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## New Jersey v. T.L.O.: The Supreme Court's Lesson on School Searches

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## NEW JERSEY v. T.L.O.: THE SUPREME COURT'S LESSON ON SCHOOL SEARCHES

GERALD S. REAMEY\*

A 14-year-old high school freshman and her companion were discovered by a teacher smoking in their school lavatory, an area in which smoking was not permitted.<sup>1</sup> The girl, T.L.O., was taken to Assistant Vice Principal Theodore Choplick, to whom she denied smoking altogether.<sup>2</sup> Mr. Choplick demanded T.L.O.'s purse, opened it, and found a package of cigarettes inside.<sup>3</sup> As he removed the evidence from the purse, he observed a package of cigarette rolling papers which, because of his experience, he believed related to the use of marihuana.<sup>4</sup> Mr. Choplick's further search of the purse uncovered a small amount of marihuana,<sup>5</sup> a pipe,<sup>6</sup> several empty plastic bags,<sup>7</sup> approximately forty dollars in small bills and change,<sup>8</sup> an index card listing the names of students who owed T.L.O. money,<sup>9</sup> and two letters implicating the student in drug dealing.<sup>10</sup> These items of evidence were subsequently used, along with the confession of selling marihuana given by T.L.O. to the police, to adjudicate the student a delinquent and suspend her from school.<sup>11</sup>

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1. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4084 (U.S. Jan. 15, 1985).

2. See *id.* at 4084.

3. See *id.* at 4084.

4. See *id.* at 4084.

5. See *id.* at 4084.

6. See *id.* at 4084.

7. See *id.* at 4084.

8. See *State ex rel. T.L.O.*, 428 A.2d 1327, 1330 (N.J. Juv. & Dom. Rel. Ct. 1980).

9. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4084 (U.S. Jan. 15, 1985).

10. See *id.* at 4084. One of these letters was a handwritten request by T.L.O. to a friend asking the friend to sell marihuana in school. See *State ex rel. T.L.O.*, 428 A.2d 1327, 1330 (N.J. Juv. & Dom. Rel. Ct. 1980).

11. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4084 (U.S. Jan. 15, 1985). In her confession, T.L.O. admitted that she had been selling marihuana in school and that, on the day of

T.L.O.'s motion to suppress was denied by the trial court,<sup>12</sup> and she appealed on fourth amendment grounds to the intermediate state appellate court.<sup>13</sup> In a divided opinion, the Appellate Division held that the fourth amendment applied to the search by the school official, but concluded that the search was a reasonable one because Mr. Choplick had "reasonable cause" to believe it necessary to maintain discipline or enforce school policies.<sup>14</sup> The New Jersey Supreme Court reversed the Appellate Division, not because the standard adopted by the lower court was incorrect,<sup>15</sup> but because the search was unreasonable under that standard.<sup>16</sup> It was the court's determination that the federal exclusionary rule applied to illegal searches conducted by school officials, just as to those conducted by the police.<sup>17</sup>

The State of New Jersey subsequently petitioned for certiorari on the grounds that the exclusionary rule should not apply to school officials unless law enforcement personnel were involved in the search.<sup>18</sup> It was conceded by the State that the "reasonable cause" standard applied by the New Jersey Supreme Court was "appropriate and that the court had correctly applied that standard."<sup>19</sup>

The United States Supreme Court, after hearing argument on the exclusionary rule issue, ordered reargument to consider the applicability of the fourth amendment and whether the standard applied by the New Jersey courts was indeed correct.<sup>20</sup> On that reargument, the

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the search, she had sold 18 to 20 marihuana cigarettes for one dollar each. *See State ex rel. T.L.O.*, 428 A.2d 1327, 1330 (N.J. Juv. & Dom. Rel. Ct. 1980).

12. *See State ex rel. T.L.O.*, 428 A.2d 1327, 1330-34 (N.J. Juv. & Dom. Rel. Ct. 1980). The juvenile court subsequently adjudicated T.L.O. a delinquent and imposed a probated sentence. *See New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4084 (U.S. Jan. 15, 1985).

13. *See State ex rel. T.L.O.*, 448 A.2d 493, 493 (N.J. Super. Ct. App. Div. 1982).

14. *See id.* at 493-94.

15. The New Jersey Supreme Court held, as had the Appellate Division, that a school official may conduct a reasonable search for evidence if reasonable grounds exist "to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." *See State ex rel. T.L.O.*, 463 A.2d 934, 941-42 (N.J. 1983).

16. *See id.* at 942. The court reasoned that the assistant principal lacked reasonable grounds to believe that T.L.O. had evidence of a rule infraction or crime in her purse. *See id.* at 942. There was no basis for his belief that the purse contained cigarettes, but had there been, the official had no reason to seize the cigarettes since the rule violated pertained to the *area* in which students were permitted to smoke; smoking or possession of cigarettes was not prohibited. *See id.* at 942.

17. *See id.* at 939.

18. *New Jersey v. T.L.O.*, 43 U.S.L.W. 4083, 4085 (U.S. Jan. 15, 1985).

19. *See id.* at 4085.

20. *See id.* at 4086. Professor Yale Kamisar has been quoted as speculating that the

State of New Jersey urged adoption of a "reasonable suspicion" standard in lieu of the "reasonable cause" applied by the New Jersey Supreme Court.<sup>21</sup>

Ultimately, the reasonable suspicion standard prevailed as the United States Supreme Court held: 1) the fourth amendment applies to school officials as to other "state officials"; 2) students may, in appropriate circumstances, claim a legitimate expectation of privacy in their personal effects; and 3) on balance, evaluating the reasonableness of a search under the attendant circumstances better serves the interests of the state than strict adherence to a probable cause standard and also adequately protects the privacy rights of the students in an educational environment.<sup>22</sup> The Court refused to require that a warrant be obtained<sup>23</sup> and reserved judgment as to the exclusionary rule question.<sup>24</sup>

To appreciate the significance and persuasiveness of the Court's holding, it is worthwhile to briefly consider various approaches taken by jurisdictions addressing cases similar to *T.L.O.*<sup>25</sup> This is most effectively done and easily understood by analyzing the fourth amendment issues in their logical turn. The threshold question is, of course: Does the fourth amendment apply to students and their educators? If it does not, the inquiry ends. But if school officials are state officers governed by the fourth amendment and the rights guaranteed by the amendment are enjoyed by their students, the issue then is the level of suspicion required before a search can be performed. Concomitantly, the scope of the permitted search becomes an important concern. Finally, it must be determined whether the traditional warrant requirement exists in the context of school searches, or whether instead a

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reargument was ordered because a majority could not be obtained in favor of abolishing the exclusionary rule for searches conducted by school officials. See Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A. J., Feb. 1985, at 54.

21. See Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A. J., Feb. 1985, at 50, 52.

22. *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4085-87 (U.S. Jan. 15, 1985).

23. See *id.* at 4087.

24. See *id.* at 4085 n.3.

25. For good general discussions of the law relating to school searches, see W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.11, at 452-72 (1978 & Supp. 1985); W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 39(k) (1985); W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 17.2 (1984). A more dated but useful survey of the jurisdictions may be found in Annot., 49 A.L.R.3d 978 (1973).

blanket exception or one or more specific exceptions to the warrant requirement apply in the schools.

The question of whether the fourth amendment is applicable turns, in the first instance, on whether school officials, like Vice Principal Choplick, are "state officers."<sup>26</sup> In what one author has termed the "early view,"<sup>27</sup> courts refused to apply the Constitution to educators because of the so-called *in loco parentis* doctrine.<sup>28</sup> The essence of this approach is that because the fourth amendment does not control the actions of private parties, it cannot control the conduct of school officials acting on behalf of private parties (the parents).<sup>29</sup> The doctrine has been applied less and less frequently in recent decisions, largely due to the educational realities that militate against its use. The principal argument against its continued vitality may be summarized as follows: School officials work for the state; they enforce compulsory attendance rules as well as regulations governing the conduct of students within their care, under authority that is not coextensive with that of parents.<sup>30</sup> Further, the fruits of their searches of students, like

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26. See *Mapp v. Ohio*, 367 U.S. 643, 654 (1961); *Elkins v. United States*, 364 U.S. 206, 213 (1960).

27. See W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* 17-3 (1984).

28. See *id.* at 17-3. The term *in loco parentis* simply means "in place of the parent" and has been employed as a shorthand way of describing the relationship between educators and their students by reference to the parental relationship. See W. LAFAVE, *SEARCHES AND SEIZURES: A TREATISE ON THE FOURTH AMENDMENT* § 10.11(a) (1978). The employment of the doctrine in school search cases has probably never been universally accepted, but it is true that it once enjoyed more popularity than it does currently. Two authors went so far as to write in 1976, "[u]ntil recently, the school's right to search a student's person or his locker has been little questioned." Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57, 57 (1976). This conclusion was based on the characterization of school officials as private persons to whom the fourth amendment does not apply. See *id.* at 57. While the doctrine may have come under increasing criticism in recent years, it has not been entirely abandoned by courts considering school searches. See *R.C.M. v. State*, 660 S.W.2d 552, 554 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). The Texas court of appeals, in *R.C.M.*, acknowledged the waning use of the doctrine, but felt itself bound by prior law to continue it in Texas. See *id.* at 554.

29. See W. LAFAVE, *SEARCHES AND SEIZURES: A TREATISE ON THE FOURTH AMENDMENT* § 10.11(a), at 453-56 (1978); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 767 (1974). A variation on this theme has been that school officials, even if not acting *in loco parentis*, were acting as private persons in their own right and were not, therefore, state officials. See *In re Donaldson*, 75 Cal. Rptr. 220, 221-22 (Ct. App. 1969); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 765 (1974).

30. See Comment, *Students and the Fourth Amendment: "The Torturable Class"*, 16 U.C.D. L. REV. 709, 713-14 (1983). One commentator has also noted the vast difference in the protective nature of a parent's supervision and the disciplinary nature of a school official as

searches conducted by law enforcement personnel, may lead to criminal prosecution in addition to school disciplinary measures.<sup>31</sup>

In *T.L.O.*, the Supreme Court first noted that the fourteenth amendment had already been held to apply to public school officials and that the fourth amendment was applicable to the states through the fourteenth.<sup>32</sup> Logically, then, the fourth amendment would also appear to apply to public school officials.<sup>33</sup> The State of New Jersey, however, had argued that the fourth amendment is applicable only to law enforcement officers, and since the fourteenth amendment governs school officials, the fourth does not.<sup>34</sup> The Court rejected such a restrictive view of the fourth amendment, noting that in the past it has often been applied to persons other than law enforcement agents.<sup>35</sup> Moreover, the Court stated that the *in loco parentis* doctrine was "in tension with contemporary reality and the teachings of [the] Court."<sup>36</sup> Since school officials are state officers for purposes of the first amendment<sup>37</sup> and the fourteenth amendment,<sup>38</sup> the *T.L.O.* Court saw no reason to reach a different result in search cases.<sup>39</sup> School officials, enforcing compulsory attendance policies and disciplinary functions authorized, or even required, by state law are not acting "merely as surrogates for the parents."<sup>40</sup>

The decision that the fourth amendment applies to student searches

further reason for abandoning the *in loco parentis* doctrine. See Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 768 (1974). It is also noteworthy that students of more maturity are entitled to greater privacy and less supervision by even their parents. Ultimately, by at least college age, parents would have no legal authority over their children, and, therefore, someone standing in the stead of the parents would scarcely have a better claim than they. See *Morale v. Grigel*, 422 F. Supp. 988, 997-98 (D.N.H. 1976).

31. See *Morale v. Grigel*, 422 F. Supp. 988, 991-92, 996-97 (D.N.H. 1976). The court held that, while a school may justify a search for evidence of conduct that would disrupt the "operation of its academic functions," it may not engage in supervisory searches whose purpose is instead criminal prosecution. See *id.* at 998. For a summary of the criticisms of *in loco parentis* in its various applications, see W. LAFAVE, *SEARCHES AND SEIZURES: A TREATISE ON THE FOURTH AMENDMENT* § 10.11(a), at 453-56 (1978).

32. *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4085-86 (U.S. Jan. 15, 1985).

33. See *id.* at 4085-86.

34. See *id.* at 4086.

35. See *id.* at 4086.

36. See *id.* at 4086.

37. See *id.* at 4086 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)).

38. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4086 (U.S. Jan. 15, 1985) (citing *Goss v. Lopez*, 419 U.S. 565 (1975)).

39. See *id.* at 4086.

40. See *id.* at 4086.

by school officials does not, of course, resolve the question of whether students enjoy full fourth amendment protection while attending school. The current view, based largely on analogy to the first<sup>41</sup> and fourteenth amendment<sup>42</sup> cases, is that they do.<sup>43</sup> Even so, considerable disagreement persists as to the extent to which fourth amendment rights possessed by students may frustrate reasonable attempts by educators to maintain the order necessary to preserve an educational environment.<sup>44</sup> Indeed, the push and pull of these often competing interests has led many courts to assume, without expressly holding, that students are possessed of fourth amendment guarantees in their headlong rush to address the more difficult underlying conflict.<sup>45</sup>

In *T.L.O.*, the Supreme Court considered an argument advanced by the State of New Jersey that the "pervasive supervision" of school children diminishes the legitimate expectation of privacy a child may

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41. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506-07 (1969). *Tinker* has been cited repeatedly by the courts and commentators, sometimes in tandem with *In re Gault*, 387 U.S. 1 (1967), as support for the proposition that school students are not without benefit of constitutional protections merely because of their educational status. See, e.g., *Bellnier v. Lund*, 438 F. Supp. 47, 52 (N.D.N.Y. 1977); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 740-43 (1974); Schiff, *The Emergence of Student Rights to Privacy Under the Fourth Amendment*, 34 BAYLOR L. REV. 209, 211-13 (1982); Trosch, Williams & Devore, *Public School Searches and the Fourth Amendment*, 11 J.L. & EDUC. 41, 43-44 (1982); Comment, *Students and the Fourth Amendment: "The Torturable Class"*, 16 U.C.D. L. REV. 709, 717 (1983).

42. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

43. See materials cited *supra* note 41. The Georgia Supreme Court implicitly recognized the possession of fourth amendment rights by students, but pointed out that the first and fourteenth amendment rights accorded them in *Tinker* and *Goss* were "a dilute version of those accorded adults." See *State v. Young*, 216 S.E.2d 586, 593 (Ga. 1975); see also Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U.L. REV. 803, 813-16 (1980).

44. See W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.11(b), at 456-64 (1978).

45. For example, the Louisiana Supreme Court held simply, after a relatively lengthy discussion of the status of educators as state officers, that, "therefore, their students must be accorded their constitutional right to be free from warrantless searches and seizures." See *State v. Mora*, 307 So. 2d 317, 319 (La.), *vacated*, 423 U.S. 809 (1975). Although the United States Supreme Court vacated the judgment in *Mora*, the Louisiana Supreme Court held on remand that its requirement of probable cause for student searches was based on federal and state law, thereby precluding further review. See *State v. Mora*, 330 So. 2d 900, 901-02 (La.), *cert. denied*, 429 U.S. 1004 (1976). This cursory attention to the question of students' inherent fourth amendment rights is reflected in one leading commentator's observations that: "Although the courts have stated or assumed that the fourth amendment does apply to students in public schools, they have not generously applied that amendment's protection as against searches conducted by or with the aid of school administrators." Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 743 (1974).

have in property "unnecessarily" brought to school.<sup>46</sup> Pointing out that schools and prisons are not the same for fourth amendment purposes,<sup>47</sup> the Court expressly rejected the contention that privacy rights are checked at the schoolhouse door: "Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectation of privacy."<sup>48</sup>

The Court concluded that the necessity of maintaining security and order in the educational environment was an important interest demanding a measure of flexibility for its effective attainment, yet without sacrificing legitimate privacy interests of the students.<sup>49</sup> This flexibility is achieved in part by dispensing with the warrant requirement<sup>50</sup> and in part by modifying the level of suspicion required to authorize a search.<sup>51</sup>

After noting that probable cause is ordinarily required to support a search,<sup>52</sup> the *T.L.O.* majority employed a balancing of governmental and private interests to determine whether the search of the student's purse was a reasonable one within the meaning of the fourth amendment.<sup>53</sup> First, rather than requiring the usual probable cause standard, the Court held that if reasonable grounds exist to believe that the search will uncover evidence of a violation of criminal law or a school rule or regulation, the search is "justified at its inception."<sup>54</sup> The scope of the search must then be justified by a determination that the measures adopted are "reasonably related to the objectives of the

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46. *See* *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4087 (U.S. Jan. 15, 1985).

47. *See id.* at 4087.

48. *See id.* at 4087.

49. *See id.* at 4087.

50. Terming the warrant requirement "unsuited to the school environment," the Court cited the practical difficulties inherent in the warrant process as excusing its application. *See id.* at 4087. Particularly, the Court held that requiring a warrant in every student search case would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *See id.* at 4087.

51. *See id.* at 4087.

52. *See id.* at 4087.

53. *See id.* at 4087. Reasonableness, the Court held, requires a determination that the search was justified at its inception, and, if so, whether the procedure employed is within the scope dictated by the circumstances supporting the search. *See id.* at 4087. In holding that the reasonableness was the appropriate focus, rather than probable cause, the Court reserved the question of whether individualized suspicion is an essential part of reasonableness. *See id.* at 4088 n.8.

54. *See id.* at 4087-88 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).



search," taking into account the "age and sex of the student and the nature of the infraction."<sup>55</sup>

Applying this standard in *T.L.O.*,<sup>56</sup> the Court segregated the initial search for cigarettes from the subsequent search for marihuana.<sup>57</sup> The search for cigarettes, the Court reasoned, was supported by the teacher's report to Mr. Choplick that T.L.O. had been smoking in the lavatory.<sup>58</sup> Possession of cigarettes was not itself violative of a school rule<sup>59</sup> and "would not . . . necessarily be inconsistent" with T.L.O.'s claim that she had not been smoking.<sup>60</sup> The Court concluded, however, that the search for what was admittedly "mere evidence"<sup>61</sup> was permissible to corroborate the report that T.L.O. had been smoking and to "undermine the credibility" of her story that she did not smoke at all.<sup>62</sup> Once the assistant vice principal was legitimately in the purse, reasonable suspicion to continue his investigation was provided by the cigarette rolling papers he found.<sup>63</sup> The continued exploration of the search, including the reading of the letters, was held reasonable in light of the relationship of the contents to marihuana dealing.<sup>64</sup>

By its decision, the Supreme Court simultaneously clarified and confused the legal parameters for searches of students. The rejection of the *in loco parentis* doctrine by itself represents a significant ad-

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55. *See id.* at 4088.

56. *See id.* at 4088. The Court acknowledged that the standard adopted was not "substantially different" from that utilized by the New Jersey Supreme Court. *See id.* at 4088.

57. *See id.* at 4088.

58. *See id.* at 4089. The New Jersey Supreme Court held that Mr. Choplick had no more than a "good hunch" that the purse contained cigarettes. *See State ex rel. T.L.O.*, 463 A.2d 934, 942-43 (N.J. 1983). The United States Supreme Court found this "puzzling" in light of the fact that the teacher had told Mr. Choplick that T.L.O. had been smoking. *See New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4089 (U.S. Jan. 15, 1985). But the majority had already acknowledged that finding cigarettes did not necessarily indicate that T.L.O. had been smoking. *See id.* at 4088. The Court explained that while the teacher's information only indicated that T.L.O. *might* have cigarettes in her purse, absolute certainty was not required in any event. *See id.* at 4088.

59. *See id.* at 4088. The New Jersey Supreme Court held the search unreasonable, in part, for this very reason. *See id.* at 4088.

60. *See id.* at 4088.

61. *See id.* at 4088.

62. *See id.* at 4088.

63. *See id.* at 4089. Mr. Choplick's conclusion that the rolling papers were indicative of marihuana use was not disputed by T.L.O. *See id.* at 4089.

64. *See id.* at 4089. The reading of the letters was contested by T.L.O. as exceeding the scope of a reasonable search, but the Court permitted examination because of the suspected trafficking in drugs. *See id.* at 4089.

vance in bringing clarity, certainty, and consistency of application to this form of search.<sup>65</sup> The "private action" claim made on behalf of school teachers and administrators may now usually be set aside altogether, or at least carefully scrutinized in a light unfavorable to its acceptance.<sup>66</sup>

More importantly, recognizing that searches by public school officials are state action acknowledges the "contemporary reality" of the school-state relationship and thereby enhances the persuasiveness of fourth amendment interpretations in the school context.<sup>67</sup> Not only are school officials employees of the state, they are charged with the responsibility of carrying out state regulations, policies, and laws, often to the penal or educational detriment of the student.<sup>68</sup>

When school officials are engaged in investigations of criminal violations by students, and prosecution is anticipated along with or in lieu of administrative discipline, the courts have more often treated school officials as state agents or imposed higher standards of suspicion before permitting a search.<sup>69</sup> But tying the characterization of an

65. See *id.* at 4086. As previously noted, some jurisdictions have clung to the legal fiction that educators enjoy the same freedom from fourth amendment constraints as parents, while many others have abandoned the doctrine. Compare *R.C.M. v. State*, 660 S.W.2d 552, 554 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (adhering to doctrine) with *State v. Young*, 216 S.E.2d 586, 591 (Ga. 1975) (school officials are state officers governed by fourth amendment). See generally Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57, 57 (1976).

66. Careful scrutiny of the claim would, in itself, be an advance. As one commentator has noted:

The phrase *in loco parentis* has become a substitute for analysis, and consequently is deserving of the description which the Supreme Court once gave to the similar term *parens patriae*: a "Latin phrase [which was] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme."

W. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.11(b), at 456 (1978) (quoting *In re Gault*, 387 U.S. 1 (1967)).

67. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4086 (U.S. Jan. 15, 1985); see also *R.C.M. v. State*, 660 S.W.2d 552, 554 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). In *R.C.M.*, the Texas court of appeals characterized the *in loco parentis* doctrine as "rather harsh," and observed that, "[w]e cannot ignore that school officials have considerable discretion in restricting students of their vested constitutional rights without regard to the reasonableness of the detention or search." *Id.* at 554. Nevertheless, the court concluded that, "in this case, however, we are bound by the controlling common law doctrine of *in loco parentis*." See *id.* at 554.

68. See Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 768 (1974) (discusses disciplinary aspect of educator's responsibility); Comment, *Students and the Fourth Amendment: "The Torturable Class"*, 16 U.C.D. L. REV. 709, 714 (1983) (discusses educator's enforcement of rules and regulations).

69. See *Picha v. Wielgos*, 410 F. Supp. 1214, 1220-21 (N.D. Ill. 1976); *Smyth v. Lubbers*,

educator to the purpose of his search is inherently frustrating. The Gordian knot of multiple purposes can be cut only by treating all school officials as agents of the State when they conduct searches. By adopting this approach, the *T.L.O.* Court burdened the judicial system with deciding fourth amendment questions in virtually every school search case. On the other hand, it also helped assure that school children would not see their individual constitutional rights flaunted by those charged with their education.<sup>70</sup>

If school officials are agents of the government for search purposes, wrongful deprivation of the rights of students raises the issue of vindication of those rights.<sup>71</sup> It is significant to note the degree to which unlawful searches by school teachers and administrators give rise to actions for money damages as civil rights violations.<sup>72</sup> The most controversial and widely applicable remedy, however, is the exclusion of criminal evidence, the application of which in school cases was not decided by the *T.L.O.* Court.<sup>73</sup>

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398 F. Supp. 777, 786-87 (W.D. Mich. 1975); *L.L. v. Circuit Court of Washington County*, 280 N.W.2d 343, 348 (Wis. Ct. App. 1979); see also RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS 17-4, -5 (1984); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 755 (1974); Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57, 57 (1976).

70. This sentiment is reflected in the opinion of Justice Brennan: "It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections." *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4091 (U.S. Jan. 15, 1985) (Brennan, J., concurring in part & dissenting in part).

71. See Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57, 58 (1976). In their article on school searches, Professors Phay and Rogister suggest four possible remedies for unlawful school searches: 1) criminal prosecution for violation of privacy rights under 18 U.S.C. § 242; 2) a civil suit for violation of privacy under state law or 42 U.S.C. § 1983; 3) exclusion of the evidence obtained in a subsequent school proceeding; or 4) exclusion in a criminal prosecution. See *id.* at 58.

72. See *id.* at 58-59; Schiff, *The Emancipation of Student Rights to Privacy Under the Fourth Amendment*, 34 BAYLOR L. REV. 209, 226 (1982).

73. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4085 n.3 (U.S. Jan. 15, 1985). As stated, it may be that the applicability of the exclusionary rule was a primary reason for ordering reargument. See Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A. J., Feb. 1985, at 50, 54. Justices Stevens, Marshall, and Brennan would have applied the exclusionary rule to school searches. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4096 (U.S. Jan. 15, 1985) (Stevens, J., concurring in part & dissenting in part). In chastising the majority for not addressing the exclusionary rule issue, Justice Stevens wrote:

Thus, the simple and correct answer to the question presented by the State's petition for certiorari would have required affirmance of a state court's judgment suppressing evidence. That result would have been dramatically out of character for a Court that not

Use of the exclusionary rule when searches are not conducted by the police is arguably less likely to deter fourth amendment violations and is not therefore warranted when judged by a cost-benefit analysis.<sup>74</sup> But the lack of deterrence argument cannot be considered in isolation. If exclusion has even limited deterrent effect, it should be maintained against school officials unless other remedies for fourth amendment violations are entirely effective.<sup>75</sup> If disregard for constitutional guarantees is truly intolerable, a procedure incrementally decreasing the incidence of such abuse should be maintained or employed until no evidence of significant violation remains. Only then could the effect of elimination of remedial procedures be accurately gauged.

Moreover, a number of courts have applied the exclusionary rule to school officials,<sup>76</sup> apparently without sufficiently ill effect to result in change. It would be curious indeed if the Supreme Court were to finally settle the strictures of the fourth amendment on educators only to strip away the disincentive for them to ignore its mandate.

Of course, if the civil remedy provided students by acknowledging state action were an effective one, the benefits of the exclusionary rule might well fail to balance its costs. But practical hindrances and legal exceptions inhibit the efficacy of these actions. In *Wood v. Strickland*,<sup>77</sup> the United States Supreme Court engrafted on civil rights actions brought under 42 U.S.C. § 1983 a "good faith" exception for public school officials.<sup>78</sup> This exception, taken with the reduced

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only grants prosecutors relief from suppression orders with distressing regularity, but also is prone to rely on grounds not advanced by the parties in order to protect evidence from exclusion.

*Id.* at 4096.

74. See *State v. Young*, 216 S.E.2d 586, 589-91 (Ga. 1975). Of course, this argument fails entirely if the school official is acting at the behest of the police, or in conjunction with them, since law enforcement agencies are most likely to be deterred by application of the exclusionary rule. See Schiff, *The Emergence of Student Rights to Privacy Under the Fourth Amendment*, 34 BAYLOR L. REV. 209, 216-17 (1982).

75. See Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 741-42 n.20 (1974). Professor Buss suggests a "natural temptation" for police to profit from the nonapplicability of the exclusionary rule to school officials by having the educators conduct their searches for them. See *id.* at 741-42 n.20.

76. See *Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223, 238-39 (E.D. Tex. 1980); *Smyth v. Lubbers*, 398 F. Supp. 777, 794-95 (W.D. Mich. 1975); *State v. Mora*, 307 So. 2d 317, 320 (La. 1975); see also *People v. J.A.*, 406 N.E.2d 958, 960-61 (Ill. App. Ct. 1980); *People v. D.*, 315 N.E.2d 466, 468-69, 358 N.Y.S.2d 403, 405-07 (1974).

77. 420 U.S. 308 (1975).

78. See *id.* at 322. The Court held: "A compensatory award will be appropriate only if

fourth amendment protections inherent in a reasonable suspicion standard, the elimination of the warrant requirement, and the adoption of a balancing approach, dramatically reduce the likelihood of success for the plaintiff student. Moreover, few students will have the financial resources or perseverance to pursue a protracted damage action.<sup>79</sup> The exclusionary rule assumes greater significance in deterring misconduct by school officials when considered in light of the rather restricted availability of the civil remedy.<sup>80</sup>

It is also critical to the availability of these procedures of redress that the Court recognized at least some expectation of privacy by students while at school.<sup>81</sup> Of course, the legitimacy of a student's ex-

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the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Id.* at 322. The defense was compared with that existing for police civil rights suits in which the officer acted in "good faith and with probable cause." *See id.* at 317 (citing *Pierson v. Ray*, 386 U.S. 547 (1967)). The obvious fallacy in the comparison is that for police officers to be excused from their mistakes by acting in good faith, they must also have acted with probable cause. The school official is held to a much lower standard of suspicion, a fact that substantially diminishes the only factor preventing a defense based solely on the school official's good faith.

79. *See Smyth v. Lubbers*, 398 F. Supp. 777, 794 (E.D. Mich. 1975).

80. *See id.* at 794. In *Smyth*, Chief Judge Fox noted: "Where, as here, the authorities who violated the Constitution were not demonstrably guilty of bad faith, the exclusionary rule remains the only possible deterrent, the only effective way to positively encourage respect for the constitutional guarantee." *Id.* at 794. In *Jones v. Latexo Independent School District*, a federal district court in Texas reached an identical conclusion about the exclusionary rule: "The failure to apply a corollary of the exclusionary rule in this context would leave school officials free to trench upon the constitutional rights of students in their charge without meaningful restraint or fear of adverse consequences. Such a result would be intolerable, particularly in our schools." 499 F. Supp. 223, 239 (E.D. Tex. 1980). The example set for students by use of the exclusionary rule was a core consideration for Justices Stevens, Marshall, and Brennan in their dissent from the Court's avoidance of the issue:

Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people.

*New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4096 (U.S. Jan. 15, 1985) (Stevens, J., concurring in part & dissenting in part).

81. *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4087 (U.S. Jan. 15, 1985). This is in accord with prior case law that extended constitutional protection to students. *See, e.g., In re Gault*, 387 U.S. 1 (1967); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Bellnier v. Lund*, 438 F. Supp. 47, 52 (N.D.N.Y. 1977). *See generally Buss, The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 740-43 (1974).

pectation may vary from one situation to another,<sup>82</sup> a fact implicit in the adoption of a balancing test to judge the proper scope of a search. The search of T.L.O.'s purse demonstrates how her privacy expectations in its contents could be overcome where the initial intrusion was supported by adequate suspicion and the scope of the search was reasonably related to its purpose.<sup>83</sup> If the Court had relied instead on a general diminution of privacy approach for students, its approach would have been more consistent with prison search cases.<sup>84</sup>

While the *T.L.O.* majority did not directly hold that a student's expectation of privacy was lower because of his status, the result is substantially the same. The Court set the interests of society in maintaining order and discipline in schools alongside those of the student in preserving his privacy rights.<sup>85</sup> Without expressly modifying those rights, the Court approved measures designed to "strike the balance" between them and the needs of the school.<sup>86</sup>

The first of these measures was the abolition of the warrant requirement for school searches.<sup>87</sup> This cumbersome process was thought to "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>88</sup> Ironically, the Court

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82. See Comment, *Students and the Fourth Amendment: "The Torturable Class"*, 16 U.C.D. L. REV. 709, 718-20 (1983). A distinction may be drawn, for example, between the expectation of privacy in a purse, school locker, and the student's car parked in the school lot. Of the three, the locker is the least private because it belongs to the school and the student's use of it is nonexclusive. See W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 339 (1984); Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57, 65-67 (1976); Comment, *Students and the Fourth Amendment: "The Torturable Class"*, 16 U.C.D. L. REV. 709, 718-20 (1983). The student's person and items immediately associated with the person, like a purse, enjoy a somewhat higher expectation of privacy. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4097 (U.S. Jan. 15, 1985) (Stevens, J., concurring in part & dissenting in part). Compare *People v. D.*, 315 N.E.2d 466, 469, 358 N.Y.S.2d 403, 407 (1974) (finding higher expectation of privacy in student's person) with *People v. Overton*, 249 N.E.2d 366, 367, 301 N.Y.S.2d 479, 480-81 (1967) (no expectation of privacy in locker where school maintained extensive control). The student would also be justified in an expectation of privacy in his locked vehicle higher than that in a locker but perhaps less than that in a purse, depending on the part of the vehicle in which an item is stored.

83. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4087-88 (U.S. Jan. 15, 1985).

84. See *id.* at 4087 (citing *Ingraham v. Wright*, 430 U.S. 651 (1977)). Justices Powell and O'Connor would have held that students have a "lesser expectation of privacy than members of the population generally." See *id.* at 4089 (Powell, J., concurring).

85. See *id.* at 4087.

86. See *id.* at 4087.

87. See *id.* at 4087. None of the Court dissented from this holding.

88. *Id.* at 4087.

cited language from *Camara v. Municipal Court*,<sup>89</sup> which strictly required warrants, in support of its avoidance of warrants.<sup>90</sup> Undeniably, requiring school officials to obtain warrants would sometimes coincidentally lead to untenable results. While educators could surely prepare adequate affidavits to support the warrant,<sup>91</sup> they would probably refer the investigation to the police instead.<sup>92</sup> Police involvement would almost invariably result in prosecution if the search revealed sufficient evidence, a disposition not always desirable.<sup>93</sup> The warrant issue is not, however, so easily resolved as the *T.L.O.* opinion suggests. Existing exceptions to the warrant requirement, combined with analogues in the school context, greatly reduce the incidence of searches pursuant to warrant.<sup>94</sup> Furthermore, in those cases requiring a warrant, it may be that a modified procedure for its issuance, taking into account the speed and informality desirable in school searches, would better serve.<sup>95</sup>

Another measure taken by the Court in *T.L.O.* to strike a proper balance was reduction of the level of suspicion required to justify the search at its inception.<sup>96</sup> Permitting a school search on reasonable suspicion rather than probable cause was not an innovation with *T.L.O.*<sup>97</sup> Justice Blackmun's persuasively articulated concurrence, describing the educational needs placed in balance with students' pri-

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89. 387 U.S. 523 (1967).

90. Of course, in *Camara*, the Court employed a balancing test similar to that used in *T.L.O.*, but a warrant was still required, albeit on a reduced level of probable cause. *See id.* at 532-33.

91. While it may be thought that teachers and school administrators should be excused from the warrant requirement because they are ill-equipped to understand and articulate the requisite level of suspicion to obtain a warrant, the argument cuts the other way as well: The review of a neutral, detached magistrate is nowhere more necessary than in those situations in which the affiant misunderstands constitutional requirements. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(d), at 470 (1978).

92. If they did not involve the police in obtaining the warrant, they would often do so to execute the warrant.

93. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(d), at 470 (1978).

94. *See id.* at 470; Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 748-53 (1974).

95. *See* *Smyth v. Lubbers*, 398 F. Supp. 777, 792 (W.D. Mich. 1975) (suggesting internal warrant procedure); *see also* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(d), at 470-71 (1978).

96. *See* *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4087 (U.S. Jan. 15, 1985).

97. *See id.* at 4087. The Court noted that it joined the majority of other courts that have considered the issue in adopting a reasonable suspicion standard. *See id.* at 4085 n.2, 4087.

vacy rights, cannot be disregarded in considering this most difficult issue.<sup>98</sup> But the balance struck, easing the justification of school officials to search students, is arguably unnecessary.<sup>99</sup> The probable cause standard should not be abandoned unless the educational interests of students clearly outweigh the expectation of privacy concededly enjoyed by them.<sup>100</sup>

Admittedly, there may be a practical reason for dispensing with warrants. No such reason exists, however, for lowering the level of suspicion supporting a search. The *T.L.O.* majority focused exclusively on the fact that educators would be spared the "necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."<sup>101</sup> One of the clearest messages of recent United States Supreme Court cases interpreting the fourth amendment and its probable cause standard is that the concept is common sense and nontechnical.<sup>102</sup> Apparently then, the "niceties" of probable cause are no more than an application of "reason and common sense," rather than a more onerous standard. Moreover, the teacher or administrator, like Mr. Choplick, is usually possessed of more verifiably reliable information than the police. This may be developed through close observation of those in his charge with whom he spends a great deal of time,<sup>103</sup> or it may come from student or teacher "infor-

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98. See *id.* at 4090-91 (Blackmun, J., concurring). See generally Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 769-76 (1974).

99. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4092-95 (U.S. Jan. 15, 1985) (Brennan, J., concurring in part & dissenting in part); see also W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.11(b), at 459 (1978).

100. See *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4093 (U.S. Jan. 15, 1985) (Brennan, J., concurring in part & dissenting in part). Justice Brennan completely eschewed application of a balancing test once it had been determined that the fourth amendment applies to school searches. See *id.* at 4093 (Brennan, J., concurring in part & dissenting in part). But if balancing was to be used, he would have struck that balance differently: "In particular, the test employed by the Court vastly overstates the social costs that a probable cause standard entails and, though it plausibly articulates the serious privacy interests at stake, inexplicably fails to accord them adequate weight in striking the balance." *Id.* at 4093 (Brennan, J., concurring in part & dissenting in part).

101. See *id.* at 4088.

102. See *Texas v. Brown*, \_\_\_ U.S. \_\_\_, 103 S. Ct. 1535, 1543, \_\_\_ L. Ed. 2d \_\_\_, \_\_\_ (1983); *Illinois v. Gates*, 462 U.S. 213, 238 (1983); see also *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4093-94 (U.S. Jan. 15, 1985) (Brennan, J., concurring in part & dissenting in part).

103. See W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.11(b), at 459-60 (1978).



mants."<sup>104</sup> When the source is the latter, problems of reliability associated with informants used to assist criminal investigations are often absent.<sup>105</sup>

Finally, reduction of the level of suspicion justifying a search will inevitably increase the incidence of mistake, particularly in the absence of review by a magistrate. Since probable cause is not certainty, or even proof beyond a reasonable doubt, some mistakes would occur anyway if this higher standard was adopted in the interest of society's legitimate need to detect and prosecute crime in schools. But substantial intrusions of the sort permitted by the Court in *T.L.O.* should not be based on the slender reed of reasonable suspicion, unless the purposes served by the search are the functional equivalent of those justifying a search for criminal evidence.

This distrust of lower standards of suspicion is heightened when the suspicion extends beyond the parameters of criminal activity, as it does in school searches.<sup>106</sup> The *T.L.O.* Court related suspicion to both criminal activity and "rules of the school."<sup>107</sup> If suspected violation of trivial rules not subverting the educational needs of students may be the basis of a full-blown search, the balance struck by the Court accords privacy rights no weight in such cases.<sup>108</sup>

It is the result suggested by this skewed balance that is the most alarming facet of the decision in *T.L.O.*<sup>109</sup> Balancing competing interests to achieve reasonableness is often appropriate, but, like all fluid concepts, it requires great care to avoid abuse,<sup>110</sup> and whatever its

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104. *See id.* § 10.11(b), at 459-60.

105. *See id.* § 10.11(b), at 459-60. This is especially true after adoption of the "totality of circumstances" approach in gauging reliability and the ease with which information could be corroborated in the school setting. *See New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4094 (U.S. Jan. 15, 1985) (Brennan, J., concurring in part & dissenting in part); *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

106. *See New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4097-98 (U.S. Jan. 15, 1985) (Stevens, J., concurring in part & dissenting in part).

107. *See id.* at 4097-98.

108. *See id.* at 4097-98.

109. Justice Brennan's opinion reflects this concern: "The question facing the Court is not whether the probable-cause standard should be replaced by a test of 'reasonableness under all the circumstances.' Rather, it is whether traditional Fourth Amendment standards should recede before the Court's new standard." *See id.* at 4094 (Brennan, J., concurring in part & dissenting in part).

110. *See LaFave, Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1199-1214 (1983). The Supreme Court has considered a balancing test for detentions under the

virtue, it is likely to foster inconsistency of application and result.<sup>111</sup> When measure after measure is removed from one side of the balance without tipping the scales, it can only be because gravity is stayed by an interested hand.

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fourth amendment and cautioned against its use without reference to the nature of the intrusion. *See Dunaway v. New York*, 442 U.S. 200, 206-16 (1979).

111. *See New Jersey v. T.L.O.*, 53 U.S.L.W. 4083, 4095 (U.S. Jan. 15, 1985) (Brennan, J., concurring in part & dissenting in part).