Public School Drug Searches: Toward Redefining Fourth Amendment "Reasonableness" to Include Individualized Suspicion

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PUBLIC SCHOOL DRUG SEARCHES:
TOWARD REDEFINING FOURTH AMENDMENT
"REASONABLENESS" TO INCLUDE
INDIVIDUALIZED SUSPICION

I. Introduction

Incidents of illegal drug use1 and violent crime2 plague public school authorities across the nation. As narcotics and weapons appear on school campuses, school officials seek to conduct searches of

1. Federal Government statistics released on January 7, 1985, indicated that although overall drug use by high school students slightly declined during 1984, the use of cocaine slightly increased. Brinkley, Drug Use in High Schools Down, N.Y. Times, Jan. 8, 1985, at B5, col. 1. Two 1984 surveys of high school seniors revealed current cocaine use at 11% in New York and 13% in Massachusetts. Id. These findings indicate a "trend toward earlier and more extensive involvement in substance use . . . that may appear in a national survey of high school seniors in 1985-1986." Keyes & Block, Prevalence and Patterns of Substance Use Among Early Adolescents, 13 J. YOUTH & ADOLESCENCE 1, 12 (1984). Among high school seniors surveyed in 1983, 93% of the students had used alcohol at some time during their lives; 27% had used stimulants; 16% had used cocaine; 15% had used hallucinogens, including LSD and PCP; 14% had used tranquilizers, sedatives or barbiturates; 14% had used inhalants; and 10% had used opiates other than heroin. TEEN DRUG USE 2 (G. Beschner & A. Friedman ed. 1986) [hereinafter cited as TEEN DRUG USE]. A large scale study indicated that 57% of the American student population tried marijuana by twelfth grade, and 5.5% use marijuana daily. See Johnston, O'Malley & Buchanan, Highlights From "Drugs and American High School Students, 1975-1983," NATIONAL INSTITUTE FOR DRUG ABUSE, DHHS PUBLICATION No. (ADM) 84-1317 (1984) (providing data for each year from 1975-1983). An alarming 1983 study reported that by the time students reach seventh grade, nearly one-half of the surveyed population had experienced peer pressure urging them to try marijuana. See TEEN DRUG USE, supra, at 1 (citing Borton, Pressure to Try Drugs, Alcohol Starts in Early Grades, WEEKLY READER (April 25, 1983)).


2. See SCHOOL CRIME AND DISRUPTION (Ernst, Wenk & Harlow ed. 1978); VIOLENCE AND CRIME IN THE SCHOOLS (K. Baker & R. Rubel ed. 1980); N.Y. Times, Oct. 29, 1985, at A16, col. 6 (Boston school officials met to consider instituting routine locker searches to prevent students from carrying weapons in school); King, School Vigilante Group Is Linked to 35 Felonies, N.Y. Times, Apr. 20, 1985, at A29, col. 1 (Texas student vigilante group suspected of committing violent felonies
students' lockers, property, and persons for contraband or prohibited weapons.\(^3\) Public school authorities justify their actions by stating that since the state requires children to attend school,\(^4\) the state retains a compelling interest, if not an affirmative duty, in ensuring

in attempt to threaten fellow students engaging in criminal activity at school); N.Y. Times, Mar. 6, 1985, at B2, col. 2 (teacher at Brooklyn public high school stabbed in school building by 16 year old student); Friendly, *Is Violence Exaggerated?*, N.Y. Times, Jan. 22, 1985, at C1, col. 1 (examining levels of violence in different public school systems). *But see* N.Y. Times, Feb. 14, 1985, at B8, col. 2 (New York City public school weapons incidents decreased 28% during the first four months of the 1984-1985 school year).

3. Detroit recently assigned law enforcement officers to conduct weapons searches in high schools; part of New York City's annual budget is reserved to pay security guards in elementary schools; and California amended its state constitution to require more careful records of search incidents involved on school campuses. Friendly, *Is Violence Exaggerated?*, N.Y. Times, Jan. 22, 1985, at C10, col. 3; *see also* J. Hogan, *The Schools, the Courts, and the Public Interest* 117-19 (2d ed. 1985) [hereinafter cited as Hogan]; 3 W.R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.11 (1978 & Supp. 1986) (general discussion of searches directed at students) [hereinafter cited as LaFave, Search and Seizure].

that the school environment remain free of illegal substances which might present safety hazards to teachers or fellow students.5

The fourth amendment to the United States Constitution6 was adopted to protect individual citizens from unreasonable searches and seizures.7 In New Jersey v. T.L.O.,8 the Supreme Court held the fourth amendment applicable to school searches and recognized that students have some constitutionally protected expectation of privacy in their belongings.9 However, the majority ultimately de-

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5. See infra notes 107-10 and accompanying text.
6. 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.
U.S. Const. amend. IV.
9. Although the United States Constitution does not expressly include a right to privacy, the Supreme Court has held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance. Various guarantees create zones of privacy." Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (citation omitted) (Connecticut statute forbidding use of contraceptives struck down as unconstitutional violation of right to privacy in marital relationship); see also Mapp v. Ohio, 367 U.S. 643, 655 (1961) (recognizing "right of privacy" implied by fourth amendment).
In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court expressly stated that "the Fourth Amendment cannot be translated into a general constitutional "right to privacy."" Id. at 350 (electronic surveillance conducted in public phone booth violated user's reasonable expectation of privacy). Instead, the Court explained that the U.S. Constitution protects a person's legitimate expectation of privacy. In Katz, the Court stated that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351-52 (citations omitted). Justice Harlan's concurring opinion established two criteria which a reasonable expectation of privacy must satisfy. Id. at 361 (Harlan, J., concurring). The person must actually manifest his subjective expectation of privacy and the expectation must be one which society recognizes as reasonable. Id.
cided\textsuperscript{10} that the prevalence of student drug use\textsuperscript{11} and the uniqueness of the school setting\textsuperscript{12} would allow school authorities to invade students' privacy rights and conduct searches for prohibited substances upon "reasonable suspicion" or "reasonable cause," rather than the higher traditional standard of "probable cause."\textsuperscript{13}

The Court did not establish fixed criteria concerning the type of information necessary to support a "reasonable suspicion" that a student possesses contraband.\textsuperscript{14} Thus, a crucial unaddressed issue remains whether a student search should be deemed valid if, prior to the search, school officials lacked individualized suspicion\textsuperscript{15} that

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The Supreme Court recently stated that the concept of a legitimate expectation of privacy by definition "is critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities," because "[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate' . . . [or] 'that society is prepared to recognize as reasonable.'" United States v. Jacobsen, 466 U.S. 109, 122 n.22 (1984) (citations omitted) (fourth amendment did not require government narcotics agents to obtain warrant before performing field tests on damaged package discovered by private freight carrier).

The modern application of the "reasonable expectation of privacy" standard is that if no reasonable expectation of privacy exists in the area searched, there is no "search" within the meaning of the fourth amendment, and fourth amendment requirements do not govern the search at issue. See infra notes 49-52 and accompanying text; see also 1 LAFAVE, SEARCH AND SEIZURE, supra note 3, § 2.1 (discussing history and evolution of Katz expectation of privacy standard).

10. Justice White wrote the Court's opinion, which was joined by Justices Burger and Rehnquist. 105 S. Ct. 733, 736 (1985). Justices Powell and O'Connor filed a concurring opinion. Id. at 747. Justice Blackmun filed a separate concurring opinion. Id. at 748. Justices Stevens, Marshall, and Brennan filed opinions concurring in part and dissenting in part. Id. at 750, 759.

11. Id. at 742.

12. Id. at 743, 747 (Powell & O'Connor, J.J., concurring).

13. Id. at 743-44. For an examination of probable cause, see infra notes 55, 73.

14. Instead, the Court employed a balancing test described infra notes 96-101 and accompanying text.

15. Justice Brennan defined "individualized suspicion" in the context of a school search for illegal narcotics:

At the time of the raid, school authorities possessed no particularized information as to drugs or contraband, suppliers or users. Furthermore, they had made no effort to focus the search on particular individuals who might have been engaged in drug activity at school. The authorities had no more than a generalized hope that their sweeping investigative techniques would lead to the discovery of contraband.

a particular student or group of students had violated a criminal law or school rule. If individualized suspicion is not an essential element of the requisite reasonable suspicion, school authorities could conceivably form a subjective assessment of the student population, determine that a drug use problem exists, and then proceed to randomly search some or all students to locate contraband which may or may not be present.

The possibility of dragnet searches for contraband grows more alarming as the potential scope of student searches widens. Since the late 1960's, school officials have conducted three major types of searches at public high schools. The least invasive searches were typically of a school locker, an automobile, or a student's personal property, such as a handbag, or piece of luggage. More invasive searches include narcotic detection dogs sniffing lockers and persons.


In the criminal law context, "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure .... But the Fourth Amendment imposes no irreducible requirement of such suspicion." United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976) (citation omitted) (border patrol's routine stop of vehicle did not require individualized suspicion that particular vehicle contained illegal aliens); cf. Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (searches conducted by roving border patrol require specific evidence of wrongdoing by target individuals). Similarly, in the context of administrative searches, the Supreme Court held that an "area" warrant was sufficient to support the reasonableness of inspecting private residences within a particular neighborhood for building code violations, and specific knowledge of the condition of the particular dwelling was unnecessary. Camara v. Municipal Court, 387 U.S. 523, 538 (1967). For a discussion of individualized suspicion in the school context, see infra notes 291-304 and accompanying text.

17. See Margolick, Students and Privacy, N.Y. Times, Jan. 21, 1985, at B4, col. 5.
19. See infra notes 122-31 and accompanying text (discussion of locker searches).
23. See infra note 149 and accompanying text.
24. See infra notes 151-64 and accompanying text.
to uncover illegal drugs. Until recently, the most invasive school searches were student body searches, which ranged from a pat-down\textsuperscript{25} to a full strip search.\textsuperscript{26} However, during the past year, several schools have instituted policies requiring students to undergo urinalysis testing in order to detect drug use.\textsuperscript{27}

This Note examines the conflict between a school’s right to preserve educational safety and a student’s right to privacy in his possessions, his person, and his body fluids. Section II addresses the history of the fourth amendment and its application to public schoolchildren. Section III discusses \textit{New Jersey v. T.L.O.} and the decision’s impact on school search law. Sections IV and V employ the \textit{T.L.O.} balancing test to evaluate public school officials’ need to conduct searches, weighing that need against the rights of students to preserve their privacy against invasive searches. Section VI reviews analogous invasive body search programs instituted in nonschool contexts. This Note will conclude that invasive body searches should not be conducted in public schools without the added safeguard of individualized suspicion to protect students’ fourth amendment rights.

\section*{II. History and Application of the Fourth Amendment to Public Schools}

Prior to 1985, the United States Supreme Court had never decided a case directly addressing the fourth amendment rights of public school students.\textsuperscript{28} In earlier decisions, the Court had considered the rights of schoolchildren under the first, fifth, eighth, and fourteenth amendments.\textsuperscript{29} The Court clearly stated that students were “persons”

\begin{enumerate}
\item \textsuperscript{25} A “pat-down” can be defined as “a limited search of the [person’s] outer clothing . . . .” \textit{Terry v. Ohio}, 392 U.S. 1, 24 (1968) (upholding “stop and frisk” procedure to locate concealed weapons when police are investigating a person’s suspicious conduct).
\item \textsuperscript{26} For a discussion of student strip searches, see infra notes 194-210 and accompanying text.
\item \textsuperscript{27} For a discussion of urinalysis testing, see infra notes 211-84 and accompanying text.
\item \textsuperscript{28} For this reason, \textit{New Jersey v. T.L.O.} was a case of first impression in the United States Supreme Court. See Margolick, \textit{Students and Privacy}, N.Y. Times, Jan. 21, 1985, at B4, col. 5.
\item \textsuperscript{29} See Board of Educ. v. Pico, 457 U.S. 853 (1982) (first amendment bars local school boards from censoring and removing books from school library); \textit{Tinker v. Des Moines Indep. Community School Dist.}, 393 U.S. 503, 506 (1969) (first amendment protects students’ right to wear armbands as passive protest against United States policy in Vietnam); \textit{In re Gault}, 387 U.S. 1 (1966) (fifth amendment privilege against self-incrimination applies in juvenile delinquency proceedings); \textit{see also Ingraham v. Wright}, 430 U.S. 651 (1977) (eighth amendment prohibition against cruel and unusual punishment does not apply to disciplinary corporal punishment
\end{enumerate}
whose fundamental rights must be respected under the United States Constitution. It follows that students in public schools should be entitled to other basic protections afforded to “people” by the Bill of Rights, especially the fourth amendment right of “the people” to be free from unreasonable searches and seizures.

For the most part, juveniles outside the school environment enjoy the same fourth amendment protections as do adults, and yet the question remains whether characteristics unique to the school environment effectively reduce students to the status of second-class citizens for fourth amendment purposes. The Supreme Court has stated that the primary purpose of the fourth amendment was to protect the individual from “arbitrary and oppressive official conduct” because “[u]ncontrolled search and seizure is one of the
first and most effective weapons in the arsenal of every arbitrary government."\(^{34}\)

Although the fourth amendment was designed to protect citizens from unreasonable searches by federal government officials, in *Mapp v. Ohio*,\(^{35}\) the Supreme Court ruled that any right to privacy enforceable against the federal government under the fourth amendment was also enforceable against state action under the due process clause of the fourteenth amendment.\(^{36}\) As a result, evidence obtained from a search violating the fourth amendment would be subject to exclusion in state courts\(^{37}\) as well as in federal courts.\(^{38}\) This "exclusionary rule"\(^{39}\) has been the principal method of ensuring that the
constitutional guarantee against unreasonable searches and seizures does not become a mere "form of words." 40

The fourth amendment prohibits only unreasonable searches and seizures; other types of searches are not affected. 41 The first inquiry is whether a "search" or "seizure" occurred to trigger the protection of the fourth amendment. 42 The word "seizure" has been defined as the act of taking possession of real or personal property by removing it from the actual or constructive possession of another person. 43 More recently, the Supreme Court stated that a "seizure" occurs when "there is some meaningful interference with an individual's possessory interests in [the] property." 44 As to a "seizure" of a person, courts have held that full-fledged arrests, 45 "investigatory
detentions," or a "detention of the [person] against his will"
qualify.48

A "search" involves an intrusion into a hidden place as part of
a quest for contraband, or for illicit or stolen property49 that occurs
"when an expectation of privacy that society is prepared to consider
reasonable is infringed."50 If the search invades a reasonable
expectation of privacy, the next step is to ascertain whether the search
satisfies fourth amendment requirements; if it does not, the search
will be deemed unreasonable.51 To determine the reasonableness of
a search, the governmental interest in conducting the search must
be balanced against the individual's right to be free from unwanted
intrusions.52

Traditionally, leading authorities agreed that the fourth amendment
"reasonableness" standard derived its meaning from the warrant
clause.53 The Supreme Court in Katz v. United States54 stated that

46. See Davis v. Mississippi, 394 U.S. 721, 727 (1969) (fingerprints obtained
during dragnet police detention procedure without probable cause held inadmissible
in evidence).

47. Cupp v. Murphy, 412 U.S. 291, 296 (1973) (fingernail samples taken to
preserve "highly evanescent evidence" upon probable cause held not to violate
fourth and fourteenth amendments).

48. See Terry v. Ohio, 392 U.S. 1, 16 (1968) (seizure occurs "whenever a police
officer accosts an individual and restrains his freedom to walk away"). Compare
United States v. Berry, 670 F.2d 583, 597 (5th Cir. 1982) (implicit constraints on
a person's freedom constitute a "seizure") with United States v. Ramirez-Cifuentes,
682 F.2d 337 (2d Cir. 1982) (disagreeing).

49. See BLACK'S LAW DICTIONARY 1211 (5th ed. 1979); see also Beck v. Ohio,
379 U.S. 89, 93-95 (1964) (warrantless search of criminal suspect arrested on probable
cause held unconstitutional); State v. Oliver, 368 So. 2d 1331, 1335 (Fla. Dist. Ct.
App. 1979) (demand to disclose or produce concealed object treated as "search"),
cert. dismissed, 393 So. 2d 1200 (Fla. 1980); Case v. State, 624 S.W.2d 348, 350
in adult theater held to be "search").

50. United States v. Jacobsen, 466 U.S. 109, 113 (1984); see also State v.
Ragsdale, 381 So. 2d 492, 497 (La. 1980); Macias v. State, 649 S.W.2d 150, 151-52
(Tex. Ct. App. 1983) (taking a urine sample constitutes "search" and "seizure"
under fourth amendment).

51. See Amsterdam, Perspectives on the Fourth Amendment, supra note 42, at
388; see also Delaware v. Prouse, 440 U.S. 648, 654 (1979) (balancing test applied
to warrantless vehicle searches); Terry v. Ohio, 392 U.S. 1, 23, 27 (1968); infra
notes 96, 115-16 and accompanying text; Camara v. Municipal Court, 387 U.S.
523, 530-31 (1967) (warrantless administrative searches held reasonable when balanced
against individual rights).

52. See Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court,
Ct. 733, 743-44 (1985)).

53. The language of the fourth amendment does not indicate any relationship
between the two clauses. It has been suggested that the two clauses were written
for separate purposes: historically, the first clause was interpreted to provide general
protection against unreasonable searches and seizures, while the second clause
a search conducted without a validly obtained search warrant was *per se* unreasonable under the fourth amendment. This general rule itemized the requirements for obtaining search warrants. See N. Lasson, The History and Development of the Fourth Amendment to the Constitution of the United States 100 (1937). There are three possible interpretations of the relationship between the two clauses:

1. that the "reasonable" search is one which meets the warrant requirements specified in the second clause; (2) that the first clause provides an additional restriction by implying that some searches may be "unreasonable" and therefore not permissible, even when made under warrant; or (3) that the first clause provides an additional search power authorizing the judiciary to find some searches "reasonable" even when carried out *without* a warrant.

J. Landynski, Search and Seizure and the Supreme Court 42 (Johns Hopkins University Studies in Historical and Political Science, Series LXXXIV, 1966) (emphasis in original) [hereinafter cited as Landynski]. Legal scholars generally agree that although the first two of these possible interpretations are faithful to the original understanding of the fourth amendment, the Supreme Court today tends to adhere to the third interpretation. See Landynski, supra, at 43; Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev. 257, 281-82 (1984).

54. 389 U.S. 347 (1967) (discussed supra note 9). A valid search warrant must be issued by a judge or magistrate upon probable cause. Id. at 357. For a definition of probable cause, see infra notes 55, 73. See also 1 Ringel, Searches and Seizures, Arrests and Confessions § 1.4 (1985) (tracing the historical development of the *per se* unreasonable rule for warrantless searches) [hereinafter cited as Ringel, Searches and Seizures]; Hall, Search and Seizure, supra note 7, § 1.3 (same); Buss, The Fourth Amendment, supra note 31, at 743 (stating that searches conducted without warrants are presumptively unreasonable).


Many different fact situations give rise to probable cause. See, e.g., United States v. Repetti, 364 F.2d 54, 56 (2d Cir. 1966) (reliability of government informant plus detail and accuracy of information provided constitutes probable cause); State v. Sherrick, 98 Ariz. 46, 402 P.2d 1 (1965) (en banc) (confession constitutes probable cause for issuance of search warrant), cert. denied, 384 U.S. 1022 (1966); State v. Craver, 70 N.C. App. 555, 558, 320 S.E.2d 431, 433 (1984) (probable cause to issue search warrant satisfied when applicant shows reason to believe illegal
was subject to a "few specifically established and well-delineated exceptions." Of these exceptions, the Court has recognized only five that waive the warrant requirement: searches made under exigent circumstances where the police are in "hot pursuit;" pursuant to a "stop and frisk" for weapons; where the evidence is in plain view; or with the consent of the individual whose person or property activity exists in specified place to be searched); cf. People v. Montanaro, 34 Misc. 2d 624, 626, 229 N.Y.S.2d 677, 681 (Kings County Ct. 1962) (to obtain search warrant, applicant must have probable cause to believe specified property will be found on specific premises; whereas to obtain arrest warrant, there must be probable cause that specific persons committed specific crimes).


57. "Exigent circumstances" are those circumstances sufficient to excuse an officer from the requirement of obtaining a warrant to conduct a search for which he has probable cause. Such circumstances include time pressures, the emergency nature of the situation, and the potential danger of the situation which makes obtaining a warrant impossible or ill-advised in light of the urgent need for immediate action.

1 Ringel, Searches and Seizures, supra note 54, § 10.1. See generally 1 Ringel, Searches and Seizures, supra note 54, §§ 10.1-10.5 (background and development of doctrine of exigent circumstances); Hall, Search and Seizure, supra note 7, ch. 7 (exigent circumstances).

58. For leading cases discussing the warrant exception for hot pursuit of a fleeing felon, see United States v. Santana, 427 U.S. 38 (1976); Warden v. Hayden, 387 U.S. 294 (1967); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc); State v. Page, 277 N.W.2d 112 (N.D. 1979). See generally 2 LaFave, Search and Seizure, supra note 3, § 6.1(e); 1 Ringel, Searches and Seizures, supra note 54, § 10.5(b); Hall, Search and Seizure, supra note 7, §§ 7.6-9.


60. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court established three requirements for a valid plain view and seizure of evidence: (1) the officer must have had a prior justification for his intrusion of the suspect's privacy; (2) the evidence seized must have been discovered inadvertently; and (3) the seizing officer must immediately be aware of the evidentiary value of what was found. See id. at 466-70. For a general discussion of the "plain view" doctrine, see 1 LaFave, Search and Seizure, supra note 3, § 7.5; 1 Ringel, Searches and Seizures, supra note 54, § 13.8; Hall, Search and Seizure, supra note 7, §§ 3.9-16.
is searched.\textsuperscript{61} In addition, even in the above five instances, with the exception of consent, the Court has emphasized that the "fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable \textit{under all the circumstances}.\textsuperscript{62}

III. \textit{New Jersey v. T.L.O.}\textsuperscript{63}

In its 1985 decision, \textit{New Jersey v. T.L.O.},\textsuperscript{63} the Supreme Court extended the proposition that the reasonableness of a search should be evaluated in light of the totality of the surrounding circumstances

\textsuperscript{61} Consent by a suspect to a search effectively waives fourth amendment requirements of a search warrant and the necessity for probable cause. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (by consenting to vehicle search, occupants of vehicle stopped by police for traffic violations effectively waived their fourth amendment rights when the search yielded evidence used for prosecution). The two issues to be addressed in a potential consent search case are: (1) whether the consent was voluntarily given in light of the totality of the circumstances; and (2) whether the person consenting to the search has the authority to do so. See 1 \textsc{Ringel, Searches and Seizures, supra} note 54, §§ 9.1-7 (consent searches); \textsc{Hall, Search and Seizure, supra} note 7, §§ 4.1-46 (same).

\textsuperscript{62} United States v. Chadwick, 433 U.S. 1, 9 (1977) (emphasis added). This "overall reasonableness" might ultimately set limitations on law enforcement officers' power to search in instances when a court determines that despite the presence of a valid search warrant, the search at issue was unreasonable. See, \textit{e.g.}, United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (major intrusions, such as surgery, may not be conducted without a prior adversary proceeding with appellate review on the issuance of the warrant), \textit{cert. denied}, 429 U.S. 1062 (1977).


A high school teacher found T.L.O. and another student smoking cigarettes in a restroom in violation of school rules and escorted the two girls to see Assistant Vice-Principal Choplick. After T.L.O. denied that she smoked at all, Choplick demanded to see her purse, opened it, and found a pack of cigarettes inside. As Choplick removed the cigarettes, he noticed a package of cigarette rolling papers—commonly associated, in his experience, with the use of marijuana. Choplick then decided to search the bag thoroughly. He found some marijuana, a pipe, several empty plastic bags, $40.98 in small bills, and letters implicating T.L.O. in drug dealing.

The Supreme Court, in reversing the New Jersey Supreme Court judgment, concluded that Choplick's search of T.L.O.'s purse did not violate the fourth amendment. The Court held that the fourth amendment applied to searches conducted by school personnel, but that "the school setting require[d] some easing of the restrictions to which searches by public authorities are ordinarily subject." As a result, the focal point in this and future school search cases would be a "standard of reasonableness that stops short of probable cause."


65. Id. at 736-37.
66. Id. at 737.
67. Id.
68. Id.
69. Id.
70. Id. at 739.
71. Id. at 739-40.
72. Id. at 743. The Court formally dismissed the traditional fourth amendment requirement for a search warrant in school searches. Id.
73. Id. Probable cause for a search can be defined as:
   [A] flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Texas v. Brown, 460 U.S. 730, 742 (1983) (citations omitted) (holding evidence seized in plain view from validly stopped vehicle admissible because officer performed lawful inspection of front seat area); see also Iverson v. State, 480 F.2d 414, 418 (8th Cir. 1973); United States ex. rel. Eidenmuller v. Fay, 240 F. Supp. 591, 594, 595 (S.D.N.Y.), cert. denied, 384 U.S. 964 (1965); Buss, The Fourth Amendment, supra note 31, at 744 ("'probable cause' attempts to articulate an evidentiary standard that does not permit obtaining a warrant to be casual or automatic, but
A reasonableness standard balances the government’s interest in conducting a search against the schoolchild’s interest in preventing an invasion of his privacy. While the Court accepted that the maintenance of order is necessary in schools, the Court stated that “the situation is not so dire that students in the schools may claim no legitimate expectations of privacy.” The Court further acknowledged that an invasion of privacy is greatest where, as here, the search is of the person or belongings carried on the person.

A. Application of T.L.O. to School Search Law

Prior to T.L.O., lower federal and state courts often circumvented strict applications of the fourth amendment which would have invalidated school searches. These courts seemed unwilling to deprive school officials of their authority to enforce school rules, especially when serious threats to school safety, such as drugs or weapons, were involved. Some courts used the approach taken in In re Donaldson, which held that while the fourth and fourteenth amendments restrained government or state action, school principals acted as private citizens and not as government officials or state agents. Adherents of the

at the same time is not so high that warrants become virtually unobtainable”).

74. T.L.O., 105 S. Ct. at 743. Many lower federal and state courts applied the fourth amendment to school searches but allowed school officials to invade students’ privacy rights upon less than probable cause. See Comment, Privacy Penumbra Encompasses Students in School Searches, 25 Washburn L.J. 135, 143 n.61 (1985).

75. T.L.O., 105 S. Ct. at 742.

76. Id. at 741-42.

77. See id. at 738-39 n.2 (citing decisions based upon “private citizen” theory, discussed supra notes 79-83, or in loco parentis doctrine, discussed supra notes 91-92).

78. See id.


80. 269 Cal. App. 2d at 511, 75 Cal. Rptr. at 221. As a result, fourth amendment prohibitions would not apply to searches and seizures conducted by school officials. Id.; see D.R.C. v. State, 646 P.2d 252 (Alaska App. 1982) (school personnel held not to be “law enforcement officers,” consequently their search of a student for stolen money did not violate state or federal constitutional limitations); In re Thomas G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970) (same holding in search of student’s person for pills); In re J.A., 85 Ill. App. 3d 567, 406 N.E.2d 958 (1980) (holding that school disciplinary officer, also a part-time juvenile police officer, was not acting as police officer at the time he searched student’s coat); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (N.Y. Crim. Ct. 1970) (when police
private citizen theory drew support from an earlier Supreme Court decision which held that the fourth amendment does not protect an individual against searches and seizures conducted by private citizens not acting as government agents. However, if school officials did not act alone but acted together with law enforcement personnel, the search lost its private character and became a search conducted pursuant to governmental authority, and therefore, was subject to the probable cause and warrant requirements of the fourth amendment.

In T.L.O., the Supreme Court eliminated the distinction between a private citizen and a state agent, holding that school personnel conducting searches act as state agents for fourth amendment purposes. The Court left open the standard that would apply to

were not involved, school official held equivalent to a private person); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (1974) (same holding in search of student's person for pills). But see People v. Bowers, 77 Misc. 2d 697, 356 N.Y.S.2d 432 (Sup. Ct. App. T. 2d Dep't 1974) (school security officer at whose request student emptied manilla envelope which contained marijuana, held not equivalent to a teacher, so he could only premise search upon probable cause); M.J. v. State, 399 So. 2d 996, 998 (Fla. App. 1981) (holding "where a law enforcement officer directs, participates, or acquiesces in a search conducted by school officials, the officer must have probable cause for that search"); infra note 83 and accompanying text.


81. See Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (fourth amendment intended to restrain "sovereign authority" and "not intended to be a limitation upon other than governmental agencies").

82. See, e.g., M. v. Board of Educ., 429 F. Supp. 288, 292 (S.D. Ill. 1977) (upholding student search by school officials when no police involvement); Picha v. Wielgos, 410 F. Supp. 1214, 1221 (N.D. Ill. 1976) (police involvement in school search increases degree of justification needed to conduct search). But see Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), aff'd in part, remanded in part on other grounds, 631 F.2d 91 (7th Cir. 1980) (per curiam), cert. denied, 451 U.S. 1022 (1982) (school search did not lose private character because police participation was at invitation of school personnel, and prior agreement had been reached stating that no arrests were to be made if drugs were found).

searches "by other public authorities acting at the request of school officials."\(^\text{84}\) This raises the possibility that police participation in a school search might still call for strict satisfaction of the probable cause and warrant requirements of the fourth amendment.\(^\text{85}\)

At least one state court has gone further by holding that school personnel are state agents subject to identical fourth amendment strictures as law enforcement officers in the criminal process.\(^\text{86}\) In

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\(^{84}\) T.L.O., 105 S. Ct. 733, 741 n.5.


State v. Mora, the court expressly applied a probable cause standard to school searches, 87 and the exclusionary rule to bar the fruits of unlawful school searches from criminal trials and juvenile delinquency proceedings. 88

After T.L.O., in which the Supreme Court established that a lower standard of reasonableness would govern school searches, that portion of the Mora decision adopting the probable cause standard may be inconsistent. However, Mora may survive T.L.O. because the more stringent requirements adopted by the Louisiana court were based in part on state law. 89 If a state court bases its judgment on state statutory or constitutional law, which requires a higher standard than the standard demanded by the United States Constitution, its judgment rests on adequate and independent state grounds and is immune from review by the United States Supreme Court. 90

In Mercer v. State, 91 a Texas Court of Civil Appeals employed an alternative theory to exempt a school search from fourth amend-

87. Id., 330 So. 2d at 901.
88. See id. at 904-05 (Summers, J., dissenting). Although the Mora court expressly adopted the exclusionary rule, the Supreme Court in T.L.O. later left open the question of whether illegally seized evidence from a school search would be admissible in court. T.L.O., 105 S. Ct. at 739 n.3.
89. Mora, 330 So. 2d at 901-02; see also Davis, Rights of Juveniles, supra note 32, § 3.7(a).
90. Davis, Rights of Juveniles, supra note 32, § 3.7(a). A majority of the Supreme Court supported this view, stating that "[o]f course, New Jersey may insist on a more demanding standard under its own Constitution or statutes. In that case, its courts would not purport to be applying the Fourth Amendment when they invalidate a search." 105 S. Ct. at 745 n.10 (1985). Pennsylvania courts have generally sought to apply the fourth amendment in a more expansive manner than do the federal courts. See, e.g., Commonwealth v. DeJohn, 486 Pa. 32, 43-44, 403 A.2d 1283, 1291 (1979), cert. denied, 444 U.S. 1032 (1980); Commonwealth v. Harris, 429 Pa. 215, 219 n.2, 239 A.2d 290, 292 n.2 (1968) (state has power to impose higher standards for searches and seizures than standards imposed by federal courts).
91. 450 S.W.2d 715 (Tex. Civ. App. 1970) (high school principal who demanded that student empty his pockets acted in loco parentis, not as state agent, and marijuana discovered by this search did not violate student's fourth amendment rights); see also In re Fred C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972); M.J. v. State, 399 So. 2d 996 (Fla. App. 1981) (school officials who acted alone were treated as state agents subject to lower constitutional standard for conducting searches than probable cause due to doctrine of in loco parentis); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. App. T. 1st Dep't 1971), aff'd, 30 N.Y.2d 734, 284 N.E.2d 153, 133 N.Y.S.2d 167 (1972) (high school discipline coordinator possessing reasonable suspicion that student had narcotics on his person was entitled to search and seize the drugs under in loco parentis doctrine); R.C.M. v. State, 660 S.W.2d 552, 553-54 (Tex. Ct. App. 1983) (vice-principal and security guard acted in loco parentis when searching a juvenile). Compare D.R.C. v. State, 646 P.2d 252, 260 (Alaska Ct. App. 1982) (teacher and assistant principal who searched
ments requirements. The court upheld school officials’ authority to conduct searches upon a lower standard of suspicion than probable cause based upon the doctrine of in loco parentis. The in loco parentis doctrine asserts that although fourth amendment restrictions may apply to state agents, school personnel act as agents of the students’ parents. As a result, school officials would be considered private persons for fourth amendment purposes, school searches could be conducted without a warrant or probable cause, and evidence obtained from a search could be used in subsequent judicial proceedings.

The Supreme Court has since rejected the in loco parentis doctrine because it conflicted “with contemporary reality and the teachings of this Court.” However, since T.L.O. established a reasonable suspicion standard for school searches, instead of a higher probable cause standard, earlier lower court decisions using the in loco parentis doctrine to uphold school searches based upon a standard lower than probable cause, in effect remain good law.

B. The T.L.O. Two Prong Balancing Test

The T.L.O. Court established a test to determine the overall reasonableness of a school search. The first prong of the test inquires “whether the . . . action was justified at its inception.” Generally, the search is justified if the teacher or school

students acted merely within the scope of their employment, not as government agents seeking criminal activity—therefore no fourth amendment restrictions applied) with People v. Bowers, 77 Misc. 2d 697, 356 N.Y.S.2d 432 (Sup. Ct. App. T. 2d Dep’t 1974) (high school security officer who searched a student held not within ambit of in loco parentis, so he could only premise his search upon probable cause and not reasonable suspicion).


93. See supra note 80 and accompanying text.


95. 1 RINGEL, SEARCHES AND SEIZURES, supra note 54, § 17.2(a).

96. T.L.O., 105 S. Ct. at 744 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)). Although the T.L.O. Court expressly adopted a test from Terry to clarify the
official had reasonable grounds to suspect that a search would produce evidence tending to show that the student violated either a law or a school rule. The conduct of the assistant vice-principal in *T.L.O.* satisfied this prong of the test because a teacher’s report gave rise to a reasonable suspicion that T.L.O. possessed cigarettes and had been smoking in the school restroom.

The second prong of the *T.L.O.* test inquires "whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’" This requirement is satisfied if "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." The *T.L.O.* Court concluded that Mr. Choplick did not act unreasonably in thoroughly searching T.L.O.’s purse after

meaning of “reasonable suspicion,” the two cases differ significantly. In *Terry*, a police officer observed two men who appeared to be “casing” a place before committing a “stick-up.” 392 U.S. at 6. The officer had no other information to form “probable cause” for a belief that a crime was about to take place. 392 U.S. at 28. However, the Court created a narrow exception to the traditional need for probable cause due to "the need for law enforcement officers to protect themselves and other prospective victims of violence . . . ." 392 U.S. at 24. The *Terry* Court allowed the officer’s act of conducting a “carefully limited search” for weapons based upon the reasonable conclusion “in light of [the officer’s] experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . .” 392 U.S. at 30 (emphasis added). The officer “did not conduct a general exploratory search for whatever evidence of criminal activity he might find.” *Id.*

In contrast, the Supreme Court has not stated that school searches must be severely limited in scope, as is a "stop-and-frisk." See *Terry v. Ohio*, 392 U.S. at 16 n.12, 17 n.13 (establishing legal scope of "stop-and-frisk" procedure). School officials need only comply with a vague "reasonableness, under all the circumstances" standard, *T.L.O.*, 105 S. Ct. at 743, which may allow students' privacy to be invaded by intrusive searches for contraband based upon school officials' reasonable suspicion that would be illegal if undertaken by police officers without probable cause. See *infra* notes 150-69 (discussing canine investigations of students’ persons); notes 194-210 (discussing strip searches of students); notes 211-27 (discussing drug testing of students) and accompanying text. Justices Brennan and Marshall have expressly stated that "[i]f the search in question is more than a minimally intrusive *Terry*-stop, the constitutional probable-cause standard [should] determin[e] its validity." *T.L.O.*, 105 S. Ct. at 753 (Brennan & Marshall, JJ., concurring in part and dissenting in part).

97. 105 S. Ct. at 744, 745. A majority of the Court stated that it has “‘repeatedly emphasized the need for affirming the comprehensive authority of the States, and of school officials consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’” *Id.* at 744 n.9 (citing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 507 (1969)).

98. 105 S. Ct. at 745-46.

99. *Id.* at 744 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

100. *Id.* at 744.
he discovered cigarette rolling papers and, therefore, his conduct also satisfied the second prong of this test.\textsuperscript{101}

In sum, the first prong of the \textit{T.L.O.} balancing test assesses a public school administrator's impetus and justification for conducting student searches; while the second prong addresses the scope of the search at issue, measuring the reasonableness or severity of the intrusion upon students' privacy interests resulting from the search.

\section*{IV. The Need to Conduct Student Searches}

Public school authorities strive to exercise discipline over students and simultaneously to preserve a type of environment conducive to students' intellectual and social development.\textsuperscript{102} The Supreme Court underlined the importance of the educational process by stating that Boards of Education may not violate the Bill of Rights when they create school policies:\textsuperscript{103} ""[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.""\textsuperscript{104}

Compulsory education laws force children to "associate with the criminal few—or perhaps merely the immature and unwise few—closely and daily."\textsuperscript{105} In addition, these laws may impose an affirmative duty on school officials to provide a "safe and secure environment"\textsuperscript{106} by "investigat[ing] any charge that a student is using or possessing narcotics and [by taking] appropriate steps, if the charge is substantiated."\textsuperscript{107} To fulfill this duty, school personnel

\begin{itemize}
\item \textsuperscript{101} \textit{Id.} at 746-47.
\item \textsuperscript{103} West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} State v. Young, 234 Ga. 488, 496, 216 S.E.2d 586, 592, \textit{cert. denied}, 423 U.S. 1039 (1975) (search of high school student by school official who noticed furtive movements by student did not violate his fourth amendment rights).
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{People v. Overton}, 20 N.Y.2d 360, 363, 229 N.E.2d 596, 598, 283 N.Y.S.2d 22, 24-25 (1967); see also \textit{Horton v. Goose Creek Indep. School Dist.}, 690 F.2d 470, 480 (5th Cir. 1982) (per curiam) (society assumes a duty to protect students "from dangers posed by anti-social activities—their own and those of other stu..."
must retain broad supervisory and disciplinary powers.\textsuperscript{108} A public school can be described as "a special kind of place in which serious and dangerous wrongdoing is intolerable."\textsuperscript{109} As a result, school authorities' efforts to maintain an educational environment free from drug and alcohol abuse\textsuperscript{110} may deserve an extremely high degree of judicial protection.


\textsuperscript{109} People v. Scott D., 34 N.Y.2d 483, 486, 315 N.E.2d 466, 468, 358 N.Y.S.2d 403, 406 (1974); \textit{see also} Fisher v. Burk Burnett Indep. School Dist., 419 F. Supp. 1200 (N.D. Tex. 1976) (drug overdose at school). Society's interest in protecting juveniles and preventing crime among juveniles stems from the state's \textit{parens patriae} interest in the welfare of children. \textit{Parens patriae} literally means "parent of the country" and refers traditionally to the state's role as guardian for persons under a legal disability. \textit{Black's Law Dictionary} 1003 (5th ed. 1979). Children, due to their lack of legal capacity, are assumed to be subject to parental control. \textit{Id}. If parental control ceases, the state steps in, acting as \textit{parens patriae} to promote the child's welfare. See Schall v. Martin, 467 U.S. 253, 265 (1984); Santosky v. Kramer, 455 U.S. 745, 746 (1982); State v. Gleason, 404 A.2d 573, 580 (Me. 1979); People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976); \textit{see also} Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (juveniles are at "a time and condition of life when a person may be most susceptible to influence and to psychological damage") (footnote omitted); Belotti v. Baird, 443 U.S. 622, 635 (1979) ("minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them") (footnote omitted). \textit{But see In re Gault}, 387 U.S. 1, 16 (1967) (\textit{parens patriae} is a "Latin phrase [which has] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme").

\textsuperscript{110} Drug abuse may be defined as "the consumption, without medical authorization, of medically useful drugs which have the capacity for altering mood and behavior" or "the use, except for medical research, of mind-changing drugs and substances having no legitimate medical application." P. HAHN, \textit{The Juvenile Offender and the Law} 92 (3d ed. 1984) (citing \textit{Drug Abuse: A Manual}
V. Student Privacy Interests

"[R]ecognizing an important school interest in preventing harm to and the distraction of students is the beginning, not the end of analysis." An assumption underlying the T.L.O. decision is that school officials would not have enough freedom to perform their disciplinary duties if stringent fourth amendment requirements of probable cause and search warrants applied to school searches. However, by lifting these requirements, the T.L.O. Court erased the obstacles which had prevented school officials from intruding on a student’s legitimate expectation of privacy, reasoning that “special characteristics of elementary and secondary schools . . . make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting,” and “[i]n any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.”

Two earlier Supreme Court decisions suggest an approach to the issue of which intrusions upon a student’s expectation of privacy should be deemed reasonable. In Terry v. Ohio, the Court authorized police officers to carry out a limited search for weapons during an investigative stop, using a standard of less than probable cause, and emphasized that “the scope of the particular intrusion, in light of all the exigencies of the case, [should be made] a central element in the analysis of reasonableness.”

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2. New Jersey v. T.L.O., 105 S. Ct. 733, 743 (1985); see supra note 83 and accompanying text.
3. T.L.O., 105 S. Ct. at 747 (Powell & O’Connor, JJ., concurring); see Buss, The Fourth Amendment, supra note 31, at 769; see also Margolick, Students and Privacy, N.Y. Times, Jan. 21, 1985, at B4, col. 5.
4. See Amsterdam, Perspectives on the Fourth Amendment, supra note 42, at 390.
6. 392 U.S. at 17, 18 n.15.
In Schmerber v. California,117 the Court stated that searches which breach the body wall, such as blood extraction, intrude more upon the “interests in human dignity and privacy”118 than do external body searches, and consequently require greater justification. Taken “[t]ogether, Terry and Schmerber might support a general fourth amendment theory that increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification.”119 This sliding scale approach reasons that a search of a student’s person or body cavity raises more severe fourth amendment questions than does a search of a student’s locker.120 By extension, the definition of a “reasonable” search should vary in proportion to the ascending severity of the intrusion upon a student’s legitimate expectation of privacy.121

A. Locker Searches

In general, courts have upheld the right of school authorities to search student lockers.122 One theory exempts lockers from the ambit of fourth amendment protection because they are school property;123

118. Id. at 769-70.
119. Amsterdam, Perspectives on the Fourth Amendment, supra note 42, at 390 (footnote omitted).
120. See Buss, The Fourth Amendment, supra note 31, at 773.
122. See Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981) (student and school jointly owned lockers, therefore school officials are permitted to search lockers for disciplinary reasons); cf. Horton v. Goose Creek Indep. School Dist., 677 F.2d 471, 479 n.21 (5th Cir. 1982) (per curiam) (discussing validity of students’ expectations of privacy in school lockers), op. replaced, 690 F.2d 470 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983); see also infra notes 123-27 and accompanying text (discussing ownership of school lockers).
123. This theory presumes that ownership of the locker would enable the student to have a reasonable expectation of privacy regarding its contents. 1 RINDEL, SEARCHES AND SEIZURES, supra note 54, § 17.2(c). However, in Katz v. United States, 389 U.S. 347 (1967), discussed supra note 9, the Supreme Court stated that ownership was not a valid prerequisite to a reasonable expectation of privacy, since what the student “seeks to preserve as [a] private [place], even in an area accessible to the public, may be constitutionally protected.” 389 U.S. at 351-52. “A search has taken place if that reasonable expectation of privacy ha[s] been invaded,
thus, a student would retain no legitimate expectation of privacy in his locker space. At best, courts have recognized that a student's possession of his locker is exclusive only in relation to other students.

School officials exercise dominion and control over their proprietary interest in lockers by issuing locks or combinations while retaining master keys and lists of allotted combinations, by being responsible for the general maintenance of student lockers, and by issuing rules and regulations concerning what is and is not permissible for students to store in their lockers. As a result, even if a student

regardless of technical ownership of the property." O'Hara, Search and Seizure Analysis in School Settings, 13 EDUC. L. RPTR. 1, 5 n.12 (1983).

124. Courts do not agree on this theory. See supra note 122. As a matter of policy, a student could argue that he has a "strong interest" in the privacy of his locker because "his personal freedom and privacy are already restricted by compulsory attendance laws and the resulting structure and regulation of in-school life" so that "his locker is one of his few harbors of privacy within the school." Buss, The Fourth Amendment, supra note 31, at 772-73; 3 LAFAVE, SEARCH AND SEIZURE, supra note 31, at 463. Another relevant consideration may be whether school authorities explicitly stated in a student handbook the school policy that "possession" of a school locker is not exclusive. "This is not to suggest that [students] may be deprived of [their] Fourth Amendment expectation of privacy by a government announcement that the expectation [of privacy in the locker] will not be honored, for this is quite clearly not the case." 3 LAFAVE, SEARCH AND SEIZURE, supra note 3, at 463. However, advance notice may provide the student with the chance to limit the scope of an intrusion by not storing his personal items in his school locker: "when the balance between privacy and law enforcement interests is extremely close, a regulation giving the student advance notice of a possible search may tend to swing the balance away from the student's interest in privacy." Buss, The Fourth Amendment, supra note 31, at 765; see also Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 234 (E.D. Tex. 1980) ("the mere announcement by officials that individual rights are about to be infringed upon cannot justify the subsequent infringement").


Although a student may have control of his school locker as against fellow students, his possession is not exclusive against the school and its officials. A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes.


subjectively believes his locker to be a private area, the student’s knowledge that school officials possess a master key makes this expectation unreasonable.\(^{127}\)

School administrators typically can conduct locker searches in accordance with school policy in response to bomb threats\(^{128}\) or when contraband is suspected of being hidden there.\(^{129}\) A majority of courts reason that school authorities have the right and possibly the affirmative duty to inspect student lockers for disciplinary purposes.\(^{130}\) In order to preserve a student’s minimal privacy interest, most courts allow locker searches to be conducted based upon a reasonable suspicion that contraband will be discovered.\(^{131}\)

In *T.L.O.*, the Supreme Court considered only a search of a student’s purse and expressly refused to set a standard governing searches of school lockers or desks.\(^{132}\) The Court did not make a

In addition, courts support this conclusion by examining analogous cases involving searches of lockers in public buildings other than schools. See, e.g., United States v. Bunkers, 521 F.2d 1217, 1219-21 (9th Cir.), cert. denied, 423 U.S. 989 (1975) (postal employee’s acceptance of locker constituted consent to searches authorized by government regulations); Shaffer v. Field, 339 F. Supp. 997, 1002-03 (C.D. Cal. 1972) (deputy sheriff’s locker deemed government property and therefore was subject to search), aff’d, 484 F.2d 1196 (9th Cir. 1973); United States v. Donato, 269 F. Supp. 921, 923-24 (E.D. Pa.) (locker at U.S. mint subject to regular inspection, so that no reasonable expectation of privacy existed), aff’d, 379 F.2d 288 (3d Cir. 1967); *cf.* United States v. Speights, 557 F.2d 362 (3d Cir. 1977) (search of police officer’s locker at station house held invalid because officer had a legitimate expectation of privacy, lock was his own, and department had not promulgated any rules regarding use or inspection of lockers); Tucker v. Superior Court, 84 Cal. App. 3d 43, 48, 148 Cal. Rptr. 167, 169 (1978) (restaurant employee retained reasonable expectation of privacy in unlocked locker provided for his use by employer).

127. See supra note 126.
129. See, e.g., State v. Joseph T., 336 S.E.2d 728 (W. Va. 1985) (upholding search of jacket inside student’s locker when school official had reasonable grounds to suspect that locker contained alcoholic beverages in violation of school rules); *In re* Christopher W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973) (upholding school principal’s actions of opening student’s locker after being informed that locker contained marijuana). In situations when school officials suspect a violation of school rules, they may inspect lockers themselves, or may effectively consent on behalf of the students to inspections by law enforcement officers. See, e.g., *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); State v. Stein, 203 Kan. 638, 456 P.2d 1, cert. denied, 397 U.S. 947 (1969).
131. See supra notes 122-30.
132. New Jersey v. T.L.O., 105 S. Ct. at 741 n.5. *But see* Gillard v. Schmidt,
strong statement regarding the expectation of privacy students enjoy while at school; it merely rejected as untenable the state's argument that students have no expectation of privacy. The possibility exists that a somewhat lower "reasonable suspicion" standard governs locker and desk searches than the standard which applies to more intrusive student searches.

B. Canine Investigations

If, as in locker search cases, a student possesses little or no expectation of privacy and the fourth amendment does not apply, then "the government enjoys a virtual carte blanche to do as it pleases. The [government's] activity is 'excluded from judicial control and the command of reasonableness.'" The Tenth Circuit extended this theory to uphold the use of trained narcotic detection dogs to conduct a dragnet exploration of school lockers. The dogs were taken through the school hallways, and when a dog repeatedly "keyed in" on a locker, the locker was opened and searched without a search warrant. The court denied that this procedure constituted a "search" within the meaning of the fourth amendment because school officials' joint ownership of school lockers destroyed students' expectation of privacy in locker space, and because school officials had the power to search lockers once a probability existed that contraband was hidden inside.

The Fifth Circuit also held that an exploratory investigation of student lockers or automobiles by drug detection dogs did not constitute a fourth amendment "search," and referred to its previous

579 F.2d 825, 826-28 (3d Cir. 1978) (school guidance counselor maintained a reasonable expectation of privacy in his unlocked school-owned desk).

133. T.L.O., 105 S. Ct. at 742.


136. Id. at 666.

137. Id. at 670. The "probability" that contraband was contained in a locker consisted of a reliable dog's positive reaction to a particular locker. Id.

138. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982) (per curiam), cert. denied, 463 U.S. 1207 (1983). The search program at issue called for the dogs to be taken on a random and unannounced basis to the school to sniff student lockers, automobiles, and the students themselves. 690 F.2d at 474. If a dog alerted its handler to a locker, school officials would open and search the locker without the student's consent. Id. If a dog alerted its handler to an automobile in the school parking lot, its owner would be asked to open the doors and trunk. Id. If the student refused to comply, his parents would be notified. Id.
rulings that sniffing by dogs of luggage checked in at a bus terminal or an airport did not constitute a "search" because "the passenger's reasonable expectation of privacy does not extend to the airspace surrounding that luggage." The court added that "[i]f anything, one's expectation of privacy in a car is lower than in one's luggage.

The United States District Court for the Eastern District of Texas reached a different conclusion and ruled against the use of drug detection dogs by a school district to sniff both automobiles and students. The court held that dog investigations were indeed "searches" under the fourth amendment because dogs are able to detect odors completely beyond the range of the human sense of smell.

140. United States v. Goldstein, 635 F.2d 356, 360-61 (5th Cir.), cert. denied, 452 U.S. 962 (1981) (reasoning that use of trained drug detection dogs to sniff around exterior of luggage checked at airport does not constitute "search" within meaning of fourth amendment); United Stated v. Sullivan, 625 F.2d 9, 13 (4th Cir. 1980) (due to current airport security measures, passengers retain no reasonable expectation of privacy in their checked luggage), cert. denied, 450 U.S. 923 (1981); see supra note 60 and accompanying text. Various circuit courts also have held that a dog's sniff does not constitute a "search" triggering fourth amendment protection if the sniff is of various inanimate objects. See, e.g., United States v. Venema, 563 F.2d 1003, 1005 (10th Cir. 1977) (lockers); United States v. Solis, 536 F.2d 880, 882 (9th Cir. 1976) (trailers); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976) (luggage); State v. Martinez, 26 Ariz. App. 210, 547 P.2d 1003, 1005 (1977) (car); see supra note 60 and accompanying text. Various circuit courts also have held that a dog's sniff does not constitute a "search" triggering fourth amendment protection if the sniff is of various inanimate objects. See, e.g., United States v. Venema, 563 F.2d 1003, 1005 (10th Cir. 1977) (lockers); United States v. Solis, 536 F.2d 880, 882 (9th Cir. 1976) (trailers); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976) (luggage); State v. Martinez, 26 Ariz. App. 210, 547 P.2d 62, 113 Ariz. 345, 554 P.2d 1272 (1976) (cars); United States v. D.T.W., 425 So. 2d 1383 (Fla. Dist. Ct. App. 1983) (patrol of school parking lot which yielded drug paraphernalia in open view in student's car held not to be fourth amendment "search").
142. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 477 n.13 (5th Cir. 1982) (per curiam), cert. denied, 463 U.S. 1207 (1983); see also United States v. Place, 690 F.2d 470, 477 n.13 (5th Cir. 1982) (per curiam), cert. denied, 463 U.S. 1207 (1983); see also United States v. Place, 462 U.S. 696, 707 (1983) (holding that subjecting luggage "which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment"). The Supreme Court narrowly stated that "the particular course of investigation . . . here—exposure of respondent's luggage . . . in a public place, to a trained canine—did not constitute a search," id., possibly implying that dog sniffs of humans would warrant an opposite result. The Second and Ninth Circuits support this view. See United States v. Solis, 536 F.2d 880 (9th Cir. 1976); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976). At least one lower court has interpreted this decision to mean that similar "sniff tests" may be conducted in the absence of probable cause or reasonable suspicion. See United States v. Beale, 736 F.2d 1289, 1292 (9th Cir.) (canine sniff of luggage checked at airport does not constitute "search" or "seizure"); cert. denied, 105 S. Ct. 565 (1984).
144. Id. at 232-33.
quently, the dog’s sniff did not merely enhance the senses of the school official but totally replaced his sense of smell, and was used to perceive otherwise undiscoverable information. Applying a fourth amendment reasonableness standard to the drug dog investigations at issue, the court held that even these minimally intrusive searches required “articulable facts which focus suspicion on specific students.” The sniffing of automobiles was especially unreasonable under circumstances in which students had minimal access to their cars during a school day, and therefore, the school’s interest in conducting such a search was deemed clearly insignificant.

There is a sharp distinction to be drawn between the use of drug detection dogs to sniff lockers or cars and the use of the dogs to sniff students’ bodies for contraband. The Supreme Court in T.L.O. recognized that “even a limited search of the person is a substantial invasion of privacy.” However, since the Court refused to review the two major circuit court decisions on canine searches...

145. Id.
146. Id. But see United States v. Bronstein, 521 F.2d 459, 462 n.3 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976) (holding that dog’s sniff merely enhances police officer’s sense of smell in identical way flashlight enhances officer’s sight). This is known as the “plain smell” doctrine, which is an extension of the “plain view” doctrine discussed supra note 60 and accompanying text. Under the plain view doctrine, police or state officials may “seize contraband or evidence of crime which comes within their vision as they go about their business in a legitimate fashion,” reasoning that “an individual has no reasonable expectation of privacy in that which he exposes to public observation.” Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 231 (E.D. Tex. 1980). The “plain smell” doctrine extends the ability of state officials to search if they perceive suspicious odors. See, e.g., United States v. Walker, 522 F.2d 194, 196 (5th Cir. 1975) (border patrol officers justified in searching car after detecting odor of marijuana from car). For a complete discussion of the “plain smell” doctrine and its application to school search cases, see Pilka, Constitutionality of Canine Searches in Public Schools, 14 EDUC. L. RPTR. 1, 12-14 (1984).
148. Id. at 235-36.
150. T.L.O., 105 S. Ct. at 741 (citing Terry v. Ohio, 392 U.S. 1, 24-25 (1968)).
in public schools, there remains a split in authority regarding the constitutionality of using trained canines to sniff students for drugs.

The Fifth Circuit in Norton v. Goose Creek Independent School District, and the United States District Court for the Eastern District of Texas in Jones v. Latexo Independent School District, both held that a canine sniff of a student's person constituted a "search" within the meaning of the fourth amendment. In Jones, the court held that such sniff searches "exceeded the bounds of reasonableness" since they were conducted in a "blanket, indiscriminate manner without individualized suspicion of any kind." In Horton, the Fifth Circuit noted that using a dog to intentionally sniff a human body was "indecent and demeaning" and that a child could easily be shamed or embarrassed at a dog's display of excitement under these circumstances. Both Horton and Jones ruled that dragnet sniff searches of students violated the fourth amendment, and the Horton court asserted that future dog searches should be conducted with individualized suspicion of specific students, and not the entire class of students.

152. 690 F.2d 470 (5th Cir. 1982) (per curiam), cert. denied, 463 U.S. 1207 (1983).
154. In reaching this conclusion, the Fifth Circuit in Horton drew a similar analogy as the court in Jones, stating that courts have universally held that the use of magnetometers in airports to detect concealed weapons qualifies as a fourth amendment "search" even though that search seems far less intrusive on a person's expectation of privacy than do sniffs by a trained dog. 690 F.2d at 478. In Jones, the court compared a dog sniff to an electronic listening device and also concluded that a sniff search entailed a greater invasion of a person's privacy. 499 F. Supp. at 232-33. However, the Jones court weighed heavily the fact that school officials used poor judgment in using the dogs "to inspect virtually the whole Latexo school body," including kindergarteners. Id. at 233-34; see 3 LaFave, SEARCH AND SEIZURE, supra note 3, at Supp. 247.
156. Horton, 690 F.2d at 478 (citations omitted).
157. Id. at 479; see also Doe v. Renfrow, 631 F.2d 91, 94 (7th Cir. 1980) (per curiam) (Swygert, J., dissenting from order denying petition for rehearing) (stating that canine searches of students' bodies constitute "the type of 'severe, though brief intrusion upon cherished personal security' that is subject to constitutional scrutiny") (citation omitted), cert. denied, 451 U.S. 1022 (1982).
158. Horton, 690 F.2d at 481; Jones, 499 F. Supp. at 234-35 (dragnet search is "anathema to the protection accorded citizens under the fourth amendment").
should not be conducted unless school officials have "reasonable cause" to suspect contraband was possessed by specific students. 159

In contrast, in Doe v. Renfrow, 160 the Seventh Circuit concluded that a dragnet canine sniff of all students and their belongings to detect drugs did not constitute a "search" within the meaning of the fourth amendment. 161 Even though students were not permitted to leave their classrooms for the nearly three hour duration of the procedure, the court rejected the argument that this constituted a mass detention because the investigation occurred during the regular school day. 162 While the Doe court acknowledged that requiring some students to empty their pockets after a dog "alerted" to them did constitute a "search," the court ruled that these searches were constitutional because "the alert of the dog constituted reasonable cause to believe" the students were concealing drugs. 163 Thus, based upon the reasoning in Doe, it appears that the general existence of a drug use problem in a public school would justify the use of canines to detect narcotics allegedly hidden on students' bodies. 164

159. Horton, 690 F.2d at 481-82; accord Jones, 499 F. Supp. at 234-35.
161. 475 F. Supp. at 1020-21. The Fifth Circuit in Horton, attempted to distinguish the facts from those in Doe by stating that in Doe, the Seventh Circuit held that there was no search because the dogs did not actually touch the students, whereas in Horton, the dogs did make physical contact with the students. 690 F.2d at 477-78. As a result, a different privacy interest was invaded in the two cases. Id. at 477-79. The Horton court seemed to follow the theory that a person's reasonable expectation of privacy does not extend into surrounding airspace, but is inherent only in the person's body. Id. at 477-78.
162. Doe, 631 F.2d at 94 (Swygert, J., dissenting).
163. Doe, 475 F. Supp. at 1024. However, such an "alert" did not justify a subsequent strip search of a 13 year old female student which the court deemed to be a serious invasion of her constitutional rights. See infra notes 196-98 and accompanying text.
164. 475 F. Supp. at 1020-22. In addition, the court referred to the minimal intrusiveness of the dog sniffs, the fact that a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting," id. at 1022, and the doctrine of in loco parentis as justification for the decision to search. Id. at 1022-23. For a discussion of the in loco parentis doctrine, see supra notes 92-95 and accompanying text.

The Doe decision has been vehemently criticized at each stage of the case's appellate progression. See, e.g., 631 F.2d at 93 (Swygert, J., dissenting); 635 F.2d 582, 584 (1980) (Chief Judge Fairchild and Circuit Judges Swygert, Wood, and Cuhady dissenting from denial of petition for rehearing en banc); 451 U.S. 1022 (1982). Justice Brennan, dissenting from a denial of certiorari to the Supreme Court, stated:

We do not know what class petitioner was attending when the police and the dogs burst in, but the lesson the school authorities taught her
C. Personal Searches

Personal searches present situations in which a student conceivably has a higher expectation of privacy than he would in his locker or car. However, warrantless searches of a student’s person by school officials have been repeatedly upheld where school officials have based their actions upon a reasonable suspicion that a student is concealing contraband. Evidence obtained from these searches that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. . . . Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

Id. at 1027-28.

165. Personal searches can be defined as searches directed at the student’s clothing, his person, or possessions carried on his person. See O’Hara, Search and Seizure Analysis in School Settings, 13 EDUC. L. RPTR. 1, 5 (1984). The category includes cases in which school officials demand that the student empty pockets, a purse, or remove some or all of his clothing. Id.

166. Id. In a related case involving a pat-down search of a traveler who refused to empty one pocket at a border, the Seventh Circuit stated that a pat-down search, because it “falls short of the intrusiveness associated with a strip search, is governed by principles different from those applicable to strip searches.” United States v. Dorsey, 641 F.2d 1213, 1217 (7th Cir. 1981); see also United States v. Nieves, 609 F.2d 642, 646 (2d Cir.) (not every request to remove articles of clothing or to remove object from pockets will transform a search into a strip search, because levels of embarrassment and invasiveness significantly differ), cert. denied, 444 U.S. 1085 (1979); United States v. Klein, 592 F.2d 909, 912 (5th Cir. 1979) (relatively unobtrusive pat-down search held not equivalent to strip search).

167. See, e.g., Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984) (reasonable cause to believe search is necessary in furtherance of maintaining school discipline and order, or duty to maintain safe environment conducive to education), cert. denied, 105 S. Ct. 1749 (1985); Bilbrey v. Brown, 738 F.2d 1462, 1467 (9th Cir. 1984) (reasonable belief that school officials had reasonable or probable cause to search); Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 481 (5th Cir. 1982) (per curiam) (reasonable cause includes individualized suspicion), cert. denied, 463 U.S. 1207 (1983); Bellnier v. Lund, 438 F. Supp. 47, 53 (N.D.N.Y. 1977) (reasonable grounds consist of articulable facts, and search must be in furtherance of legitimate school goal, such as discipline); M. v. Board of Educ., 429 F. Supp. 288, 292 (S.D. Ill. 1977) (“reasonable cause to believe”); In re William G., 709 P.2d 1287, 1295, 221 Cal. Rptr. 118, 126 (Cal. 1985) (en banc) ("articulable facts, together with rational inferences from those facts, warranting an objectively reasonable suspicion that the student or students to be searched are violating or have violated a rule, regulation, or statute"); State v. Baccino, 282 A.2d 869, 872 (Del. Super. Ct. 1971) (reasonable suspicion); State v. D.T.W., 425 So. 2d 1383, 1386 (Fla. Dist. Ct. App. 1983) (“reasonable subjective suspicion supported by objective, articulable facts” which suggest the presence of “prohibited objects or substances”); State v. Young, 234 Ga. 488, 496, 216 S.E.2d 586, 592-93 (1975) (reasonableness is “considerably less than probable cause” and school officials “must be allowed to search without hindrance or delay . . . to insure that students are not whimsically stripped of personal privacy and subjected to petty tyranny”), cert. denied, 423 U.S. 1039 (1975); In re J.A., 85 Ill. App. 3d 567, 573, 406 N.E.2d 958, 962 (1980)
has been held admissible in both criminal and juvenile proceedings.\footnote{168}

The most compelling issue arising from these cases is what degree of certainty equals "reasonable suspicion," enabling school officials to legally invade a student's privacy rights.\footnote{170} The T.L.O. decision stated that courts should consider the necessity and purpose of the search and weigh the extent of the invasion of privacy.\footnote{171}

A search that entails asking a student to empty his pockets—even if the student's compliance is not meaningfully consensual—entails a less hostile or offensive invasion than a more physical search—whether a mere "pat down," a search inside clothing, a strip search, or the ultimate humiliation of a body cavity search. Nevertheless, there is not much doubt that the personal indignity of a pockets-emptying search is real and serious.\footnote{172}

\footnote{168. In re Fred C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972) (search initiated by school officials with police subsequently assisting yielded evidence later admissible at criminal proceeding).


170. To assist in a determination of whether a "reasonable suspicion" to search exists, courts have considered several factors as relevant. The United States Supreme Court focused on the child's age, sex, and the nature of the infraction at issue. See New Jersey v. T.L.O., 105 S. Ct. 733, 744 (1985). Other courts have examined: (1) the child's history and school record; (2) the prevalence and seriousness of the drug or violence problem in the school; (3) the exigencies in conducting a search without delay and further investigation; (4) the probative value and reliability of the information used as justification for the search; and (5) the particular teacher or school official's experience with the student. See, e.g., State v. D.T.W., 425 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1983); Doe v. State, 88 N.M. 347, 352, 540 P.2d 827, 832 (1975); People v. Scott D., 34 N.Y.2d 483, 489, 315 N.E.2d 466, 470, 358 N.Y.S.2d 403, 408 (1974) (basis for finding sufficient cause for school search is less than basis required for search outside school premises); State v. McKinnon, 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977) (requiring reasonable grounds for the search and the search must be necessary to maintain school discipline); State v. Joseph T., 336 S.E.2d 728 (W. Va. 1985) ("articulable facts . . . provid[ing] reasonable grounds to search the students" and the search must further a legitimate goal of school officials).


172. Buss, The Fourth Amendment, supra note 31, at 773; see also M. v. Bd. of Educ., 429 F. Supp. 288 (S.D. Ill. 1977) (scope of intrusion was slight, merely requiring student to empty his pockets).}
Generally, searches of purses and pockets will be upheld when conducted by school personnel if there are reasonable grounds to believe that the sought-after contraband will be found, and when such action is conducted to maintain school discipline.\textsuperscript{173}

In one case,\textsuperscript{174} a vice-principal saw a student out of class in violation of a school rule. The vice-principal tried to take the student’s coat in order to prevent him from leaving the school building.\textsuperscript{175} After a brief struggle, the vice-principal had full possession of the coat.\textsuperscript{176} Since the vice-principal knew from experience\textsuperscript{177} that the student had been involved with drugs, he searched the coat and found ten packets of hashish.\textsuperscript{178} The court applied a reasonable suspicion standard and upheld the search as valid.\textsuperscript{179}

In a similar case,\textsuperscript{180} the student had a bulge in his pocket and repeatedly put his hand into the pocket and pulled it out.\textsuperscript{181} As the student was being escorted to an administrator’s office, he ran out of the school.\textsuperscript{182} An administrator caught him several blocks away and forced the student to open his hand, disclosing a syringe and eyedropper.\textsuperscript{183} Again, this search was upheld as reasonable under the circumstances.\textsuperscript{184}

It has also been held that a student’s “furtive movements” can give rise to a reasonable suspicion.\textsuperscript{185} However, the mere fact that

\begin{itemize}
\item \textsuperscript{173} See \textit{supra} note 164 and accompanying text. \textit{Contra} Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976) (school principal acting on phone tip contacted police and then had several female students searched by school nurse; the court accepted lower “reasonable suspicion” standard when search related to discipline and safety, but required probable cause when it was essentially a criminal investigation). For a discussion of probable cause, see \textit{supra} notes 55, 74.
\item \textsuperscript{174} State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); see also \textit{In re} Bobby B., 172 Cal. App. 3d 377, 218 Cal Rptr. 253 (1985) (holding high school dean acted reasonably by asking students in school restroom to produce passes to be out of class and to empty their pockets in order to discover concealed drugs).
\item \textsuperscript{175} 282 A.2d at 870.
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{Id.}; see \textit{In re} L.L., 90 Wis. 2d 585, 602, 280 N.W.2d 343, 351 (Wis. Ct. App. 1979) (stating that teacher’s prior experience with student can give rise to reasonable suspicion of his present behavior).
\item \textsuperscript{178} 282 A.2d at 870.
\item \textsuperscript{179} \textit{Id.} at 872.
\item \textsuperscript{181} \textit{Id.} at 909, 319 N.Y.S.2d at 732.
\item \textsuperscript{182} \textit{Id.} at 910, 319 N.Y.S.2d at 732.
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.} at 913-14, 319 N.Y.S.2d at 736.
\item \textsuperscript{185} See \textit{State v. Young}, 234 Ga. 488, 216 S.E.2d 586 (student’s furtive motion of jumping up and down and quickly putting something into his pants as school
a student visited a restroom with other students on several occasions during the day for periods of five seconds or less, was held not to support a reasonable suspicion that the student possessed contraband. 186 Most cases involve searches which are limited in their intrusiveness, conducted by school officials on the basis of a tip from a student or another informant. 187 The information tends to be that a student was selling drugs, 188 or attempting to sell drugs, 189 or that a student was keeping drugs in his locker, 190 or on his person, 191 or that a student had taken drugs and appeared intoxicated. 192

A crucial legal issue is raised when school officials conduct more invasive searches of the student's person. 193 Strip searches by school principal approached held to create reasonable suspicion justifying valid search), *cert. denied*, 423 U.S. 1039 (1975); *In re L.L.*, 90 Wis. 2d 585, 602-03, 280 N.W.2d 343, 352 (Wis. Ct. App. 1979); see also *Sibron v. New York*, 392 U.S. 40, 66-67 (1968); *People v. Superior Court*, 3 Cal. 3d 807, 817-19, 478 P.2d 449, 454-56, 91 Cal. Rptr. 729, 734-36 (1970); cf. *In re William G.*, 709 P.2d 1287, 1297, 218 Cal. Rptr. 118, 128-29 (Cal. 1985) (en banc) (combined facts that a student was out of class and engaged in "furtive gestures" in attempt to hide his calculator case from school official provided no reasonable basis for official to search calculator case in absence of prior knowledge relating particular student to possession, sale, or use of contraband).


187. The information obtained from the informant typically constitutes a reasonable suspicion justifying a search of the student or students. See *In re J.A.*, 85 Ill. App. 3d 567, 406 N.E.2d 958 (1980); *People v. Stewart*, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (N.Y. Crim. Ct. 1970); see also 3 LAFAVE, SEARCH AND SEIZURE, supra note 3, at 460.


190. See *In re Christopher W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973) (four students informed school officials that defendant's locker contained a sack of marijuana).


193. For a discussion of the emotional aftereffects of strip searches, see M.M.
personnel have been condemned as having "no place in the school house." In *T.L.O.*, Justice Stevens noted that "[t]o the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent and serious harm." In *Doe v. Renfrow*, school officials authorized a strip search when a trained narcotic detection dog repeatedly "alerted" to the scent of drugs on one student. The Seventh Circuit reacted strongly to the actions taken by school officials:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. . . . [t]he conduct herein described exceeded the "bounds of reason" by two and a half country miles.

A strip search clearly involves a severe infringement of a person's legitimate expectation of privacy in his person. Yet, the Ninth Circuit has held that school officials need only have "reasonable cause" to believe that the student has drugs in his possession to justify a strip search. This criterion was not satisfied by an adult observer's report of an exchange between two students of unidentifiable material. Similarly, the fact that one student entered a school restroom with another student and exited quickly twice within one hour was

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195. *Id.* (emphasis added). However, within one month of the Supreme Court’s decision in *T.L.O.*, two assistant principals were disciplined for strip searching ten junior high school students in an unsuccessful attempt to locate twenty dollars reported as missing. Houston Chron., Feb. 16, 1985, at 1:13, col. 1.
198. 631 F.2d at 92-93.
200. *Id.* at 1467-69.
held not to constitute sufficient reasonable suspicion to justify a subsequent strip search. 201

The Second Circuit held that school officials had insufficient reasonable suspicion to conduct a strip search of a female student who had a reputation for stealing when she was caught holding another girl's purse in an empty classroom during a school fire drill. 202 The court stated that although a reasonable suspicion might justify a search of the student's pockets or purse, strip searches were to be judged by a stricter standard: "as the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause." 203

An alternative and preferable approach requires individualized suspicion as an element of reasonable suspicion. In Bellnier v. Lund, 204 school officials strip searched an entire elementary school class because three dollars had allegedly been stolen from one child. 205 School officials did not suspect a particular student. However, all the children were ordered to strip down to their undergarments so that the officials could search their clothes for the money, which was never located. 206 The United States District Court for the Northern District of New York held this search to be unconstitutional because "'[t]here were no facts . . . which allowed the officials to particularize with respect to which students might possess the money, something which has time and again . . . been found to be necessary to a reasonable search under the Fourth Amendment.'" 207

The Kentucky Court of Appeals 208 and the Sixth Circuit 209 followed

201 In People v. Scott D., the court stated that school officials' determination that reasonable cause existed might have been correct if they had observed "accumulated instances of concentrated association with students suspected or known to be involved in drug use or distribution." 34 N.Y.2d 483, 490, 315 N.E.2d 466, 470, 358 N.Y.S.2d 403, 409 (1974); see also Doe v. Renfrow, 631 F.2d 91-92 (7th Cir. 1980) (Seventh Circuit held that although initial searches of students' outer garments were reasonable based upon canine sniffs giving rise to "reasonable suspicion," school officials did not act reasonably in strip searching a student without further evidence).


203 607 F.2d at 589.


205 Id. at 49-50.

206 Id.

207 Id. at 54.

208 See Rone v. Daviess County Bd. of Educ., 655 S.W.2d 28 (Ky. Ct. App. 1983) (holding that reasonable grounds for strip search of student existed when student had passed prescription drugs and marijuana to fellow students).

209 Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) (school officials who
this reasoning in upholding student strip searches as valid, as long as school officials had a reasonable suspicion that the specific students possessed contraband. Both courts expressly stated that the searches at issue were upheld because each search involved particularized suspicion of specific students for a single purpose, and no general searches of other students were conducted.\footnote{210}

D. Urinalysis Testing

Several public school districts have introduced urinalysis testing to screen students for drug use, thereby raising new questions about what constitutes a “reasonable” search under the fourth amendment.\footnote{211} A leading case addressing this issue was decided in 1985 by the United States District Court for the Western District of Arkansas. In \textit{Anable v. Ford},\footnote{212} a high school had instituted a policy of screening any student suspected of drug or alcohol intoxication by either blood, breath, urine, or polygraph tests.\footnote{213} Refusal to submit observed activity reasonably believed to indicate use and sale of marijuana had reasonable cause to search students involved, \textit{cert. denied}, 105 S. Ct. 1749 (1985).

\footnote{210} Rone, 655 S.W.2d at 30; Tarter, 742 F.2d at 983.

\footnote{211} See \textit{Anable v. Ford}, Civ. No. 84-6033, Memorandum Opinion (W.D. Ark. filed July 15, 1985). Other school districts have sought to introduce urinalysis testing to screen for drug and alcohol abuse. The Phelps-Clifton Springs School District in Clifton Springs, New York, voted to institute a random urine testing program under which all students would provide urine samples, but only a certain percentage would be chemically analyzed. Under the school policy, parental permission is required to perform the urine tests, and the school maintains that the program is voluntary. See Robinson, \textit{Plan for Student Drug Test in Hands of Court}, N.Y. Times, Nov. 17, 1985, § 11, at 12, col. 4 (discussing judicial review of proposed student urine testing policies in various public school systems); \textit{Student Drug Tests to Begin}, N.Y. Times, Nov. 3, 1985, at A46, col. 5 (discussing the Phelps-Clifton Springs program). The Patchogue-Medford, New York school district sought to begin a urinalysis testing program to screen 23 teachers seeking tenure for traces of drug use. Robinson, \textit{Student Drug Tests to Begin}, N.Y. Times, Nov. 17, 1985, § 11, at 12, col. 4. Under the school policy, a positive test could result in a denial of tenure. However, compulsory tests were barred as an impermissible and unconstitutional search of the bodies of prospective tenure teachers.\footnote{L.I. Judge Bars Testing Faculty for Drug Abuse, N.Y. Times, June 15, 1985, at A26, col. 1. A unanimous panel of the Appellate Division, Second Department recently affirmed this decision. Patchogue-Medford Congress of Teachers v. Board of Educ., N.Y.L.J., Aug. 12, 1986, at 3, col. 1.}
to a drug test was considered a violation of this policy. A student who was expelled after a breath test and another who was expelled after a positive urine test challenged the policy of mandatory drug testing as violating their fourth and fourteenth amendment rights.

The court recognized that after T.L.O., school officials must have at least a reasonable suspicion that a student is under the influence of drugs before a breathalyzer test could be required. The court held the breath test to be constitutionally valid because "[i]taking a student to the police station to blow into a breathalyzer machine is little more invasive in itself than taking a child to a five-and-dime store to blow up a balloon." The urine test, on the other hand, was rejected because it constituted a "search" of body fluids under the fourth amendment. The scope of the test was deemed excessively intrusive because "the test bears so little relation to the guilt or innocence of any particular student that its use as a determining factor . . . cannot be consistent with constitutional requirements."

Although the Arkansas school's urine testing policy ultimately was declared unconstitutional, the policy had required administration

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215. Id. at 1-2, 25, 35. A third student participated in the initial filing but was excluded for a lack of standing. Id. at 25.
216. Id. at 1.
217. Id. at 28-29.
218. Id. at 31.
220. The student was forced to disrobe from the waist down, while an adult school official of the same sex observed her giving the urine sample for testing. Anable, No. 84-6033, Memorandum Opinion at 41-42 (W.D. Ark. filed July 15, 1985).
221. Id. at 39. The court reviewed expert testimony concerning the reliability of the Emit immunoassay test results, concluding that "results of the urine test utilized provide very little more information regarding the event at school." Id. at 38; see also Putting Them All to the Test, TIME, Oct. 21, 1985, at 61 (discussing inaccuracy of Emit urine test results). A positive test result under the Arkansas school policy would enable school officials to impose sanctions on the student even though the test, by its nature, cannot distinguish between marijuana use at home or at school. Anable, No. 84-6033, Memorandum Opinion at 39 (filed July 15, 1985). As a result, the court held that the urine test policy constituted an impermissible and improper attempt by school officials to regulate off-campus conduct, especially since the Supreme Court in T.L.O. had clearly stated that school officials could design school policies only to "maintain[n] discipline in the classroom and on school grounds." Anable, No. 84-6033, Memorandum Opinion at 40 (citing T.L.O., 105 S. Ct. 733, 742 (1985)).
of tests only when school administrators had some objective basis to suspect specific students were involved with drugs or alcohol.\footnote{222} A more alarming possibility would be a general or random search policy requiring all students to provide urine samples for chemical analysis, even if school officials had no reason to suspect that the students tested had any involvement with illegal drugs or alcohol.

This type of drug search policy was proposed in 1985 at Becton Regional High School in East Rutherford, New Jersey.\footnote{223} The Board of Education voted to include mandatory tests for drugs and alcohol as part of each student’s annual physical examination.\footnote{224} Any student who did not complete the examination would be barred from classes.\footnote{225} Five students and their parents filed suit, arguing that the tests would violate the fourth amendment by unnecessarily invading their privacy rights.\footnote{226} The New Jersey Superior Court held the policy unconstitu-

\footnote{222.} The school policy provided, in relevant part:
Sale, distribution, use or possession of alcoholic beverages, controlled substances, (illegal drugs), marijuana, or other materials expressly prohibited by federal, state, or local laws is not permitted by students in school buildings, on school property, or at school functions. Also, the sale, distribution or abusive use of prescription, patent or imitation drugs is not permitted. A trace of illegal drugs/alcohol in one’s body is a violation of this policy. . . . A student may be searched where there is reasonable suspicion that the student may be hiding evidence of a wrongdoing.


\footnote{225.} Id. at 5.

\footnote{226.} Id. at 6. On August 13, 1985 a temporary restraining order enjoining the testing of urine samples was granted. Id. at 3. On September 3, 1985, the temporary order was extended into a preliminary injunction. Id.
tional because it called for improper general searches of students' bodies under the "guise" of a medical examination.227

VI. Invasive Body Searches in Nonschool Contexts

In examining the ramifications of forcing schoolchildren to undergo invasive body searches, the first step is to determine whether the student has a protectable privacy interest in his breath or body fluids: blood and urine.228 If the fourth amendment protects an individual's privacy with respect to his physical person,229 to an area of private activity,230 and to zones of privacy drawn by his legitimate expectation of privacy,231 then a person's body232 also ought to be protected

227. Id. at 9-10. The court stated that in evaluating a schoolchild's reasonable expectations of privacy, it is inappropriate to draw analogies from a person's reasonable expectation of privacy in a correctional facility or a heavily regulated industry. Id. at 8 (distinguishing McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), and Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985)); see supra notes 259-70 and accompanying text.

In addition, the court in Odenheim held that the school policy failed to satisfy the T.L.O. two-prong test. See supra notes 97-101 and accompanying text (discussing two-prong test). Odenheim, No. C-4305-85E, slip op. at 9 (drug testing policy held "not reasonably related in scope to the instances of student drug use which initially justified the interference, urinalysis, in the first place" because "[s]chool policy already provides[d] for exclusion and/or suspension of students who are involved with drug activity." Id. at 10, 9.

228. See Katz v. United States, 389 U.S. 347 (1967) (fourth amendment protection not based solely on presence or absence of physical intrusion into a given place); supra note 9 (describing two qualifications which a "reasonable expectation of privacy" must meet to be constitutionally protected).


230. E.g., United States v. Karo, 104 S. Ct. 3296, 3303 (1984) (private residence represents an area of private activity); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion") (citations omitted).


232. The Sixth Circuit stated that the fourth amendment and students' privacy interests would clearly outweigh any interest in school discipline or order which might be served by a "degrading body cavity search" to determine if a student possessed contraband in violation of school rules. See Tarter v. Raybuck, 742 F.2d 977, 982-83 (6th Cir. 1984), cert. denied, 105 S. Ct. 1749 (1985).
from seizure and chemical examination.  

Breathalyzer and urine tests implicate the identical interests in human dignity and privacy found to be at stake in Schmerber v. California, in which the Supreme Court found that the fourth amendment prohibits “any such intrusions on the mere chance that desired evidence might be obtained.” One clearly has a reasonable and legitimate expectation that the chemical breakdown of one’s body fluids will remain private information. Of secondary im-

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233. Detaining and testing an individual for alcohol or illegal drug use by means of a breathalyzer test or urinalysis constitutes a “search” triggering the protections of the fourth amendment. See Anable v. Ford, No. 84-6033, Amended Judgment at 7-8 (W.D. Ark. filed Sept. 6, 1985) (court held breath tests to be constitutional but held that urine tests violated students’ legitimate expectations of privacy); Allen v. City of Marietta, 601 F. Supp. 482, 489 (N.D. Ga. 1985) (“urinalysis test is a search and seizure within the meaning of the fourth amendment”). The two tests are essentially identical to blood tests which the Supreme Court deemed “searches” under the fourth amendment. See Schmerber v. California, 384 U.S. 757, 767 (1966); Storms v. Coughlin, 600 F. Supp. 1214, 1217 (S.D.N.Y. 1985) (urinalysis test indistinguishable from the blood test held to fall within fourth amendment in Schmerber). In Storms v. Coughlin, the court stated that “[a]lthough it involves no forced penetration of body tissues, as does a blood test, [urinalysis] does involve the involuntary extraction of body fluids. In that sense, if not literally, it is an ‘intrusion beyond the body’s surface.’” Id. at 1218 (citation omitted); cf. McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (finding that “[u]rine, unlike blood, is routinely discharged from body, so no government intrusion into body is required to seize urine;” however, one has reasonable expectation of privacy in the chemical content of one’s body fluids, so that taking the urine specimen is a fourth amendment “search”) (discussed infra at notes 261-65 and accompanying text). But see Murray v. Haldeman, 16 M.J. 74, 81-82 (C.M.A. 1983) (finding that where no physical intrusion into person’s body occurs, such as stomach pumping, catheterization or drawing blood, furnishing a urine sample is not an “intrusive search” of body); accord Shoemaker v. Handel, 608 F. Supp. 1151, 1158 (D.N.J. 1985) (breathalyzer and urine tests require lesser intrusions than searches involving invasions into the body).


236. Schmerber v. California, 384 U.S. at 769-70 (emphasis added). The Schmerber standard applied in criminal cases required probable cause to believe an offense was committed, plus a clear indication that evidence relating to the offense would be found in the body cavity, blood, or body tissue to be invaded. Id. at 770. In contrast, the high school policy challenged in Anable (discussed supra notes 211-22 and accompanying text) interpreted the T.L.O. “reasonableness, under all of the circumstances” standard (discussed supra notes 96-101 and accompanying text) to mean that school officials must hold only a reasonable suspicion that the student had used alcohol or illegal drugs prior to administering an invasive body search such as urinalysis. Anable, No. 84-6033, Memorandum Opinion at 26-28 (W.D. Ark. filed July 15, 1985).

portance is the manner in which the samples are obtained,\textsuperscript{238} and the potential stigma which attaches to a student if the test results are inaccurate.\textsuperscript{239}

The next analysis focuses on whether or not school officials can legally justify their use of urinalysis tests as reasonable searches due to the serious nature of the alleged infractions—drug or alcohol use on school premises.\textsuperscript{240} A brief survey of how invasive searches, such as urinalysis and blood tests, are treated in other contexts provides valuable guidance.\textsuperscript{241}

Prison inmates enjoy virtually no expectation of privacy in their persons\textsuperscript{242} or belongings in their cells, due to the important gov-
government interest in maintaining security at penal institutions.\textsuperscript{243} A United States District Court in Arizona held that blood may be extracted from prisoners suspected of taking drugs if medical personnel conduct the procedure in a hygienic environment.\textsuperscript{244} The United States District Court for the Southern District of New York found that random urinalysis tests at a prison would be permissible on a standard of less than probable cause, because of prisoners' status.\textsuperscript{245}

The Supreme Court has emphasized fundamental differences between a prisoner's and a schoolchild's expectations of privacy, stating that "'[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration,""\textsuperscript{246} and that "'[w]e are not yet ready to hold that the schools and prisons need be equated for the purposes of the Fourth Amendment."\textsuperscript{247} However, by its nature, a mandatory student drug testing policy inherently assumes that students have lower expectations of privacy in their body fluids than members of

\begin{itemize}
\item prison officials to conduct strip searches of prisoners in non-emergency, non-contact visit situations. See generally 1 RINGEL, SEARCHES AND SEIZURES, supra note 54, § 17.4 (discussing body searches of prisoners).
\item 245. Storms v. Coughlin, 600 F. Supp. 1214, 1220 (S.D.N.Y. 1984); see also Debating a Police Test for Drug Use, N.Y. Times, Jan. 7, 1986, at B6, col. 4 (District of Columbia instituted program testing arrestees for drug use and offering results to judge at bail hearing).
\item 246. T.L.O., 105 S. Ct. at 742 (quoting Ingraham v. Wright, 430 U.S. 651, 669 (1977)).
\item 247. T.L.O., 105 S. Ct. at 742.
\end{itemize}
the general population.248 As a result, the school must be compared to other special settings in which people have a lowered expectation of privacy in their bodies.

As with prison searches, persons entering the United States at a border are subject to invasive searches, including strip searches249 and invasive body cavity searches.250 The strong government interest in preventing contraband smuggling and the setting of the search justify a traveler's diminished expectation of privacy at a national border.251

Persons in the military252 are subject to urinalysis testing programs253

248. See supra note 113 and accompanying text.
249. Customs officials typically need “real” or “reasonable suspicion” that a person is smuggling contraband to conduct a strip search. See, e.g., United States v. Des Jardins, 747 F.2d 499 (9th Cir. 1984) (“real suspicion”); United States v. Faherty, 692 F.2d 1258 (9th Cir. 1982) (same); United States v. Smith, 557 F.2d 1206 (5th Cir. 1977) (“reasonable suspicion”), cert. denied, 434 U.S. 1023 (1978); United States v. Asbury, 586 F.2d 973 (2d Cir. 1978) (same); United States v. Solimini, 560 F. Supp. 648 (E.D.N.Y. 1983) (same); see also United States v. Moody, 649 F.2d 124, 127 (2d Cir. 1981) (border search requiring pulling down a girdle held reasonable).
250. To conduct a body cavity search, customs authorities must meet the stricter standard of having a “clear indication” or “plain suggestion” that the person is carrying contraband within his body. See United States v. Shields, 453 F.2d 1235 (9th Cir.) (holding body cavity search permissible when clear indication or plain suggestion exists of concealed contraband on person's body), cert. denied, 406 U.S. 910 (1972); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967) (same holding); see also United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985) (approving the prolonged detention at the border of a suspected drug smuggler until she produced monitored bowel movement).
252. The rights of privacy and freedom of expression are curtailed for members of the military due to the “different character of the military community and . . . [the] fundamental necessity for obedience, and the consequent necessity for imposition of discipline . . . .” Parker v. Levy, 417 U.S. 733, 758 (1974) (First amendment applications differ in military community); see also Goldman v. Secretary of Defense, 734 F.2d 1531 (D.C. Cir. 1984) (Orthodox Jewish air force captain properly forbidden by military regulations from wearing his yarmulke for religious reasons while in uniform), aff'd sub nom. Goldman v. Weinberger, 106 S. Ct. 1310 (1986); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) (U.S. Army's policy of excluding homosexuals from military service did not infringe upon appellant's constitutional rights); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (U.S. Navy policy of mandatory discharge for homosexual conduct did not violate constitutional rights to privacy or equal protection).
under which any service member may be forced to give a urine specimen as part of a random sampling. Refusal to obey is punishable as an offense in itself.\textsuperscript{254} Urinalysis test results are admissible in subsequent courts-martial.\textsuperscript{255} The rationale for according military personnel more circumscribed fourth amendment protections than civilians enjoy reflects conditions peculiar to a military community.\textsuperscript{256}

However, invasive body searches have not been confined to military employees.\textsuperscript{257} In the public employment context, it has been held

\textsuperscript{254} Violation of an order to provide a urine specimen may violate one of three different provisions. See Uniform Code of Military Justice (U.C.M.J.) art. 90 (disobedience of a superior’s order); id. art. 91 (insubordinate conduct toward a warrant, noncommissioned, or petty officer); id. art. 92 (failure to obey order or regulation). Prosecution for disobedience of an order to provide a urine sample in a criminal case was allowed. United States v. Brints, 15 C.M.R. 818 (A.B.R. 1954).

\textsuperscript{255} See Abney, supra note 253, at 6-13.

\textsuperscript{256} See Committee for GI Rights v. Callaway, 518 F.2d 466, 476-77 (D.C. Cir. 1975) (upholding warrantless drug inspections conducted without probable cause); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. 1985) (discussing “conditions peculiar to the military community” which cause a military service member’s expectations of privacy to differ from those held by civilians).


The Supreme Court recently vacated a temporary restraining order issued by the Ninth Circuit which had blocked a program designed to administer mandatory blood, breath, and urine tests to the nation’s railroad employees involved in accidents or infractions. Dole v. Railway Labor Executives’ Ass’n, 106 S. Ct. 876 (1986); see N.Y.L.J., Jan. 28, 1986, § 1, col. 3; Feerick, Employee Rights and Substance Abuse, N.Y.L.J., Feb. 7, 1986, at 2, col. 4. The six-part program authorizes pre-employment testing and tests of workers involved in accidents to be conducted if there is reasonable cause to suspect drug use. See BNA Daily Labor Report, Jan. 28, 1986, at A-4. The Supreme Court decision in Dole compels every American railroad carrier to adopt a similar policy to identify drug and alcohol abusers due to the heavy federal regulation of the railroad industry and the nature of employment which may endanger public safety. See also Stille, Drug Testing: The scene is set for a dramatic legal collision between the rights of employers and workers, Nat’l L.J., Apr. 7, 1986, at 1, col. 1; Rimer, State Court Officers’ Unions Agree to Drug Testing, N.Y. Times, Feb. 8, 1986, at 30, col. 2 (state court officers and clerical staff for New York City’s state courts will be required to submit to urinalysis tests for drug abuse if reasonable cause is found).

On March 3, 1986, the President’s Commission on Organized Crime issued a report on drug enforcement in America which suggested that “the Government should test all Federal employees and should not award Federal contracts to private employers that do not begin drug testing programs.” See N.Y. Times, Mar. 4, 1986, at A1, col. 1; Pasztor, Crime Panel Head Qualifies Support for Drug Testing, Wall St. J., Mar. 5, 1986, § 1, at 12, col. 2 (discussing limiting the Commission’s
that in order to ensure continuing public safety, bus drivers have no reasonable expectation of privacy with regard to submitting to
blood and urine tests for the detection of alcohol or drug abuse.

Correctional facility employees have similarly diminished expec-
tations of privacy because the presence of contraband, drugs or
alcohol poses a serious threat to the internal security of an incar-
ceration facility. Although some intrusive searches might be allowed
inside the penal institution which would not be reasonable outside,

recommendations for widespread drug testing of military and civilian government
employees and federal contractors).

In the private sector, it is estimated that as many as 25% of the large corporations
in America screen prospective employees for drug use. Drugs at Work, 72 A.B.A.
J. 34 (Mar. 1, 1986) (discussing challenges to employee testing policies); Rothstein,
Screening Workers for Drugs: A Legal and Ethical Framework, 11 EMPLOYEE
RELATIONS L.J. 422 (1985-86); Bishop, Worker Drug Tests Resisted: Coast Cases
Are Watched, N.Y. Times, Nov. 27, 1985, at D1, col. 3 (discussing test case in
San Francisco challenging company’s selection process for distinguishing certain
employees to undergo drug tests on basis of job classification); Battling Drugs On
the Job, TIME, Jan. 27, 1986, at 43 (quoting official at National Institute on Drug
Abuse that “[n]early half of all the FORTUNE 500 firms are expected to have
programs in place within a year to identify abuse and rehabilitate employees at
company expense”); Putting Them All to the Test: Does Wider Screening Mean
Narrower Freedoms?, TIME, Oct. 21, 1985, at 61 (presenting divergent views of
policies underlying drug testing).

258. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.)
(rules requiring bus drivers to submit to urine tests following involvement in serious
accidents held constitutional), cert. denied, 429 U.S. 1029 (1976).

259. “[S]ociety is prepared to recognize as reasonable the proposition that cor-
rection officers have diminished expectations of privacy in light of the difficult
burdens of maintaining safety, order and security that our society imposes on those
who staff our prisons.” Security and Law Enforcement Employees, Dist. Council
82 v. Carey, 737 F.2d 187, 202 (2d Cir. 1984); see also Pell v. Procunier, 417
U.S. 817, 823 (1974) (“central to all other corrections goals is the institutional
consideration of internal security within the corrections facilities themselves”);
United States v. Thomas, 729 F.2d 120, 123 (2d Cir. 1984) (expectations of privacy
differ in various locations and circumstances), cert. denied, 105 S. Ct. 158 (1984);
security considerations reduce scope of normal expectations of privacy); Bautista,
Sheriff: Check All Officials for Drugs, The Record (Bergen County, N.J.), Jan.
27, 1986, at A1, col. 3 (Passaic County, N.J. drug testing program requiring
sheriff’s employees, including all guards, court attendants, and clerks, to submit
to drug tests, resulted in resignations of four employees).

260. See, e.g., United States v. Stassi, 544 F.2d 579, 582 (2d Cir. 1976) (major
narcotics conspiracy “hatched” in federal penitentiary), cert. denied, 430 U.S. 907
officials estimate that 70-80% of inmates in Maximum are current drug users,
including perhaps 40 heroin addicts. The traffic in contraband is a major cause
of violence.”), aff’d, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980).

261. See Security and Law Enforcement Employees, Dist. Council 82 v. Carey,
737 F.2d 187 (2d Cir. 1984) (strip searches and body cavity searches of correction
employees may be conducted if a standard of reasonable suspicion is met).
prison employees do not lose all of their Fourth Amendment rights at the prison gates." The United States District Court for the Southern District of Iowa scrutinized a department of corrections policy which subjected correction officers to searches of their vehicles, urinalysis and blood tests. The court held that these invasive searches had to be justified by a "reasonable suspicion, based upon specific objective facts," attesting to the employee's on-the-job involvement with alcohol, controlled substances, or weapons.

In contrast, the United States District Court for the District of New Jersey held that race horse jockeys must obey state racing commission regulations providing for the administration of breathalyzer tests to detect blood alcohol content and random urinalysis tests to discover usage of alcohol and controlled substances. The court found that jockeys have "significantly diminished expectations of privacy" due to the "pervasive and continuous regulation [of the horse racing industry] by the state." In applying "the reasonableness test" to evaluate the jockey drug test procedures, the


263. McDonell, 612 F. Supp. at 1122.

264. Id. at 1132. In McDonell, administrators at the Men's Reformatory at Anamosa had received confidential information that an employee suspected of drug smuggling had associated with people outside the facility who were under police surveillance for their drug-related activities. Id. at 1126. McDonell refused to submit to a urinalysis test and was dismissed. Id.

265. Id. at 1126; see Security and Law Enforcement Employees, Dist. Council 82 v. Carey, 737 F.2d at 208 (stating that random searches of correction officers are unreasonable).

266. Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985). State regulations require licensed jockeys to take a breathalyzer test daily and between three and five jockeys chosen nightly at random after the races must submit to urinalysis tests. Id. at 1093. A jockey may be required to provide a urine sample at a maximum of three times within a seven day period. Id. at 1096. Penalties for a positive test include fines, enrollment in a treatment program, and expulsion from racing in New Jersey. Id. at 1095. The three stated purposes of the regulations are: (1) to increase the safety of the participants in a race; (2) to promote the integrity of the racing industry; and (3) to rehabilitate drug and alcohol abusers. Id. at 1093. *On July 10, 1986, the Third Circuit affirmed the Shoemaker decision, but limited its holding to voluntary participants in a highly regulated industry. 795 F.2d 1136, 1142 n.5 (3d Cir. 1986).

267. 619 F. Supp. at 1102.

268. Id. State regulation of the horse racing industry exists due to the grave risks of serious injury. Id.

269. Id. at 1100. The test consists of weighing "the legitimate government interest in maintaining the integrity of the racing industry and the safety of the sport against the legitimate expectations of privacy retained by jockeys . . . ." Id.
court relied on the fact that the tests were uniformly administered to all licensed jockeys in the state and noted that this procedural safeguard "substitut[ed] for the lack of any individualized suspicion."270

In a similar decision, the Court of Appeals for the District of Columbia upheld a police department regulation providing that any department official may order any member of the force to submit to urinalysis testing upon suspicion of drug abuse.271 The court determined that a police officer may have a lesser privacy interest in his person than that of the general public under certain circumstances272 because "the police force is a para-military organization dealing hourly with the general public in delicate and often dangerous situations."273

In contrast, the Fifth District Court of Appeals of Florida struck down a city policy which mandated random urinalysis testing of police officers and firefighters because it violated fourth amendment rights.274 The court held that unless tests are part of annual physical

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270. Id. at 1103. The court distinguished McDonell, see supra notes 262-64 and accompanying text, stating that because breathalyzer and urine tests at issue in Shoemaker are less intrusive than body cavity or strip searches in McDonell, individualized suspicion was not needed in Shoemaker as in McDonell to justify the lesser invasion. 619 F. Supp. at 1101. In addition, in Shoemaker, the regulations were administered in accordance with established standards which did not rest all discretion in the hands of unnamed authorities. Id. at 1103, 1106-07. In contrast, the policy at issue in McDonell did not identify who had the authority to require an officer to submit to a search, nor did the policy establish standards for the actual test procedures. See 612 F. Supp. at 1126.

271. Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008-09 (D.C. 1985). The testing program in Turner resembles in some respects the testing policy for corrections officers in McDonell, discussed supra notes 262-64. In Turner, a member of the Board of Police and Fire Surgeons could, at his discretion, order the tests. 500 A.2d at 1006. Nevertheless, the policy "does not grant the Department carte blanche to order testing on a purely subjective basis." 500 A.2d at 1008. There must be a "reasonable, objective basis for medical investigation through urinalysis," which may fall short of the traditional requirement of probable cause. Id. at 1008-09. In McDonell, no written standards dictated who had the authority to order the tests or how the tests were to be administered. 612 F. Supp. at 1126; see also Alex, Paterson Chief: Drug Tests for All Police, The Record (Bergen County, N.J.), Jan. 31, 1986, at B1, col. 3 (discussing a Paterson, N.J., Police Department order for all recruits to undergo urinalysis for drug use; similar testing instituted by the Newark, N.J., Police Department, and at New Jersey police training academies).

272. Turner, 500 A.2d at 1008. A concurring opinion suggested that at best, a urinalysis test is minimally intrusive. Id. at 1011 (Nebeker, J., concurring). "[B]ody waste is forever discarded upon release from the body. An individual cannot retain a privacy interest in a waste product that, once released, is flushed down the drain." Id.

273. 500 A.2d at 1008.

examinations, the city must have a "reasonable suspicion" that the employee is using a controlled substance before drug testing can occur. The court stressed that random drug tests are onerous because:

[without a scintilla of suspicion directed toward them, many dedicated firefighters and police officers are told, in effect, to submit to such testing and prove themselves innocent, or suffer disciplinary action. When the immediate end sought is weighed against the private right affected, the proposed search and seizure is constitutionally unreasonable.]

A schoolchild is not legally equivalent to a prisoner, because every student has a recognizable privacy interest in his person which is protected by the fourth amendment. Although in school search cases courts typically emphasize the importance of maintaining a drug and alcohol-free environment, these safety concerns clearly do not approach the level of the government's interest in preserving security in a prison facility or at a border entry point. However, due to compulsory education laws, and the importance of discipline

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App. 1985); see Marcotte, Drug Testing, 71 A.B.A. J., Feb. 1, 1986, at 20. The random testing policy invalidated in Bauman resembles the urinalysis program in McDonell which also did not identify the person by name or position who would be authorized to require the employee to provide a urine specimen, or any standards for the policy's implementation. 612 F. Supp. at 1126; see Bauman, 475 So. 2d at 1325; see also supra notes 263-65, 270 and accompanying text.

275. 475 So. 2d at 1325.

276. Id. at 1325; accord Turner, 500 A.2d 1005 (D.C. 1985) (discussed supra notes 271-73 and accompanying text). In Turner, the court upheld a city policy requiring police officers to submit to drug tests on the basis of reasonable suspicion that the officer used drugs, reasoning that "in the context of current widespread, large scale drug usage in all segments of the population, the Department was justified in promulgating Special Order 83-21 in an effort to prevent the illicit use of narcotics by members of the police force." 500 A.2d at 1008 (emphasis added). The court in Bauman expressly criticized this rationale:

[T]he Chief of Police has received no information ... that any member of the Palm Bay Police Department has used marijuana. The incidence of known marijuana use among fire fighters ... even after urine testing, is less than six (6) people. While not suggesting that this figure is insignificant, it is hardly a legal springboard for the [random testing] the City now seeks to [implement].

475 So. 2d at 1325 (emphasis in original).


278. See supra notes 228-34 and accompanying text.

279. See supra notes 102-10 and accompanying text (presenting judicial and school administrators' views regarding the need to conduct student searches).


281. See supra note 4.
and order to the educational setting, the school may be compared to an industry or institution that is heavily regulated by the government.

Yet, courts which evaluate programs instituted to combat drug or alcohol abuse by employees of heavily regulated industries, or by police and fire department employees, primarily focus on the immediate concerns that substance abusers may jeopardize the public welfare and endanger their own lives. Employees in these fields, military servicepeople and travelers crossing national borders constructively waive their privacy interest in varying degrees as a precondition to their work or actions. An identical diminished expectation of privacy should not be unilaterally imposed on students merely because they attend public schools.

VII. Recommendations

Many types of student search incidents have occurred at public schools as a result of school administrators' efforts to combat student substance use. As one court noted, "[t]here is no doubt about it—searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently

282. See supra notes 103-11 and accompanying text.
283. See supra notes 258-73 and accompanying text.
284. See, e.g., Security and Law Enforcement Employees, Dist. Council 82 v. Carey, 737 F.2d 187, 201-02 n.23 (2d Cir. 1984) (notice provided to correction facility employees in rule book issued prior to employment stating that while on facility property employees were subject to being searched, necessarily diminished their subjective expectations of privacy significantly); Shoemaker v. Handel, 619 F. Supp. 1089, 1102 (D.N.J. 1985) (licensed participants in regulated industries have diminished expectations of privacy due to the restrictions placed upon them). The standard established by the Supreme Court is that a person who relies on consent to justify the lawfulness of a search must prove the consent was freely and voluntarily given. See Schneckloth v. Bustamonte, 412 U.S. 218, 222-23 (1973). The totality of the surrounding circumstances must be reviewed; including evidence that the person had knowledge of his right to refuse to grant his consent. Id. at 226-27, 248-49; see United States v. Sihler, 562 F.2d 349, 350-51 (5th Cir. 1977) (search of prison employee's lunch bag held reasonable because large posted sign which employee passed daily stated that all persons entering prison were subject to search). But see Armstrong v. New York State Comm'r of Correction, 545 F. Supp. 728, 731 (N.D.N.Y. 1982) ("careful factual inquiry must be undertaken in order to determine whether consent is voluntary under the circumstances") (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).
285. See supra notes 122-33 (locker searches); supra notes 135-64 (canine investigations); supra notes 165-92 (personal searches); supra notes 192-210 (strip searches); supra notes 211-27 (urinalysis testing), and accompanying text.
286. See supra note 1 for a discussion of the prevalence of substance use among students.
searched the colonists.) That potential, however, does not make a . . . search . . . a constitutionally reasonable one. 287

The question of what does make a student search constitutionally reasonable under the fourth amendment has only been superficially addressed by the Supreme Court. 288 T.L.O. established a two part "reasonable suspicion" standard and applied it to uphold a warrantless search of a purse when there was less than probable cause to believe the student possessed contraband in violation of school rules. 289 A later federal district court decision interpreted the "reasonable suspicion" standard to bar more invasive urinalysis tests instituted to screen students specifically suspected by school authorities of being under the influence of controlled substances. 290 A logical extension of this reasoning indicates that an invasive body search policy, such as one requiring urinalysis testing when there is no individualized suspicion of the students to be tested, should clearly be unconstitutional. This was a New Jersey Superior Court's holding. 291 Similar rulings that student searches are unconstitutional, based upon the absence of individualized suspicion, have been reported with respect to canine searches, 292 strip searches, 293 and luggage searches. 294


288. See New Jersey v. T.L.O., 105 S. Ct. 733 (1985). The Court addressed "only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case," 105 S. Ct. at 736. The Court based its decision in part on the minimal intrusiveness of the search in question and the presence of individualized suspicion that the particular student had violated a school rule. Id. at 744 n.8, 746-47. The Court refused to specify what standard would apply to searches of students' lockers or desks, id. at 741 n.5, or whether school authorities can conduct searches in the absence of individualized suspicion. Id. at 744 n.8; see also Walts, New Jersey v. T.L.O.: The Questions the Court Did Not Answer About School Searches, 14 J. L. & Educ. 421 (1985).


292. See Doe v. Renfrow, 475 F. Supp. 1012, 1021 (N.D. Ind. 1979), aff'd in part, remanded in part, 631 F.2d 91 (7th Cir. 1980) (per curiam), cert. denied, 451 U.S. 1022 (1982) (Brennan, J., dissenting from denial of certiorari); see supra notes 161-64 and accompanying text; Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 481-82 (5th Cir. 1982) (per curiam) (distinguishing canine sniffing of school lockers, which was deemed not a fourth amendment "search" from canine sniffing of persons, which was held a "search" requiring individualized
One court has explained the significance of how individualized suspicion relates to the constitutionality of a search: "In any sufficiently large group, there is a statistical probability that someone will have contraband in his possession. The Fourth Amendment demands more than a generalized probability; it requires that the suspicion be particularized with respect to each individual searched."295

The philosophical underpinnings of the fourth amendment support

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293. See Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (holding that school officials must have reasonable particularized suspicion as prerequisite to valid search for stolen money); see also In re William G., 709 F.2d 1287, 1299, 221 Cal. Rptr. 118, 130-31 (Cal. 1985) (en banc) (citing Hentoff, The Day The Girls of Elyria Were Strip-Searched, The Village Voice (N.Y.), June 18, 1985 at 25, col. 3. After finishing gym class at a junior high school in Elyria, Ohio, one of the girls told her teacher that her watch and ring were missing. Id. Acting on what the school superintendent would later call "reasonable deliberation of critical issues at hand," the gym teacher proceeded to search the lockers and purses of each of the 20 girls in the class. Id. Other female school officials joined her in conducting body searches of each student. Id. The allegedly stolen jewelry was never found. Id. A local newspaper observed that "[t]heft is serious business—but to ask 20 girls to take off most of their clothing in the hope that one guilty party will be found, goes beyond common sense, and is an affront to the innocent . . . ." Id.)


an individualized suspicion requirement. In *Ybarra v. Illinois*, the Supreme Court noted that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." In *United States v. Afanador*, the Fifth Circuit stated that "[I]f there be any doubt . . . 'reasonable suspicion' must be specifically directed to the person to be searched." The *T.L.O.* court refused to decide whether its "reasonable suspicion" standard included individualized suspicion. However, *T.L.O.* presented a case in which school officials *did* have individualized suspicion of the student and conducted a minimally invasive search. When more invasive searches are conducted, a different formulation of "reasonable suspicion" must be employed, and the *T.L.O.* Court strongly implied that individualized suspicion would be required under the fourth amendment:

> Exceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated by a search are minimal *and* where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

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296. 444 U.S. 85 (1979) (mass investigatory detention, interrogation, and search of bar patrons).

297. *Id.* at 91 (citing *Sibron v. New York*, 392 U.S. 40, 62-63 (1968)); *see also* *Doe v. Renfrow*, 451 U.S. 1022, 1027 (1982) (Brennan, J., dissenting from denial of certiorari) (citing *Ybarra* to support the Court's traditional "abhorrence of unfocused, generalized, information-seeking searches"); *Davis v. Mississippi*, 394 U.S. 721 (1969) (mass detention and fingerprinting of men fitting general description of perpetrator of crime); *People v. Aldridge*, 35 Cal. 3d 473, 480, 674 P.2d 240, 244, 198 Cal. Rptr. 538, 542 (1984) ("Our state and federal Constitutions were written precisely to outlaw . . . unrestricted general sweeps and searches").

298. 567 F.2d 1325 (5th Cir. 1978).

299. *Id.* at 1331 (concluding that fourth amendment does not permit any automatic transference of suspicion).


301. *Id.; see also* *Ybarra v. Illinois*, 494 U.S. 85, 107 (1979) (Rehnquist, Blackmun, J.J., Burger, C.J., dissenting) (stating that "in place of the requirement of 'individualized suspicion' as a guard against arbitrary exercise of authority, we have the determination of a neutral and detached magistrate [in a search warrant] that a search was necessary."); *In re William G.*, 709 P.2d 1287, 1299-1300, 221 Cal. Rptr. 118, 129-31 (1985) (en banc) (Bird, C.J., concurring and dissenting) (expressly urging a judicial adoption of an individualized suspicion element as part of the reasonable suspicion standard established in *T.L.O.* to govern warrantless school searches).

VIII. Conclusion

Although the fourth amendment guarantees a student's legitimate expectation of privacy, current legal standards permit public school authorities to search a student's person and possessions if the conduct is deemed "reasonable, under the circumstances." The vagueness of the term "reasonableness" becomes crucial when school officials seek to use this standard to justify invasive body searches, which require extreme invasions of a child's dignity and privacy.

Public school attendance, which is mandated by state education laws, should not automatically subject students to severe encroachments upon their constitutionally protected expectations of privacy. In order to provide an additional safeguard to students, "reasonableness" should be uniformly interpreted to require that school officials possess individualized suspicion of specific students prior to conducting a valid search.303 Under no circumstances should generalized, exploratory, or random drug or alcohol screening searches be permitted in public schools, because "[t]he problem of drug abuse in the schools is not to be solved by conducting school house raids on unsuspecting students absent particularized information regarding drug users or suppliers."304

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