

St. John's Law Review

Volume 68
Number 4 *Volume 68, Fall 1994, Number 4*

Article 8

April 2012

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Recommended Citation

Dugan, Catherine M. (1994) "New York Court of Appeals Upholds Search of Outer Surface of Public High School Student's Book Bag Based on Less than Reasonable Suspicion," *St. John's Law Review*. Vol. 68 : No. 4 , Article 8.

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CRIMINAL PROCEDURE LAW

New York Court of Appeals upholds search of outer surface of public high school student's book bag based on less than reasonable suspicion

Students, as United States citizens, are guaranteed under the Fourth Amendment¹ protection from unreasonable searches and seizures.² Traditionally, however, courts have limited this Fourth Amendment protection within the school environment.³ New

¹ U.S. CONST. amend. IV provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated"

² See *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (indicating that searches of students by public school officials are governed by Fourth Amendment). The Court in *T.L.O.* determined that students have "legitimate expectations of privacy" in personal property brought to school and that "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items." *Id.* at 338-39. New York courts have long recognized that students enjoy some protection against unreasonable searches and seizures. See, e.g., *People v. Scott D.*, 34 N.Y.2d 483, 485, 315 N.E.2d 466, 467, 358 N.Y.S.2d 403, 405 (1974) ("High school students are protected from unreasonable searches and seizures, even in the school, by employees of the State whether they be police officers or school teachers."); *People v. Jackson*, 65 Misc. 2d 909, 910, 319 N.Y.S.2d 731, 733 (Sup. Ct. App. T. 1st Dep't 1971) (holding that students retain limited Fourth Amendment rights in school setting), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); *People v. Bowers*, 77 Misc. 2d 697, 698, 356 N.Y.S.2d 432, 434 (Sup. Ct. App. T. 2d Dep't 1974) (arguing *Tinker* doctrine that schoolchildren "do not shed their constitutional rights 'at the school house gate'" should apply to Fourth Amendment as well as First Amendment rights) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

³ See, e.g., *Scott D.*, 34 N.Y.2d at 488, 315 N.E.2d at 469, 358 N.Y.S.2d at 408 (requiring less cause for school search than for search conducted outside of school); *People v. Overton*, 20 N.Y.2d 360, 363, 229 N.E.2d 596, 598, 283 N.Y.S.2d 22, 25 (1967) (holding that vice principal had power to consent to search of student's locker due to school's control over locker and its duty to supervise students), *aff'd on reh'g*, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969); see also *In re Ronald B.*, 61 A.D.2d 204, 206-07, 401 N.Y.S.2d 544, 546 (2d Dep't 1978) (upholding frisk of student based upon reasonable suspicion); *Jackson*, 65 Misc. 2d at 914, 319 N.Y.S.2d at 736 (upholding school search based upon reasonable suspicion short of probable cause).

In providing less Fourth Amendment protection within the school setting, earlier New York cases relied primarily on the doctrine of *in loco parentis*, which posits that teachers are not subject to constitutional limitations since they stand in the place of parents. See generally 79 C.J.S. *Schools and School Districts* § 493 (1952) ("A school teacher stands in the place of a parent to pupils, and may exercise such powers of control, restraint, and correction as may be reasonably necessary to enable him to perform his duties as teacher and accomplish the purposes of education."). In *Overton*, the court of appeals reasoned that school authorities have an obligation to maintain safety in schools, and that parents have a right to expect that protective measures

York courts have long recognized that warrantless searches of students are reasonable, even without probable cause,⁴ so long as

will be taken. 20 N.Y.2d at 362, 229 N.E.2d at 597, 283 N.Y.S.2d at 24. The *Jackson* court expressed a similar idea: "[T]he *in loco parentis* doctrine 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 reasonable suspicion should be accepted as necessary and reasonable." 65 Misc. 2d at 913, 319 N.Y.S.2d at 736. Citing *Overton*, the court recognized "the affirmative obligation [of school officials] to investigate any charge that a student is using or possessing narcotics," which "becomes a duty when suspicion arises." *Id.* at 910, 319 N.Y.S.2d at 733 (citation omitted).

Unlike some states, see *T.L.O.*, 469 U.S. at 332 n.2, New York has not found that the doctrine of *in loco parentis* leaves teachers and other school officials totally free from Fourth Amendment constraints, but has consistently recognized limits to the *in loco parentis* doctrine in the context of Fourth Amendment rights. See *supra* note 2; *Bowers*, 77 Misc. 2d at 699-700, 356 N.Y.S.2d at 435 (holding doctrine inapplicable to search of student performed by school security officer who was not considered member of school's professional staff).

In *Scott D.*, the New York Court of Appeals based its determination that students receive less Fourth Amendment protection upon the widespread dangers in schools as well as upon the parental role of teachers. 34 N.Y.2d at 486-88, 315 N.E.2d at 469-70, 358 N.Y.S.2d at 406, 408. The court recognized that "the conditions of security in a school may not be ignored and will modify the rules for the application of the standard of reasonableness for a school search." *Id.* at 488, 315 N.E.2d at 469, 358 N.Y.S.2d at 408. The court also observed, however, that school searches often lead to criminal prosecutions, thus attenuating the similarity between school officials and parents and highlighting the student's need for Fourth Amendment safeguards in the school setting. *Id.* at 488, 315 N.E.2d at 469, 358 N.Y.S.2d at 407-08.

Outside the school environment, students are entitled to the same Fourth Amendment rights as adults. See *Scott D.*, 34 N.Y.2d at 488, 315 N.E.2d at 469, 358 N.Y.S.2d at 408. Ordinarily, courts prefer that searches be performed pursuant to a search warrant. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Even if a search falls within a recognized exception to the warrant requirement, it is usually justified only where probable cause exists. See *T.L.O.*, 469 U.S. at 340 (citations omitted). As the *T.L.O.* court noted, however, "'probable cause' is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . ." *Id.* at 340 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring)).

⁴ See, e.g., *Jackson*, 65 Misc. 2d at 913, 319 N.Y.S.2d at 736 (concluding that "the rigid standard, probable cause, may not be imposed upon a school official if he is expected to act effectively *in loco parentis*"). The court in *Jackson* reasoned that the Fourth Amendment prohibits only *unreasonable* searches and seizures, and that reasonableness depends upon the context in which the search is conducted. *Id.* at 913, 319 N.Y.S.2d at 735. To illustrate the impact of context upon the reasonableness of the search, the court drew an analogy to *Terry*, in which the U.S. Supreme Court reduced the level of cause required for a limited weapons patdown due to the need to ensure safety and the limited intrusion of weapons frisks. *Id.* (citing *Terry*, 392 U.S. at 27). In *Scott D.*, the court of appeals likewise considered the "ultimate issue" to involve the balancing of individual rights against the urgent needs of society. 34 N.Y.2d at 488, 315 N.E.2d at 469, 358 N.Y.S.2d at 408. "Given the special responsibility of school teachers in the control of the school precincts and the grave threat, even lethal threat, of drug abuse among school children, the basis for finding sufficient

there existed sufficient individualized suspicion that evidence of a violation of law or of school rules would be found.⁵ In 1985, the United States Supreme Court in *New Jersey v. T.L.O.*⁶ adopted a similar standard, stating that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."⁷ Thus, a school official need not obtain

cause for a school search will be less than that required outside the school precincts." *Id.*; see also *Ronald B.*, 61 A.D.2d at 206, 401 N.Y.S.2d at 545 (interpreting *Scott D.* to require that school searches be reasonable, although not necessarily based upon probable cause).

⁵ While probable cause clearly is not required, New York courts have struggled to define the level of suspicion necessary to search a student. In *Jackson*, the Appellate Term, First Department, required that a school search "have a basis founded at least upon reasonable grounds for suspecting that something unlawful is being committed, or about to be committed . . ." 65 Misc. 2d at 914, 319 N.Y.S.2d at 736. Prior to *T.L.O.*, however, the court of appeals did not use "reasonable grounds" language to describe the appropriate level of suspicion. For example, in *Scott D.* the court struck down a school search, indicating that the suspicions of the official performing the search lacked a "sufficient basis." 34 N.Y.2d at 490, 315 N.E.2d at 470, 358 N.Y.S.2d at 409. While the court made clear that "random causeless searches" are impermissible, it suggested that the search may have been reasonable if it were based on "more than an equivocal suspicion that [the student] is engaged in dangerous activities." *Id.* at 489, 315 N.E.2d at 470, 358 N.Y.S.2d at 408. Factors to be considered in assessing whether there was sufficient cause to search include the age and history of the student, the prevalence of the suspected infraction at the particular school, and any exigency involved. *Id.* The following year in *People v. Singletary*, 37 N.Y.2d 310, 311, 333 N.E.2d 369, 370, 372 N.Y.S.2d 68, 70 (1975), the court of appeals again refrained from labeling the quantum of suspicion required as "reasonable grounds" or "reasonable suspicion" when it upheld the search of a student based upon "concrete, articulable facts" from a known informant. *Id.*

⁶ 469 U.S. 325 (1985).

⁷ *Id.* at 341. To be reasonable, the search must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (quoting *Terry*, 392 U.S. at 20). The *T.L.O.* Court stated that

[u]nder ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

Id. at 341-42 (footnotes omitted). *T.L.O.* involved the search of a high school student's purse by the school's assistant vice principal, which was conducted after a teacher discovered the student smoking in the restroom in violation of school regulations. *Id.* at 328. When the student denied smoking, the assistant vice principal demanded to see her purse, opened it, and found a package of cigarettes. *Id.* Upon removing the cigarettes, he saw a package of cigarette rolling papers, which indicated possible drug use. *Id.* This evidence triggered a complete search of the purse, which produced marijuana and evidence of drug dealing. *Id.*

The *T.L.O.* Court stated that the scope of the search as performed must be "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." *Id.* at 342 (footnote omitted). The search of the student's purse, which included opening a zippered com-

a search warrant before searching a student at school,⁸ nor is probable cause required.⁹ While the *T.L.O.* Court held that ordinarily a school search will be reasonable when based upon "reasonable grounds" or "reasonable suspicion,"¹⁰ the Court did not rule that this level of justification is always required for a school search to be constitutionally permissible.¹¹ Recently, in *In re*

partment and reading letters found in the purse, was held to be reasonable in scope. *Id.* at 347.

⁸ *Id.* at 340. In holding that a search warrant is not required, the U.S. Supreme Court reasoned that requiring a warrant would unduly burden the ability of teachers to maintain discipline. *Id.*

⁹ *Id.* at 341. The Court also found the probable cause standard too demanding for the school setting. *Id.*

¹⁰ The inconsistent conclusions regarding what constitutes reasonable suspicion based on the same facts reached by the New Jersey courts and U.S. Supreme Court in *T.L.O.*, see 469 U.S. at 344-46, and by the New York Court of Appeals in *In re Gregory M.*, 82 N.Y.2d 588, 591, 627 N.E.2d 500, 501, 606 N.Y.S.2d 579, 580 (1993), indicate that this requirement is somewhat elusive.

¹¹ *T.L.O.*, 469 U.S. at 341-42. Several other issues pertaining to school searches were expressly left open by the *T.L.O.* Court. While the Court fashioned its holding to apply to searches by public school officials, it declined to consider the question of the level of suspicion required when school officials perform searches in connection with or when urged by law enforcement officials. See *id.* at 341 n.7. Compare *People v. Bowers*, 77 Misc. 2d 697, 699-70, 356 N.Y.S.2d 432, 435 (Sup. Ct. App. T. 2d Dep't 1974) (finding that probable cause, rather than less demanding standard, governed legality of search performed by school security officer because officer, although paid by Board of Education, had been appointed by Police Commissioner and remained subject to commissioner's orders and was, therefore, government agent) with *People v. Jackson*, 65 Misc. 2d 909, 910, 319 N.Y.S.2d 731, 733 (Sup. Ct. App. T. 1st Dep't 1971) (upholding off-premises search conducted by coordinator of discipline pursuant to chase initiated at school and based upon "a high degree of suspicion, but short of probable cause," despite follow-up assistance of police officer patrolling school), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

In *T.L.O.*, the U.S. Supreme Court also left unresolved the question of whether the exclusion of evidence is the appropriate remedy for violations of students' Fourth Amendment rights. See 469 U.S. at 333 n.3. In *People v. Scott D.*, the New York Court of Appeals held that the exclusionary rule does apply to searches of students. 34 N.Y.2d 483, 488, 315 N.E.2d 466, 469, 358 N.Y.S.2d 403, 408 (1974). The *T.L.O.* Court also declined to resolve the issue of locker searches, 469 U.S. at 337-38 n.5, but the New York Court of Appeals addressed the issue in *People v. Overton*, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967). See *supra* note 3. The *T.L.O.* Court expressly left open the issue of whether individualized suspicion is always necessary for school searches, although it noted that prior cases have upheld searches without individualized suspicion when the official's discretion is limited and the search implicates minimal privacy interests. 469 U.S. at 342 n.8. In *People v. Dukes*, 151 Misc. 2d 295, 300, 580 N.Y.S.2d 850, 853 (N.Y.C. Crim. Ct. N.Y. County 1992), the court upheld the use of a metal detector at the entrance of a Manhattan public high school as a reasonable administrative search, despite the lack of suspicion concerning particular individuals. The court found the search to be minimally intrusive, due to school guidelines that limited the extent of the search and required that the device be activated twice before a limited patdown for weapons could be performed. *Id.* at 299, 580 N.Y.S.2d at 852.

Gregory M.,¹² the New York Court of Appeals upheld a patdown search of the exterior of a high school student's book bag by a school security officer; the search was initiated on grounds that concededly did not rise to the level of reasonable suspicion.¹³

In *Gregory M.*, a student arrived at his Bronx high school without his identification card and went to the dean's office to obtain a new one.¹⁴ School policy required that he leave his cloth book bag with a school security officer.¹⁵ When the student tossed his bag onto a metal shelf, the contact produced a "metallic 'thud'" which the security officer described as "unusual."¹⁶ Alerted by the sound, the security officer touched the outside of the book bag and detected the shape of a gun.¹⁷ He then called the school's dean, who also felt the form of a gun within the bag.¹⁸ Upon opening the bag, the head of security discovered a .38 Titan Tiger Special located inside.¹⁹

At the subsequent juvenile delinquency proceeding, the Family Court, Bronx County, denied *Gregory M.*'s motion to suppress the gun.²⁰ On appeal, the Appellate Division affirmed the Family Court's ruling, finding that the metallic thud heard by the security officer gave rise to a reasonable suspicion that a gun was located in the student's book bag, thereby justifying the patdown search, or "frisk," of the bag's exterior.²¹

In a six-to-one decision, the Court of Appeals affirmed the holdings of the lower courts.²² After recognizing that searches of public school students are subject to constitutional limitations,²³

When balanced against the strong governmental interest in weapon-free schools, the slight invasion of privacy was reasonable. *Id.* at 300, 580 N.Y.S.2d at 853.

¹² 82 N.Y.2d 588, 627 N.E.2d 500, 606 N.Y.S.2d 579 (1993).

¹³ *Id.* at 591, 627 N.E.2d at 501, 606 N.Y.S.2d at 580.

¹⁴ *Id.*

¹⁵ *Id.* at 590, 627 N.E.2d at 501, 606 N.Y.S.2d at 580.

¹⁶ *Id.* The security officer's action consisted of "[running] his fingers over the outer surface of the bottom of the bag." *Id.*

¹⁷ *Gregory M.*, 82 N.Y.2d at 590, 627 N.E.2d at 501, 606 N.Y.S.2d at 580.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 590-91, 627 N.E.2d at 501, 606 N.Y.S.2d at 580.

²¹ *Id.* at 591, 627 N.E.2d at 501, 606 N.Y.S.2d at 580. The Appellate Division, First Department, reversed the Family Court's determination of juvenile delinquency and remanded the matter for fact-finding on an evidentiary issue unrelated to the touching of *Gregory M.*'s book bag. *Id.*

²² *Gregory M.*, 82 N.Y.2d at 591, 627 N.E.2d at 501, 606 N.Y.S.2d at 580.

²³ *Id.* at 591-92, 627 N.E.2d at 501, 606 N.Y.S.2d at 581; see also *supra* note 3 and accompanying text (describing limitations of students' constitutional rights while on school grounds).

Judge Levine, writing for the majority, applied the balancing of interests analysis employed in *People v. Scott D.*²⁴ and *T.L.O.* to determine whether the search at issue was reasonable despite the absence of reasonable suspicion.²⁵ This balancing entails weighing the student's "legitimate expectations of privacy and personal security"²⁶ against the government's need to maintain order.²⁷ Judge Levine acknowledged that the *T.L.O.* Court required less justification for school searches than for searches outside the school setting and that ordinarily school searches may be performed upon reasonable grounds for suspecting that a violation of law or school rules has been committed.²⁸ The court accepted *T.L.O.*'s reasonable suspicion standard as applicable under the New York Constitution²⁹ searches of students and their belongings when such searches resemble the one performed in *T.L.O.*,³⁰ but distinguished the search of the student's purse in *T.L.O.* from the "investigative touching" of Gregory M.'s book bag.³¹ In the

²⁴ 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974).

²⁵ *Gregory M.*, 82 N.Y.2d at 592-94, 627 N.E.2d at 502-03, 606 N.Y.S.2d at 581-82. The court acknowledged that the "minimally intrusive," "purposeful investigative touching" of the cloth book bag fell "marginally within a search for constitutional purposes." *Id.* at 591, 627 N.E.2d at 501, 606 N.Y.S.2d at 580 (citations omitted). The court then conceded that the sound made when the student tossed his bag, without more, did not create a reasonable suspicion that the bag contained a weapon. *Id.*

²⁶ *Id.* at 592, 627 N.E.2d at 502, 606 N.Y.S.2d at 581. The New York Court of Appeals stated that:

[T]he Supreme Court held that a determination of the appropriate standard of reasonableness to govern a certain class of searches requires a balancing: "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."

Id. (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)).

²⁷ *Id.*

²⁸ *Id.* (citing *T.L.O.*, 469 U.S. at 342).

²⁹ N.Y. CONST. art. II, § 12.

³⁰ *Gregory M.*, 82 N.Y.2d at 592, 627 N.E.2d at 502, 606 N.Y.S.2d at 581.

³¹ *Id.* at 592-93, 627 N.E.2d at 502, 606 N.Y.S.2d at 581. The court stated that "the investigative touching of the outer surface of appellant's book bag falls within a class of searches far less intrusive than those which, under *New Jersey v. T.L.O.*, require application of the reasonable suspicion standard." *Id.* at 592, 627 N.E.2d at 502, 606 N.Y.S.2d at 581. In justifying its use of a standard below reasonable suspicion, the court noted that the *T.L.O.* Court did not mandate that a certain level of individualized suspicion always be required. *Id.* at 593, 627 N.E.2d at 502, 606 N.Y.S.2d at 581-82 (citing *T.L.O.*, 469 U.S. at 342 n.8). Notably, the *Gregory M.* court did not rely on the doctrine of *in loco parentis* in applying a lesser standard of suspicion, but instead alluded to the special needs doctrine. See 82 N.Y.2d at 592, 627 N.E.2d at 503, 606 N.Y.S.2d at 582; see also *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (reasoning that warrant and probable cause requirements should be lifted only when "special needs" render adherence to those standards impracticable). The

court's view, when Gregory M. relinquished his book bag to the security guard as required by school policy, he "had only a minimal expectation of privacy" in the guard's touching the exterior of the bag.³² The court reasoned that Gregory M.'s diminished privacy interests were clearly outweighed by the urgent governmental interest in keeping deadly weapons out of schools, rendering appropriate a standard below that of reasonable suspicion.³³ Thus, the "'unusual' metallic thud" was sufficient to render the investigative touching reasonable and not arbitrary, even though it did not give rise to a reasonable suspicion that the bag contained a firearm.³⁴ The court conditioned its use of a "graduated standard of reasonableness" on the limited nature of the search and the fact that its purpose was to maintain security in the school rather than to investigate criminal activity.³⁵

In a vehement dissent, Judge Titone criticized the majority for providing students less Fourth Amendment protection than the "reasonable suspicion" standard used by the Supreme Court in *T.L.O.*³⁶ According to Judge Titone, the touching of the bag's exterior constituted a "full-blown search" requiring reasonable suspicion even in the school setting under *T.L.O.*³⁷ He reasoned that *T.L.O.* provided no basis for the court to uphold such a search on less than reasonable suspicion³⁸ and found the court's description of the "'investigative touching'" of the bag's exterior as "'far less intrusive' than other types of searches" to be inconsistent with recent court of appeals decisions.³⁹ Judge Titone objected to the

T.L.O. majority had discounted the *in loco parentis* doctrine as inconsistent with modern views and found that school authorities instead derive their power from the state. *Id.* at 336-37.

³² *Gregory M.*, 82 N.Y.2d at 593, 627 N.E.2d at 502, 606 N.Y.S.2d at 581.

³³ *Id.* at 593, 627 N.E.2d at 502-03, 606 N.Y.S.2d at 581-82.

³⁴ *Id.* at 593-94, 627 N.E.2d at 503, 606 N.Y.S.2d at 582. When the guard discerned the shape of a gun, there arose reasonable suspicion to support the subsequent opening of the bag. *Id.* at 594, 627 N.E.2d at 503, 606 N.Y.S.2d at 582.

³⁵ *Id.*

³⁶ *Gregory M.*, 82 N.Y.2d at 596, 627 N.E.2d at 504-05, 606 N.Y.S.2d at 583 (Titone, J., dissenting).

³⁷ *Id.* (Titone, J., dissenting).

³⁸ *Id.* at 596, 627 N.E.2d at 504-05, 606 N.Y.S.2d at 584 (Titone, J., dissenting).

³⁹ *Id.* at 597, 627 N.E.2d at 505, 606 N.Y.S.2d at 584 (Titone, J., dissenting). Judge Titone referred to *People v. Diaz*, 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993), and *In re Marrhonda G.*, 81 N.Y.2d 942, 613 N.E.2d 568, 597 N.Y.S.2d 662 (1993), emphasizing the manual manipulation involved in an investigative touching. *Gregory M.*, 82 N.Y.2d at 597, 627 N.E.2d at 505, 606 N.Y.S.2d at 584 (Titone, J., dissenting). In *Diaz*, the court of appeals declined to extend the plain view doctrine—which provides that finding items located in "plain view" is not a search subject to the

court's classification of the touching as a "minimally intrusive"⁴⁰ type of search that justified a lesser standard of suspicion, arguing that, once particular conduct has been found to constitute a full search, rather than a less intrusive investigation such as the limited weapons patdown at issue in *Terry v. Ohio*,⁴¹ courts have been unwilling to reduce the level of suspicion required based merely on the intrusiveness of a particular search.⁴² Further, the characterization of the touching as a full search rather than a limited patdown depends upon the intrusiveness of the touching, and should not be affected by the fact that the search occurred within the school context.⁴³ Judge Titone noted that the *T.L.O.* Court recognized that students retain privacy interests in the school environment.⁴⁴ In addition, Judge Titone doubted that the prevalence of weapons in schools justified the majority's holding because the court did not tailor the applicability of a lesser standard to crimes involving dangerous weapons, and there are more effective means of curbing the problem, such as metal detectors.⁴⁵ Finally, Judge Titone perceived potential difficulties in applying the

limits of the Fourth Amendment—to the detection of other contraband items during a limited weapons frisk. 81 N.Y.2d at 107, 612 N.E.2d at 299, 595 N.Y.S.2d at 941. The court of appeals in *Marrhonda G.* likewise held the "plain touch" doctrine inapplicable to an officer's inadvertent detection of the form of a gun in a suspected runaway's bag. 81 N.Y.2d at 944-45, 613 N.E.2d at 569, 597 N.Y.S.2d at 663. *But see* *Minnesota v. Dickerson*, 113 S.Ct. 2130, 2136-38 (1993) (accepting plain touch doctrine within bounds marked by *Terry v. Ohio*, 392 U.S. 1 (1968)).

⁴⁰ *Gregory M.*, 82 N.Y.2d at 591, 627 N.E.2d at 501, 606 N.Y.S.2d at 580.

⁴¹ 392 U.S. 1 (1968). In *Terry*, the U.S. Supreme Court upheld a patdown search for weapons based upon reasonable suspicion. *Id.* at 30-31.

⁴² *Gregory M.*, 82 N.Y.2d at 597, 627 N.E.2d at 505, 606 N.Y.S.2d at 584 (Titone, J., dissenting). According to Judge Titone, the majority thereby "blur[red] the all-important distinction between searches and such lesser forms of intrusion as limited *Terry* patdowns." *Id.*

⁴³ *Id.* at 598, 627 N.E.2d at 506, 606 N.Y.S.2d at 585 (Titone, J., dissenting).

⁴⁴ *Id.* at 598-99, 627 N.E.2d at 506, 606 N.Y.S.2d at 585 (Titone, J., dissenting). Judge Titone observed that the school setting does not diminish the invasiveness of the search and reminded the court that students' privacy interests in belongings brought to school have been recognized. *Id.* at 599, 627 N.E.2d at 506, 606 N.Y.S.2d at 585. He also noted that, in this case, it cannot be said that *Gregory M.* waived his right to privacy because he was required to leave his closed book bag with the security officer temporarily in order to obtain identification. *Id.*

⁴⁵ *Id.* at 599-600, 627 N.E.2d at 506-07, 606 N.Y.S.2d at 586 (Titone, J., dissenting). Judge Titone stressed that, despite varying governmental needs, constitutional protections should be viewed as constant. *Id.* at 600, 627 N.E.2d at 507, 606 N.Y.S.2d at 586.

majority's holding, since the court did not indicate the nature or limits of the standard it used.⁴⁶

It is submitted that while the court of appeals in *Gregory M.* reached the correct result in the case before it, the application of a standard lower than reasonable suspicion for initiating a school search should be viewed as the exception, rather than the rule. The *T.L.O.* Court did not expressly mandate that reasonable suspicion be regarded as the absolute minimum basis for a school search.⁴⁷ Rather, in balancing the interests involved, the Court focused on the overall reasonableness of the search under the circumstances.⁴⁸ In light of the factual distinctions between *T.L.O.* and *Gregory M.*, the court of appeals was justified in departing from the reasonable suspicion standard to determine the legality of the investigation of Gregory M.'s bag. While the search at issue in *T.L.O.* involved the opening of a student's purse to look for ciga-

⁴⁶ *Id.* at 601-02, 627 N.E.2d at 507-08, 606 N.Y.S.2d at 587 (Titone, J., dissenting). Judge Titone alluded to the lack of guidance provided by the court, since the distinction between reasonable suspicion and a "thud" which "evidently suggest[ed] to the school security officer the possibility that [the bag] might contain a weapon" is a fine one. *Id.* at 601, 627 N.E.2d at 507, 606 N.Y.S.2d at 587 (Titone, J., dissenting) (quoting the majority opinion, 82 N.Y.2d at 593, 627 N.E.2d at 503, 606 N.Y.S.2d at 582). According to Judge Titone, the majority's description of the level of suspicion justifying the touching of Gregory M.'s bag as "an 'evident suggestion' and "a 'premonition' that is 'less rigorous' than reasonable suspicion" is unlikely to provide any meaningful guidance to school authorities. *Id.* at 601, 627 N.E.2d at 507-08, 606 N.Y.S.2d at 587 (Titone, J., dissenting) (quoting the majority opinion, 82 N.Y.2d at 591, 593, 627 N.E.2d at 501, 503, 606 N.Y.S.2d at 580, 582). Judge Titone also expressed concern that the court's standard might condone arbitrary, causeless searches based merely upon "unusual" behavior. *Id.* at 601-602, 627 N.E.2d at 508, 606 N.Y.S.2d at 587 (Titone, J., dissenting).

⁴⁷ The *T.L.O.* Court stated that a school official's search of a student will be properly instituted upon reasonable grounds "[u]nder ordinary circumstances." *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). It is not clear whether the footnote that follows this sentence, reserving the question of whether individualized suspicion is needed in all types of school searches, *id.* at 342 n.8, conditions the "ordinary circumstances" language such that the *level* of individualized suspicion may not be reduced, or whether it refers to the requirement of suspicion pertaining to a particular individual.

⁴⁸ *Id.* at 341. Notably, the Court began its analysis by quoting the reasonableness standard adopted in *Camara v. Municipal Court*, 387 U.S. 541 (1967), which "requires 'balancing the need to search against the invasion which the search entails.'" *T.L.O.*, 469 U.S. at 337 (quoting *Camara*, 387 U.S. at 536-37). This test was used by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), to determine whether stops and patdowns, which are deemed lesser intrusions than full arrests and searches, *see* 3 WAYNE R. LAFAYE, *SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT* § 9.1(c), at 339-40 (2d ed. 1978), may be justified upon a lesser showing than probable cause. *See Terry*, 392 U.S. at 21.

rettes,⁴⁹ the search in *Gregory M.* involved the significantly lesser invasion of touching the outside of a book bag to determine if it contained a firearm.⁵⁰ Also, it is clear that the governmental interest in maintaining public safety at issue in *Gregory M.* is much more compelling than the suspected infraction involved in *T.L.O.*, tipping the scales in favor of reasonableness. It is submitted that to remain true to *T.L.O.*, however, the court of appeals should have emphasized that reasonable suspicion is the baseline standard of cause required for a school search, and the use of a less demanding standard is the exception, just as probable cause is the norm and reasonable suspicion the exception outside the school setting.⁵¹

The prevalence of weapons in schools is on the rise,⁵² presenting lethal dangers to students, staff, and the community at large. In instances involving deadly weapons, school officials should be accorded the flexibility contemplated by the *T.L.O.* Court.⁵³ As

⁴⁹ *T.L.O.*, 469 U.S. at 328.

⁵⁰ *Gregory M.*, 82 N.Y.2d at 590-91, 627 N.E.2d at 501, 606 N.Y.S.2d at 580.

⁵¹ As a leading commentator has observed, "[t]he balancing test makes more sense if it is viewed not so much as a matter for case-by-case application, but rather as a technique for establishing the quantum of evidence needed for certain distinct kinds of official action." LAFAVE, *supra* note 48, § 9.1(d), at 344. It is submitted that limiting the *Gregory M.* holding to factually similar cases will alleviate Judge Titone's concern that the court would engage in its own balancing in every search case. See *Gregory M.*, 82 N.Y.2d at 599, 627 N.E.2d at 506, 606 N.Y.S.2d at 585-86 (1993) (Titone, J., dissenting) (noting that balance was "carefully and deliberately struck in *T.L.O.* by permitting searches conducted without warrants and on reasonable suspicion rather than probable cause") (citation omitted). See generally LAFAVE, *supra* note 48, § 3.2(a), at 557-66.

⁵² See Maria Newman, *Disciplinary Schools Planned for Students Carrying Weapons*, N.Y. TIMES, Mar. 8, 1995, at A1 (noting increase in school violence in recent years). The New York City's Schools Chancellor is seeking approval from the Board of Education to initiate a program that would impose one-year suspensions upon students who are found carrying guns or other weapons, during which time the students would be required to attend disciplinary schools. *Id.*

⁵³ See *T.L.O.*, 469 U.S. at 343. In addition to its emphasis on the overall reasonableness of the search, the Court defined the reasonable suspicion standard flexibly. The Court stated that reasonable suspicion is not merely an "inchoate and unparticularized suspicion or 'hunch,'" 469 U.S. at 346 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)), but it went on to find that the standard entails "the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people'—including government officials—are entitled to rely," 469 U.S. at 346 (quoting *U.S. v. Cortez*, 449 U.S. 411, 418 (1981)) (alteration in original). The fact that the *T.L.O.* Court did not refer to *Terry's* requirement of "specific and articulable facts," *Terry*, 392 U.S. at 21, as well as the *T.L.O.* Court's description of the lower court's conclusion that reasonable suspicion did not exist as "crabbed," 469 U.S. at 343, may indicate that the Court approved a looser standard for reasonable suspicion in the school context. Furthermore, the *T.L.O.* Court did not require "absolute certainty," 469 U.S. at 346, and indicated that

Judge Titone observed in his dissent, however, the court of appeals in *Gregory M.* did not tailor its holding to accommodate the unique risks of weapons⁵⁴ and provided little guidance to those who will be performing or evaluating school searches.⁵⁵ Perhaps the court's focus on the limited intrusion and scope of the search at issue will help rein in its departure from the reasonable suspicion standard.⁵⁶

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innocent explanations for the acts forming the basis of the school official's suspicions do not preclude the existence of reasonable suspicion, 469 U.S. at 345, 346.

⁵⁴ *Gregory M.*, 82 N.Y.2d at 599-600, 627 N.E.2d at 506-07, 606 N.Y.S.2d at 586 (Titone, J., dissenting). The New York Court of Appeals' recent rejection of the plain touch doctrine in *Diaz* and *Marrhonda G.* may help define these limits, since items of contraband other than weapons discovered in a patdown search similar to the one in *Gregory M.* are likely to be suppressed in light of those cases. See *supra* note 39.

⁵⁵ *Gregory M.*, 82 N.Y.2d at 601, 627 N.E.2d at 507-08, 606 N.Y.S.2d at 587.

⁵⁶ See *Terry v. Ohio*, 392 U.S. 1, 17-18 (1968). The Court suggested that "limitations upon the scope of searches in individual cases" might serve "as a potential mode of regulation." *Id.* at 18 n.15.

