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Dog Searches in Schoolrooms—State or Private Action?

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NOTES

DOG SEARCHES IN SCHOOLROOMS—STATE OR PRIVATE ACTION?

In 1949 the Supreme Court for the first time applied the fourth amendment[1] to the states.[2] At that time, however, the Supreme Court did not mandate a specific remedy for violations of the fourth amendment, but instead left the remedy to the discretion of the individual state courts.[3] In 1961 the Supreme Court reviewed its previous holding and found that alternative state remedies had "failed to secure compliance with the constitutional provisions."[4] Therefore, in an effort to uphold uniform and complete application of the fourth amendment in state courts, the Supreme Court stated that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority inadmissible in a state court."[5] Thus, preliminary to any decision on the constitutionality of a search is a determination of whether the questionable search was undertaken by a state or federal governmental agent. Unless it is determined that the search and seizure was under the guise of state or federal law, the fourth amendment does not apply.

Recently a United States district court was required to determine whether the fourth amendment applies to dog searches in public schools, instigated by a local school board.[6] The court was

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1. U.S. CONST. amend. IV. The amendment reads:

> The right of the people to be secure in their homes, houses, 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 person or things to be seized.

2. Wolf v. Colorado, 338 U.S. 25 (1949). Arbitrary invasion into privacy by the police is prohibited by the Due Process Clause of the fourteenth amendment.

3. *Id.* at 28-33. While the doctrine of Weeks v. United States, 232 U.S. 383 (1914), making evidence secured in violation of the fourth amendment inadmissible in federal courts is adhered to, it is not imposed on the states by the fourteenth amendment. Wolf v. Colorado, 338 U.S. at 25.

4. Mapp v. Ohio, 367 U.S. 643, 651 (1961). Evidence obtained by a search and seizure in violation of the fourth amendment is inadmissible in a state court as it is in a federal court.

5. *Id.* at 665.

6. Doe v. Renfrow, No. H 79-233 (N.D. Ind. Aug. 30, 1979), *aff'd in part, rev'd in part*, No. 79-2116 (7th Cir. 1980).

forced, as other courts will be in the future, to assess whether a mass search for drugs by school officials, with the aid of trained canine units, was an official governmental search or merely a search by private citizens.[7] In determining this issue a court must examine not only the validity of a search by a public school official, but also must face the added complexities of the propriety of the use of dogs in a mass student search.[8] This note will examine the status of the public school official under the fourth amendment and explain the effect that the use of trained dogs will have on that status.

THE STATUS OF THE SCHOOL OFFICIAL

The fourth amendment was once applicable only to the federal government.[9] Through the application of the Due Process Clause[10] it now applies to any action taken by state governmental agents.[11] The fourth amendment, however, does not apply to action undertaken by a private person. Any private action, therefore, while possibly giv-

7. During 1978, the Highland, Indiana School Administration became increasingly aware of an acute problem of illicit drug use in the school system. Facing a loss of discipline and morale among the students, the Highland School District Board decided to use trained dogs in a school wide drug investigation. The School Board requested the assistance of the Highland Police Department, and the use of trained canine units, dogs trained in connection with the Highland Police Department. The objective was to rid the school system of illicit drug use. It was agreed beforehand that evidence uncovered would not be used in any criminal investigation.

The entire student body was restricted to their first period class while the dogs were led through the classrooms. If the dogs "alerted" (a reaction by the dog to the smell of marijuana) to a particular student, that student was required to empty either pocket or purse. If the dog continued to alert, the student was escorted to a private room and strip searched. There was no marijuana found on any student that was strip searched. The plaintiffs sought an injunction against further use of the dogs in the classroom and claimed that their fourth amendment rights had been violated. Doe v. Renfrow, No. H 79-233 (N.D. Ind. Aug. 30, 1979), *aff'd in part, rev'd in part*, No. 79-2116 (7th Cir. 1980).

8. The *Renfrow* court did not actually examine the status of a search by a high school official under the fourth amendment. The court did decide that the action of the school officials was reasonable under the doctrine of *in loco parentis*.

9. Palko v. Connecticut, 302 U.S. 319 (1937) (held that the fourteenth amendment does not guarantee against state action all that would be a violation of the original bill of rights if done by the federal government); Gaines v. Washington, 277 U.S. 81 (1928).

10. U.S. CONST. amend. XIV states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11. Mapp v. Ohio, 376 U.S. 643 (1961).

ing rise to a civil suit[12] is not subject to constitutional proscription, and any evidence uncovered in such a search is not excluded in either state or federal courts on the basis of a violation of the fourth amendment.[13] Therefore, before a decision on the constitutionality of a search can be reached, it must first be determined whether the one conducting the search is a state agent acting under the directives of the fourth amendment, or merely a private individual exempt from the restrictions of the constitutional provisions.[14]

Recent case law indicates that courts are undecided whether a public official is an agent of the state.[15] Three basic views predominate in the state and federal courts.[16] Louisiana courts hold that school officials are state officials to whom the fourth amendment applies in full.[17] Other jurisdictions hold that teachers are not state officials, but are merely private citizens, and not bound by the fourth amendment.[18] Finally, the most widely regarded view is that teachers are state officials, but they are judged under a different standard than other state officials.[19] The doctrine of *in loco parentis*, applicable in the school setting, lowers the constitutional requirement of probable cause to reasonable suspicion.[20] Under this standard a teacher is allowed to search any student if the teacher has a reasonable suspicion that the student is engaged in proscribed conduct.

School Officials Considered State Officials

The fourth amendment guarantees against all unreasonable searches and seizures.[21] The language does not single out searches

12. Potts v. Wright, 357 F. Supp. 215 (E.D. Penn. 1973). A student was allowed to bring a civil suit against the Chief of Police and the Superintendent of the School District for violation of her civil rights when she was subjected to a strip search while at school.

13. Burdeau v. McDowell, 256 U.S. 465 (1921).

14. *See, e.g.*, Barnes v. United States, 373 F.2d 517 (5th Cir. 1967), in which a motel owner on his own initiative searched a travelling case that the defendant had left behind and discovered several forged checks which he turned over to the police. The evidence was admissible because it was uncovered during a private search.

15. Belliner v. Lund, 438 F. Supp. 47, 52 (N.D.N.Y. 1977).

16. A fourth view is found in State v. Wingerd, 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974). The *Wingerd* court held that the fourth amendment applies to school officials but the exclusionary rule cited in *Mapp v. Ohio* does not. *See* note 4 *supra* and accompanying text.

17. State v. Mora, 307 So. 2d 317, 319 (La. 1975).

18. In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).

19. People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

20. *Id.* at 911, 319 N.Y.S.2d at 733.

21. *See* note 1 *supra*.

by law enforcement officers, or searches designed solely to obtain criminal convictions.[22] Indeed, since the fourteenth amendment has been brought to bear on "state actions," the proscribed "state actions" have been construed to cover any public official's action on behalf of any state or any of its administrative agencies.[23]

A school Board of Education is considered one of a state's administrative agencies. An examination of the educational laws of the various states readily shows that states are inextricably entwined in their public school systems.[24] Each state has compulsory education requirements for children between the ages of seven and sixteen.[25] The state supplies revenue to support public schools and to pay the salaries of the teachers, and therefore may justly claim the right to prescribe the qualifications of the teachers, and to name the conditions of the educational curriculum.[26] State action exists when the wrongdoer's action is clothed with the authority of the state.[27] Therefore, since school officials are regulated by and derive their authority from state law they are acting only under the authority of state laws when they act to enforce a school policy. Such action by the school official can be classified as state action.

In deciding the validity of the search of a high school student's personal possessions by a school teacher, the Louisiana Supreme Court looked to the authority given by the state to the school official.[28] Under the Louisiana Code[29] a school official is charged with the responsibility of implementing the state's policies in the educa-

22. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 753 (1974).

23. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969) (school boards may not prohibit freedom of expression absent evidence of substantial interference with school discipline); Camara v. Municipal Court, 387 U.S. 523 (1967) (invalidity of warrantless searches by city housing inspector).

24. *See, e.g.*, ILL. REV. STAT. ch. 122, §§ 1-1 to 1214 (1975); IND. CODE §§ 20-1-1-2 to -13-30-2 (1976 & Supp. 1979); New York Compensatory Education Provision, N.Y. EDUC. LAW § 3205 (McKinney 1970).

25. Mercer v. State, 450 S.W.2d 715, 720 (Tex. Civ. App. 1970) (dissenting opinion).

26. *Id.*.

27. Monroe v. Pape, 365 U.S. 167 (1961). The Court reaffirms its position that action taken "under color of state law" refers to any power or misuse of power made possible only because the actor is clothed with the authority of state law. The Court explicitly rejected the idea that "state action" should be construed to mean only that power taken in accordance with state law and excluding any offense outside of state law, even though taken with the authority of state law. *Id.* at 172-84.

28. State v. Mora, 307 So. 2d at 319.

29. LA. REV. STAT. ANN. §§ 17:1-:3454 (West 1963 & Supp. 1979).

tional system. By state law, teachers are authorized to hold every pupil to a strict accountability for disorderly conduct while at school. Principals may suspend students for directly violating school policies.[30] The state Board of Education is required to prescribe specific courses of study.[31] The court therefore concluded that school officials are strictly accountable to the state, and insofar as they are discharging their duties by enforcing state policies and regulations, are within the purview of the fourth amendment's prohibitions. Consequently, the court held that the Louisiana student has a constitutional right to be free from warrantless searches and seizures equivalent to that of an adult.

If the fourth amendment applies in full, as held by the Louisiana court, then any search conducted without a warrant is *per se* unconstitutional[32] unless it falls within one of the "specifically established and well delineated exceptions" to the warrant requirement.[33] The Supreme Court has created only a few exceptions in which a government official may search without a warrant. An arresting officer may search a person arrested in order to find hidden weapons.[34] An officer in "hot pursuit" of a fleeing suspect may make

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30. LA. REV. STAT. ANN. § 17:416 (West Supp. 1979).

31. LA. REV. STAT. ANN. § 17:262 (West Supp. 1979).

32. Boyd v. United States, 116 U.S. 616, 641 (1886).

33. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Supreme Court stated in *Coolidge*:

> [T]he most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few well established and well delineated exceptions. The exceptions are "jealously and carefully drawn," and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. "The burden is on those seeking the exemption to show the need for it." In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental Constitutional concepts. In times not altogether unlike our own they won—by legal and Constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important.

Id. at 454, 455 (footnotes omitted).

34. In Chimel v. California, 395 U.S. 752, 762-63 (1969), the Supreme Court held that "[w]hen an arrest is made it is reasonable for the arresting officer to search the person arrested, in order to remove any weapons that the latter might seek to use in order to resist arrest or effect escape." The officer may also look for and seize any

a search of any premises in which the suspect may reasonably be hiding.[35] If an officer reasonably believes that an armed robbery is about to occur he may "stop and frisk" an individual to prevent the robbery.[36] Border searches[37] and searches under authority of military law[38] are also made exceptions to the warrant requirement. In all of these exceptions the Court recognizes the existence of "exigent circumstances" which make it impossible for an officer to obtain a warrant in time to prevent criminal activity.[39]

A student search is not one of the exceptions to the warrant requirement. The same exigent circumstances as detailed above do

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evidence on the arrestee's person in order to prevent its concealment or destruction. The Court allowed this search to be extended to an area "within his immediate control" and construed this area to include the "sphere around his person from within which he might gain possession of a weapon or destructible evidence." The Court strictly limited this area and found no justification for a routine warrantless search of any room other than that in which the arrest occurs. Similiarly, no justification could be found for searching desk drawers and other concealed areas within the room itself. *Id.* at 763.

35. The Supreme Court has held that the fourth amendment does not require police officers to delay in the course of an investigation, if to do so would gravely endanger their lives or the lives of others. This "hot pursuit" exception recognizes that speed is often essential to reduce the likelihood of a criminal doing further damage to society. Under such circumstances a search to discover a fleeing suspect is not invalidated by the lack of a warrant. The permissible scope of a search must be at least as broad as may reasonably be necessary to prevent the danger that the suspect may resist or escape. Warden v. Hayden, 387 U.S. 294, 298-300 (1967).

36. In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court determined that an officer is allowed to stop and frisk a suspect without probable cause. The necessity for preventing an armed robbery outweighs the minimal intrusion in a frisk for weapons. The Court used an "objective reasonable man" standard to determine whether there was reasonable cause to believe the individual searched was armed, and whether the search itself was reasonable under the circumstances.

37. Another exception is found in cases involving border searches. Because of the overriding interest in protecting territorial integrity in the United States, authorizations of border searches were in effect before the ratification of the fourth amendment. *See, e.g.*, Act of July 31, 1789, Ch. 5, 1 Stat. 29, 43. It is generally accepted that a search by a customs official at the time and place of entering the United States need not be supported by probable cause. "Unsupported" or "mere" suspicions alone are sufficient to justify such a search for purposes of Customs Law enforcement. Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

38. Searches conducted in accordance with military law and under the direction of proper military authority may be conducted without probable cause. In United States v. Grisby, 335 F.2d 652, 654 (4th Cir. 1974), the court held that a commanding officer has the unqualified right to enter and search the quarters of military personnel. Likewise, a military picket is authorized to search any automobile entering a military reservation. The court held that these searches, lawful and valid under military law, are reasonable, and thus do not fall under the prohibitions of the fourth amendment.

39. *See* note 33 *supra* and accompanying text.

not apply to the student search. The student is already under the control of the school authorities and may be detained until the warrant is obtained. If the school official is acting as an extension of the state he must operate within the restrictions of the fourth amendment. Since there is no exception to the fourth amendment for student searches, the school official may search students only under the same circumstances that a law enforcement officer may act.[40]

Teachers Are Not State Officials

The Louisiana court's view that a school official is absolutely restricted by the fourth amendment contrasts sharply with the view followed by California and Texas. These courts begin with the premise that a public official is not a state agent.[41] A review of the pertinent cases, however, fails to disclose any logic for this premise. One court rationalized that in any school search the purpose of the investigation is not to aid law enforcement agencies, but rather to maintain discipline in the interest of an orderly school operation and to secure evidence of student misconduct.[42] Because the purposes of

40. State v. Mora, 307 So. 2d 317 (La. 1975).

41. This view that a school official acts outside the authority of government as a private citizen has been highly criticized in *Buss*, note 22 *supra*. The author states:

> The private citizen theory seems to have been extended to a point of ultimate absurdity by the courts in *Mercer v. State* and *In re C.* The *Mercer* court said the searching principal was not acting as an arm of government because he was acting *in loco parentis*. The court's reasoning, in other words, is that because a parent would not exercise governmental power, the principal acting in the parent's place does not either. It is difficult to see whether the court's reasoning is more objectionable because of the overblown view of *in loco parentis* or because of its totally illogical conclusion. The flaw in the reasoning may be too obvious to clarify with exegesis, but the following may prove useful. Under a system of compulsory education, a school authority acquires power over the child directly by reason of law, and solely because that authority is the agent of the governmental branch charged with carrying out the law. It seems unhelpful to call this *in loco parentis*. But it is errant nonsense to characterize this governmentally derived power as *in loco parentis* and then to deny its governmental origins.

Id. at 767.

42. *In re* Donaldson, 269 Cal. App. 2d 509, 511, 75 Cal. Rptr. 220, 222 (1969). The court goes on to add that the fact that evidence of crime is uncovered and prosecutions result from a search by a school official should not make the search and seizure unreasonable. The court appears to be looking at the reasonableness of the search to justify the school official's action. However, if the court were true to its preliminary premise this would not be necessary. If the school official is not a state official it makes no difference how unreasonable the search is; conduct of a person not acting under the authority of a state is not proscribed by the fourth amendment. There are no state standards for search and seizure by a private citizen who is not

the school official are different from those of law enforcement, the school official somehow remains free from state authority. The courts have apparently equated state authority with state law enforcement, and as school officials do not act with the intent to further the aims of law enforcement they act as private citizens under the fourth amendment.

A second rationalization for the holding that a teacher is not a state agent is found in the doctrine of *in loco parentis.* Several jurisdictions hold that a teacher is deemed to stand in the place of the parent in regard to authority over the child.[43] The teacher derives authority from the ancient doctrine of *in loco parentis,*[44] whereby the parent impliedly delegates authority to the teacher. In acting to discipline the student the teacher is merely operating as a parent, and does not come under the prohibitions of the fourth amendment. Although *in loco parentis* has been codified into public law in many states,[45] theoretically any discipline used by the teacher stems from the parent. As the parent is outside the arm of government in the discipline of a child, so too should be the teacher.

This view that *in loco parentis* grants similiar immunities to both parent and teacher is not logically consistent. The analysis breaks down when one contends that a parent, merely by sending a child to school, has transferred all parental rights to school authorities who assume these same rights. There are many parental responsibilities which teachers cannot assume. School officials may not administer medication to a child unless authorized by parent or physician.[46] In some states corporeal punishment will not be ad-

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acting as an agent of the state; therefore a determination of reasonableness is not applicable.

43. Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

44. The doctrine of *in loco parentis* was established at common law and mentioned by Blackstone:

> [The parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, *viz,* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. BLACKSTONE COMMENTARIES 453-54 (1st ed. 1897). For a broad historical analysis of the *in loco parentis* doctrine, *see* Mawdsley, *In Loco Parentis: A Balancing of Interests,* 61 ILL. B.J. 638 (1973).

45. *See, e.g.,* 24 PA. STAT. ANN. tit. 13, § 1317 (Purdon Supp. 1979), which grants teachers in public schools "the same authority as to conduct and behavior over the pupils . . . as the parents . . . may exercise over them," (limited to those powers necessary to the effectuation of the school's purposes).

46. Mercer v. State, 450 S.W.2d at 720.

ministered without express parental consent.[47] A teacher may not force religious or patriotic beliefs upon a child against his wishes.[48] Likewise parents do not have the same responsibilities as the teachers. Parents, while having the right to search their children, also have the right to remain silent as to any incriminating evidence they might find.[49] Teachers have no similiar rights to silence. Therefore, merely because a school official acts *in loco parentis* under both common law and state law, it is not settled that he may act with complete parental authority. A teacher may discipline in a manner sufficient to create a healthy environment for the students, much as a parent may discipline a child to create a healthy home environment. But when a school official searches a child and turns over incriminating evidence to the police, the authority of *in loco parentis* has been extended beyond its natural boundaries[50] and the search becomes antagonistic to the theory itself.[51]

Using the *in loco parentis* doctrine to circumvent the fourth amendment in student searches disregards the doctrine's own limitations. At common law it was explicit that a schoolmaster received authority to restrain and correct a child only to the extent

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47. *Id.*

48. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). The Supreme Court held that school authorities could not make regulations prohibiting students from protesting the war in Vietnam, because as long as the students were not disruptive their conduct was within the Free Speech Clause of the first amendment and the Due Process Clause of the fourteenth amendment.

49. A parent is not considered an accessory to the crime merely by remaining silent. *See* Villareal v. State, 78 Tex. Crim. 368, 182 S.W. 322 (1916), in which a father concealing the fact that his son had killed a person was not charged as an accessory to the crime.

50. Mercer v. State, 450 S.W.2d at 721.

51. Comment, *Search and Seizure—School Officials' Authority to Search Students is Augmented by the In Loco Parentis Doctrine*, 5 FLA. L. REV. 526, 531 (1977) (footnotes omitted):

> Using the *in loco parentis* doctrine as a basis for student searches disregards the history of the doctrine and is in direct conflict with its underlying theory. To stand "in the place of the parent" implies that one is to look after the child's best interest in the same manner as a parent. It is unlikely that most parents would believe it to be in the best interest of the child to search him for drugs to use against him in a criminal trial. Most parents probably do not believe that a criminal conviction or determination of delinquency benefits a child and would rather seek other remedies. Additionally, it cannot be assumed that a parent would voluntarily provide the police with drugs obtained from their children. Actually the converse is true; most parents would probable elect not to turn their children in.

necessary to implement the learning process.[52] The authority to punish for non-educational purposes was not delegated to the teacher but was retained by the parent. While the school official may be acting under a quasi-immunity when functioning within the confines of the *in loco parentis* doctrine, this immunity extends no farther than the doctrine's set limitations. Any conduct beyond the duty to restrain and correct a student for educational purposes will be sanctioned under the teacher's concurrent role as a state official. Therefore, while the doctrine of *in loco parentis* may give school officials a great deal of control over the students, it does not follow that it authorizes student searches which may lead to the discovery of drugs or other contraband and in turn to criminal prosecution. Unless an alternative theory is followed, the school official will again be restricted to the fourth amendment prohibitions in anything other than educational discipline.

Teachers as State Officials but Held to a Lower Standard of Reasonable Suspicion

A third and better view combines both previously mentioned theories on the status of the school official. This view is expressed in the oft-cited New York case, *People v. Jackson*.[53] The court began with the premise that a school official is a state agent who, without special circumstances, is confined to the strict probable cause requirement of the fourth amendment. The *in loco parentis* doctrine, however, is so compelling, in light of public necessity and as a social concept antedating the fourth amendment, that any action, including a search taken thereunder upon a reasonable suspicion, should be accepted as necessary and reasonable.[54]

Because the Constitution forbids only unreasonable searches, the *Jackson* court proposes a balancing test, in light of the extraordinary circumstances of the school environment, to determine what would be a reasonable search. On one hand, it cannot be argued that either students or teachers shed their constitutional rights merely by entering an environment different than society at large.[55] Yet the law is clear that in some situations search and seizure is allowed on

52. *See* note 45 *supra*.

53. People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

54. *Id.* at 914, 319 N.Y.S.2d at 736. Since the fourth amendment forbids only unreasonable searches and seizures, the court proposes a case by case analysis to determine if a particular student search was reasonable under the circumstances.

55. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503. (1969).

less than traditional standards of probable cause, because the interests of government and society outweigh the intrusion.[56] One court engaging in a balancing test to determine the adequacy of cause to search for marijuana on the basis of odor alone redefined probable cause as reasonable cause.[57] The court held that if there is adequate reasonable cause to search, the search will not violate the fourth amendment. Adequacy of cause and reason depends on balancing the needs of law enforcement against the individual's right to be protected against undue invasion of reasonably expected privacy.[58]

This redefinition of "probable cause" to "reasonable cause" is not a subjective definition looking into the officer's good faith, but rather an objective one, measured by a standard determined by the court based on its balancing of all the factors and its appraisal of how a prudent person would view the facts.[59] The balance, then, must be struck between the extent of invasion, the reasonableness of the search in light of the circumstances, and the possible extent of harm if the search is foregone. However, any proposed balancing test would naturally be nebulous. One writer has expressed the fear that a balancing of interests, combining the qualified immunity of school teachers with a minimal standard of reasonableness and an abandonment of the right to suppress evidence obtained under unlawful searches would result in a lack of effective judicial sanctions for violations of students' fourth amendment rights by a school official.[60] If a school official is held to be a state official under fourth amendment prohibitions, and a student is deemed to have the constitutional rights of an adult,[61] the judicial interpretation of the reasonableness of the interests of the student, and the reasonableness of the interests of the school board will inevitably clash.[62]

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56. *See* notes 28-34 *supra* and accompanying text.

57. People v. Hilber, 403 Mich. 312, 269 N.W.2d 159 (1978).

58. *Id.* at 315, 269 N.W.2d at 162-63.

59. *Id.*

60. State v. Young, 234 Ga. 488, ____, 216 S.E.2d 586, 601 (dissenting opinion), *cert. denied*, 423 U.S. 1039 (1975). Justice Gunter in a dissenting opinion expressed a concern that the court in proposing its balancing test failed to balance the proper interests. The majority claimed to be balancing the interests in the maintenance of order and discipline in the public schools against the student's fourth amendment rights. Justice Gunter, however, stated that the actual interests being balanced were the acknowledgment and enforcement of the student's constitutional rights in a criminal prosecution and the right to a fair prosecution and a fair trial against the state's interest in a criminal conviction.

61. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, (1969).

62. State v. Baccino, 282 A.2d 869 (Del. Super. 1971).

The school has been recognized as a unique environment which alters the way the courts will look at the constitutional interests involved.[63] Common experience requires recognition of the fact that when large numbers of teenagers gather together, their inexperience and lack of mature judgment will often create hazards to those in the group.[64] Since children are required by state law to go to school, both the school and the state have the duty to see that the children are protected while in the classroom. Parents who surrender their children to the school environment have a right to expect that certain safeguards will be taken by the school board and the state to insure the child a proper education.

The corresponding duty of the school official is to maintain discipline and to promote learning in the public school. But discipline in the school often requires immediate action, and cannot await the procurement of a search warrant based on probable cause.[65] If the teacher does not take immediate steps to investigate possible crime he may violate his quasi-parental duty toward the child. The *in loco parentis* doctrine gives the teacher the right to take disciplinary action to maintain the educational environment of the school. In acting upon this duty the teacher can be held only to a reasonable good faith test to justify the student search if it is to be at all feasible to maintain order.

The argument can be made that not only do the teachers have a duty to search any child reasonably suspected of drug use, but also that the child impliedly consents to this restriction of his liberty and submits to all reasonable school regulations merely by attending school.[66] This argument fails when viewed in light of mandatory school attendance.[67] It would be an extreme imposition to force one to go to school and once there to give up constitutional privileges otherwise retained if attendance was not mandatory. In

63. The Supreme Court recognized in *Tinker v. Des Moines Independent Community School Dist.*, that the "special characteristics of the school environment" must give rise to a balancing test in which the student's first amendment rights to freedom of expression will often collide with the rules of the school authorities. Tinker v. Des Moines Independent Community School Dist., 393 U.S. at 506-07.

64. State v. Mora, 307 So. 2d at 322.

65. State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977).

66. Several courts have allowed searches of students' lockers on the theory that the students impliedly consent to actions taken by the school officials in an effort to enforce school policy against drug possession. *See, e.g.*, State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969); People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 383 N.Y.S.2d 22, (1967).

67. *See* note 21 *supra.*

fact, the argument has been made that since school attendance is mandatory, the courts should be even more diligent to protect students' rights.[68]

While school officials owe parents and society a duty to maintain discipline and an effective school environment, it is unclear how far that duty extends. Clearly, random searches that are insufficiently justified by the evidence are prohibited.[69] While the need for a mass search within the school environment may be greater than the need for one outside the school,[70] the emotional damage inflicted by a random search is extreme and may have unknown effects on the children.[71]

While searches based on insufficient evidence are not allowed, some courts do not require even enough evidence to establish traditional probable cause. Instead these courts only require enough evidence to establish a reasonable suspicion of criminal activity. Unfortunately, this reasonable suspicion, or reasonable cause standard, has never been specifically delineated with regard to student searches. The cases relying on this reasonable cause standard are based on varying degrees of what is a reasonable ground for a student search. While the court opinions do not clarify the standard of reasonable suspicion, a study of the facts of the individual cases may help to articulate what is considered justifiable cause to search.

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68. State v. McKinnon, 88 Wash. 2d at 84, 558 P.2d at 790. *But see State v. Young*, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975), for an opposite view. The *Young* court emphasized that:

> [I]t is not merely the unruly or criminal student who is involuntarily in school. All the other students are there involuntarily also, and are forced to associate with the criminal few—or perhaps merely the immature or unwise few—closely and daily. The state owes those students a safe and secure environment.

Id. at 492, 216 S.E.2d at 592.

69. Picha v. Wieglos, 410 F. Supp. 1214 (N.D. Ill. 1976). In *Picha* the court determined that an unidentified telephone call did not supply probable, or even reasonable, cause to search students.

70. People v. D., 34 N.Y.2d 483, 488, 315 N.E.2d 466, 471, 358 N.Y.S.2d 403, 408 (1974).

71. In a dissenting opinion, Judge Roselli stated:

> In my exploration of this subject I have found that the commentators, both in the legal profession and in the education profession, are not at all convinced that the denial of constitutional rights to students is beneficial to the educational atmosphere or process, or that the gain in discipline outweighs the loss of personal privacy and dignity. This loss, it must be remembered, is felt by the innocent as well as the guilty.

State v. McKinnon, 88 Wash. 2d at 78, 558 P.2d at 784 (dissenting opinion).

Perhaps the strongest evidence giving rise to a reasonable suspicion is actual observation of a possible crime by a principal or teacher. One court has held that when both the Dean of Boys and an instructor observed students smoking, and recognized the characteristic smell of marijuana, the reasonable suspicion requirement had been satisfied.[72] Any ensuing search was therefore considered valid. Another court, however, extended this idea of a reasonable suspicion even further.[73] An assistant principal had observed furtive actions by one of a group of students, and for that reason searched the student and his two companions. Marijuana was found on one student. The record does not specify whether the student drawing suspicion to the group was the one actually possessing the marijuana, but the court intimated that the search of all three students was reasonable and the evidence need not be excluded.[74]

This court failed to define a furtive act and confused the definition of reasonable suspicion. The issue now becomes how furtive is furtive enough to be reasonably suspicious. Another question raised is whether a reasonable suspicion toward one student may be imputed to his companions. The court failed to answer these questions.

Another case gives rise to further problems.[75] Based on unspecified information, a Coordinator of Discipline sought out a certain student and requested that the student accompany him back to his office. En route the Coordinator noticed a bulge in the student's pocket, and further observed him constantly putting his hand into his pocket. Suddenly the student ran for the door. After a lengthy chase the Coordinator and a police officer captured the student and forced him to surrender drug paraphernalia.[76] The court sustained the student's conviction for the possession of contraband, holding that the student's actions had satisfied the reasonable suspicion test. The decision fails to clarify whether the unspecified information alone would have given the Coordinator reasonable cause to search the student, or whether the search was reasonable only after the suspicious actions on the part of the student.

The previously mentioned decisions were based on a combination of information received by the school official and suspicious ac-

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

73. State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975).

74. *Id.* at 496, 216 S.E.2d at 594.

75. People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

76. *Id.* at 910, 319 N.Y.S.2d at 732.

tions on the part of the student involved. Yet mere information alone has also been considered enough to give a principal a reasonable suspicion of the criminal activity of a student.[77] In one instance the police received a telephone call from an informant who related information about possible distribution of drugs in the school by a specific student. The information included an accurate description of the suspected student's clothing, and even specified the pocket where amphetamines were located. This information was relayed to the high school principal who promptly searched the described student and discovered in the identified pocket several packets of amphetamines.[78] Although the information in this case was received via a police officer, other cases have held that information via a student will also supply reasonable suspicion when the student informant is known and reliable.[79]

These cases show that almost any evidence, however minimal, will supply reasonable suspicion. Few cases have dealt with the reasonableness of a search when no evidence has been found on the student. At least one case allows the conclusion that the courts would handle the problem much differently.[80] In *Picha v. Wieglos*, a phone call led the principal to suspect that three girls had drugs in their possession. He called the police, and when they arrived the girls were strip searched. No drugs were found.[81] The court refused to determine whether the phone call by itself was sufficient to give the principal a reasonable suspicion to search. Instead the court decided that since there was police involvement in the search both police and principal would be held to a strict probable cause standard before a search would be allowed.

Another court has gone so far as to base the minimal standard for student searches upon the teachers' "good faith exercise of their public trust."[82] This standard is lower than the reasonable suspicion

77. State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977).

78. *Id.* at 76, 558 P.2d at 782.

79. M. v. Board of Educ. Ball Chatham, 429 F. Supp. 288 (S.D. Ill. 1977). People v. Singletary, 37 N.Y.2d 310, 333 N.E.2d 369, 372 N.Y.S.2d 68 (1975); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (Crim. Ct. N.Y. 1970).

80. Picha v. Wieglos, 410 F. Supp. 1214 (N.D. Ill. 1976).

81. *Id.* at 1216.

82. State v. Young, 234 Ga. at 495, 216 S.E.2d at 593-94. This decision was highly criticized in Comment, *Student Searches—The Fourth Amendment and the Exclusionary Rule*, 41 MO. L. REV. 626 (1976). The writer stated that a reasonable suspicion standard, rather than the good faith standard should be the minimal standard for student searches. The reasonable suspicion standard adequately serves the state's interest of maintaining order and discipline in the school while at the same time giving the students fourth amendment protection from arbitrary searches by the school of-

standard adopted by a majority of the courts which have held that the school official is a governmental official subject to the fourth amendment.[83] This good faith action by teachers and administrators is subject only to minimal restraints necessary to insure that "students are not whimsically stripped of personal privacy and subjected to petty tyranny."[84] One recent case has found it necessary to set limits on school officials' use of the good faith defense in searching students. In *Doe v. Renfrow*,[85] the court found a nude search of a thirteen-year-old child to be an invasion of that child's constitutional rights, and allowed her to seek damages for this invasion.

A summary of the cases supporting the lower standard of reasonable suspicion shows that what is necessary on the part of the school official is conduct carried out in good faith with at least some evidence supporting the school official's suspicions toward the student. The courts are just beginning to articulate what good faith conduct would fail to meet the lesser standard of reasonable suspicion. It has been argued that good faith is an inadequate standard of reasonableness since good faith looks to the searcher's motive, which may be entirely valid, and yet clearly beyond the bounds of reason.[86]

THE EFFECT OF THE USE OF DOGS ON THE STATUS OF THE SCHOOL OFFICIAL

Courts have differed greatly on the status of the school official under the fourth amendment. In the cases mentioned previously, the focus has been directly on the school official, and his or her authority over the pupil. Serious questions are raised when the school official attempts to extend that authority by obtaining the use of trained dogs to aid in drug detection. The following section will analyze the effect that the use of dogs will have on the legal status of the school official under the fourth amendment. With very few appellate cases directly dealing with dog searches in the public

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ficials. But a good faith standard guarantees no such protections. A school official could possess a good faith belief in the need for a search, when in reality that good faith belief may be based on nothing more than a "hunch," baseless rumors, or irrational suspicions. Once a good faith standard is adopted there is no longer any objective criteria by which the court can measure the reasonableness of the search. *Id.* at 630, 631.

83. Comment, *supra* note 82, at 627.

84. State v. Young, 234 Ga. at 495, 216 S.E.2d at 593.

85. Doe v. Renfrow, No. H 79-233 (N.D. Ind. Aug. 30, 1979), *aff'd in part, rev'd in part*, No. 79-2116 (7th Cir. 1980).

86. *See* note 82 *supra*.

schools, an attempt to analyze the effect of the change in the status of the school official under each of the views outlined above will be largely by analogy.

The Use of the Dogs Under a Strict Probable Cause Standard

The Louisiana courts consider the school official to be a state official held to an absolute standard of probable cause.[87] According to this view, the courts must find one of two things true to sustain the use of dogs in public schools. The use of the dogs may be considered a search, an invasion of the student's "reasonable expectation of privacy."[88] If this is so, then the courts will require a strict showing of probable cause before finding the use of the dogs valid. If the use of dogs does not invade any "reasonable expectation of privacy," then the use of the dogs will not be considered a search. If there is no search, no constitutional determination will need to be made.

In *United States v. Solis*,[89] a federal district court held that the use of trained dogs to detect the presence of marijuana in the interior of a trailer constituted an illegal search in the absence of a warrant supported by probable cause. The defendant had parked the locked trailer at the rear of a gasoline service station. The court held that the defendant had a reasonable expectation that the area behind the gasoline station would be treated as a private place and, therefore, the use of the dogs invaded the defendant's privacy.[90] This reasoning was based on *Katz v. United States*,[91] which held that the physical trespass doctrine previously adhered to in search and seizure cases was no longer controlling.[92] After *Katz*, any violation of an individual's reasonable expectation of privacy would be

87. *See* notes 21-40 *supra* and accompanying text.

88. *See* notes 91-94 *infra* and accompanying text.

89. United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975), *rev'd*, 536 F.2d 880 (9th Cir. 1976).

90. *Id.* at 327.

91. 389 U.S. 347 (1967).

92. Prior to *Katz*, the absence of any physical penetration into the area in question foreclosed further fourth amendment inquiry. Olmstead v. United States, 277 U.S. 438, 457, 464, 466 (1928). The amendment was thought to limit only searches and seizures of tangible property based upon physical trespass. In Silverman v. United States, 365 U.S. 505 (1961), the Court extended the fourth amendment to include the recording of oral statements overheard without "technical trespass." *Id.* at 511. Then in 1967, the Court in *Katz* expressly overruled the "physical trespass" doctrine and emphasized that the fourth amendment protects people and not simply areas. Now electronic monitoring may be considered a search if it intrudes into a person's reasonable expectation of privacy, regardless of the lack of physical trespass.

considered a search and seizure within the meaning of the fourth amendment. The Supreme Court explained that, "[w]hat a person knowingly exposes to the public . . . is not a subject of the Fourth Amendment protection . . . but what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected."[93]

Katz therefore has defined a search as a governmental intrusion into an area in which a person has a reasonable expectation of privacy. In *Solis* the district court found that the defendant had a reasonable expectation of privacy in parking and locking his trailer behind the gasoline service station. The use of dogs to sniff for marijuana was a search without probable cause and hence unconstitutional.

A Court following the reasonable expectation argument in this district court's decision in *Solis* would have to consider the degree of expected privacy that the student has in the classroom. If indeed the student has a justifiable expectation of privacy[94] which the dogs invade, then the use of the dogs will constitute a search. Unless probable cause can be established upon the entire classroom of students, or upon individual students prior to the search, the warrantless use of dogs to search for drugs will therefore be precluded.

The decision in *Solis* was overturned at the circuit level[95] on the ground that the use of the dogs was not an invasion of the defendant's reasonable expectation of privacy, hence not a search. The court instead found that the dogs were merely "monitoring the air in an area open to the public in determining the possible existence of a criminal enterprise nearby."[96] The court emphasized that the dogs alone did not establish the probable cause necessary to search the trailer. The probable cause to search was based partly

93. Katz v. United States, 389 U.S. at 353.

94. Under the *Katz* "reasonable expectation" doctrine, the cases which determine whether governmental conduct constitutes a search and seizure can be divided into two categories: those which utilize an objective emphasis, and those which utilize a subjective emphasis. The objective approach is one in which it is decided or assumed that the aggrieved party had an actual expectation of privacy; the inquiry of the court is then whether that expectation was justifiable. The subjective approach, on the other hand, is one in which the primary inquiry is whether the aggrieved party had an actual, subjective expectation of privacy without considering whether the expectation was justifiable. For further examination into the subjective-objective approach of the *Katz* doctrine see, Note, *Katz and the Fourth Amendment—A Reasonable Expectation of Privacy, or, A Man's Home Is His Fort*, 23 CLEV. ST. L. REV. 63 (1974).

95. United States v. Solis, 536 F.2d 880 (9th Cir. 1976).

96. *Id.* at 882.

upon an informant's statement giving the drug agent a location and description of the trailer supposedly containing marijuana bricks. Also, talcum powder, a substance used to disguise the odor of marijuana, was clearly visible on the outside doors of the trailer. Finally, the dogs alerted to the smell of the marijuana. The three circumstances taken together provided probable cause for the further search of the trailer.

The Court of Appeals for the Tenth Circuit has also determined that the use of a dog to sniff the area outside of a storage locker was not a search under the *Katz* interpretation.[97] The areaway outside the locker was public property which, known to the defendant, was occasionally patrolled by marijuana sniffing dogs at the consent of the landlord. According to the court, the defendant had no justifiable expectation of privacy in the areaway outside of the locker, and thus the use of the dogs to patrol this area was not an invasion of his constitutionally protected rights.[98]

The court held that the ensuing search of the defendant's storage locker was also lawful, as it was made under valid probable cause. Again, as in *Solis*, the probable cause was not based merely on the alert by the dog. Local drug authorities had been keeping the defendant under surveillance as a result of a previous drug arrest. Based on their observations, the authorities brought the dogs to verify their suspicions. The alert by the dog to the smell of marijuana was only one of a series of circumstances affording probable cause to search the locker.

Following these decisions, a student search based entirely upon the alert of a dog would not be allowed. The searching agent in *Solis* had a reasonable foundation on which to particularize his search to the individual trailer. The dogs alone did not establish probable cause. Likewise, in a student search there must also be a reason to single out a particular student as one probably possessing drugs. Student searches are unique because generally there is not enough evidence beforehand to supply strict probable cause to search. The dogs are used not as a reinforcement of a school official's suspicions toward a particular student, but rather as the sole means of supplying probable cause. While the issue of whether probable cause should be supplied solely by an alert of the dog is beyond the scope of this note,[99] the case law to date does not support such a theory.

97. United States v. Venema, 563 F.2d 1003 (10th Cir. 1977).

98. *Id.* at 1006.

99. *See* Lederer & Lederer, *Admissibility of Evidence Found by Marijuana Detection Dogs*, April 1973 ARMY LAWYER 12, 14, for an examination of the question of

Therefore, unless school officials have a strong suspicion that a student has drugs in his possession, the alert by the dog alone is insufficient to supply the strict probable cause requirement.

At least one court was willing to admit that the use of dogs was itself a search.[100] In *State v. Elkins*, a federal agent received an anonymous phone call describing a certain parcel on an airlines carrier allegedly containing marijuana. The agent brought in a trained dog to sniff the parcel. The dog immediately indicated the presence of marijuana in the package. The court stated affirmatively that such use of the dogs constituted a search.[101] The court went on to find that such a search was reasonable under the circumstances because a person transferring a parcel by a common carrier should have no reason to object to having his package sniffed by a trained dog.[102] Any minimal intrusion by the dogs hurts only those persons transporting marijuana. The innocent transferor is not injured, and in fact is not even aware that his package has been searched by a trained dog.

The invasion involved in a student search is not so minimal. The search by the dogs affects the innocent student as well as the one possessing marijuana. A mistake by the dog can force an innocent student to undergo further search and possible humiliation. Following the logic of the *Elkins* court, the use of dogs would be considered a search. Therefore the use of the dogs will only be allowed if the invasion is minimal and outweighed by the state's need for the intrusion.

The preceding cases have dealt with situations in which dogs were used to aid the law enforcement officer in establishing probable cause. Courts holding to the Louisiana view, which considers school officials as having the same status as law enforcement agents,[103] will likewise be held to this strict probable cause standard. If the use of dogs is considered a search the school official must have enough prior information to supply the probable cause requirement with regard to that particular student. If that standard is met, there would be no need for the dogs to further corroborate the official's suspicions, and the official may search the student without the dogs. If there is not probable cause to search the student the

whether an alert by a dog will provide probable cause to search in light of current army law.

100. State v. Elkins, 47 Ohio App. 2d 307, 354 N.E.2d 716 (1976).

101. *Id.* at 310, 354 N.E.2d at 718.

102. *Id.* at 311, 354 N.E.2d at 719.

103. *See* notes 28-40 *supra* and accompanying text.

use of dogs alone will not supply probable cause. The dogs merely reinforce any previous foundations of suspicions already leveled against the student. Without some previous information leading the school official to particularize among the individual students, the students may not be randomly searched by the dogs.

The Effect of the Use of Dogs on the Private Citizen Theory

As previously stated, a search by a private individual is not a search under the restrictions of the fourth amendment.[104] If a school official is considered a private person he is not bound by probable cause requirements when searching a student.[105] The extent to which a school official's private-citizenship may be extended is unclear. The question arises whether a school official may authorize a dog search under the auspices of the *in loco parentis* doctrine without causing the private search to be changed into a governmental search. It appears he can not. The dogs used in the drug detection are almost invariably trained by a law enforcement department such as the local police[106] or the military.[107] As the "alert" of each dog is individual to the dog itself, the dog's trainer must be controlling the dog in order to get an accurate reading of the dog's responses. Thus the search no longer remains one of a school official operating alone within the public school system to maintain discipline; rather, it becomes a joint action with the local law enforcement agencies. What may have been merely a private search thus becomes a search tainted with state action and thus subject to constitutional regulation.[108]

The effect of police involvement in an otherwise private search was analyzed in *Picha v. Wieglos.*[109] In *Picha*, a student suspected of possessing drugs was searched by a school nurse and psychologist. The search was undertaken in connection with local police officers. The court held that it was not necessary to decide the status of the school official under the fourth amendment, since the search

104. *See* notes 10 and 11 *supra* and accompanying text.

105. *Id.*

106. Doe v. Renfrow, No. H 79-233, slip op. at 7, *aff'd in part, rev'd in part*, No. 79-2116, slip op. at 2 (7th Cir. 1980).

107. Lederer & Lederer, *supra* note 99, at 14.

108. *See* Stapleton v. Superior Court, 70 Cal. App. 101, 103-04, 73 Cal. Rptr. 575, 577, 447 P.2d 967, 969 (1969), where the search of petitioner's car was deemed part of a joint operation by police and credit card agents. The court held that the official participation in the planning and implementation of the overall operation was "sufficient without more to taint with state action the subsequent acts of such credit card agents." *Id.*

109. Picha v. Wieglos, 410 F. Supp. 1214 (N.D. Ill. 1976).

was undertaken jointly with law enforcement officers. The court explained that since it is the responsibility of the police to find evidence of crime, when a search is undertaken in connection with police officers the standard of probable cause must be met to justify the search under the fourth amendment.[110] Therefore the court concluded:

> Although the school officials continued to act under the color of their statutory school authority, the matter became at least partly a quest for illegal items. As far as the police are concerned, such an investigation cannot come under the ambit of the state interest that dwells under the banner of *in loco parentis*. Although the school may have an interest in the safety of its charges, either with regard to one student possessing drugs, or with regard to the possibility that the student would transfer the possession of the drugs to another student, all it can do in furtherance of that interest is to locate, and perhaps confiscate, the drugs. . . . Consequently the maintenance of school discipline cannot be here said to temper the application of the Constitution to a search caused by police for evidence of crime.[111]

As the district court noted, school officials cannot operate jointly with law enforcement without having their quasi-immunity under the *in loco parentis* doctrine affected. To allow the school official to operate under the *in loco parentis* concept, and at the same time garner the assistance of the police makes a mockery of the *in loco parentis* theory. Once school officials resort to the use of law enforcement to maintain control of drug possession in the schools, they have stepped outside the bounds of the quasi-parental relationship which previously had given them immunity from constitutional restrictions. A school official who seeks assistance of the law enforcement agencies must do this at the cost of giving up the *in loco parentis* immunity.

The Effect of the Use of Dogs on the Reasonable Cause Standard

The majority of jurisdictions consider the school official to be a state agent, but subject to only a reduced standard of reasonable cause, or reasonable suspicion in searching the students.[112] The ra-

110. *Id.* at 1219.
111. *Id.* at 1220, 1221.
112. *See* notes 53-86 *supra* and accompanying text.

tionale for this reduced standard of reasonable cause is based on an awareness of the unique circumstances of a school environment.[113] A student search is more readily considered reasonable, even though based on a minimal amount of evidence, than would be the search of an adult based on similiar evidence. The student's right to be protected from unreasonable search and seizure, while not overlooked, is balanced with the reasonableness of the search, based on the individual facts of the case. The use of dogs to aid in the student search, however, may upset the balance between the lesser student rights, and the reasonableness of the search. Any such balancing must take into account both the reliability of the dogs to signal the actual presence of drugs, and the effect that the use of dogs will have on the school environment.

In order to adequately determine the reasonableness of the use of dogs in the classroom, an initial inquiry must be made into the dog's reliability and accuracy in alerting to the actual presence of drugs on the individual. The reliability of the dogs used in drug searches is an area unfortunately often overlooked or misunderstood by the courts.[114] The military courts are the only courts to actually address the issue. While army law is not dispositive of or binding precedent on this issue, the military's determination is persuasive authority.

The military courts begin with the premise that for a dog to supply probable cause to search, the dog must be "well trained and well tested."[115] The army requires that the commanding officer who authorizes the search must prior to the search be specifically aware of the dog's reliability. General knowledge that the dog has graduated from a military drug detection course will not be held sufficient reason to accept the dog's reliability without further inquiry.[116]

The reliability of the dog is subject to the interpretation of its handler. Usually when a dog handler quotes a percentage reliability for a dog he is stating the number of "finds" of "planted" marijuana divided by the number of "plants."[117] The problem is that seldom

113. *See* note 63 *supra.*

114. For two opposing views on the reliability of the use of dogs to detect marijuana see, Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORD. L. REV. 973, 984-89 (1976); and Lederer & Lederer, *supra* note 99.

115. United States v. Ponder, 45 C.M.R. 428, 434 (A.F.C.M.R. 1972). *See also*, J. WIGMORE ON EVIDENCE § 177 (3d ed. 1940), on the reliability of bloodhound evidence.

116. Lederer & Lederer, *supra* note 99, at 14.

117. *Id.* at 15.

does the dog handler indicate the number of times that the dog has falsely alerted. The dog will alert to the smell of a drug that has been long since removed. The remaining odor is called a "dead scent." The ability of a dog to tell the difference between an "actual scent" and a "dead scent" is crucial for fourth amendment purposes.[118] The fourth amendment protects privacy; every alert of the dog to a dead scent is an invasion of an innocent person.[119]

Even if the dog is known and proven to be accurate in its alerts, it must still be determined whether the use of the dog is a reasonable invasion of a student's privacy. The army has frequently used dogs to search for drugs in a situation somewhat analogous to the classroom, that of an army barracks. The Supreme Court's decision in *Katz* requires probable cause to search before a person's expectation of privacy may be invaded.[120] A soldier billeted in the barracks may not expect a dog search, but he is well aware that his quarters are for many purposes public and open to members of the command.[121] In one military decision it was suggested that the individual soldier had no expectation of substantial privacy.[122] Therefore no cause is necessary to walk the dogs through the area; any contraband found may be seized.[123]

The same analogy may be drawn to the student's expectation of privacy in the classroom. Indeed, the student may have less of an expectation of privacy than the soldier. A soldier keeps all his possession in his locker in the barracks and is provided no other area of privacy during his military stay. The student, however, keeps only those belongings in his locker needed to get him through the day, and is not, by attending school, forced to forego any other sphere of privacy.

The issue as to what is an unreasonable invasion of an individual's reasonable expectation of privacy remains in both these settings. The military courts at least suggest that in an open barracks, under the supervision and authority of a commanding officer, the use of dogs does not constitute an unreasonable invasion of the

118. At least one case recites an even more drastic mistake. In Doe v. Renfrow No. H 79-233 slip op. at 7, *aff'd in part, rev'd in part*, No. 79-2116 (7th Cir. 1980), a drug detection dog alerted to a student. The student had been playing recently with her pet dog, which was in heat.

119. Lederer & Lederer, *supra* note 99, at 15.

120. *See* notes 91-93 *supra* and accompanying text.

121. Lederer & Lederer, *supra* note 99, at 12.

122. United States v. Sumner, 34 C.M.R. 850 (A.F.B.R. 1964).

123. *Id.*

soldier's privacy. Under the *Katz* interpretation any intrusion into a public area unprotected by a justifiable expectation of privacy is not an unreasonable search *per se.*[124] Likewise, if the courts hold that a student has no justifiable expectation of privacy in the classroom, any search by the dogs will not be an unreasonable search *per se.* Reasonableness will be determined, rather, by an examination of the particular facts of the case.

Airport searches, now a part of every day air travel, provide a second analogy whereby one may determine the reasonableness of a mass search, undertaken without a warrant and without probable cause.[125] The courts have consistently upheld these searches on public policy reasons. The most widely used means of a search is the walk-through magnetometer, a device activated by ferrous metal.[126] Since their initial use, magnetometers have become increasingly sophisticated instruments of search, and are now used at a growing number of airports. Each passenger is required to pass through the magnetometer; if the instrument is activated, the passenger may be subjected to a second and more extensive search.[127]

It is agreed that airport searches do not fit into one of the previously recognized exceptions[128] for dispensing with a search warrant.[129] A consensus of court holdings demonstrates that although airport searches do not fit into one of the previously defined exceptions, they are not considered violative of the fourth amendment unless the search is unreasonable on the facts.[130]

Like the standard of reasonableness in dog searches, this reasonable standard to search in airline search cases is found by balancing the interests of society with the interests of the individual searched. One writer has stated:

> [W]hen the risk is the jeopardy to hundreds of human lives, and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness so long as the search is conducted in good faith for the purposes of

124. Katz v. United States, 389 U.S. at 351.

125. *See, e.g.*, United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Miner, 484 F.2d 1075 (9th Cir. 1973); United States v. Fern, 484 F.2d 666 (7th Cir. 1973); United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973).

126. United States v. Albarado, 495 F.2d 799 n.2 (2d Cir. 1974).

127. United States v. Edwards, 498 F.2d 496, 497 n.3 (2d Cir. 1972).

128. *See* notes 34-38 *supra* and accompanying text.

129. United States v. Edwards, 498 F.2d at 498.

130. *Id.*

> preventing hijacking or like damages and with the reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.[131]

Piracy and hijacking were increasing to drastic proportions at the time the airport searches were first mandated.[132] In comparison with the intensity of the danger involved and the degree of the invasion that an airlines magnetometer search would require, social utility requires an individual search prior to boarding.[133]

The airlines setting can be distinguished from the school setting by the degree of danger involved. The risk to the public is much greater and more immediate in airline search cases. The danger of student drug possession is not to be minimized. Yet the degree of danger of student drug possession is to a large extent a personal danger to the individual student possessing drugs, and not to society at large. The drastic measures taken in airline cases should be used only in an emergency.

One court in explaining the rationale for allowing the use of massive search techniques in the airline cases stated, "What is clear is that the public does have the expectation, or at least under our Constitution the right to expect, that no matter the threat, the search to counter it will be as limited as possible, consistent with meeting the threat."[134] The magnetometer does not annoy, frighten, or humiliate those who pass through it. Even the activation of the alarm is no cause for concern, since such a large number of people activate it in so many different ways, that no social stigma is attached to the activation of a magnetometer.[135]

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131. United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972).

132. Between 1961 and 1968, hijackings of United States aircraft averaged about one per year. In 1968, however, the number rose to 18. In 1969 there were 40 attempted hijackings of United States aircraft, 33 successful. United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973). *See also*, McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORD. L. REV. 293, 294-95 (1972).

133. In 1970, President Richard Nixon announced "A Program to Deal with Airplane Hijacking." In part President Nixon said: "I have directed the Department of Transportation to have American Flag carriers extend the use of surveillance techniques to all gateway airports and other appropriate airports in the United States . . . ." 1970 *Public Papers of the Presidents: Richard Nixon* 742-43 (PUB. PAPERS). As the airport searches became more widespread and other aspects of the anti-hijacking program took effect, the number of successful hijackings dramatically declined to 10 in 1972. United States v. Albarado, 495 F.2d 799 (2d Cir. 1974).

134. United States v. Albarado, 495 F.2d at 806.

135. *Id.*

Conversely, the use of dogs to search students is not such a limited search. Student searches are not ordinary experiences. The stigma cast upon the student may be a deeply humiliating experience. This intrusion is not one of momentary detention, but rather is a major invasion into the student's privacy, and as such should be considered unreasonable.

Moreover, in airline searches, a passenger has the option, although perhaps impractical, of using alternative means of transportation. No one is ever forced to undergo a magnetometer search, but instead voluntarily consents as a requirement for air travel.[136] Anyone carrying illegal equipment onto the plane does so at the risk of activating the magnetometer, and impliedly accepts this risk. The student, however, has no option in school attendance. State law mandates this school attendance.[137] If indiscriminate dog searches are allowed, students may refuse the search only at the risk of expulsion.

Airline searches are deemed reasonable in light of the balancing engaged in by the courts. The courts have weighed the degree of invasion and the alternatives afforded to the passenger, with the danger to society of air piracy. Because aircraft hijacking represents an immediate threat to hundreds of lives, and because the invasion of the passenger's privacy is minimal, the courts permit airport searches in spite of a lack of probable cause.

Student searches involve no such immediate and drastic threat to society. The balancing test for student searches involves a lesser threat to society, and a deeper and more prolonged invasion of fourth amendment rights. It is true that warrantless airport searches, undertaken without probable cause, provide a somewhat analogous setting to student searches. Student searches, however, can be distinguished from the airport searches in light of the disparity between the danger involved, the degree of invasion to the individual, and the lack of alternatives available to the students.

The airport searches represent an exception to the general law of search and seizure. Quite consistently the courts have condemned mass warrantless searches. In a New York case an entire grade school class was individually taken and strip searched in an effort to discover stolen money.[138] The court held that where there

136. United States v. Davis, 482 F.2d 893 (9th Cir. 1973).
137. *See* note 25 *supra*.
138. Belliner v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

were no facts which allowed school officials to particularize with respect to which pupil might have possessed the stolen money, search of the entire class was invalid under the Constitution, even on a reduced standard of reasonable suspicion.[139] The court stated that it is essential to a proper search under the fourth amendment that there must be some reason to single out an individual as giving probable suspicion. For a mass class search to be valid there must be some reasonable suspicion that each student possessed contraband or evidence of a crime.

The danger in the New York case was relatively small as compared with the danger of drug possession. But even where greater dangers are present the court jealously protects a person's right to be free from random and indiscriminate mass searches. In *Lankfelt v. Gelston*,[140] police conducted searches of more than three hundred houses, mostly private dwellings, searching for suspected murderers thought to be hiding in the area. All the searches were based on unverified anonymous tips. No search warrants were issued. In enjoining the police action, the circuit court emphasized that "the parties seeking redress have committed no acts warranting violation of the privacy of their homes, there has never been any suspicion concerning them or their associations. It cannot be contended that an anonymous or unverified source is probable cause for the search of a home."[141]

Thus, the court held that random indiscriminate searches will be condemned in the courts. Furthermore, the court found that there must be more than a minimal amount of evidence allowing the police to particularize their search to a specific home or individual. A search will not be justified when based only on unverified rumors and anonymous tips.

Unverified tips were considered insufficient evidence to support probable cause in *Lankfelt*. Yet this is often all the evidence that is available to the school official who is attempting to control

139. The student search was undertaken as an immediate result of the theft of three dollars from one student. However, the defendant school official stated that they were also aware of prior complaints from class members concerning missing money, lunches, and other items. The defendants alleged that this afforded reasonable cause to search the entire classroom. The court disagreed and held that in view of the slight danger of the conduct involved, the extent of the search, and the age of the students involved, it could not in good conscience say that the search undertaken was reasonable. *Id.* at 51, 54.

140. Lankfelt v. Gelston, 364 F.2d 197 (4th Cir. 1966).

141. *Id.* at 201-02.

drug possession in the school. While one can sympathize with the school official's efforts, the use of dogs to indiscriminately search each student should not be sanctioned by the law.

SUMMARY

Three theories have been advanced concerning the status of school officials under the fourth amendment. Each theory will be affected if dogs are used in the schools to search the students for drugs. One jurisdiction has argued that a school official is a state agent, and will be held to a strict standard of probable cause when searching the students for drugs. In order for the school official to authorize a dog search in such a jurisdiction, the official must first be able to establish probable cause to allow the use of the dog. If probable cause is established before the dog search, however, there is no need for the dogs to further verify the presence of the drug. The official may proceed to search the student without the use of the dogs. Again, the use of dogs to search the entire classroom will be precluded because probable cause must be found before such a search can be authorized, and it is unlikely that probable cause can be established for an entire classroom of students.

Other states hold that school officials are free from the restrictions of the fourth amendment, under a private citizen theory. This private citizen exemption is destroyed, however, when the private school official acts in cooperation with law enforcement officials. Such cooperation between private and state officials will be held joint action for the purposes of the fourth amendment, and the entire search must meet the requirements of probable cause.

Finally, the majority of the courts acknowledge the school official as an arm of the state government. These jurisdictions hold the school official to a reduced standard of reasonable cause. Although acting under the restrictions of the fourth amendment, the school official may nonetheless search the student on less than probable cause if the official has a reasonable suspicion that the student possesses contraband. However, even with this lesser standard the search must be reasonable under the circumstances of the particular case. Reasonableness is determined by a weighing of the various factors involved. When dogs are used to search the students, the reasonableness of the search becomes highly questionable. The dogs are often unable to tell the difference between the actual presence of the drug and merely a lingering scent of the drug on a student's clothing after being near friends who smoked marijuana. Any

mistake will force an innocent student to undergo a more intensive search. In light of the possible emotional harm and social stigma from such a search, and the likelihood of mistake, the use of the dogs should be reserved for only very extreme emergencies.

CONCLUSION

Because student searches do not fit into the exceptions to the warrant requirement, they must be reasonable on their facts if such searches are to be considered constitutional. The two separate settings where random warrantless searches have been held to be reasonable can be readily distinguished. Airport searches are distinguishable because the degree of danger of hijacking presents a graver risk to society than the danger of the individual student's drug possession. The military searches provide a more readily applicable analogy to the student search, because both the soldier and the student have a limited expectation of privacy. However, because of the potential for emotional harm involved in a search of innocent children, what may be a reasonable search in a military barracks is unreasonable in a public classroom.

Therefore, unless the Supreme Court sees the necessity to carve out an exception to the warrant requirement for student searches, a student search based on a dog's alert must be subject to fourth amendment principles. The search must be based on probable cause or must be considered reasonable in light of the facts. It is true that the courts have expressed an occasional willingness to balance the interests of society against the interests of the individual in an effort to determine the reasonableness of the search. If indeed in the interests of society a search is deemed reasonable it will not be prohibited by the fourth amendment. Nonetheless, while society's interest in the prevention of drug abuse is entirely valid, it does not outweigh the individual student's right to be free from unreasonable searches and seizures. Because dog searches alone have not been shown to establish probable cause to search, a search based on a dog's alert is unreasonable. Therefore, unwarranted use of dogs to search students indiscriminately in the public schools must be prohibited in the courts.

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