COMMENT

NEW JERSEY V. T.L.O.—CLOSING THE SCHOOLHOUSE GATE ON THE FOURTH AMENDMENT

INTRODUCTION

Search and seizure doctrine is an area fraught with conceptual niceties. Courts face more than the usual difficulties when required to interpret the fourth amendment in the context of school searches. The amendment protects citizens against unreasonable searches and seizures by government officials. It reads in pertinent part: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . and no Warrants shall issue, but upon probable cause . . . ."[1] A warrantless search is presumptively unreasonable[2] unless it falls within one of the following judicially recognized exceptions to the warrant clause: good faith,[3] consent,[4] exigency,[5] or where the search is conducted pursuant to a lawful arrest[6] or administrative

1. U.S. CONST. amend. IV. The full text of the fourth amendment reads:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. *See* Katz v. United States, 389 U.S. 347, 357 (1967); *accord* Welsh v. Wisconsin, 466 U.S. 740 (1984).

3. The Supreme Court first recognized the "good faith" exception to the warrant clause in United States v. Leon, 104 S. Ct. 3405 (1984). The Court ruled that evidence obtained by police officers acting in reasonable reliance, i.e., in "good faith," on a facially valid search warrant was admissible in the criminal prosecution of suspected drug traffickers despite a later determination that the magistrate lacked probable cause to issue the warrant. *Id.* at 3408. To exclude such evidence, the Court stated, would offend the basic concepts of the criminal justice system. *Id.* at 3413.

4. Voluntary consent can render constitutional what otherwise would be an unreasonable search and seizure. Constitutional protection narrows to the extent that one legally capable of doing so voluntarily consented to the invasion of privacy. The police may conduct a search without probable cause or a warrant provided they obtain the consent of one in control of the searched area or one with authority to consent to the search. The consent exception is fully explored in Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

5. Exceptional or urgent circumstances constitute exigency and excuse the lack of prior judicial approval for a search. For example, exigency exists where a police officer has probable cause to believe that an offense is in progress and the suspect may possess relevant evidence. Such a circumstance may justify a warrantless search and seizure in order to prevent the escape of the suspect or destruction of evidence. Public safety concerns also constitute exigency. Thus, courts permit a warrantless search in instances of "hot pursuit," where the police are in immediate pursuit of a suspect believed to be dangerous to the public. *See generally* United States v. Watson, 423 U.S. 411 (1976).

6. The rule is well-established that a search incident to a lawful arrest may be conducted without a warrant in order to ensure the security of the arresting officer and to preserve evi-

inspection.[7]

The enforcement mechanism of the fourth amendment is the exclusionary rule, which prohibits the use of illegally seized evidence in subsequent criminal prosecutions.[8] The rule aims to deter government misconduct by depriving government agents of the fruits of an illegal search. More importantly, the exclusionary rule protects the rights of those citizens who do become victims of illegal searches.[9]

In a landmark ruling, the Supreme Court held that the fourteenth amendment, as applied to the states, "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."[10] The applicability of the fourth amendment to the states through the due process clause of the fourteenth amendment is a basic principle of constitutional law.[11] Thus, state instrumentalities, including boards of education, are required to protect an individual's right to be free of unwarranted invasions of privacy. The Court's decision effectively makes evidence of wrongdoing that was unlawfully obtained by public school officials inadmissible in any subsequent criminal prosecution of a suspected student offender. Appropriately, the same constitutional requirement has now been extended to school disciplinary proceedings.[12]

Recent Supreme Court decisions have tended to restrict the scope of protection traditionally available under the fourth amendment. Noting what he

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dence. *See* United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467 (1973). In this regard it should be noted that the "stop and frisk" rules permit a police officer to conduct a limited patdown of an unarrested suspect's outer clothing during questioning. The obvious concern here is the safety of the police officer. *See* Terry v. Ohio, 392 U.S. 1 (1968).

7. Courts have upheld warrantless searches of an administrative or regulatory nature to enforce legislative goals, such as improving the health and safety conditions in underground mines, Donovan v. Dewey, 452 U.S. 594 (1981), or enforcing the Gun Control Act by inspecting the business premises of licensed gun dealers. United States v. Biswell, 406 U.S. 311 (1972). *But cf.* Camara v. Municipal Court, 387 U.S. 523 (1967) (warrantless inspection of a residence by a Department of Health inspector held unconstitutional under the fourth amendment). In *Camara*, the Supreme Court stated: "[t]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.* at 528. Additionally, warrantless border searches of persons and property entering the United States have been upheld on the theory that a sovereign has a recognized right to regulate who and what enters the country. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

With respect to administrative searches, however, the individual suffers whether the government's motivation is to investigate crime or simply to enforce regulatory standards. School officials have used the administrative search theory to justify searches conducted in schools without a warrant on the grounds that the purported lack of a law enforcement objective shields such searches from the requirements of the fourth amendment.

8. Weeks v. United States, 232 U.S. 383, 393-94 (1914).

9. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360-65 (1974).

10. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). The Court held that a state statute compelling children in public schools to salute the flag and pledge allegiance to the United States was an unconstitutional violation of the first and fourteenth amendments.

11. Mapp v. Ohio, 367 U.S. 643 (1961).

12. *See, e.g.*, Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975) (evidence obtained in violation of the fourth amendment by state college officials inadmissible in college disciplinary proceedings).

calls a "headlong rush [by the Supreme Court] into the conferral of broader police power"[13] in the fight against drug trafficking, one commentator expressed the concern that the drug trade may produce an injury even worse than the evil itself—atrophy of the fourth amendment and serious impairment of substantial liberties.[14] In like manner, the Court's concern for classroom discipline has led to a similar impairment of the fourth amendment rights of public school students.

Not until *New Jersey v. T.L.O.*[15] did the Supreme Court rule directly on the question of the applicability of the fourth amendment to school searches. In that case, a search for cigarettes in a high school girl's purse led to the discovery of marijuana and to her prosecution for drug dealing. Prior to the *T.L.O.* decision, federal and state courts resolved school search cases virtually on an ad hoc basis without guidance from the Court.[16] Predictably, the results were troubling in their diversity, prompting one commentator to characterize that particular area of law as possessing "all the consistency of a Rorschach blot." [17]

That concern was not ill-founded; judges' opinions ranged from requiring full application of both the fourth amendment and the exclusionary rule to all school searches, to refusing to apply either doctrine.[18] However, most state and lower federal courts adopted an intermediate standard, requiring that a school official have "reasonable grounds" to conduct a warrantless search of a

13. Kamisar, *Fifteen Years of the Burger Court*, NATION, Sept. 29, 1984, at 274, col. 1 (quoting Professor Wayne LaFave). The article reviews the Burger Court's record in the area of criminal law during the 1982 term. Professor Kamisar concludes that the Court's current posture is steadily narrowing the protections against unreasonable searches and seizures.

14. *Id.*

15. 105 S. Ct. 733 (1985).

16. Amsterdam, *supra* note 9, at 349.

17. *Id.* at 375.

18. The cases can be placed into the following categories:

The fourth amendment does not apply because of the doctrine of *in loco parentis*. In re G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970); In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (N.Y.Co. 1970); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

The fourth amendment applies but the exclusionary rule does not. United States v. Coles, 302 F. Supp. 99 (N.D. Me. 1969); State v. Young, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975); Farmer v. State, 156 Ga. App. 837, 275 S.E.2d 774 (1980); State v. Mora, 307 So. 2d 317 (La. 1975) (Sommers, J., dissenting), *vacated*, 423 U.S. 809 (1976); State v. Wingerd, 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974) (dictum).

The fourth amendment applies but an intermediate standard of reasonableness should govern the search. Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir.1982), *cert. denied*, 463 U.S. 1207 (1983); In re W, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); In re G.C., 121 N.J. Super. 108, 296 A.2d 102 (1972); People v. Singletary, 37 N.Y.2d 310, 333 N.E.2d 369, 372 N.Y.S.2d 68 (1975); People v. D., 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Div. 1st Dep't 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); State v. MacKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977).

The fourth amendment and the exclusionary rule apply in full force and require a finding of probable cause before a search may be conducted. Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976); State v. Mora, 307 So. 2d 317 (La. 1975).

student's person or property.[19]

The thesis of this Note is that reasoned application of the probable cause standard to school searches is necessary both to shield students from unwarranted invasions of privacy and to provide a well-defined standard for school officials seeking to conduct searches. Indeed, the probable cause standard would ensure that the evidence obtained against a student would not be barred from a subsequent prosecution. Thus, efforts by school officials to enforce either the criminal law or school policies will not be thwarted because a search that yielded evidence of wrongdoing was later held unconstitutional.

Although early case law is riddled with inconsistencies, courts even then recognized and upheld the view, best expressed by Justice Fortas in *Tinker v. Des Moines School District*, that students "do not shed their constitutional rights at the schoolhouse gate."[20] Unfortunately, as this Note concludes, the Supreme Court's decision in *T.L.O.* portends the closing of that gate. Before examining that opinion, however, it is necessary to take a closer look at the complicated path the case took on its way to the Supreme Court.

I

HISTORY OF *NEW JERSEY V. T.L.O.*

T.L.O.'s fact pattern is typical of those found in most student search cases. A high school teacher reported observing two students smoking cigarettes in a lavatory in violation of a school regulation limiting smoking to designated areas. The students were taken to the school official's office where one girl admitted smoking but the other, T.L.O., did not. Based on the teacher's assertion, the school's assistant vice principal took T.L.O. to a private office, where he asked to look through her purse. He found a package of cigarettes in full view inside the purse and removed it. He also saw and removed a package of rolling papers. Continuing the search, he discovered a metal pipe and several plastic bags, one of which was found to contain marijuana. In addition, the purse contained a list of names, two letters, and forty dollars.

The school official called the police and the girl's mother, and T.L.O. was taken to police headquarters. At that time, she admitted selling marijuana to other students. The police charged her with delinquency based on possession of marijuana with intent to distribute. In addition, she was suspended from school for ten days.[21]

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19. *See, e.g.*, Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975); In re G.C., 121 N.J. Super. 108, 296 A.2d 102 (1972); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Div. 1st Dep't 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

20. 393 U.S. 503, 506 (1969). See *infra* text accompanying notes 34-35 for a discussion of the case.

21. State *ex rel.* T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (1980), *vacated*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd*, 94 N.J. 331, 463 A.2d 934 (1983), *rev'd sub nom.* N.J. v. T.L.O., 105 S. Ct. 733 (1985).

Before the criminal proceeding, T.L.O. successfully challenged the suspension in the Chancery Division of the New Jersey State Superior Court. That court ruled the search unconstitutional.[22] However, the judge in the juvenile court prosecution denied her motion to suppress both the evidence taken from the purse and the statements she made to the police. Consequently, T.L.O. was tried, adjudged delinquent and sentenced to a year's probation.[23]

On appeal, the Appellate Division of the New Jersey Superior Court upheld the purse search, endorsing a standard lower than probable cause for school search cases. However, because it questioned the validity of the confession, the court vacated the delinquency adjudication and remanded.[24] The lone dissenting judge criticized the court for "riding roughshod over the rights of a juvenile."[25] T.L.O. appealed to the New Jersey Supreme Court, and that court reversed.[26]

The New Jersey Supreme Court acknowledged the applicability of the fourth amendment to school searches. However, the court concluded that school officials have the authority to conduct a warrantless search on school premises if the search is administrative in nature.[27] The court abandoned "probable cause" in favor of the less stringent standard of "reasonableness" but warned that as the degree of intrusiveness intensifies, reasonableness must give way proportionately to the higher standard.[28] Applying that analysis to the facts, the court found the full search of T.L.O.'s purse unreasonable and held that her legitimate expectation of privacy had been violated. In the court's view, the school official lacked any legal basis either for opening the purse or for pursuing the search after finding the disputed cigarettes.[29]

New Jersey appealed, and the Supreme Court granted certiorari. Significantly, the Court bypassed the issue the State raised and sought reargument of

22. State *ex rel.* T.L.O., 94 N.J. 331, 337, 463 A.2d 934, 937 (1983), *rev'd sub nom.* N.J. v. T.L.O., 105 S. Ct. 733 (1985).

23. Stewart, *And in Her Purse the Principal Found Marijuana*, A.B.A. J. , Feb. 1985, at 51.

24. State *ex rel.* T.L.O., 185 N.J. Super. 279, 281, 448 A.2d 493, 493 (App. Div. 1982), *rev'd* 94 N.J. 331, 463 A.2d 934 (1983), *rev'd sub nom.* N.J. v. T.L.O., 105 S. Ct. 733 (1985). In support of her motion to suppress her statements to the police, T.L.O. argued that she had not knowingly waived her fifth amendment right against self-incrimination. *Id.*

25. *Id.* at 284, 448 A.2d at 495. On the basis of Judge Joelson's dissent, T.L.O. was able to appeal as of right to the New Jersey Supreme Court.

26. State *ex rel.* T.L.O., 94 N.J. 331, 350, 463 A.2d 934, 944.

27. *Id.* at 340, 463 A.2d at 943. See *infra* text accompanying notes 56-58 for an exposition of administrative search theory.

28. 94 N.J. at 346, 463 A.2d at 942 (citing M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979)). "Probable cause" is a term of art susceptible of various definitions. Nevertheless, the working definition of the term was set out by the Supreme Court in Brinegar v. United States, 338 U.S. 160 (1949). The Court found probable cause to exist where " 'the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Id.* at 175-76 (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

29. 94 N.J. at 347, 463 A.2d at 942.

the merits of the case.[30] Such activism on the part of a more liberal Court might have signalled a widening of constitutional protection for young people. For the Burger Court, however, it provided yet another opportunity to undo the positive work of its predecessors.

II
THE CONSTITUTIONAL RIGHTS OF THE YOUNG

A. An Overview

Where the searches are equally egregious, non-school searches come under much greater constitutional scrutiny than those searches conducted within schools.[31] Yet, students and young people are said to enjoy the basic protections of the Bill of Rights. In fact, past Supreme Court opinions have specifically recognized the right of the young to the same constitutional guarantees accorded others.

One of the first cases to uphold those rights was *In re Gault*,[32] in which a state court adjudged delinquent a fourteen-year old boy accused of making obscene phone calls, and placed him in a correctional institution. A state statute would have permitted his incarceration to last until his twenty-first birthday. However, an adult convicted of a similar offense would have received no more than a two-month jail term or a fifty dollar fine. Reversing the adjudication, the Supreme Court held that delinquency proceedings are subject to fourteenth amendment due process prescriptions. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," the Court stated.[33]

In *Tinker v. Des Moines School District*,[34] the Supreme Court extended first amendment protection to students. In that case, several students had been suspended for wearing black armbands in school to protest the Vietnam War. The Court overturned the school regulation forbidding their expression on the

30. The Court did not address the question raised by New Jersey on appeal, i.e., the appropriate remedy in juvenile court proceedings for unlawful school searches. Instead, it requested reargument on the underlying fourth amendment issue. 104 S. Ct. 3583 (1984). The Court's activism disturbed its more liberal members, on behalf of whom Justice Stevens wrote:

> The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court . . . orders reargument directed to the questions that New Jersey decided not to bring here . . . . Thus, in this nonadversarial context, the Court has decided to plunge into the merits of the Fourth Amendment issues despite the fact that no litigant before it wants the Court's guidance on these questions.

Id. at 3584 (Stevens, J., dissenting from order granting reargument). Referring to United States v. Leon, 104 S. Ct. 3405 (1984) and Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984), where the Court carved out significant exceptions to the warrant requirement, Justice Stevens continued: "Of late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen." *Id.*

31. *See* M. v. Board of Educ., 429 F. Supp. 288 (S.D. Ill. 1977); Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968).

32. 387 U.S. 1 (1967).

33. *Id.* at 13.

34. 393 U.S. 503 (1969).

grounds that it infringed on freedom of speech. In the Court's words "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect."[35]

Similarly, the Court applied the protection of the fourteenth amendment to high school students in *Goss v. Lopez*.[36] Officials from Lopez's public high school suspended him for up to ten days in connection with a lunchroom disturbance. In accordance with a state statute, no hearing was held prior to the suspension. Lopez successfully challenged the school's action on due process grounds.[37] Again, the Court deferred to the dictates of the Constitution, ruling that, "[t]he authority [of] the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards."[38]

These cases are illustrative of instances where the Supreme Court has interpreted the Constitution with an eye towards protecting the rights of all citizens, students and adults alike. It is difficult to imagine how the rights already accorded students by the Court are any more fundamental than the right to be free of unwarranted invasions of privacy. Yet, in its apparent haste to limit the impact of the fourth amendment on school searches, the Burger Court drew precisely such a distinction.

Students share with all people a fundamental interest in security from significant invasions of privacy. Arguably, they deserve more protection because of the restrictions on personal freedom already imposed on them by compulsory education. Nevertheless, full protection has proved elusive due to a variety of social concerns, most notably drug abuse.

B. Drug Abuse in Schools and Fourth Amendment Jurisprudence

Nationwide efforts of law enforcement authorities to curb the influx and distribution of narcotics and other drugs have shaped recent developments in fourth amendment law.[39] In most fourth amendment cases, defendants seek to exclude evidence of drug abuse or drug trafficking. Schools have hardly been immune to the drug plague; various studies report an increase in marijuana and other drug use among students.[40] Not surprisingly, the majority of school

35. *Id.* at 511.

36. 419 U.S. 565 (1975). The Court stated: "We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency." *Id.* at 531.

37. *Id.* at 584.

38. *Id.* at 574.

39. *See* Segura v. United States, 104 S. Ct. 3380 (1984) (warrantless entry into apartment of suspected drug dealers upheld); Illinois v. Gates, 462 U.S. 213, 232-36 (1983) (anonymous letter naming suspected drug dealers provided sufficient probable cause); Michigan v. Summers, 452 U.S. 692 (1981) (valid warrant to search premises for narcotics implicitly authorized police officers to detain occupants while conducting search).

40. E. GOODE, DRUGS IN AMERICAN SOCIETY (2nd ed. 1984); U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, PUB. NO. 80-930, DRUGS AND THE NATION'S HIGH SCHOOL STUDENTS, 23 (1979); 1 NAT'L INST. ON EDUC., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE,

search cases also involve attempts by students to exclude drug evidence from proceedings against them.[41]

Despite the serious consequences they may face if involved in drug use or distribution, the law compels public school students to submit to searches that clearly would be unconstitutional against non-student suspects. The highly intrusive, full-scale search of T.L.O.'s purse would never have been upheld outside the school setting on less than probable cause. Other cases are equally revealing. In *In re G.C.*,[42] a state court approved a school official's search, based on an anonymous tip, of a student's purse. The search uncovered a bottle of amphetamines. In the court's opinion, "the privacy rights of public school children must give way to the overriding governmental interest in investigating reasonable suspicions of illegal drug use . . . even though there is an admitted incursion of constitutionally protected rights . . . ."[43] One court has even implied that drug abuse and crime in schools have reached the point that compliance with the commands of the fourth amendment should no longer be of major concern,[44] a view the Supreme Court appears largely to adopt in its *T.L.O.* opinion.

C. Theories Used to Justify Lessened Fourth Amendment Protection

Courts have developed various theories to justify lessened fourth amendment protection for students, among which are *in loco parentis*, special characteristics, and administrative search theory.[45]

"In loco parentis" means in the place of, or instead of, a parent and expresses the idea that parents hand over not only children, but also their parental powers and duties, when they send their children to school.[46] In turn, school authorities are expected to protect the child as a parent would. The modern version of *in loco parentis*, however, has taken quite a different form. The concern with protection of the child has become a duty to protect other children from the child. The school's new role is more like that of a law enforcement agency, "in which the general student society is protected from the

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VIOLENT SCHOOLS — SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS (1978).

41. *See, e.g.*, New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (marijuana); Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (drugs); Tarter v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983), *aff'd in part and rev'd in part*, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1749 (1985) (marijuana); Piazzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971) (marijuana); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970) (marijuana).

42. 121 N.J. Super. 108, 296 A.2d 102 (1972).

43. *Id.*

44. Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975).

45. *See generally* Trosch, Williams & Devore, *Public School Searches and the Fourth Amendment*, II J. L. & EDUC. 41 (1982); Amsterdam, *supra* note 9; Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974).

46. *See generally* Dutton, *Justifying School Searches; The Problems with the Doctrine of In Loco Parentis*, 8 J. JUV. LAW 140 (1984).

harms of antisocial conduct."[47]

The doctrine is well-illustrated in the case law. For example, in *Mercer v. State*,[48] acting on a tip that a student was in possession of marijuana, a school official called the student to his office, made him empty his pockets, and brought in the police after finding marijuana. The *Mercer* court upheld the search because, in its view, the school official was not acting as an arm of government but *in loco parentis*. Therefore, the fourth amendment did not apply.[49] Similarly, a search of a student conducted *off* school premises was upheld in *People v. Jackson*.[50] The court based its decision on the grounds that the school official, acting *in loco parentis*, had simply to establish reasonable suspicion—not probable cause—to fall safely within the ambit of the fourth amendment.[51]

Appropriately, *in loco parentis* rarely is invoked anymore, having been summarily dismissed in *T.L.O.* as "in tension with contemporary reality and the teachings of this Court."[52]

The special characteristics of schools is another theory frequently relied upon to justify questionable school searches, as was the case in *T.L.O.*[53] The special relationship between students and school officials arises from the need for order in the schools and is said to justify less than full fourth amendment protection.

The court in *People v. Overton*[54] upheld a locker search on the basis of the unique relationship that exists between schools and their "charges," and supported that decision in classic "special characteristics" language.

> [S]chool authorities have an obligation to maintain discipline over the students . . . . [W]hen large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who

47. Buss, *supra* note 45, at 768. Piercing the parental veil of *in loco parentis*, Buss observes:

> One of the things that makes in loco parentis such an erroneous phrase . . . is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power . . . . What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such, it should be subjected to law enforcement rules . . . . [C]asting the school administrator in the parental role diverts attention from the relevant considerations that might argue for or against permitting the search.

Id.

48. 450 S.W.2d 715 (Tex. Civ. App. 1970).

49. *Id.*

50. 65 Misc.2d 909, 319 N.Y.S.2d 731 (App. Term 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

51. *Jackson*, 65 Misc. 2d at 909-11, 319 N.Y.S.2d at 733.

52. New Jersey v. T.L.O., 105 S. Ct. at 741.

53. *Id.* at 743. Whereas schools unquestionably have a duty to ensure the general welfare of students, that obligation does not allow schools to accommodate state interests by increased violations of students' rights to privacy.

54. 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *reh'g denied*, 393 U.S. 992 (1968).

> surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.[55]

The court's rationale is more conclusory than convincing. Assuredly, the compulsory nature of school attendance places a responsibility on schools to provide a safe environment for students; however, that obligation should not place school officials outside the reach of constitutional boundaries.

The administrative search theory addresses searches made to enforce school policies and regulations. Technically, the search of T.L.O.'s purse was an administrative search that escalated into a search for evidence of criminal activity.[56] School searches that can be categorized as administrative in nature routinely are upheld, even where there is a clear law enforcement motive (which normally should trigger the fourth amendment).

In *Moore v. Student Affairs Committee of Troy State University*,[57] narcotics agents called a university dean to enlist his aid in tracking down suspected marijuana users. Acting on information supplied by informers and with the cooperation of school officials, the agents searched several dormitory rooms and found a small amount of marijuana in a student's room. Although the officers had neither a warrant nor the student's consent, the student was suspended for an indefinite period. A district court upheld the search, viewing it as "administrative" in nature.[58] The purpose of the search, the court explained, was to enforce school policies rather than find evidence for a criminal prosecution.

Administrative search reasoning inadequately takes into consideration situations where school policies and law enforcement objectives overlap. Moreover, it is disingenuous to purport to determine the intent of a search after it has already occurred. The administrative search theory, provides too broad a cloak under which school officials and law enforcement authorities may dissimulate collusion.

D. Age Discrimination

Whereas students in general are deprived of fourth amendment protection under the theories discussed above, younger students face even higher hurdles in the courts. University students enjoy greater constitutional protection than elementary and secondary school children who are presumed to require more supervision because of their legal status as minors.[59] The dubi-

55. *Id.* at 362, 229 N.E.2d at 597, 283 N.Y.S.2d at 24.

56. *See supra* note 7 and accompanying text.

57. 284 F. Supp. 725 (M.D. Ala. 1968).

58. The university regulation in force at the time of the search reserved to the college "the right to enter rooms for inspection purposes. If the administration deems it necessary the room may be searched and the occupant required to open his personal baggage and any other personal material which is sealed." *Id.* at 728.

59. *See, e.g.*, Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975) (sharp distinction in terms of constitutional rights is drawn between adults in school and younger students).

ous notion that increased supervision decreases the need for privacy and personal security may explain why some of the most egregious school searches have been inflicted on young children.[60] Although courts will not hesitate to strike down such searches, the attitudes that inspire them persist. A few examples highlight the problem.

Doe v. Renfrow[61] involved a dragnet inspection of an entire student body by school officials, a police chief and drug-detecting dogs. Responding to the reaction of the dogs, officials subjected a thirteen-year old girl to a nude search. The officials later realized that the animals were reacting to the smell of the girl's own dog and not to the presence of drugs. The case evoked public and judicial outrage and the search was struck down.[62]

The search in *Bellnier v. Lund* began with a child's complaint that three dollars were missing from his coat pocket and ended in the fruitless strip search of a whole fifth grade class.[63] The search was conducted with no factual basis whatsoever that would have permitted the school official to particularize which student, if any, might have the money. The impropriety of such a search is patent.

In light of such cases, it may be time to afford full constitutional protection to all schoolchildren, including the very young, as at least one court has suggested.[64] Regrettably, it is only the extreme cases which seem to shock the somnolent judicial conscience into an awareness of the injustices some students must endure. These cases also strongly suggest that the much-touted good judgment of school officials can be quite dubious, often to the serious detriment of those affected by it.

Arguably, younger students are less likely than their older counterparts to bring drugs, weapons, or other contraband into schools. Moreover, the order required in an elementary school differs from that necessary in a high school or college. Taking into account the psychological and emotional vulnerability of children, it is obvious that young students, those left outside the aegis of the Constitution, are in many ways more in need of its safeguards than older students.

It is indefensible that minors should be deprived of the fourth amendment protection guaranteed an adult wrongdoer in those instances where minors do commit offenses which carry serious or adult sanctions.[65]

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60. *See* Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1982); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); M.J. v. State, 399 So. 2d 996 (Fla. App. 1981) (strip search conducted by law enforcement and school officials unsupported by probable cause); People v. D., 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974) (strip search invalidated for lack of sufficient basis for suspicion of drugs).

61. 631 F.2d 91 (7th Cir. 1980).

62. *Id.*

63. *Lund*, 438 F. Supp. at 50.

64. *Renfrow*, 631 F.2d at 93.

65. *See* Stewart, *supra* note 23, at 54. T.L.O. was suspended from school for a period,

III
A CRITIQUE OF *NEW JERSEY V. T.L.O.*

The Court's opinion[66] begins with a promise to enunciate "the proper standard for assessing the legality of searches conducted by public school officials."[67] It then goes on to strip away the little protection students did enjoy by sanctioning warrantless, full-scale searches, the legality of which would be measured, not against the Constitution, but by a balancing test.[68]

In adopting its modified standard, the Court pays lip service to students' privacy rights but fails to reach a decision that would ensure those rights. The majority reasoned that the need for discipline in the educational environment requires some easing of the fourth amendment restrictions governing the conduct of school authorities. Thus, the Court opined, school officials need not obtain a warrant supported by probable cause before searching a student under their authority.[69]

The Court held further that a search will be justified when there are reasonable grounds at its inception for suspecting it will turn up evidence that the student has violated or is violating either the law or school rules. The scope of a search is lawful to the extent that the "measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[70]

Applying that formulation to the facts of *T.L.O.*, the Court upheld the entire search of the student's purse. It approved the initial search on the basis of the teacher's allegation, which it found created a reasonable suspicion that cigarettes were in the purse, and sanctioned the subsequent full search on the same grounds. The Court so ruled even though the presence of cigarettes constituted 'mere evidence' that did not bear directly on whether T.L.O. actually violated school rules.[71] The discovery of the rolling papers, the Court reasoned, then provided enough suspicion to justify the extensive exploration of the purse, which ultimately led to evidence of drug-related activities.

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adjudicated delinquent and sentenced to a year's probation. Although she has since graduated from high school, she has had difficulty finding employment partly because of the lawsuit.

Of course, sanctions can be much more serious, depending on the nature of the child's activity. For example, under New York law, a 13-year old charged with murder or a 14- or 15-year old charged with a crime of violence will be tried as an adult in Criminal Court and not as a juvenile delinquent in Family Court. *See, e.g.*, N.Y. CRIM. PRO. LAW § 720.10 (McKinney 1984). Should that youthful suspect be searched in school, she will be accorded child-sized constitutional protection although she may face severe adult sanctions.

66. The Justices split 6 to 3, with Justice White writing for the majority. The opinion was joined in full by Chief Justice Burger and Associate Justices Powell, Rehnquist and O'Connor. Associate Justice Blackmun did not sign the White opinion but provided a sixth vote for the holding in a separate opinion. Associate Justices Brennan, Stevens, and Marshall filed partial dissenting opinions.

67. New Jersey v. T.L.O., 105 S. Ct. 733, 736 (1985).

68. *Id.* at 741.

69. *Id.* at 743.

70. *Id.* at 744.

71. *See infra* note 74 and accompanying text.

Both the reasoning and the conclusions of the opinion are disputable. The extensive search of the purse simply does not pass constitutional muster, under either a traditional probable cause analysis or under the majority's intermediate "reasonableness" standard. The record reveals the occurrence of a detailed and minute examination of the contents of the purse, including the student's private papers and letters. At its inception, the purpose of the search was to determine whether T.L.O. was smoking cigarettes in the girls' restroom. Presumably the discovery of the package of cigarettes answered that question.[72] Nevertheless, the school official extended the search to include the entire contents of the purse. The result was a maximally intrusive, warrantless search unjustified either by exigency or other exceptional circumstances.[73] The school official did not have probable cause to conduct the search since neither possession of cigarettes nor lying about one's smoking habits is relevant to whether a student has been smoking in a non-designated area in school. Thus, the question becomes whether the search was at least 'reasonable under the circumstances.' The Court seems to look everywhere but to the Constitution for an answer and eventually finds one in a discussion in the Federal Rules of Evidence on the weight to be given 'mere evidence.'[74]

As if by sleight of hand, the Court transforms one disturbingly thorough search into two separate searches, the first then justifying the second: "The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marihuana."[75]

The basic flaw in the Court's analysis is that the first search was itself of dubious legality. Were *possession* the infraction, opening the purse might have been reasonable in view of the school's legitimate interest in protecting the health of students. However, possession itself did not violate school rules. The Court crafts the argument that possession is relevant to whether the student had been smoking and to the credibility of her denial, and thereby provides a "nexus" between the item searched for and the infraction.[76]

Nowhere in the Court's reasonableness standard is there any basis for such a strained rationale. Moreover, nowhere in the language of the fourth amendment is there as nebulous and expansive a notion as "nexus." Assuming, arguendo, the validity of the first search, it should have ended with the discovery of the rolling papers, on which the assistant vice principal based his

72. It is even questionable whether a search that would have discovered the cigarettes would be constitutional. *See infra* text accompanying notes 74 and 76.

73. *See supra* notes 2-7 and accompanying text.

74. 105 S. Ct. at 745-46. To be relevant, an item of evidence need only tend to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. FED. R. EVID. 701. Citing the rule, the majority said that "evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue." *Id.* The Court draws its "nexus" argument from that reasoning.

75. *Id.* at 745.

76. *Id.*

suspicion of marijuana possession. As Justice Brennan points out in his dissent:

> The mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring both that T.L.O. had violated the law by possessing marihuana and that evidence of that violation would be found in her purse . . . . [He] was not entitled to search possibly the most private possessions of T.L.O. based on the mere presence of a package of cigarette papers.[77]

Brennan justifiably questions the proposition that the presence of rolling papers indicates the presence of marijuana. More importantly, were the proposition true, it would effectively change the nature of the search from an administrative inspection conducted to enforce a school regulation to a full-fledged inquiry into criminality. At that point, the fourth amendment should apply in full force. As one commentator has noted, "when the sole purpose of the search is to find evidence of a crime, the school administrator is a policeman, whatever his formal title."[78] As such, a school official should be held to the same standards as a law enforcement officer.

In sum, the initial search of T.L.O.'s purse was unreasonable at its inception and the further search, conducted by a quasi-law enforcement officer for evidence of a crime, was unsupported by probable cause and therefore violative of the warrant requirement of the fourth amendment. Accordingly, the Court should have excluded the fruits of the entire search from the evidence used to prosecute T.L.O. Nevertheless, the majority upheld the search on the basis of the special and distinctive nature of schools.[79]

Underlying the opinion is the Court's concern about drug abuse and violent crime in schools. The Court argues that the time necessary to establish probable cause and obtain a warrant would unduly interfere with a school official's ability to respond swiftly and effectively to events calling for discipline. Even if true, the Court's argument does not militate against the well-established doctrine that a warrantless search, absent probable cause or exceptional circumstances, is presumed unreasonable under the fourth amendment.[80] Missing from the Court's analysis is the fundamental point that privacy is as essential a human value to students as it is to adults, whether in the context of a private home, a public street, or a school. Before the Court's opinion, only minimally intrusive searches, conducted under compelling circumstances, were appropriate cases for relaxing fourth amendment standards. The complete excavation of T.L.O.'s purse to obtain evidence of a minor infraction of school rules falls well outside that category.[81]

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77. *Id.* at 758.

78. Buss, *supra* note 47, at 755.

79. 105 S. Ct. at 743.

80. *See supra* note 2 and accompanying text.

81. The majority's reliance on the use of a balancing test to determine the reasonableness of a search is wholly against the weight of established case law. Only in exceptional circumstances has it been held appropriate to depart from traditional probable cause in favor of balanc-

Another disturbing element in the opinion is the Court's wish to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause."[82] It is troubling that the Court would place a higher value on the inconvenience to school officials of learning an important legal concept than on the students' interest in personal privacy. The Court's opinion is still more troubling in that its own standard of reasonableness measured by a two-part balancing test is itself replete with conceptual "niceties."

The first part of the test pertains to the validity of a search at its inception and is satisfied if the school official has reasonable grounds to expect to find evidence of a violation of the law or school rules. However, school rules sometimes can be arbitrary and trivial. If the conduct in question does not seriously threaten safety, violate classroom discipline, or fall under a recognized exception to the warrant requirement, fourth amendment strictures should prevail. It would be difficult to make a persuasive argument in support of the view that school officials have a compelling need to search students in order to enforce minor school regulations. Yet that result is not unlikely under the Court's ruling. As Justice Stevens warns:

> [The majority's opinion] will permit teachers and school administrators to search students when they suspect that the search will reveal evidence of even the most trivial school regulation or precatory guideline for student behavior . . . . For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.[83]

The goal of the second part of the test is to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses. However, the Court does not apply that test to the instant case; instead, it permits a male administrator to rummage through the purse of a female high school student in order to obtain evidence of cigarette smoking.

In its sweeping opinion, the Court only cursorily addressed the issue the State had actually raised, i.e., the applicability of the exclusionary rule to school searches. Given the latitude *T.L.O.* offers school officials seeking to search students, that omission may be of little importance. Nevertheless, the

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ing governmental interests against the privacy interests of an individual. Florida v. Royer, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting); Dunaway v. New York, 442 U.S. 200 (1979). Probable cause has always been the standard for a full-scale search. As Justice Brennan states in his dissent from *T.L.O.*, "The line of cases begun by Terry v. Ohio, 392 U.S. 1 (1968), provides no support [for the position that a full-scale intrusion may be justified on less than probable cause], for they applied a balancing test only in the context of minimally intrusive searches that served crucial law enforcement interests." 105 S. Ct. at 753. *See, e.g.*, United States v. Hensley, 105 S. Ct. 675 (1985) (brief stop); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (border search upheld); Terry v. Ohio, 392 U.S. 1 (1968) (patdown of outer clothing); *cf.* United States v. Place, 462 U.S. 696 (1983) (holding of luggage for period of time for a canine sniff held unreasonable in absence of probable cause).

82. 105 S. Ct. at 744.

83. *Id.* at 763 (footnotes and citations omitted) (Stevens, J., dissenting in part).

opinion leaves unanswered what standards are to govern searches of students' lockers, desks, or other school property and what remains of the requirement of particularized suspicion for searches. The Court leaves these questions for another case, but if the T.L.O. opinion is any indication of the Court's thinking with respect to the privacy rights of students, then the answers are likely to be against the best interests of students.

IV
A Case for Probable Cause

It is not immediately apparent why strict adherence to the fourth amendment necessarily should hinder attempts by school authorities to maintain order. Probable cause exists where facts and circumstances are sufficient to warrant a person of reasonable caution to believe an offense has occurred.[84] The Court has described that time-honored standard as practical, fluid, flexible, and easily applied.[85] Thus, existing doctrine can and should accommodate the conflicting interests of students and school officials.

Courts have always treated circumstances requiring immediate action differently under the fourth amendment. Such circumstances present special government needs sufficient to override the warrant requirement.[86] Continuing that policy in public schools would shield the educational environment from disorder without disfiguring the fourth amendment. It is important to recall that the fourth amendment aims to ensure individual privacy by forcing the government to obtain a warrant in the absence of exigency or other special circumstances, inconvenience notwithstanding. Thus, there is no need to completely discard the warrant requirement in school searches because a warrant is not needed where immediate action is necessary.

A school official faced with a possible status violation, e.g., drug dealing, need not take immediate action. Drug trafficking is an ongoing activity which provides officials and other school personnel ample opportunity to observe suspicious behavior. Their observations, supported by any records they might keep on suspects, would provide sufficient probable cause to permit authorities to address the problem within the confines of the Constitution. Moreover, the possibility of destruction of evidence could be countered by a brief detention of the student until the arrival of law enforcement authorities.

It is ill-conceived to dispense with the warrant requirement in all school searches. The *T.L.O.* opinion allows school officials to search students virtually with impunity. Increased disruption is inevitable if school officials do not feel at all obligated to develop more than the mere shred of evidence now called for under the Court's relaxed standard. For every wrongdoer apprehended, many innocent students may have their privacy violated unnecessa-

84. *See supra* note 28.

85. *Gates*, 462 U.S. at 321-39.

86. *Place*, 462 U.S. at 703-07; *see supra* note 80; *cf.* Mincey v. Arizona, 437 U.S. 385 (1978).

rily. Surely that possibility alone threatens the purpose and spirit of the fourth amendment.

While no one would gainsay that drug abuse and violence trouble our schools, the same problems plague society as a whole. Surely the Court would oppose a total dismantling of the fourth amendment in order to permit law enforcement authorities to tackle these crimes more effectively, unshackled by the inconvenience of constitutional restraints.

This decision has effectively dashed any hope students might have held that the Court would interpret the Constitution with an eye towards fully preserving the rights that document is believed to ensure. Students should now look beyond the Court to state constitutions for full fourth amendment protection. A search that may not offend the federal Constitution, as interpreted by the Burger Court, nonetheless may be illegal if it conflicts with a state constitutional provision. Furthermore, since the Court will not overturn a state court decision based upon an independent state ground, the state alternative is an option worth pursuing.

CONCLUSION

The Constitution transcends the vicissitudes of contemporary social realities. Today, schools are facing serious and difficult problems; tomorrow, they may not be. The judiciary should resist the impulse to rewrite the Constitution according to a momentary vision of what appears to be the social good. While society certainly has an interest in preserving order throughout all its institutions, that goal should never be pursued at the expense of individual liberty. As Professor Anthony Amsterdam observed over a decade ago, "the history of the destruction of liberty . . . has largely been the history of the relaxation of [procedural] safeguards in the face of plausible-sounding governmental claims of a need to deal with . . . threats to the good order of society."[87]

This is precisely the danger threatened by the Court's opinion. Replacing the constitutionally mandated requirement of probable cause with a reasonableness standard subject to wide interpretation is especially dangerous where a right as fundamental as privacy is at stake. Indeed the inherent vagueness of the Court's school search standard renders it "so open-ended that it may make the Fourth Amendment virtually meaningless in the school context."[88] 'Reasonableness under all the circumstances' simply does not provide the desperately needed bright, clear line beyond which school officials will know not to proceed.

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87. Amsterdam, *supra* note 9, at 354.

88. 105 S. Ct. at 767.

* This Comment is dedicated to the memory of Yale law student Paula Cooper, a good friend who would have been a great lawyer. The author would also like to express her appreciation for the valuable assistance, editorial and otherwise, of R. Havazelet, P. Constantino, and D. "Bert" Bertocci.