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Susan P. Stuart

Valparaiso University School of Law

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IN LOCO PARENTIS IN THE PUBLIC SCHOOLS: ABUSED, CONFUSED, AND IN NEED OF CHANGE

*Susan Stuart**

*[T]o kill an error is as good a service as, and sometimes even better than,
the establishing a new truth or fact.*

—Charles Darwin¹

In loco parentis is a common law doctrine that has been used to characterize the on-campus relationship between a school and its students, but its abuse has led to such absurd cases as Safford Unified School District No.1 v. Redding. Although waning in higher education, the doctrine is experiencing a resurgence in elementary and secondary schools. As originally conceived, the doctrine was used primarily to justify and defend student disciplinary actions: the school stood in the shoes of the parent and had authority to discipline, almost at will. The doctrine, however, never seemed to have a corollary in the schools' responsibility for students' safety. Now, in loco parentis is being reenergized to excuse violating student rights, particularly with degrading treatment in matters of search and seizure, but with little or no concomitant recognition of any responsibility to protect students from equally degrading treatment occasioned by sexual harassment and bullying. This Article discusses why this doctrine is being revived and why that revival is misguided. Part of the blame lies with courts' and schools' inability to articulate some other, more modern justification for school disciplinary policies. A larger portion of the blame, however, lies both with a careless political process that is tasking schools with more than just an educational function and with an equally careless judiciary that believes in loco parentis means "it's none of our business." Instead, education professionals can and should be exploring an institutional model of their relationship with students in both the treatment of and duties toward their civil rights.

* Professor of Law, Valparaiso University School of Law. Many thanks to the participants at the Summer 2009 Oxford Roundtable where this thesis was first presented; to Bill Horvath, my trusty research assistant; and to Ivan Bodensteiner for his ability to get me to focus.

1. 2 CHARLES DARWIN, MORE LETTERS OF CHARLES DARWIN 422 (Francis Darwin & A. C. Seward eds. 1903) (Letter 752 to A. Stephen Wilson, March 5, 1879).

I. INTRODUCTION

In the evolution of law, perhaps one of the greatest anomalies is the continuing vitality of the doctrine of *in loco parentis* in education law. Meaning “in the place of a parent,” the doctrine would ordinarily be understood to require the guardianship qualities of a parent, as being supportive, protective, and perhaps disciplinary. When the doctrine is applied in public schools, most courts have focused almost solely on the disciplinary aspect of the principle without considering its concomitant protective responsibilities. At some point during the late twentieth century, courts began to revisit the viability of *in loco parentis* in the modern, state-run institutions of present-day public schools and turned to a more realistic legal analysis of the school–child relationship. Lately, however, *in loco parentis* has experienced an inexplicable resurgence that seems designed primarily to protect school districts from the responsibility for unwise and otherwise indefensible search and seizure policies disguised as disciplinary decisions.

There may be several reasons for this trend, not the least of which is the authoritarian tendencies of the current U.S. Supreme Court,² which might side with the unquestioned authority of school boards and administrators to manage their school districts. This unfortunate state of affairs is multifaceted, but this Article demonstrates the unsuitability of *in loco parentis* as a legal doctrine in schools, first, because it was never properly implemented by the courts in the United States and, second, because its continued existence is no longer appropriate to the modern needs of public education.³

When courts first started using *in loco parentis* as a justification defense for schools, they used it as a descriptive word of convenience because they never really adopted the entirety of the doctrine. From its origins in U.S. public education law, the common law doctrine of *in loco parentis* was applied almost exclusively to student discipline. Rarely was it understood to also apply to parental-like responsibilities for the *care* of students. Consequently, *in loco parentis* was a misnomer for something other than the doctrine was intended and was applied in other arenas, such as higher education.

2. See, e.g., Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 434–47 (1991); Susan Stuart, *Shibboleths and Ceballos: Eroding Constitutional Rights Through Pseudocommunication*, 2008 BYU L. REV. 1545, 1552–57 (2008).

3. This Article’s scope does not develop a thorough examination of an obligation of public schools to provide support and protection to students—the flip-side to the disciplinary use of *in loco parentis*. That topic will be addressed in a later article related to the increasing intrusiveness of student searches. See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (middle school student improperly strip-searched for prescription-strength ibuprofen).

Second, even if properly adopted, *in loco parentis* was never designed to be or understood as a concept that would apply to the system of state-run schools in the United States. *In loco parentis* assumes a voluntary delegation of parental authority and was envisioned during a time of either home-schooling tutors or small residential, private schools. The doctrine is now anachronistic in an era of involuntary delegation occasioned by compulsory attendance laws and of large public schools with responsibilities that often go beyond educational function. As a consequence, courts started to drift away from *in loco parentis*, and it may well have died a natural death, especially with the decisions in *Tinker v. Des Moines Independent Community School District*⁴ and *New Jersey v. T.L.O.*⁵ Unfortunately, the Supreme Court intervened and halted—at least temporarily—what would ordinarily be a quiet, natural, and uneventful death of a species that deserved to be extinct.

A body of legal scholarship discourses on various evolutionary theories about the law.⁶ “Today the idea that law ‘evolves’ is so deeply ingrained in Anglo-American legal thought that most lawyers are no longer even conscious of it as a metaphor.”⁷ A burgeoning field of study posits that the formation of law is evolutionary in and of itself and that there is fruitful inquiry into this field as a construct of cultural evolution: “[B]ehavioral research with genetic implications.”⁸ Most pertinent here is perhaps Holmes’s “doctrinal” approach to evolution in the law:⁹

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be

4. 393 U.S. 503 (1969).

5. 469 U.S. 325 (1985).

6. See, e.g., Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319 (2008); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985); M.B.W. Sinclair, *Evolution in Law: Second Thoughts*, 71 U. DET. MERCY L. REV. 31 (1993); see also Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343 (1984).

7. Elliott, *supra* note 6, at 38.

8. E. Adamson Hoebel, *Anthropology, Law and Genetic Inheritance*, in LAW, BIOLOGY & CULTURE: THE EVOLUTION OF LAW 27, 28 (Margaret Gruter & Paul Bohannon eds., 1983). Legal anthropology as a research field has focused, in many respects, on those characteristics of the law that one might find in any ordinary law review article: “the nature of norms, dispute handling processes, sanctions, authority and levels of hierarchy within a social system to which any body of law may apply.” *Id.* at 31; see, e.g., John M. Conley & William M. O’Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 LOY. L.A. L. REV. 41 (1993); Elliott, *supra* note 6, at 71–90; Anne Griffiths, *Law, Space, and Place: Reframing Comparative Law and Legal Anthropology*, 34 LAW & SOC. INQUIRY 495 (2009).

9. Elliott, *supra* note 6, at 50.

governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.¹⁰

Although law is affected by judges' conscious choices as they make and define the law,¹¹ the law does evolve, even if that evolution is merely a metaphor for the change that law experiences.¹² In this context, *in loco parentis* was never adaptable to the common school tradition of the United States, and consequently, it could not evolve. And it should have been allowed to die years ago.

To support that thesis, this Article addresses both the history of and the flaws in the *in loco parentis* doctrine in education law. First, this Article examines both the historical origins and judicial reliance on the *in loco parentis* doctrine, primarily in the United States. It then addresses the inherent fallacy of relying on the doctrine, especially in contemporary education law cases. Last, this Article explores the better alternative—professional education standards—as being much better measures of school districts' duties and responsibilities because they provide better normative standards for courts to compare than the loosely descriptive *in loco parentis* doctrine. Ultimately, this Article expostulates that the *in loco parentis* doctrine should be put out of its misery: if courts will not allow it to go the way of the dodo, then it will have to be eradicated like the ubiquitous kudzu.

II. WHAT'S OLD IS NEW AGAIN

The report of my death was an exaggeration.

—Mark Twain¹³

The origins of the *in loco parentis* doctrine are murky. It may go back as far as the Code of Hammurabi through ancient Roman times to

10. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881); see also Elliott, *supra* note 6, at 50.

11. Elliott, *supra* note 6, at 54.

12. *Id.* at 90. “We speak of the law ‘adapting’ to its social, cultural, and technological environment without the slightest awareness of the jurisprudential tradition we are invoking.” *Id.* at 38.

13. Mark Twain quotations – Death, <http://www.twainquotes.com/Death.html> (last visited Apr. 5, 2010).

the present.¹⁴ The Latinism, *in loco parentis*, translates as “in the place of a parent.”¹⁵ It is not to be confused with *parens patriae*, which means “parent of his or her country.”¹⁶ While *in loco parentis* describes the relationship of an individual who has the care and custody of children in the place of the children’s parents, the parental role ascribed to *parens patriae* is undertaken by a government to care for those who cannot care for themselves, such as children and the infirm.¹⁷ An individual may be the parent or *in loco parentis* to a child, but the state can step in to protect the child from the parent if need be, like an über-parent.¹⁸ This situation reveals the inherent clash between the notion that the state can be *in loco parentis* to schoolchildren yet still act as *parens patriae*. This clash is like the fox guarding the chicken coop—at what point will the state police itself in its *parens patriae* role if it is failing in its *in loco parentis* role?

This label of *in loco parentis* is still applied to any person or entity standing in a guardian-type position in the place of a parent.¹⁹ In that circumstance, using the term presupposes that the guardian will act like a parent in all respects. For some reason, however, this term has become most closely identified with education law and has gained an unexpected life of its own by meaning something other than its commonly

14. Alan F. Edwards, Jr., *In Loco Parentis: Alive and Kicking, Dead and Buried, or Rising Phoenix?* 2 (Educ. Res. Info. Ctr. Doc. #375720, 1994), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/13/64/1a.pdf.

15. Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?* 15 J.L. & EDUC. 271, 271 (1986); BLACK’S LAW DICTIONARY 858 (9th ed. 2009). *Black’s Law Dictionary* provides the following definition: “Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.” *Id.* A person acting *in loco parentis* “acts in place of a parent, either temporarily . . . or indefinitely . . . has assumed the obligations of a parent without formally adopting the child.” *Id.* at 1257 (“person in loco parentis”).

16. BLACK’S LAW DICTIONARY, *supra* note 15, at 1221.

17. Zirkel & Reichner, *supra* note 15, at 271 n.1; Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381 (2000); Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 51 (2007).

18. Scott A. Davidson, Note, *When Is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. L. 403, 406 (1996) (“Because of the child’s natural dependency on his or her parents, the state has a superior right to protect the child when that dependency threatens the child’s well-being.”).

19. As of June, 2009, the following federal statutes use the terminology *in loco parentis*: 5 U.S.C. § 6381 (2006 & Supp. II. 2008) (Family & Medical Leave Act); *id.* § 8102a (Compensation for Work Injuries); 8 U.S.C. § 1232 (Aliens & Nationality); 10 U.S.C. §§ 1126, 1477, 1482 (Armed Forces); 18 U.S.C. §§ 115, 879, 1116 (Crimes & Criminal Procedure); 20 U.S.C. §§ 932, 1232h, 7801, 9402 (Education); 22 U.S.C. §§ 213, 2708 (Foreign Relations); 25 U.S.C. § 231 (Indians); 29 U.S.C. § 2611 (Labor); 33 U.S.C. § 902 (Navigation & Navigable Waters); 37 U.S.C. §§ 401, 411f, 411h (Pay & Allowances of the Uniformed Services); 38 U.S.C. § 1901 (Veterans’ Benefits); 42 U.S.C. §§ 1301, 1437d, 1437f, 2000c-6, 2000d, 2000e, 9858n (Public Health & Welfare). If one searches the online legal retrieval systems, one finds there is nearly the same number of federal regulations using the term.

understood definition.

William Blackstone's *Commentaries* is usually cited as the common law source of the edict that schools stand in the shoes of the parent:

[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.²⁰

Although Blackstone cited to no legal authority for this common law proposition,²¹ contemporary researchers infer that his sources were Aristotle, Hobbes, Locke, and Mills, primarily for antecedents of a father's power to control his children:²²

Part of the parental task of raising children to be responsible adults consists in making rules for them, and part of the task of making rules includes the power to enforce those rules where necessary Others are not allowed to take it upon themselves to discipline children, except in those situations in which they occupy some other guardian-like role in relation to those children, such as teachers, and even in those circumstances the power is *in loco parentis*.²³

Note that even contemporary researchers are attributing only the parental right of discipline to *in loco parentis* powers of teachers. But a close and literal reading of Blackstone should highlight that he joined *in loco parentis* with discipline; he did not *extract* discipline as the only portion of *in loco parentis* that applied to the teacher nor did he divest teachers of their overarching guardianship responsibilities, especially given the historical context.

Nevertheless, this narrow interpretation of Blackstone's common law persisted (and still persists)—that Blackstone meant that teachers have only disciplinary powers—and such narrow interpretation profoundly shaped the early legal doctrine as a defense of justification in school

20. 1 WILLIAM BLACKSTONE, COMMENTARIES *441, available at http://avalon.law.yale.edu/18th_century/blackstone_bk1ch16.asp; see William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 559 (1971); Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 18–19 (2002); John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765–1985*, 8 J. LEGAL HISTORY 260, 260 (1987); Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1144 (1991); Zirkel & Reichner, *supra* note 15, at 271.

21. BLACKSTONE, *supra* note 20, at *441; Hogan & Schwartz, *supra* note 20, at 271 n.4.

22. Hogan & Schwartz, *supra* note 20, at 260. The “core context” for *in loco parentis* is student discipline, or “restraint and correction.” Zirkel & Reichner, *supra* note 15, at 273.

23. Arthur Ripstein, *Closing the Gap*, 9 THEORETICAL INQUIRIES L. 61, 85 n.36 (2008).

discipline cases, particularly when corporal punishment was involved.²⁴ The doctrine “was readily imported from England as protection for public school teachers who saw the need to corporally punish students in the[i]r charge. This protection took the form of a broad, although not unlimited, defense in criminal and civil suits for assault and battery.”²⁵ In the 1837 case of *State v. Pendergrass*²⁶—deemed the earliest U.S. case applying the *in loco parentis* principle—the State of North Carolina charged a schoolmistress with assault and battery for having applied a switch to a seven-year-old female student.²⁷ Although not denoted by its Latinism, the *in loco parentis* principle was the rationale for the court’s determination that the schoolmistress’s authority to impose discipline in the form of corporal punishment derived from the delegation of parental authority:

It is not easy to state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils. It is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.²⁸

The *Pendergrass* court clearly acknowledged a great discretion bestowed upon teachers that was nearly parallel to a court’s refusal to interfere in the parent-child relationship.²⁹

24. See Buss, *supra* note 20, at 559–60.

25. Zirkel & Reichner, *supra* note 15, at 273.

26. *State v. Pendergrass*, 19 N.C. 365 (1837).

27. *Id.*; Hogan & Schwartz, *supra* note 20, at 262.

28. *Pendergrass*, 19 N.C. at 365–66. The schoolmistress’s conviction was overturned on appeal, as a matter of law, because the injuries inflicted on the child were only temporary and the schoolmistress’s motivation was not activated by malice. *Id.* at 367–68. Note that the *Pendergrass* opinion discussed affirmative tutelary duties in addition to the disciplinary power delegated to effectuate a child’s education. Later decisions ignored the affirmative tutelary duty in favor of emphasizing the disciplinary power.

29. See also Zirkel & Reichner, *supra* note 15, at 273. An Alabama court “cited the [*in loco parentis*] doctrine as clothing the teacher with the parent’s delegated authority to discipline the pupil to the same extent that they could do so themselves.” *Id.* Also keep in mind that contemporary law did not afford much protection for children. At about the same time the *Pendergrass* case was appealed so was the case of Mary Conner. When Mary attempted to discipline her teenage son for failing to follow her instructions, she threw a fire poker at him. Her teenage son evaded the poker, but it killed her five-year-

For well over a century, cases applying *in loco parentis* as a legal doctrine were confined nearly exclusively to corporal punishment cases. One path of this application established that teachers had wide discretion to punish students as a matter of law, constrained only if the students sustained serious injuries.³⁰ That path is nearly extinct. The other path of the doctrine regards teacher discretion as a question of fact whereby a trier-of-fact could determine the reasonableness of the punishment; this path survives today in those jurisdictions that still allow teachers to administer corporal punishment.³¹ This other path also signaled the narrowing of a teacher's discretion, as Blackstone proposed, to the purposes for which the teacher is employed, i.e., within the limits of the teacher's responsibility and jurisdiction.³²

The Supreme Court summarized the "modern" view of *in loco parentis* in 1977:

At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child. Blackstone catalogued among the "absolute rights of individuals" the right "to security from the corporal insults of menaces, assaults, beating, and wounding," but he did not regard it a "corporal insult" for a teacher to inflict "moderate correction" on a child in his care. To the extent that force was "necessary to answer the purposes for which (the teacher) is employed," Blackstone viewed it as "justifiable or lawful." The basic doctrine has not changed. The prevalent rule in this country today privileges such force as a teacher or administrator "reasonably believes to be necessary for (the child's) proper control, training, or education." To the extent that the force is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability.³³

old child. Mary was convicted of manslaughter, but the mitigating circumstances reduced her penalty to a shilling. *Rex v. Conner*, (1836) 173 Eng. Rep. 194, 195; Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense – Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 414 (1998).

30. Zirkel & Reichner, *supra* note 15, at 274.

31. *Id.* at 275–76.

All of the circumstances are to 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 child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline.

Ingraham v. Wright, 430 U.S. 651, 662 (1977); see Zirkel & Reichner, *supra* note 15, at 275–76; see also Buss, *supra* note 20, at 561–62.

32. Zirkel & Reichner, *supra* note 15, at 275.

33. *Ingraham*, 430 U.S. at 661 (footnotes & citations omitted). In setting out this principle in *Ingraham*, the Court relied on the *Restatement (Second) of Torts* § 147(2), which configured the *in loco*

The Court, however, added a modern twist to its version of *in loco parentis* that Blackstone had not included, that an additional *raison d'être* for a teacher's disciplinary power is "the maintenance of group discipline."³⁴ This new language departed from the traditional notion of parental delegation of authority over one's own child only, and its acceptance in a modernized version of *in loco parentis* explains to a certain extent the doctrine's lingering life.

By the mid-1980s, scholars were tolling the death knell of *in loco parentis* in public education.³⁵ In higher education, *in loco parentis* likely was breathing its last. By the 1960s, colleges and universities had to scale back their ability to control their students through the *in loco parentis* doctrine.³⁶ In contrast, *in loco parentis* still had strong adherents in public education through the mid-1980s, in different jurisdictions and in different types of cases. And it likely remains as strong as ever in some of those pockets, such as those states that continue to allow corporal punishment.³⁷ It maintains its current presence, however, predominately as a rationale for relaxing the Fourth Amendment protections for student searches and for stifling First Amendment freedom of student speech.

Student searches were justified as long ago as 1930, when *in loco parentis* was invoked as a defense when one teacher strip-searched a teenage girl, looking for money stolen from another teacher.³⁸ The appellate court ruled the jury should have been instructed properly on the parameters of *in loco parentis* and the teacher's authority: whether the search was done lawfully for purposes of the child's educational training (*in loco parentis*) or unlawfully for the purpose of retrieving

parentis disciplinary power as follows:

(2) One other than a parent who has been given by law or has voluntarily assumed in whole or in part the function of controlling, training, or educating a child, is privileged to apply such reasonable force or to impose such reasonable confinement as he reasonably believes to be necessary for its proper control, training, or education, except in so far as the parent has restricted the privilege of one to whom he has entrusted the child.

RESTATEMENT (SECOND) OF TORTS § 147(2) (1965).

34. *Ingraham*, 430 U.S. at 662.

35. See Hogan & Schwartz, *supra* note 20, at 269–70; see generally Zirkel & Reichner, *supra* note 15.

36. Zirkel & Reichner, *supra* note 15, at 281–82; DAVID A. HOEKEMA, *CAMPUS RULES AND MORAL COMMUNITY: IN PLACE OF IN LOCO PARENTIS* 12–13, 28–31 (1994); see generally Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education*, 64 MO. L. REV. 1 (1999).

37. See, e.g., *Austin B. v. Escondido Union Sch. Dist.*, 57 Cal. Rptr. 3d 454, 464–66 (Cal. Ct. App. 2007).

38. Zirkel & Reichner, *supra* note 15, at 276. The girl was forced to remove her outer clothing and her bloomers in search of the money that was allegedly stolen.

money belonging to a third person (not *in loco parentis*).³⁹ Student search jurisprudence was quiescent until 1969, when a California court ruled that *in loco parentis* authorized a vice principal's search of a student locker for drugs because he stood in the shoes of the parent and could use similar "moderate force to obtain obedience" as the parent could.⁴⁰ The doctrine then took on a life of its own as schools became increasingly concerned about drugs on campus.

Through a number of permutations, the *in loco parentis* doctrine eventually changed the balance between schools and their students' Fourth Amendment privacy rights,⁴¹ culminating in *New Jersey v. T.L.O.*, where a school official searched a student's purse and found marijuana and related paraphernalia.⁴² In that case, the Supreme Court addressed two primary issues that were intertwined with the *in loco parentis* doctrine. First, the Court held that school officials cannot shield themselves from constitutional analysis under the Fourth Amendment by arguing that, by reason of *in loco parentis*, they are private actors like parents: "In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."⁴³ Having disposed of the *in loco parentis* doctrine to hold school officials are state actors, the Court had a vacuum to fill: there was no established rationale for school disciplinary power other than *in loco parentis*. As a consequence, the Court needed a reason to allow schools to invade students' Fourth Amendment privacy rights, especially searches, while foregoing the need for warrants and probable

39. *Phillips v. Johns*, 12 Tenn. App. 354, 355–56 (Tenn. Ct. App. 1930).

40. Hogan & Schwartz, *supra* note 20, at 265; *In re Donaldson*, 75 Cal. Rptr. 220, 223 (Cal. Ct. App. 1969). The California court ultimately held that the vice principal was not a government official for purposes of the Fourth Amendment so his search was not proscribed by the Fourth Amendment. *Id.* at 222. That holding is no longer good law. *In re William G.*, 709 P.2d 1287, 1293 (Cal. 1985); *see also infra* notes 42–44 & accompanying text; Zirkel & Reichner, *supra* note 15, at 276–78.

41. *See* Hogan & Schwartz, *supra* note 20, at 266–69; Zirkel & Reichner, *supra* note 15, at 276–77; *In Interest of L.L.*, 280 N.W.2d 343, 349–50 (Wis. Ct. App. 1979). The primary modus operandi was that school officials need not have probable cause to search students and their belongings and lockers. All that was necessary was a reasonable suspicion that a student possessed an illegal or dangerous item. *Id.* at 351–52.

42. 469 U.S. 325 (1985); *see also* Hogan & Schwartz, *supra* note 20, at 269; Zirkel & Reichner, *supra* note 15, at 277–78.

43. *T.L.O.*, 469 U.S. at 336–37. In its analysis, the Court emphasized that "parental delegation" was not an appropriate source of school authority because of compulsory attendance laws. Furthermore, schools exercise public authority when engaging in student searches in light of Court precedent requiring that they similarly exercise public authority under the First Amendment and the Fourteenth Amendment's Due Process Clause. *Id.* at 336 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Goss v. Lopez*, 419 U.S. 565 (1975)).

cause.⁴⁴

The test the Court developed certainly departed from the *in loco parentis* doctrine of disciplining students. The Court's test "balanc[es] the need to search against the invasion which the search entails," juxtaposing the students' Fourth Amendment expectations of privacy against the state's need for order.⁴⁵ This regime rested on the modern institutional premise of

the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. . . . [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.⁴⁶

This regime would permit schools' flexibility in their disciplinary procedures while likewise preserving the informality of the relationships between students and teachers.⁴⁷ Requiring schools to get warrants before they search students is unsuitable to an environment where discipline must be swift and informal. Likewise, this environment is unsuitable to requiring teachers to familiarize themselves with the niceties of probable cause. Therefore, all a school official must show is that the search was reasonable at its inception—a reasonable suspicion that a student is violating either the law or a school rule—and reasonable in its scope.⁴⁸ With this effort, the Court seemed to abandon *in loco parentis* for a more modern treatment of the student–school relationship whereby a school's disciplinary actions are guided by norms set out in school rules and the law, definitive benchmarks as well as hallmarks of modern public education.⁴⁹

44. *Id.* at 338–40.

45. *Id.* at 337.

46. *Id.* at 339.

47. *Id.* at 340.

48. *Id.* at 341–42.

49. For the proposition that the Court killed *in loco parentis* once and for all in *New Jersey v. T.L.O.*, see Hogan & Schwartz, *supra* note 20, at 269–70, and Zirkel & Reichner, *supra* note 15, at 278. On the other hand, Justice Powell had a tough time giving up *in loco parentis* and concurred in *New Jersey v. T.L.O.* on notions of *in loco parentis* "lite":

The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

The primary duty of school officials and teachers, as the Court states, is the education

Inexplicably, ten years later, the Court reverted to the familiar *in loco parentis*.

The need to justify random urinalysis testing of high school athletes impelled the Supreme Court to once again visit the balancing of Fourth Amendment rights with the government interests in *Vernonia School District 47J v. Acton*.⁵⁰ But unlike the *New Jersey v. T.L.O.* Court, the *Vernonia* Court relied heavily on *in loco parentis* in ultimately determining that the school district's Student Athlete Drug Policy was constitutional: "[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is."⁵¹ The Court abandoned the fairly rational balancing test of *New Jersey v. T.L.O.* and instead applied the *in loco parentis* doctrine to diminish students' Fourth Amendment expectations of privacy. Rather than justify the drug-testing scheme within a legitimate governmental interest in maintaining order and discipline in schools, the Court created a different governmental interest—victims that the school district must protect: "(1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."⁵²

In supporting this rationale, the Court acknowledged that *in loco parentis* may no longer be a shield from constitutional inquiry, particularly in light of compulsory attendance laws. Nevertheless, the Court needed a reason to protect the victims it had created and found it in the "custodial and tutelary" power of schools, thereby "permitting a degree of supervision and control that could not be exercised over free adults."⁵³ Having reduced students' Fourth Amendment expectations of privacy because of the victims created by the *in loco parentis* doctrine, the Court still felt compelled to justify this new "duty" to protect and returned to *in loco parentis* to describe the government's need as

and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. 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. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

T.L.O., 469 U.S. at 349–50 (Powell, J., concurring) (footnotes omitted).

50. 515 U.S. 646 (1995).

51. *Id.* at 665.

52. *Id.* at 664.

53. *Id.* at 655. The Court, however, took great pains to note that *in loco parentis* discipline and control of students did not translate into the commensurate *in loco parentis* duty to protect. *Id.*

“important enough” to justify random urinalyses.⁵⁴ Both these arguments—one for control and discipline and the other for care and protection—are classic ingredients of *in loco parentis*, even if the Court did not specifically mention either Blackstone or the Latinism. But the Court’s authoritarian tendencies remain focused on the school districts’ right to discipline and not on the concomitant duty to protect, except in rationalizing the expansion of school district discretion to control and discipline.⁵⁵

The Court used nearly the same reasoning later to justify suspicionless—yet mandatory—drug testing of all middle and high school students who wished to participate in extracurricular activities in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.⁵⁶ In that case, the Court ratified the school district’s policy without requiring any particularized or identifiable drug problem within this particular population to justify regular drug-testing because there was (and remains) a “nationwide

54. “[T]he Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.” *Id.* In further support for reintroducing *in loco parentis* into the analysis of restricting Fourth Amendment rights, the Court went to great pains to gather evidence of the need for control and discipline necessary to maintaining the school’s educational mission: “And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.” *Id.* at 662. Indeed, the Court noted the school district’s very real concerns:

We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court’s conclusion that “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,” that “[d]isciplinary actions had reached ‘epidemic proportions,’” and that “the rebellion was being fueled by alcohol and drug abuse as well as by the student’s misperceptions about the drug culture.”

Id. at 662–63 (alteration in original). The Court also made equally plausible arguments based on the physical and psychological effects that drugs have on children, including the substantial physical risks run by drug-using student-athletes while playing sports. But overarching all concerns are those for the “victims” not the individual student and the student’s Fourth Amendment rights: “[T]he necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.” *Id.* at 662.

55. Curious then is the Court’s continued commitment to excluding any duty to protect from the school district’s roster of educational responsibilities, particularly any constitutional duty to protect children as held in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *Vernonia*, 515 U.S. at 655. Thus, the Court’s commitment to *in loco parentis* remained on the discipline and control end of the parental duty—and elevating it to such constitutional imperative, of such high governmental importance, as to limit students’ Fourth Amendment expectations of privacy—but without any *enforceable* duty to protect. Thus, that “duty” as posited in *Vernonia* is ephemeral and merely a rhetorical bludgeon to justify expanding a school district’s disciplinary power but not its protective duties.

56. 536 U.S. 822 (2002). In *Earls*, the school district’s policy applied to any student who wanted to participate in extracurricular activities, such as FFA, band, choir, National Honor Society, and the like.

epidemic of drug use.”⁵⁷ According to the Court, this generalized evidence was sufficient government interest for a school district to protect children in its care from that drug-use epidemic. In doing so, the Court also necessarily diminished those children’s constitutional rights because of the unchallengeable assertion that a “student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety”⁵⁸ and “to prevent and deter the substantial harm of childhood drug use.”⁵⁹ By these pronouncements, the Court abandoned any objective standard of determining whether student searches have anything to do with the violation of school rules. Furthermore, the institutional mission to maintain order and control is subservient to the nearly limitless discretion afforded to the school’s “protective” function. Although *in loco parentis* power of schools historically derived from their disciplinary function, the Court in *Earls* appealed to the converse—the protective side of a parent’s role—for which there is little historical support, legal tradition, or case precedent—and certainly no norms.

What little legal precedent exists for this strange turn in the fortunes of the *in loco parentis* doctrine was fed in large measure by a First Amendment case. In fashioning this protective rationale in student search cases, the Court relied heavily on the *in loco parentis* doctrine set out in *Bethel School District No. 403 v. Fraser*.⁶⁰ *Fraser* involved a school district’s defense against a § 1983 suit brought by a student who had been disciplined for making a sexually suggestive campaign speech during a student assembly. In upholding the school district’s disciplinary action, the Court emphasized that schools acting *in loco parentis* must protect children from being exposed to indecent, lewd, or sexually explicit speech⁶¹ because schools’ educational mission is to “inculcat[e] fundamental values necessary to the maintenance of a democratic political system.”⁶² According to the Court, this role is an important government interest to be balanced against students’ First

57. *Id.* at 836. The school did put on evidence that there was illegal “drug use” in the school district but none that would target this particular student population. *Id.* at 834–35. Consequently, there could be no particularized suspicion of any individual’s being a drug user or rule violator, as required in *New Jersey v. T.L.O.*

58. *Id.* at 830.

59. *Id.* at 836.

60. 478 U.S. 675 (1986). Justice Scalia specifically quoted *Fraser*’s *in loco parentis* passage—taking some liberties with its actual usage—as part of the Court’s rationale in upholding the random drug-testing in *Vernonia*. *Vernonia*, 515 U.S. at 655.

61. *Fraser*, 478 U.S. at 684.

62. *Id.* at 681, 683.

Amendment rights.⁶³ This role gives a school district the sole discretion to determine what speech is appropriate to the school:

[S]chools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.⁶⁴

With little more government interest than this, the Court determined that the school had the better part of the balance against the First Amendment. This precedent, which touts the schools' parental and tutelary responsibilities, proved useful for balancing against students' Fourth Amendment rights in the student search cases and demonstrates how *in loco parentis* came to be resurrected.

Unfortunately, *in loco parentis* fails as a rational support for giving school boards the nearly unlimited discretion that courts persist in according them. It is chiefly a doctrine devised by the law that has little application to how education professionals actually do or should run their schools. The key to eliminating it, therefore, is to demonstrate how the legal interpretation of the doctrine is wrong, or at least has been misapplied in public education law.

III. *IN LOCO PARENTIS* "WOULD BE ENORMOUSLY IMPROVED BY DEATH"⁶⁵

As a preliminary matter, any knowledge that teachers and school administrators have about *in loco parentis* likely has more to do with their experiences as undergraduate students than from information intentionally conveyed to them during a teacher training program. Indeed, there is little literature that instructs teachers how to act *in loco parentis*. An informal Internet search revealed primarily materials

63. "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." *Id.* at 681.

64. *Id.* at 683. The Court made particular note that U.S. Senators have been censured for abusive language on the floor and likened schools to the Senate: why should students have more freedoms than U.S. Senators? *Id.* at 682. Since then, of course, we have had a Vice President utter an obscenity—"F@*# you!"—on the floor of the chamber to a sitting Senator without repercussion. Helen Dewar & Dana Milbank, *Cheney Dismisses Critic with Obscenity*, WASH. POST, June 25, 2004, at A4.

65. H.H. MUNRO ("Saki"), *The Feast of Nemesis*, in *THE COMPLETE WORKS OF SAKI* 322 (Doubleday & Co. 1976).

relating to legal decisions. A cursory glance through contemporary books on education history and strategies yielded a similar conclusion. The only references to *in loco parentis* are limited to matters of historical significance or legal opinions.⁶⁶ Some contemporary educational texts do not even list the Latinism in their indices.⁶⁷

For all the folderol that goes on in courts concerning *in loco parentis*, one would think that professional educators would be versed in this doctrine. That, however, is not the case. Indeed, a fairly recent, albeit small, survey of teachers indicated that many did not know what *in loco parentis* means; the majority of respondents stated that they had no right to react to students as a parent would.⁶⁸ A more comprehensive survey is likely unnecessary to conclude that educators do not rely on the *in loco parentis* doctrine because it is meaningless to them. Perhaps the lack of familiarity exists because the phrase has a meaning pertinent only to the law and not useful to professional educators.⁶⁹ As a term of art, it provides teachers no guidance in classroom management, and professional educators would not touch the doctrine with a ten-foot barge pole because it is descriptive, not normative. It is a legalism not modern reality.

In loco parentis lingers because it takes the burden off courts from questioning the discretion of school board decisions. Ironically, the doctrine only reached that evolutionary stage by misinterpreting Blackstone's use of the Latinism, by limiting it to school discipline without regard to the obligations imposed by standing "in the place of a parent."

66. See, e.g., RODGER W. BYBEE & E. GORDON GEE, VIOLENCE, VALUES, AND JUSTICE IN THE SCHOOLS (1982) (history); JOAN C. HARLAN & SIDNEY T. ROWLAND, BEHAVIOR MANAGEMENT STRATEGIES FOR TEACHERS: ACHIEVING INSTRUCTIONAL EFFECTIVENESS, STUDENT SUCCESS, AND STUDENT MOTIVATION—EVERY TEACHER AND ANY STUDENT CAN! (Charles C. Thomas, 2d ed. 2002) (legal).

67. See, e.g., RALPH M. GERSTEIN & LOIS A. GERSTEIN, EDUCATION LAW: AN ESSENTIAL GUIDE FOR ATTORNEYS, TEACHERS, ADMINISTRATORS, PARENTS AND STUDENTS (2d ed. 2007); THE SAGE HANDBOOK OF EDUCATIONAL LEADERSHIP: ADVANCES IN THEORY, RESEARCH, AND PRACTICE (Fenwick W. English ed., 2005); R. MURRAY THOMAS, WHAT SCHOOLS BAN AND WHY (2008); WAYNE J. URBAN & JENNINGS L. WAGONER, JR., AMERICAN EDUCATION: A HISTORY (Routledge 4th ed. 2009).

68. Anthony E. Conte, *In Loco Parentis: Alive and Well*, 121 EDUC. 195, 196–97 (2000). The survey seems a bit misdirected. The thesis is good: how to improve educator-parent collaborations. But couching that thesis based on whether teachers are or are not familiar with the legal parameters of *in loco parentis* seems a bit tangential, particularly when the author of the survey noted that only about 18.3% of respondents had discussed the doctrine in their teacher preparation programs. *Id.* at 198–99. One of the conclusions that perhaps would have been more valid is that, if *in loco parentis* is not being taught in teacher preparation courses, there might be a good reason not to.

69. This legalistic usage of the Latinism may be similar to that attributable to "insanity" and its distinctive use by the legal profession but not by the medical profession. See, e.g., Stanley Fish, *Empathy and the Law*, N.Y. TIMES, May 24, 2009, <http://fish.blogs.nytimes.com/2009/05/24/empathy-and-the-law/?ref=opinion>.

A. What Blackstone Really Meant

It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

—Oliver Wendell Holmes, Jr.⁷⁰

Perhaps the starting point in unraveling the erroneous interpretation of Blackstone's *in loco parentis* doctrine and tracing it to its current revival is to discern what parental rights and responsibilities might inform *in loco parentis*, even as a descriptive as opposed to normative standard. Until recently, parents' rights over their children were almost limitless in the United States, and individual states were loath to interfere in the parent-child relationship.⁷¹ The legal authority of a parent over a child was virtually unquestioned because that authority was "understood to be grounded in natural law and . . . not dependent on behavior that promoted the child's interest."⁷² Even today, legal treatment of the parent-child relationship remains mired in ancient tradition and "accords unwarranted legal protection to biological parents in ways that are both directly harmful and symbolically corrosive to the interests of their children."⁷³ Although it seems unlikely that parents would entrust their children to another so they could be used and abused in ways that are unquestioned by the law, this reluctance to interfere in the parent-child relationship could naturally be construed as inuring to one who is *in loco parentis*. So the historical perspective points to the seeds of a school official's nearly unlimited discretion.

At the same time, the law has been slow to recognize parents' duties toward their children, the responsibility to protect and care for them. Depending upon the jurisdiction, criminal statutes have recognized a parental duty to protect by imposing sanctions for child neglect and child abuse.⁷⁴ Under tort law, an affirmative duty of a parent to protect

70. *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

71. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2407 (1995).

72. *Id.* at 2407.

73. *Id.* at 2406. One specific aspect that the courts and legislatures both have been loath to address is parental use of corporal punishment. Even in criminal cases, parents may have a "parental corporal punishment privilege" as a justification defense to criminal charges for using force against their children. "[T]he greatest problem emanating from the parental privilege to use disciplinary force is that in an attempt to accommodate traditional disciplinary practices, current standards hedge on the issue of whether parents can physically injure their child." Johnson, *supra* note 29, at 418.

74. Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311, 312-13 (2006).

a child has been slow to evolve. As the American Law Institute prepares to launch its new *Restatement (Third) of Torts*, it has noted that “there has been almost no judicial consideration of the affirmative duties of family members to each other.”⁷⁵ Consequently, we also have the seeds for a general reluctance to impose any duties on schools for the safety of the children in their charge.⁷⁶

So did Blackstone really mean, when he described the common law responsibilities of the teacher as *in loco parentis*, that teachers would have nearly unbridled discretion in the charge of children? His language suggests he did:

[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis,

75. *Id.* at 316. The American Law Institute further stated that “a number of . . . courts do not view the parent’s duty to the child as an affirmative one.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40, cmt. o, Reporter’s Notes (Proposed Final Draft No. 1, April 6, 2005). Ironically, the *Restatement (Third) of Torts* does acknowledge that there might be an affirmative duty between a parent and minor child under a custodial duty, but not necessarily as a special parent-child relationship. *Id.* at cmt. n. The custodial duty would generally recognize an affirmative duty of a custodian to one in custody, such as children in day-care, prisoners, hospital patients, children in summer camp, and the like. *Id.* at cmt. n, Reporter’s Notes.

This attitude may go a long way toward explaining the near dearth of parental duties to children mentioned in leading literature that espouses parental rights in the education of their children. See, e.g., Tara Dahl, *Surveys in America’s Classrooms: How Much Do Parents Really Know?*, 37 J. L. & EDUC. 143, 148–49 (2008) (author posits a general parental duty to provide education without any enforceable rights in children or from the state); Linda L. Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY’S L.J. 611 (2001); see also Eric A. Degroff, *Parental Rights and Public School Curricula: Revisiting Mozart after 20 Years*, 38 J.L. & EDUC. 83, 108–12 (2009). Degroff makes a persuasive case that legal scholars imposed a duty upon parents to provide children with an education, particularly from English philosophers and scholars. But he makes no persuasive case that parents have ever been held accountable for that duty. Indeed, he concedes that point when he states that parents will be held accountable for breach of that duty only if there is a “clear omission.” *Id.* at 112. He merely uses the duty as a neat segue to his primary thesis that parents’ rights to control education are fundamental. *Id.* at 110–11. Implicitly, his posture seems to illustrate the concern that Justice Douglas expressed in *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J. dissenting in part):

Our opinions are full of talk about the power of the parents over the child’s education And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.

Furthermore, a duty to provide an education is easily confused with the parental right to direct a child’s upbringing. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

76. As it turns out, of course, courts are also reluctant to impose a duty to protect on schools. At most, they will impose a duty to supervise, but because of the exigencies of the nature and of the number of children under their care, school districts generally do not have a duty to protect. They clearly have no constitutional duty to protect if courts follow *DeShaney* in the school context. The *Restatement (Third) of Torts*, however, recognizes a special student–school relationship that may alter that notion a bit. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 (Proposed Final Draft No. 1, April 6, 2005).

and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.⁷⁷

Parsing the meaning of any common law doctrine is often difficult. Unlike statutes—in which legislators presumably have chosen precise words that courts can interpret—the common law is usually gleaned from the ideas that the words are intended to convey. What is clear is that Blackstone was not any more specific about what he meant by *in loco parentis* than what we know about parental rights. If we examine the text no further, we find no outermost limits to the relationship of the teacher to the child than we do about the relationship of the parent to the child, at least from this minimal fraction of Blackstone's work that has been quoted time and again as the foundation for court decisions about student–school relationships.

Two options remain: we can examine the context of Blackstone's *in loco parentis* provision, and we can examine how courts have interpreted that provision. In examining both, we find that *in loco parentis* is out-dated (if it was ever proper) and is useless in guiding either courts or schools.

First, the context of Blackstone's statement is both textual—where in his *Commentaries* it arises—and temporal—when it was written. Textually, Blackstone's *in loco parentis* pronouncement appears in Book 1, *The Rights of Persons*, in Chapter Sixteen, “Of Parent and Child.” In that chapter, Blackstone related the civil law principle that a man who has children has the duty to provide maintenance if they cannot otherwise provide for themselves.⁷⁸ Their protection, while not required, is permitted by law.⁷⁹ Blackstone also posited that parents have a duty to educate their children suitably to their station in life but acknowledged that the law of England articulated that duty in only two instances: apprenticeship education of the poor and penalties on parents who sent their children out of England for a Roman Catholic education.⁸⁰ Otherwise, only natural law suggested that parents educate their children or face the consequences of being saddled with uneducated issue.⁸¹

Concurrent with these parental duties, Blackstone described the legal foundation for parental powers: “The power of parents over their

77. BLACKSTONE, *supra* note 20, at *441.

78. BLACKSTONE, *supra* note 20, at *436–37.

79. *Id.* at *438.

80. *Id.* at *439.

81. *Id.* Consequently, “[t]he rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family.” *Id.*

children is derived from the former consideration, their duty; this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it.”⁸² Although an ancient Roman father had the power of life and death over his children, a contemporary English father had power “much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education.”⁸³ Although Blackstone placed his provision for *in loco parentis* within this description of parental power,⁸⁴ the overall context places Blackstone’s reference to *in loco parentis* as equally referring to both duties and powers of parents to be placed in the hands of the “tutor or schoolmaster” as it can to being limited to just a delegation of disciplinary power. The conjunction “and” and the limiting phrase “as may be necessary to answer the purposes for which he is employed” suggest that the last phrase of Blackstone’s charge merely limits the disciplinary power of the schoolmaster or tutor without otherwise diminishing the parental duties of support and protection that he—the schoolmaster or tutor—must likewise undertake.

The latter and broader interpretation makes more sense in the temporal context than the narrow limits courts have attributed to the doctrine as applying to disciplinary power only. This interpretation is also congruent with the contemporary treatment of apprenticeships. The apprenticeship programs were a transfer of parental custody of a child to a master, who stood *in loco parentis* to the child and “provid[ed] education and support in return for the minor’s labor.”⁸⁵ Thus, the *in loco parentis* doctrine for apprenticeship educational programs was not confined to the master’s capacity to discipline the apprentice. Masters also had an enforceable duty to provide education and support to their apprentices. Indeed, one U.S. court ruled that an “[a]pprenticeship would remain a binding indenture that required education and support in return for labor”⁸⁶ because the master’s “responsibilities existed independently from [the apprentice’s] ability to work for him.”⁸⁷ Thus,

82. *Id.* at *440.

83. *Id.* (footnote omitted)

84. The doctrine is hard on the heels of Blackstone’s assertion that the “power” of the parent extends even beyond death so that he may, by his will, appoint a guardian for his children. *Id.* at *441.

85. James D. Schmidt, “Restless Movements Characteristic of Childhood”: The Legal Construction of Child Labor in Nineteenth-Century Massachusetts, 23 LAW & HIST. REV. 315, 320 (2005). As Blackstone pointed out, apprenticeships were generally used by the poor for educational purposes. See *supra* note 80 and accompanying text.

86. Schmidt, *supra* note 85, at 321.

87. *Id.* at 322.

in the temporal context of Blackstone's authorship, the common understanding of *in loco parentis*—even in the United States—extended beyond parental discipline.

Blackstone's application of *in loco parentis* to schoolmasters and tutors likely would not have been much different than that commonly given in apprenticeship programs. He wrote the *Commentaries* in the mid-eighteenth century when English schools were not creatures of the state.⁸⁸ When the rich exercised their "natural" duty to educate, they voluntarily exercised that right, rather than being mandated by the state. Their educational options were also not state-run; Parliament considered education voluntary.⁸⁹ Around that time, England provided education in a variety of organizational forms,⁹⁰ the most common of which included home instruction; Dame Schools; Latin Grammar schools; "public" schools; and universities.⁹¹ None of these options were large institutions—except perhaps the universities—and, in many respects, relied upon either in-house or residential instruction.⁹²

Blackstone was not an ardent supporter of state-run education.⁹³ Although he was considered instrumental in the movement of reform-minded, eighteenth-century England, the underlying "philosophy was predominantly individualistic and utilitarian."⁹⁴ Hence, two of his sons attended Cheam, a private classical⁹⁵ boarding school "where the Master

88. FREDERICK EBY, *THE DEVELOPMENT OF MODERN EDUCATION: IN THEORY, ORGANIZATION, AND PRACTICE* 266 (2d ed. 1952); NICHOLAS HANS, *NEW TRENDS IN EDUCATION IN THE EIGHTEENTH CENTURY* 15 (1951).

89. EBY, *supra* note 88, at 266.

90. HANS, *supra* note 88, at 17–24.

91. Home instruction consisted of private tutors for older children and nurses for younger children. Dame Schools were "a combination nursery and primary school conducted by a mistress who divided her time between teaching and domestic tasks." EBY, *supra* note 88, at 267. The "dames" running the schools often could barely read and write, and their primary educational goals were to teach religious passages, the alphabet, and easy words for reading. The Latin grammar schools, although becoming obsolete, focused on a classical education based on learning Latin. *Id.* at 90, 268. By the eighteenth century, only the rich could afford the nurses and tutors necessary for children to succeed at the Latin grammar schools. The "great public schools" established in England were boarding schools, often affiliated with a college. Although at first formed for the education of poor boys, they eventually became the bastions of the aristocracy. *Id.* at 38; HANS, *supra* note 88, at 17–19. And, of course, higher education was offered by Oxford and Cambridge, which at that time "did not look upon the advancement of knowledge as one of their functions." EBY, *supra* note 88, at 268.

92. Similarly, private school options were the only educational opportunities in colonial North America. *See, e.g.*, BYBEE & GEE, *supra* note 66, at 24–25.

93. EBY, *supra* note 88, at 372.

94. *Id.* Although the eighteenth century saw England in a period of transition with regard to reforming education, those reforms were slow to gain traction, particularly because of the English character of the time: "While politically democratic, they were economically individualistic and socially worshipers of aristocracy." *Id.* at 370.

95. HANS, *supra* note 88, at 117, 123. These boarding schools grew up in opposition to the classical Latin grammar schools and their teaching methods. "Most teachers [in Latin schools] had

himself boarded the boys and was more of a ‘paterfamilias’ than the distant demi-god of a large public institution.”⁹⁶ Blackstone’s *in loco parentis* charge therefore must be understood to mean that a parent may transfer authority over the child to a tutor (typically employed in the household) or schoolmaster (of a boarding school). And in this temporal context, Blackstone likely meant that when a parent contracted for these residential arrangements for a tutor or schoolmaster, parents were conveying both welfare and tutelary responsibilities, not just disciplinary duties. Indeed, English education law did not confine the *in loco parentis* doctrine to disciplinary authority but interpreted this parental delegation also to require that the schoolmaster act as a “reasonably prudent and careful parent.”⁹⁷ In fact, under English law, Blackstone’s *in loco parentis* imposed duties on the teacher that might exceed those of the parent.⁹⁸ But this is not how U.S. courts have interpreted or used *in loco parentis*.

B. How U.S. Courts Got It Wrong

[We] have really everything in common with America nowadays, except, of course, language.

—Oscar Wilde⁹⁹

Although giving frequent lip-service to Blackstone’s *in loco parentis* doctrine, U.S. courts never adopted the accurate common law tradition in public education—though they did for higher education.¹⁰⁰ First,

neither method nor sound learning themselves, but they knew how to beat the child without mercy.” EBY, *supra* note 88, at 126.

96. HANS, *supra* note 88, at 117.

97. Hogan & Schwartz, *supra* note 20, at 263; see *Starr v. Crone*, (1950) 4 D.L.R. 433, citing to *Williams v. Eady*, (1893) 10 T.L.R. 41, for the standard. See also *Myers v. Peel* (County Bd. of Educ.), (1981) 123 D.L.R. (3d) 1. Courts in New York have used the standard of “a parent of ordinary prudence” but in the context of defining a teacher’s duty of supervision. E.g., *Lawes v. Bd. of Educ.*, 213 N.E.2d 667, 668 (N.Y. 1965); *Ohman v. Bd. of Educ.*, 90 N.E.2d 474, 475 (N.Y. 1949). As further discussed, *infra*, the duty of supervision in U.S. public education law does not rise to a level of duty to protect and is conceptually separate from *in loco parentis*.

98. Hogan & Schwartz, *supra* note 20, at 264; see generally Jean LeDrew Metcalfe, “[T]here could not be a better definition”: A Defence of the Careful or Prudent Parent Standard, 13 EDUC. & L.J. 257 (2003).

99. OSCAR WILDE, *The Canterville Ghost*, in LORD ARTHUR SAVILE’S CRIME AND OTHER STORIES 89, 94 (1891).

100. *In loco parentis* in higher education recognized the college’s duty to protect student welfare. See W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Nonprofit Organization to Support Student-Athletes*, 35 IND. L. REV. 851, 856–58 (2002); Theodore C. Stamatokos, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65

U.S. public education law cases misinterpreted *in loco parentis* to mean a transfer of only the parent's disciplinary authority without the concomitant welfare duty, unlike the English cases. In the alternative, even if not misinterpreted, *in loco parentis* is not the appropriate standard to use in a state-run public institution governed by compulsory education laws. As a consequence of either problem, the doctrine's resurrection from its late-twentieth-century doldrums was based on outdated, outmoded, and unworkable reasoning.

First, courts in the United States never really adopted *in loco parentis* as a usable doctrine of behavior for professional educators but merely as a convenient legal Latinism for something distinct from Blackstone's meaning. Courts used the doctrine almost exclusively to justify school discipline. As noted above, *in loco parentis* was the foundation for cases examining corporal punishment and student searches in the United States.¹⁰¹ In formulating that foundation, courts latched onto Blackstone's reference to "restraint and correction" as the underlying delegation of a single power.¹⁰² Perhaps for those colonial schools in the same temporal context as Blackstone's, adopting *in loco parentis* might have made sense as the only available resource for legal authority. But then courts did not also invoke the doctrine to hold public schools accountable for the welfare of students.

Unlike English courts, U.S. courts have not recognized a reasonable parental duty that teachers have over the welfare of their students. A very few cases—and a smaller number of jurisdictions—have recognized some form of duty to students that ostensibly arises from *in loco parentis*.¹⁰³ That duty, however, was not based on the welfare of the child but rather on the teacher's obligation to provide education and training.¹⁰⁴ Courts were not willing to let teachers completely off the hook for their responsibilities to students under the law, as parents might be, but they were loath to impose a high level of responsibility on

IND. L.J. 471, 473 (1990); see also Gavin Henning, *Is In Consortio Cum Parentibus the New In Loco Parentis?*, 44 NASPA J. 538, 539–40 (2007). The progenitor case, *Gott v. Berea College*, 161 S.W. 204 (Ky. 1913), "suggests that the *in loco parentis* doctrine imposes a duty to protect the physical welfare of students." Stamatokos, *supra*, at 474. It has been suggested that the adoption of this familial model of higher education, based on *in loco parentis*, was a result of U.S. institutions' efforts to imitate the educational organizations of Oxford and Cambridge. Jackson, *supra* note 20, at 1135–36. *In loco parentis* at the higher education level exhibited four different types of power wielded by colleges and universities: the power to direct student behavior; the power to punish; the responsibility of care; and partial immunity from limits on student searches. HOEKEMA, *supra* note 36, at 27–28.

101. Zirkel & Reichner, *supra* note 15, at 273; Hogan & Schwartz, *supra* note 20, at 262–63, 265–68.

102. DeMitchell, *supra* note 20, at 19.

103. See generally Zirkel & Reichner, *supra* note 15, at 279–81.

104. *Id.* at 280.

teachers.¹⁰⁵ As a consequence, most jurisdictions that have weighed in on the issue typically hold that a teacher only has a duty of supervision, not a duty to the child's welfare.¹⁰⁶ In fact, the current trend seems to be moving away from ensuring that students learn in a safe environment to imposing liability only if the teacher's behavior constitutes wanton or willful misconduct.¹⁰⁷ Thus, U.S. courts did not properly adopt the *in loco parentis* doctrine as likely envisioned by Blackstone to include both the welfare and disciplinary powers of the parent.¹⁰⁸

In the alternative, even if U.S. courts had fully embraced *in loco parentis*, it is now obsolete. Current compulsory education laws require parental delegation of their educational responsibility.¹⁰⁹ The Supreme Court even cited this involuntary delegation as a rationale for moving away from *in loco parentis* as the justification for corporal punishment:

Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view more consonant with compulsory education laws that the State itself may impose such corporal punishment as is reasonably necessary "for the proper education of the child and for the maintenance of group discipline."¹¹⁰

105. *Id.* at 280.

106. "All teachers and administrators are expected to provide reasonable supervision of students under their charge." NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* 113 (1999). This duty of supervision presumably arose out of *in loco parentis*. *Id.* at 116. But schools are not insurers of student safety. Teachers only need act as a prudent person would under the circumstances. GERSTEIN & GERSTEIN, *supra* note 67, at 228. One author suggests that *in loco parentis* as adopted by U.S. courts embraces the duty to protect. DeMitchell, *supra* note 20, at 23–26; see also Peter Gallagher, Note, *The Kids Aren't Alright: Why Courts Should Impose a Constitutional Duty on Schools to Protect Students*, 8 GEO. J. ON POVERTY L. & POL'Y 377 (2001). That author, however, relied on the Supreme Court rationales in its controversial student search cases. Those rationales are primarily nonstarters in any legal sense because no other court in the country has recognized the duty to protect students, and the Court itself refuses to recognize any constitutional duty to protect.

107. See Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 688 (2004).

108. A couple of mid-twentieth-century U.S. cases seem to posit the reasonable, prudent parent standard to protect children. Hogan & Schwartz, *supra* note 20, at 263–64. Closer examination of those cases, however, reveals a closer kinship to the duty to supervise than a duty to protect. See *Ohman v. Bd. of Educ. of City of New York*, 90 N.E.2d 474, 475 (N.Y. 1949); *Hoose v. Drumm*, 22 N.E.2d 233, 234 (N.Y. 1939).

109. See generally Hogan & Schwartz, *supra* note 20, at 268.

110. *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (footnote omitted). Another court expressed it this way:

[I]n a compulsory education system, the parent does not voluntarily yield his authority over the child to the school, so the concept of delegated authority is of little use. We agree with most courts that school officials have special duties with associated powers, but we prefer not to tie them to the *in loco parentis* doctrine. Instead we view the school

In fact, the Court's *New Jersey v. T.L.O.* student search opinion seemed to have put the doctrine to bed in 1985: "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated education and disciplinary policies."¹¹¹

New Jersey v. T.L.O. was a perfect opportunity to kill *in loco parentis* in its tracks. What does this doctrine—interpreted to deal with disciplinary measures—have to do with a student search? Searches are not disciplinary measures like corporal punishment although punishment may arise from the fruits of the search. Instead, searches are a police function—perhaps a uniquely institutional function—designed to create a safe educational environment, not a parental function delegated to the school. Regardless, the Supreme Court has staked its claim to revive *in loco parentis* to student searches.

On the heels of *New Jersey v. T.L.O.* and during the mid-1980s, some authorities suggested that the *in loco parentis* doctrine was dead or at least so weakened that it soon would be.¹¹² But these authorities had not counted on the Supreme Court's desire to take part in the War on Drugs. The revival of the doctrine, as recounted above in *Vernonia* and *Earls*, is not without logic. The Court seems to view its role as that of a parent, or in any event, views hierarchical managers—especially governmental managers—as having superior abilities by the mere virtue of being managers. Their decisions are unquestionably correct.¹¹³ This reverence for school officials is doubly enticing because of the historical reliance on *in loco parentis* as the source of school authority. Never mind that modern educational managers have moved to more professional standards; it has become a doctrine of convenience to justify the Court's allowing school officials to wield discretion with little oversight.

Even the Court's recent rationale is not in keeping with the *in loco parentis* doctrine. If one relies on Blackstone's version of the

as a special situation, in the same way that the border or an airport presents a special situation

Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 481 n.18 (5th Cir. 1982) (citations omitted); Hogan & Schwartz, *supra* note 20, at 268.

111. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); see Hogan & Schwartz, *supra* note 20, at 269–70.

112. Hogan & Schwartz, *supra* note 20, at 269–70; Zirkel & Reichner, *supra* note 15, at 282. And it is pretty much dead at the higher education level where, in fact, the doctrine made a great deal more sense. E.g., Henning, *supra* note 100, at 541; Stamatakos, *supra* note 100, at 474–76. *But see* Randall Bowden, *Evolution of Responsibility: From In Loco Parentis to Ad Meliora Vertamur*, 127 EDUC. 480 (2007).

113. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

doctrine—which the Court did in the recent cases—then the delegation of the power should be confined to a particular child and a search of that child. As a result, the Court has reasoned that *in loco parentis* is the appropriate doctrine to protect *other* children. Unless there is a tutelary lesson given to the searched (or “disciplined”) child, the school officials are searching on behalf of *third parties*. A parent’s delegation of power would not, logically, cover that analysis. Searching a student for the health and safety of the student body and the educational environment is an institutional goal, not a delegation of power from a parent. It may be a valid goal but is not sanctioned by the *in loco parentis* doctrine.¹¹⁴ The parental equivalent is a mother’s searching the *neighbor* children before they can play with *her* children. The second logical problem is, of course, that parents are the ones who sue school districts for student search problems because they are *not* happy with the way schools are conducting themselves vis à vis their children: “In the absence of any other justification, the doctrine of *in loco parentis* has no applicability where, as here, the parents agree with the child rather than the school.”¹¹⁵

In addition, the Court’s rationale is not based on the U.S. version of *in loco parentis*, which does not acknowledge a duty to protect. Not only have all other U.S. courts to date shied away from imposing that duty under *in loco parentis*, most states’ common law traditions impose on teachers nothing greater than a duty to supervise, which implies an institutional obligation, and not a duty to protect, which implies a more personal, individualized obligation more akin to *in loco parentis*.

But that did not stop the Court’s most recent evocation of the *in loco parentis* doctrine, which exemplifies how far the Court is willing to rely on the doctrine, in *Morse v. Frederick*.¹¹⁶ Although backing away from actually stipulating that *in loco parentis* was the basis for its decision, the Court piggy-backed all the reasoning of its recent drug search cases to justify the discipline meted out by a school principal against a student who refused to comply with the principal’s order to remove a banner at an off-campus, but school-sanctioned, event. The banner read “BONG HiTS 4 JESUS” so the principal couched her action in a school district policy that forbade public student expression that advocated illegal drug

114. *But see* BYBEE & GEE, *supra* note 66, at 64–65 (“[T]he doctrine of *in loco parentis* . . . supports the notion that to maintain its effectiveness, education must be free of the enforcement of individual rights guaranteed to citizens in general.”).

115. *Karr v. Schmidt*, 320 F. Supp. 728, 734 n.19 (W.D. Tex. 1970) *rev’d on other grounds*, 460 F.2d 609 (5th Cir. 1972); *Breen v. Kahl*, 419 F.2d 1034, 1037–38 (7th Cir. 1969); Zirkel & Reichner, *supra* note 15, at 270.

116. 551 U.S. 393 (2007).

use.¹¹⁷ The case was postured in such a way that the Court could have relied on the disciplinary function of *in loco parentis*, but in doing so, the Court could not have created a blanket ban on drug-related speech, regardless of a school district's disciplinary rules.

Setting aside whether the Court majority really thought the banner promoted illegal drug use,¹¹⁸ the Court had to fumble its way to a resolution that would put the Court's imprimatur on this censorship. Of course, the Court majority's primary goal was to walk back the undeniably long-lasting impact of *Tinker v. Des Moines Independent Community School District*.¹¹⁹ But in doing so in *Morse*, the Court could not decide whether the school district's role in limiting speech hung on its disciplinary power—the principal was compelled to act because the banner was “in violation of established school policy”¹²⁰—or its protective duty—“[s]tudent speech celebrating illegal drug use at a school event . . . poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.”¹²¹ Although not explicitly endorsing *in loco parentis*,¹²² the Court supplanted it with something equally amorphous: that the “special characteristics of the school environment”¹²³ empower school districts

117. *Id.* at 397–98.

118. What if the banner had said “DiNKY HOCKER SHOOTS SMACK”? This is no less nonsensical and attention-getting than the banner, but then the Court would run into the problem of censoring the title of a young adult novel that is touted as one of the most influential of the twentieth century. See M.E. KERR, *DINKY HOCKER SHOOTS SMACK* (HarperTeen 1989); *One Hundred Books that Shaped the Century*, SCH. LIBRARY J. (Jan. 1, 2000), <http://www.schoollibraryjournal.com/index.asp?layout=article&articleId=CA153035&q=dinky+hocker+shoots+smack>.

119. 393 U.S. 503 (1969).

120. *Morse*, 551 U.S. at 398. “*In loco parentis* has been used to justify school rules in general.” Zirkel & Reichner, *supra* note 15, at 278.

121. *Morse*, 551 U.S. at 408. “[S]chool boards know that peer pressure is perhaps ‘the single most important factor leading schoolchildren to take drugs,’ and that students are more likely to use drugs when the norms in school appear to tolerate such behavior.” *Id.* One author suggests that the *Morse* Court placed too great an emphasis on protection when the purpose of a democratic education is preparation. Andrea Kayne Kaufman, *What Would Harry Potter Say about BONG HiTS 4 JESUS? Morse v. Frederick and the Democratic Implications of Using In Loco Parentis to Subordinate Tinker and Curtail Student Speech*, 32 OKLA. CITY U. L. REV. 461, 462 (2008).

122. On the other hand, Justice Thomas's concurring opinion clearly supports a return to and strengthening of *in loco parentis* disciplinary powers in the schools. “In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.” *Morse*, 551 U.S. at 412 (Thomas, J., concurring). As a consequence, Justice Thomas would defer completely to the decisions of schools and not protect student speech at all. *Id.* at 421. A recent analysis suggests that Thomas's dissent is historically inaccurate and merely “restorative nostalgia.” David Blacker, *An Unreasonable Argument Against Student Free Speech*, 59 EDUC. THEORY 123, 137–42 (2009).

123. *Morse*, 551 U.S. at 408 (majority opinion). This “test” enunciated in *Morse*—“special

“to determine ‘what manner of speech in the classroom or in school assembly is inappropriate.’”¹²⁴ Even if the Court implied in *Morse* that it abandoned its strange version of *in loco parentis*, all it did was put a different mask on it without providing any normative guidance to schools. Perhaps that was the point.

Given their reliance on this vague and merely descriptive principle, courts have given school officials carte blanche to treat students in a way that does not comport with good educational practice. As a consequence, school districts believe it completely appropriate to strip-search a female middle-school student to find prescription strength ibuprofen with no evidence that the student might even have such pills, much less in her underwear.¹²⁵ That this case wound its controversial way to the Supreme Court is astounding.

Of course, lawyers are to blame for these problems. Professional educators, for the most part, have never assumed that they have discretion to do as they please with children’s rights. Unfortunately, the occasional school official does, and the courts approve that behavior, reducing both students’ rights and their teachers’ duties to a caricature, like Washington Irving’s Ichabod Crane.¹²⁶ If the lawyers would listen to the educators, they might learn about professional norms and the outer boundaries of institutional behavior.

IV. RELYING ON THE EXPERTS

Upon the subject of education . . . I can only say that I view it as the most important subject which we as a people may be engaged in.

—Abraham Lincoln¹²⁷

Rigidly applying *in loco parentis* to public schools comforted courts that they were not stepping on schools’ discretion. The result, however, has been an abandonment of the law to the vagaries of school officials

characteristics of the school environment”—is hardly better than *in loco parentis*: it maintains the reality of the *in loco parentis* test with a façade of having some kind of “educational” quality to it. Indeed, the *Morse* decision would have been better served by simply noting that the school had a disciplinary rule in place rather than suggesting that all speech that has something to do with drugs is anathema to the “special characteristics of the school environment.”

124. *Id.* at 404.

125. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642–43 (2009).

126. *See* WASHINGTON IRVING, *THE LEGEND OF SLEEPY HOLLOW* (David McKay Co. 1928) (1820).

127. Abraham Lincoln, *First Political Announcement*, Mar. 9, 1832, available at <http://showcase.netins.net/web/creative/lincoln/speeches/1832.htm>.

who have no guidance from the courts. As a consequence, courts determine what *in loco parentis* means on an ad hoc basis rather than on a consistent and rational basis of judging the performance of school districts and their employees, especially in light of students' individual rights. *In loco parentis* has always been about the outer limits of power, not how to run an institution. Retaining that analysis has benefited school boards and school officials who have tested those outer boundaries of conduct. This is not to say that those outer boundaries should not be tested nor that problematic litigation does not sometimes lie at the feet of litigious parents. But more than a fair number of public education cases that have reached the appellate courts arose because of extreme behavior by school officials. In an inordinate number of cases, that behavior has been sanctioned by courts that treat those decisions with undue respect.

The consequences for students have been enormous, from increasing restrictions on student speech to loosening restrictions on how schools can conduct student searches. Schools have been given license to reach the outer boundaries of control by courts' countenancing institutional and official behavior that is farther and farther from the reaches of professional conduct. Conversely, students do not enjoy the concomitant protections for their safety in such things as sexual harassment and bullying. While schools are afforded greater protections from liability for affirmative disciplinary actions, they are also afforded greater protections when they fail to protect students because protecting students is not within the purview of this U.S. version of *in loco parentis*. In other words, the courts—and the Supreme Court in particular—are making law in accord with ill-advised school administrators, not good school administrators.

In loco parentis has been rekindled for a couple of reasons. First, it is a familiar doctrine most adaptable to accommodating the outdated notion that schools are analogous to parenting so, if parents' duties and responsibilities have few limits, then schools' do too. As the reasoning goes, if the courts give schools all the power that parents have, then society will not have all these discipline problems. That is wishful thinking. Saying it does not make it so—and seems like legislating futilely from the bench. Exhorting good behavior from the bench does not translate well into the trenches. Discipline problems in schools are not so easily solved, and rewarding inappropriate educational administrative practices does not solve those discipline problems.

Second, schools are asked to do too much that is outside their original purview yet are constantly scrutinized by parents and other stakeholders. That courts give schools so little guidance on these legal matters is not

helpful. Schools are expected to do innumerable things that are essential to their charges' upbringing and future: "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."¹²⁸ To a certain degree, schools have been put in the position, by default, of being both parent and educator, but that position is not the same as being the parent with unlimited discretion. In addition, the government has imposed on schools the responsibility of being the drug police: "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs."¹²⁹ Along with multiple other federal and state statutes imposing duties that are not necessarily education-related, Congress imposed the disastrous No Child Left Behind Act, which—as if schools do not have enough to worry about—threatens schools with loss of funds if their students do not reach prescribed levels of proficiency in targeted academic disciplines.¹³⁰ Tack onto that a parental rights movement that feels an obligation to tell schools what to teach their children and a Court that recently devalued the government employee to voicelessness,¹³¹ it is a wonder there is anybody left who would want to teach at all.

Given these issues, it is surprising that more cases of bad school officials' behavior have not surfaced. Thus, if the cases the Court is deciding on this absurd proposition are the minority, what is the majority of school officials doing right? And if the majority is doing it right, should courts adopt their strategies as guidance for those who are not? Why not abandon the descriptive (and basically obsolete) doctrine of *in loco parentis* and follow a more normative standard by which schools

128. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

Today, education is perhaps the most important function of state and local governments. 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 required in the performance of our most basic public responsibilities, even service in the armed forces. 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. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

129. *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

130. Gershon M. Ratner, *Why the No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 UDC/DCSL L. REV. 1, 3–5, 8–9 (2007).

131. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); see Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281 (2008).

can anticipate how to govern themselves and parents have leverage when schools go astray?

Such a standard would derive not from a parental delegation of authority but from a *public* delegation of authority. The power of today's school district is no longer that of the personal and moral convictions that might have informed the schoolmaster in a one-room schoolhouse. Instead, "[t]oday's public school officials . . . act in furtherance of publicly mandated educational and disciplinary policies."¹³² These mandates, as well as the constructs endorsed by education, sociological, and psychological sources, would better serve students—and court decisions—by establishing the norms of acceptable school governance rather than by following the *in loco parentis* doctrine. At their best, these norms would keep school districts out of litigation. On the other hand, expert witnesses could establish such norms when a school district's abuse of those norms is in court.¹³³

Normative behavior is one of the fundamentals of teacher preparation. Teachers have norms to follow in measuring their students' achievement, to measure the effectiveness of their instruction, and in complying with state law certification, as well any other number of federal- and state-mandated standards. The No Child Left Behind Act is all about norms. Teachers have norms to follow in curriculum development, professional development, and classroom management. Teachers must follow standards and guidelines, and educational administrators are versed even more completely in normative behavior. Logging on to the website of any professional school of education reveals numerous courses devoted to norms.¹³⁴ Perhaps more specifically, national professional education and school board associations have codes of ethics that emphasize students' civil rights.¹³⁵

132. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

133. In fact, the Supreme Court recently relied on normative research from education experts to support its restrictions on strip searches: "The reasonableness of [Redding's] expectation . . . [of privacy] is indicated by the consistent experiences of other young people similarly searched . . . [A] number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be . . ." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2641–42 (2009).

134. *E.g.*, Ind. U. Sch. of Educ., Teacher Leader Program, <http://education.indiana.edu/elps/EducationalLeadership/TeacherLeaderProgram/tabid/10201/Default.aspx>; U. of Ill. Coll. of Educ., Educ. Org. & Leadership, <http://courses.illinois.edu/cis/2009/spring/schedule/EOL/index.html?skinId=2169>.

135. Nat'l Ass'n of Secondary Sch. Principals, Ethics for School Administrators, <http://www.principals.org/Content.aspx?topic=47104>; Nat'l Educ. Ass'n, Code of Ethics, <http://www.nea.org/home/30442.htm>; NAT'L SCH. BDS. ASS'N, CODE OF ETHICS FOR SCHOOL BOARD MEMBERS, <http://www.nsba.org/MainMenu/Governance/OtherBoardIssuesResourcesandReportsonSchoolGovernance/CodeofEthicsforSchoolBoardMembers.aspx>.

In light of this exposure, the suggestions that follow are not new to educational professionals although they might be strange and mysterious to some school boards and their lawyers. They are nevertheless much easier to follow and understand for teachers and school administrators. In addition, they conform to an institutional framework for guidance, not an ephemeral parental–custodial role. Schools have many more responsibilities and duties than parents so their norms must be institution-specific and reflective of professionally run enterprises, not of a loosely governed home-school paradigm. In acknowledgement of those realities, courts must move past Victorian (and even colonial) ideas of school organization and leadership and recognize school districts are entities that can follow, and would probably welcome, better legal guidance than the *in loco parentis* doctrine from the courts.

The following objective norms of educational professionalism may inform courts about what professional educators can do. Evidence of such norms would allow courts to judge school district behavior against an objective standard. Furthermore, these norms are widely accepted and can be attested to by an expert educational witness.

First, courts can judge schools by their rules. School districts must have an environment that reflects and enforces their rules. Indeed, the Supreme Court has acknowledged that behavior that violates school rules is an appropriate basis for discipline.¹³⁶ Most school districts strive for this type of environment because it is the only way the institution can survive. State statutes and regulations require such rules. School districts that fail to have a regularized disciplinary code and clear school rules should not be rewarded with an amorphous, discretionary standard under the “special characteristics of the school environment” test. That judicial test says nothing that professional educators do not already know and fails to establish guidelines. States require schools to draft rules of conduct, rules that provide notice to students of the behavior that will not be tolerated in school. These rules are usually formulated for student handbooks and distributed to students and parents each year for purposes of due process notice. Professional school districts do several things with those rules, which should be followed by all school districts: (1) The rules must be current with both the law and professional literature, and must go through the appropriate internal review process and, when necessary, the appropriate public review process for public comment; (2) counsel must regularly review the rules in light of the current law and the professional literature, and should explain what they mean to all the stakeholders; (3) the school district

136. *T.L.O.*, 469 U.S. at 336.

must assure the best method of dissemination of these rules to students and parents; and (4) teachers and staff must be familiar with the rules and be instructed on how they must enforce the rules. So long as the rules pass legal muster, the courts have better guidance about the school district's professionalism and leave little to the school district's unbridled discretion.

Second, the school districts must have an environment that reflects and enforces the basic welfare of their students. This objective leaves less discretion for the courts than appears at first blush. It means that school districts must draft not just standards for prohibiting bad behavior to avoid discipline, but also guidelines that reflect a higher order of behavior.¹³⁷ A school is fundamentally avoiding its basic educational mission if it does not have both aspirations and prohibitions for its students. These aspirations must reflect the needs of a safe environment and current civil rights laws. A school district that intends to defend its disciplinary actions as part of its educational mission must articulate that mission. That mission includes, as the Court has rightly suggested, that "schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."¹³⁸ The whole package is required, not just the disciplinary arm of the state but also the tutelary arm of the state. Again, most school districts understand the need for these aspirations, but they often fall short of following through. These policies, if put into evidence in court, would indicate whether the school district really is engaging in its educational mission and whether to give the school the benefit of the doubt when it comes before the court because of its disciplinary actions. These policies would allow courts to say with some authority that the schools' acts conform to professional educational standards.

Third, in the absence of a school rule that applies or might otherwise affect a constitutional right imbued on a student, the *Tinker* doctrine should be revived as a normative rule of school district conduct. If student behavior does not "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others,"¹³⁹ then the

137. See, e.g., BYBEE & GEE, *supra* note 66, at 217–44.

138. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)

139. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). The irony is that the Court is trying to move away from the *Tinker* rule for reasons that are not entirely clear but seem designed to give more flexibility for schools to do strange things in which the Court chooses not to interfere. The irony is that school districts are finding themselves having to go back to the *Tinker* model to deal with off-campus, online speech that does not otherwise come within the "special characteristics" of the institution nor otherwise have an immediate effect on the educational mission of the school but

school district must ignore the small stuff. Most school districts probably follow this rule of thumb anyway so why courts find it so difficult to apply to schools is a mystery. Students will not behave perfectly, and schools are prepared to deal with that truth, perhaps more so than courts. But making students subject to discipline that has no rationale is not a good model of school management. Why courts would assume that school districts would, similarly, behave better without clearer guidance is also perplexing. Besides, neither of these positions will force parents to become more involved in civilizing their children or imposing consequences for bad behavior at home. So long as schools are saddled with the task of “inculcating fundamental values necessary to the maintenance of a democratic political system,” they should have standards and guidelines that courts should require they follow in their disciplinary decisions.

A fourth objective guideline is reliance on best educational practices. These practices may be internal, institutional guidelines, but there are many professional education leaders and texts that outline how to run a good school. Accreditation agencies judge school districts’ best practices, and professional employees are subject to review on their best practices. The resources on these objective guidelines are easily accessible and easily understandable.¹⁴⁰ Thousands of school administrators follow them daily. Surely, school districts can explain these to courts so they can be understood.

The fifth, and overarching, principle is assessing the school district’s ability to conduct itself as a democratic institution. Indeed, the Court’s charge to schools in *Fraser* is to inculcate democratic principles in their students; democratic education is a primary function of schools. As a consequence, schools must “walk the walk.” This is not to say that courts can or should second-guess a school board’s organizational scheme, but if litigation arises because the school district has failed to conduct itself as a democratic institution, then the school board’s ability to run the institution becomes fair game. This objective norm is widely touted in the literature as one of the most effective ways to run a modern school district and anticipates a collaborative rather than a hierarchical organization, sharing leadership with community and institutional stakeholders.¹⁴¹ Not only does this model address many of the issues

that does have a disruptive impact on the school environment. The *Bethel* Court’s *in loco parentis* “basic educational mission” model is entirely unworkable in these circumstances, being descriptive rather than normative. *Fraser*, 478 U.S. at 685.

140. *E.g.*, N. CENT. ASS’N COMM’N ON ACCREDITATION AND SCH. IMPROVEMENT, ACCREDITATION STANDARDS FOR QUALITY SCHOOLS (2007), http://www.advanced-ed.org/accreditation/standards/advanced_school_standards.pdf.

141. *See, e.g.*, Frances K. Kochan & Cynthia J. Reed, *Collaborative Leadership, Community*

raised in the No Child Left Behind Act, but it could also weaken parental opposition to any particular policy or practice that might otherwise be litigated. In fact, this collaborative model is the only one that justifies the decision in *Vernonia*, that the school district collaborated with the community to come up with what most stakeholders believed was the best way to address a serious and rampant drug problem.¹⁴² Recognizing community standards of best practices would surely be a much more objective test of the validity of a school district's action than courts' continuing to limp along with the broad discretionary standard that sprouted from the equally vague *in loco parentis* doctrine.

These objective standards may be used singularly, in tandem, or for particular situations. They are not exclusive, and they might not be appropriate in all circumstances.¹⁴³ But they are all verifiable and subject to proof during the course of litigation. For example, plaintiffs' lawyers could call expert witnesses, from any school or department of education at a local university, to testify to the best practices of a well-run school district. Defense lawyers, if they want to justify the school district's behavior, might introduce guidelines to support its decision, although the likelihood of school boards wanting to voluntarily circumscribe their virtually unlimited discretion is probably remote. Proof of adherence to, or neglect of, these guidelines would be an issue of fact decided by the trier-of-fact to assess the reasonableness of school district behavior, particularly in balance against individual student rights. If the school district cannot offer proof of its professional school environment, then it probably cannot establish a government interest sufficient to override an individual student's rights. Judges may finally determine that the nearly unbridled discretion given to school boards is too broad as a matter of law.

Part of the problem is that lawyers involved in school litigation want to rely on legal concepts rather than concepts from other disciplines. That is why courts have been guided by *in loco parentis*, rather than something more practical. There may be any number of reasons for this preference although sheer convenience comes to mind. But the education profession does not run itself by *in loco parentis*. Courts

Building, and Democracy in Public Education, in SAGE HANDBOOK, *supra* note 67, at 68, 72–74.

142. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649–50 (1995).

143. Student searches, especially drug searches, are a unique species of problem that is beyond the scope of this Article. Briefly, however, student searches have become a police function that schools have undertaken, both voluntarily and involuntarily, and that implicate issues that are truly outside the educational mission of schools. Considering the massive amount of professional education literature available, there are likely any number of objective guidelines that school districts can and should follow without running afoul of either parents or the law.

should not assume so either.

V. CONCLUSION

Contrary to the authorities who declared the doctrine dead in the 1980s, *in loco parentis* remains alive and well, explicitly in student search cases and implicitly in student speech cases. The Supreme Court led this revival and has given little regard to the doctrine's irrelevance to contemporary public education. As the aphorism goes, "bad facts make bad law." And the revival of *in loco parentis* is mired in bad facts. Millions of schoolchildren have gone through the public schools in the past few decades, and hundreds of thousands of teachers and administrators have been involved with those students. In the greater scheme of things, relatively few disputes between schools and students reach the courts, particularly appellate courts. To reach such "rapprochement," something must be governing the student-school relationships in some predictable and noncontroversial fashion, some normative standard that schools, students, and parents use to dispose of these disputes.

Courts, however, have a difficult time deciding these disputes. When push comes to shove, they rely on a magnified discretion for school districts to know what is best for the educational mission of the schools. This discretion is, in no small measure, dependent on the doctrine of *in loco parentis*. Courts are unprepared to question school boards' authority for reasons that seem obscure, unless viewed from that perspective. Indeed, many cases are taken up on appeal, not because there are no institutional norms but because the cases and their facts are of such bizarre proportion that one wonders what the school board was thinking in letting it get that far. Perhaps other school administrators are thinking the same thing. Rather than regard these cases as outliers and as evidence of other administrative problems in the school district, courts are wont to be persuaded that these problems are so intractable that they are outside their judicial capacity. Of course, there are courts who invite that persuasion because it appeals to their sense that management is always right. In doing so, these courts put their imprimatur on these outliers and the outermost boundaries of collective institutional behavior, not based on any coherent standards but on some loosely defined doctrine that allows courts to throw up their collective hands and say, "We don't understand how to run schools so we won't interfere, regardless of what we really think."¹⁴⁴ This laissez-faire

144. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S.

judicial attitude invites other school districts to follow suit rather than maintain objective, professional norms. To the extent that *in loco parentis* is at the root of these problems, it should be put to death, quickly and now.

822, 838 (2002) (“In upholding the constitutionality of the Policy, *we express no opinion as to its wisdom*. Rather, we hold only that [the suspicionless drug-testing] Policy is a reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its schoolchildren.” (emphasis added)).

