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ABSTRACT

This paper explores whether or not the recent increase of interest by the U.S. Supreme Court in educational disputes results in a gradual reduction in the role that professional ethics plays in educators' everyday decisions. It is argued that there are links between an educator's professional ethics and constitutional justice. The increase in Supreme Court activity in educational disputes between 1966 and 1985 raises issues of the court's activism and the consistency of the educational policies entailed by Supreme Court rulings. The case of "New Jersey v. T.L.O." illustrates the implications a decision may have for the professional educator. The activism of the Supreme Court may be seen as an obstacle to those who would educate the educators because it impedes the implementation of a code of ethics for educators and it creates confusion about the source of an educator's authority. Clarification of the moral principles found in the U.S. Constitution and in important parts of the education profession's ethics should enhance the educator's ability to identify responsibilities and strengthen the conviction to act on these responsibilities. An appendix outlines arguments in the "T.L.O." case. (SLD)

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Does the U.S. Supreme Court's Recent Activism in Reviewing Educational Disputes Make the Attempt to Implement a Code of Professional Ethics for Educators a Vain Effort?

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Does the U.S. Supreme Court's Recent Activism in Reviewing Educational Disputes Make the Attempt to Implement a Code of Professional Ethics for Educators a Vain Effort?

INTRODUCTION

My aim in this paper is twofold. First, I shall attempt to find out whether, and if so how, the recent increase of U.S. Supreme Court interest in educational disputes results in a gradual reduction in the role that professional ethics plays in the decisions educators make in everyday life. Second, to the extent that the Court's activism creates such a problem for education professionals, I shall make use of a claim that suggests that there are links between the educator's professional ethics and Constitutional justice. I will then use this claim to suggest a solution to the problem.

More specifically, I am referring to that part of professional ethics which is composed of a set of constructive, creative, and adaptable norms (versus a prevailing, negative, and conservative class of rules) and which is used to regulate the student-teacher relationship. Moral responsibility is a primary force in implementing such a part of a code of ethics. A sense of social responsibility in the moral agent is also an important factor in ethical behavior. Indeed, social responsibility can serve to regulate one's practices within an association where member's practices may be evaluated according to established principles of justice. Moreover, social responsibility enables one to act autonomously, and yet not irresponsibly, by encouraging some actions and discouraging others.

I will begin, then, by noting the legal activism concerning student rights disputes and I will examine the various effects such activism has upon implementing a code of professional ethics for educators. I will analyze the influence of this activism upon an educator's everyday actions which have, heretofore, been guided by a sense of moral and social responsibility. The analysis will focus on the Supreme Court's conception of public education and the Justices' views about the constitutionality of certain student searches and seizures conducted by public school officials on school grounds.

I will argue that the Court's activism works as a barrier, impeding the everyday implementation of educational policies and practices (particularly those which are dictated by a sense of social responsibility and regulated by a code of professional ethics). However, this problem can be solved by relying upon existing links between professional ethics and the principles of social responsibility which stem from the strictures of the Fourth and Fourteenth Amendments.

The procedure I am proposing to address the problem outlined above is composed of the following steps:

1. A technique for explicating the High Court's argument as articulated by the Toulmin's analysis of legal and ethical reasoning (Toulmin, 1984).
2. Philosophical linguistic analysis of the High Court's opinions in order to clarify the relations which have developed among the terms as used by the High Court to describe educational phenomena, procedures, and objectives.
3. Identification of those constitutional principles which are relevant to educational issues.
4. Investigation of the norms of professional ethics and the principles of social responsibility which are appropriate to the educator's duties.

#### I. ANALYSIS OF THE REASONING IN THE CASE NEW JERSEY V. T.L.O.

Between 1966 and 1985 the U.S. Supreme Court has decided approximately one hundred twenty-one cases which involved educational disputes. This constitutes three times the number of High Court decisions reached during an entire century before 1966, approximately forty-one between 1859 and 1965. (See Zirkel 1988 for a complete list of educational cases decided by the Supreme Court.)

The increase of the Supreme Court's interest in educational disputes during the period between 1966 and 1985 has raised concerns, revolving around two issues, among a number of educators and other interested parties. The first issue concerns the Court's activism in reviewing these disputes and the second issue addresses the consistency of the educational policies entailed by such rulings.

Elsewhere I have used Toulmin's analysis of legal and moral reasoning to study the New Jersey v. T.L.O. case (see Petronicolos). According to Toulmin,

[r]easoning . . . involves dealing with claims with an eye to their contexts, to competing claims, and to the people who hold them. It calls for the critical evaluation of these ideas by shared standards; a readiness to modify claims in response to criticism; and a continuing critical scrutiny both of the claims provisionally accepted and of any new ones that may be put forward subsequently. A "reasoned" judgement is thus a judgement in defense of which adequate and appropriate reasons can be produced (10).

Given Toulmin's description of reasoning (see Toulmin) and noting that such reasoning composes the threads which are then

interwoven to form arguments, his characterization of arguments can be summarized as follows:

1. Arguments intend to raise different issues such as aesthetic, scientific, legal, ethical, etc.
2. They are composed of the claim (conclusion) and of the supportive reason (ground).
3. The connection between the claim and the reason is guaranteed by means of a rule (warrant). This rule to be forced into play presupposes evidence (backing) such as a general body of information.
4. Finally, the strength of the argument is expressed through modifiers (qualifiers).

At the end of this paper I have appended the Supreme Court's reasoning in the T.L.O. case (see Appendix). Using Toulmin's approach to legal reasoning, I found that this decision is based on five principal arguments that are warranted by statements relevant to education. Following the State of New Jersey's petition for a review of the T.L.O. case, the opinion of the High Court overrode a number of the State's arguments and relied upon threads of reasoning in which education-related statements functioned in one of two roles: (1) as rebuttals which directly undermined the grounds of the State's argumentation; or (2) as backing used to buttress another set of warrants upon which the decision turned.

A close examination of this analysis revealed the following important points:

1. Uses by the Supreme Court of the expressions "school authorities," "public school official," "state officer," "educational policies," and "school disciplinary procedures" indicate that the relationship between teachers or administrators and students develops in a fashion analogous to the relationship that has developed between a state officer and a citizen. This leads the reader of such opinions to choose between two very different conceptualizations of the educator. On one hand, it may be understood from T.L.O. that educators act on behalf of the State merely as public servants, performing assigned duties. On the other hand, educators have long been viewed, with considerable justification, as professionals whose duties are determined by their role within a social institution, i.e., the school as a societal locus for the education.

2. The Supreme Court in T.L.O. initially attempts to present a description of the role that educators are called upon to play when they enforce disciplinary procedures in public schools. Due to what the Court claims is a sound educational environment, new ideas about the educator/student relationship begin to emerge. Discipline now becomes prior to learning. That discipline is linked to learning in a temporal sequence where, discipline comes first. In line with the same reasoning, the relationship between an educator and a student is now shaped by the belief that in all schools it is necessary to establish close supervision of the students first and only then start to educate them.
3. Towards the end of the opinion, the Supreme Court argues that a standard of reasonableness better fits the school environment than the probable cause and warrant requirements which previously governed searches of students. One should keep in mind that, as used here, the term "school environment" refers to a context which completely satisfies the needs of teachers and administrators for freedom to maintain order and enforce swift and informal disciplinary procedures. As an example, Argument #4 (see Appendix, page IV) makes the Court's position on the warrant requirement rather clear. School officials do not need to obtain a warrant before searching a student who is under their authority. But how is this conclusion logically reconciled with what the Court has found before? How is a shift from the conclusion of the third argument (C3) to the conclusion of the fourth argument (C4) possible? How, in practice, can an educator be clear about the conclusions of Arguments #3 and #4 in a way that ensures consistency with both the law and the practices of the educational profession? (See Appendix, Arguments #3 and #4.)
4. There are two statements found in the Court's decision which make the possibility of a transition from C3 to C4 clear. "A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." (T.L.O., 469 U.S. 336, 338-339, 1985) and "To receive protection of the Fourth Amendment, an expectation of privacy must be one that society is "prepared to recognize as legitimate" (Id. at 339). Implicitly held in these statements and in many other statements uttered by the Justices, is the assumption that society is prior to the individual. This calls again for considerations about the education

profession. To whom is an educator responsible? To the student? To the parent? Moreover, what is the source of the educator's authority? Her client, the family, the school board, or the State? Finally, what is the reproductive role that the school, as a social institution, has? Do we need schools in order to cure social illnesses, serve the community, or educate the individual?

The considerations just noted bear profound and pervasive impacts upon the education profession. As the instant case of T.L.O. illustrates, these considerations can enhance the educator's understanding of how the Court defines such concepts as, "the legitimate expectations of privacy" and "the personal security of the public school student." Only when the educator understands the esoteric definitions attached to these concepts by the law, can the educator formulate rational policies which will satisfy the intellectual and ethical demands of both professions (Petronicolos, 4-6).

## II. THE EDUCATION PROFESSION.

In the field of education the protection of the student's rights of the freedom of speech, due process and privacy within the public schools is addressed both by school policies and, through several incorporated provisions, by codes of professional ethics for educators. Experts in professional ethics will agree that if individuals are forced to avoid immoral actions, they will never develop the critical judgement skills and the moral traits necessary for a virtuous life. Moreover, such actions as individuals do take will hardly, if ever, qualify as actions that rise to the level of moral behavior.

School policies that aim at the protection of student's rights are formal regulations most often stated in the form of a prevailing, negative, and conservative class of rules. Many of these policies originate from legal decisions about educational disputes relevant to the student's rights and to the duty of educators to preserve a sound educational environment.

Simultaneously, these same rights are recognized as legitimate and are protected by codes of professional ethics for educators. These provisions usually take the form of constructive, creative, and adaptable norms.

Hence, it is appropriate at this point to consider some of the limitations that regulations pose for professionals in public education who must decide what kind of regulations should govern their actions: formal rules that best meet the expectations of the law and the general public or flexible rules that best fit the various educational contexts?

## A. What Is a Profession?

In the article called "Toward a Definition of Profession" Morris Cogan proclaims that there is no "authoritative" definition of what profession is (47). However, Cogan admits that a tentative definition is possible and, in fact, useful in inviting "critical consideration of the problem of profession" (48). This tentative definition goes as follows:

A profession is a vocation whose practice is founded upon an understanding of the theoretical structure of some department of learning or science, and upon the abilities accompanying such understanding. This understanding and these abilities are applied to the vital practical affairs of [human beings]. The practices of the profession are modified by knowledge of a generalized nature and by the accumulated wisdom and experience of [humankind], which serve to correct the errors of specialism. The profession, serving the vital needs of [human beings], considers its first ethical imperative to be altruistic service to the client (48-49).

Earlier in the same article Cogan tries to evaluate disputes on the worth of professionalizing practices about human affairs by saying ". . . given government good or bad and profession equally good or bad, it appears probable that profession will be an effective force in reconciling the necessity for control with the preservation of individual and group liberty" (46).

In this section I will use Cogan's approach to a tentative definition of profession as a point of departure in addressing important issues about duties, obligations, and responsibilities professionals have in general. Findings from this discussion will then be utilized in explaining aspects of a professional's conduct, with greatest focus upon the ethics of a profession. At the end of this process, if practitioners in the field of education are found to bear the unique features of a profession, I will attempt to identify those ethical norms and principles which should regulate the educators' everyday conduct and practices.

## B. Duties, Obligations, and Responsibilities of Professionals

Cogan's main interest lies in how people in modern society understand a profession. Cogan, himself, sees it as an institution and there is much to commend this view. Certainly, for any contemporary practitioner to lay serious claim to professional status, she must be generally recognized as possessing the authority to do so. And it is the pervasive notion of the institution which appears to underlie and affirm



general acceptance of the authority of certain individuals to provide society with vital public services.

The specific institutional aspects of profession consist of a series of guides and morals which take the form of procedures, exclusions, and expertise, which govern authorized service to the others and which, subsequently, influence private and public life in society. However, as I will claim later, the institutional aspects of profession are conditions necessary but not sufficient to fully identify a practice as a profession.

Thus, the duties and obligations professionals bear should first be understood in terms of society's institutional organization. This organization, particularly in modern democracies, requires that actions are deliberate, reasonable, and balanced by a public conception of social justice. In short, professions are institutionalized practices -- public or private -- and an understanding of the aims and nature of institutions in a democratic society helps one to begin clarifying the aims and nature of a profession.

To advance a profession's claims upon the authority to provide a vital public service, professionals must demonstrate two things. First, that the provision of this service is important and necessary for society. Second, that professionals have the capacity to provide this assistance to the public with a commitment to disinterested service. With the understanding that professions in a democratic society are institutionalized practices, professions forward their claims of authority to provide public service through their associations. Membership in professional associations serves to assure the public that high expertise and moral standards exist among the professionals in the field. Thus, one way for the professions to obtain the status necessary to establish their authority and independence, is to have in place procedures which control entry into the profession and rules which regulate the behavior of the professionals already in practice (see Abbott). These procedures include, among others, codes of professional ethics.

Codes of professional ethics function as control mechanisms internal to professional associations. As such, a code of professional ethics helps an association to establish the high status of a profession and, consequently, to garner the public's trust. The role played by these codes at the level of a professional's everyday conduct relates, of course, to her duties and obligations.

Within the framework of profession as just defined, the duties and obligations governing daily professional conduct are now seen as direct outcomes of the profession's fundamental ethical claim to possess the authority and the responsibility necessary to provide society with a vital public service.

Further, it is entirely consistent with this definition that each professional is seen to have obligations and duties to serve the society-at-large as well as the individual client.

In servicing the public, duty is seen as guiding a professional to act deliberately whereas obligation binds her to act under the guidance of reason and principles of good practice.

To continue this line of analysis, it is necessary at this point to define two important terms. Though "duty" and "obligation" are often used identically, it is necessary to distinguish the way in which these terms are employed in the current discussion. Ordinary uses of the term "duty" point to a rule in relation to some specific role (e.g. the role of a parent or of an officer). On the other hand, "obligation" is used in association with the idea of contract (e.g. to keep a promise, or to respect an agreement). In light of those definitions, duty is seen as guiding a professional to act deliberately when servicing the public whereas obligation is seen to bind the professional to act under the guidance of reason and principles of good practice.

In order to further analyze the duties and obligations a professional has, one must be careful to avoid identifying professions merely as institutionalized practices requiring no further qualifications. For there are many practitioners who would use the term "profession" to identify a vocation from which they seek to earn a livelihood and through which they advance claims about the distribution of goods (e.g. salaries, fees, status, etc.) through an association (e.g. a union). However, despite the fact that almost every practitioner can claim a service-to-the-public status through membership to an association, few practices rise to the level of a profession. Ultimately, true professions are distinguished by a number of inherent features which: (1) permit the provision of unique and important benefits to the larger society; (2) allow the individual professional to undertake roles that will foster the development of certain desirable virtues; and (3) encourage the individual professional to accept roles that pertain to morality.

The significance of a professional's character is found in the role professional ethics plays in protecting clients as well as the reputation of the profession from the corrupting power of associations. With regard to associations, the primary focus is on goods external to the professions. For example, the former often direct their efforts to political struggles in order to gain status that will allow them to claim monopoly upon public service. In contrast, the trust accorded the true profession by the public is primarily the outcome of the perceived value of the professional practices based upon goods which are intrinsic qualities of these practices. In this instance, intrinsic qualities refer to the excellence of the products, the life of the professional as this is realized through her professional

role within the societal locus, and the authority of standards and qualities in the pursuit of this role. In this context, distinct virtues which are necessary components of any professional's profile would seem to include justice, courage, and honesty.

### C. Professional Ethics and Responsibility.

Professional duties and obligations are formally acknowledged in codes of ethics. Professional ethics, however, are different than a formal code that seeks to delimit the conduct proper to professionals operating within a particular field. Instead, professional ethics have application in other areas because they are anchored in morality and tend to address the broader issues confronting the profession. As a result, professional ethics are relied upon to illuminate the relations of the professional to society-as-a-whole as well as to her clients on an individual basis. The power of professional ethics in regulating professional behavior rests upon the idea that a professional failure is an ethical failure as well.

Actions are normally judged as right or wrong by referring to a standard or a set of standards. However, when do professional ethics issues arise and, thus, trigger a standard under which an action may be judged as ethically right or wrong? Moreover, what are the proper standards to consult in such an instance and under what conditions would people willingly agree to weighing the merit of their actions under those standards?

In an analysis of ethical reasoning Toulmin points out that occasions of ethical debate arise: (1) at the margins between professional roles or at points where professional and private lives meet and overlap; and (2) in cases where certain considerations require us to override, and so overrule, technically correct answers to problems of a professional enterprise, no matter how validly from the professional's standpoint someone has arrived to these answers (394-395). Following Toulmin's analysis, ethical standards of right or wrong can be set forth in order to recommend or rule out certain kinds of actions as acceptable or unacceptable (396). At this point, one may well ask why individuals would put themselves in the middle of an ethical dilemma and make great efforts to take the ethically correct action even when nothing external to them forces them to act so?

This question is central not only to issues of professional ethics but also to issues related to theories of ethics in general. In trying to answer the question of when a person and her actions are morally good, Frankena gives some suggestion about what a good candidate for answering this question would look like. He says that a person and her actions are morally good when "whatever his[/her] actual motives in acting are,

his[/her] sense of duty or desire to do the right is so strong in him[/her] that it would keep him[/her] trying to do his[/her] duty anyway" (70). Frankena's thesis suggests that morally good actions are those which are motivated by a strong sense of duty and that morally good persons are those individuals who experience this strong sense of duty and who live according to its calling.

Obviously, a person with these qualities would be able to act responsibly even under conditions of great autonomy. She also would have both a continuing capacity to identify her position within the social and cultural coordinates of the community and the conviction to undertake whatever role that her position within that context entails. In other words, a person who always decides to willingly act under the guidance of ethical standards is a person who has a strong sense of social and moral responsibility as well as one who has the virtues that strengthen her willingness to undertake such a role.

To summarize this section, a professional is an individual who is committed to serve the public deliberately and under the guidance of reason. She bears the responsibility to act always according to the highest moral, theoretical, and practical standards known in a field. To be able to undertake and carry out these responsibilities, a professional should cultivate the skills and virtues which are essential for living up to the expectations of such a role. A code of professional ethics, therefore, must encompass a set of standards which are based upon principles of both morality and good practice. On one hand, a code of professional ethics should ensure that those who enter the field are equipped with the highest skills associated with their areas of their professional expertise. On the other hand, those same professional ethics should allow the professional enough freedom to act autonomously and, thus, develop the moral dispositions which are essential to good practice.

#### D. Educators as Professionals.

Few would dispute that education, when seen as a major social institution, currently bears a role whose importance has risen to levels traditionally associated with the family and with the church. Among the highest values served by the institution of education is the realization and expansion of human potentials within and throughout the entire culture. Indeed, as the major social institution now entrusted with preserving these values, education may not be legitimately used to serve any, more specific, aim above and before the transmission of culture and the development of each individual as a person and a member of society. Given a mission of such a broad scope, some may find it difficult to support the thesis that a particular group of individuals, alone, can be responsible for distributing educational goods to the community.

In contrast to the overarching, societal institution of education, schools are organizations of "formal" education and schooling is a social institution serving much more specific aims. The terms "educator," "teacher," and "school administrator" are used for those individuals who have the expertise and authority to assist in realizing the specific goals of schooling. Moral integrity and autonomy are important qualities for these individuals as well. In this light, it may seem sufficient to simply conclude that teaching is a profession and that, as a result, a code of professional ethics for educators can be implemented. The issue, however, is somewhat more complex.

Currently, the educational community faces a daunting obstacle in attempting to formulate and implement a code of professional ethics governing the educator: the professional educator's moral responsibility to her client cannot be clearly defined because the substituent concept of the educator's proper client, itself, remains quite vague. As a result of this difficulty, educators are unable to formally and explicitly delineate the sources and scope of their concomitant authority and responsibility. For example, it is clear that teachers have the right to give orders to their students, to make decisions and pronouncements, to give examinations, to discipline students, and to assign student's grades. Yet, despite the fact that this form of authority is offered to the teacher as part of her role within the schooling system and despite the fact that none disputes her exercise of this authority, it nonetheless remains unclear what the precise source and scope of this authority is. Before the Supreme Court's decision in the T.L.O. case, the moral authority of the teacher flowed from the presumption that the teacher acted "in loco parentis." However, in T.L.O., the High Court found that the teacher acts as a representative of the State. As a result, the Fourth Amendment is now seen to place limits on the scope of the public school teacher's traditional authority.

Toulmin finds that "in legal arguments it is necessary to show what general kinds of backing underlies each of the conflicting warrants" (66). Within the judicial context, he says that the basic question is "can we find proper support for this warrant in the common law, statutes, administrative regulations, codes and so on currently accepted as valid, binding, and authoritative within the relevant jurisdiction?" (67). Looking again at the analysis of the Supreme Court's reasoning in T.L.O. (see Appendix), one can see the differences between the backing in arguments #1 to #4. In argument #1 the moral tone of the backing is in a complete opposition with the statute tones of the backing in arguments #2, #3, and #4. One, then, would ask: Is there any consistency in what backs the Court's arguments -- and thus makes them sound? Moreover, can educators find the cultural and social coordinates defining their role within a democratic

society by analyzing the Court's floating conceptions of education?

### III. CONCLUSIONS.

As it currently appears, the situation confronting the community of school educators does not present the brightest prospects for professional autonomy and moral development. Yet, there is strong support for suggesting that moral rules such as "Do not inflict pain" and "Treat all equally" are among those precepts that underlie both the Constitution and the ethics of professional educators. For example, the first of the two precepts, "Do not inflict pain," is found in both the Fourth Amendment and in provisions of ethical codes for educators which protect the personal integrity of students and colleagues (assuming that privacy and offenses against a person's integrity can be reasonably included as infliction of pain). Similarly the second of the above principles, "Treat all equally," underlies both the Fourteenth Amendment and provisions in codes of ethics which address issues of fair treatment and due process. Even more importantly, this last principle can also be found in the backing of argument #1 (for implicit in this statement is an idea of consistency of practice and fair treatment).

In conclusion, the Court's activism can be seen to create a obstacle to those who would educate the educators because it impedes the implementation of a code of ethics for professional educators and it creates confusion about the source of educator's authority. However, moral principles found in both the Constitution and in important parts of the profession's ethics, promise to shed new light upon the proper source of the educator's moral authority. In addition, the clarification of such principles should initially enhance the education professional's ability to identify her social and moral responsibilities within a given situation and should subsequently strengthen her conviction to act upon those responsibilities she has identified.

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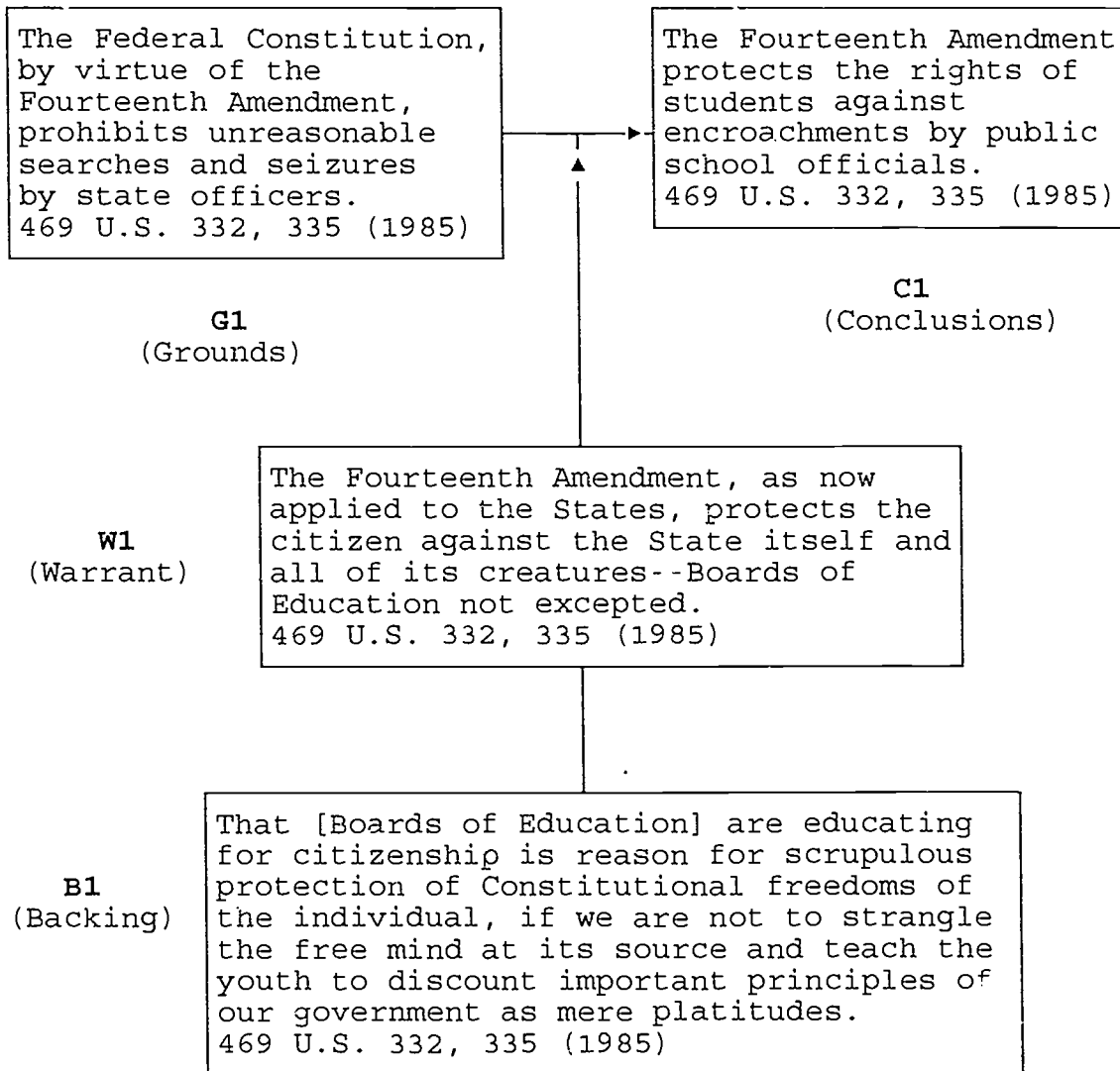
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APPENDIX

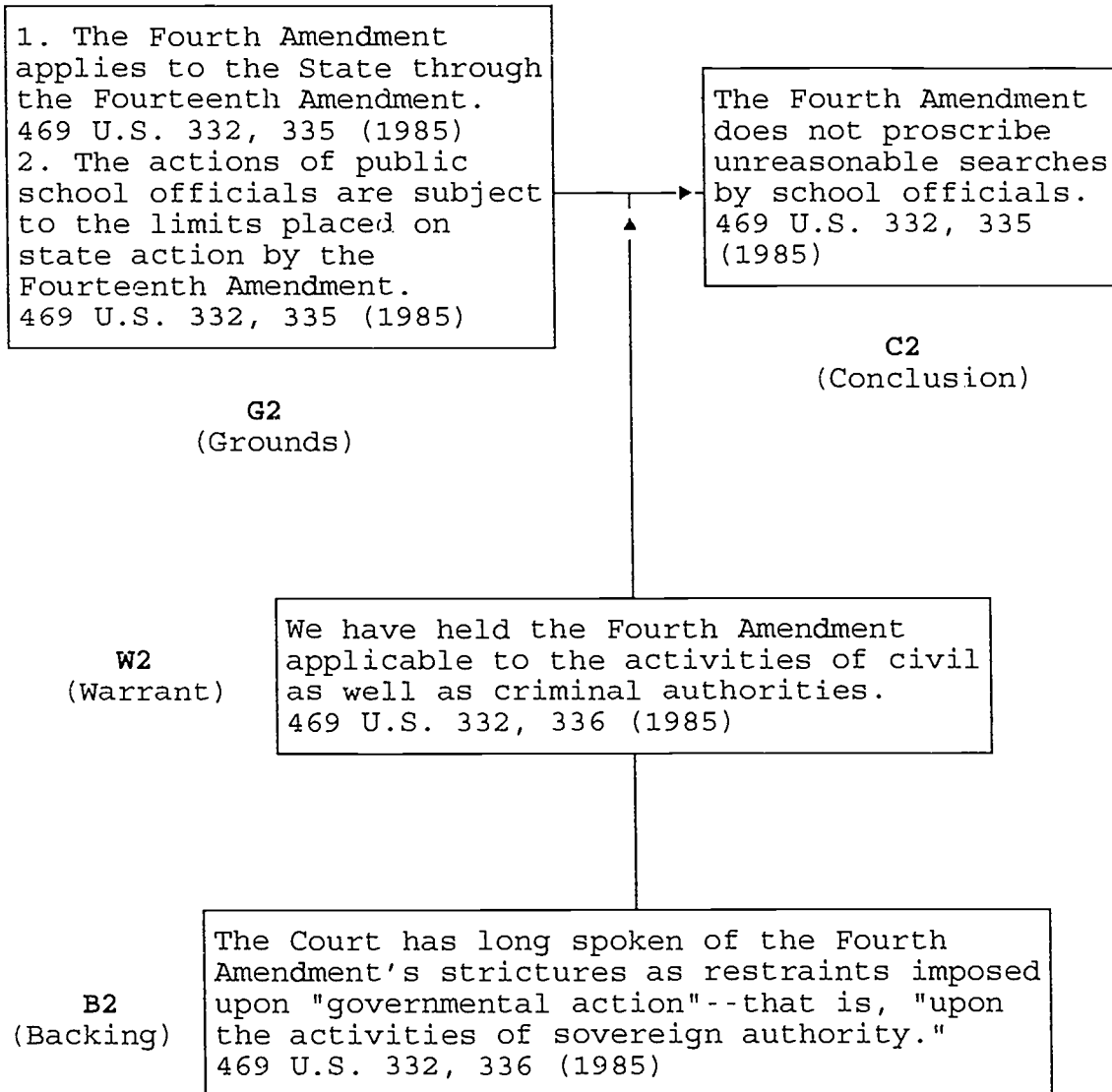


ARGUMENT #1



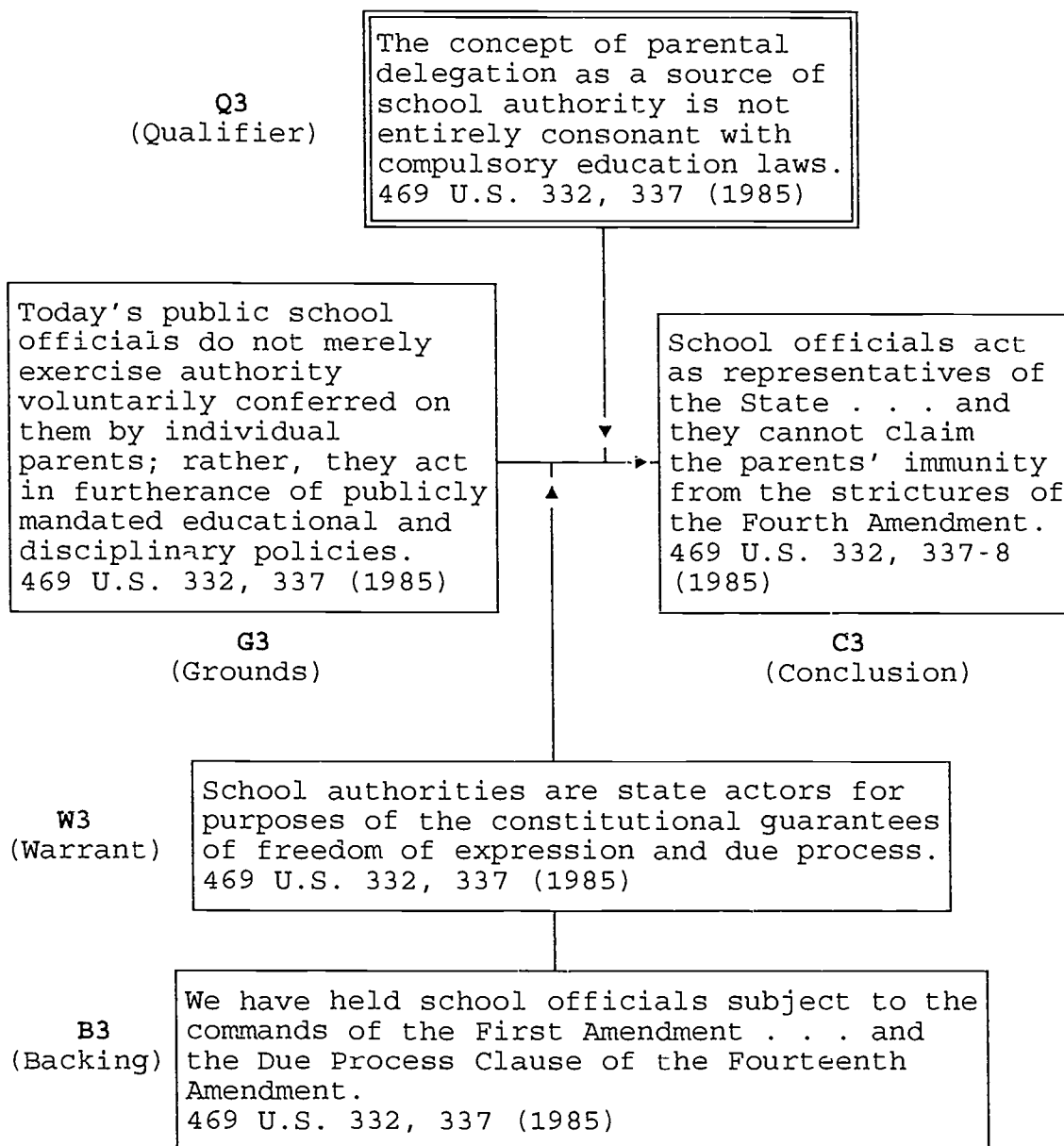
**Note:** The Grounds in this argument are quoted from Elkins v. United States, 364 U.S. 206, 213 (1960); the Warrant and the Backing are from the case West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

ARGUMENT #2



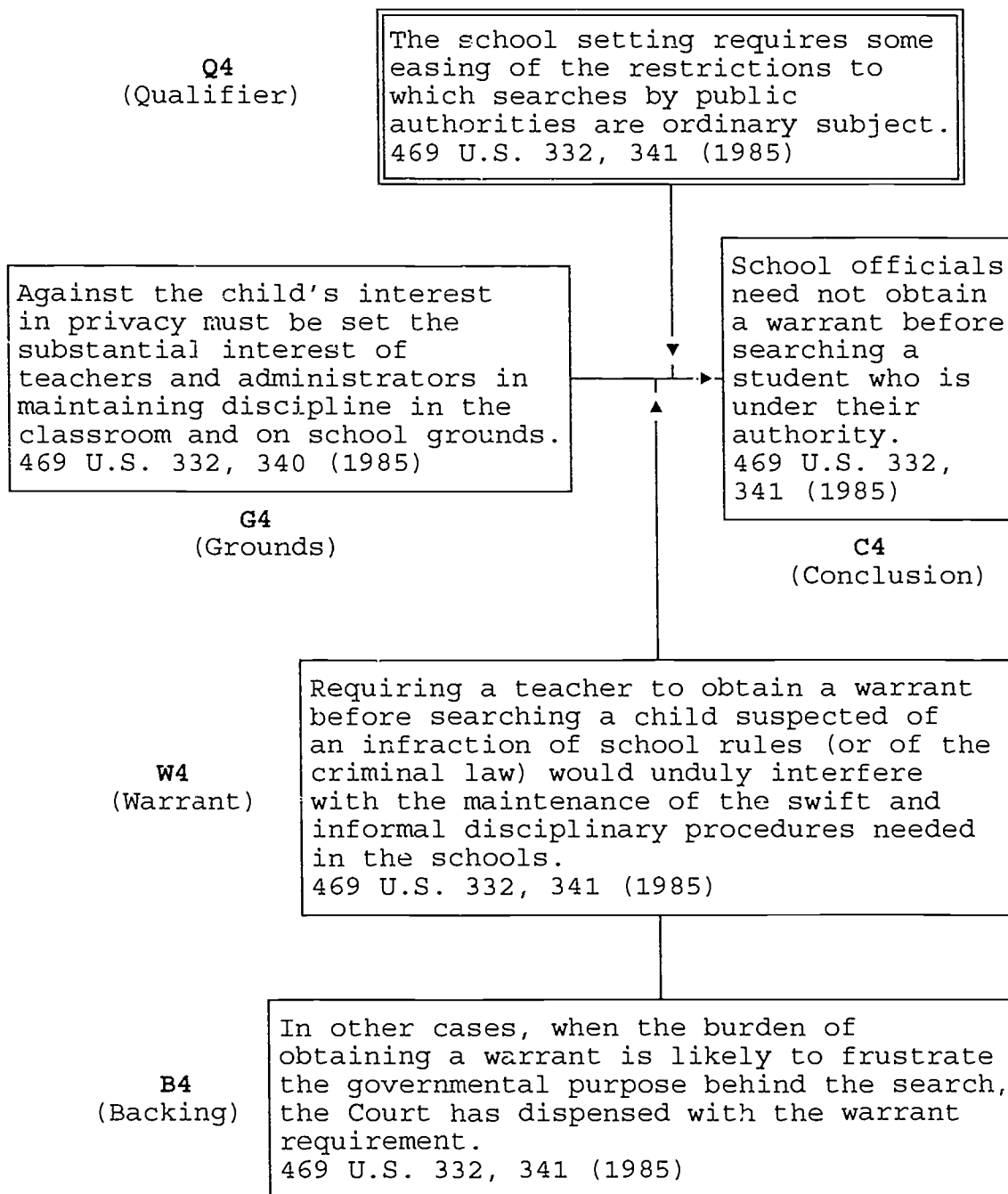
**Note:** The Backing refers to the case Burdeau v. McDowell, 256 U.S. 465, 475 (1921); the Warrant directs to three cases: Camara v. Municipal Court, 387 U.S. 523 (1967), Marshall v. Barlow's Inc., 436 U.S. 307, 312-313 (1978) and Michigan v. Tyler, 436 U.S. 499, 506 (1978).

ARGUMENT #3



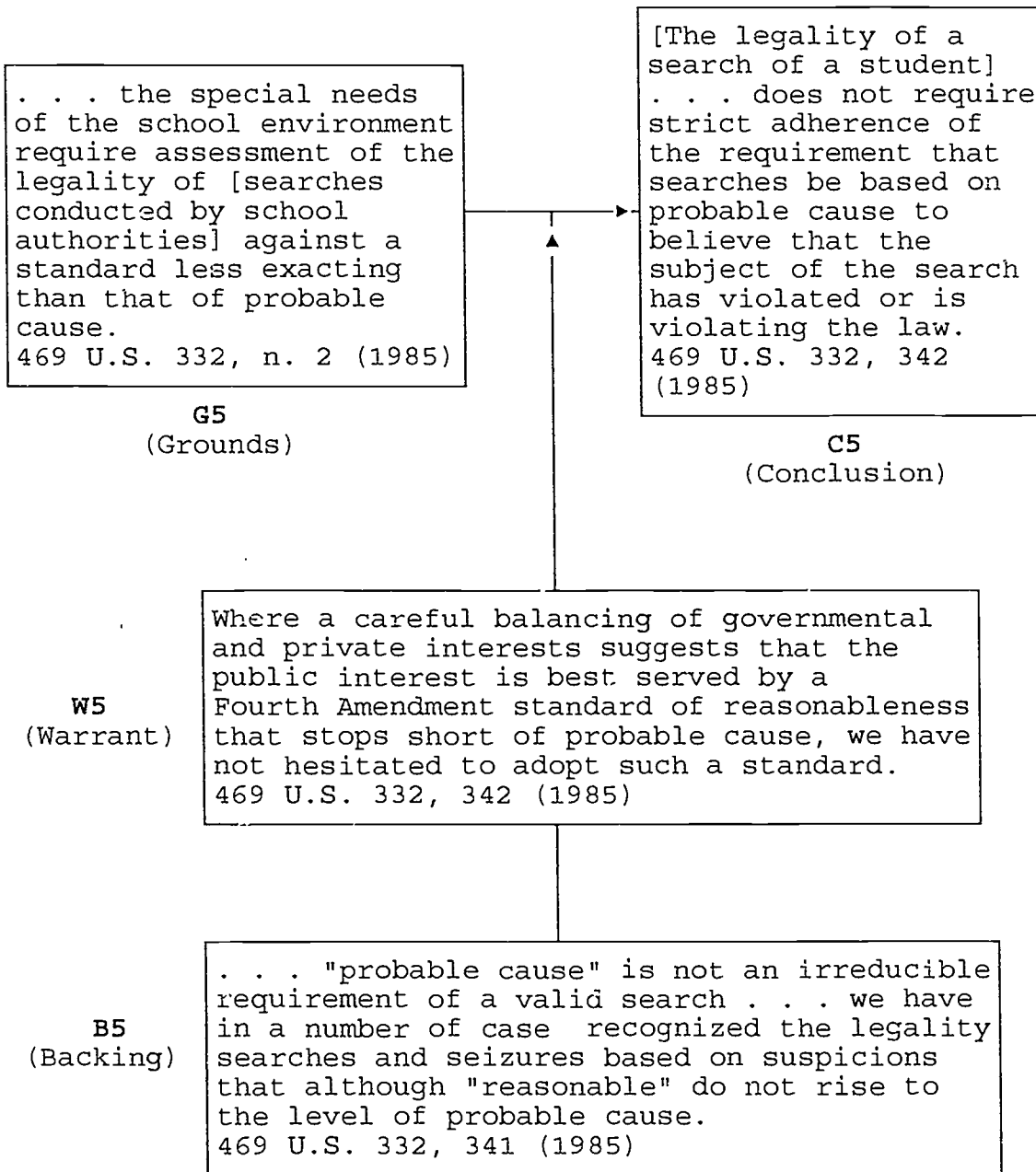
Note: The Warrant and the Backing direct to Tinker v. Des Moines, 393 U.S. 503 (1969) and to Goss v. Lopez, 419 U.S. 565 (1975); the qualifier refers to the case Ingraham v. Wright, 430 U.S. 651, 662 (1977).

ARGUMENT #4



Note: The Backing refers to Camara v. Municipal Court, 387 U.S., at 532-533.

ARGUMENT #5



**Note:** The Grounds, Warrant and Backing of this argument refer to numerous cases in which, according to the Court, the probable cause requirement has been reduced.