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Article

# ***173** Stay in Your Seat: The Impact of Judicial Subordination of Students' Rights on Effective Rights Education

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*The United Nations Convention on the Rights of the Child requires that State Parties, including Canada, provide rights education to young citizens. To teach rights adequately, educators must understand how children's rights function in society. Effective rights education, therefore, requires that educators themselves be well informed about the nature and extent of students' rights. To the extent educators are informed about student rights by the rare judicial pronouncements on the subject by Canadian courts, the authors argue that the educators' understanding is inadequate. While the expression of student rights is common enough, when faced with a student's claim to such rights, the tendency of the judiciary is to subordinate children's rights to the interests of order and discipline. This exacerbates existing obstacles to teaching rights to children, including adult suspicion, educators' lack of knowledge and a general fear that empowering children will lead to disorder. To move toward effective rights education and protection in schools, and to meet Canada's international obligations, teacher education must improve and embrace an educational theory that promotes respect for student rights and autonomy*.

## ***174 1. INTRODUCTION**

> *[I]nsofar as the educational process is aimed at, among other things, the development of autonomy in students, then a measure of a good teacher is the teacher's capacity to contribute to that development; a measure of a good school is the degree to which it provides the opportunities that are conducive to the autonomy of the students*. [FN1]

Schooling provides an important opportunity for children to realize themselves and others as rights bearers in a democratic society. Assisting students to seize this opportunity to learn respect for rights and national democratic values requires that Canada take steps to educate students about the operation of individual autonomy rights in our society. Those charged with educating children must themselves understand how children's rights function in society. Effective rights education, therefore, requires that educators be adequately informed about the extent and nature of students' rights.

This article begins by exploring how the extent and nature of students' rights have been traditionally understood through the principle of *in loco parentis*, and how this concept has been imported into the contemporary judicial understanding of students' rights. Specifically, we will explore judicial treatment of two constitutional rights: freedom of expression and the right not to be unreasonably searched. We will identify some of the

obstacles to teaching children about their rights, and how the above judicial understanding exacerbates these impediments. The obstacles we discuss include adult suspicion, educators' lack of knowledge and a general fear that empowering children will lead to disorder. We conclude by identifying potential areas for change: better teacher education and the modeling of an educational theory that stresses individual rights and student autonomy.

The concept of children as rights holders is a relatively recent idea. The recognition of children as persons under the law is a twentieth century ***175** phenomenon; it is a movement that has progressed to a point where children are currently accorded not only legal personhood, but also the status of individual rights-holder as set out in the United Nations Convention on the Rights of the Child. [FN2] The Convention is significant because it goes beyond mere declarations of rights to protection. [FN3] It explicitly recognizes children as possessors of autonomous rights that must be respected and protected by state signatories. [FN4] Author John Eekelaar points out that the Convention could have been expressed as a catalogue of duties owed to children by adults. Instead it recognizes an individual rights formulation and “the insight that people can contribute positively to others only when they are respected and fulfilled.” [FN5] This implies that the rights of children are not something bestowed upon them as adults see fit, or as a result of their relationship with adults, but are instead inherent, inalienable and subject to the same protections as the rights of adult members of society.

Because the Convention so strongly asserts the rights of the child, Canada is required, as a signatory, to make rights education and the empowerment of children a top priority. Since ratifying the Convention in December 1991, [FN6] the federal and provincial governments have been generous with their rhetoric and initiatives addressing children's rights. The federal government has designated the Human Rights Directorate of Multiculturalism and Citizenship Canada to disseminate information about the Convention. [FN7] Many provincial governments have made some attempts to integrate rights awareness into the formal curriculum. The Convention has propelled the movement towards greater rights education, but, despite the above initiatives, Canada is still not adequately educating its youth about their rights.

***176** The UN Committee on the Rights of the Child was established under the Convention to assess the progress of state parties in relation to Convention principles. Among a number of other problem areas the Committee identified with respect to Canada, such as declining social and economic supports for children, the Committee was particularly disappointed with Canada's rights-education efforts. The Committee's assessment concluded that rights education has not been adequately addressed:

> It recommends that a nationwide education campaign be launched, in the framework of the United Nations Decade for Human Rights Education, to sensitize the population at large - including children themselves - to the principles and provisions of the Convention, and that consideration be given to incorporating the rights of the child in the school curricula. At the same time, [Canada] should integrate the Convention into the training curricula for professional groups dealing with children, especially judges, lawyers, immigration officers, peace-keepers and teachers. [FN8]

In its report, *Children's Rights: Reality or Rhetoric*, the international organization Save the Children has also analyzed Canada's progress in furthering Convention principles and, like the Committee, found Canada's rights education inadequate. The organization observed that “[h]uman rights, in general, and children's rights in particular, are not widely taught .... The lack of rights awareness ... has implications for the holistic development of the child.” [FN9]

By ratifying the Convention, Canada recognized a need to ensure that “the child should be fully prepared to

live an individual life in society, and brought up ... in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity." [FN10] The role of education in achieving this goal is expressed in Article 29 of the Convention:

> State Parties agree that the education of the child shall be directed to:
>
> (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
>
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the *Charter* of the United Nations;
>
> (c) The development of respect for ... the national values of the country in which the child is living ...;
>
> ***177** (d) The preparation of the child for responsible life in a free society ... [FN11]

According to the Convention, then, state parties like Canada are obligated to take steps to ensure that rights education is an essential curricular goal. So far this effort has failed, and we argue that this failure begins with Canadian courts and their reluctance to extend the full protection of the *Canadian Charter of Rights and Freedoms* [FN12] to children in school. The *Charter*, legislated into Canada's constitution in 1982, lists the individual rights and freedoms which cannot be infringed by our government. Section 8, for example, states that individuals cannot be unreasonably searched by officials acting for the state. Section 2(b) protects freedom of expression, meaning that a state law or action that limits free speech is a violation of this constitutional right. These rights are not entirely inviolate. Section 1 of the *Charter* allows government to infringe rights where they can demonstrate that such a violation is reasonable and justified in "a free and democratic society." In order to require a government to justify a rights violation, the individual must first convince a court that he or she is entitled to the protection of the right. This has proven to be a substantial obstacle for students attempting to assert their rights.

Prior to the *Charter*, courts rarely interfered in school-related matters, leaving the treatment of students' rights to the wide discretion of school administrators relying on the concept of *in loco parentis*. Post-*Charter* Canadian courts have continued to defer to this authority. The guidance Canadian courts have provided to administrators suggests a traditional and paternal understanding of students' rights is appropriate. This view, however, does not accord with the Convention's forceful contention that children are to be granted autonomous rights. The Convention precludes a paternalist assumption; one that regards children as "immature 'not-yets' rather than rights-bearing persons in the here and now." [FN13] Although the courts have held that *Charter* rights should be interpreted in a purposive matter, ensuring that government actors respect and protect those rights, their reluctance to stray from the traditional *in loco parentis* concept of the rights of students in schools conveys the message that the rights of students are inferior to those possessed by adult citizens.

## ***178 2. *IN LOCO PARENTIS*: THE TEACHER AS KIND AND JUDICIOUS PARENT**

The traditional relationship between adults and children was one of subjection and submission. Under the care of their parents children were afforded only those rights their parents saw fit to give them. Parental behaviour was subject to judicial intervention only in the most extreme circumstances. Children were considered little more than the property of their parents and an interest in that property could be transferred to another adult. [FN14]

The concept of *in loco parentis* derives from this idea of interest transfer. It is defined as "in the place of the parent; instead of a parent; charged factitiously with a parent's rights, duties and responsibilities." [FN15] With

respect to the discipline of students, teachers were viewed by the courts as acting *in loco parentis* and could act toward children in a way that "shall be similar to that of a kind, firm and judicious parent." [FN16] Although by the twentieth century concepts of children's rights had transcended the traditional notion of property, the *in loco parentis* principle was firmly entrenched in the judicial understanding of school authority. Canadian courts continue to rely on the notion of the schoolteacher as surrogate parent, despite the fact that the legislation of compulsory public education means that administrative authority derives more from the state than the parent. [FN17] Addressing this concern a Nova Scotia court stated:

> A parent or one who stands in the place of a parent, may use reasonable force, including corporal punishment, for discipline and control. A school teacher has the same authority. 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 schools 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. [FN18]

***179** Instead of considering *in loco parentis* an inappropriate framework in the context of state-derived power, the court reasons that the principle is extended to allow discipline even where parents object. The result of the extension, justified by the need to maintain order in schools, is to strengthen the principle of *in loco parentis* by vesting it with the power of the state. *In loco parentis* originally implied that school authority constituted parental authority transferred from parent to teacher. The term is now buttressed with state derived paternalism.

Paternalism implies incapacity. It implies that those over whom it is exercised are not competent to care for themselves and any rights they possess are those which are created by or derived from the paternal authority. By importing this paternal concept into the student/school relationship, courts can comfortably leave discretion in the hands of school administrators. Professors Greg Dickinson and Wayne MacKay in *Rights, Freedoms and the Education System in Canada*, describe the traditional *in loco parentis* approach as an unacceptable preference for "the virtues of discipline and obedience over those associated with individual rights and challenging authority." [FN19] Some commentators argue that declarations of children's rights such as the Convention "officially [put] to rest older assumptions about the primary rights of parents and the role of the paternalistic state in protecting the interests of children." [FN20] However, the following analysis demonstrates that when it comes to applying constitutional protection to students, the courts have been loath to give up the traditionally paternal principle of *in loco parentis*.

## 3. THE RIGHT TO BE FREE FROM UNREASONABLE SEARCH

> *For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the school house as it does in the enforcement of criminal laws*.
>
> ***180** Pugsley J. of the Nova Scotia Court of Appeal [FN21] quoting with approval Powell and O'Connor JJ. of the U.S. Supreme Court. [FN22]

> *Education should, among other things, be about teaching justice in Canadian society both by precept and example. Schools should be a microcosm of a 'just society'. Conversely, justice, when properly administered, should not only deal fairly with an individual case, but also educate people about how society responds to crime*.
>
> Wayne MacKay [FN23].

If the above two statements appear discordant, it is because they represent two very different ideas about how constitutional rights should apply to students in a school context. The former statement reflects an attachment to the traditional judicial deference to the actions of school authorities at the expense of students' rights. The latter statement is a recognition that only by affording students the full constitutional protection given to other members of society, can they be properly educated about those same democratically determined rights.

Prior to the enactment of the *Charter*, the decisions and actions of educators regarding student discipline were “seldom held to judicial scrutiny” as courts were “reluctant to deal with educational issues.” [FN24] With the constitutionalization of individual rights under the *Charter* and the contemporary movement toward strengthening the rights of the child, traditional judicial deference under the auspices of the *in loco parentis* principle is no longer appropriate. However, when presented with otherwise obvious violations of students' rights to be free of unreasonable search and seizure under section 8 of the *Charter*, Canadian courts have maintained the deferential approach. The result has been to deprive students of a constitutional right, and to reinforce the improper notion that the rights of children are inherently subordinate.

**(a) *R. v. M.(M.R.)***

In the case of *R. v. M. (M.R.)*, [FN25] the Supreme Court of Canada recently considered the search of a high school student suspected of possessing drugs. The school vice-principal, Mr. Cadue, had a tip that the student, M.R.M., would be bringing drugs to the school dance. When the student and a friend arrived at the dance, Cadue called the police and brought the ***181** two students into his office. A police officer arrived and, after identifying himself, sat silently in the office while Cadue conducted a search. Cadue found marijuana in M.R.M.'s sock, and immediately handed the drugs to the police officer. The officer read M.R.M. his rights and arrested him.

If this situation had involved an adult suspected of carrying drugs, the above search would be considered unreasonable. First, for a search to be reasonable, a police officer must present enough evidence to a judge for the judge to issue a search warrant. If a search is conducted without a warrant a court will automatically presume the search is unreasonable. If the state cannot rebut this presumption, any obtained evidence likely will not be admitted at trial. To prove the search was reasonable, the police need to show that they had ‘reasonable and probable’ grounds to believe that they would find evidence of a crime. The standards for reasonable searches are high, because they protect the rights of all citizens to be free from arbitrary searches by state agents. [FN26] Without these standards police officers could violate the privacy of any individual, guilty or not, based on how they look, how they act, or what race they are.

This standard would likely not have been met by one tip from a fellow student. Nevertheless, the Supreme Court of Canada held that the search of M.R.M. was reasonable and the evidence could be used against him. The court based this decision on the assumption that students' privacy rights are “significantly diminished” in schools. Because of the problem of youth violence, educators need to be given wide latitude to control and discipline students. The court's understanding of how education is to be conducted is reflected in the following statement:

> It is essential that our children be taught and that they learn. Yet, without an orderly environment learning will be difficult if not impossible. In recent years, problems which threaten the safety of students and the fundamentally important task of teaching have increased in their numbers and gravity. The possession of illicit drugs and dangerous weapons in the schools has increased to the extent that they challenge the ability of school officials to fulfill their responsibility to maintain a safe and orderly environ-

> ment. Current conditions make it necessary to provide teachers and school administrators with the flexibility required to deal with discipline problems in schools. They must be able to act quickly and effectively to ensure the safety of students and to prevent serious violations of school rules. [FN27]

Based on this reasoning the court ruled that school administrators conducting searches of students, even though they are assumed to be state ***182** actors, are not to be held to the same standards as state actors conducting searches of ordinary citizens. If a school administrator has a reasonable belief that some school rule has been broken, the court determined that this is sufficient to overcome the diminished privacy rights of students.

**(b) The Resulting Impact on Students**

The *M. (M.R.)* decision is based on the premise that a search of a student by a school administrator for disciplinary purposes is unlike a criminal search, even when the school administrator knows that, if the search is successful, criminal charges will result. In *M. (M.R.)*, the court asserted that the primary purpose of the search was administrative, and that criminal charges were not absolutely certain to result. This assertion rings hollow, however, when one considers that Mr. Cadue had called the police prior to the search. Cadue himself testified: "I felt that there was a likelihood that I might find drugs." [FN28] Dickinson, in his comment on this case, states perceptively:

> The facts in *M.(M.R.)* seem almost surreal - the police officer sitting passively watching the 'kind, firm and judicious' parent-principal do his educational duty. One wonders, of course, whether the officer would have remained passive had the boy jumped up and bolted during the search. I think we all know the answer. [FN29]

The answer to Dickinson's question is illustrative of the criminal nature of the search and the inappropriateness of distinguishing between a police officer and a principal if both searches result in criminal charges. The court bases the distinction between a school administrator and police officer on the supposed 'special' nature of the school/student relationship. The language used in the judgment to describe the relationship harkens back to the pre-*Charter* recognition of *in loco parentis*.

The courts, though, are cognizant enough of the inappropriateness of the *in loco parentis* principle to not overtly attribute their reduction of students' *Charter* rights to such an obviously paternal assumption. Instead, they shift subtly from descriptions of the welfare of students to the resulting need for an orderly and authoritative learning environment that benefits all society. Dickinson, however, comments that such a position is not new but is "merely the social utilitarian purpose courts have identified, in lieu of *in loco parentis* ..." for granting broad discretionary powers to educators carrying out discipline.

***183** The breadth of this discretion lends itself to more ominous violations of students' privacy than were likely contemplated by the Supreme Court. In one Manitoba case, [FN30] the trial court judge interpreted the *M. (M.R.)* decision to mean that where the need for school discipline was the result of the student's committing a crime, the accused could have *no* privacy rights in school. Similarly, in December 1998, twenty Ontario high-school students were required to submit to a strip search after a large amount of money went missing. [FN31] The money was later discovered; it had been lost, and not stolen by any of the violated students. This highly intrusive infringement of personal privacy demonstrates how some school administrators will interpret — no matter how incorrectly — their broad discretionary power to ignore the privacy rights of students. While it is likely neither of these situations would pass even the permissive *M. (M.R.)* test, they remain two examples of how the Supreme Court's statement about students' rights can unfortunately result in a total negation of privacy rights.

Another difference between the court's treatment of students and adults in similar search situations, is the use of a *results-oriented* approach. The results-oriented approach bases its reasoning on the fact that the student is guilty. A critic of American search cases, J.M. Sanchez remarks that this approach is analytically flawed and dangerous:

> Any evaluation of constitutional rights which, from the very outset, is reacting to the defendant's guilt is likely to result in an increase in the powers of the government and a reduction of the rights of the population. [FN32]

The Supreme Court of Canada has itself cautioned against this approach. In *Hogan v. R.*, Justice Laskin commented that the results-oriented approach "has in it too much of the philosophy of the ends justifying the means." [FN33] In fact, in *R. v. Wong*, a case dealing with the unreasonable ***184** search of an adult, the Supreme Court specifically forbade a results-oriented approach, stating:

> [I]t would be an error to suppose that the question that must be asked in these circumstances is whether persons who engaged in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy. [FN34]

Applying this reasoning to *M. (M.R.)* suggests that the court should not be asking whether, considering the supposed need to maintain order, students engaged in the illegal activity of possessing drugs and guns at school should expect their privacy to be respected. Instead the appropriate inquiry is a neutral one. A neutral inquiry would ask whether *any* student in school has a reasonable expectation of privacy. Further, a neutral inquiry would consider the impact of search powers on ordinary students. Consider the situation of the other student who sat in the office with M.R.M. Did that student, whose only transgression was coming to the school with accused, have a right to privacy? What was the impact of Cadue's criminal search on the dignity and self-worth of an innocent student? In adopting a results-oriented approach, the Canadian judiciary demonstrates an understanding of students' rights that is inconsistent with a neutral *Charter* interpretation.

**(c) Teaching Indignity**

The logical inconsistency of the results-oriented approach is clear: full *Charter* protection is not for students because that would impair the ability of school administrators to curb their criminal activity. There is nothing here to indicate that the court considers the rights of those students who do not end up in court because the violation of their rights did not result in a criminal charge. What was the impact on the privacy rights and dignity of the 20 innocent Ontario students who were required to remove their pants and underwear in front of their teacher and their peers? If this case had resulted in an arrest of one of the students, this extreme abuse of court sanctioned discretion would have been found inconsistent with the *M. (M.R.)* criteria for reasonableness, and a violation of privacy would have tainted any resulting evidence. However, as all students were exonerated, barring a separate civil action, a court will not consider their case. Consideration of the innocent student is apparently unnecessary ***185** according to Canadian courts because of the supposed special relationship between students and school administrators.

The concept of a special relationship, embodied in the *in loco parentis* principle, may be appropriate in fostering caring and trusting interactions between students and those who are responsible for their intellectual, emotional and physical health for approximately 35 hours every week. It strains credulity, however, to suggest that

when an administrator is enforcing rules, especially ones with potentially criminal results, he or she is not more appropriately characterized as “an agent of the state charged with properly executing compulsory education.” [FN35] To hold otherwise is to send a dangerous message: the rights of students can be routinely subordinated to other interests. This is the message that reaches those in charge of maintaining order in schools, and it is these same frontline people — teachers, principals and other school officials — who are also responsible for the rights education of students. The debate for education policy makers, according to Dickinson, now becomes:

> ... whether exploiting this judicial latitude to treat students as “second class citizens” under the Constitution is necessary or justified for the sake of order, discipline or safety in schools, bearing in mind the “hidden curriculum” taught to students about the meaning of justice by the way schools exercise the considerable authority given to them by the state. [FN36]

If we believe that teaching rights requires modeling rights, how much can we let the anachronistic dictates of the judiciary impact an educators understanding of students' rights? This debate also informs the following analysis of a student's right to freedom of expression.

## 4. FREEDOM OF EXPRESSION

### (a) Limited Judicial Interpretation in the School Context

Free speech is often thought of as one of the cornerstones of a liberal democracy, founded on a belief in the importance of a free exchange of opinions in the ‘marketplace of ideas'. Freedom of expression permits the debate of ideas and ensures an avenue to criticize the government. Fundamental freedoms like free speech are entrenched in the Constitution, in section 2 of the *Charter*, which states:

***186** 2.) Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;

b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication;

c) freedom of peaceful assembly; and

d) freedom of association. [FN37]

Section 2(b) has been interpreted, within the context of the focus on fundamental freedoms, as an essential part of the citizen's relationship with the state.

The Supreme Court of Canada established a test in *Irwin Toy Ltd. v. Québec (Procureur général)* [FN38] to determine the types of expression protected under s. 2(b). The court concluded that all Canadians have a right to be free from the government regulation of non-violent activities that attempt to convey meaning. Different types of speech can be limited if there is a valid government interest or need, such as the protection of minorities or the rights of others. This basic understanding of freedom of expression is available to “everyone” under the *Charter*. [FN39] Canadian courts have only briefly considered the implications of s. 2(b) in schools, and the issue has never reached the Supreme Court of Canada. The decisions of the two lower level courts that have considered it are an indication of the direction higher courts may take when deciding on students' freedom of expression rights.

In a 1988 Ontario High Court decision, *Devereux v. Lambton Country R.C. Separate School Bd.* [FN40] the judge refused to recognize student dress as a significant aspect of freedom of expression. The court found that "none of the freedoms guaranteed by the *Charter* have [sic] been infringed. To hold otherwise would trivialize those rights." [FN41] The decision does not thoroughly consider the scope of students' *Charter* rights or the appropriate balancing of students' rights and school order. The ruling demonstrates a conservative approach to the extension of rights to students ***187** and pre-dates the Supreme Court of Canada's expansive definition of "expression" in the *Irwin Toy* decision.

The second case addressing students' freedom of expression rights involved an application for an injunction against the disciplinary action taken by the school administration. The 1993 case, *Lutes (Litigation Guardian of) v. Prairie View School Division No. 74.* [FN42], was instigated when Chris Lutes' privilege to leave the school grounds was revoked after he sang the chorus of a banned song, "Let's Talk About Sex," in front of a Board administrator while off the school property during lunch. While deciding only on an injunction request, the judge briefly considered the s. 2(b) infringement.

> I find as a fact on this interim application, that Chris was disciplined primarily for singing a banned song and this clearly violates his freedom of expression as guaranteed by the *Charter*.
>
> ...
>
> I am satisfied Chris has established a strong *prima facie* case that his freedom of expression as guaranteed under s. 2 of the *Charter* has been violated and that the actions of the school cannot be justified under s. 1. [FN43]

This judgment indicates a more progressive, purposive interpretation of the *Charter* than that seen in the *Devereux* case. However, without a higher court decision on the matter, the issue of students' s. 2(b) rights remains uncertain.

Without a definitive statement on students' s. 2(b) rights, it is open to courts to resort to a pre-*Charter* approach and rely on the *in loco parentis* doctrine to regulate students' relationship to the school. The traditional approach of deferring to school officials continues to be used in the absence of a post-*Charter* understanding of students' expression rights. The Supreme Court's approach to student privacy rights, discussed above, indicates that even if s. 2(b) were to come before it, the traditional and deferential approach would be upheld in the interests of maintaining order. Education Law scholar Wayne MacKay comments on this approach in his consideration of the *Charter* as a new avenue for advancing students' rights. He observes:

> [t]he tradition has been to resolve educational issues in the political rather than the judicial arena, and courts, as part of their deference to the general social ***188** order, have taken a hands-off approach to the decisions of school boards and school administrators. [FN44]

This reluctance to examine the method of discipline, or extent of the school's disciplinary role, generates an unfortunate gap in the judicial comment on students' rights. Supporters of the deferential approach maintain that entrenching the rights of children will usurp the 'fatherly' role of schools. [FN45] Adopting this reasoning fails to consider the existence of students' rights and perpetrates an unexamined application of state authority by refusing to consider the methods or effects of that power.

**(b) Citizenship Education**

The traditional approach is in direct opposition to the promotion of the free exchange of ideas in a democratic society. The latter requires the acceptance of expressions of opinion that are unpopular or difficult. The opera-

tion of a ‘marketplace of ideas' depends upon the assumption that individuals are capable of choosing between ideas. Based on an adult perception that children lack the capacity to make rational decisions, children traditionally have not been permitted to participate in the ‘marketplace of ideas'. However, commentators argue that the school should be the location of children's democratic education.

> Educators are fond of trumpeting the virtue of Canada's democratic society but are not so eager to practice it in their own schools. Values are best learned by practice and students should be given the opportunity to experience democracy as well as hear about it. [FN46]

Educator Ken Osborne surveys the place of citizenship education in the Canadian educational landscape. He concludes that “[o]ne of the weaknesses of citizenship education over the years has been its inability to penetrate the classroom, to turn its rhetoric into actual practice.” [FN47] When ***189** the important decision making involved in sifting thorough information and determining values is taken over by schools, students are denied the opportunity to develop their own opinions, yet only “[t]hrough expression, [is] an individual ... able to test his or her ideas, opinions and beliefs.” [FN48]

The failure of the education system to embrace and promote students' freedom of expression rights is compounded by the inconsistent importance judges attribute to those rights. Judicial decisions regarding the rights of students frequently “confuse good citizenship with obedience for its own sake” [FN49] and highlight the importance of deference to authority in the development of a peaceful citizen. However, democratic education is one of the judicially endorsed values expected of our education system. The Supreme Court of Canada confirmed the state's interest in education in *R. v. Jones* [FN50] when it concluded that a certain standard of education must be provided, even though the parents and the children objected to the curriculum being taught. [FN51] Despite this clear indication that the state's values are being inculcated in school, the courts refuse to acknowledge the state's interest in free expression as a component of these democratic values. Free expression in schools will sometimes encroach on school discipline or make the administration of the schools difficult. Reconciling the educational needs of students and the discipline concerns of teachers and administrators is an important aspect of overcoming resistance to students' rights. However, respect for and protection of these competing interests by the judiciary should be based on a principled understanding of the importance of free speech. “[I]t is the complexity of values that are realized through freedom of expression that makes speech a fundamental right worthy of stringent judicial protection.” [FN52]

Without s. 2(b) protection for students in schools, not only is an opportunity to gain skills lost, but valid and important opinions also are stifled. In the current debates about the role of corporations in the classroom, the imperative of school discipline is being used to curtail students' ***190** participation in or protests against school decisions. In Meadowvale, Ontario, students were disciplined for protesting the broadcast of the Youth News Network (YNN) in their school. YNN is a 12.5-minute daily broadcast made up of ten minutes of current events and magazine-style news coverage interspersed with 2.5 minutes of advertising. A very brief public notification process took place after the contract with YNN had been signed. The introduction of YNN into the school was not seamless. At an assembly introducing YNN to the school, a student asked the principal, “why a profit organization was allowed to infiltrate our school.” [FN53] The audience applauded the question, but the principal walked away without responding. Despite early opposition to the program, YNN broadcasts began. Any student opposition to YNN was quickly followed by disciplinary action by the school administration. One student wrote a “zine” [FN54] criticizing the broadcasts and the school's involvement. School administration confiscated the zine, despite the fact that it was not produced on school grounds or with school resources. In a ‘battle of the bands' competition, another student — wearing a shirt that stated “YNN sucks” — was disqualified. A teacher turned off his amps in the middle of the performance because he had asked the audience whether they agreed

with the message on his shirt. A group of students at Meadowvale formed the Students Against Youth News Network Organization (SAYNNO) and planned a 15 minute walkout protest. The principal informed the students that they would be suspended for participating in the walkout. When 75 students left their classes, the administration sent letters home to parents informing them that their children had left class 15 minutes early and may or may not have participated in the student protest.

The introduction of YNN into Meadowvale Secondary School did not involve student participation or input. School discipline was used to silence student protest. John Pugente, president of the Canadian Association of Media Education Organizations, condemns the school's response: “When the students complained, they were sent to detention; when the parents complained, they were forbidden from entering (school) property; and when the public complained, they got sued.” [FN55]

***191** The efforts of these students in voicing their objections to corporate involvement in their schools is an example of the type of free speech that should be protected under the *Charter*. State intrusion into the free exchange of ideas through the use of disciplinary measures would not be tolerated for any other group of citizens in Canada. Not only is it an aspect of the education system's role to promote public participation and debate, it is also a responsibility of larger society to protect the rights of this vulnerable group of citizens as they try to raise unpopular opinions. Our success as a rights-protecting society can be evaluated by the extent to which divergent views are allowed to influence public debate. If we fail to support and facilitate the efforts of students like those protesting YNN in their schools we not only do a disservice to those students, but we also endorse the debasement of our notion of the rights of citizenship in a free and democratic society.

## 5. ADULTHOOD DENIED

Expressions of children's rights abound, but when faced with the actuality of a student's claiming to those rights, the judiciary has tended to subordinate children's rights to the interests of order and discipline, rendering *Charter* rights for students very much an “empty claim.” Gaffield and West note that “one of the most salient characteristics of juvenile status in education, law and the economy is ‘denied adulthood.”’ [FN56] The judicially sanctioned denial of students' autonomy rights results in an institutionalized oppression, which is justified by the claim that this denial is in the interests of the oppressed. [FN57] Courts generally hold the view that learning takes place in an orderly environment. It is therefore thought that it is in the best interest of students to extend broad discretion to those administering education to preserve this orderliness. The impenetrable nature of this discretion is a consequence of the preservation of *in loco parentis* — a principle that is inappropriate when applied to a 21st century understanding of children's rights.

The present *Charter* interpretation of students' rights within schools is incongruous with the purposive extension of the *Charter* to the average citizen. Because, as Gaffield and West insist, “[c]hildren's rights will not ***192** be achieved in isolation from the liberation of other sectors of society”, [FN58] judicial segregation of students' rights into a separate and more restrictive framework could immutably subordinate them. Considering Canada's legislative commitment to the inculcation of democratic values and international obligations under the Convention on the Rights of the Child, [FN59] the present judicial approach to the rights of children in schools is conspicuously inadequate. The following obstacles to teaching students' about their rights demonstrate that the guidance provided by Canadian courts is counter-effective in the empowerment of students.

## 6. OBSTACLES TO THE REALIZATION OF STUDENTS' RIGHTS

Recognizing that judicial respect for students' rights is far from adequate raises questions about the social factors that have facilitated this wholesale neglect. Certainly, the history of the common law interpretation of the relationships between children and their parents, and schools and law, is a factor. Arguably, however, other forces have fortified the reluctance to acknowledge and protect the non-welfare rights of minors. Some of these factors are particularly evident in the operation of schools. Adult suspicion of children's rights, educators' lack of knowledge of rights and the general culture of resistance to student's rights in school are substantial barriers that will change only with shifting social attitudes.

**(a) Adult Suspicion**

Adult suspicion is one of the commonly cited reasons for the limited protection of children's rights. Kathy Bickmore, of the Ontario Institute for Studies in Education, observes that “adults, including educators are not necessarily disposed toward sharing power with young people.” [FN60] This general observation summarizes the attitude often adopted by teachers, parents and society, whose reluctance or suspicion is buttressed by the idea that children are not competent to make informed, rational decisions and by the perception that children will make mistakes because they lack experience and wisdom. By relying on these assumptions, adults maintain unrestricted decision making power over children.

***193** The media contributes to adult suspicion of children and rights, by perpetrating the idea that children's rights threaten public order and safety. The sensational and misleading reporting of youth crime and educational underachievement fuels calls for stricter discipline and ‘back-to-basics' education. The media portrayal of youth as uninterested in school, citizenship or their neighbours, compounds the perception that youth are inconsiderate, self-absorbed and primarily interested in illegal, immoral or other destructive activities. [FN61] Howe and Covell observe that “the public equates youth crime with too many rights for youth present[ing] yet another problem for acceptance of children's rights education in schools.” [FN62] These negative stereotypes reach the public through the media, affecting the opinions of parents, employers and particularly teachers.

In *M. (M.R.)*, the Supreme Court of Canada told us that violence and crime among youths have increased to such an extent that today's school administrators are faced with “grave and urgent” problems that were “unimaginable” in the previous generation. [FN63] This opinion both reflects and reinforces what the average Canadian reads and watches every week in the local and national news. The court offers no data to back up their dire conclusion, suggesting that even the courts are not immune to the common perception that youth violence — particularly school-based youth violence — is out of control.

In an article critical of the media representation of youth violence, Dolmage points out the danger of relying on what he determines to be an erroneous and unsubstantiated perception of youth as criminals. [FN64] Despite the fact that youth violence had actually declined in the previous five years, 67% of Canadians polled in September 1998 believed that schools were less safe then than they were five years before. [FN65] In a doctoral study, Hall found that 93% of school administrators thought youth violence had increased significantly, but only 28% thought it had increased in their own schools. [FN66] Dolmage attributes these gaps in perception to extensive media manipulation of a few sensational stories of youth violence. He concludes his article by appealing to policy makers to base decisions only on “defensible data obtained through valid and reliable research and not ***194** moral panic designed to sell advertising.” [FN67] It is alarming that in proclaiming youth violence to be a serious problem, Canada's highest court appeared to rely on absolutely no reliable and valid supporting evidence. Instead, the court chose to rely on the latest in media-inspired political rhetoric to support the granting of

broad discretionary powers to school officials.

The general misinformation about and one-dimensional portrayal of youth perpetrate the adult suspicion that “taking children's rights seriously would mean the erosion of the authority of teachers in the classroom and of parents in the home.” [FN68] However, there is no basis for this correlation between authority or order and the protection of children's rights. Jordon argues that “the legitimate interests involved in child-rearing can still be met without treating children in a manner inconsistent with the way other citizens in a liberal democracy are treated.” [FN69] The recognition of children's rights as independent and freestanding is a precondition to protecting and respecting those rights in schools.

**(b) Educators' Knowledge**

The second barrier to social change is rooted in educators' lack of knowledge about rights. As with any right or responsibility, the right-bearer must be aware of the right and informed of its scope. The extent to which children understand their rights depends largely on the individual impetus of teachers or parents. Without accurate information in the hands of teachers, educating children properly about their rights is impossible. In a study published in 1998, a series of 14 questions, each addressing a different rights issue in the educational setting, was given to teachers across Canada. On 11 of the 14 issues, over 20% of respondents selected ‘I don't know’ as their answer, with 40% confessing similar ignorance on 6 out of 14 issues. [FN70] In addition to the lack of knowledge, there was regional and topical variation in the ‘correct’ answers given by educators and administrators, demonstrating that knowledge of rights is inconsistent in teacher training and professional development opportunities across the country. The report's authors conclude that “[t]hese numbers are disturbing, as they appear to indicate considerable ignorance regarding different ***195** individuals' and groups' rights in relation to education.” [FN71] If we expect teachers to educate students about their rights and prepare them to promote and respect the rights of others, we need to ensure that effective and accurate information is provided to them both before they begin their careers, and through regular professional development.

**(c) School Resistance**

A third obstacle to the realization of children's rights is the resistance within schools to respecting and promoting students' rights. This resistance can be analyzed by considering, on the one hand, the issues facing teachers and, on the other, those facing administrators or principals. As with the suspicion of adults in general, these issues are based on fears and assumptions about the effect of promoting student rights in the school setting.

One common inhibitor to promoting students' rights in the classroom is the fear that teachers will be unable to maintain order and teach effectively in the face of demands for rights recognition. The educational and developmental goals of independence, abstract and hypothetical thinking and self-determination should actually increase in importance as children age. Instead, the trend is toward a more structured and controlled classroom as children age and are more apt to question or flout authority. The fear of disorder is used to justify “fewer opportunities for participation in the classroom as the child increases in age and maturity.” [FN72] Missing from this equation is the positive impact of rights education on classroom dynamics. Rather than creating a climate of disorder and chaos, promoting and respecting students' rights might eliminate discipline issues through increased responsibility and respect for the rights of others. This would also allow for a progressive increase in the level of student participation in learning. While fear of a chaotic classroom environment may be legitimate, it is rooted in an inadequate understanding of rights. There is little evidence to support any specific result of rights promo-

tion in schools. However, the possibility of failure surely is an insufficient reason not to try, especially when the possibility of profound success is equally plausible.

The concern of administrators is rooted much more in the formal role of the principal in maintaining order and school safety. The courts have typically been deferential to this authority. Traditionally, children's freedom ***196** and autonomy are more constrained than those of adults because of a state interest in the responsible and healthy development of children. [FN73] One teacher, commenting on a court ruling restricting students' rights, heralded the decision as a sign that courts would "continue to view school discipline as an area in which they will rarely intervene," while maintaining that the exercise of school rules is "best left to the common sense of the administrator rather than courts of law." [FN74] While this argument may be practical, it fails to address the protections clearly encapsulated in the *Charter*. The need for discretion on the part of administrators must not remain totally unrestricted because it can be abused in ways that are contrary to our democratic values. According to professor Michael Manley-Casimir:

> Discretion can be used benevolently or malevolently, reasonably or unreasonably, justly or unjustly. While it can ensure administrative responsiveness and flexibility, ... it can also allow for arbitrary and unjust treatment of individuals. The scope of discretionary action thus needs to be limited in a way that preserves the administrative flexibility and safeguards individuals from possible abuse. This is especially needed in schools. [FN75]

The *Charter* provides for appropriate flexibility and safeguards by acknowledging the role of discretion while still protecting the rights and freedoms of citizens. Section 1 allows for students' rights to be limited by concerns about school order and would permit variation in the level of protection afforded to students of different ages. Therefore, the recognition of students' rights would ensure the procedural safeguards enshrined in the *Charter* and would outline the extent of a principal's authority while still allowing for age-appropriate flexibility in school administration.

Nonetheless, many administrators resist attempts to provide for accountability to, or involvement of, students in their disciplinary decisions. Administrators are reluctant to discuss changes to their discretionary authority. This reluctance may be based on a fear that *Charter* scrutiny ***197** of administrative discretion would lead to the erosion or complete removal of that authority. Instead, recognition of students' rights would allow for defined guidelines and the confident use of that power, thus benefiting everyone involved.

It is clear that the restriction of *Charter* rights is based as much on assumptions and misconceptions as it is on the needs or interests of schools and parents. These obstacles to taking children's rights seriously can each be overcome by a shift in attitude that transcends schools and courts. That shift can be brought about by a more substantial public discussion of students' rights.

A change in society's understanding of children's rights is needed to overcome the barriers discussed above. One theorist argues that "the centre of gravity of legal development lies not in legislation, nor in the juristic science, nor in judicial decision, but in society itself." [FN76] To facilitate reform in the acknowledgment of student rights in schools, the process of social change requires the involvement of the larger society, not just those directly affected. This is particularly important because students lack the resources, legal standing and knowledge to assert and defend their own rights. Understanding the process of social change reveals a substantial barrier to the advancement of students' rights that can be effectively addressed by the deliberate recognition on the part of all members of society that the promotion of students' rights is in all our interests. As in most areas of social change, education can play a pivotal role. In the present context, this potential begins with the teacher-train-

ing, graduate and in-service education of those best positioned to effect change directly in the school environment and in society at large — teachers and administrators.

## 7. TEACHER TRAINING AND THE JUDICIAL UNDERSTANDING OF STUDENTS' RIGHTS

How teachers and school administrators come to an understanding of students' rights will determine their ability to teach and respect those rights. As explained above, educators understand students' rights according to particular pre-conceived frameworks. Adult suspicion about the merits of children's rights, a lack of understanding of rights and resistance based on the fear that children's rights will inhibit school order are all ***198** influential in educators' responses to calls for rights education. These preconceptions suggest that how educators are trained in relation to children's rights will significantly impact the understanding of rights they will bring to the classroom. An analysis of five Canadian books, written, at least in part, to teach educators about the laws of education, reveals that it is the present judicial understanding of students' rights that is being taught to teachers and administrators as the acceptable one. [FN77] Consequently, the pre-conceptions of educators, instead of being challenged and changed, are in fact reinforced by the inadequate and deleterious dictates of the judiciary.

In *Legal Handbook for School Administrators*, Anthony Brown demonstrates and reinforces a suspicion of students' rights, stating cynically that “now it appears that people want to assert their rights but are not willing to accept the responsibilities that accompany those rights.” [FN78] The book goes on to set out the law for administrators and does not contain any discussion about children's rights beyond what is explicitly established in law. The school administrator using this book as her guide will be assured that:

> Given that the courts have generally upheld the authority of principals and teachers to operate the school and classroom and that there is still legal recognition of the teacher's *in loco parentis* role, there does not appear to be any reason why pupils should not be questioned as they have in the past, or that normal disciplinary practices should not be in effect. [FN79]

Brown also co-authored *Education Law* with Marvin Zuker. Even before directly addressing the issue of school discipline, the authors disclose their perception that students' rights are subordinate in the following ***199** passage: “The issue of order and discipline has haunted educators all over the world. How do you control immature human beings?” [FN80] The authors continue by confirming fears about out-of-control school violence — an observation which they, like the Supreme Court of Canada in *M. (M.R.)*, appear to base more on common perception than on social science data. The data about youth crime that is offered by the text is derived entirely from American, not Canadian statistics. [FN81]

In *Rights and Realities*, Jonathan Black-Branch intends to explain to teachers and administrators how the *Charter* will affect their roles. Although Black-Branch warns educators that the *Charter* “has contributed to the erosion of traditional administrative authority” [FN82] he is quick to reassure them that the courts' treatment of students in search and seizure cases “sends a clear message to school principals that they are to conduct business as normal within schools.” [FN83]

*Teacher Beware: A Legal Primer for Classroom Teachers*, written by Alex Proudfoot and Lawrence Hutchings, provides the reader with the rare opportunity to actually contemplate the relationship between the actions of teachers and the rights of students. Although, like the others, this text outlines the law as interpreted by the courts, it also questions the judicial interpretation of students' rights. The unfortunate aspect of the authors' analysis is that it appears to be motivated more by a desire to avoid liability than an assumption that the recognition of students' rights is important in itself and an effective way to inculcate democracy. The authors state:

“Knowledge of the law will provide guidance to the teacher by suggesting ways of protecting himself and his employer ....” [FN84] While this motivation requires some consideration of students' rights, it is insufficient. A more meaningful understanding of students' rights is one that is motivated by a desire to teach rights effectively and empower children.

Finally, in *Schools and Students: Legal Aspects of Administration*, W.H. Giles produces a work that the foreword promises will be “an invaluable assurance to classroom teachers, to head teachers, to school boards and to local education authorities.” [FN85] The message that Giles ***200** imparts to those who deal with the rights of students on a daily basis is that:

> [t]he courts must not punish caring teachers ... who are guilty of a momentary lapse in judgement, when the same lapse committed by a parent would bring no lawsuit. Society must recognize that people are ultimately responsible for their own stupidity. Children in school who, because of their own outrageous behaviour, hurt themselves or others, should be held accountable for that behaviour .... To achieve that goal, the judges must act more like parents dealing with children, instead of looking for scapegoats among educators. The educator, or teacher, also, must act as parent (*in loco parentis*) where the welfare of the child is at stake. It is not a matter of duty. It is a matter of need. [FN86]

In this one statement, Giles confirms all the fears and suspicions of the uninformed educator. There is no recognition that it might be possible to both maintain order and respect rights. Nowhere in his ‘invaluable’ text are children's rights mentioned except as irritable obstacles to what should be unscrutinized authority. The opinion of Giles is not unique. It is both affirmed by, and an affirmation of, the judicial understanding of students' rights. New teachers and school administrators are not presented with an alternative to this regressive analysis. This is an unacceptable omission.

## 8. CONCLUSION: MODELING RIGHTS PROTECTION

The kinds of resources discussed above reinforce the erroneous message that even teaching students about their rights — let alone granting them — will undermine, rather then benefit, schools, teachers and principals. A study by Howe and Covell suggests otherwise. These authors say that as children “... value their own rights as well as the rights of others, and as they become rights-conscious adults with voting power and in leadership positions, they will become more demanding [of] existing Canadian laws, policies and practices.” [FN87] The net gain to society of tolerant, responsible citizens who value and protect rights is undoubtedly in the interest of our government and our communities. An understanding of the expectations and obstacles facing schools leads to a simple, but transformative conclusion. In order to teach children about rights, we must be prepared not only to claim that children have rights, but also to model them.

In a pilot program in Nova Scotia, Howe and Covell developed a rights education curriculum for Grade 6 students. In the development of ***201** the program, they addressed four areas they see as critical in the education of children's rights: adequate structures for student participation; protection of fundamental freedoms; teacher education about rights; and, teaching styles that reflect the needs and stages of child development. The results of this pilot project strongly support the argument that teaching rights to students benefits schools, teachers, peers and society. Howe and Covell write:

> As children learn that they have rights (and are persons worthy of rights), they become more willing to recognize and endorse the rights of others and to embrace the related values of tolerance and multiculturalism. [FN88]

The authors go on to state that “teaching children's rights is a foundation for the practice of children's rights.” [FN89] Role-modeling by teachers and schools, as well as the practical learning of complementary rights and responsibilities, would allow children to defend their own rights and effectively promote the rights of others.

Howe and Covell's study of this rights-education curriculum demonstrates how respect for students' rights promotes the state's interest in education. Courts commonly herald inculcation of community values as the reason for limiting rights in schools. However, in this context, the inculcation of community and state values calls for a concerted effort to integrate rights education at all levels. The *Charter*, as well as Canada's international obligations, clearly indicates that we view ourselves as a rights-respecting society. Our interest in promoting these values requires that we satisfy “the real function of education [which is] to transmit knowledge, to foster thinking and creativity, to provide role models and to expose children to precepts of a democratic system.” [FN90] Schools play a central role in the development of these communal, societal values. The Supreme Court of Canada, in *M. (M.R.)*, focused overwhelmingly on disciplinary concerns, but still recognized this role, stating that it is teachers “who must carry out the fundamentally important task of teaching children so that they can function in our society and fulfill their potential ... [I]n no small way, teachers and principals are responsible for the future of the country.” [FN91] In fulfilling that role, “it is at least as important to provide students with a model of justice and equality in our schools as it is to teach them the admitted virtue of following rules.” [FN92] Society ***202** maintains high expectations for children once they leave the school system, celebrating the innovation, involvement, and success of its graduates. To prepare them to meet these expectations, children should expect adult decision-makers to pay as principled and vigilant attention to their rights as we expect of citizens in relation to each other. Our responsibility is not just to prevent harm to children but to value and protect their rights when the state becomes involved in their lives. Permitting schools to infringe on basic rights accorded to all other citizens falls far short of that responsibility.

Wayne MacKay observes that by emphasizing the value of order in schools, we leave little room for pursuing a theory of education that stresses individual rights and student autonomy. [FN93] The high priority given to order is countered by the Convention, which requires Canada, as a state-party, to view children as independent rights-holders who must be involved in the decisions affecting their lives. The Convention goes further and imposes a duty to teach children about their rights. Prominent rights philosopher Michael Ignatieff succinctly describes the proper framework in which we, as adult decision-makers, can reconcile competing perspectives in the resolution of complicated questions of children's rights:

> Children do have rights. They have the right not just to be sheltered and cared for and protected from abuse but also to be treated as moral agents in their own right with intentions, purposes and visions of the world that we should not assume are identical to our own. [FN94]

Moral agency should therefore be our goal; order and respect are a consequence of this agency, not a precursor. Without a concentrated recognition of students' moral agency we stand to prevent them from realizing their goals and we forfeit a unique perspective about the operation of our community.

[FNa1]. Greg Sitch, who trained to become a teacher, is now a third-year law student at the University of Victoria.

[FNaa1]. Sarah McCoubrey is a third-year law student at the University of Victoria with past experience in alternative education and curriculum design.

[FN1]. R.F. Magsino, “Student Rights in Canada: Nonsense Upon Stilts?” in H. Berkley, C. Gaffield, & W.G. West, eds., *Children's Rights: Legal and Educational Issues* (Toronto: O.I.S.E., 1978) at 103.

[FN2]. Convention on the Rights of the Child (with Reservations and Statement of Understanding), UN doc. A/RES/44/25, 20 November 1989; entry into force September 2, 1990; in force for Canada December 13, 1991, Can.T.S. 1992 (“Convention”).

[FN3]. See M. Freeman's criticism of early children's rights documents in “Whither Children: Protection, Participation, Autonomy?” (1993) 22 *Man. L.J.* 307. Freeman sees the Convention's full participation provision, Article 12, as a recognition of the child as a “full human being, with integrity and personality and with the ability to participate fully in society,” *ibid.* at 319.

[FN4]. Convention, above, note 2 at Article 1.

[FN5]. J. Eekelaar, “Importance of Thinking that Children Have Rights” in P. Aston et al. eds., *Children, Rights and the Law* (Oxford: Oxford University Press, 1992) at 234. See also A.G. Mower, *The Convention on the Rights of the Child: International Law Support for Children* (London: Greenwood Press, 1997).

[FN6]. With the exception of Alberta.

[FN7]. S. Muscroft (ed.), *Children's Rights: Reality or Rhetoric* (London: I.S.C.A., 1999) at 102.

[FN8]. Committee on the Rights of the Child, Comments on Canada, U.N. Doc. CRC/C/15/Add.37 (Ninth session, 1995), at 19.

[FN9]. Above, note 7 at 109.

[FN10]. Above, note 2 in the Preamble.

[FN11]. *Ibid.* at Article 29.

[FN12]. Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (“*Charter*”).

[FN13]. B. Howe and K. Covell, “Schools and the Participation Rights of the Child” (January 2000) 10 *E.L.J.* 107 at 109.

[FN14]. For a detailed description of children as property, see M. Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter, 1983), Chapter 1: “The Evolution of a Concept” at 6-23.

[FN15]. *Black's Law Dictionary*, (St. Paul: West Pub. Co., 1990) at 787.

[FN16]. R. Young, “Student Conduct and Discipline” in *School Law* (The CLE Society of BC, 1994) at 5.1.03.

[FN17]. Wayne MacKay criticizes the inadequacy of the *in loco parentis* approach in the context of state-derived power in “Students as Second Class Citizens Under the *Charter*” (1987) 54 C.R. (3d) 390, and in “The Canadian *Charter of Rights and Freedoms*: A Springboard to Students' Rights” (1984) 4 *Windsor Yearbook of Access to Justice* 174.

[FN18]. *Murdock v. Richards*, [1954] 1 D.L.R. 766, at 769 ("*Murdock*"). Other examples of pre-*Charter* deference to the *in loco parentis* powers of school administrators include *Ward v. Blaine Lake School Board*, [1971] 4 W.W.R. 161 (Sask. Q.B.); *McIntyre v. Blanchard (Township) Public School Board, Section 8* (1886), 11 O.R. 439 (Ont. H.C.).

[FN19]. G. Dickinson & W. MacKay (eds.), Rights, *Freedoms and the Education System in Canada* (Toronto: Edmond-Montgomery, 1989) at 318.

[FN20]. Howe and Covell at 109. See note 13.

[FN21]. *R. v. M. (M.R.)* (1997), 7 C.R. (5th) 1 (N.S. C.A.), leave to appeal allowed (1997), 164 N.S.R. (2d) 240 (note) (S.C.C.), affirmed (1998), 171 N.S.R. (2d) 125 (S.C.C.) at 15 [C.R. (5th)] per Pugsley J.A. (*M.M.R.* (C.A.)).

[FN22]. *New Jersey v. T.L.O.* (1985), 105 S. Ct. 733 (U.S. N.J) at 747 ("*T.L.O.*").

[FN23]. "*Principles in Search of Justice for the Young: What's Law Got to Do With It*?" 6 *E.L.J.* 181 at 182.

[FN24]. J. Black-Branch, *Rights and Realities* (Dartmouth: Ashgate, 1997) at 20.

[FN25]. (1998), 20 C.R. (5th) 197 (SCC) ("*M. (M.R.)*").

[FN26]. See *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1984), (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97 (S.C.C.).

[FN27]. Above, note 25 at para. 36.

[FN28]. Above, note 21 at 5.

[FN29]. G.M. Dickinson, "Searching for Reason" (1996-8) 8 *E.L.J.* 441 at 448.

[FN30]. *R. v. S.M.Z.*, [1998] M.J. No. 81 (Man. Q.B.). On appeal, a higher court, while maintaining the student's conviction, fashioned a ruling more consistent with *M.R.M.* by substituting "significantly diminished expectation of privacy" for the lower court's "no expectation of privacy". See *R. v. S.M.Z*, [1998] M.J. No. 587 (Man. C.A.).

[FN31]. "Staff Regrets Strip Search of Students" *The [Saskatoon]Star Phoenix* (9 December 1998) A13.

[FN32]. J.M. Sanchez, "Expelling the Fourth Amendment from Schools: Students' Rights Six Years After *T.L.O.* " (Summer 1992) 21 *J. L. & Ed.* 381, at 410. Justice Cory made a note of the criticism by Sanchez, as well as that of T. Fischer, "From *Tinker* to *T.L.O.*: Are Civil Rights for Students Flunking in School?" (1993) 22 *J.L. & Ed.* 409, in *M.R.M.*, above, note 25 at para. 42. He dismissed the criticism, however, without any explanation of what it was or why it was not valid.

[FN33]. (1974), [1975] 2 S.C.R. 574 (S.C.C.) at 597.

[FN34]. [1990] 3 S.C.R. 36 (S.C.C.) at 50.

[FN35]. W. MacKay, "Students as Second Class Citizens" above, note 17 at 391.

[FN36]. G.M. Dickinson, "SCC Ruling Has Implications for School Locker Searches" (1995-6) 7 *E.L.J.* 2 at 287.

[FN37]. *Charter* above, note 12 at s. 2.

[FN38]. [1989] 1 S.C.R. 927 (S.C.C.).

[FN39]. The term 'everyone' was interpreted by the Supreme Court of Canada in *Singh v. Canada (Minister of Employment & Immigration* by Chief Justice Dickson who stated: "I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law": [1985] 1 S.C.R. 177 (S.C.C.) at para. 35.

[FN40]. (Unreported) (October 31, 1988) (Ont. Div. Ct.), digested in (1988) *School Law Commentary*, Case File No. 3-5-12. Cited in J. Wilson, *Wilson on Children and the Law* (Toronto: Butterworths) at 8.57 ("*Devereux*").

[FN41]. Quoted in Maurice Green, "Student Rights: Case Comment" (1989-90) 2 *E.L.J.* 110 at 110.

[FN42]. (1992), 101 Sask. R. 232 (Sask. Q.B.) ("*Lutes*").

[FN43]. *Ibid.* at para. 24.

[FN44]. A. Wayne MacKay. "The Canadian *Charter* of Rights and Freedoms: A Springboard to Student Rights" (1984) *The Windsor Yearbook of Access to Justice* 174 at 184. MacKay contemplates the likelihood of Canadian courts considering these issues in light of the *Charter* and concludes that Canadian rights consciousness will evolve differently from the American model. As a result he hypothesizes that students' rights will be negotiated within the political rather then the judicial arena.

[FN45]. H. McConnell and J. Pyra, "The Impact of Some Aspects of the Constitution and the Canadian *Charter* of Rights and Freedoms on Education" (1989-90) 2 *E.L.J.* 1 at 47. The authors conclude by arguing that "there is no tension between the *Charter* and the traditional common law *in loco parentis* protection of children" (at 48). They claim that the two can operate in parallel to protect children.

[FN46]. Above, note 44 at 225.

[FN47]. K. Osborne, "Education for Citizenship" 1998 38(4) *Education Canada* 16 at 17.

[FN48]. C. T. Dienes and A. Connelley, "When Students Speak: Judicial Review In the Academic Marketplace" (1989) 7 *Yale Law and Policy Review* 343 at 352.

[FN49]. Above, note 44 at 176.

[FN50]. [1986] 2 S.C.R. 284 (S.C.C.). This case deals with the objections of a pastor of a fundamentalist church who ran a school for his children and 20 other children. He refused to recognize the authority of the province to inspect his curriculum or issue a permit for schools based on the claim that it infringed on his right to teach his children in accordance with his religious value.

[FN51]. R. F. Magsino. "Student Rights and the *Charter*: An Analysis of Legal and Extra-Legal Considerations" (1988-89) 1 *E.L.J.* 233 at 255.

[FN52]. Above, note 48 at 353.

[FN53]. David Brand. “Why YNN Sucks”, *Adbusters* Magazine, www.adbusters.org/campaigns/commercialfree/toolbox/ynnsucks.html

[FN54]. Zines are small, hand-produced publications distributed through informal networks throughout North America. They are an aspect of current youth culture, evolving out of the punk Do-It-Yourself (DIY) movement.

[FN55]. James McKinnon. “First In, First Out: A crumbling Foothold for Commercial TV in Schools”. *Adbusters Magazine* website: www.adbusters.org/campaigns/commercialfree/toolbox/firstin.html

[FN56]. C. Gaffield & W.G. West, “Children's Rights in the Canadian Context”, in H. Berkley, C. Gaffield & W.G. West, eds., *Children's Rights: Legal and Educational Issues* (Toronto: O.I.S.E., 1978) at 11.

[FN57]. *Ibid.* at 11.

[FN58]. *Ibid.* at 12.

[FN59]. Above, note 2.

[FN60]. Howe and Covell at 114. See note 13.

[FN61]. *Ibid.* at 121. See note 13.

[FN62]. B. Howe and K. Covell, “Teaching Children's Rights: Considerations and Strategies” (1998-99) 9 *E.L.J.* 95 at 106.

[FN63]. Above, note 25 at para. 3.

[FN64]. W.R. Dolmage, “Lies, Damned Lies, and Statistics: The Media's Treatment of Youth Violence” (Jan. 2000) 10 *E.L.J.* 1.

[FN65]. *Ibid.* at 2.

[FN66]. *Ibid.* at 42.

[FN67]. *Ibid.* at 46.

[FN68]. Above, note 62 at 104.

[FN69]. M.D. Jordon, “Parents Rights and Children's Interests” (July 1997) Vol. X (No. 2) *Can. J. of L. & Jurisp.* 14.

[FN70]. F. Peters and C. Montgomerie, “Educators' Knowledge of Rights” (1998) 1 *Can. J. of Ed.* 23 at 40.

[FN71]. *Ibid.* at 45.

[FN72]. Howe and Covell at 119. See note 13.

[FN73]. C. Smith, “Children's Rights: Judicial Ambivalence and Social Resistance” (1997) 11 *Int. J. of L. & the*

*Family* 103 at 132. Compulsory schooling originated from concerns about child labour and the health of working class children. The development of particular skills and the protection from aspects of larger society became more pressing concerns within this century. Concern about the ideas children are exposed to is used to justify the arguably arbitrary distinctions between children and adults.

[FN74]. B. Thom and D. Thom, “School Order and Discipline Preferred Over Student's Rights: *R. v. G.(J.M.)”* (1990-1) 3 *E.L.J.* 105 at 108.

[FN75]. M. Manley-Casimir, “A Case Study Approach to Discretion in School Discipline” in H. Berkley, C. Gaffield & W.G. West eds., *Children's Rights: Legal and Educational Issues* (Toronto: O.I.S.E., 1978) at 121.

[FN76]. T. Sussel, *Canada's Legal Revolution: Public Education, the Charter and Human Rights* (Toronto: Edmond-Montgomery Ltd., 1995) at 9.

[FN77]. These particular texts were selected based on their use in Education Law classes, or their availability in Faculty of Education libraries. Some books addressing these issues do include a contextual critique of students' rights beyond their strict judicial treatment. Two such books. *Education Law in Canada* by Wayne MacKay (Emond-Montgomery, 1984) and *Rights, Freedoms and the Education System in Canada: Cases and Materials* by Greg Dickinson and Wayne MacKay (Emond-Montgomery, 1989) are currently out of print and so unavailable to many education students and professors. *Canada's Legal Revolution: Public Education, the Charter and Human Rights* by Terri Sussel (see above, note 76) and *Education, Students' Rights, and the Charter* by Ailsa Watkinson (Saskatoon: Purich Publishing Ltd., 1999) are both recent publications addressing the issue of education and rights directly. However, neither book is being used as a text or reference book in the education courses surveyed. The selection of the five texts included in this analysis does not represent the full breadth of available comment on students' rights, but it does reflect the range of texts and case materials available in Education programs.

[FN78]. A. Brown. *Legal Handbook for School* Administrators (Scarborough: Carswell, 1989) at 3.

[FN79]. *Ibid.* at 109.

[FN80]. A. Brown and M. Zuker, *Education Law* (Scarborough: Carswell, 1998) at 163.

[FN81]. *Ibid.* at 169.

[FN82]. Above, note 24 at 70.

[FN83]. *Ibid.* at 79.

[FN84]. A. Proudfoot and L. Hutchings, *Teacher Beware: A Legal Primer for the Classroom Teacher* (Calgary: Detselig, 1988) at 12.

[FN85]. W. H. Giles, *Schools and Students* (Vancouver: Carswell, 1988) in foreword.

[FN86]. *Ibid.* at vi-vii.

[FN87]. Howe and Covell at 113. See note 62.

[FN88]. *Ibid.* at 103. See note 62.

[FN89]. *Ibid.* at 103. See note 62.

[FN90]. Sanchez above, note 32 at 412.

[FN91]. Above, note 25 at 214.

[FN92]. W. MacKay “Students as Second Class Citizens” above, note 17 at 400.

[FN93]. *Ibid.* at 400.

[FN94]. Michael Ignatieff, *The Rights Revolution*. CBC Massey Lecture Series. Broadcast November 15, 2000.
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