a tool for prevention of litigation produces positive but localized effects. On the other hand, the infusion of knowledge of the law, including rights and duties arising from the law, into society itself could unleash explosive and widespread positive outcomes.

Other professions have had major successes in the preventive arena by using a broad-based societal approach. For example, in preventive medicine, poliomyelitis and smallpox are virtually eliminated by vaccinating children before disease organisms invade their bodies.⁴ Preventive dentistry touts a significant reduction in the rate of dental cavities by fluoridation of the water supply which allows the developing tooth to incorporate the fortifying element within its matrix.⁵ In both of these comprehensive

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1. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

2. *Lou Brown's Preventive Law Glossary, Part III*, 7 PREVENTIVE L. REP., Dec. 1988, at 27, 27 (quoting Brown, *An Inquiry into Whether Preventive Law Should be Ranked as a Specialty*, Legal Specialization, Special Committee on Specialization, American Bar Association, 1976, at 61).

3. See William C. Bednar, Jr., *The Common Goal: A Case Predicted Is a Lawsuit Prevented*, 10 PREVENTIVE L. REP., June 1991, at 7.

4. Jane Sisk, *The Cost of Prevention: Don't Expect a Free Lunch*, 269 JAMA 1710, 1710 (1993).

5. *Id.*

endeavors, early introduction of the preventive entity demands that the target population must be children. The effect is that controlling precautionary measures are in place before threshold disease-producing elements attack.

Because attitudes concerning self and others also are formed early, a direct inculcation of the principles of law with the corresponding set of positive social values also can be directed to young members of society in order to help prevent unlawfulness and violence. The formal public school curriculum offers the best opportunity to optimize this power of the law as a preventive rather than merely a remedial agent. Although constitutional, contract, property, and criminal law offer fertile subjects for inclusion within a school curriculum at later grades, tort law embodies legitimate, consensual values appropriate for introduction as early as pre-school and should serve as the discipline first introduced in a comprehensive law-related educational program. Inclusion of a law-based, values-rich program need not supplant the role of the parent nor violate First Amendment rights. Rather, it could complement the modern family structure and its limitations while demonstrating the balance between freedom to act and duty not to act in a principled society.

This Note is grounded on the belief that ownership of the law is vested not only in the well-bred, the well-educated, and the well-heeled; on the contrary, it is the birthright of every citizen. Furthermore, it should be affirmatively administered rather than imposed primarily after its limits are violated. The public school provides an environment conducive for dissemination of law-based principles. This writing presents an overview of the school environment and of court decisions affecting the legitimacy of value inculcation within the public school. It reviews several state responses to the need for education in values and limited community responses along with a proposal for a compulsory proactive law-based curriculum based on tort law principles. Although developing a detailed methodology is reserved for experts in other fields, the Note discusses general parameters. Tort law principles are largely nonstatutory and process-oriented and, when used as the basis of a school program, must respect First Amendment limitations. An exploration of these proscriptions is included and advantages are delineated.

I. THE SCHOOL ENVIRONMENT

A. *The School Population*

1. *Pupil Profile.*—The school has been called the “microcosm of society”;⁶ in addition, a significant part of the American citizenry is composed of school children. Of a population of 249,924,000 in 1990,⁷ an estimated 29,742,000 children were enrolled in public school grades kindergarten through eight, and approximately 11,284,000 in grades nine through twelve.⁸ Projections to the year 2000 are for an increase to 33,032,000 and

6. *Microcosms of Society*, 47 TEX. B.J. 250, 251 (1984) (attributed to Leon Jaworski).

7. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 14, Table 12 (1992).

8. *Id.* at 141, Table 215.

13,507,000 respectively.⁹ Notably, more than 16% of the population is in a public elementary or secondary school setting.

During the past several decades, major alterations have occurred in the families from which these children come. For example, the number of families composed of a male head of household with no spouse but with one natural or adopted child under eighteen rose by 108.9% from 1970 to 1980 and by a further 87.4% from 1980 to 1991.¹⁰ The number of families with a female head of household and no spouse present with one natural or adopted child under eighteen rose 137.9% from 1970 to 1980 and 36.9% from 1980 to 1991.¹¹ One-parent families with more than one child also have increased significantly.¹² This phenomenon, along with the increased number of families in which both parents work, has resulted in the "latchkey kid," who receives less quality adult contact and fewer opportunities for moral education from those adults.¹³ As pupils are consolidated into larger schools and others are bussed away from local schools, the community, once an additional source of value training for the child, becomes a less dominant force.¹⁴ These societal shifts create new challenges for the schools.

2. *Order and Discipline.*—Teachers are aware of the resultant new burdens placed upon their profession. In a 1991 study, 89% of teachers after their first year of teaching agreed or strongly agreed with the statement, "[m]any children come to school with so many problems that it's very difficult for them to be good students."¹⁵

These "problems" are evidenced in part by violent and disruptive behavior within the school environment. In 1990, 6.7% of attempted robberies occurred inside schools or on school property, as did 4.0% of completed robberies, 13.8% of simple assaults, 6.2% of aggravated assaults, and 5.4% of personal larcenies with contact.¹⁶ Street gang membership has increased, especially among Hispanic, Asian/Pacific Island, and Black student populations.¹⁷ Incidents of violence and drug use are almost commonplace,¹⁸ including alcohol and other illegal drug use,¹⁹ student possession of weapons, trespassing, vandalism of school property, as well as both physical and verbal abuse of teachers.²⁰

9. *Id.*

10. OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., DIGEST OF EDUC. STATISTICS 25, Table 17 (1992) [hereinafter DIGEST].

11. *Id.*

12. *Id.* For a history of divorce law and its economic, religious, and cultural facets, see Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984).

13. Eagan Hunter, *Our Self-Destructive Youth: A Look at the Problems and Their Causes*, NASSP BULL., Jan. 1993, at 52, 54.

14. James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U. CHI. LEGAL F. 153, 167 (1991).

15. Metropolitan Life/Louis Harris Associates, Inc., *The American Teacher, 1991*, DIGEST OF EDUC. STATISTICS, at 82, Table 72 (1992) [hereinafter *American Teacher, 1991*].

16. BUREAU OF THE CENSUS, *supra* note 7, at 185, Table 297.

17. OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 1992, at 17 (1992).

18. DIGEST, *supra* note 10, at 137, Table 138.

19. DIGEST, *supra* note 10, at 137, Table 138.

20. DIGEST, *supra* note 10, at 140, Table 141.

Students, too, acknowledge intrusions upon their peace and the resultant negative impact upon the learning process. In a United States Department of Education study of eighth graders in 1988, 77.9% agreed or strongly agreed that other students often disrupt class; 11.8% did not feel safe at their school; 39.6% believed that disruptions by other students interfered with their learning; and 52.8% believed students who misbehave were often unchastised.²¹ It seems obvious that, if learning is to improve, the number of destructive disruptions to the academic process must decrease. This necessitates a focus on non-academic social conduct. Authorities acknowledge that, with less positive socialization by traditional channels, the schools must take a more proactive role in the non-academic development of a child, both individually and societally.

In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. . . . The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned.²²

B. Guidance From the Court

1. *Dual Agency—Parent Substitute and State Actor.*—The authority of the school was originally based on the principle of "in loco parentis,"²³ but as early as 1943, the Supreme Court formally recognized the school's position as state authority: "[T]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."²⁴ This status was referenced by Justice Black in 1969²⁵ and by the Court in 1977 when it noted that "[a]though the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been *replaced* by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary."²⁶ However, in *Ingraham v. Wright*, the Court, in a five to four decision,²⁷ upheld the quasi-parental authority of school officials in dispensing corporal punishment by holding that: (1) the Eighth Amendment does not apply to public school teachers or administrators who use corporal punishment for

21. DIGEST, *supra* note 10, at 135, Table 135.

22. *Goss v. Lopez*, 419 U.S. 565, 593 (1975) (Powell, J., with whom Burger, C.J., and Blackmun and Rehnquist, JJ., joined, dissenting). The dissenting justices did not agree with the majority that a school suspension for up to ten days violated constitutional due process.

23. See John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765-1985*, 8 J. LEGAL HIST. 260 (1987).

24. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

25. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 516 (1969) (Black, J., dissenting) ("[T]he elected school officials and the teachers [are] vested with state authority.").

26. *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (citation omitted) (emphasis added).

27. Justice White filed dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. Justice Stevens also filed a dissenting opinion.

disciplinary reasons,²⁸ and (2) the Due Process Clause of the Fourteenth Amendment does not require prior notice and an opportunity to be heard before reasonable corporal punishment is imposed by school personnel.²⁹

Although the identification of school as a creature of the state is firmly established, the doctrine of *in loco parentis* has not been entirely abandoned. In his *Goss v. Lopez* dissent, Justice Powell spoke of the teacher's role as a "parent-substitute."³⁰ In his concurring opinion in *New Jersey v. T.L.O.*, decided eight years after *Ingraham*, Powell declared that "teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child."³¹ The principle gained vitality in another post-*Ingraham* Supreme Court decision, *Bethel School District v. Fraser*.³² Referring to prior decisions, Chief Justice Burger, writing for the majority, noted that "[t]hese cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."³³ As the dicta in *Bethel* suggests, the concept of the school as a state figure has not wholly supplanted the doctrine of *in loco parentis* so that, at some level, these principles co-exist.

Uncertainty about the role and scope of authority of school teachers and administrators has led to increased court intervention so that judges—who are sometimes "at least two generations and 3,000 miles away"³⁴—resolve the ambiguities. Accordingly, courts were forced to determine that a school could exclude a student who brought an automatic weapon and ammunition to school,³⁵ that a one-day suspension for wearing a shirt declaring "Drugs Suck!" did not violate due process rights;³⁶ and that Indian students could challenge enforcement of a school's dress code restricting the hair length of male students.³⁷

2. *Traditional Republicanism and Liberalism*.—The tension created by attempts to define the boundaries of school authority³⁸ can be viewed within the context of the traditional republican-liberal debate. Classical republicanism focuses on civic virtue and participatory government, as opposed to liberalism, which spotlights individual rights and governmental constraints.³⁹ Although these models depict only "implicit tendencies,"⁴⁰

28. *Ingraham*, 430 U.S. at 671.

29. *Id.* at 682.

30. 419 U.S. 565, 594 (1975) (Justice Powell, with whom Burger, C.J., and Blackmun and Rehnquist, JJ., joined, dissenting).

31. 469 U.S. 325, 348 (1985) (Powell, J., with whom O'Connor, J., joined, concurring).

32. 478 U.S. 675 (1986).

33. *Id.* at 684.

34. *Id.* at 692 (Stevens, J., dissenting). See also Bednar, *supra* note 3, at 7 (noting the number of court cases involving education law).

35. *Carey v. Maine Sch. Dist.*, 754 F. Supp. 906 (D. Maine 1990).

36. *Broussard v. School Bd. of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992).

37. *Alabama and Coushatta Tribes of Tex. v. Trustees of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993).

38. See Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986).

39. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 19 (2d ed. 1991).

generally the traditional republican is said to believe that law has a positive role in constructing a community while the liberal views law as a necessary evil.⁴¹ Applying these perspectives to the school setting, the republican objective is for "individuals to join together in public life for the preservation and advancement of the community. The skills necessary for full participation in the political life of the community, the skills necessary for full citizenship, are those provided by education."⁴² In contrast, the liberal position emphasizes "equal educational opportunity," and directs that "the instruments for attaining and protecting equal opportunity are the equal protection and due process guarantees against discriminatory action against individuals."⁴³

The Supreme Court also has entered this debate within the context of the public schools. The often-cited quote from *Tinker v. Des Moines Independent School District*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"⁴⁴ embodies a more liberal position. The *Tinker* Court found that students who wore black armbands to public school in protest of the Viet Nam War were protected by the First Amendment's Free Speech Clause.⁴⁵ However, this opinion hinted at the possible limitations of its holding by describing the protected speech as a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners . . . [with] no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the *rights of other students to be secure and to be let alone.*"⁴⁶

Again, with a somewhat liberal leaning, the Court in *Goss v. Lopez*, by a narrow margin, found that a state-created property interest in education was protected by the Due Process Clause and "may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."⁴⁷ The suspension of a student for up to ten days without notice or hearing was held invalid, and the statutory provision that allowed such suspensions was proclaimed unconstitutional.⁴⁸

Four years later, in another close decision, the Court upheld a New York state education law forbidding employment of aliens as primary or secondary schoolteachers if they qualified for United States citizenship but made no attempt to become naturalized.⁴⁹ Exhibiting a strongly republican perspective, Justice Powell, writing for the majority, explained that the role of school teachers—like police officers,⁵⁰ and persons occupying state elective or key nonelective executive, legislative and judicial

40. Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1833 (1987).

41. *Id.* at 1833-34.

42. James Gordon Ward, *Legal Issues for School Reform*, in THE PRINCIPAL'S LEGAL HANDBOOK 303 (1993).

43. *Id.* at 302.

44. 393 U.S. 503, 506 (1969).

45. *Id.* at 514.

46. *Id.* at 508 (emphasis added).

47. 419 U.S. 565, 574 (1975) (5-4 decision).

48. *Id.* at 574-75.

49. *Ambach v. Norwick*, 441 U.S. 68 (1979) (Blackmun, Brennan, Marshall, and Stevens, JJ., dissenting).

50. *Id.* at 74 (citing *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

positions⁵¹—is so “bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government.”⁵² This special function of the teacher in developing an “understanding of the role of citizens in our society”⁵³ was found to lie in all teachers, not just those involved with teaching history and government.⁵⁴ In finding the constitutionally-mandated rational relationship between the requirement for citizenship and legitimate state interests, Justice Powell spoke of the influence of teachers upon “the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.”⁵⁵ Although quite supportive of the view that educators have an obligation to remain involved with the inculcation of values, arguably this decision is not purely republican in nature. Education in fundamental values necessarily includes education regarding liberty interests that are protected from unconstitutional governmental interference.⁵⁶

In 1982, the competing philosophies were again counterpoised in *Board of Education, Island Trees v. Pico*,⁵⁷ where the Court reviewed the actions of a school board in removing books from the library. In his concurring opinion, Justice Blackmun spoke of the need to harmonize the inculcative function of the schools and the First Amendment’s prohibition on “prescriptions of orthodoxy.”⁵⁸ The school library was differentiated from the regular school curriculum and the Court held that the local school board could not remove books from the library merely because it disapproved of the concepts therein.⁵⁹ The motivation behind the board’s actions was a key factor. The Court implied that it would be more receptive to claims based on vulgarity or educational unsuitability.⁶⁰

Although the more liberal position prevailed, the Court was considering a motion for summary judgment, which demanded that all evidence be construed in a manner most favorable to the party seeking removal of the books.⁶¹ This case was also narrowly decided. Chief Justice Burger’s dissenting opinion, joined by Justices Powell, Rehnquist and O’Connor, expounded:

Today the plurality suggests that the *Constitution* distinguishes between school libraries and school classrooms, between *removing* unwanted books and *acquiring* books. Even more extreme, the plurality concludes that the *Constitution requires* school boards to justify to its teenage pupils the decision

51. *Id.* (citing *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

52. *Id.* at 73-74.

53. *Id.* at 78.

54. *Id.* at 79-80.

55. *Id.* at 79 (citations omitted).

56. *See infra* notes 66-67, 175-84 and accompanying text.

57. 457 U.S. 853 (1982) (plurality decision).

58. *Id.* at 879 (Blackmun, J. concurring in part and concurring in the judgment).

59. *Id.* at 875 (plurality opinion).

60. *Id.* at 871. The books had originally been placed in the library by school authorities and the school board acted contrary to the recommendations of the Book Review Committee appointed by the board itself. *Id.* at 857-58.

61. FED. R. CIV. P. 56.

to remove a particular book from a school library. I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.⁶²

The Court again focused on individual rights in 1985 when, in *New Jersey v. T.L.O.*,⁶³ it held that the Fourth Amendment applied to searches by school officials. In this decision, which included five separate opinions, the Court spoke of the balancing of rights and authority in light of present social order:

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.⁶⁴

In addition, the Court recognized the school as a unique entity requiring a distinctive application of liberty concepts: "[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."⁶⁵ In his separate opinion, Justice Brennan voiced the more liberal perspective: "It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections."⁶⁶ Justice Stevens further charged:

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from school teachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance.⁶⁷

Later in that decade, the pendulum again shifted in favor of school control when the Supreme Court held that the school possessed authority to temporarily suspend a student

62. *Pico*, 457 U.S. at 893 (Burger, C.J., dissenting).

63. 469 U.S. 325 (1985) (holding that a search of a student's purse was reasonable and thus did not violate Fourth Amendment).

64. *Id.* at 339 (citation omitted).

65. *Id.* See also *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("[W]ith reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms")

66. *T.L.O.*, 469 U.S. at 354. (Brennan, J., with whom Marshall, J., joined, concurring in part and dissenting in part).

67. *Id.* at 385-86 (Stevens, J., with whom Marshall, J., joined, concurring in part and dissenting in part).

for using offensive but not legally obscene language in a nominating speech at a school assembly.⁶⁸ The majority of the Court subordinated the right of free speech to that of the school's authority. Chief Justice Burger quoted *Tinker* with approval, "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."⁶⁹ In one of the more pro-republican decisions, the Court adopted the position: "[P]ublic education *must* prepare pupils for citizenship in the Republic. . . . It *must* inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."⁷⁰ The Court elaborated:

[B]ut these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibility of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in *teaching students the boundaries of socially appropriate behavior.*⁷¹

Again, recognizing the uniqueness of the school setting, the Supreme Court indicated: "[I]t does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."⁷²

Approximately eighteen months later, again within the context of freedom of speech, the Court in *Hazelwood School District v. Kuhlmeier*⁷³ solidified its support of school authority. With Justices Brennan, Marshall and Blackmun dissenting, the *Hazelwood* Court held that high school administrators did not violate the First Amendment by "exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions [were] reasonably related to legitimate pedagogical concerns."⁷⁴ The Supreme Court again acknowledged the exceptional limitation on rights of free speech within the character of the public school: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school."⁷⁵ This Court distinguished *Tinker*, which dealt with the school's lack of authority to silence a student's personal views displayed on an armband worn by that student on the school grounds,⁷⁶ from the school's authority in regard to a school newspaper which

68. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

69. *Id.* at 686 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 526 (1969)).

70. *Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968) (emphasis added)).

71. *Id.* (emphasis added).

72. *Id.* at 682.

73. 484 U.S. 260 (1988).

74. *Id.* at 273.

75. *Id.* at 266 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986)).

76. *See supra* notes 44-46 and accompanying text.

“students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”⁷⁷

The present composition of the Supreme Court differs from that of the Courts deciding the preceding cases. Two of the staunchest supporters of individual rights and the liberal position have retired.⁷⁸ Because the decisions favoring individual rights were decided by narrow margins, the most recent decisions have favored the more republican point of view, and the highest Court has lost its more liberal supporters, it is reasonably predictable that inculcation of legitimate values by public school authorities would be, if not actively promoted, at least met with a high degree of tolerance by the present United States Supreme Court.

II. LIMITED PROACTIVE RESPONSE

Government officials from presidents to prosecutors have reacted to the perceived need for improving citizenship education within the schools. “[M]aking this land all that it should be” is the motto of America 2000, a nine year plan developed by the chief executives of the national and state governments.⁷⁹ President Bush proposed: “Think about every problem, every challenge we face. The solution to each starts with education. For the sake of the future, of our children[’s] and of the nation’s, we must transform America’s schools. The days of the status quo are over.”⁸⁰

America 2000 formulated six goals. Goal Number Three addressed student achievement and citizenship. It stressed preparing for both “responsible citizenship” and “productive employment.”⁸¹ Goal Number Six stated: “By the year 2000, every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning.”⁸²

The federal legislative branch also has become involved in the campaign to improve the public schools. The United States Senate has conducted hearings on school violence⁸³ and both Houses have endorsed legislation with the purpose of improving safety at the school.⁸⁴ However, this form of federal action has been limited, perhaps because of the general recognition that states should play the major role as protagonists for change.⁸⁵

77. *Hazelwood*, 484 U.S. at 271.

78. Justices Brennan and Marshall, who endorsed the liberal perspective, were replaced with Justices Souter and Thomas, respectively. In addition, Justice Ginsburg now sits on the court in the place of Justice White, and Justice Breyer succeeded Justice Blackmun.

79. AMERICA 2000, AN EDUCATION STRATEGY. Culmination of summit held by President Bush with 50 state governors in Charlottesville, Va. on Apr. 18, 1991 (on file with author).

80. *Id.* at 2000-02.

81. *Id.* at 2000-62.

82. *Id.* at 2000-65.

83. See, e.g., *Children Carrying Weapons: Why the Recent Increase*, Hearing before the Sen. Comm. on the Judiciary, 102d Cong., 2nd Sess. (1992).

84. See, e.g., Gun-Free School Zones Act of 1990, 18 U.S.C. § 921 (1990). The Fifth Circuit Court of Appeals held that section 922 (q) was “invalid as beyond the power of Congress under the Commerce Clause.” *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536.

85. See, e.g., Bill Clinton, *Priority Issues for the States as Educational Reform Continues*, 1 STAN. L

Several states have accepted this challenge and developed a direct approach to incorporation of value education into the curriculum. The Oregon State Board of Education recommended that "character education" be mandated throughout that state and the North Clackamas School District responded.⁸⁶ The district superintendent invited community groups to suggest desirable character traits to be promoted within the elementary and secondary school system. The group determined that thirteen attributes mirrored the moral values of that community: patriotism, integrity and honesty, courtesy, respect for authority, courage, self-esteem, compassion, self discipline and responsibility, work ethic, appreciation for education, patience, respect for others and property, and cooperation.⁸⁷ These values were to be cultivated over a four-year period, with several highlighted each year.⁸⁸ Kentucky, too, used the task force approach to make recommendations for value and character education in that state. Committee members represented educators, parents, the legislature, state and local school boards, law enforcement agencies, higher education, Catholic archdioceses, and three private institutes.⁸⁹

San Ramon, California developed a character education program based on character traits defined by the creators of the program rather than by community consensus.⁹⁰ The United States Constitution and Bill of Rights served as the basis of a character education program formulated by the Baltimore County Public Schools of Towson, Maryland task force.⁹¹ Those values recommended for inclusion in a school program were: compassion, courtesy, critical inquiry, due process, equality of opportunity, respect for others' rights, honesty, rule of law, integrity, knowledge, loyalty, justice, objectivity, order, patriotism, rational consent, reasoned argument, freedom of thought and action, responsibility, responsible citizenship, tolerance, truth, human worth, and dignity.⁹²

The Ohio State Department of Education enumerated ten core values for use within its character education program: compassion, courtesy, tolerance, honesty, self-discipline, diligence, responsibility, self-respect, courage, and integrity.⁹³ School districts were

& POL'Y REV. 5, 6 (1989). See also R. Freeman Butts, *Analysis of Civic Education in the United States: National Standards and Civic Education in the U.S.* Paper presented at the International Conference on Western Democracy and Eastern Europe: Political, Economic and Social Changes (East Berlin, Germany, Oct. 18, 1991), at 7 (author states that the general consensus of the National Education Goals Panel "seemed to be" that a uniform national curriculum was not desired, although national goals and national standards were seen as advantageous) (on file with author).

86. Richard Beswick, *Character Education*, OR. SCH. STUDY COUNCIL BULL., May 1992, at 14-20.

87. *Id.* at 14.

88. *Id.*

89. Fonda P. Butler, *Comparing the Values Hierarchy of the Kentucky Department of Education's Character/Values Task Force. Comparing a Character/Values Task Force to a National Sample.* Paper presented at the Annual Meeting of the Mid-South Educational Research Association (Little Rock, Ark., Nov. 8-10, 1989) (abstract of paper on file with author).

90. Beswick, *supra* note 86, at 20.

91. Beswick, *supra* note 86, at 20.

92. Beswick, *supra* note 86, at 20.

93. CHARACTER EDUCATION IN OHIO: SAMPLE STRATEGIES. Ohio State Dep't of Educ., Columbus 1 (1990).

encouraged to refine these and to incorporate them throughout the school activities, including guidance programs, athletics, special assemblies, and the student code of conduct.⁹⁴

In some instances, communities themselves have taken the initiative to provide junior citizens with a level of value training within the school setting. Some communities have permitted parents to choose among schools, including private schools.⁹⁵ Other programs are based on volunteerism. "Tribes" is a broad-based example of such an approach, focusing on teamwork and social skills with four "norms" which are introduced at the elementary school level: no put downs; the right to "pass" in a social situation (choose not to actively participate); attentive listening; no names and no gossip.⁹⁶ Prosecutors, too, have become involved in working as resource persons within the schools. A program called Legal Lives, introduced by cities into their school programs, consists of a thirty week curriculum of problem solving and conflict resolution.⁹⁷ Prosecutors or deputy prosecutors use fact scenarios to stimulate discussion among fifth graders attending those schools that choose to participate.⁹⁸ Other volunteer-based approaches are available to school districts or to individual teachers if they choose to participate. An example is Project LEAD (Legal Education to Arrest Delinquency), which includes a manual titled "Putting Yourself in the Other Person's Shoes" consisting of fourteen activities depicting the role of laws and decision making in conformance with the law.⁹⁹ In addition, public and private interest groups provide resource materials for use within the school classrooms.¹⁰⁰

Although there is a definitive movement within states and communities to utilize public schools for value inculcation, some of which is law-oriented, the effort is fragmented and typically optional. In addition, target groups are often older pupils, whose basic attitudes are more firmly established than those of younger children. Because all students are held to a level of accountability for knowing the law and for abiding by its directives, a comprehensive and compulsory form of value education based upon principles of law should be mandated and instigated when children enter school.

94. *Id.* at 19-21.

95. See Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1991 U. CHI. LEGAL F. 171 (1991).

96. Telephone Interview with Lauri Waldner, *Tribes* Coordinator, Noblesville Elementary Schools, Noblesville, Indiana (Oct. 21, 1993), regarding Jeanne Gibbs, *TRIBES: A Process for Social Development and Cooperative Learning* (on file with author). Notably, the *Tribes* coordinator distinguished the "social skills" upon which *Tribes* is established from "value education."

97. Telephone Interview with Jan Lesniak, Marion County, Indiana, Office of the Prosecutor (Oct. 26, 1993).

98. *Id.*

99. LEAD has been used by 27 Indiana counties with 11,043 students participating. Lawyers and other members of the judicial system serve as resource persons. For information, contact Dorothy Campbell, 9245 Meridian St., Suite 118, Indianapolis, IN 46260-1812.

100. For example, The Center to Prevent Handgun Violence cooperated in providing information to school systems to teach children about the dangers of handguns. One result, *No Guns For Me!*, is an activity book that demonstrates the dangerous nature of guns and advises children to stay away from guns. It was written for the early elementary grades. PAT HOBBY, *NO GUNS FOR ME!* (Rick Detorie, illus., 1990).

III. PROPOSED PROACTIVE "LAWFUL" RESPONSE

A. Rationale

A comprehensive "Citizenship Education Program" could be based on a tri-partite view of citizenship: national, state, and community. The Constitution with its Amendments and Bill of Rights would serve as the foundation for national citizenship education and should be a vital part of a public school curriculum of law-related education.¹⁰¹ History, government, and civics courses normally incorporate a degree of constitutional law within their subject matter.¹⁰²

State citizenship includes rights and duties under both criminal and tort law. These now separate disciplines were not differentiated in early history but were both part of the system of primitive law developed to "preserve the peace and to prevent the use of force by one person against another or another's possession of property."¹⁰³ Today, a positive correlation remains between criminal and tort law, with a sharing of "punitive" elements and nomenclature. Children have been held accountable for their actions in both areas. Although the common law rested on the presumption that a child between seven and fourteen years of age could not form criminal intent, jurisdictions today vary somewhat concerning the authority of the state to punish a juvenile offender.¹⁰⁴ However, modern day law students are regularly exposed to the decision in *Garratt v. Dailey*¹⁰⁵ where a child of five years and nine months was found liable for tortious battery. In the interests of fairness and justice, the state, who is the party prosecuting criminal actions against children and whose courtrooms are used to maintain civil claims against them, must take

101. The Office of Education defines "law-related education" as "those organized learning experiences that provide students and educators with opportunities to develop the knowledge and understanding, skills, attitudes, and appreciations necessary to respond effectively to the law and legal issues in our complex and changing society." Janice K. Colville & Rodney H. Clarken, *Developing Social Responsibility Through Law-Related Education*, at 6. Paper presented at the Annual Meeting of the American Education Research Association (San Francisco, Cal., Apr. 20-24, 1992). An example of a law-related educational program is CIVITAS, which draws upon both the classical republican tradition and the liberal view of citizenship. It embraces "fundamental values" (the public good; individual rights; justice; equality; diversity; truth; patriotism) and "fundamental principles" (popular sovereignty; constitutional government with separation of powers and checks and balances; separation of church and state; federalism; conflicts among fundamental principles). Butts, *supra* note 85, at 12-14.

102. For a collateral discussion of "facts" related in history texts, see Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (1987).

103. PAGE KEETON & ROBERT E. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS I* (2d ed. 1977).

104. See Tim A. Thomas, Annotation, *Defense of Infancy in Juvenile Delinquency Proceedings*, 83 A.L.R. 4th 1135 (1991).

105. 279 P.2d 1091 (Wash. 1955). The Supreme Court of Washington remanded for clarification of whether the "substantial certainty" test had been met. The trial court entered a judgment for plaintiff and the judgment was affirmed by the Supreme Court of Washington. 304 P.2d 681 (1956). See also Randall K. Hanson, *Parental Liability*, 62 ST. B. WIS. 24 (1989) (discussing liability of parents for children's wrongful conduct—Wisconsin jurisdiction).

responsibility for educating these children regarding their accountability under the law. Government has a legitimate interest, and arguably, a legitimate *duty* to remove ignorance of its laws.

Nevertheless, even though criminal law principles are beginning to be successfully integrated into various public school programs,¹⁰⁶ the direct employment of formal tort law principles in public school curricula has been tapped only superficially. Unlike disciplines involved principally with economic relationships (*e.g.*, contract law), which are more appropriately introduced at an older age, tort law, which implicates social relationships and correlating duties of citizens to other citizens,¹⁰⁷ could be assimilated into a curriculum at a very early age. Furthermore, this approach invites the community to become involved by defining the distinctive needs of its citizens and by tailoring a formal program to satisfy those needs.

Using tort law as the nucleus for the inculcation of values by introducing its principles into a formal, mandatory public school program originating at the pre-school or kindergarten level could result in schools that are safer, classrooms that are more conducive to learning, and a society that has notice of its duties under the law.

Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.¹⁰⁸

B. Citizenship Education—The Visible Curriculum

American tort law has long protected an individual's interests in freedom from harmful or offensive bodily contact, apprehension of harmful or offensive contact, confinement, baseless invasions of good reputation, infliction of emotional distress, and interference with exclusive possession of chattels and of land.¹⁰⁹ In addition to protecting against intentional invasions of these interests, tort law protects against negligent intrusions and charges a child to use the degree of care of a reasonable child, *i.e.*, a child of her age, intelligence and experience.¹¹⁰ From these principles, legitimate meritorious "values" can be extracted and used to develop a comprehensive, direct, and indirect school program that is both academic and conduct-oriented.

106. See, *e.g.*, P. David Kurtz & Elizabeth W. Lindsay, *A School-Juvenile Court Liaison Model for the Prevention of Juvenile Delinquency*, JUV. & FAM. CT. J., Winter 1985-86, at 9.

107. Admittedly, the duties that citizens owe to other citizens can be regarded as part of other legal disciplines. In this Note, however, the duty of every citizen to other citizens is distinguished from the system of criminal law where the state is a party to an action and from contract law where an affirmative act of the citizen is involved.

108. *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., with whom O'Connor, J., joined, concurring).

109. See generally RESTATEMENT (FIRST) OF TORTS (1934).

110. *Id.* § 283.

One core premise of such a program is self-worth, founded upon the interests in the integrity of one's psychological and physiological well-being.¹¹¹ "The higher a student's self-esteem, the more likely it is she will treat others with respect and fairness; the more likely it is she will find ways to get along well with others and get them to respond positively to her."¹¹² Other benefits of positive self-worth are increased security, ability to cope with adversity and diversity, and amenability to accept challenges and frustrations as part of the learning process.¹¹³ Physical safety and emotional security are two vital elements of self-esteem¹¹⁴ and likewise are incorporated in tort law precepts. Additional aspects of self-esteem such as identity, affiliation, competence, and mission¹¹⁵ could also be developed by using the philosophy cradled within tort law.

A second proposition central to a tort-based school program is acknowledgment of the worth of others and acceptable conduct based on that premise. Using the vernacular of the Supreme Court, this element includes attention to the "sensibilities of fellow students" and addresses the "interest in teaching students the boundaries of socially appropriate behavior."¹¹⁶ Respect for others, it should be noted, includes an understanding and acceptance of diversity, be it gender, race, religion or other basis.

The anticipated goal of a direct tort law based curriculum is to develop within a child *intrinsic* control based on the values self-respect and respect for others. In contrast, an externally disciplined person "is like a puppet on a string. . . . [H]e does not see a relationship between his actions and the welfare of others."¹¹⁷ Rather, he follows rules so that he will not "get caught." Internalizing discipline recognizes the advantages of acting and reacting in a lawful manner rather than in an unlawful one, whether or not one will "get caught." The formally taught lesson would serve as the foundation of the law-based curriculum. In addition, opportunities exist for teaching these values through other formal subject areas and through the "hidden curriculum."¹¹⁸

The nature of psychosocial development demands that this curriculum begin early. The sense of self and others begins to develop while the child is quite young, and this serves as the basis for all psychosocial development.¹¹⁹ Socialization, the process of learning how one is "supposed" to act,¹²⁰ usually beings in a family setting.¹²¹ However, the school setting, where children are together in larger groups for about seven hours each day, provides another vehicle for socialization. All fifty states mandate that compulsory

111. Bettie B. Youngs, *Self-Esteem in the School: More than a "Feel-Good" Movement*, NASSP BULL., Jan. 1993, at 59.

112. *Id.* at 61.

113. *Id.*

114. *Id.* at 62.

115. *Id.*

116. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

117. LAUREL N. TANNER, *CLASSROOM DISCIPLINE FOR EFFECTIVE TEACHING AND LEARNING* 61 (1978).

118. *See infra* notes 140-42 and accompanying text. *See also* the "curriculum onion" in MIKE BOTTERY, *THE MORALITY OF THE SCHOOL: THE THEORY AND PRACTICE OF VALUES IN EDUCATION* 96 (1990).

119. ERNEST T. GOETZ ET AL., *EDUCATIONAL PSYCHOLOGY: A CLASSROOM PERSPECTIVE* 98-106 (1992).

120. *Id.* at 100.

121. *Id.*

schooling begin at an early age.¹²² Although some leakage would occur due to the right of parents to fulfill the education requirements of their children via home schooling and private schools,¹²³ the greatest population of children is readily accessible within the public school setting. Furthermore, trends show that children are now entering the formal schooling process at a younger age. Pre-primary enrollment has increased, as have the number of hours that the pre-schooler spends at school.¹²⁴ This trend presents an opportunity to teach law-related education earlier when less "unlearning" would be required.

States by their constitutions are generally responsible for public education policy¹²⁵ and for almost half of relevant costs.¹²⁶ In addition, each state has primary authority to select the curriculum so that, if the state chose, it could have statewide textbook adoption as in Texas and California.¹²⁷ Therefore, in order to promote commitment and harmony, as well as faithfulness to the law, the state legislature or the state board of education, if authority exists therein, must take the initiative in guiding and monitoring a tort law based program.¹²⁸

It is well settled law that the local school board makes curriculum decisions, too. For example, the rights to include music¹²⁹ and physical education¹³⁰ within the curriculum have been upheld. More recently, the dissenting Justice in *Hazelwood* related this position:

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved the "daily operation of school systems" to the States and their local school boards.¹³¹

Although tort law already embodies community held values, community citizenship suggests that the local school districts seek additional input from parents, teachers, and community leaders in refining and supplementing a curriculum based on locality-specific needs and values. Justice Brennan acknowledged in *Hazelwood* that "the public educator

122. MICHAEL IMBER & TYLL VAN GEEL, *EDUCATION LAW* 17 (1993).

123. For a case dealing with the rights of parents in school selection, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

124. Between 1970 and 1980, pre-primary enrollment of three to five year olds increased by 19%; from 1980 to 1991, it rose by an additional 30%, with about 38% of these children attending school all day, compared with 32% in 1980 and 17% in 1970. DIGEST, *supra* note 10, at 61, Table 47.

125. See *supra* note 85 and accompanying text.

126. In 1989-90, 47% of all revenues came from state sources, 47% from local sources, and 6% from the federal government. DIGEST, *supra* note 10, at 150, Table 148.

127. IMBER & VAN GEEL, *supra* note 122, at 84-85.

128. Accord Lee Gordon, Note, *Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education*, 36 N.Y.L. SCH. L. REV. 397, 425 (1991).

129. *State ex rel. Andrews v. Webber*, 8 N.E. 708 (Ind. 1886).

130. *Alexander v. Phillips*, 254 P. 1056 (Ariz. 1927).

131. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278-79 (1988) (Brennan, J., dissenting, with whom Marshall and Blackmun, JJ., joined) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

nurtures students' social and moral development by transmitting to them an official dogma of 'community values.'¹³² He echoed the earlier decision in *Pico* where the Court quoted with approval the petitioner's brief stating that local school boards must be allowed "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political."¹³³ Finally, teachers and administrators select specific methods of instruction depending on how the students learn and what resources are available.

The teaching of tort law principles need not be burdensome. First, every student today experiences a form of classroom rule dispensing. A formal program based upon the law would bestow legitimacy upon and conformity within the curriculum. Second, private schools have proven that a value education program can be successfully taught while fulfilling state education requirements.¹³⁴ Research shows that, in recent history, Catholic schools compare favorably to public schools in areas of academic outcomes, effective discipline, and a higher sense of community, with special effectiveness noted among students from "disadvantaged background[s]."¹³⁵ The positive results do not derive solely from value inculcation as other important fundamental differences exist between public and Catholic schools. However, infusion of values is the core of the curriculum.¹³⁶ The Catholic school model can serve as a guide for instilling values, not based upon religious edicts, but upon principles of law by which all citizens are governed. Characteristics of this model include an awareness that: (1) early introduction of value education is valuable;¹³⁷ (2) there must be an integration of values into every curriculum area;¹³⁸ and (3) different methodologies of teaching of values are appropriate for different ages and different capabilities.¹³⁹

C. *Citizenship Education—The Hidden Curriculum*

Although the focus of this Note is on student citizens and their interpersonal relationships with other student citizens, any values teaching must be done with action as well as with words. This concept underlies the "hidden curriculum," sometimes termed the "manipulative curriculum," the "informal curriculum," or the "unrecognized

132. *Id.* at 278 (quoting plurality opinion from Board of Educ., *Island Trees v. Pico*, 457 U.S. 853, 864 (1982)). Interestingly, the Supreme Court defers to contemporary community standards in determining what constitutes "prurient interest" in the meaning of obscenity. *Miller v. California*, 413 U.S. 15 (1973). On the opposite end of the spectrum, appropriately, the community should determine what comprises meritorious values.

133. Board of Educ., *Island Trees v. Pico*, 457 U.S. 853, 864 (1982).

134. See JOHN J. CONVEY, *CATHOLIC SCHOOLS MAKE A DIFFERENCE. TWENTY-FIVE YEARS OF RESEARCH* (1992).

135. *Id.* at 33.

136. *Id.* at 75.

137. See IRENE T. MURPHY, *EARLY LEARNING: A GUIDE TO DEVELOP CATHOLIC PRESCHOOL PROGRAMS*, Preface (1986).

138. ROBERT J. KEALEY, *CURRICULUM IN THE CATHOLIC SCHOOL* 23 (1985).

139. See MARY LEANNE WELCH, *A BEGINNING: RESOURCE BOOK FOR INCORPORATING VALUES AND CHURCH TEACHINGS IN THE CATHOLIC SCHOOL CURRICULUM* (1990).

curriculum."¹⁴⁰ Many analysts believe that *how* the teaching and administration proceed in terms of interpersonal relationships is more influential in determining attitudes and behavior than are the textbooks and formal classroom instruction.¹⁴¹ Therefore, the process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class. Rather, "schools must teach by example the shared values of a civilized social order."¹⁴²

IV. CONSTITUTIONAL PARAMETERS

A. Curriculum Decisions and the First Amendment

Nonstatutory tort law is process-oriented and, consequently, less formal than would be more statutorily based disciplines. Therefore, establishing a program requires care so that a value-based curriculum is not applied haphazardly and does not overreach constitutional constraints.¹⁴³ The general rule is that "school boards may set curricula bounded only by the Establishment Clause."¹⁴⁴ A corollary tenet is that "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."¹⁴⁵

The First Amendment to the Constitution demands that the government, whether national or state, remain neutral between religion and non religion.¹⁴⁶ In its approach to this Establishment Clause principle, the Supreme Court has strictly enforced the "wall of separation"¹⁴⁷ between church and state. Within the school context, the Court decided in 1962 that organized recitation of nondenominational prayer was unconstitutional.¹⁴⁸ Soon thereafter, the Court struck down a requirement that a Bible be read at the beginning of each school day.¹⁴⁹ Later that decade, in *Epperson v. Arkansas*,¹⁵⁰ a state statute which disallowed the teaching of evolution in public schools, colleges, and universities was

140. BOTTERY, *supra* note 118, at 97-98.

141. WALDO BEACH, ETHICAL EDUCATION IN AMERICAN PUBLIC SCHOOLS 59 (1992).

142. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

143. See Tyll van Geer, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983).

144. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1080 (6th Cir. 1987) (Boggs, J., concurring opinion), *cert. denied*, 484 U.S. 1066 (1988).

145. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

146. U.S. CONST. amend. I.

147. David G. Leitch, Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127 (1985) (citing letter from Jefferson to Messrs. Nehemiah Dodge and Others, A Committee of the Danbury Baptist Association (Jan. 1, 1802), reprinted in THOMAS JEFFERSON, WRITINGS 510 (M. Peterson ed. 1984)). The Note asserts that a broad definition of religion for free exercise purposes, if used within Establishment Clause analysis, is incompatible with the role of public educator as marketer of ideas because exclusion of religious viewpoints is intrinsically non-neutral; a pluralism model is not only equitable but constitutionally mandated.

148. *Engel v. Vitale*, 370 U.S. 421 (1962).

149. *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

150. 393 U.S. 97 (1968).

found to be contrary to the freedom of religion demanded by the First Amendment, as applied to the States by the Fourteenth Amendment. In a 1971 decision, the Supreme Court delineated the *Lemon* test for determining whether or not an act violated the Establishment Clause.¹⁵¹ To meet the measure of constitutionality, government conduct must encompass: (1) a secular purpose; (2) a principal effect neither to advance nor to inhibit religion; and (3) no excessive government entanglement with religion.¹⁵² In 1985, a one minute silence for meditation or prayer during the school day was found to fail the *Lemon* test.¹⁵³ Soon thereafter, the Court considered a state statute broader than that in *Epperson* and held that the teaching of evolution when restricted to a concurrent teaching of creation science was also unconstitutional.¹⁵⁴

In a more recent decision, the Supreme Court distinguished the formal curriculum from noncurriculum-related student organizations and decided that the Establishment Clause is not violated by a school district that allows a student Christian club to function on the school premises.¹⁵⁵ The Court in 1992 revisited the issue of Establishment Clause restrictions within a school setting when, in a five to four decision, it ruled that prayer given by the clergy at an official public school graduation ceremony is not permitted.¹⁵⁶ Justice Kennedy delivered the opinion of the Court, differentiating *Marsh v. Chambers*,¹⁵⁷ in which the Court held that prayer exercised in a session of a state legislature does not violate the Establishment Clause. He asserted:

The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*.¹⁵⁸

151. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

152. *Id.* at 612-13.

153. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

154. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

155. *Board of Educ. of Westside Community Sch. v. Mergens*, 110 S. Ct. 2356 (1990) (one dissent) (The Court decided this case in context of the Equal Access Act.).

156. *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (Blackmun, J., concurred and filed an opinion with which Stevens and O'Connor, JJ., joined. Souter, J., concurred and filed an opinion with which Stevens and O'Connor, JJ., joined. Scalia, J., dissented and filed an opinion with which Rehnquist, C.J., White and Thomas, JJ., joined).

157. 463 U.S. 783 (1983).

158. *Lee*, 112 S. Ct. at 2660. Compare *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988), where the majority of the District of Columbia Circuit Court of Appeals held that a nontheist had no standing to bring an action challenging refusal of the Congressional chaplains to invite nontheists to present secular discourse during morning prayer. Judge (now United States Supreme Court Justice) Ruth Bader Ginsburg, disagreeing with the court's no standing disposition of the case, would have resolved the issue by recognizing that House and Senate rules "authorize opening legislative sessions *with prayer*, nothing more and nothing else. . . . Kurtz has, under current jurisprudence, no tenable free speech, establishment clause, or due process claim to advance. I would so hold directly and would not avoid the question by a circuitous determination that Kurtz lacks standing to seek its settlement." *Id.* at 1147-48.

In addition to remaining religion-neutral in establishment of religion, government is also banned from unduly interfering with the free exercise of religion.¹⁵⁹ This First Amendment tenet has also been implicated in judicial decision-making within the context of the public school. The Court intervened in *West Virginia Board of Education v. Barnette*¹⁶⁰ and found that a public school could not force a student to salute the American flag when, under his religious beliefs, the flag was an "image" which his Bible forbade him to worship.

More recently, the Ninth Circuit in *Grove v. Mead School District* delineated the factors to be considered in a claim of violation of the right to free exercise of religion: (1) the degree of burden upon the right to free exercise of religion; (2) the presence of a compelling state interest legitimizing the burden; and (3) the effect that accommodation of the complainant would have on state's objectives.¹⁶¹ Although the Court of Appeals found that the parent had standing because of her right to direct her child's religious training,¹⁶² it held that the inclusion of a book in the tenth grade literature curriculum over the parent's objections did not violate the Free Exercise Clause. In denying the removal of the book, the three-judge panel described it as a "comment on an American subculture" and "religiously neutral."¹⁶³

The Sixth Circuit, meeting *en banc*, likewise ruled in an alleged violation of the Free Exercise Clause that the reading of a basic reader series chosen by school authorities was not an unconstitutional infringement of the right to free exercise of religion because "students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion."¹⁶⁴ The setting of this controversy was Tennessee, where, by statute, public schools were required to include "character education" in the curriculum; however, the parents' objections targeted alleged teachings about secular humanism, evolution, pacifism, and magic.¹⁶⁵ Although elements of compulsion might invoke the Free Exercise Clause, the court noted that it is an infringement upon the Establishment Clause "to tailor a public school's curriculum to satisfy the *principles or prohibitions* of any religion."¹⁶⁶ Both *Grove* and *Mozert* can be interpreted to permit a fairly high degree of deference to the states in formulating curriculum decisions.

159. U.S. CONST. amend I.

160. 319 U.S. 624 (1943); *cf.* *Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992) (holding that a state statute requiring public school elementary students to recite the Pledge of Allegiance with its phrase "under God" did not violate the Establishment Clause of the First Amendment; the term was but a ceremonial invocation of God).

161. 753 F.2d 1528, 1533 (9th Cir. 1985) (citing *Callahan v. Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984)), *cert. denied*, 474 U.S. 826 (1985).

162. *Id.* at 1532.

163. *Id.* at 1534.

164. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

165. *Id.* at 1062.

166. *Id.* at 1064 (citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)) (emphasis added).

B. *Passing Constitutional Muster*

A tort law based curriculum must comport with Establishment Clause and Free Exercise Clause limitations. In addition, it cannot unduly trammel upon an individual's realm of intellect and conscience.

Although the *Lemon* test has recently been brought into question,¹⁶⁷ it does provide a formidable structure for analysis of a curriculum proposal. The secular purpose element should be satisfied because the state has a well established and powerful interest in the education of its students. Likewise, the *principal* effect is neither to advance nor inhibit religious beliefs. The question remains how much "entanglement" with religion is unavoidable.

Every law embodies a set of values that were considered of merit and all laws consist of a choices of values, so the state is by nature a "purveyor of morality."¹⁶⁸ Arguably, the Supreme Court itself chooses values.¹⁶⁹ Because religion and law embody certain parallel virtues, a curriculum based upon tort law will necessarily have a positive correlation with various religious teachings. For example, teaching respect for another's property is analogous to the commandment "[y]ou shalt not steal,"¹⁷⁰ and slander and libel are similar to giving "false testimony against your neighbor."¹⁷¹ Consequently, a value-oriented curriculum could be found offensive to some, but offense, by itself, is not a violation of the First Amendment.¹⁷² Although law expresses public morality, obviously, morality is not synonymous with religion, and any contrary argument is disingenuous. A tort-based curriculum would pass the *Lemon* test.

The responsibility of legislators, teachers, textbook committees, and boards of education is to strive to see that the utterances of the state are faithful to what appears to be a genuine communal consensus, understanding all the while that no claim can be made that a particular societal consensus reflects a true, correct, eternal, moral stance.¹⁷³

Furthermore, because any law-related education program does not occupy the field, it should not unreasonably interfere with the freedom of parents to teach children principles they deem appropriate. A tort-based program is not intended to be a unitary source of value education. As Justice Kennedy remarked: "[W]e acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce."¹⁷⁴ Furthermore,

167. See discussion of *Lee v. Weisman* in *Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437, 445 (7th Cir. 1992).

168. Don Welch, *The State As a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540, 543 (1988).

169. See Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 387 (1985).

170. *Exodus* 20:15 (New International Version).

171. *Exodus* 20:16 (New International Version).

172. *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992).

173. Welch, *supra* note 168, at 551. See Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1083-89 (1978) (discusses connotations of "religion"). Also, see discussion of relation between law and morals in RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 262-63 (4th ed. 1992).

174. *Lee*, 112 S.Ct. at 2661.

the compelling state interest in informing citizens of the duties under the law for which they will be held accountable substantially outweighs any burdens placed upon parents. Although a value education program, even when cloaked in terms such as "character education" or "social norm education," may not please parents of every religious denomination, "[i]f we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds."¹⁷⁵ In addition, "Government . . . retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right . . . and select private education at their own expense."¹⁷⁶

A third and crucial challenge remains. Any mandatory value education program may not encroach upon "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."¹⁷⁷ The Supreme Court pronounced in *Barnette* that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or *other matters of opinion* or force citizens to confess by word or act their faith therein."¹⁷⁸ For some time the Court has discouraged tunnel-visioned access to ideas disseminated in the public schools.¹⁷⁹ More recently, in *Weisman*, the warning was reiterated: "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."¹⁸⁰

This limitation on indoctrination is especially crucial in the elementary and secondary schools where the government owns a near monopoly in speaking to a captive audience whose youth and experience level hinder critical evaluation. Furthermore, students are typically reinforced positively in proportion to their exhibited level of conformity to the ideas presented within the classroom. Yet the power and need to inculcate legitimate values need not rise to the level of "indoctrination," defined as "the unbalanced presentation of *controversial* ideas."¹⁸¹ Although law embodies the ideas and opinions of a society, tort law principles such as self-esteem and respect for the persons and property of others are hardly controversial ideas. In addition, while governmental neutrality has been a core principle in judging First Amendment speech,¹⁸² governmental speech has been noted as not usually requiring neutrality because this requirement is both too limiting and too expansive.¹⁸³

175. *McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (referring to the then 256 separate religious entities in the continental U.S.). *Accord Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437, 444 (1992).

176. *Sherman*, 980 F.2d at 445 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

177. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

178. *Id.* (emphasis added).

179. *E.g.*, *Board of Educ., Island Trees v. Pico*, 457 U.S. 853 (1982).

180. *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992).

181. Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 547 (1987) (emphasis added) [hereinafter "*Bending" History in Public Secondary Schools*].

182. See Stephen E. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. 19 (1986).

183. "*Bending" History in Public Secondary Schools*, *supra* note 181, at 536-38. The author argues that,

A tort-based law-related education program cannot rise to the level of orthodoxy so as to institute a “[state] religion or religious faith.”¹⁸⁴ Clearly, respect for others includes respect for the unique array of talents and diverse characteristics of each member of society. Furthermore, a law-related curriculum must include an understanding that the law is not a static entity but rather an ever developing organism. Knowledge of the law and of legal processes provides a mechanism for beneficial participation in changing “undesirable” attributes. If compliance with the present day dictates of law were to beget uniformity of thought and spirit by exclusion of and refusal to explore ideas, greater risks both to society and to the individual would accrue in the long run.¹⁸⁵ Rather than becoming “closed circuit recipients,”¹⁸⁶ students must be taught critical thinking and analytical skills to re-evaluate the legitimacy of society’s law-based values.

V. ADVANTAGES

Schools could efficiently compensate for the fewer opportunities for the modern family to inculcate values in children so that a proactive law-related program would comport with economic theory.

If the content of a law became known only after the events to which it was applicable occurred, the existence of the law could have no effect on the conduct of the parties subject to it. The economic theory of the law is the theory of law as deterrence, and a threat that is not communicated cannot deter.¹⁸⁷

The direct cost to the State in its investment in human capital, activated at the early stages in child development, should be small compared to the direct costs of rehabilitation or remediation.¹⁸⁸ In addition, human costs including decreased feelings of safety, decreased focusing on academics, and decreased sponsorship of unusual and rewarding extra-curricular activities,¹⁸⁹ could be avoided. Collectively, society could partially circumvent the costs of low teacher morale and the resultant loss of highly qualified teachers.¹⁹⁰ Added benefits would accrue if students, armed with an awareness of their worth and of the worth of others, share their experiences with their parents and create a “trickle up” effect.

rather than using self-government, the marketplace of ideas, or checking value tests, the fairness test as used in the context of the broadcasting industry is appropriate for distinguishing between improper indoctrination and legitimate teaching of history. *Id.* at 553-79.

184. *Lee*, 112 S. Ct. at 2655 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

185. “*Bending*” *History in Public Secondary Schools*, *supra* note 181, at Summary, 552.

186. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969).

187. POSNER, *supra* note 173, at 265.

188. For every dollar spent on pre-school education, an estimated six dollars was saved in costs of special education, welfare, crime and decrease in worker productivity. Clinton, *supra* note 85, at 10 (referring to statistics from the HOUSE SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES, OPPORTUNITIES FOR SUCCESS: COST EFFECTIVE PROGRAMS FOR CHILDREN—UPDATE, 1988, at 39 (1988)).

189. Edward Wynne, *Discipline in a Good School*, SOC’Y, May-June 1990, at 98, 100.

190. JAMES K. NIGHSWANDER, A GUIDEBOOK FOR DISCIPLINE PROGRAM PLANNING 3-5 (1981).

In addition to being efficient, tort-based law-related education can be effective: "[O]verwhelming evidence suggests that reward, praise, and interactions with children which promote the development of a positive self concept are the most powerful motivators for learning."¹⁹¹ Existing program research shows that students participating in law-based programs exhibit an overall improvement in behavior.¹⁹² An earlier introduction of additional principles of law should promote more favorable results. Although any law-based program has limitations and can hardly substitute for nurturing received in the family unit, without a degree of school success, neglected children rarely improve.¹⁹³

Furthermore, a tort law-based education program should be highly accepted by teachers and students. Teachers recognize the need for creative solutions to social problems within the school setting and accept their expanded role in development of a child's potential. In a 1989 survey of teachers, 91% answered that a non-traditional approach to education would either "help a lot" or "help some."¹⁹⁴ When asked to respond to the statements, "A school's job is to teach children. Health and social problems should be addressed by other agencies outside the school," 74% either somewhat disagreed or strongly disagreed.¹⁹⁵ Students, too, feel the need for increased safety¹⁹⁶ and should welcome the opportunity to more fully satisfy this basic need.

CONCLUSION

The Supreme Court recognizes the role of the school in transmitting cultural values. However, value inculcation in the public schools has been criticized and its effectiveness doubted because of disagreement over what and whose values to inculcate. Law-based education embodies a communal consensus and thus provides a legitimate basis for teaching values within the public schools' formal and informal curricula. Tort law, founded on self-esteem and a belief in the value of other persons and their property, is the vehicle by which this can be introduced into the early childhood curriculum. Because attitudes are framed early in a child's development, the establishment of a constitutionally sound, compulsory program as soon as a child enters school comprises a preventive approach to discipline and behavior problems which can improve learning in all subject areas. Enhancing compliance with the law within the school should spill over into the

191. Irwin A. Hyman, *Eliminating Corporal Punishment in Schools: Moving From Advocacy Research to Policy Implementation*, 9 CHILDREN'S LEGAL RTS. J. 14, 16 (1988).

192. Janice K. Colville & Rodney H. Clarcken, *Developing Social Responsibility Through Law-Related Education*. Paper presented at Annual Meeting of Educational Research Association (San Francisco, Cal., Apr. 20-24, 1992) (on file with author). Programs include student involvement with case studies, mock trials and active involvement of police officers, lawyers, judges and others.

193. Margaret Beyer, et al., *Treating the Educational Problems of Delinquent and Neglected Children*, 9 CHILDREN'S LEGAL RTS. J. 2, 11 (1988) (referring to *Schools That Work: Educating Disadvantaged Children*. U.S. Dep't of Educ., Pueblo, Col. G.P.O. (1987)).

194. Metropolitan Life/Louis Harris Associates, Inc., *The American Teacher, 1989*, DIGEST OF EDUC. STATISTICS, at 30, Table 24 (1992).

195. *American Teacher, 1991*, *supra* note 15, at 31, Table 26.

196. *See supra* note 21 and accompanying text.

out-of-school environment. By using the law to educate and socialize children into lawful behavior patterns, preventive law, developed within an integrated public school curriculum, can efficiently and effectively confer upon each citizen an ownership in the law. This proprietorship produces a more informed citizenry prepared to participate more fully and more positively in this government "by the people."