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With Temperate Rod: Maintaining Academic Order in Secondary Schools

By ARNOLD TAYLOR*

FOREWORD

We are living in an era of truculence, especially among our youth. The truculent spirit is manifested in street clashes, campus disturbances, and classroom confrontations in our secondary schools. Both the action and reaction of, and to, these pupil protestations are as contemporary as the latest news bulletin. It is against this background of current conflict that the following article by Arnold Taylor on the authority and means of school officials to discipline secondary school pupils comes of age at the very hour of its literary birth.

I have become acutely aware of rapidly changing concepts not only in education proper, but also in the response of people, both pupils and parents, to established truisms of the past. These changing concepts are evident not only in the school, but also in the home. When I was a boy in the foothills of Lewis County, Kentucky, my grandmother wore her nightcap when she went to bed, she didn't take it. Friends would drop in for a call; now they call in for a drop. When a boy was in the principal's office, it meant the boy was in trouble. Now when a boy is in the principal's office, it means the principal is in trouble.

School administrators are confronted with a myriad of vexing problems running the gamut from pupil attire to violent physical attacks on both persons and property. Long hair, love beads, scooter skirts, short dresses, berets, beards, sex education, and sex without education have, and are, creating astronomical challenges to school officials across the country—challenges which

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not only would tax the wisdom of Solomon, but also would sorely tempt the patience and long suffering of Job.

Problems of this nature and magnitude are no strangers to secondary school administrators in Kentucky. Pupil demonstrations and disturbances in our secondary public schools have occurred *this* school year in Northern Kentucky, Jefferson County, and the Jackson Purchase. Other serious outbreaks have been averted by prompt and proper action of local school officials. Unfortunately, this may not be the end, but merely the commencement—only the beginning of the beginning.

It is imperative that school officials better acquaint themselves with the rudimentary requirements of the law. It is equally imperative that the courts establish these prerequisites in clear and cogent terms so that order and decorum may be maintained in the classroom as well as in the courtroom. It is to this desirable objective that I believe Mr. Taylor has fashioned his article.

The article contains an examination of the law on school discipline as it now exists; its application to both teachers and pupils; and possible legislative amendments to strengthen and improve this vital area of human relations.

I am sure that this article will be of interest not only to the members of the Bench and the Bar, but also to many of our secondary school administrators, especially those pursuing courses of study in our graduate schools. I would be more than willing to, and do, recommend it to their attention.

*Ray Corns***

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INTRODUCTION

Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him.

Proverbs 22:15

Biblical injunctions aside, this article will examine the extent to which secondary school authorities, particularly those in Kentucky, may regulate the behavior, activities and attitudes of their students. While certain of the legal principles described in this paper may well be applicable to other phases of the educational spectrum, it should be understood that this article does not attempt an application of those principles to grade school or university students. However, the article does intend to encompass all secondary schools, public or private.

The right of the school authorities to administer discipline is clearly a subject deserving discussion. Simply because student unrest has arisen mainly in the universities does not mean that seeds of disorder do not exist among people of high school age; their normal restiveness is support enough for this proposition. Youthful resentment of authority is always present, and society spends much time devising ways of keeping that antagonism at bay. But repression is never complete, and rebellion will eventually break out. The difference occurs in form: some destroy, others content themselves with aural or visual shock. The school authorities then exert their controls by imposing upon the individual the norms of the school community as interpreted by the authorities. Is this anything less than law enforcement? Yet, if we call this law *enforcement*, we presuppose a supporting body of rules and standards by which to judge the act. But if definite standards are created, the school authorities must be bound, as well as benefited, by them. So, the teacher, the superintendent, or the board members must be made aware of the extent to which he may exert disciplinary pressure, not only to enable him to preserve an academic atmosphere while honoring students' rights, but also for self-protection.

This, then, is the purpose of this article: first, to describe the law as it is; next, to inspect the effects of those legal rules upon school authorities, as well as students; and finally, to make some recommendations, on both a theoretical and practical level, with a view toward benefiting the parties involved. Initially, this

article will discuss the jurisdictional bases by which school authorities are deemed to have disciplinary rights over students. Section II will deal with the types of activities which have been held by the courts to be subject to regulation. Section III will discuss the possible means of discipline at the authorities' disposal, while Section IV will detail the penalties which may be levied upon the individual for improperly punishing a student. Finally, certain recommendations will be propounded.

I. THE SCHOOL AUTHORITIES' JURISDICTION

A. *Theoretical Bases*

1. Generally

There are six traditional theories on which school authorities' power to administer punishment in the maintenance of order may be based.

Consent of the parent. There may exist some contractual or other agreement, express or implied, between the school and the parent on behalf of the child. Thus, school regulations published in catalogues may be considered part of a contract between the parent and the school. There are several criticisms of this theory, but the basic fault in a contractual approach is that the parties do not in fact deal at arms length, and do not truly stand as equals.¹ Such a doctrine is an anomaly, since courts daily relieve people of obligations imposed upon them by persons in a dominant position.

Statutory authorization. Conceivably, the state may create an entirely new relationship between the teacher and student by injecting itself into the situation, enacting statutory authorization for jurisdiction over the student. For example, Kentucky Revised Statutes (hereinafter KRS) 160.290(2) allows a school board to enact regulations governing the conduct of pupils, and further provides that these regulations, although they must be consistent with the general school laws of the State, shall be binding on

¹ See Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 Ky. L.J. 643 (1966). Goldman's fiduciary theory is found workable in the secondary as well as university campus and utilized extensively in the author's subsequent recommendations. See text accompanying notes 118 *et. seq. infra*.

the board of education and parties dealing with it. But the positivistic approach is insufficient, for the existence of *some* power is not arguable. The clash occurs when the questions begin to become: *what* power and *how much* power? A statute could even answer these questions if specific enough, but it can never provide justification for power through mere articulation. It will never tell us *why* the legislature or the legislature's delegate has the power to forbid one thing but must accept another, why it may punish this act one way but must move differently with others.

Consent of the pupil. Clearly, where the student himself has agreed that he shall be subject to regulation, the school authorities would effectively have that power. Although there might be some question as to the capacity of the student, by reason of his lack of majority, it would be especially effective in those cases where the student is of legal age. In Kentucky, of course, this theory might be useful in connection with high schools simply because eighteen is the statutory age of majority for most purposes. But this would not be the case in all jurisdictions, and even in Kentucky it would probably be useful only for pupils in their senior year of high school. Inevitably, however, this theory fails, for such consent could easily be withdrawn, and, more importantly, the student does not negotiate the terms of his admission on equal footing with the school.

Quasi-judicial capacity. It has been said that the teacher acts in a role not unlike that of a judicial authority, creating in him certain immunities and privileges of disciplinary action. This would not seem distinct from the next theory, the doctrine of *in loco parentis*.

In loco parentis. By far the most popular theory is that the teacher stands *in loco parentis* to the student. Although the term is often used, the dissection of this doctrine, both under Kentucky law and that of other jurisdictions, reveals that its meaning is not as clear as is usually assumed.

There was no generally accepted common law definition of the phrase, *in loco parentis*. In *Thomas v. United States*,² using the natural and ordinary definition, the Sixth Circuit Court of Appeals held that one standing *in loco parentis* has assumed the status of

² 189 F.2d 494 (6th Cir. 1951).

a lawful parent by accepting the obligations incident to the parental relationship without going through the formalities necessary for a legal adoption.

The Kentucky Court of Appeals has applied a similar definition. In *Rudd v. Fineberg's Trustee*,³ the Court stated:

One who stands to a child in loco parentis is bound for its maintenance, care, and education, and entitled to its services.⁴

In another case, *Brummitt v. Commonwealth*,⁵ it was held that a stepfather, voluntarily taking his wife's child into the family, places himself *in loco parentis* and assumes an obligation to maintain and support the child having no income of his own, the relationship being substantially the same as that of parent and child.

These definitions of *in loco parentis* are ones commonly applied. In defense of the theory it can only be said that it presents a convenient and expedient vehicle for imputing to the teacher certain of the parent's rights with few of the responsibilities. This seems to be Dean Prosser's view of the theory's validity, as he demonstrates the fallacy of such an argument.

It is sometimes said that the parent, by sending the child to school, has delegated his discipline to the teacher; but since many children go to public school under compulsion of law, and the child may well be punished over the objection of the parent, a sounder reason is the necessity for maintaining order in and about the school.⁶

The Court of Appeals has implicitly admitted that *in loco parentis* could not be used in the teacher-student relationship within the doctrinal purity. The Court has expressed the view that teachers stand *in loco parentis* only in a general way.⁷ This supports the notion that the doctrine is used more for ease than accuracy, and that the Court of Appeals does not intend to be bound by logical extension of an application of pure *in loco parentis* doctrine where absurd results would be reached.

The nuisances caused by the application of *in loco parentis* to

³ 277 Ky. 505, 126 S.W.2d 1102 (1939).

⁴ *Id.* at 507, 126 S.W.2d at 1103.

⁵ 357 S.W.2d 37 (Ky. 1962).

⁶ W. PROSSER, LAW OF TORTS § 27 (3d ed. 1964).

⁷ Board of Educ. v. Luster, 282 S.W.2d 333 (Ky. 1955).

the student-teacher relationship are basically twofold. First, there are technical criticisms created by difficulties in definition. Secondly, there are possibilities of conflict between the disciplinary approaches of the teacher and the parent.

As a matter of technicality, application of the rule in a pure form would impose upon teachers certain responsibilities which none would really wish to assume. For example, they would have to accept the obligation of support, education and maintenance of the child. Furthermore, to say that the teacher is *in loco parentis* implies that the parent has given up rights to services of the child, which the parent would certainly not wish to do. This technical problem is eliminated by allowing more than one person to be *in loco parentis* to a child, but the necessity of this proviso makes it clear that the application of the pure theory is impossible. The rule not being applicable to the teacher-student relationship, the courts have modified the doctrine with respect to teachers, by employing it only in part, that is, to the right of the teacher to regulate the student. In fact, there is little evidence that the doctrine was ever intended to be used outside those areas where the one standing in *in loco parentis* was to have responsibility for support and maintenance, i.e., guardians or masters of apprentices.

There are other technical objections. If the doctrine amounts to no more than a temporary delegation of parental powers, logic would dictate that the parent could forbid punishment. This would seem the necessary result whether the parent had expressly or impliedly delegated his authority. Yet, the doctrine as applied does not include this logical extension of the rule.

Aside from legal niceties, there are strong possibilities of conflict between the regulatory desires of the teacher and parent. Where a conflict arises (activity at home affecting the school or an order of the parent relative to the school) the theory furnishes no means of resolving the conflict. Both teacher and parent should have a fairly definite zone of influence, and *in loco parentis* does nothing to establish these zones. It provides that the teacher has certain rights of discipline, but it does not itself describe or effectively limit those rights either in substance or in scope. That is left to other rules, which, it will be shown, strike their own limits and effect criteria for limitation.

For all these reasons the theory *in loco parentis* is largely irrelevant, as it neither says what privilege of punishment the teacher wields, nor enables us to calculate the extent of the privilege. It holds that the teacher is in fact more limited than the parent in matters of discipline, but the impossibility of equating parental rights with the teachers' demonstrates the equal impossibility of fully applying the doctrine of *in loco parentis*.

2. In Kentucky

The Court of Appeals of Kentucky has expressed two concepts of jurisdiction of the school over the pupil in disciplinary matters. In *Gott v. Berea College*,⁸ the school authorities were considered to stand *in loco parentis* concerning the physical and moral welfare and mental training of their pupils. Thus, it was held that the authorities of Berea College could enact regulations for the government of their pupils for any purpose subject to parental governance. In *Casey County Board of Education v. Luster*,⁹ the Court of Appeals referred to teachers and officials of public schools as standing *in loco parentis* to their pupils "in a general way." At first glance, then, it appears that Kentucky employs the well-worn doctrine of *in loco parentis* as a basis of jurisdiction. But a second basis for jurisdiction was set forth in *Kentucky Military Institute v. Bramblet*,¹⁰ wherein the Court held that the plaintiff, by entering his son as a student in the school, was bound by its published catalogue which contained prohibitions of certain activities. The Court held that it was the duty of the son to obey all reasonable rules and regulations adopted by the managers of the school for the control of students. Indeed, the Court had initiated this implied contract theory in *Gott* in pointing out that a college or university may prescribe requirements for admission, as well as rules for conduct, and anyone entering as a student impliedly agrees to conform to those rules.¹¹

⁸ 156 Ky. 376, 161 S.W. 204 (1913). It will be noted that this case deals with a college, and makes reference to colleges and universities, whereas this article began by eliminating universities from consideration. There is no real contradiction, as the principles enunciated in *Gott* are basic ones, generally applied by other jurisdictions. Unfortunately, there is no Kentucky case stating these rules and dealing only with secondary schools.

⁹ 282 S.W.2d 333 (Ky. 1955).

¹⁰ 158 Ky. 205, 164 S.W. 808 (1914).

¹¹ It should be noted that in *Gott* the Court also stated that such rules for admission are viewed more critically where the institution is supported in whole or in part by appropriations from the public treasury.

Finally, the statutory authorization found in KRS § 160.290(2), previously mentioned, should be kept in mind.

B. *Enactment And Application Of Disciplinary Regulations*

In turning the examination to the legal principles which determine the validity of rules and regulations passed by a school board for the government of the school essentially two issues are raised. Initially, the propriety of the rule itself comes into question. Secondly, a Court will examine the manner of enforcement of the rule in determining whether the type of action taken against the pupil was proper.

The Kentucky Court of Appeals has used various approaches in an attempt to formulate a single principle to be used in determining the validity of a rule itself. Arbitrary and unreasonable regulations will not be enforced.¹² Nor will rules of admission or conduct be enforced if those rules are unlawful or against public policy.¹³ It has also been stated that the school could make any rule or regulation for the betterment of pupils that a parent could for the same purpose.¹⁴

While arbitrariness and unreasonableness are always arguable criteria, certainly a regulation imposing no standard or guidelines upon the enforcing agency, thereby giving the pupil no gauge by which to guide his activities, is unreasonable and arbitrary.¹⁵ It has also been held that permanent exclusion from the school is arbitrary and unreasonable.¹⁶ The crucial point is that the reasonableness of the rule or regulation is a question of law for the Court, although whether the pupil in fact violated the rule is for the jury to decide.¹⁷

The maintenance of discipline in a public school is generally committed to the discretion of the school board, and the courts will usually not interfere with the discretion of school authorities in the enforcement of a proper regulation.¹⁸ But where the board,

¹² Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964).

¹³ Kentucky Military Institute v. Bramblet, 158 Ky. 205, 164 S.W. 808 (1914). The same standards may apply to private secondary schools since they apply to private colleges. See *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913).

¹⁴ *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913).

¹⁵ Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964).

¹⁶ See Annot., 11 A.L.R.3d 996 (1967).

¹⁷ Carr v. Wright, 423 S.W.2d 521 (Ky. 1968); *Kentucky Military Institute v. Bramblet*, 158 Ky. 205, 164 S.W. 808 (1914).

¹⁸ Board of Educ. v. Luster, 282 S.W.2d 333 (Ky. 1955).

or the official in charge, acts arbitrarily or maliciously in the enforcement of a rule, the court will inquire into the propriety of that enforcement.¹⁹ Therefore, the court has no power to review an honest judgment as to whether a pupil was guilty or innocent of misconduct, and refusal to condone the act or give the pupil another chance is not arbitrary conduct. Nevertheless, where an expulsion of a pupil occurs without charge of misconduct, the court will inquire into such an exercise of power.²⁰ In addition to the terms "arbitrariness" and "maliciousness," the Court of Appeals has employed the phrase "other improper motives" in delineating those cases in which it will examine the enforcement of otherwise proper regulations.²¹ It has also stated that the enforcement of a proper rule "for fraudulent purposes" will subject enforcement to review by the Court.²²

C. Geographical Scope of Disciplinary Regulations

Although most instances of misbehavior worrying school authorities occur on school property, it is not unusual for school regulations to apply to student activities away from the school grounds. The legislature has recognized the necessity for a principle of extraterritoriality of sorts by its enactment of KRS § 161.180, which provides:

Each teacher in the public schools shall hold pupils to a strict account for their conduct in the school, on the way to and from school, on the playgrounds, and during intermission or recess.

It will be noted that the language of this statute grants the teacher extraterritorial jurisdiction over the pupil only while the pupil is on the way to or from school. Nevertheless, the Court of Appeals has adopted a rule whereby reasonable regulation may be extended even farther. In *Gott v. Berea College*,²³ the Court ap-

¹⁹ *Id.* See *Wilson v. Board of Educ.*, 307 Ky. 703, 210 S.W.2d 350 (1948); *Byrd v. Begley*, 262 Ky. 422, 90 S.W.2d 370 (1936); *Board of Educ. v. Booth*, 110 Ky. 807, 62 S.W. 872 (1901).

²⁰ *Cross v. Board of Trustees*, 121 Ky. 469, 89 S.W. 506 (1905). The appellant's petition was dismissed by the trial court for failure to state a cause of action, but the Court of Appeals reversed the dismissal. The case was remanded for trial at which the lower court found against the plaintiff who again appealed. The second decision of the Court of Appeals is reported at 129 Ky. 35, 110 S.W. 346 (1908), in which the Court affirmed.

²¹ *Cross v. Board of Trustees*, 129 Ky. 35, 110 S.W. 346 (1908).

²² *Kentucky Military Institute v. Bramblet*, 158 Ky. 205, 164 S.W. 808 (1914).

²³ 156 Ky. 376, 161 S.W. 204 (1913).

provingly quoted authority²⁴ to the effect that the power of school authorities is not confined to the school-room and grounds or to times while the pupil is on his way to or from school, but extends to any act which is detrimental to the good order and best interest of the school, whether committed during school hours or after the student has returned home. The Court did attach the proviso that such a rule was not intended, nor would be permitted, to interfere with parental control of children in the home; but then a proviso to the proviso was added, the Court stating that "interference with parental control of children in the home would not be permitted unless the acts forbidden materially affect the conduct and discipline of the school."²⁵

II. REGULABLE ACTIVITIES

Having examined the purported bases for jurisdiction of secondary school authorities over students, and having set forth the abstract legal principles which govern the enactment of rules for conduct, as well as the enforcement of proper rules, we must now approach the problem on a more concrete level. The question then becomes the practical one of what student activity may be considered an "offense." This broad question necessarily requires an answer to certain other questions. First, how reasonable has the Court found specific regulations to be; and second, how has the Court of Appeals reacted to the enforcement of those regulations?

In essence, this section will involve an examination of particular behavior on the part of students which resulted in disciplinary action. The thrust of this section is to demonstrate, on a practical basis, how the Court of Appeals thinks its theoretical rules should be applied.

It seems logical to conceive two categories of misconduct by secondary school students: either the act is externally directed and directly related to others in the school, or it is internally directed toward the student himself, having no direct physical effect upon others. In the former classification, positive acts or words are directed externally, while in the latter, the matter is one of personal appearance or attitude. It should not be mis-

²⁴ F. MECHEM, PUBLIC OFFICES AND OFFICERS § 730 (1890).

²⁵ Gott v. Berea College, 156 Ky. 376, 380, 161 S.W. 204, 206-07 (1913).

apprehended that activities involving the latter category cannot be felt to have an ultimate external effect. Even though manner of attire does not physically affect other students, the sentiment of the school authorities, if they attempt to proscribe articles of dress, must be that such matters are in fact detrimental to the academic atmosphere. Whether such sentiment will bear analysis is another question.

A. *Externally Directed Acts*

Externally directed behavior may itself be separated into two categories: (1) positive behavior, an act with the intent to physically affect someone else; and (2) passive behavior, a refusal to do as ordered. Clearly a distinction between these two forms of behavior must be drawn.

1. Positive Behavior

The secondary school has the right to enact a rule preventing students from leaving school grounds during school hours. This restrictive power has been extended to provisions against students patronizing business establishments off the school grounds, or particular restaurants. In *Board of Education v. Luster*,²⁶ such a rule was violated when the father of two children persisted in taking the children, or letting them go, to a restaurant which had been declared off-limits. Applying the abstract notions set forth above in Section I(B), the Court of Appeals held that the regulation was not unreasonable or arbitrary, since it is common knowledge that children allowed to select their own food will often indulge in imbalanced diets. This regulation, the Court indicated, appeared to be for the common good of all children attending the school.

A similar prohibition was approved in *Gott v. Berea College*,²⁷ the Court expressing the view that the danger of epidemics from unsanitary conditions in many public restaurants made the regulation reasonable. Furthermore, Berea College maintained a cafeteria for students' use and its minimal profit margin was a persuasive factor. It should be noted that the Court's reference to unsanitary conditions in public restaurants was a comment based

²⁶ 282 S.W.2d 333 (Ky. 1955).

²⁷ 156 Ky. 376, 161 S.W. 204 (1913).

upon conditions in 1913, and would not necessarily hold true today.

An essential part of maintaining discipline is a continued attitude of respect toward the governing authorities. Consequently, in *Board of Education v. Booth*,²⁸ disciplinary action was taken against a pupil for insulting a teacher.²⁹ That case, however, was decided upon the basis that schools have the right to formulate necessary rules for the administration of the school. Another means of maintaining respect towards the teachers is found in KRS § 161.190 which provides:

No person shall upbraid, insult or abuse any teacher of the public schools in the presence of the school or in the presence of a pupil of the school.

KRS § 161.990(3) provides that violators of KRS § 161.190 shall be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). Although this statute was probably designed to operate against adults coming into the school, there is no reason why it could not apply equally to students.

Another regulation which has been held reasonable and proper is a rule establishing a curfew in a high school dormitory. In *Byrd v. Begley*,³⁰ the Court, confronted by such a rule, held that a seven o'clock curfew, designed to require students to devote their evenings to study instead of visiting, was reasonable beyond doubt.

There exists a substantial quantity of precedent supporting the suspension or expulsion of a pupil because he smoked upon school grounds.³¹ Much of the case law concerning such a regulation is based upon the concept that the school authorities have that broad degree of discretion previously discussed and they may exercise that discretion in order to protect the morality of the pupils. Needless to say, this is a rather outdated approach, and one that Kentucky need not employ. KRS § 438.050 makes it a crime to smoke a cigarette on school grounds while children are assembled on the premises for lawful purposes. Also KRS § 438.020(1) provides:

²⁸ 110 Ky. 807, 62 S.W. 872 (1901).

²⁹ 61 Op. ATT'Y GEN. 293 (1961) refers to this action as being a grossly insulting essay.

³⁰ 262 Ky. 422, 90 S.W.2d 370 (1936).

³¹ See Annot., 33 A.L.R. 1180 (1924).

Any person under the age of eighteen who smokes or has about his person or premises any cigarette or cigarette papers or any other form prepared to be filled with smoking tobacco for cigarette use, shall be fined not more than five dollars.

These statutory provisions, coupled with the language of KRS § 158.150, discussed *infra*,³² have the effect of permitting a student in the Kentucky school system to be suspended or expelled for smoking on school premises.

Enforcement of a rule requiring expulsion of a student for failure to maintain a certain grade level is not objectionable. However, the situation will be critically examined by the courts where there is evidence that the decision is an arbitrary one, the expulsion not truly being based upon grades.³³

Illustrative of the limits courts will place upon the enactment of regulations governing pupils' extracurricular activities is *Gentry v. Memphis Federation of Musicians*.³⁴ The Tennessee legislature had enacted a statute which in effect made it unlawful for any school band to play at functions outside the school at which professional musicians might be employed. The court held that this statute was designed for no purpose connected with school discipline, but solely for the purpose of profiting another group of citizens, as to whom the students' rights were not inferior.

Certainly, extracurricular activities may be regulated to some extent, where they have a definite and direct connection with the educational process. Thus, even without statutory authority, high school students may generally be forbidden to create or join secret societies, although such a regulation could not be enforced during a school's vacation period.³⁵ In *Kentucky Military Institute v. Bramblet*,³⁶ a rule forbidding hazing was held to be reasonable.

³² Section II (c).

³³ *Barnard v. Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913).

³⁴ 177 Tenn. 566, 151 S.W.2d 1081 (1941).

³⁵ *Wilson v. Abeline Independent School Dist.*, 190 S.W.2d 406 (Tex. 1945). See also *Passel v. Ft. Worth Independent School Dist.*, 429 S.W.2d 917 (Tex. 1968), sustaining the constitutionality of a Texas statute forbidding participation by students in such organizations under pain of expulsion from school.

³⁶ 158 Ky. 205, 164 S.W. 808 (1914). It should be noted that the general regulation involved in this case forbade, as well as hazing, gambling or possessing gambling materials; use or possession of intoxicating drinks; profane or indecent

(Continued on next page)

2. Passive Behavior

As stated before, into this category falls behavior which is overt only in the sense that it is a refusal to actively participate in some function. For example, in *Cross v. Board of Trustees*,³⁷ a pupil was suspended from school for declining a part in commencement exercises assigned him by the principal. Sustained by the Court of Appeals, the suspension was rationalized upon the basis that section 4367 of the Kentucky Statutes (now KRS § 158.150) provided that willful disobedience of a teacher was good cause for suspension or expulsion.³⁸

A typical act of passivity on the part of a student is failure to attend school at all. Since this is a matter largely controlled by statute,³⁹ there is little doubt that failure to attend school makes the child susceptible to disciplinary procedures. On this matter, the sole question is simply what type of punishment may be administered.

A final facet is the requirement of KRS § 158.035 that each child present a certificate showing his immunization. The statute further provides that the governing body of the school, whether public or private, shall enforce the provisions relating to that certificate.⁴⁰ Without such statutory authorization a requirement of vaccination is not so easily imposed. In *Board of Trustees v. McMurtry*,⁴¹ the Court of Appeals held that where the state or local health board has not expressly granted authority to him, an individual health officer has no power to require pupils to be vaccinated on pain of denial of the privilege of attending school. The Court stated however that with proper legislative authorization, a state or local health board may issue such an order when they believe that there is a reasonable apprehension of an epidemic in the school district and that vaccination of the school

(Footnote continued from preceding page)

language; owning or reading demoralizing papers, books or pictures; smoking cigarettes or chewing tobacco; possessing concealed weapons; borrowing or lending money; and contracting debts or selling clothes without permission of the superintendent. But this case deals only with the hazing portion of the regulation and cannot be used as authority for the reasonableness of any other of the mentioned prohibitions, even though certain of them would doubtless be reasonable.

³⁷ 129 Ky. 35, 110 S.W. 346 (1908).

³⁸ The school regulations, passed pursuant to an enabling clause, required pupils to obey whatever was commanded by any teacher.

³⁹ Ky. REV. STAT. [hereinafter cited as KRS] § 159.010 (1934) *et seq.*

⁴⁰ KRS § 214.036 (1968) creates certain health and religious exceptions.

⁴¹ 169 Ky. 457, 184 S.W. 390 (1916).

children is the only means by which it can be prevented. Of course, even where there is no specific delegation of power, the existence of an emergency justifies local school administrators in making vaccination a condition for admission to public schools. But, unless the legislature has expressly conferred the power to do so, or unless such an emergency exists, the local body does not have the authority to so require the vaccination.⁴²

B. Internally Directed Acts

This section deals with the extent to which the school authorities may regulate behavior which is intended by the actor only to express personal tastes or attitudes, with no primary intent to affect other students.

1. Dress Codes

There are no Kentucky cases dealing directly with questions arising in this area, but generally the student's appearance may be regulated if it can be shown that there is a rational connection between the matter regulated and the educational processes of the school. The tenor of the Kentucky cases dealing with the subject of regulation and discipline generally lend the impression that this rule would be applied in the Commonwealth.

Certainly, where it can be shown that an item of attire is causing actual damage to school property, the school authorities are justified in proscribing the attire. Thus, evidence that the school's hardwood floors were deteriorated at an inordinate rate by metal heel plates on student's shoes has been held to justify the prohibition of such heel plates.⁴³ In reaching its decision, the court rejected the argument that it was permitting detailed regulation of student apparel; and because no hardship or indignity was being imposed upon the student, the court felt the regulation to be reasonable.

Basically, the concern about appearance is based on the notion that an extraordinary appearance is disruptive to school discipline. Such disruption might occur because of noisy heel plates,⁴⁴ but it is a term more often applied to unusual hair-

⁴² Hill v. Bickers, 171 Ky. 703, 188 S.W. 766 (1916).

⁴³ Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).

⁴⁴ *Id.*

styles, immodest attire and excessive cosmetics. Some case law⁴⁵ holds that school authorities may properly proscribe immodest clothing and the use of cosmetics. While today it is unlikely that moderately applying make-up would result in discipline, rules prohibiting immodest attire or the excessive use of cosmetics are still viable in some locations.

It is entirely possible that health or religious requirements could create exceptions to the degree of permissible regulation of student appearance. A female student, recently ill, might well be allowed to wear slacks to school, under orders of her mother, if the weather should be inclement.⁴⁶ Then too, it is unlikely that a court would permit school authorities to require a Catholic student (attending a public school) to attend school on Ash Wednesday.

Appearance may not only be prohibited, it may be prescribed. Thus, the requirement that a pupil wear a specified uniform during school hours was long ago said to be proper,⁴⁷ but the school cannot require the uniform to be worn at home if the parent does not wish it.⁴⁸

Certain attire may also be required for participation in a special ceremony. Thus, participation in a graduation ceremony may be conditioned upon the student's wearing a cap and gown.⁴⁹ However, a refusal of the school authorities to issue a student's diploma and certificate because she refused to wear the cap and gown was held arbitrary and unreasonable.⁵⁰

2. Symbolic Expression

There are occasions on which the regulation of a student's personal appearance may come into conflict with freedoms guaranteed him under the first amendment of the United States Constitution. The status of high school student does not remove a person from the protection of the Constitution, and the validity of a regulation which conflicts with the first amendment freedom of speech is illustrated by two federal cases. Although

⁴⁵ See, e.g., *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923).

⁴⁶ See Annot., 14 A.L.R.3d 1201 (1967).

⁴⁷ *Connell v. Gray*, 33 Okla. 591, 127 Pac. 417 (1912) (dictum).

⁴⁸ *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913).

⁴⁹ *Valentine v. Independent School Dist.*, 191 Iowa 1100, 183 N.W. 434 (1921).

⁵⁰ *Id.* See also the discussion of OAG 61-315, *infra*.

no Kentucky cases have dealt with this question directly, it is hardly arguable that the principles enunciated in these two federal cases would not be applicable to Kentucky since the issues in those two opinions arise from rights guaranteed by the United States Constitution.

In September of 1964, a number of students at a high school in Philadelphia, Mississippi, began wearing "freedom buttons" to school. The buttons were approximately one and one half inches in diameter, and contained the words, "one man, one vote" and the letters "S.N.C.C." The principal of the school announced to the entire student body that these buttons were not to be worn at the school. The basis for this regulation was that the buttons had no bearing upon the educational process, and would cause disturbance of the scholastic atmosphere. Disregarding this order, some of the students continued to wear the buttons, and they were suspended from school. *Burnside v. Byars*⁵¹ was the resulting civil rights action under 42 U.S.C. § 1983 (19) for a preliminary injunction, claiming breach of the students' rights under the first and fourteenth amendments to the United States Constitution. The preliminary injunction was denied, but on appeal it was held that the preliminary injunction should issue.

In *Burnside* the Court first stated that while the fourteenth amendment clearly protects the first amendment rights of school children against the imposition by school authorities of unreasonable regulations, first amendment freedom of speech may be abridged by state officials if that abridgement is required to protect a legitimate state interest. The need of effective discipline for an orderly program of classroom learning being manifestly a legitimate state interest, school officials are thus allowed a wide latitude of discretion. Even so, such a regulatory rule must be a reasonable exercise of this power. Thus, if regulations essential for the maintenance of order and discipline are reasonable, an exchange of conversation between students may be properly regulated even though such restriction would infringe upon a basic freedom.

The Court in *Burnside* then inspected the record to determine the degree of disruption caused in this school. The evidence

⁵¹ *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

showed only a mild curiosity on the part of other children in the school, and even the principal testified that the expulsion was not the result of commotion, but because the school regulation was violated. The Court took the position that there is an inherent distinction between wearing buttons in the manner which had occurred and activities which would obviously distract students, such as carrying banners, scattering leaflets and making speeches. Therefore, the Court held that the wearing of these buttons did not materially and substantially interfere with the requirements of appropriate discipline and the operation of the school. Thus, by the above described test, they were undue infringements upon the students' right to free expression.

The distinctions drawn by the Court in *Burnside* are again illustrated in *Blackwell v. Board of Education*,⁵² decided the same day as *Burnside*. In *Blackwell*, the same type of buttons were again worn to a Mississippi high school. Certain students were initially warned not to wear these buttons, which admonition would probably have been illegal by the *Burnside* rationale. Shortly after this warning, several of the students returned to school with the same buttons and began distributing them to students in the corridor of the school building. This activity included pinning buttons on students who did not ask for one, with a resultant state of confusion and breakdown of orderly discipline in the school. The Court held that the evidence clearly showed an unusual degree of commotion and boisterous conduct, destroying order, discipline, and decorum in the school. For these reasons, the Court of Appeals affirmed the action of the District Court denying the preliminary injunction.

Although the rules in *Burnside* and *Blackwell* appeared as the likely result, at least one United States District Court took a slightly different position. In *Tinker v. Independent Community School District*⁵³ an injunction was sought against school authorities, pursuant to 42 U.S.C. § 1983. During December, 1965, school officials enacted a regulation prohibiting the wearing of arm bands on school property. Aware of this regulation, the plaintiffs persisted in wearing black arm bands to their respective schools in order to express their beliefs about the war in Vietnam.

⁵² 363 F.2d 749 (5th Cir. 1966).

⁵³ 258 F. Supp. 971 (S.D. Iowa 1966).

As stated by the District Court, the question was "whether the action of officials of the defendant School District forbidding the wearing of arm bands on school facilities deprived the plaintiffs of constitutional rights secured by the freedom of speech clause of the first amendment."⁵⁴

The District Court first enunciated the principles governing the cases. Here, the court's language did not differ from that creating the tests used in *Burnside* and *Blackwell*. Yet, in applying the verbiage to an actual decision the conclusions of the two courts differed. The District Court in *Tinker* held that while the arm bands themselves might not be disruptive, it was the avowed purpose of the plaintiffs to express their views on a controversial subject in this manner, and the reactions and comments from other students would be likely to disturb the atmosphere required for school operations. An anticipation of disturbance, the Court felt, was not unreasonable. Since the regulation did not prevent discussion of the war within the school in an orderly, organized manner, such a limited restriction was considered insignificant and not improper. Acknowledging the persuasive effect of *Burnside* and *Blackwell*, the District Court devised the rule that school officials' actions should not be limited to situations involving only the actual occurrence of material interference with school discipline. Rather, school officials were to be given a wide degree of discretion, and if there should exist a reasonable basis upon which school authorities might anticipate a breach of school discipline, regulations reasonably calculated to prevent that disorder would be upheld. On appeal to the Circuit Court of Appeals, this judgment of the District Court was affirmed.⁵⁵

The Supreme Court refused to ratify the rule established in the lower courts' decisions in *Tinker*.⁵⁶ The Supreme Court quickly pointed out that *Tinker* does not involve regulation of clothing, hairstyles or deportment, nor concern aggressive and disruptive behavior. The Court conceived this case to involve silent and passive expression of opinion, unaccompanied by disorder or disturbance. Discussing the record, Mr. Justice Fortas for the majority emphasized that there was no disruption of school work

⁵⁴ *Id.* at 972.

⁵⁵ *Tinker v. Independent Community School Dist.*, 383 F.2d 988 (8th Cir. 1967).

⁵⁶ *Tinker v. Independent Community School Dist.*, 393 U.S. 503 (1969).

or interruption of the scholastic endeavors of the remaining students. The decision of the school authorities had been based upon a belief that demonstration through the wearing of the arm bands simply should not be permitted, and not because of actual fear of disruption. The majority opinion expressed the undebatable proposition that a regulation adopted by school officials forbidding discussion of the Vietnam war, or the expression by a student of opposition to that war, would violate the students' constitutional rights, at least where it could not be shown that such activities would materially and substantially disrupt the work and discipline of the school. In this case, Mr. Justice Fortas said that the wearing of armbands, being akin to pure speech, could not be prohibited merely because school officials apprehended disturbance. Citing *Burnside*, the Court ruled that such restrictions may not be sustained unless it can be shown that the proscribed acts would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. Students in school as well as out of school are "persons" under the United States Constitution, and they are entitled to the exercise of fundamental rights, which exercise cannot be confined to supervised and ordained discussion taking place only in the classroom. So any attempted restriction of the exercise of those rights to the classroom cannot be condoned. Careful note should be made, however, that the Court also stated that conduct by the students, in class or out of it, which for any reason materially disrupted class work or involved substantial disorder or invasion of the rights of others would not be immunized by the constitutional guaranty of free speech.

In a strong dissent, Mr. Justice Black took the position that the activities involved were in fact disruptive of school decorum and discipline. Justice Black's inspection of the record revealed to him that the armbands did exactly what the elected school officials anticipated, *i.e.*, distract pupils' minds from their classwork. Justice Black characterized as a myth the theory that one has a constitutional right to say what one pleases, where one pleases, when one pleases, as the Court had often decided exactly the opposite. In Justice Black's view a high school pupil has not a complete freedom of speech within the school.

In the other dissent, Mr. Justice Harlan stated he was not

certain that there was any disagreement between the majority and himself on the proposition that school officials should be accorded wide authority in maintaining discipline in their institutions. Justice Harlan did, however, propose to translate that principle into a workable constitutional rule by casting upon those complaining the burden of showing that particular regulations are motivated by other than legitimate school concerns.

Though there has been a great deal of concerned talk about this particular decision of the Court, reasoned analysis will show that the results are not truly shocking. First, it simply cannot be reasonably argued that the District Court's rule in *Tinker* should supplant the legal precepts found in *Burnside*, *Blackwell* and the Supreme Court's rationale in *Tinker*. The latter three cases clearly provide remedies for school authorities met with students actually causing disruption of the classroom. Where disruption of school discipline is not occurring, no sensible person could argue that the students' right to speak, be it by pure or symbolic speech, should be restricted. Argument comes only when an interpretation of the fact situation must be made, and this is the crux of the disagreement between the opinions of the majority and Justice Black. A thornier problem is presented where the situation is susceptible to an interpretation of nascent violence. Here, to be sure, there are reasonable arguments for either position. Courts are daily willing to issue injunctions or affirm the right of civil authorities to enforce a curfew where troubles do not yet exist but are in fact imminent. True, it must be recognized that the passive exercise of a first amendment right is of a high plane; and a belief that others, enraged by that exercise, might cause violence may not be adequate cause to restrict the privilege. Yet, as Justice Black reminded the majority in biting phrases, the Court has in fact allowed restrictions in such circumstances. Making this point, Justice Black cited some recent cases, but he neglected to cite a somewhat older case which is illuminative of his theory of the issue.

*Feiner v. New York*⁵⁷ involved the prosecution and conviction of the petitioner for making a street corner speech tending to cause racial agitation. The agitation never reached the point of actual violence, but threats made by onlookers caused the

⁵⁷ 340 U.S. 315 (1951).

police to arrest Feiner. Affirming the conviction, the Supreme Court cited earlier cases which held, in effect, that the state had an obvious power to restrict freedom of speech when a clear and present danger of riot, disorder, interference with traffic and other immediate threats to public safety, peace and order appeared. Mr. Chief Justice Vinson, speaking for the majority, felt the record showed the petitioner was responsible for the creation of such clear and present danger and the petitioner's rights were, therefore, justifiably restricted.

One dissenter saw *Feiner* in the gravest light, finding it to be "a dark day for civil liberties in our Nation."⁵⁸ In his mind, the decision rested upon a belief that the policeman, under the circumstances detailed, could reasonably conclude whether serious commotion or riot was imminent. Therefore, the policeman could restrict the petitioner's right of freedom of speech in order to prevent the supposed riot. The dissenter viewed the record as making "far-fetched" any suggestion that there was imminent threat of riot or uncontrollable disorder. That dissenter was Mr. Justice Black.

It would appear that both the majority has changed in composition and Justice Black has changed his position. But the principle of stare decisis demands that the new majority in *Tinker* should have made some greater effort at harmonizing the various decisions. Moreover, little legal training is required to understand that Black's two dissenting opinions are on their faces contradictory. In *Feiner*, he would have reversed a conviction because he believed that a few mumbles did not allow New York to restrict freedom of speech. In *Tinker*, he was willing to give local school authorities the power to determine whether there was danger of turmoil, and he would have found that such danger existed in *Tinker* because a few adverse comments had been made. Consequently, it would seem that Justice Black's comments to the effect that a high school student's constitutional rights while in school are not absolute is indicative of a change in his philosophy on these matters.

The cited cases demonstrate the difficulty included in the practical, vis-a-vis the theoretical, discussion of any legal subject. In law school we are taught principles of law. In practice

⁵⁸ *Id.* at 323.

there is usually little argument about the applicable rules of law but great conflict between statements of fact. Mr. Justice Harlan was close to home when he stated that he did not think he truly disagreed with the fundamental principles outlined by the majority. But beyond agreement as to fundamental principles always comes a question of fact. It is not a question of lack of certainty in the law, for the Supreme Court itself was unable to state with greater clarity the legal principles enunciated in *Burnside* and *Blackwell*. Yet the Court might divide upon a conclusion to be drawn from an application of those principles to the facts of a given case.

3. Hairstyles

The principles involved in *Burnside*, *Blackwell* and *Tinker* are being extended to a contemporary teapot tempest, bizarre hair styles. It has been held that unusual hair styles may be rationally forbidden where they tend to distract other pupils. Proof of the student's good character in other respects, or his use of the hair style in his role as a professional musician have been considered immaterial.⁵⁹ Some federal district courts have held that compelling a student to cut his hair does not infringe upon his first amendment right of freedom of expression, disparage any rights provided him by the ninth amendment, or constitute a cruel and unusual punishment within the scope of the eighth amendment. Thus, these courts have held that a regulation enacted by a state school board barring students with extreme hair cuts from attendance at school was not unreasonable nor arbitrary where it was shown that disturbances and disruption of classroom atmosphere resulted when such hair cuts were worn in the school.⁶⁰

⁵⁹ Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965).

⁶⁰ Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Ferrell v. Independent School District, 261 F. Supp. 545 (N.D. Tex. 1966). Further comment about *Ferrell*, is necessary. In that case the District Court cited an Eighth Circuit Court of Appeals decision, *Byrd v. Sexton*, 277 F.2d 418 (8th Cir. 1960), as support for a supposed two part test under which it was to be determined whether plaintiff students would have a cause of action against school authorities under the civil rights statutes because of the enactment of some regulation which affected the students. The Texas District Court misconstrued the language of *Byrd*, in stating that the first question in a two part test used in *Byrd* was the determination of whether actions of the school authorities were unlawful under state law. However, this is not an accurate reading of *Byrd*. In the passage in question, the *Byrd* Court simply pointed out that the plaintiff claimed no invalidity of state law or of state constitutional provisions, but at most complained of acts said to be improper under

(Continued on next page)

It must be emphasized that the federal courts are moving away from a determination of which particular constitutional rights of the student might be infringed through action taken against him because of his particular hair style. Instead, such theoretical analyses are truncated by the simple statement that the freedom of a person to present himself physically to the world as he sees fit is a highly protected freedom, and any effort on the part of the state to impair this freedom imposes upon the state a "substantial burden of justification."⁶¹ In *Breen v. Kahl*⁶² the District Court found that the defendant authorities had not carried their substantial burden of justification. With regard to distraction of other pupils, the record contained expressions of opinion by several school administrators that such distraction does result from an abnormal appearance of one student, but no direct testimony appeared in the record that such distraction had in fact occurred. Contentions on the part of school authorities that non-conforming students did not perform as well as those presenting an ordinary appearance likewise failed for lack of hard facts. The Court agreed that the degree of proof necessary for the

(Footnote continued from preceding page)

the Missouri Constitution. *Ferrell* implies that a federal district court, in order to find for plaintiffs in such a case, must be shown that the school authorities were acting contrary to state law, but this is precisely opposite to what the Circuit Court was saying. The thrust of the Circuit Court opinion was that invalidity of the state law or the state constitution *vis-a-vis* the United States Constitution must be shown. Reflection upon the purpose of the Civil Rights statutes makes it apparent that the District Court is incorrect, and even causes the belief that the Court did not intend to express such a position. Such statutes were designed to protect United States citizens' rights in the face of state statutes proper under the State Constitution, and were not intended to operate only where State law was also broken.

⁶¹ *Breen v. Kahl*, 296 F. Supp. 702, 706 (W.D. Wisc. 1969). The reasoning of this case, however, has recently been rejected by the Sixth Circuit Court of Appeals. In *Jackson v. Dorrier*, No. 19351, decided April 6, 1970, the Sixth Circuit Court of Appeals sustained a Tennessee District Court's decision denying injunction relief requested by students. The Court of Appeals rejected arguments that the students had been deprived of freedoms guaranteed them by the first, third, fourth, fifth, ninth and fourteenth amendments to the United States Constitution. It found that substantial evidence supported the findings of the district judge that regulation of hair length has a real and reasonable connection with the successful operation of the educational system and with the maintenance of school discipline. The Court chose to follow *Ferrell v. Independent School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966). It should be noted that the District Court had heard evidence concerning disturbances of the classroom atmosphere and decorum resulting from the long hair. To this extent, therefore, the decision is not surprising. The theory that there is a right to freedom of appearance was clearly rejected in *Breen v. Kahl*, so the field is fertile for a decision of the United States Supreme Court finally deciding the matter of questions of appearance alone, not involving claims of first amendment freedoms.

⁶² 296 F. Supp. 702 (W.D. Wis. 1969).

school authorities to meet their burden is often a delicate and uncertain matter, but it emphasized that the defendants had fallen far short of showing that the distraction caused by male high school students whose hair lengths exceeded the board standard was so aggravated, frequent and persistent that this invasion of their individual freedom by the state was warranted. In fact, the Court noted the state superintendent did not find that the length of the plaintiff's hair was the disruptive influence or factor, but only that a refusal to obey the board's rule was disruptive. The Court considered there to be a significant distinction between these two types of disruption, expressing the position that disruption of the latter category obviously affords no support for constitutionality of the regulation itself.

It is readily apparent that the three political cases earlier discussed contain the very principles involved in regulation of a student's hair style. The mere belief on the part of school administrators that disruption will occur from the wearing of an unusual hair style will not be sufficient to warrant interference with the student's freedom of appearance. Rather, school officials must be able to show actual disruption of school decorum and discipline. The only apparent essential difference between political expression and personal appearance is that the courts, with respect to the latter category, do not intend to work themselves into a theoretical corner by assigning these rights of personal attire and grooming to a specific provision of the United States Constitution.

Ultimately some court may declare all dress codes unenforceable, but no one wins or loses in such event. If appearance does not truly harm school decorum, the rules in the cited cases prevent regulation, regardless of what the dress code provides. Those rules at the same time give the school authorities defined powers which operate even in the absence of a dress code.

4. Marriage of Students

It is not unusual for persons of high school age to marry. But the marriage of persons still in high school is felt by most school authorities to be destructive of scholastic decorum and not to be sanctioned. The leading case in Kentucky upon this issue is *Board*

of *Education v. Bentley*.⁶³ The rule enunciated in the case is a quotation with approval of 47 Am. Jur. Schools § 155:

However, a pupil may not be excluded from school because married, where no immorality or misconduct of the pupil is shown, nor that the welfare and discipline of the pupils of the school is [*sic*] injuriously affected by the presence of the married pupil.

Accordingly the Court in *Bentley* found that the regulation involved was invalid.

In *Bentley* the regulation contained language to the effect that any student who married must automatically withdraw from school, the student not being permitted to re-enter for one full year, and then only as a special student with permission of the principal. Bentley was apprised of this regulation prior to her marriage and, as was the practice of the board, she was permitted to complete the then current six weeks term before being required to withdraw.

The Court agreed that the board was entitled to exercise its sound discretion in these matters and that a reasonable and appropriate regulation could well be adopted. Yet, this regulation was held arbitrary and unreasonable. Even though the board claimed that such marriages cause a great deal of excitement and discussion, thereby disrupting school work, it was admitted that the board, as a matter of practice, still permitted as much as six weeks of continued attendance at the school before the pupil was required to leave. Assuming that the board was correct in its statement of purpose, this possibility of six weeks attendance at school while married had the effect of destroying the purpose of the regulation. But the regulation's fatal vice was its determination that every married student, regardless of circumstances, was to lose at least a year of schooling. Subsequently, he could be re-admitted if the principal allowed it. Yet, the principal was given no standards by which to reach his decision, and the pupils had no gauge by which to estimate whether the principal's consent would be forthcoming. Additionally, the refusal of the school board to grant an exception in this case, solely on the

⁶³ 383 S.W.2d 677 (Ky. 1964).

grounds that it had never granted an exception before, demonstrated to the Court the unreasonable and arbitrary effect of the regulation, *i.e.* imposing an identical result in every case without regard to circumstances.

Certain criteria by which to judge an anti-marriage regulation immediately become apparent from language contained in *Bentley*. First, the board must be given discretion to weigh the circumstances and then reach a decision. To this end, the regulation may not contain a provision automatically imposing the penalty. Next, the vesting of power to readmit a pupil must be accompanied by guidelines sufficient to allow both the authority and the student means by which to decide whether consent to readmission would be granted.

C. *Statutory Amplification of Kentucky Case Law*

Several statutes amplify the case law of Kentucky. KRS § 160.290(2) provides:

Each [school] board shall make and adopt . . . rules, regulations, and bylaws . . . for the government, regulation, and management of the public schools and school property of the district . . . and for . . . the conduct of pupils. The rules, regulations, and bylaws . . . shall be consistent with the general school laws of the state and shall be binding on the board of education and parties dealing with it. . . .

KRS § 158.150 provides:

All pupils admitted to the common schools shall comply with the lawful regulations for the government of the schools. Willful disobedience or defiance of the authority of the teachers, habitual profanity or vulgarity, or other gross violation of propriety or law constitutes cause for suspension or expulsion from school. . . .⁶⁴

To a great extent, enforcement of rules and regulations passed by the board falls to the school superintendent, who has general supervision of the conduct of the schools and the discipline of pupils.⁶⁵ As a practical matter, the teacher also plays a significant

⁶⁴ KRS § 158.030 (1962) defines a "common school" as "an elementary or secondary school of the state supported in whole or in part by public taxation."

⁶⁵ KRS § 160.370 (1962).

role in the maintenance of school discipline. Each teacher is to enforce the course of study and regulations prescribed for the schools.⁶⁶ More precisely, KRS § 161.180 provides:

Each teacher in the public schools shall hold pupils to a strict account for their conduct in the school, on the way to and from school, on the playgrounds, and during intermission or recess.

Armed with these statutes, the jurisdiction of the board, the superintendent, and the teacher would seem almost plenary, and an examination of these statutes gives the initial impression that it might well prove useless to contend a rule was unreasonable. Under KRS § 161.180, the teacher is to hold pupils to a strict account for their conduct even while going to and from school, with case law extending the possibility of control even into the home. Also, under KRS § 158.150, specified discipline may be imposed for "other gross violation of propriety or law." The phrase "gross violation of law" has been used to support an Attorney General's opinion that it was proper to suspend unmarried students engaging in sexual relations where the girl subsequently became pregnant during the school year.⁶⁷

Although apparently nowhere officially interpreted, the other portion of KRS § 158.150, "gross violation of propriety," would seem even wider in scope and possibility of interpretation. At least a violation of law is, by definition, an act contrary to specific statutes or ordinances, while a violation of propriety becomes all too subjective.

Also, under KRS § 158.150, wilful disobedience or defiance of the authority of teachers will result in the specified discipline. In fact, in *Byrd v. Begley*,⁶⁸ the curfew case, an earlier version of this statute was held to authorize suspension of the student. The student had been found in a room other than his after the 7:00 p.m. curfew and was ordered to his room. He being slow in obeying the order and announcing the intention to go to sleeping quarters other than his own room, suspension by the superintendent ensued.

⁶⁶ KRS § 161.170 (1946).

⁶⁷ 1957 OP. ATT'Y GEN. 40021. Whether any such acts took place on school property was not stated.

⁶⁸ 262 Ky. 422, 90 S.W.2d 370 (1936). See note 19 *supra*.

This "defiance of teachers" statute plainly contains the greatest possibilities for insidious official behavior contrary to the rights of the secondary school student. While "gross violation of propriety" is a vague enough term allowing for myriad sins, as a matter of practice it would not be a vexatious phrase. Activities considered to fall within that prohibition would likely be punishable under different rules and other theories. Yet, it is practicality itself which causes the other important portion of KRS § 158.150 to be disturbing. While wilful disobedience or defiance of the authority of teachers appears at first blush to be something the school cannot permit, the phraseology gives the school authorities power to levy the prescribed penalties for any wilful disobedience or any defiance. The statute draws no distinction between disobeying or defying an improper rule or improper exercise of authority. By making that observation, there is no intention of raising questions as to civil disobedience being a right of the high school student. The point is not that the student has a right to attempt a distinction between proper and improper exercise of authority, but that the statute in fact draws no distinction between proper or improper authority. This is the dangerous aspect of KRS § 158.150.

III. METHODS OF DISCIPLINE

A simple statement of possible modes of discipline produces a rather short list. A pupil could be detained after school (with commonly applied additives such as washing blackboards), a money penalty might be imposed, a search of his person with subsequent seizure of offending articles is conceivable, and withholding academic records might be useful. Nearly all these disciplinary tactics have been attempted in the past, but they are relatively minor methods. The disciplinary techniques receiving the most emphasis, in both application and argument, are corporal punishment and suspension and expulsion.

A. *Corporal Punishment*

It is the nearly universal rule that a teacher has a privilege of sorts against liability for reasonable corporal punishment ad-

ministered as a disciplinary measure.⁶⁹ Some courts long ago took the position that a parent, lawfully imbued with the power of reasonable correction, may delegate part of his parental authority to the teacher which the teacher may then exercise in a moderate manner.⁷⁰ However, if the punishment inflicted was in fact unreasonable or excessive, it is no defense that the teacher was acting within the scope of his authority to maintain academic control. Unlike the board, the individual teacher is not clothed with governmental immunity.⁷¹ Thus, the question of whether the teacher was acting within or without his authority has been characterized as irrelevant to whether he is liable for a tort arising from corporal punishment.⁷²

A few courts have held that there is a presumption of reasonableness of the corporal punishment administered,⁷³ and others have stated that the teacher is entitled to the benefit of any doubt that may exist.⁷⁴ These statements apparently mean only that the burden is on the student, as on any plaintiff, to prove that the discipline used was improper.

Among the factors the courts have thought important in gauging reasonableness are age, size, sex, physical condition, and the conduct of the pupil which caused the teacher to take disciplinary steps.⁷⁵ Some courts have admitted evidence tending to show that the pupil had misbehaved in the past,⁷⁶ although other courts have held that an instruction permitting the jury to consider the disposition of the pupil was erroneous.⁷⁷ The essential criterion being that the punishment be reasonable and moderate, the fact that the punishment does not have the salutary effect sought is not important, and a teacher may not continue to beat a student simply because he appears to be unsubdued.⁷⁸

Some states have accompanied the granting to the teacher of

⁶⁹ This rule is supported by implication in *Hardy v. James*, 5 Ky. Ops. 36 (1872).

⁷⁰ See, e.g., *Stevens v. Fassett*, 27 Me. 266 (1847).

⁷¹ See discussion at section IV. B. *infra*.

⁷² *Carr v. Wright*, 423 S.W.2d 521 (Ky. 1968); *Kentucky Military Institute v. Bramblett*, 158 Ky. 205, 164 S.W. 808 (1914).

⁷³ See, e.g., *Drake v. Thomas*, 310 Ill. App. 57, 33 N.E.2d 889 (1941).

⁷⁴ See, e.g., *Calway v. Williamson*, 130 Conn. 575, 36 A.2d 377 (1944).

⁷⁵ *Suits v. Glover*, 260 Ala. 449, 71 So. 2d 49, 43 A.L.R.2d 465 (1954).

⁷⁶ *Adreozzi v. Rubano*, 145 Conn. 280, 141 A.2d 639 (1958); *Drake v. Thomas*, 310 Ill. App. 57, 33 N.E.2d 889 (1941).

⁷⁷ *Haycraft v. Grigsby*, 88 Mo. App. 354 (1901).

⁷⁸ *Whitley v. State*, 33 Tex. Crim. 17, 25 S.W. 1072 (1894).

the power of discipline over pupils, with certain statutory relief from liability for punishment.

In Pennsylvania, 24 Pennsylvania Statutes § 13-1317 provides:

Every teacher, vice principal, and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians, or persons in parental relation to such pupils may exercise over them.

But a child has rights against a barbarous parent, and a teacher acting *malo animo* may be found by the jury to be without the protection of the statute.⁷⁹

The Montana statute differs slightly from most, in that it involves the actual granting of authority to levy corporal punishment. 4 Revised Code of Montana § 75-2407 provides:

Whenever it shall be deemed necessary to inflict corporal punishment on any student in the public schools, such punishment shall be inflicted without undue anger and only in the presence of teacher and principal, if there be one, and then only after notice to the parents or guardian; except that in cases of open and flagrant defiance of the teacher or the authority of the school, corporal punishment may be inflicted by the teacher or principal without such notice.

It is immediately apparent after reading this statute that there yet remains a number of fact questions; for example, was the punishment inflicted with "undue anger," and was proper notice given to the parent or guardian?

Texas has relieved the teacher of certain criminal liability by enacting 2A Texas Penal Code, Art. 1142:

Violence used to the person does not amount to an assault or battery in the following cases:

1. In the exercise of the right of moderate restraint or correction given by law to . . . the master over his apprentice, the teacher over the scholar.

This statute, of course, only relieves the teacher of criminal liability for assault and battery, and does not relate to other crimes or to civil liability.

⁷⁹ Guerrieri v. Tyson, 147 Pa. Super. 239, 24 A.2d 468 (1942).

Where the argument has been made that a statute abrogated the teacher's privilege of reasonable corporal punishment as a means of discipline, the courts have required an explicit declaration of that purpose in the language of the statute.⁸⁰ In this regard it should be noted that KRS § 167.170 grants to the State Board of Education alone the power of expulsion of a pupil from the Kentucky School for the Blind. It further provides:

No officer or employee of the school shall be permitted to inflict corporal punishment upon any of the pupils.

Punishment must be authorized to be reasonable. Reasonableness in degree of an unauthorized punishment can operate to mitigate damages. Thus, a teacher in a public school was held unable to thrash a pupil for failure to pay for the careless destruction of school property, the requirement of payment being viewed as unreasonable.⁸¹ Likewise, where a fourteen year old pupil's father had forbidden her to carry water from a well to the school, the teacher was powerless to order her to do so, and any corporal punishment for a refusal to carry the water was improper.⁸²

Finally, the punishment must be administered because of a definite offense which the pupil has committed, and the pupil should be told why he is being punished. The purposes of punishment are reformation of the pupil, enforcement and maintenance of school discipline and setting an example for other students; but unless the punishment is related to a specific wrong and this relation is made known, these ends cannot be met and the punishment cannot be proper.⁸³

B. *Suspension and Expulsion*

The second important category of discipline is suspension or expulsion, a technique long enjoyed by school authorities in Kentucky. KRS § 158.150 provides:

⁸⁰ See, e.g., *Stevens v. Fassett*, 27 Me. 266 (1847).

⁸¹ *State v. Vanderbilt*, 116 Ind. 11, 18 N.E. 266 (1888).

⁸² *State v. Davis*, 158 Iowa 501, 139 N.W. 1073 (1913). It is not altogether certain however, that the court founded its decision upon the refusal of the child to carry the water, as the defendant himself went to great length to show punishment for *insolence* in refusal, not mere refusal.

⁸³ *State v. Mizner*, 50 Iowa 145 (1878).

All pupils admitted to the common schools shall comply with the lawful regulations for the government of the schools. Wilful disobedience or defiance of the authority of the teachers, habitual profanity or vulgarity, or other gross violation of propriety or law constitutes cause for suspension or expulsion from school. The superintendent, principal or head teacher of any school may suspend a pupil for such misconduct, but shall report such action in writing immediately to the superintendent. The Board of Education of any school district may expel any pupil for misconduct as defined in this section, but such action shall not be taken until the parent, guardian, or other person having legal custody or control of the pupil has had an opportunity to have a hearing before the Board. The decision of the Board shall be final.

This statutory authorization has long existed in Kentucky, at least since 1893, when Ky. Stat § 4367, the predecessor to KRS § 158.150, was enacted. Clearly then, suspension of a pupil may be authorized by a superintendent, principal or head teacher of schools in Kentucky. Upon a hearing being had as to the facts of the situation, the Board of Education of the school district may expel the pupil for the prescribed reasons.

It is, of course, not unusual that the remedy of suspension is granted by statute. What is unusual is that it may be the exclusive remedy of Kentucky school authorities. In OAG 61-315 the Attorney General of the Commonwealth of Kentucky rendered an opinion in response to the following question: *May the school records of a pupil be withheld at the end of the school year if that pupil has damaged school text books and other school property and not made restitution for same?* First detailing the provision of KRS § 158.150 and briefly reviewing various cases mentioning the right of suspension and expulsion, the Attorney General concluded that the student could not be denied his school records; because the statute defines the method of enforcing disciplinary rules and regulations without mentioning withholding records.

However, the Attorney General must have viewed this construction as not ruling out all other modes of disciplinary sanction since in OAG 61-293 (rendered on the same date as OAG 61-315) the opinion was given that a pupil who has failed to prepare his lessons may be detained after school hours for a brief period of time. This opinion was based upon KRS § 161.180, which provides that teachers shall hold pupils to a strict account for their

conduct in school. Later, in OAG 64-329, the Attorney General rendered an opinion that a school teacher may search a pupil's pockets or purse and confiscate such articles as cigarette lighters, pocket knives, or key chains with cigarette lighters attached if the teacher acts with reasonable judgement and for good cause, without malice and for the welfare of the child as well as of the school. This opinion was based upon a Tennessee case, and upon a general rule followed by the Court of Appeals that teachers and officials of public schools stand *in loco parentis* to the pupil. Furthermore prior to OAG 61-315, the Attorney General had assumed power in teachers to levy punishment other than suspension when he opined in OAG 60-553 that a teacher is empowered to inflict corporal punishment on disorderly and insubordinate students.

It should be noted that the Court of Appeals has never had before it a case involving the question whether, in light of KRS § 158.150, corporal punishment is permissible. Only two Kentucky cases even refer to corporal punishment. In *Hardy v. James*,⁸⁴ the question was not whether the teacher might inflict corporal punishment upon a refractory pupil, but whether the teacher had a right to strike the pupil when he himself was struck during the course of a game in which he was participating as an equal. The only other case which even refers to the question of inflicting corporal punishment is *Cross v. Board of Trustees*,⁸⁵ wherein the Court decided that suspension from school was the proper recourse, as infliction of corporal punishment would have been unwise for the particular act of disobedience there involved, since the pupil was eighteen years of age and too large to be subject to a whipping.

However, the question whether the legislature, by authorizing suspension and expulsion determined that the method of discipline should govern all cases exclusively and thereby eliminated other forms of disciplinary action was the exact question posed in *Stevens v. Fassett*,⁸⁶ and the Maine Court held that statutory language similar to KRS § 158.150 was not sufficient to support a decision that moderate corporal punishment was prohibited. The applicable statute provided that a school super-

⁸⁴ 5 Ky. Ops. 36 (1872).

⁸⁵ 33 K.L.R. 472, 129 Ky. 35, 110 S.W. 346 (1908).

⁸⁶ 27 Me. 266 (1847).

intending committee should expel from school any obstinately disobedient student. The contention that this forbade corporal punishment was rejected for several reasons. The rule of moderate physical punishment was a well established one. Secondly, such intent was not sufficiently explicit in the language of the statute. Finally the statute simply specified a type of action which might be taken against the described pupils, and did not indicate that other action, fundamentally less severe, might not be taken against pupils who had disobeyed their teachers repeatedly.

The Maine Court in *Stevens*⁸⁷ was clearly incorrect in its reasoning. With regard to its first basis for decision, it is true that the privilege of moderate corporal punishment is a well established one but the mere fact that it is established does not prevent the legislature from enacting a statute which modifies or eliminates it. As to the second reason, a statute need not specify the remedies which are not to exist subsequent to its enactment for it to constitute an exclusive remedy. With respect to the third, the Court presumed that the "other action" would be fundamentally less severe than suspension or expulsion. This rationale neglects the consideration that the student, when threatened with suspension or expulsion, would be entitled to a hearing and given an opportunity to state his case, and to subject the teacher's position to objective examination. It can hardly be said that this is a fundamentally more severe action than arbitrary action such as corporal punishment.

This last comment relates directly to the question raised earlier in this article concerning the propriety of that portion of KRS § 158.150 (1962) making wilful disobedience or defiance of the authority of teachers cause for suspension or expulsion from school, regardless of whether the teacher was in fact acting properly. If KRS § 158.150 (1962) is construed to constitute a complete description of the forms of discipline available to the school authorities, then the questions raised earlier concerning obedience of even improper orders are answered. If this section is determined to govern exclusively, there would be no possibility of improper corporal punishment. The question of discipline would be one determined at a hearing which in turn would reveal

⁸⁷ *Id.*

first, whether the order was proper, and second, whether the order was disobeyed.

IV. PENALTIES FOR IMPROPER PUNISHMENT

The purpose of this section is to isolate the rules which determine the penalty or the extent of liability to be suffered by the teacher or other individual imposing improper punishment. One approach to this area could conceivably involve an attempt to relate particular types of punishment to particular types of misconduct on the part of the student. In that way a quite mechanical approach could be used in determining liability. Punishment "A" would necessarily follow misconduct category "1," and any deviation from that *a priori* determination would mean one of two things: the teacher was not applying sufficient punishment, or the teacher would be liable, civilly or criminally, for an excess of punishment.

Unfortunately there is little case law which supports such a computer-like administration of student-teacher relations. Indeed, there has been little or no discussion of this question in the cases. The only occasion on which the Kentucky Court of Appeals has had an opportunity to mention the matter was in *Cross v. Board of Trustees*.⁸⁸ That case regretfully offers no assistance since the basis for determination that corporal punishment would not have been suitable in the circumstances was not that the misbehavior did not call for corporal punishment, but that the student was of such age and size as to make its application inappropriate.

While it is true that some correlation of type of punishment to class of misbehavior could be created, *e.g.* offending items might be confiscated, nearly all offenses can be treated with suspension/expulsion, corporal punishment, or detention. The general approach has been to leave to the discretion of the authorities the question of what sanction is proper in the circumstances, trusting them not to use methods which common sense would call too severe for the offense.⁸⁹ That the discretion of the school authorities is the dominant element emphasizes the

⁸⁸ 33 K.L.R. 472, 129 Ky. 35, 110 S.W. 346 (1908). For a discussion of this case, see the text accompanying note 86 *supra*.

⁸⁹ See cases cited in Section I.

importance of providing punishment which is administered only after a hearing is granted the student. In this way, the facts upon which the school authority bases its decision will be known, and a reviewing court will be given as correct a record as possible by which to judge the authority's action.

A. *Wrongful Suspension Or Expulsion*

Concerning the liability of the school authorities for the wrongful suspension or expulsion of a student, there is little that need be added to the previous discussion.⁹⁰ While at least one jurisdiction has taken the view that such action by a school board is judicial in nature and the members thus being immune from liability even though they acted with malice,⁹¹ this is not the general rule. In such situations, the cases cited in Part I of this article clearly show that liability on the part of the school authorities will lie only where the suspension or expulsion was arbitrary, unreasonable, with malice, or with "other improper motive." The only distinction to be drawn is between a cause of action on the student's part and a cause of action on the part of the parents. Manifestly, the student is deprived of a valuable right and privilege, a loss for which he may recover damages.⁹² On the other hand, a parent has no right to damages, absent loss or expense; and generally his only remedy is an action for mandamus to compel the authorities to readmit his child to school,⁹³ although there is some authority to the contrary.⁹⁴

B. *Improper Corporal Punishment*

Personal liability of an individual for excessive corporal punishment levied against a pupil in an effort at discipline takes one of two forms: civil or criminal. But the school board in Kentucky is immune from liability for the tort of an individual supervisor, teacher or board member. Naturally, anyone actively participating in the tortious conduct will be personally liable for his own involvement, and it is quite unlikely that liability will be

⁹⁰ See Parts I and III, B *supra*.

⁹¹ *Sweeney v. Young*, 82 N.H. 159, 131 A. 155 (1925).

⁹² See *Williams v. Smith*, 192 Ala. 428, 68 So. 323 (1915).

⁹³ See, e.g., *Douglas v. Campbell*, 89 Ark. 254, 116 S.W. 211, 211 L.R.A. (N.S.) 205 (1909).

⁹⁴ See, e.g., *Roe v. Deming*, 21 Ohio St. 666 (1871).

imputed beyond the active participants. But a board of education is immune from liability for physical harm inflicted upon a student by an individual teacher, or superintendent because the school board constitutes an integral part of the state, and it is entitled to the protection of sovereign immunity.⁹⁵

Even though the board as an entity may be immune, the individual board members may yet be liable, even though they may not be personally involved in the incident. If it can be proven that the individual board members negligently employed the person causing the harm, then they will be individually liable. But in order to prove such negligence it must be shown that the individual members knew, when they hired him, of the employee's propensity for the particular willful conduct causing the harm.⁹⁶

Unlike Kentucky, some jurisdictions have statutes imposing liability upon the school board for any judgment arising out of the negligence of the school district, its officers or employees.⁹⁷ A Connecticut statute requires boards of education to save any teacher, employee or staff member from financial loss and expense arising out of any law suit for personal injury from punishment levied.⁹⁸ This protection is conditioned upon a showing that the teacher or employee was acting in the discharge of his duties within the scope of his employment or under the direction of the board.⁹⁹ The Connecticut courts have interpreted this statute not to impose liability directly upon the board of education, but to provide indemnification to the teacher from loss, rather than indemnification from liability.¹⁰⁰

1. Civil Liability

Civil liability may result from a breach of the simple rules of negligence; that is, did the teacher fail to act as a reasonably prudent person would act in the same or similar circumstances.¹⁰¹

⁹⁵ *Carr v. Wright*, 423 S.W.2d 521 (Ky. 1968); *Cullinan v. Jefferson Co.*, 418 S.W.2d 407 (Ky. 1967); *Wood v. Board of Educ.*, 412 S.W.2d 877 (Ky. 1967).

⁹⁶ *Moores v. Fayette Co.*, 418 S.W.2d 412 (Ky. 1967) (dictum); *Wood v. Board of Educ.*, 412 S.W.2d 877 (Ky. 1967) (dictum).

⁹⁷ *Cf.* CALIF. GOV. CODE § 815, 812.25 (West 1963), formerly CALIF. EDUC. CODE, § 903 (West 1959).

⁹⁸ CONN. GEN. STAT. § 10.235 (1958).

⁹⁹ *Id.*

¹⁰⁰ *Plasse v. Board of Educ.*, 28 Conn. Supp. 198, 256 A.2d 519 (1969); *Swainbank v. Coombs*, 19 Conn. Supp. 391, 115 A.2d 468 (1955).

¹⁰¹ *Drum v. Miller*, 135 N.C. 204, 47 S.E. 421 (1904).

It has been held that if a teacher, from the knowledge she had of a pupil and from his appearance, could justifiably suppose the child to be like other children of his age, and inflicted only a proper punishment, the teacher would not be liable for damages, even though some hidden defect in the pupil's constitution causes unusual injury to follow the punishment.¹⁰² Such a rule places the duty upon parents having children whose health was impaired to inform the teacher of that fact.¹⁰³ This, of course, is manifestly contrary to the general principle that a tortfeasor takes the plaintiff as he finds him, no immunity from liability occurring by reason of some peculiar defect in the plaintiff.

Apart from liability based upon negligence, the teacher may be held responsible in damages by reason of his bad motive. In truth, an investigation into the teacher's motives is simply another means of determining the reasonableness of the punishment. However, punishment with improper motive is distinguishable from negligently imposed punishment by the factor of intent. A teacher imposing corporal punishment with malice will be held liable for damages regardless of the care exercised in the imposition.¹⁰⁴

Finally, there exists the possibility of actions against the teacher or other school authorities for civil assault and battery, false imprisonment, personal injury and wrongful death.

The normal rules of damages involved in civil liability are applied.¹⁰⁵ Assessing compensatory damages involves diminution or destruction of the power to earn money, medical and other attendant expenses, physical and mental pain and suffering, and, for the parent, loss of services of the child. Punitive damages are recoverable when the acts complained of were especially wanton, reckless, malicious or offensive in nature.¹⁰⁶ Also relevant here is the generally applicable KRS § 411.010 (1962), which provides that a defendant in a civil action for damages inflicted by an assault or battery may plead in defense or mitigation of claim for

¹⁰² *Quinn v. Nolan*, 7 Ohio 585, 4 W.L. Bull. 81 (1879).

¹⁰³ *Id.*

¹⁰⁴ *Drum v. Miller*, 135 N.C. 204, 47 S.E. 421 (1904). It has been held that cases requiring malice as a precondition to recovery must be considered as creating rules of criminal law rather than civil liability. E.g., *Suits v. Glover*, 260 Ala. 449, 71 So. 2d 49, 43 A.L.R.2d 465 (1954).

¹⁰⁵ *Harrod v. Fraley*, 289 S.W.2d 203 (Ky. 1956).

¹⁰⁶ *Id.*

punitive damages any provocation of such a nature to cause a person of ordinary prudence and judgment to take the action which was taken by the defendant.

2. Criminal Liability

It is, of course, axiomatic that criminal liability depends only upon whether the constituent elements of crime have been satisfied. If such precedent elements are met by infliction of disciplinary action, unlike the civil rule, there can be no privilege even for a parent,¹⁰⁷ much less for a teacher.

Some case law holds, however, that criminal liability will not follow a mere excess in punishment, but will result only where death or permanent injury to the child results, or where malice on the part of the teacher is shown.¹⁰⁸ The requisite malice may be either proven directly or inferred from the circumstances. Malice may be *express*, such as where there is specific evidence introduced tending to show that the teacher acted out of spite, hatred, ill will, passion, anger or the motive of revenge with the specific intent to inflict the harm which resulted.¹⁰⁹ However, the malice sufficient to impose criminal liability not always being express malice, or easily proven, the doctrine of *legal malice* has been constructed. This is the appellation for permitting inference of the malice from the circumstances in order to support a criminal conviction. It is a fundamental rule of criminal law that legal malice may be inferred from the type of instrument used to inflict the injury or from the extent and nature of the use of that instrument.¹¹⁰ Furthermore, even though it is said that mere excess of punishment will not support a criminal conviction, a purpose other than correction may be inferred therefrom and constitute legal malice.¹¹¹ Similarly, particularly cruel punishment would also tend to support a finding of legal malice.¹¹²

A discussion of criminal liability involves a question similar to matters previously discussed in relation to civil liability: may a

¹⁰⁷ Taylor v. Commonwealth, 302 S.W.2d 378 (Ky. 1957); Montgomery v. Commonwealth, 23 K.L.R. 732, 63 S.W. 747 (1901); See Fabian v. State, 235 Md. 306, 201 A.2d 511, *cert. denied*, 379 U.S. 869 (1954).

¹⁰⁸ Roberson v. State, 22 Ala. App. 413, 116 So. 317 (1928).

¹⁰⁹ *Id.*

¹¹⁰ Taylor v. Commonwealth, 302 S.W.2d 378 (Ky. 1957).

¹¹¹ State v. Thornton, 136 N.C. 610, 48 S.E. 602 (1904).

¹¹² Haydon v. State, 15 Ala. App. 61, 72 So. 586 (1916).

teacher be convicted of a crime where the injury is serious only because of some unusual physical condition of the pupil? It will be recalled that the earlier discussion questioned some decisions in other jurisdictions implying, contrary to the majority "thin skull" rule, that malice is a necessary element for imposing civil liability for excessive punishment. Here, however, that approach should not be criticized, as the teacher should not be subject to criminal liability by means of civil liability rules. The Texas courts have held that a teacher inflicting otherwise reasonable and moderate punishment will be criminally liable for injuries due to an unusual condition of the pupil if the teacher knew or should have known of the condition.¹¹³ Not only does this rule fail to adequately protect the teacher, but it also fails to comply with basic elements of criminal law as it fails to require that some evidence be in existence to support a finding of criminal intent. The Texas rule would seem to be no more than the basic rule of negligence, that is, whether the defendant knew or should have known of a peculiar condition in the student. Thus, it is defective, by reason of its application of civil negligence rules to criminal prosecutions.

There are several penalties which may be inflicted in a criminal proceeding. Where death results from the crime, there are four possibilities. First, the defendant may be found guilty of voluntary manslaughter, the punishment for which is confinement in the penitentiary for not less than two nor more than twenty-one years.¹¹⁴ A second verdict is involuntary manslaughter, an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life. This may result in confinement in the penitentiary for not less than one nor more than fifteen years. Thirdly, an act constituting reckless conduct results in imprisonment in the county jail for not more than twelve months, or a fine not exceeding \$5,000, or both.¹¹⁵ Fourth and finally, there are two types of prosecution for homicide. Where a person willfully strikes another without intent to cause death, but the victim dies within six months, the possible penalties are confinement in the penitentiary for not less than

¹¹³ *Ely v. State*, 68 Tex. Crim. 562, 152 S.W. 631 (1912).

¹¹⁴ KRS § 435.020 (1946).

¹¹⁵ KRS § 435.022 (1962).

one nor more than six years.¹¹⁶ Willful murder is punishable by confinement in the penitentiary for life, or by execution.¹¹⁷

A conviction for criminal assault where the victim survives is limited to the crime of assault with a deadly weapon, and it is unlikely that such event would occur in the scholastic setting. However, KRS § 435.160 (1962) does provide that any person who maims another may be confined in the penitentiary for not less than one nor more than five years. KRS § 208.020 (4) (1964) is here applicable too. It provides:

The [Juvenile] court shall have exclusive jurisdiction of persons who, and no persons shall, willfully and unnecessarily expose to the inclemency of the weather, or in any other manner willfully injure in health or limb any child actually or apparently under the age of 16 years.

V. RECOMMENDATIONS

A. *A Workable Theory*

Having examined in section I the traditional theories of jurisdiction, and found them all wanting, it is appropriate to search for a workable theory of disciplinary jurisdiction over secondary students.

The threshold inquiry is whether any theory is needed. If we can use Prosser's approach and simply declare that maintenance of order is sufficient reason for allowing teachers to discipline pupils we have said little, for two questions are left unanswered: what behavior is punishable and how is it punishable? Doubts about the need of a theory therefore soon fade, evolving into a more desperate search for a workable theory.

The traditional theories explored in section I each fail because of some disturbing criticism. The contractual theories necessarily presume an equality of parties, which is an unsupportable presumption. A statutory theory, expository but unexplanatory, can fully satisfy only a legal positivist. *In loco parentis* has been shown to entail too many practical and technical objections to permit its unqualified use. The quasi-judicial theory, besides being indistinct from *in loco parentis*, has the unfortunate flaw of not solving

¹¹⁶ KRS §435.050 (1946).

¹¹⁷ KRS § 435.010 (1946).

the problem; it provides immunity within limits without detailing nor supplying criteria for detailing those limits. A jurisdictional theory, to be truly useful, also must provide a basic standard by which to measure disciplinary procedures, and tell why the school may impose them.

The search can end with Professor Goldman's fiduciary theory,¹¹⁸ which requires only slight modification to serve secondary schools. Under this theory, any contractual approach to student-institution relations is abandoned in favor of basing the law on the parties' status. The student is recognized as having a status subordinate to the school, he having accepted this subordination on the vaguest of terms either because of his confidence in the school's fidelity and integrity or because he was put there by some outside force, likely parents or school districting. In either event, the school dominates the student and the very existence of this domination is cause enough to require special standards of conduct on the school's part; certainly a higher degree of fairness than is exacted from participants in a mere contract. The school undertakes to satisfy the confidence of the student or his parents by educating the pupil.

Negatively stated, the fiduciary theory avoids the specific criticism levied against the traditional views. While there is a vague consensual relationship, based upon historic contracts between the school and its students, there is nothing approaching a contract. Nor is there any contention that the school has been delegated mystic rights by the parent, or that the school has stepped into a pair of ill-fitting parental shoes. Since fiduciary status lies outside the realm of parental rights and duties, the school becomes an entirely separate entity, having its own areas of responsibility.

From a positive viewpoint the fiduciary theory likewise has value. There is no distinction between public and private schools.¹¹⁹ There is imposed a general duty of fairness upon all behavior of the fiduciary, both in enactment of rules and enforcement of them, which guarantees to the student a procedure and a result which is consonant with concepts of due process. The school is required to demonstrate fairness, rather than the stu-

¹¹⁸ Goldman, *supra* note 1.

¹¹⁹ *Id.*, at 673.

dent being required to prove the disciplinary action wrong.¹²⁰ At the same time, this theory plainly imposes upon the fiduciary the duty to protect its capacity to perform its trust function; *i.e.*, to educate. Thus the school may act in the best interests of all when activities endangering the performance of its trust function occur, regardless of the desires of one or more of the students.

Professor Goldman's fiduciary theory need be modified only insignificantly to be applicable to secondary schools. Since he offers the theory for the university, he rejects the existence of any extensive relationship between the university and parents because most university students are emancipated or of majority.¹²¹ This, of course, does not hold for high schools. Unlike a university, secondary schools should owe duties toward the parent. By placing comparatively young persons in its care, parents also repose a great deal of confidence in the high school, and this confidence must not be overlooked.

Upon reflection, it is apparent that some courts have for years used an approach not entirely unlike the fiduciary theory. While attempting to utilize the traditional theories, the Kentucky Court of Appeals spoke in terms of arbitrariness, malice, "other improper motives," fraudulent purposes, unreasonableness, unlawful action and actions against public policy. This language may just as easily be used in a fiduciary sense. Indeed, a review of some of those cases, in light of the fiduciary theory, yields the conclusion that that theory would not have altered in result many of those decisions.

The following activities are obviously regulable under the fiduciary theory as they relate to the functioning of the school's duty to provide an education: insulting teachers; violating a curfew in high school dormitory where residence is required; failing to maintain certain grades; hazing; disobedience or defiance of teachers; failure to comply with immunization requirements of the state; wearing such distracting or otherwise damaging things as metal heel plates, immodest clothing, excessive cosmetics and distracting hairstyles; the exercise of first amendment freedoms which results in disruption of the school routine; and marriage of

¹²⁰ *Id.*, at 674.

¹²¹ *Id.*, at 680.

a student. The school's right to protect its capacity to perform its trust function causes regulation in these areas to be permissible, so long as it is shown that disturbance of the academic atmosphere directly resulted from the behavior.

Certain other activities previously discussed may not be properly regulable under the fiduciary theory, even though the courts have heretofore permitted regulation. There are here two categories: activities which may be regulable in some instances and not in others; and those activities which, under the fiduciary theory, should never be regulable.

Into the first category falls proscribing patronization of restaurants off school grounds. Certainly, a rational argument could be made in favor of requiring children to eat only in the school restaurant if one exists. Then too, a restaurant with a poor sanitary record might be declared off limits; for if the school did not provide a restaurant for the children, its fiduciary duty would encompass health protection for them. But where there are no sanitation problems and where the school does not provide a restaurant, it would not be permissible by the fiduciary theory to allow school authorities to forbid students to enter particular restaurants as there are only two conceivable reasons why school authorities would do so: (1) because the establishment serves alcoholic beverages, and (2) for some personal discrimination against the restaurateur. If the restaurant serves alcohol, statutes forbid the entrance of persons under twenty-one years of age anyway, hence the normal legal processes could be used to control students patronizing such a restaurant. Similarly, personal motivation certainly would fall without the scope of fiduciary responsibilities.

Other activities regulable depending on the circumstances could easily arise under the statutory authorization for disciplinary action where the pupil acts in gross violation of law. Here again, any violation that disrupts the academic atmosphere would be regulable under the fiduciary theory, but it is not altogether certain that the legal authorities would restrict their interpretation of that statutory authorization to only those violations. An example is the previously noted opinion of the Kentucky Attorney General which stated that this particular statutory provision permitted school authorities to suspend students en-

gaging in sexual relations.¹²² If the acts took place on school property this may be a justifiable opinion, but if they did not, they constitute a violation of law more properly punishable by the proper legal authorities than by academic censure. Under the fiduciary theory, secret societies would continue to be regulable, but only when they attempt to intrude into the school by organizing or holding meetings. They are not now regulable during non-school months, and by the same rationale should not be regulable even during the school year when their activities take place entirely without the school.

Last among the matters regulable according to circumstances is truancy. Occasional truancy may be best punished through academic discipline. On the other hand, continuous failure to attend school cannot be halted by academic processes for which the student already holds contempt. The latter situation should be remedied by other legal processes.

The much smaller category is that of those activities never regulable under the fiduciary theory. The prior holding that a student may be disciplined for refusing to join in commencement exercises,¹²³ does not seem to be a sound position under the fiduciary theory although the court ostensibly rested its decision upon the supposed educational value of participation in such a program.

Since a substantial number of people smoke today, smoking does not have the disruptive influence that it might have had at one time, and it is therefore not altogether certain that smoking can be forbidden on the grounds that it disturbs the academic atmosphere of the school. Of course, smoking on school grounds is forbidden by statute, and as such it may properly fall within those areas regulable because they constitute a violation of law taking place on school grounds. Yet, as noted above, the violation of law taking place on school grounds should be corrected by school authorities only when it is related directly to the academic function, and when it does not so relate it should be a matter for the legal authorities.

Considering these particular decisions, it is apparent that the

¹²² 1957 OP. ATT'Y. GEN. 40021.

¹²³ *Valentine v. Independent School Dist.*, 191 Iowa 1100, 183 N.W. 434 (1921).

bulk of the courts' decisions would have been the same had the courts used the fiduciary theory. By applying such standards as unreasonableness and arbitrariness, the Kentucky Court of Appeals has satisfied the initial requirements of the fiduciary theory. It has also satisfied the next, more important, requirement of the theory by demanding that all such regulations relate to the educational purposes of the school. Nonetheless, we should not cast upon the Court the entire burden. To a great extent the legislature can aid in the determination of fairness by enacting useful statutes.

B. *A Legislative Model*

The purpose of this section is not to restate specific criticisms previously made, but to set forth a model for legislation designed to correct the problems discovered.

The matter of initial concern is to set out the scheme of disciplinary action that should prevail. First, when a student is deemed guilty of conduct contrary to statutes or regulations of the school board, a Superintendent, principal or head teacher of any school should be empowered to suspend the student. Immediate notice to the pupil's parents or legal custodian and a hearing held within one week of the suspension should be mandatory. At the end of the hearing, the board would decide whether to readmit the pupil or expel him. If readmitted, the pupil should have no cause of action against school authorities for the wrongful suspension. However, were the decree expulsion rather than readmission, his right to judicial review should remain unimpaired. No corporal punishment of any kind should be permissible; but if the misconduct were simply a matter of the pupil having some illegal item in his possession and causing classroom disorder through its display or use, confiscation of the item should be permissible. And finally, for minor incidents, detention of the pupil after school for reasonable periods should be allowable.

This disciplinary scheme can be erected through changes of addition rather than correction of Kentucky Statutes. KRS § 167.150 (1962) should be amended to include a provision similar to that found in KRS § 167.170 (1962) so that no officer or employee of any school, public or private, shall be permitted to in-

flict corporal punishment upon any pupil. The hearing by the school board required by KRS § 158.150 (1962) should be required to be held within one week of suspension, with notice to the student's guardian. Those granted the authority of causing suspension of pupils would be granted statutory immunity from any liability for wrongful suspension where the pupil so suspended is not expelled at the end of the required hearing, but is reinstated in school. Finally, statutory authorization would be granted to school authorities for detention for a reasonable period of time and for confiscation from the student of items the possession of which on school premises is forbidden by law and causes disturbances of academic order.¹²⁴

The most obvious advantage of this system is the elimination of any danger of physical harm to a student within the scope of permissible punishment. The question ceases to be whether the corporal punishment was activated by the teacher's improper motive, and whether the injured student should recover due to such motive, and becomes merely whether any corporal punishment was inflicted. The teacher no longer have the right to impose physical punishment, any such punishment inflicted upon a pupil as a means of discipline would be actionable.

Because there would be no right of discipline through corporal punishment, and because there would be no cause of action for wrongful suspension where a pupil is reinstated after the hearing, there is no possibility of a civil suit or a criminal prosecution against school authorities arising out of a claim of abuse of disciplinary discretion. Those proceedings which may arise would allege unauthorized disciplinary action and thus not incur the line drawing problems of degree of privilege.

The hearing required by law to follow suspension will serve multiple purposes. All parties will have a chance to air their grievances publicly. More importantly, there will be an open discussion of both the propriety and the enforcement of the regulation. Vague phrases such as "other gross violation of propriety"

¹²⁴ The specific creation of such a disciplinary technique might at first seem contradictory to earlier comments about the fiduciary theory; we criticized the use of academic discipline for the regulation of crimes. But it should be noted that this remedy affects only cases where classroom disorder has occurred from the display or use of an illegal item.

will be examined critically in the public light, rather than applied discreetly behind closed doors. Also, requiring imposition of punishment by a group rather than an individual increases the likelihood of a rational decision, not only by the simple number of decisionmakers, but also by the increased temperateness accompanying distance in time from the occurrence. Finally, the hearing process will create a record facilitating greater accuracy on appellate review. The argument that this proposal creates unnecessary formalism is unfounded, for the same hearing is presently required by KRS § 158.150 (1962). More importantly, it will provide an important safeguard for the student.

Most of the arguments against this scheme will focus on the prohibition of corporal punishment and the primary reliance on the remedy of suspension. While it is true that mild corporal punishment is sometimes beneficial, its primary applicability is to pupils younger than high school students. Furthermore, while it is true that speedy application of a paddle may provide a quicker impression, the advantages of substituting a speedy suspension for possible physical harm to the student are apparent. It can, of course, be plausibly argued that suspension would simply give uncaring students a holiday whereas swiftly applied corporal punishment would effectively serve the needs of the school and the student. This raises the question whether the purpose of discipline is maintenance of order in the school so that willing students may obtain their education, or the correction of the pupil involved. No doubt it can be argued that the purpose is dual, involving each of these elements. Yet, where there is a conflict between the two, fond hopes of synthesis cannot prevail and the more important element must be ascertained. Obviously, the ultimate reason for keeping order is to enable those wishing to gain an education to do so. Responsibility for correction of the child ultimately rests upon the parent, and a responsive parent should be sufficiently disturbed by the suspension to himself take some action. Thus, the fact that an unruly student might welcome a period of suspension should not be determinative.

It cannot be argued that truly less severe means of discipline have been prohibited by this proposal. It is true that a gentle tap may be less severe than suspension from school for a week,

but the danger of corporal punishment is that the physical blow cannot be retracted once it has fallen. If that blow causes effects more severe than were intended nothing can be done. Moreover the proposed plan does not eliminate truly less severe means of discipline. There remain the techniques of confiscation and detention. Furthermore, expulsion is not a necessary result of the hearing. Readmission of the pupil is quite possible.

A final advantage of this proposal is that the law is clarified by the codification of desired principles, and unwanted or conflicting case law on the subject is eliminated. At the same time, the proposed plan will not affect regulations of the school board, because the standard rules as to reasonableness would remain in effect; and an adoption of the fiduciary theory by the Court of Appeals would create a basic rule to govern each such regulation.

CONCLUSION

The argument can be made that there is in fact no need for a proposal as that herein promulgated since no harm has yet resulted from the present law and decisions. But such an argument fails to consider the very purpose of these recommendations. The question is not whether evil has occurred, but rather whether there is a distinct possibility of its occurrence. The criticisms leveled at the existing system reveal that abuse of a teacher's privilege of reasonable corporal punishment is quite possible, and that such a possibility should be eliminated, not just for the well-being of pupils, but for the good of the teacher as well. These recommendations make no distinction between public and private secondary schools for that very reason. There may be a greater applicability of the contractual theory to relations among private schools and parents, but merely ascertaining the theory that can best be used to justify discipline is not the point of this article. No parent would accept the results of excessive punishment with a contractual shrug, and no teacher should be deprived of the protection afforded by this plan simply because he teaches in a private school.

Nearly every day, a fresh article appears in a newspaper describing a student protest of some sort. Lately, however, high school students have been conspicuous in those articles. The

United States Supreme Court recently denied certiorari in a case involving haircuts, and today's hairstyles make it certain that for every Supreme Court case there must be hundreds of unreported local incidents involving appearance. But secondary school students are learning the advantages of public protest, or at least the publicity of protest, and more will be heard from them. The deficiencies herein observed in present law will become glaringly visible all too soon.