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THE DEVELOPMENT OF SEARCH AND SEIZURE LAW IN PUBLIC SCHOOLS

*Bill O. Heder**

I. INTRODUCTION

One day in the fall of 1994, I turned around and found that my twin boys were suddenly old enough to attend elementary school. Central Elementary, the closest school (and thus the school of choice) was located just four blocks down our street and was staffed mostly with people I knew who were graduates of the local university. In anticipation of our inevitable P.T.A. membership, my wife and I discussed for the first time the type of school environment our children were likely to encounter, and how we felt about it.

Our discussion was perhaps typical of young parents in small-town America. We talked briefly of the quality of the instruction and facilities. With a cynical acceptance of the fact that grade-schoolers were bound to wear out pants, shoes, and the occasional elbow or collar bone, student health and safety were almost non-issues to us. Obviously, we were not aware that elsewhere, in school districts throughout the United States, schools were initiating canine drug search policies in classrooms and halls, and still others were executing random drug testing among high school athletes.

It has been said that we live in a country made of communities where our neighborhood school may have been built in the Kodachrome years of World War II, or where the shiny new school is funded by our increased property taxes. We live close enough to hear the roaring crowds at the local high school football games from our back porch. We wear hats and jackets promoting the band or baseball programs.

It seems counter-intuitive, if not un-American, to react to increased regulation in our local school with home schooling.

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Similarly, there is something un-neighborly about secreting our children away to private school because of book bag checks at the local public school. Having said so, it is hardly deniable that the increased regulation of public schools impinges on a common nerve of parents nation-wide; it seems to constitute a surrender of part of who we are and where we came from.

It is likely that the perceived loss arises from a cumulative estimation of what public education should be and what children need and deserve. We have definite ideas about what growing up in America should be. Perhaps it is the threat to these ideas that most begs the question, "What do we expect from public education, and at what price?" Analysis of the Supreme Court's decisions affecting public schools reveals a special sensitivity to the unique issues of children, regardless of their age. However, that sensitivity is at best only a partial explanation for the decisions that have come from that Court.

A continued search necessarily embraces an innumerable set of factors which directly and indirectly propel the condition and the social contribution of public education in the United States. This paper traces just one critical influence in that equation: the law of search and seizure under the Fourth Amendment.[1] This narrow focus stems from the idea that in the context of public education's goals and limitations, the issue of search and seizure among students may indicate a crippling of public education's posture, and doubts about its future contribution to society.

In addressing the legal issue of search and seizure in public schools, this article provides an accurate perspective from which the reader may better analyze the current state of the applicable law. Substantial discussion will be devoted to providing a historical context for the pivotal court decisions related to this issue. From the perspective gained in this analysis, a set of elemental arguments will be identified consisting of principles recognized and then applied by the Supreme Court in decisions throughout the twentieth century.

These arguments will be presented and analyzed under the recognition that the same principles will determine the future course of search and seizure in public schools. Court holdings

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1. U.S. CONST. amend IV.

will be scrutinized as indicia of our changing societal view of children's individual liberties. Administrative reactions to those decisions will be considered as predicates to future policy. In the end, it is hoped that the reader will feel not only primed but compelled to ask and answer the seminal question: "What do I expect from public education, and at what price?"

II. PRIVACY UNDER THE FOURTH AMENDMENT

As is often the case with beginnings weighted in social consequence, there are a multitude of factors which led to a judicial recognition of students' right to privacy in public school. The constitutional basis for our law dictates that recognition begins with several significant interpretations of the protective language of the Fourth Amendment. The application of that language by case law to various areas of our society makes up the history of students' rights to privacy under search and seizure law.

A. THE PROBLEM OF INTERPRETATION

To state that the Fourth Amendment prohibits "unreasonable searches and seizures" by the government is the truth, but hardly the *whole* truth.[2] For rather than removing uncertainty about privacy rights in citizens, that language begs two immediate questions of interpretation: what is meant by "government" and what is meant by "unreasonable?" In turn, the answers to those queries lead to more questioning, and the analysis of a constitutional search has begun.

The first question of whether a given search is a government act is a revealing query. With this first question comes a realization that there are more searches which do not trigger Fourth Amendment scrutiny than those which do. The everyday example of a father's search of his teenager's room is much more common than police searches, and yet the father's search does not qualify for Fourth Amendment protections. However, in order for police officers or agents to search the boy's room,

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

they must produce a valid and detailed warrant, supported by affidavits showing probable cause. Such a process necessarily and intentionally limits the frequency and scope of government searches.

In critiquing search and seizure issues as applied to the public school environment, one must focus on the school official as a government actor (rather than the police), and must analyze what safeguards are in place to protect individual privacy from his or her search. Focusing on a discrete set of contributing cases is necessary because the majority of decisions dealing with issues in public schools, other than the Fourth Amendment, can be set aside as either distractive to the issue of student privacy or redundant to lesser points.[3]

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3. A sampling of the broad range of decisions relating to student rights in public schools: In *Foley v. Benedict*, 55 S.W.2d 805 (1932), the court held that students were not entitled to a hearing for academic dismissal. That decision would later be supported by the Supreme Court in *Regents* of *University of Michigan v. Ewing*, 474 U.S. 214 (1985), where the Court upheld the dichotomy between academic and disciplinary dismissal as to due process protections. The Seventh Circuit, *Scoville v. Board of Education. of Joliet Twp.*, 425 F.2d 10 (7th Cir. 1970), held that a student underground paper called "Grass High" could not be censored by administration. A much earlier case, *Minersville School District. v. Gobitis*, 310 U.S. 586 (1940) (overruled by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), had supported school administrative restrictions upon students' rights to free speech arguably not nearly as "inappropriate" as the *Scoville* example. Although the school administration, had labeled the student paper "inappropriate" and "indecent", the expelled members of the student staff won the lawsuit. Going the other direction, the Sixth Circuit sided with the school officials in *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). There the school had a long-standing rule against the wearing of buttons, badges, scarves and other means whereby the wearers identify themselves as supporters of a cause or bearing messages unrelated to their education. The court found the button wearing rule appropriate in light of disruptive conduct possibilities. In *Boynton v. Casey*, 543 F. Supp. 995 (D. Maine 1982), students were expelled for the possession of marijuana and the expulsion was upheld by the court which decided that students had no right to something equivalent to a Miranda warning. After the Supreme Court's adamant defense of individual liberties in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), a subsequent decision, *Epperson v. Arkansas*, 393 U.S. 97 (1969), found the Court rejecting a statutory prohibition against teaching Darwinism in schools but then affirming, in the same opinion, the necessity of comprehensive authority in State and school authorities to prescribe and control conduct and curriculum in schools. The Court emphatically upheld the protection of constitutional freedoms in schools in *Shelton v. Tucker*, 364 U.S. 479 (1960), but then issued a decision eighteen years later in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (administrative censorship of school newspaper was permissible), that outraged many in the literary world as a complete demolition of free expression in public schools. *See infra*, note 53.

The fact is, the Supreme Court did not really address student privacy rights in public schools until 1985, after a long series of contradictory decisions from lower courts.[4] These lower court decisions will be summarized merely to indicate the various court approaches to the issue of student Fourth Amendment rights. Their lack of cohesion serves best as an indication of the need for finality from the Supreme Court, which came with the ruling in *New Jersey v. T.L.O.*, in 1985.[5]

A small group of decisions, which will be addressed in greater length, consists of those select cases in which elemental issues of constitutional protections were addressed and defined by the Court in such a way as to provide a basis for the *T.L.O.* decision and its progeny.[6] Unlike the first scattered group, the decisions from this smaller set were not isolated to the area of student's rights. They were cases from various gristmills of law in our society: criminal, civil, residential and industrial. The decisions in those cases refined search and seizure principles, forming precedential steps by which the Court would ultimately bring the Fourth Amendment to the doors of public school.

These cases and the rules flowing from them were employed to create the "special needs" exception—the latest and most broad exception to the warrant requirement of the Fourth Amendment.[7] This line of cases, tracing the development of

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4. *See infra* notes 42 and 43.

5. 469 U.S. 325 (1985).

6. *Id.* at 325 (1985). Significant decisions applied: Elkins v. United States, 364 U.S. 206 (1960) (applying the Fourth Amendment protections to the States via the Fourteenth Amendment); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (necessity of upholding constitutional protections if we are to teach youth the validity of the constitution); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (defining governmental actions as activities by State agents and agencies); Camara v. Municipal Court, 387 U.S. 523 (1967) (balancing test between governmental need and the weight of intrusion); Goss v. Lopez, 419 U.S. 565 (1975) (hasty and effective action needed to maintain discipline necessary in school setting); Terry v. Ohio, 392 U.S. 1 (1967) (even a limited search of a person is an intrusion); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) ("probable cause is not an 'irreducible' requirement of a valid search").

7. After its introduction into Fourth Amendment jurisprudence, the special needs exception expanded. Examples of special needs searches today are numerous. They include searches of prisoners, parolees, and probationers, as well as border searches, immigration stops and searches, airport security checks, administrative and regulatory searches, and military searches. The most recent example is found in the practice of drug testing employees in certain fields. *See* Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602 (1989).

exceptions to the warrant requirement, is of such independent significance that it necessitates separate discussion.

B. DEFINING A GOVERNMENT SEARCH

Considering the list of societal players from parents to nosy neighbors and their pets, there will likely always be unwanted searches taking place for which there is no Fourth Amendment protection. It is not these intrusions which we address or which the courts consider under the Constitution. The only searches of constitutional consequence are those executed with the aid, assistance, or approval of government actors or officials.[8] The Supreme Court gave some direction on what actors and activities constituted a government action in 1960 with *Elkins v. United States*.[9] But it was seven years later in *Katz v. United States* that the Court took an opportunity to measure what government actions were acceptable under the Fourth Amendment.[10]

1. The Katz Case

In 1967, Charles Katz was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute.[11] At trial the Government was permitted, over the defendant's objection, to introduce evidence of his end of the telephone conversations. These conversations were overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the court of appeals rejected the contention that the recordings had been obtained in violation of the Fourth

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8. *See* Elkins v. United States, 364 U.S. 206, 213 (1960).

9. *Id.*

10. 389 U.S. 347 (1967).

11. 18 U.S.C. §1084 provided in pertinent part: "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined . . . or imprisoned not more than two years, or both."

Amendment because there was no physical entrance into the area occupied by the defendant.

The issues presented on appeal to the Supreme Court were: 1) whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening device is in violation of the right to privacy of the user of the booth, and 2) whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to violate the Fourth Amendment.[12]

A. Analysis

In the first words of the opinion, the Court quickly ended the argument over whether a telephone booth was a "constitutionally protected area" by stating that the Fourth Amendment protects people and their interests, not places.[13] Therefore, the telephone booth was not at issue. Perhaps more significant, the Court concluded that what a person knowingly exposes to the public, even in his own home, would not be the subject of Fourth Amendment protection.[14] The counter assertion of that statement is that what a person does not hold out to the public, regardless of where he keeps it private, carries an interest protected by the Fourth Amendment right to privacy. The Court dismissed a Government claim that lack of physical trespass was a threshold requirement of a search or seizure, then moved to the issue of warrants and probable cause for the search.[15]

The officers in *Katz* had exercised great caution and restraint in an effort to insure that the search was not held unreasonable. They had taken care that only Mr. Katz's conversations were recorded or listened to. They had only installed the bug after having probable cause to believe that betting was going on. But the Court was not swayed by preventative caution. In spite of the fact that the government had shown that a magistrate would have granted them a warrant for their search if they had asked, the Court was not willing to allow the government agents themselves to exercise that class of discretion.[16]

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12. *See Katz*, 389 U.S. at 349-50.
13. *See id.* at 351.
14. *See id.*
15. *See id.* at 354, 355.
16. *See id.* at 356, 357.

Ultimately, the Court held that when lacking a prior warrant supported by sworn affidavit proving probable cause, a search was "*per se* unreasonable," and the evidence gathered therefrom could not be used against Mr. Katz.[17] It should be noted that in so finding, the Court recognized several different circumstances in which exceptions to the warrant requirement were already in place.[18] These circumstances included the search incident to a lawful arrest,[19] the exigency exception of hot pursuit of a suspect,[20] and a search with a suspect's consent.[21]

As a result of *Katz*, the formal test for a legal search rested on basic text-driven requirements from the plain language of the Fourth Amendment: 1) was the government involved, 2) did the suspect subjectively expect privacy, 3) was that expectation accepted by society as reasonable, and 4) did the officer have a warrant supported by probable cause and issued by a neutral magistrate? The significance of these stated criteria in the context of public school search and seizure is that by the time the Court finally addressed the Fourth Amendment in a public school setting, these requirements had been substantially removed by a series of cases creating exceptions to the *Katz* holding.[22]

C. *THE QUESTION OF GOVERNMENT ACTORS AND ACTIONS*

Prior to the *Katz* decision, the Court had already identified the first requirement—government action—as any search conducted under the direction or request or permission of the government or its agent.[23] In at least one otherwise unrelated consideration of Fourteenth Amendment requirements in 1943, the

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17. *Id.* at 358, 359.

18. *See id.* at 357.

19. *See* Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, 267 U.S. 132 (1925).

20. *See* Warden Md. Penitentiary v. Hayden, 387 U.S. 294 (1967); McDonald v. United States, 335 U.S. 451 (1948).

21. *See* Zap v. United States, 328 U.S. 624 (1946).

22. *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) ("Just as we have in other cases dispensed with the warrant requirement when 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,' [Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967)], we hold today that school officials need not obtain a warrant before searching a student who is under their authority").

23. *See* Elkins v. United States, 364 U.S. 206, 213 (1960).

Court had defined government actors or agents to include school boards and school administrators.[24] Certainly then, in the context of public school privacy issues, the relationship of the searcher to the individual or property being searched becomes critical to the analysis. The father searching his child's bedroom is not a government actor. However, if he happens to be a school administrator and searches his child's school locker, under the decisions leading to *T.L.O.*, he will have triggered Fourth Amendment scrutiny by his actions.

Part of the principle debate as to administrative duties in public schools is centered on the principle of *in loco parentis* (acting in the parents' place). This idea will be discussed in greater length under the *T.L.O.* decision, however it should be noted for the sake of perspective, if nothing else, that some of the pressure applied in *T.L.O.* was to persuade the Supreme Court to view the searches differently in light of the school setting. This pressure came from the idea that a school administrator acts in the place of parents, arguably changing that critical relational element of the search analysis.

D. EXPECTATIONS OF PRIVACY

For the sake of preliminary discussion, school search and seizure can be assumed to be a state action. The language of the Fourth Amendment provides an order of elimination by which the remaining issues are to be addressed.[25] Once having determined, for example, that the search was a state action, the next issue, again outlined in *Katz*, becomes whether there was *a subjective expectation of privacy* in the item being searched. If not, the scrutiny ends. If there *was* such an expectation, a final test is required*: whether that person's expectation is reasonable.* Again, a negative finding ends the scrutiny. A positive response, by strict constitutional definition, makes the search unreasonable.

The application of this test is clearer in the example of the father and teenager. In that scenario, the father's search of the room failed the threshold requirement of Fourth Amendment analysis in that the was not a state actor or agent in relation to

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24. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
25. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurrence).

the teenager. However, if we were to assume the possibility that the father was a school administrator and had searched the teenager's school locker, under the early case which defined school authorities as State actors, the first criteria is met and the second and third factors come into play.[26] At home, though the child might have an expectation of privacy from parents, society is not willing to recognize that expectation as reasonable.

It is not by coincidence that this issue of "reasonable expectation" becomes a core consideration in any application of search and seizure law in public schools. Does the student have a reasonable expectation of privacy in his or her locker? This kind of question has become integral to court determinations of the nature of school administrative actions. This type of question is reformed and revised and reapplied for each school and each student in the United States. Each new iteration changes the expression and application of search and seizure law in public schools. If one student cannot reasonably expect privacy for his public school locker, then can another student expect to maintain the privacy of her book bag contents? If a book bag, then what about a purse? If a purse, what about a coat pocket? If a coat pocket, then what about a pant pocket? If a pant pocket, then what about underclothing? If underclothing, then what about body fluids?

Such a direct line drawn from lockers to test tubes accelerates the discussion, but can also be distracting. The issue of student privacy does not generate answers by a tangential measure of a search's proximity to an individual student's bare skin. With each case, different circumstances (each paralleling the Fourth Amendment analysis in importance) must be considered. There is no denying that individual circumstances and factors tend to muddy constitutional water and make the analysis—not to mention the application—of the Fourth Amendment much less definitive. For instance, under the *Katz* test, a locker search may be appropriate if supported by a warrant based on probable cause. However, the same search may not have been appropriate for a row of lockers. Such a search would be too generalized and risks intrusion upon students outside the circle

26. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

of suspicion. And yet, as the analysis continues, such a search (suspicionless) for drugs becomes permissible.

Thus, the Fourth Amendment merely constitutes a point of entry for search and seizure analysis in public schools, and does not supply a solid formula for every circumstance. Each case requires the court (or lesser actors) to determine what constitutes a reasonable expectation under the circumstances. It is the demonstrated difficulty and inconsistency of that determination that so complicates the definition of privacy in public schools.

E. ATTEMPTS TO DEFINE "REASONABLE" EXPECTATIONS OF PRIVACY

Due in part to the fact that the wording of the Fourth Amendment merely includes a prohibition against "unreasonable" searches and seizures by the government, the Supreme Court has not supplied a clear definition of what constitutes a *reasonable* search or seizure. The test for subjective and socially acceptable privacy expectations places immense discretionary and interpretive burdens upon the courts. How, for instance, is a court to know with certainty what society deems a reasonable expectation? Similarly, how is the court to accurately interpret each new set of social and personal circumstances attending each new search? Moreover, the answer might be easier to live with than its ramifications. The fact that a given search violates a drug dealer's reasonable expectation of privacy will not assuage the neighborhood fury over a crack house left open for business. Thus, the definition of what is reasonable grows in importance as well as perplexity.

In *United States v. Montoya de Hernandez*,[27] the Court stated that reasonableness "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."[28] From this open-ended definition came the development of the first of several balancing tests regarding search and seizure. Unable to find a bright line definition for an enigmatic word like "reasonableness," this balancing test attempts to ferret out the greater good by sorting all the circum-

27. United States v. Montoya de Hernandez, 473 U.S. 531 (1985).
28. 473 U.S. 531, 537 (1985).

stances surrounding a given search onto the side of either governmental interest or intrusion.[29]

In reality, all this dividing and weighing only creates more questions. After all, the *enhanced* order of consideration entails the following: 1) was the search conducted by a government actor or agent, 2) if so, did the party being searched have a subjective expectation of privacy in the item searched, 3) if so, is that expectation one which society is willing to accept as reasonable, and 4) if so, did the governmental need outweigh the intrusion upon a citizen's privacy? But how is the court to decide the gravity of the governmental interest or predict the ramifications of a single intrusion upon privacy?

The test, like others measuring concepts of social conscience, cries out for a numerical weight or register which offers some exactness. But numerical formulas are not effectively applied to issues of human discretion, and a court, having found no common denominator for individual rights, is perhaps the least likely institution to attempt such an application.[30] Instead, it generally will choose to err on the side of the individual rights, as it did in the case of privacy, creating a presumption that any intrusion is unreasonable where the government or its agent has not proven it to be necessary by sworn affidavit.

In light of that presumption, the government actor is required to obtain a valid search warrant by demonstrating probable cause to a neutral magistrate prior to conducting the search. The purpose of this exercise, as explained by the Supreme Court in *Aguilar v. Texas*, is to insure that the rights of the individual are not lost or forgotten in the harried atmosphere of law enforcement.[31]

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29. *See* Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 619 (1989); Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

30. The appreciable nature of individual human rights seems such that our judicial system has never been willing, as a whole, to assign numbers to the evaluation of constitutional rights, human pain and suffering, life or death. The mere contemplation devalues intangible interests. Thus, flat numerical systems for measuring such damages are strongly discouraged. Tort money damage claims represent the closest relation to such a measurement, but are still a crude mechanism for compensating victims for damage to something considered inalienable. They are only "accurate" when based upon some contractual measure such as insurance terms or anticipated financial costs or losses.

31. 378 U.S. 108 (1964).

In practical effect, the neutral magistrate becomes a gatekeeper, charged with issuing warrants only where there is probable cause to believe that the search will reveal evidence of the commission or contemplation of a crime. Sworn affidavits showing that probability and an explanation of why a warrant is necessary to further important police interests, help create a balancing mechanism to measure the level of intrusion against the governmental interest. A secondary but wholly appreciable contribution of this requirement is to minimize for law enforcement personnel the opportunity to abuse discretion imposed upon them by the Supreme Court's circumstantial definition of a "reasonable" search.[32]

F. EXIGENCY EXCEPTIONS TO THE RULE

The development of a presumption of unreasonableness without a warrant gave rise to a series of cases and decisions in which efforts to protect individual rights by correctly balancing government interests and privacy considerations failed to satisfy the practical needs of administration.[33] In final effect, the balancing test of a reasonable burden relative to government interest need only be applied in cases where the warrant and probable cause requirements have been met, and yet a social ill persists or perhaps thrives. In those cases (a number of which were presented to the courts immediately on the heels of *Katz)*, strict adherence to the *Katz* holding simply meant that criminal activity was benefitted more than law enforcement—to a point that society would not tolerate.

One reality of document-driven law is that a lack of discretion in the field makes for very immobile policing. It is merely a reiteration of the age-old conflict between the risks of discretion and the costs of inefficiency. From the criminal perspective, an immense, text-heavy law in the middle of the road promotes detours. The law of search and seizure after *Katz* was more dependant upon its own wording and predictably less mobile for lack of discretionary application; it was thus more subject to avoidance.[34]

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32. *See* Katz v. United States, 389 U.S. 347, 356-57 (1967).
33. *See infra* notes 38-40.
34. *Id.*

Addressing this conflict between constitutional protection and undesirable results, the courts carved out exceptions to the Fourth Amendment formula requirements.[35] For example, warrantless searches were upheld when exigent circumstances required an immediate search to prevent the destruction or loss of evidence of a crime.[36] This represented a reversal of fortunes for some. The individual interests that had been protected by the warrant and probable cause requirements could now be presumed socially unacceptable if the privacy was too likely to serve a criminal purpose. This exigency exception cut off the analysis at the point of reasonable expectations of privacy. A suspect who ran from the police was deemed to hold no reasonable expectation of privacy even in his own home.[37] The question was never asked whether or not the search had been supported by a valid warrant.

Technically, the test for a valid search did not change; rather, the quality of expectation in privacy changed. Again, the analogy of a parent's search of the teenager's bedroom leaps to mind, expanded somewhat by exception to a sense of social governance. In a paternalistic posture, society says to the miscreant child through the court, "I will respect your rights until you demonstrate to me that you cannot be trusted, then don't expect to be cut any slack!"

In recent years, warrantless searches have been upheld by the Supreme Court for officers in hot pursuit of a suspect,[38] in police stop-and-frisk searches and in border searches.[39] Still more exceptions have been carved out under a premise that failure of an individual to exhibit a certain level of interest in privacy (as demonstrated by a failure to sufficiently secure or hide items) displaces the warranty requirement.[40]

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35. *See* Myron Schreck, *The Fourth Amendment in Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 118-19 (1993).

36. *See* Cupp v. Murphy, 412 U.S. 291 (1973).

37. *See* Warden v. Hayden, 387 U.S. 294 (1967).

38. *See id.* at 298.

39. *See* United States v. Montoya de Hernandez, 473 U.S. 531 (1985); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Ortiz, 422 U.S. 891 (1975); Terry v. Ohio, 392 U.S. 1 (1968); Carroll v. United States, 267 U.S. 132 (1925).

40. *See* Arizona v. Hicks, 480 U.S. 321 (1987); California v. Carney, 471 U.S. 386 (1985); Oliver v. United States, 466 U.S. 170 (1984); United States v. Ross, 456 U.S. 798 (1982); United States v. Mendenhall, 466 U.S. 544 (1980); United States v.

G. *ADMINISTRATIVE EXCEPTIONS TO THE RULE*

The creation of so many exigency exceptions to the strict warrant and probable cause requirements of *Katz* resulted in an increased use by the courts of the balancing test to determine the reasonableness of searches in troublesome industries or public services. Recall for a moment the balancing test already discussed in terms of the weight of intrusion upon privacy compared to the governmental need.[41] That balance test was applied, in part, by defining "reasonable" according to the presence or lack of a valid warrant.[42] In light of so many exigency exceptions to the warrant requirement, reasonableness based on the warrant presence or lack thereof was ineffective. The troublesome cases were becoming less and less exceptional. Thus, the courts devised a new class of searches, such as administrative searches, which, because of their unique settings, carried a presumption of reasonableness without warrants.[43]

2. *The Camara Decision*

Soon the old bones of the warrant and probable cause requirements of *Katz* would be joined by the exigency requirement, dismissed in an increasing number of cases with the recognition that the administration of specific industries and activities required constant, close, and sometimes surprising regulation in order to curb conditions threatening to the public.[44] Although the Supreme Court bantered ideas about for

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Matlock, 415 U.S. 164 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969).

41. *See* Skinner v. Ry Labor Executives' Ass'n., 489 U.S. 602, 619 (1989).

42. *See* Wolf v. Colorado, 338 U.S. 25 (1949); United States v. Katz, 389 U.S. 347, 357 (1967).

43. *See* Camara v. Municipal Court, 387 U.S. 523, 535 (1967) (building inspection for housing code violations); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (government employer's searching employee's desks); *Michigan Dep't. of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints upheld).

44. In Frank v. Maryland, 359 U.S. 360 (1959), the Supreme Court first addressed the constitutionality of administrative searches and found that warrantless administrative searches could be legal. Though the decision was overruled in less than a decade by *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), the factors presented by the Court as grounds for dismissing a warrant requirement would lay the groundwork for future court dismissal of a warrant requirement in "special needs" situations. Those theories were that the inspection touched at most upon the periphery of the important

3. Analysis

The Supreme Court's decision, while riddled with solid references to Fourth Amendment requirements, presented a mixed message. On one hand, the Court said that inspections for the general public health or welfare for fire code violations required a kind of warrant that did not require probable cause to believe that a specific person or residence was in violation of the law.[48] On the other hand, the Court insisted that a warrant must be issued in order to define the scope and authority of the inspection.[49] The Court then hinted that the warrant could be deemed "reasonable" if the legislature statutorily defined the criteria and the scope in light of a known public concern.[50] Rather than saying that a warrant is always required, the Court admited that one is not. Rather than insist that probable cause is always required, the Court stated that circumstances meeting a statutory permission of inspection would satisfy the probable cause requirement.

Perhaps most significant for the development of further exceptions that followed the *Camara* decision, the Court had stated that exceptions for certain industries and activities do exist, and that the elements of a warrant and probable cause can be more or less critical depending upon the situation.[51] Furthermore, the Court set out a reasonableness standard for administrative searches that balanced valid public interests against private intrusions.

In the process of rejecting *Frank*, the *Camara* Court admitted the fact that the traditional probable cause requirement was ill-fitted to the unique circumstances of typical administrative search situations. The Court set out a revised reasonableness standard for these searches that balanced public interests against the intrusion upon private interests. Administrative searches without warrants were justified without a complete showing of probable cause, based on consideration of the following factors: 1) the long history of judicial and public acceptance of administrative need in the area, 2) the public interest demanding that all dangerous conditions be prevented or abated,

48. *See* Camara v. Municipal Court, 387 U.S. at 523 (1967).
49. *See id.* at 532-33.
50. *See id.* at 538.
51. *Id.* at 539.

and 3) the fact that the invasions only involved a limited invasion of privacy.[52] This new set of considerations became increasingly significant as the Court approached search and seizure in public schools.

With new-found regulatory freedom, administrative searches grew in number and type relatively quickly, forming a recognizable appendage to the body of search and seizure law. In the same year, 1967, the Supreme Court applied the *Camara* considerations to justify inspections of buildings not used as residences.[53] Then, in addition to building inspections, the courts across the country would follow the Supreme Court's lead and uphold regulatory searches in closely regulated businesses such as pharmaceutical,[54] firearm,[55] nuclear[56] and mining industries.[57]

III. BRINGING THE FOURTH AMENDMENT TO SCHOOL

Having traced the evolution of Fourth Amendment analysis from the hard rules of the *Katz* decision to the expanding classes of exception, we turn now to the line of cases upon which the points of the majority argument in *New Jersey v. T.L.O.* were based.[58] While the Fourth Amendment cases moved toward a recognition of unique standards for reasonableness to meet unique circumstances, this next line of cases led the Court to a particular setting that demanded another kind of exception. At most, the convergence of the two lines of cases may have been unavoidable. At a minimum, it was fortunate timing. When the Supreme Court addressed the issue of privacy for students in public school, a line of cases was waiting in the wings that said the Court could make exceptions to the warrant and probable cause interpretation of the Fourth Amendment. Seen from the other side, with the increasing recognition of

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52. In the end, the Court admitted that no "ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails" could adequately resolve the question of administrative searches. *Id.* at 536-37.

53. *See* See v. City of Seattle, 387 U.S. 541 (1967).

54. *See* United States v. Pendergast, 436 F. Supp. 931 (W.D. Pa. 1977).

55. *See* United States v. Biswell, 406 U.S. 311 (1972).

56. *See* Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988).

57. *See* Donovan v. Dewey, 452 U.S. 594 (1981).

58. 469 U.S. 325 (1985).

public interests which cried out for a broader exception to the *Katz* rules, the issue of public school privacy came forward to create an extremely sympathetic stage for just such an extension.

A. DEFINING A GOVERNMENT ACTOR

The underlying assumption in the *T.L.O.* argument was that an unreasonable search was prohibited by the Fourth Amendment, as imposed upon the State and its actors by the Fourteenth Amendment.[59] This application was first made by the Court in *Wolf v. Colorado*[60] in 1949 and then reaffirmed in *Elkins v. United States* in 1960.[61] More significantly in the majority's argument, after *Elkins* and *Wolf* became the law on government intrusions upon privacy, the Court noted that the definition of government action had already been expanded to include public school administration in *West Virginia State Bd. of Ed. v. Barnette*.[62] Thus it is with *Barnette* that the discussion of who constitutes a government actor begins.

4. The Barnette Case

An early decision by the Supreme Court in 1940, *Minersville School District v. Gobitis*, assumed a general power in the States to impose certain cultural routines and requirements (such as the flag salute discipline) upon their citizens.[63] Accordingly, the West Virginia Legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and the constitutions of the United States and the State of West Virginia. This was for the stated purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, among other things.

In 1942, following that legislation, the West Virginia State Board of Education adopted a resolution heavily dependant upon language from the *Gobitis* decision and ordered "that the salute to the flag become a 'regular part of the daily program

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59. *See* Elkins v. United States, 364 U.S. 206, 213 (1960).
60. 338 U.S. 25 (1949).
61. 364 U.S. 206 (1960).
62. 319 U.S. 624, 637 (1943).
63. 310 U.S. 586 (1940).

and activities in public schools.'"[64] After some debate within the school communities, the salute required was a straight-armed salute with the child keeping the right hand forward and raised, the palm turned upward, and repeating the Pledge of Allegiance.[65]

Failure to conform to the routine was considered "insubordination" and was dealt with by expulsion from school. Readmission was denied until the student complied. In the meantime, until the child complied, he or she was considered "unlawfully absent," an extended duration of which would allow the state to pursue the parents with a misdemeanor charge, a fine and possible jail term.[66] Some students, primarily those of the Jehovah's Witness faith, refused to comply with the routine as a matter of religious belief, and were expelled and threatened with transfer to juvenile detention facilities.

5. Analysis

In *Barnette,* the Supreme Court reconsidered *Gobitis* in order to decide the extent of religious protection applicable to students as imposed upon the States by the Fourteenth Amendment.[67] In so doing, the Court reached the following conclusion, which was instrumental to later holdings regarding public schools:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary function, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[68]

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64. *Barnette*, 319 U.S. at 624-25.
65. *See id.* at 627.
66. *See id.* at 625.
67. *See id.* at 627.
68. *Id.* at 637.

While the overt intent of the decision focused on religious freedom under the First Amendment, a significant result was the threshold recognition in *T.L.O.* of the critical balance that must be struck between the essential social responsibilities and the liabilities of public school administration.[69] The recognition of this responsibility was then coupled with an argument that Fourth Amendment prohibitions formerly applied exclusively to police searches should logically be extended to all exercise of sovereign authority by virtue of the Court's holding in *Camara v. Municipal Court* in 1967.[70] It is this assumption of duty and authority that forms a base for actions of search and seizure in public schools.

B. UNDERSTANDING PUBLIC SCHOOL

As the case law indicates, it is safe to state that search and seizure, as a cohesive legal concept, did not exist in public schools before the early 1960s and perhaps not to any great extent until *T.L.O.* in 1985.[71] Admittedly, this generalization hinges upon a broad view of the history of public school and a view of a prior day when corporeal punishment and regulation did not yield to students claiming rights to privacy.

While there was a small group of public education cases filed and fought prior to 1960, they dealt for the most part with quality of education, parents' rights of decision, and the compulsory nature of the rapidly expanding public school system.[72] Judicial appeals in the interest of students' rights under the constitution were noticeably absent prior to the 1960s.

It is fair to assume, then, in regard to disciplinary actions in public schools over those early decades, that without the specter of litigation that drives so much of administrative policy today, something like the forced emptying of pockets during a bubble gum inspection from the 1950s could not be considered under the same hot light of constitutional ramification that

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69. New Jersey v. T.L.O., 469 U.S. 325, 334 (1985).

70. 387 U.S. 523 (1967).

71. 469 U.S. 325 (1985).

72. Examples of early education cases are *Meyer v. Nebraska*, 262 U.S. 390 (1923), wherein the parental right to instruct a child in German in a private school was upheld, and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), in which the parental right to educate a child as one chooses was grounded in First and Fourteenth Amendment protection.

would later illuminate a search of purse or pocket in a drug-related search in 1985. Of course there were the occasional class-room shake downs of a suspected cheat, and the memorable grimace of a matronly grammar teacher in sharp spectacles. There were storied interrogation scenes in the vice principal's office (blinds drawn) and then detention hall after school. The essential differences between those actions then and now are found in the line of cases which defines the roles and responsibilities of public school administrators.

C. *AN INCREASING RECOGNITION OF FOURTEENTH AMENDMENT RIGHTS*

Until the late 1940s, none of the Fourteenth Amendment due process provisions were applied to the States by the Supreme Court.[73] In fact, only the Fourth Amendment prohibition against unreasonable searches and seizures and the Sixth Amendment right to a public trial were addressed before 1961.[74] Eventually, the protections of the Fourth, Fifth, Sixth, and Eighth Amendments were held to be binding upon State legislatures and State courts, but it would still take decades of social change and several landmark cases involving students in public schools to bring a student with a Fourth Amendment claim to the Supreme Court.[75]

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73. The Fourth Amendment prohibition against unreasonable searches and seizures, *Wolf v. Colorado*, 338 U.S. 25 (1949), and the exclusionary rule requiring that the result of a violation of this prohibition not be used as evidence against the defendant, *See Mapp v. Ohio*, 367 U.S. 643 (1961). The Fifth Amendment privilege against compulsory self-incrimination, *Malloy v. Hogan*, 378 U.S. 1 (1964). The Fifth Amendment prohibition against double jeopardy, *Benton v. Maryland*, 395 U.S. 784 (1969). The Sixth Amendment right to a speedy trial, *Klopfer v. North Carolina*, 386 U.S. 213 (1967). The Sixth Amendment right to a public trial, *In re Oliver*, 333 U.S. 257 (1948). The Sixth Amendment right to a trial by jury, *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Sixth Amendment Right to confront witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965). The Sixth Amendment right to compulsory process for obtaining witnesses, *Washington v. Texas*, 388 U.S. 14 (1967). The Sixth Amendment right to assistance of counsel in felony cases, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and in misdemeanor cases in which imprisonment is imposed, *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The Eighth Amendment prohibition against cruel and unusual punishment, *Robinson v. California*, 370 U.S. 660 (1962).

74. *See* In re Oliver, 333 U.S. 257 (1948); Wolf v. Colorado, 338 U.S. 25 (1949).

75. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985). A fourteen-year-old high school freshman was accused of smoking in the girls lavatory. When she denied it, cigarettes were found in her purse. The search led to suspicion of drug use, and when continued, revealed marijuana. While there is no question that some students smoked

The Fourth Amendment history, leading to the development of administrative searches, exigency exceptions, etc. is vital to an understanding of *New Jersey v. T.L.O.*[76] in 1985. However, contemporary to the line of cases leading to administrative searches and then to the "special needs exception,"[77] there was a group of cases dealing with constitutional protections in schools, which also influenced the Supreme Court's decision in *T.L.O.*[78] This parallel line of cases includes early decisions such as *Meyer v. Nebraska.*[79] There, the Supreme Court held that State laws could not be passed under the Fourteenth Amendment protections which interfere with the rights of parents to have their children learn a foreign language.

Scattered Decisions

Not all of the decisions concerning students were as favorable as *Meyer* or *Barnette,* which followed later. Nor did they follow a predictable path toward greater constitutional protection for students. State and federal courts considering the question of Fourth Amendment protections in schools struggled to

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in school bathrooms, even in the1940s and 1950s, *T.L.O.* was the first case in which the accompanying search for cigarettes was contested to the Supreme Court. The presence of marijuana, and the attendant charges were undoubtedly critical factors in the contest.

76. *Id.*

77. "Special needs exception" was created in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Recognizing the exceptional circumstances, beyond normal need for law enforcement, and making the warrant and probable cause requirements impracticable, the Court ultimately held that public school officials do not need to obtain a warrant in order to search students.

78. Justice White drafted the opinion, with Justices O'Connor, Blackman, and Powell concurring; with partial concurrence and partial dissent by Justices Brennan and Marshall. The significant cases of support were, in order of reference. Elkins v. United States, 364 U.S. 206 (1960) (applying the Fourth Amendment protections to the States via the Fourteenth Amendment), West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) (necessity of upholding constitutional protections if we are to teach youth the validity of the Constitution), Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (defining governmental actions as activities by State agents and agencies), Camara v. Municipal Court, 387 U.S. 523 (1967) (balancing test between governmental need and the weight of intrusion), Goss v. Lopez, 419 U.S. 565 (1975) (hasty and effective action needed to maintain discipline necessary in school setting), Terry v. Ohio, 392 U.S. 1 (1967) (even a limited search of a person is an intrusion), Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (probable cause is not an "irreducible" requirement of a valid search).

79. 262 U.S. 390 (1923).

accommodate the interests protected by the Fourth Amendment and the interest of the States in providing a safe environment for the educational purposes of public schools. Some courts resolved the tension between these interests by weighing one greater than the other. In a number of cases, courts held that school officials conducting in-school searches of students were private parties acting *in loco parentis* and were, therefore, not subject to the constraints of the Fourth Amendment.[80]

Other courts held or suggested that the probable cause standard was applicable at least where the police were involved in the search or where it was highly intrusive.[81] Many other courts seemed to reach a middle ground, where the Fourth Amendment was applied to searches conducted by school authorities, but the special needs of the school environment required assessment of the legality of those searches against a standard less exacting than the normal probable cause standard. Those courts, for the most part, upheld warrantless searches, provided they were supported by a reasonable suspicion that the search would uncover evidence of an infraction of school disciplinary rules.[82]

The decisions formed a broad range of outcomes. Although one could predict an eventual Supreme Court confrontation with student privacy,[83] it would be difficult to guess which way the legal wind would be blowing when it finally happened. The early development of search and seizure law in the public school resembled the clumsy, head-long surge of the adolescence upon which it so often intruded. There were bold bursts and then misgivings in later decisions—admitting the unique-

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80. *See* D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982); In re Thomas G., 90 Cal. Rptr. 361 (1970); In re Donaldson, 75 Cal. Rptr. 220 (1969); R.C.M. v. State, 660 S.W.2d 552 (Tex. App. 1983); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

81. M. v. Board of Ed. Ball-Chatham Community Unit Sch. Dist. No. 5, 429 F. Supp. 288, (SD Ill. 1977); Picha v. Wielgos, 410 F. Supp. 1214, (N.D. Ill. 1976); State v. Young, 216 S.E.2d 586, (1975); M.M. v. Anker, 607 F.2d 588 (1979).

82. *See* Tarter v. Raybuck, 742 F.2d 977 (CA6 1984); Bilbrey v. Brown, 738 F.2d 1462 (CA9 1984); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (CA5 1982); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); In re W., 105 Cal. Rptr. 775 (1973); State v. Baccino, 282 A.2d 869 (Del. Super. 1971); State v. D.T.W., 425 So.2d 1383 (Fla. App. 1983); People v. Ward, 233 N.W.2d 180 (1975); Doe v. State, 540 P.2d 827 (N.M. App. 1975); State v. McKinnon, 558 P.2d 781 (1977); In re L.L., 280 N.W.2d 343 (Wis. App. 1979).

83. New Jersey v. T.L.O., 469 U.S. 325 (1985).

ness of the public school circumstance.[84] Supreme Court decisions seemed constantly pushed and then reigned in by an ever-changing social sense of occasion.[85]

D. CONSTITUTIONAL RIGHTS IN STUDENTS

It is one thing to state that students, being citizens of the United States, are entitled to protections under the Constitution, and even that point has been debated.[86] It has proven a completely different battle to define the scope of those rights. One of the early decisions addressing what rights a student has was *Tinker v. Des Moines Independent Community School District* in 1969.[87]

6. The Tinker Decision

On a December evening in the mid-western winter of 1965, at least five Des Moines public school students, including John Tinker, fifteen, Christopher Eckhardt, sixteen, and John's little sister, Mary Beth Tinker, thirteen, (enrolled in junior high) attended a meeting in the Eckhardt home, in which passionate views about hostilities in Vietnam were vented and discussed between the adults and youth present. As the meeting concluded, the participants determined to make a public showing of their support for a truce in Vietnam by wearing black armbands throughout the holiday season. With increased zeal they resolved to fast on December 16 and New Year's Eve.

In the days following the meeting, some principals from Des Moines area schools got wind of the planned activity. On December 14th, they met, drafted and adopted a policy to deal with the demonstrators. Any student wearing an armband to school

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84. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), and the cases leading to it; Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist., 682 F.2d 858 (9th Cir. 1982); Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1982); Trachtman v. Anker, 563 F.2d 512 (2nd Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).

85. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). The Supreme Court almost completely reverses prior arguments in *Tinker* which promised liberal protection to students under the Fourteenth Amendment. Citing the sensitivity of school children and the unique responsibility of the school administrator, many were shocked by the "step backward" toward censorship in *Hazelwood*. *See, e.g.*, Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269 (October 1991).

86. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

87. 393 U.S. 503 (1969).

would be asked to remove it. If the student failed to comply, he or she would be suspended until they returned without the arm band.

Fully aware of this new policy, on December 16, Mary Beth Tinker and Christopher Eckhardt wore black armbands to their schools. John Tinker wore his armband the next day, as did two other students who did not become parties to the Tinker suit. All refused to remove the armbands when asked, and all were suspended as a result. None of the three named students returned to school until after the appointed end of the protest, New Year's Eve. Shortly thereafter, a suit was filed against the Des Moines Independent School District on behalf of the students by their fathers, claiming a violation of the students' First Amendment Rights, specifically the right to free speech.

It is worth noting that by 1969, a century of civil exertion had served to raise the public perception of individual liberties to the point that even demonstrating students who would have been whipped, expelled, and even publicly humiliated in the early days of public education could now be granted Supreme Court protection.[88]

7. Analysis

In its decision, the Supreme Court held that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[89] In support of that statement, the Court relied on *Barnette* citation noted above.[90] But almost immediately after that statement of freedom, the Court cited earlier decisions in which it recognized school officials' need to maintain order and control conduct.[91] The Court recognized the critical balance it was being asked to find between a student's right to exercise a constitutional right and the school's interest in maintaining order and discipline.[92]

The Court next initiated a test which would come into play in later decisions regarding school administrative actions—the reasonableness of an action. In order for a given action by

88. *See id.* at 506.
89. *See Tinker*, 393 U.S. at 505.
90. *See supra*, note 68.
91. *See Tinker*, 393 U.S. at 505.
92. *See id.* at 505-6.

school administration to be found reasonable, there must be proof that the action was caused by some actual threat of material and substantial interference with school functions and purpose.[93] A mere desire to avoid discomfort or an "undifferentiated fear" of disturbance would not qualify under the Court's test.[94] The Court went on to say,

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[95]

This declaration of students' rights would influence Supreme Court decisions in the years following *Tinker*, to the extent of becoming something of a presumption. By 1985, no argument from either side of the decision in *T.L.O.* felt it necessary to debate the question of whether students deserved constitutional protection.[96]

8. The Goss Decision

Equally influential, however, was the holding in a 1975 Supreme Court decision, *Goss v. Lopez*.[97] *Goss* involved a conflict between an Ohio state law providing for free education for all children between the ages of six and twenty-one and a school administrator's ability to expel students for breaches of school rules.

A group of nine students, (all minorities) from a public high school in Columbus, Ohio were suspended for their involvement in wide-spread student unrest in the school district during February and March of 1971. State law required that the students be given a hearing on their suspension within ten days, but none of the nine students were given such a hearing. When the state court ordered that the students be reinstated and that

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93. *See id.* at 507.
94. *See id.*
95. *Id.* at 511.
96. New Jersey v. T.L.O., 469 U.S. 325 (1985).
97. 419 U.S. 565 (1975).

their records be expunged of any reference to the suspension, the State appealed.[98]

9. Analysis

Although the question presented to the Supreme Court was one of due process, the Court also made a clear statement as to the very real need in public school administration for freedom to act quickly in disciplinary actions. That recognized need would become instrumental in the *T.L.O.* decision as the majority gathered support for an argument that a strict search and seizure requirement of a warrant supported by affidavits was just not practicable in a public school setting.[99] Ultimately, the Court held that a warrant was not required of school officials for a search of a student.[100]

With support from its decision in *Goss* for the proposition that a warrant requirement was "unsuited to the school environment,"[101] all that remained was to address the issue of probable cause. On this point the Court turned to another prior decision in the *Almeida-Sanchez* case wherein it had held that the probable cause requirement was not always necessary to a reasonable search.[102]

The exact language from the *Almeida-Sanchez* decision was, "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search," and, "in certain limited circumstances neither is required."[103]

As has been stated, *New Jersey v. T.L.O.*[104] was not only the culminating point for two distinct groups of cases, but it represented the Supreme Court's first encounter with the issue of Fourth Amendment protection for students in public schools. In its holding, the Court created the latest and perhaps the broadest exception to the *Katz* warrant and probable cause requirements—what has come to be known as the "special needs" exception.

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98. *See Goss*, 419 U.S. at 568.
99. *See id.* at 580.
100. *See T.L.O.*, 469 U.S. at 340.
101. *Id.*
102. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).
103. *Id.* at 277.
104. 469 U.S. at 325 (1985).

E. NEW JERSEY V. T.L.O.

In March of 1980, a teacher at Piscataway High School in New Jersey discovered two girls smoking in the lavatory. One of the two girls was the defendant, T.L.O., who was only fourteen at the time and a freshman at the school. Because smoking in the lavatory was a violation of school rules, the teacher took the girls to the Principal's Office where they met the Assistant Vice Principal Choplick.[105]

In response to Mr. Choplick's questions, T.L.O.'s companion admitted that she had violated the rule. When asked, however, T.L.O. denied that she had been smoking in the lavatory and said that she didn't smoke at all. Mr. Choplick asked T.L.O. to come into his office where he demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed and presented to T.L.O., accusing her of lying to him.[106]

In reaching for the cigarettes, Mr. Choplick had seen, in the purse, a packet of rolling papers for cigarettes. From his experience, possession of rolling papers by high school students meant involvement with marijuana. Suspecting that he would find more evidence of drug use in the purse, Mr. Choplick looked closely in the purse and found a small amount of marijuana, a pipe, some empty plastic bags, and an unusually large roll of one-dollar bills. Also in the purse was an index card that appeared to be a list of student customers who owed T.L.O. money and two letters which implicated T.L.O. in dealing marijuana.

After Mr. Choplick notified police and T.L.O.'s mother, T.L.O. went with her mother to police headquarters and confessed to selling marijuana in the high school. On the basis of that confession and the evidence found by Mr. Choplick, delinquency charges were filed against T.L.O. In court, T.L.O. contended that her confession and the evidence found by Mr. Choplick were tainted by his illegal search of her purse. The court denied her motion to suppress the evidence and she was held to be a delinquent and put on probation for one year. On appeal to State Supreme Court held the search was in violation

105. *See id.* at 328.
106. *See id.*

of constitutional rights under U.S. Supreme Court decisions, and the evidence was ruled inadmissible.[107]

10. Student Expectations of Privacy

The Court first held, on the basis of *Elkins*[108] and *Barnette*,[109] that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to searches conducted by public school officials. Next, the argument turned to the student's expectation of privacy. Though never citing directly to the *Tinker*[110] decision, the Court nevertheless relied heavily on the *Tinker* reasoning that because students don't give up their constitutional rights when they enter the school, they should not be reasoned to have waived privacy rights as to the contents of their bags, pockets, and purses either.[111]

11. Special Needs of the School Environment

Having established students' rights and reasonable expectations of privacy, the Court next faced the task of explaining why those two considerations were not enough to find the search unreasonable and suppress the evidence. This is that critical juncture at which the line of cases showing the evolution of exceptions to the *Katz* warrant and probable cause requirements comes to bare. Thus far, the case law presented has been for the purpose of showing that students have rights and that the administrators are state actors and are bound by the Fourth Amendment.

Having already shown in a plethora of search and seizure cases that exceptional circumstances required exceptions to the hard and fast requirements of traditional Fourth Amendment analysis, the first point of attack for the Supreme Court with

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107. *See id.* at 329-30.

108. Elkins v. United States, 364 U.S. 206, 213 (1960) ("the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers").

109. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Board of Education not excepted").

110. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

111. *See T.L.O.*, 469 U.S. at 339.

regard to the reasonableness of a school search was to show the unique disciplinary needs in the public school environment. Citing the results of a congressional study on school safety[112] and its own statement from *Goss*[113] in 1975, the Court argued that school safety and discipline required some "easing of the restrictions to which searches by public authorities are ordinarily subject."[114] The opinion continued, "[t]he warrant requirement . . . is unsuited to the school environment . . .[and] would unduly interfere with the maintenance of the swift and informal disciplinary procedure needed in the schools."[115]

12. The Warrant and Probable Cause Requirements

Next, the majority addressed the probable cause requirement. Since some of the Court's earlier holdings on exigency exceptions had stated that either a warrant or probable cause could be set aside under specific circumstances and still not make a search inherently unreasonable, both could be set aside, if need be, and other checks on officer's discretion would suffice.[116]

The Court's answer was to create a test to fit differing circumstances, setting aside the requirement for a warrant or probable cause. That test asks: 1) whether the action was justified at its inception, and 2) whether the search as conducted was reasonably related in scope to the circumstances which justified the interference in the first place.[117] As a guide, the Court indicated that a search of a student by a school official would normally be justified in 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."[118]

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112. *See id.*; U.S. Dept. of Health, Education, and Welfare, *Violent Schools—Safe Schools: The Safe School Study Report to the Congress*, 1 NIE (1978) ("[I]n recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems").

113. Goss v. Lopez, 419 U.S. 565, 580 (1975) ("[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action").

114. *T.L.O.*, 469 U.S. at 340.

115. *Id.*

116. *See id.* at 340-41.

117. *See id.*

118. *Id.* at 341-42.

13. In Loco Parentis

It should also be noted that the Court was troubled by the State assertion that school administrators were acting *in loco parentis*, or in the role of parents, and thus should not be forced to justify their actions in the *T.L.O.* search under Fourth Amendment analysis.[119] The Court noted that it had recognized that theory of delegation in the past, but insisted that it did not intend to remove from school administrators any liability for their actions as representatives of the State.[120] Thus, in the end, the Court found the possibility of liability based on the dual role of school administrators. The laxness of the test created in *T.L.O.* for a reasonable search under the special needs exception seemed to account for some appreciation of the theory of *in loco parentis*. No longer would an administrator be required to obtain a warrant or show probable cause. Instead, immediate action in response to a perceived problem with the person's charge was justified for many of the same reasons we use to excuse the father's search of his son's room.

The special needs exception was the latest and broadest exception permitting a court to engage in a balancing test rather than adhere to the Fourth Amendment's textual requirements where the government can articulate a special need to do so. In this key decision, the Supreme Court not only demonstrated the evolution of its concept of constitutional requirements in a search, but created a type of search that perhaps no one could have predicted twenty years earlier. From its former insistence that a warrant and probable cause be present, the Court had moved to the other extreme, saying that in some situations neither a warrant or probable cause was essential to a reasonable search.[121]

This result may be framed as a statement of changing times. Such an explanation is acceptable to a limited extent. As a whole, we get accustomed to change, and we adjust to it. But a more complete and satisfying explanation is found in the cases the majority cited and the precedents they followed. Thus, the structure of this discussion has centered on those pieces.

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119. *Id.* at 336.
120. *See id.*
121. *See id.* at 340-41.

Thus far, the Court's discussion has been devoted to perhaps the most telling factor—the unique circumstances that were addressed by the Court.

T.L.O. was groundbreaking in the obvious particulars already discussed: the creation of a new exception to traditional search and seizure law, and the dismissal of warrant and probable cause requirements. But the long-term significance of *T.L.O.* might be measured from more subtle points in the decision. For instance, the test proposed by the Court for determining the reasonableness of a search did not specifically require individualized suspicion.[122] Nor did it insist on any proof that information leading to the search be validated or tested in any way. Actions by administration were accepted as valid in *T.L.O.* if the actions could be shown to be reasonable under the circumstances.

Under the new criteria, a mistaken observation or a faulty report could still be reasonable grounds to conduct a search if the circumstances were convincing. Without the requirement of either probable cause and with only a reference to "reasonable scope" to substitute for individualized suspicion, broad and random searches could be upheld based on little more than a perception of a serious but general problem which might be

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122. *See id.* at 340-41. The Court stated:

> The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. . . . The accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in schools does not require strict adherence to the requirement that searches be based on probable cause.

Nowhere in the *T.L.O.* decision is there a requirement made of individualized suspicion. As the quotes above indicate, there was every inference that lack of individualized suspicion, like the lack of probable cause, could be excused on the basis of circumstances. In Vernonia v. Acton, 515 U.S. 646, 653 (1995), the Court said of their decision in *T.L.O.*, "The school search we approved in *T.L.O.*, while not based on probable cause, was based on individualized suspicion of wrongdoing. As we explicitly acknowledged, however, '*the Fourth Amendment imposes no irreducible requirement of such suspicion.*'" (emphasis added).

The preceding italicized quote which Justice Ginsburg attributed to the principle of individualized suspicion, was directed to the requirement of probable cause, as shown earlier in this footnote. It is difficult to ascertain why the principle of individualized suspicion was brought up at all when it was dismissed just as quickly however, the fact remains the *T.L.O.* search may have been based on individualized suspicion, but the *T.L.O.* approved exception to traditional Fourth Amendment analysis did not have any such requirement.

effectively regulated by general searches. Using this *T.L.O.* test, schools attempted bold inroads upon the Fourth Amendment, some of which failed.[123]

14. The Cales Failure, The Williams Success

In 1980, Ruth Cales, fifteen, was a student at Howell High School. The school operated on staggered sessions. She was assigned to the afternoon session on the day of April 30, 1980. That afternoon, when she was supposed to be in class, school security (another innovation in recent years) observed her in the parking lot of the school, attempting to avoid detection by hiding behind a parked car.

When the security guard confronted her and asked for her name, she lied about her identity—though the record does not indicate how the officer new she was lying. Subsequently, she was escorted to the office of Assistant Principal McCarthy. Mr. McCarthy presided over the remainder of the search process by giving instructions to a Ms. Steinhelper who searched Ruth in a separate office. First Ruth was ordered to dump the contents of her purse on a desk. This was done in front of Mr. McCarthy. Several "readmittance slips" were revealed, which were improperly in her possession. Based on his observation of the slips, Mr. McCarthy would later testify that he suspected Ruth's involvement in drug activity.

Mr. McCarthy then ordered Ruth to turn her pants pockets inside-out, which revealed nothing unusual. Then, in another office without Mr. McCarthy, Ruth was ordered to remove her pants in front of Ms. Steinhelper. When this revealed nothing incriminating, Mr. McCarthy ordered Ruth, via Ms. Steinhelper, to bend over in such a way that Ms. Steinhelper could inspect the contents of her brassiere. Again, nothing unusual was found.

The lawsuit against the Howell school district which followed was addressed by the District Court as a matter of an unreasonable, and thus, unjustifiable search under the recent ruling in *T.L.O.*[124] The court used the *T.L.O.* ruling as the standard by which they determined that the search of Ruth Cales

123. *See* Cales v. Howell Public Schools, 635 F. Supp. 454 (E.D. Mich. 1985).
124. *See id.* at 456.

had been unreasonable. The court found that the high school had no written policy on strip searches of students. It also held that because the test was unreasonable in its inception, the second prong of the test, the issue of scope, was never considered.

The court refused to accept as reasonable the perception by Mr. McCarthy that Ruth's "ducking behind a car in the Howell High School parking lot" and possession of "readmittance slips" constituted circumstances that made any search for drug possession reasonable. It indicated that a search of the contents of the purse would likely be justified, on the basis of her lie to the security officer as to her identity. A need to prove her identity and prove that she was not involved in theft or other illegality in the parking lot seemed reason enough. However, as soon as the search was deemed unreasonable, liability was imposed, and the analysis did not continue to the subject of whether or not Ruth should have been made to strip.[125]

On the other end of the spectrum lies the *Williams by Williams v. Ellington* decision, in which a strip search of a high school student was found permissible by the Sixth Circuit Court.[126] In that case, school administrators acted on the basis of repeated tips from a fellow student that two girls were doing drugs. On January 22, 1988, a final tip was given by the informing student, stating that the two suspected girls were "at it again."[127]

Based on the cumulative information from this student as well as some unsolicited finger pointing by the suspected students, the teacher contacted and fully updated a vice principal. A search of the girls' lockers and purses revealed a small vial containing an over-the-counter substance nicknamed "rush." She was then taken into an office where she was instructed by a female faculty member to empty her pockets, then remove her shirt and then drop her pants. The further search revealed nothing suspicious.

In reviewing the reasonableness and scope of that search, the Sixth Circuit Court found that there was enough circumstantial evidence to support a search of both girls. Furthermore,

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125. *See id.* at 457-58.
126. 936 F.2d 881 (6th Cir. 1991).
127. *See id.* at 883.

the court held that the scope of the search—a strip search—was reasonable because the vial that had been found was so small it could have been hidden in underclothing. It is significant that prior to the Sixth Circuit's addressing of the circumstances in *Williams,* it was privy to the Seventh Circuit's holding regarding drug testing in *Schaill by Kross v. Tippecanoe County School Corporation,*[128] but the court seemed to rely completely on the *T.L.O.* decision.

F. RANDOM, SUSPICION-LESS DRUG TESTING

In light of the increased use of the *T.L.O.* reasonableness test, an accelerated focus from lockers to pockets to test tubes became a reality. In the years that followed, the idea of drug testing by urinalysis came to the forefront of the Fourth Amendment debate. The Supreme Court found random, suspicion-less drug testing was justified in several cases including *Skinner v. Railway Labor Executives' Association* in 1989.[129]

Skinner, a railroad worker's case, presented the Court with a significant opportunity to apply the *T.L.O.* analysis to a non-school setting that required the application of the special needs exception. The policy in question required train operators and personnel in certain levels of control to undergo urinalysis and possibly blood testing in the event of any reported mishap.

The Court discussed at length the intrusive nature of the test in comparison with the employees' diminished expectation of privacy from working in a highly regulated field. It considered the lack of individualized suspicion in comparison with the prevailing public need for safety in passenger train operation.[130] In the end, the factors of public need and a diminished expectation of privacy led the Court to uphold the policy, despite the lack of a warrant, probable cause, individualized suspicion, or even the theory of *in loco parentis*.[131]

Even prior to the final *Skinner* holding, court decisions nation-wide began to point toward Supreme Court approval of intrusive drug testing. It is no surprise that approval was given

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128. 864 F.2d 1309 (7th Cir. 1988).
129. 489 U.S. 602 (1989).
130. *See id.* at 620.
131. *See id.*

in *Skinner* and other cases.[132] Meanwhile, courts across the country were addressing the issue of drug testing in public schools. One such issue came to a head in the Seventh Circuit decision regarding the Tippecanoe County School Corporation in Indiana.[133]

15. The Schaill Decision

The Tippecanoe County School Corporation (TSC) operates two high schools in Indiana. In the spring of 1986, the baseball coach, at McCutcheon High School, received information leading him to suspect that some of his baseball team might be involved in drug use. The coach ordered urinalysis for sixteen players. No objections of any consequence were noted. From the samples taken, five of the sixteen players were found to be using marijuana. Based on those findings and other suspicion that drug abuse was a growing problem in the athletic program generally, the TSC Board of Trustees decided to institute a random urine testing program for interscholastic athletes and cheerleaders within the TSC school system.

Because the Vernonia program instituted in 1995 so closely mirrors the TSC drug testing program, there are significant details that deserve mentioning. However, the details of its implementation are reserved for discussion under the Vernonia decision. In the spring of 1987, Darcy Schaill and Shelley Johnson were fifteen-year-old sophomores at Harrison High School, which TSC also operated. Shelley had been a member of the Varsity Swim Team as a freshman. Both students attended an informational meeting prior to the 1987 school year where they learned of the drug testing program and both decided that they would not participate in school athletics if a signed consent form for random drug testing was required for participation. As soon as the school began the testing program, the students filed their claim.

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132. *See* National Treasury Employee Union v. Von Raab, 489 U.S. 656, 672 (1989).

133. *See* Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988).

16. Analysis

The District Court denied the students' claims for declaratory and injunctive relief. They appealed to the Seventh Circuit Court. The court began its analysis by quickly deciding that urine testing involves a search under the Supreme Court's interpretation of the Fourth Amendment in *United States v. Jacobsen*, a decision which followed the *Katz* definition of "search" very closely.[134] The Court held, without counter discussion, that the act of urination is one in which society recognizes a reasonable expectation of privacy.

Having determined that the act of urination was a private act, and that urine testing was a search, the court moved immediately to the effect of a signed waiver upon the constitutionality of the search. To determine this point, the court addressed what level of suspicion was required in this circumstance. While a warrant and probable cause discussion would normally have followed, because of the Supreme Court's decision in *T.L.O.*, the Seventh Circuit felt no need to debate those requirements, and found instead that the requirements did not apply in the public school setting. This effectively dissolved the appellants' broadest attack against the school board.

Finding no requirement of suspicion meant that the remaining inquiry need only focus on the reasonableness of the test, as the *T.L.O.* decision had suggested.[135] The *T.L.O.* requirement was that the search be reasonable in its inception and in its scope. Thus the Seventh Circuit addressed whether there was good reason to enact a urine testing program in the school district, and whether it was reasonable in its policy of randomly testing athletes and cheerleaders.

Reasonableness in this court's analysis fell into a two-part test: 1) whether the individual being tested has a diminished expectation of privacy because of their involvement in the athletic or cheerleading program, and 2) whether the government interest in the testing was significant enough to outweigh the intrusion. This analysis was drawn directly from the traditional balancing test created in light of *Katz* which weighs intrusion

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134. 466 U.S. 109, 113 (1984) ("[A] search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed").

135. *See supra*, note 120.

against government interest. But this test was impacted severely by the school setting.

Because the process of obtaining urine samples was closely guarded and the faculty member supervising the process was positioned either behind the student or outside the bathroom stall door, the immediate personal intrusion was considered to be mitigated. Furthermore, because the test was reserved to specific programs that carry a diminished sense or expectation of privacy in their normal operations, the intrusion was mitigated even more. The Court reasoned that the athletes, and presumably the cheerleaders, were accustomed to being in front of others in locker rooms in a state of partial undress. Therefore, the intrusion was not considered in the same light as it would have been in the case of a non-athlete.

Another factor in the diminished sense of privacy was the high regulation of the activity by coaches and trainers. The fact that participation in the programs involved many rules of training and conduct seemed to weigh significantly on the court. Also, the general societal recognition that drug abuse was a growing problem in the area of professional and collegiate athletics and in the Olympic competition, convinced the court that no student participating in the athletic program could have a valid expectation of privacy.

In weighing the governmental interest, the Court's chief considerations were the earlier findings by the baseball coach at an adjoining school and the general concern nation-wide of a growing drug problem. Additionally, the court recognized the elevated stature of athletes and cheerleaders in the eyes of the high school student body. In identifying a potentially serious problem, the court held that the search was permissible both in its inception and in its scope. It seemed to console itself in the holding by noting that the information gathered in the testing was only effective as to removing a student from the athletic programs, not from school itself and not it was connected to criminal prosecution.

In light of the *Schaill* holding, which was in direct conflict with other decisions from other parts of the country relating to very similar circumstances and claims,[136] it was inevitable that

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136. *See* Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759 (S.D. Texas 1989) (individualized suspicion was held to still be a requirement in

the Supreme Court would address the issue of search and seizure in public schools again, in the context of drug testing. And so it did in the 1995 *Vernonia School District v. Acton* case.[137]

G. THE VERNONIA DECISION

In the early 1990s, in an isolated logging community in the mountains of Oregon, the Vernonia School District operated one high school and three grade schools. For many years, the District had been quiet and isolated—free from "big city" noise, pollution and vice. But between 1980 and 1990, administrators saw a marked increase in behavioral problems in the high school. Some faculty members reported hearing drug-related talk, and an increasing number of disciplinary incidents were occurring. The faculty reported that the "[s]tudents became increasingly rude during class; outbursts of profane language became common."[138] A football and wrestling coach attributed a sternum injury and some poor execution on the football field to drug use.

Based on faculty observations, special programs were begun wherein classes were offered and speakers were hired to talk about drug use and attempt to deter the students from involvement. A drug-sniffing dog was also brought onto campus.[139] None of the administration's efforts worked. The court found that the student body, "particularly those involved in interscholastic athletics, was in a state of rebellion."[140] The increased disciplinary problems in conjunction with language and dress which the teachers and administration observed as glamorizing a drug culture finally forced the District to assume that the "rebellion" was being fueled by alcohol and drug abuse and students' misconceptions about drug culture.[141]

In 1988, the District officials began considering a drug-testing program. They held an open meeting for parental opinions to discuss the proposed Drug Testing Policy. The parents attending the meeting gave their unanimous approval, and the

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urinalysis).

137. 515 U.S. 646 (1995).

138. *Id.* at 649.

139. *See id.*

140. *Id.*

141. *Id.*

School Board approved the policy for implementation in the next fall, 1989. The express purpose of the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."[142]

17. The Testing Policy

The policy implemented by the District was, in almost every significant aspect, identical to the Tippecanoe County School Corporation policy in the *Schaill* decision, announced earlier that year. It is highly probable that the Vernonia District borrowed the policy directly from that decision because of its success on appeal in the Seventh Circuit Court. The only difference worth noting between the two policies is the penalty portion. The Vernonia policy gave the student athlete who tested positive the option of a six-week rehabilitative program and constant monitoring, or suspension for the remainder of the athletic season and the next season of any sport. A second failure would automatically result in suspension. This would equate to a maximum suspension from athletic participation of approximately six months unless the student failed another test. The third failure resulted in suspension for the remainder of the current athletic season and the next two seasons (a maximum additional penalty of approximately nine months).

The Schaill program allowed for four failures and graduated the suspension somewhat. Instead of losing the remainder of the season on the first failure and the next two seasons on the second failure, the Schaill test penalized the student by suspending him or her from one-third of the games on the first offense, and one-half of the games on the second offense. The third failure would mean no athletic participation for an academic year. The fourth offense resulted in a suspension for the remainder of the student's high school years.

Two years after the implementation of the policy, James Acton, then in seventh grade, signed up to play football in one of the District's grade schools. But because he and his parents had refused to sign the requisite consent forms, he was denied participation. The Actons filed suit against the District, seeking

142. *Id.* at 650.

injunctive relief from the policy which they claimed violated the Fourth and Fourteenth Amendments of the U.S. Constitution and two provisions of the Oregon State constitution.

18. Analysis

Much like the circumstances and the testing program common to both the *Schaill* case and *Vernonia*, the formation of the Supreme Court's decision closely mirrored the Seventh Circuit reasoning as well. It proceeded almost identically: 1) finding that urine testing is a search which animates a Fourth Amendment analysis, 2) applying the *T.L.O.* test for reasonableness in inception and scope to determine the legality of the search, 3) reiterating that a warrant and probable cause were not required after *T.L.O.*, 4) finding that athletes share only a diminished sense of privacy, 5) finding that the test is conducted in strict control, and 6) finding that the governmental interest is substantial in light of the dangerous possibilities.[143]

Perhaps most contrasted of all the arguments between Schaill and Vernonia is the fact that the Supreme Court, after finding that the *T.L.O.* decision eliminated the need for a warrant or probable cause in public school actions, went to comparatively great lengths to bolster that decision with the doctrine of *in loco parentis*. The court restructured its earlier *T.L.O.* rejection of the idea that school administrators acted under parental authority by stating:

> While denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.[144]

The Court went on to explain that although children do not shed their rights at the school gates, the rights they carry are not the same as those outside the school setting.[145] The case

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143. For a summary of the Supreme Court's holding and analysis in *Vernonia, see also* Todd v. Rush County Sch., 139 F.3d 571-72 (7th Cir. 1998), *cert. denied*, 1998 WL334388.

144. 515 U.S. 646 at 655.

145. *See id.* at 656.

cited as justification for that finding was *Goss*, where due process for a student challenging disciplinary suspension required only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred."[146]

In *T.L.O.* the Court argued that school officials were subject to the "commands of the First Amendment,"[147] and then entered a discussion on the source of public school authority. The argument followed that because teachers had already been found to be state actors for purposes of freedom of expression and due process, they must be state actors for the purposes of privacy rights.

The Court stated that the idea of parental delegation, as a source of school authority, was "not entirely 'consistent with compulsory education laws,'"[148] and that school officials do not exercise authority "voluntarily conferred on them by individual parents," but in conducting disciplinary and search procedures, the authorities "act as representatives of the State, not merely as surrogates for the parents."[149]

In *Vernonia*, the Court was faced with the necessity of justifying a much greater intrusion upon individual privacy rights than was presented in *T.L.O.* In light of that burden, it is not surprising that the majority showed a renewed willingness to embrace the doctrine of *in loco parentis*. The tenuous but crucial connection between a child's reduced expectation of privacy in the home and the student's reduced expectations of privacy in school was important in the Court's justification of an extension of the special needs exception introduced in *T.L.O.*

The most significant of the comparative arguments, from *T.L.O.* to *Vernonia* (and everything in between),[150] is the clear indication that the courts are struggling to empower school officials to effectively address rising threats to children. But the

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146. Goss v. Lopez, 419 U.S. 565, 581-82 (1975).

147. New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (citing *Tinker*).

148. *Id.*

149. *Id.* at 325.

150. Vernonia is susceptible to several different interpretations: (1) that "special needs" justifying drug testing always exist in the public school context, and thus school authorities may require drug testing for any reason including controlling access to core classes; (2) that it is necessary to show a particularized governmental need to impose drug testing on a particular student population; (3) that drug testing is permitted in special scholastic environments in which the need is well identified and the privacy expectations are diminished. *Todd.*, 139 F.3d at 572.

courts must find a means of doing so on the basis of available case law. Thus, the Supreme Court, over ten years and a mountain of frightening statistics, applied every successful argument from *T.L.O.*, added several points from lower court decisions, and then reversed its position on another issue in order to expand search and seizure in schools to include random, suspicionless drug testing.

IV. CONCLUSION

From a constitutional point of view, the path created between *T.L.O.*, *Williams*, *Schaill,* and *Vernonia* was particularly intrusive upon individual privacy rights. Yet, the accelerated incidence of drugs, weapons and even explosives entering public schools in the 1990s makes it highly probable that the evolution of search and seizure law will accelerate as well.[151] It is predictable, for example, that the criteria of a diminished sense of privacy will be tested beyond athletics and cheerleading.

A. THE FUTURE OF SEARCH AND SEIZURE IN PUBLIC SCHOOL

The next steps in search and seizure law for public schools will be toward broader regulation with less requirements of individualized or even focused suspicion.[152] This is witnessed by the present reality of metal detectors at school entrances and school-wide book bag checks in many inner-city public schools.[153] These programs are justified by the need to raise student protections, but ironically, serve to lower students' expectations of privacy as well as their constitutional protections of that interest. Thus, students who are not involved in athletics or cheerleading might be seen as having a lesser expectation of privacy. The presence and implementation of such precautions emphasize the unique safety and disciplinary concerns in public schools, while at the same time, bolster

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151. *See id.* at 571-72 (7th Cir. 1998), *cert. denied* 1998 WL334388 (holding that *Vernonia* could not be interpreted as meaning all children are subject to testing all the time).

152. *See* Chandler v. Miller, 520 U.S. 305 (1997) (holding that drug testing of electoral candidates for public office was not justified because the targeted group was not found to have a high degree of drug use or to perform safety-related tasks justifying such scrutiny).

153. *See* In the Interest of S.S., W.L. 39, 2112 (Penn. 1996).

the *Vernonia* argument that students cannot be given the same rights that adults have.

19. Plausible Scenarios

These searches involve no individualized suspicion, and are deemed reasonable in inception and scope because of the increased rate of violence and drug use in schools. As the drug problem is recognized as more inclusive than merely an athletic dilemma, it is foreseeable that school-wide drug testing could be introduced, coinciding with school-wide bag searches and metal detectors. These drug tests would be found reasonable because of both the perceived threat of drugs and the diminished expectation of privacy in every student who has undergone the other searches in the past.

This is but one scenario of many that are plausible. Others would include the testing of particular student clubs upon evidence that there is a drug problem or the random testing or general searching of participants at school dances or athletic events. It is also conceivable that school officials, given ever increasing latitude in the exercise of search and seizure, may abuse the authority for their own perverse or otherwise manipulative purposes. In any of these scenarios, the base has already been laid by *T.L.O.* and its progeny. After the liberal application of the *T.L.O.* reasonableness test in *Vernonia*, few courts will question a school official's increased regulation as long as there exists some statistical or testimonial evidence of an increased problem with discipline, drugs or violence. Unfortunately, the increased power of school officials may also mean a decreased expectation of privacy on the part of students, and a diminished sense of outrage at what would have been outright abuses of constitutional rights a few years ago.

Clearly, proving a governmental need has proven the easiest hurdle in almost all of the preceding analyses. In *T.L.O.*, on the basis of one noted study presented to Congress, it was found reasonable to permit immediate and more aggressive supervision and discipline in the school. In *Vernonia*, without a single school-specific test that showed that the athletes were involved in drug abuse to a higher degree than other students, it was found that because of increased discipline problems school-wide, and by virtue of their roles as leaders in the school, their urine could be taken and tested at random. In all of the signifi-

cant cases, the government need was found to outweigh the level of intrusion upon the individual.

Here, another factor must be considered in the discussion of justified searches; that of less-intrusive testing. It is likely that as testing procedures advance to the analysis of fingernails and hair rather than urine or blood, the intrusiveness of the test will be considered reduced. At that point it is not likely to matter whether the student has participated in locker room settings of partial undress. The fact that he or she attends public school, with its metal detectors zero-tolerance policies, and armed policemen will lead to the assumption that there is no longer a reasonable expectation of privacy in a student's hair or finger nails and that testing those items is so easily and accurately done, that it is justifiable in scope. While this advance and acceptance would eliminate some of the physical intrusion of urine sampling, the information contained in hair and fingernails must still be protected, unless at some point students are perceived as having no privacy rights at all.

B. What to Expect from Public School and at What Cost

Parents who contemplate enrolling their child in public schools are now forced to consider more factors than parents considered ten, five or even two years ago. They must weigh the increased risks of the public school environment with the increased cost of avoiding them, by using a private school or home schooling. Those costs cannot be measured in dollars alone. No parent withdraws their child from public school without considering the social, intellectual, creative, and athletic losses which could follow.

On another level, instead of considering the quality of faculty, parents can be expected to review the known or publicized incidents demonstrating a pattern of conduct of school officials in regard to discipline and search and seizure. Because the majority of what would be made public through various media is apt to be exceptional and thus sensational, the perspective of a concerned parent may be far from accurate. However, the fact that the public might be misinformed is not sufficient, at any level of advocacy, to sooth the protective passion of individual parents. Few parents would choose a school based upon the relative chances of their child being caught and disciplined for drug or weapon possession. But most parents, knowing their

child, and desiring to protect the child from embarrassment or humiliation, would reasonably wonder if such policies might harm their child, especially if mis-applied to collusive or destructive purposes.

It might be said that public education, tied as it is to funds from the citizens' purse and weighted with such a public charter, is of all creatures in our society the most reluctant in progress, the most clumsy in change and yet a most accurate measure of our nation's values and priorities. Because justification for expanding search and seizure in public schools is found in the fundamental yet overwhelming considerations of the moral and physical safety of our children, it is not likely that the courts will alter the course of that law until society alters the course of education. And yet, it is difficult to imagine that change.

The environment within a public school, for the same reasons, is a direct reflection of social priorities and problems. The history of search and seizure in public schools illustrates the effort in public education to balance a fundamental charter to educate against ever-pressing threats to physical and moral well being. The school, with finite resources, cannot take from one effort without compromising the other. And a compromise on either hand invites a tragedy.

Thus, while drug abuse, social diseases, and violence become the preoccupation of communities, the school's priorities flow increasingly toward protection, and less toward education. As parents sending children off each morning, it is doubtful that we would have the school swap those priorities. After all, with few exceptions, we are more moved by the immediacy of physical dangers to our children than intellectual threats.

Having admitted as much, it behooves us to ask ourselves what we expect of public education, and at what price? This analysis was undertaken in pursuit of perspective on a single issue of law in public education; search and seizure. The factors that a parent must weigh in deciding whether or not to enroll or leave their child in public school vary for each parent and each child and are much more broad than this single issue. In that context, search and seizure law, with its court-imposed balancing tests, merely supplies a measure of public priorities. It marks the personal intrusions we will tolerate in the interest of security. It measures our common fears as accurately as it mea-

sures personal liberties. In the school setting it may not tell all we need to know about the status or course of public education, but perhaps it tells enough.