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FOURTH AMENDMENT—SEARCHES BY PUBLIC SCHOOL OFFICIALS VALID ON “REASONABLE GROUNDS”

New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

I. INTRODUCTION

The United States Supreme Court has shown a steady willingness to expand the constitutional protections afforded to public school students. The Court's attitude in favor of students' rights is demonstrated by cases providing students with the protections guaranteed by the first,¹ fifth,² and fourteenth³ amendments. Historically, however, the Court has not adopted this attitude towards the issue of students' fourth amendment protection against unreasonable searches and seizures.⁴ Consequently, state and federal

¹ The first amendment states that “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I. See, e.g., *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969). In *Tinker*, the principals of high schools in Des Moines suspended students who wore black armbands to their schools in protest of hostilities in Vietnam. The Court held that a student retains his first amendment rights unless his conduct “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Id.* at 515. The Court emphasized that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.” *Id.* at 506.

² The fifth amendment states that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V. See e.g. *In re Gault*, 387 U.S. 1 (1968). In *Gault*, a fifteen-year-old boy was placed in a correctional institution for boys pursuant to an adjudication in a juvenile delinquency proceeding. The Court found that the proceeding failed to satisfy the basic requirements of due process and held that children in juvenile delinquency proceedings are entitled to adequate notice of the charges against them, the right to counsel, the right to confront and cross-examine witnesses, and the right to remain silent. *Id.* at 33, 41, 47, 55. The Court stressed that the Bill of Rights was not intended to apply only to adults. *Id.* at 30.

³ The fourteenth amendment states that “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, Ohio public high school students were suspended from school without a hearing for up to ten days for misconduct pursuant to an Ohio statute. The Court held that the high school students were denied due process of law in violation of the fourteenth amendment because they were suspended without a hearing prior to suspension or within a reasonable time thereafter. *Id.* at 582-83.

⁴ The fourth amendment states:

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

courts considering the question of whether students are entitled to fourth amendment protection have produced divergent and conflicting opinions.⁵

In *New Jersey v. T.L.O.*,⁶ the Court for the first time directly addressed the issue of the fourth amendment's relationship to school searches. Unfortunately, the Court's opinion in *T.L.O.* will probably only serve to compound the confusion already existing among state and federal courts concerning the constitutional validity of searches conducted by school officials. Instead of applying the traditional fourth amendment standard of probable cause to assess the validity of a search of a student's purse conducted by an assistant principal,

shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

As the language above suggests, the fourth amendment only prohibits unreasonable searches and seizures. *Elkins v. United States*, 364 U.S. 206, 322 (1966). The Supreme Court has incorporated the warrant and probable cause language of the fourth amendment into the reasonableness requirement. See Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856, 859 (1979). Consequently, the Court has held that a search conducted without a warrant is "per se unreasonable under the Fourth Amendment—subject only to a few well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). This Note will closely examine the Court's focus on probable cause in assessing the reasonableness of searches as well as the few exceptions to the probable cause requirement.

⁵ An analysis of the case law indicates that there are at least six approaches employed by courts addressing the issue of the fourth amendment's relationship to public schools. First, some courts have held that because school officials are exercising parental authority over children while they are in school, school officials are private individuals exempt from the dictates of the fourth amendment when they conduct searches in the public schools. See, e.g., *In re Donaldson*, 269 Cal. App.2d 509, 75 Cal. Rptr. 220 (1969); *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App. 1970). Second, some courts have held that the fourth amendment does not apply to searches by school officials because the fourth amendment's requirements apply only to law enforcement personnel. See *D.R.C. State*, 646 P.2d 252 (Alaska Ct. App. 1982). Third, at least one court has held that the traditional probable cause standard of the fourth amendment applies to searches conducted in public schools. See *State v. Mora*, 307 So. 2d 317 (La.), *vacated*, 423 U.S. 809 (1975), *on remand*, 330 So. 2d 900 (La. 1976). See also *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (Gunter, J., dissenting), *cert. denied*, 423 U.S. 1039 (1975); *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (1977) (Rosellini, J., dissenting). Fourth, other courts have held that the probable cause standard applies in full force when searches are conducted in public schools with the assistance of police officers. See, e.g., *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976); *State v. Young*, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975). Fifth, one court has held that the traditional probable cause standard applies in public school searches which are highly intrusive. See *M.M. v. Anker*, 607 F.2d 588 (2d Cir. 1979). Finally, a majority of the courts have held that although the fourth amendment applies to searches conducted in the public schools, the constitutional validity of these searches should be measured by a standard less demanding than probable cause. See, e.g., *Helliner v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); *State v. Baccino*, 282 A.2d 869 (Del. Super. Ct. 1971); *Doe v. State*, 88 N.M. 827, 540 P.2d 827 (N.M. Ct. App. 1975).

⁶ 105 S. Ct. 733 (1985).

the Court announced a new standard derived by balancing the school official's interest in maintaining an educational environment against the student's expectations of privacy.⁷ Based on a balancing of these interests, the Court announced that a search of a student by a teacher is constitutional "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."⁸

The Court's balancing test for school searches departs from the "long-prevailing" view that "probable cause embodied 'the best compromise that has been found for accomodating [the] often opposing interests' in 'safe-guard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'"⁹ Although the Court has recognized a few exceptions to the requirement that fourth amendment searches and seizures must be based on probable cause, none of these exceptions covers a full-scale search of a student to discover evidence of a minor school violation.¹⁰

This Note examines the Court's decision to depart from the traditional probable cause requirement of the fourth amendment and derive a standard for school searches based on a balancing of the relevant interests.¹¹ The Note argues that the balancing test used by the Court carves out an unprecedented exception to the traditional probable cause standard that will cause confusion among school administrators, as well as courts, and lead to unjustified searches of students.¹² The traditional fourth amendment standard of probable cause, when accompanied by the few isolated exceptions where probable cause is not required to make a search, adequately protects both the school official's interest in preserving an educational environment and the student's expectations of privacy.¹³

II. FACTS OF *T.L.O.*

On March 7, 1980, a teacher at the Piscataway High School in Middlesex County, N.J., discovered the respondent *T.L.O.* and an-

⁷ See *infra* text accompanying notes 34-38.

⁸ 105 S. Ct. at 744.

⁹ See *Dunaway v. New York*, 442 U.S. 200, 208 (1978) (*quoting* *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

¹⁰ See *infra* text accompanying notes 118-20.

¹¹ See *infra* text accompanying notes 81-38.

¹² See *infra* text accompanying notes 140-60.

¹³ See *infra* text accompanying notes 161-83.

other girl smoking in a lavatory.¹⁴ T.L.O. was a fourteen-year-old freshman at that time.¹⁵ Although the possession of cigarettes was not a violation of school rules, smoking in the lavatory was prohibited.¹⁶ Consequently, the teacher escorted the two girls to a meeting in the principal's office with the Assistant Vice Principal, Mr. Theodore Choplick.¹⁷

At the meeting with Mr. Choplick, T.L.O.'s companion admitted that she had violated the school rule prohibiting smoking in the lavatory.¹⁸ T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all. Mr. Choplick moved T.L.O. to his private office and demanded to see her purse. When the school official opened up the purse, he found a pack of cigarettes. Mr. Choplick also noticed a package of cigarette rolling papers while reaching into the purse for cigarettes. Knowing that rolling papers are often associated with marijuana use, the school official continued to search the purse thoroughly. This search revealed a small amount of marijuana, marijuana paraphernalia, a large sum of money, and two letters indicating that T.L.O. was involved in marijuana dealing.¹⁹ Mr. Choplick turned all of the evidence of the drug dealing over to the police.

T.L.O. and her mother later proceeded to police headquarters where T.L.O. confessed to selling marijuana in the high school. On the basis of T.L.O.'s confession and the evidence obtained from her purse, the State brought delinquency charges against T.L.O. in juvenile court.²⁰ T.L.O. moved to suppress her confession to smoking in the lavatory contending that Mr. Choplick's search of her purse violated the fourth amendment.²¹ The juvenile court denied the motion to suppress. In determining whether Mr. Choplick's search was reasonable, the court applied the standard that a school official may conduct searches based on a reasonable belief that a crime has

¹⁴ 105 S. Ct. at 736.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 736-37.

¹⁸ *Id.* at 737.

¹⁹ *Id.* Specifically, Mr. Choplick's search revealed "a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing." *Id.*

²⁰ T.L.O. also received a three-day suspension from school for smoking cigarettes in a nonsmoking area and a seven-day suspension for possession of marijuana. *Id.* at 737 n.1. On T.L.O.'s motion, the Superior Court of New Jersey, Chancery Division, set aside the seven-day suspension finding that the evidence in T.L.O.'s purse was seized in violation of the fourth amendment. *Id.*

²¹ *Id.* at 737.

been committed or that the school environment is being threatened.²² The court concluded that Mr. Choplick had a well-founded suspicion that T.L.O. was smoking in the lavatory. Moreover, the court stated that the evidence of marijuana in T.L.O.'s purse entitled Mr. Choplick to conduct a thorough search to determine the scope of T.L.O.'s drug involvement. The court found T.L.O. to be a delinquent and later sentenced her to a year's probation. A divided Appellate Division affirmed the juvenile court's finding that Mr. Choplick had not violated the fourth amendment.²³

The Supreme Court of New Jersey approved the standard used by the juvenile court to determine whether Mr. Choplick's search violated the fourth amendment.²⁴ The court, however, with two justices dissenting, reversed the juvenile court's conclusion that, under the standard, the search of the purse was reasonable.²⁵ The court stated that since possession of cigarettes did not violate school rules, Mr. Choplick's desire to obtain evidence that would impeach T.L.O.'s claim that she did not smoke did not justify his search.²⁶ Consequently, the court ordered suppression of the evidence found in T.L.O.'s purse; the fourth amendment's exclusionary rule prevented the use in juvenile proceedings of evidence unlawfully seized by school officials.²⁷ The Supreme Court granted certiorari to de-

²² The full statement of the standard applied by the juvenile court was as follows:

[A] school may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.

State ex rel. T.L.O., 178 N.J. 329, 341, 428 A.2d 1327, 1333 (1980) (emphasis in original). This standard would allow a school official to conduct a search based on a reasonable suspicion without obtaining a warrant based on probable cause from a magistrate. For a discussion of the meaning of probable cause, see *infra* text accompanying notes 163-67

²³ *State ex rel. T.L.O.*, 185 N.J. Super. 279, 448 A.2d 493 (1982). Nevertheless, the appellate division vacated the adjudication of delinquency and remanded for a determination whether T.L.O. had knowingly and voluntarily waived her fifth amendment rights before confessing. T.L.O. meanwhile appealed the fourth amendment ruling to the Supreme Court of New Jersey. *State ex rel. T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983).

²⁴ *Id.* at 346, 463 A.2d at 941-42.

²⁵ *Id.* at 347, 463 A.2d at 942.

²⁶ The court alternatively found that Mr. Choplick did not have reasonable grounds to believe that T.L.O.'s purse contained cigarettes. *Id.* Moreover, the court maintained that even if Mr. Choplick was justified in opening the purse, the existence of rolling papers inside the purse did not justify his extensive rummaging through the purse. *Id.* at 348, 463 A.2d at 943.

²⁷ *Id.* at 350, 463 A.2d at 944. The exclusionary rule provides that evidence obtained through an illegal search is not admissible at trial. The rule was formed to provide an effective recourse for people whose fourth amendment rights had been violated. See *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule has been regarded as an essential component of the fourth amendment since *Mapp v. Ohio*, 367

cide whether the exclusionary rule is an appropriate remedy for fourth amendment violations committed by school officials.²⁸

III. THE SUPREME COURT DECISION

A. THE MAJORITY OPINION

The Supreme Court, Justice White writing for the majority, reversed the decision of the New Jersey Supreme Court that the school official's search of T.L.O.'s purse was unconstitutional.²⁹ In deciding that the search was constitutional, the Court first held that the fourth amendment's prohibition against unreasonable searches and seizures applies to searches conducted by public school officials.³⁰ The State of New Jersey had contended that the fourth amendment was intended to regulate only searches and seizures carried out by law enforcement officers. The Court, however, disposed of this argument by stating that "the basic purpose of [the fourth] amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."³¹ The Court also challenged

U.S. 643 (1961), see Note, *The Fourth Amendment Right of Privacy: Mapping The Future*, 53 VA. L. REV. 1314, 1325 (1967), however, courts have split over whether the exclusionary rule is an appropriate remedy for fourth amendment violations committed by school officials. See, e.g., *Young*, 234 Ga. at 488, 216 S.E.2d at 586 (exclusionary rule does not apply to evidence obtained from school searches); *Mora*, 307 So. 2d 317 (La.), vacated, 423 U.S. 809 (1975), on remand, 330 So. 2d 900 (La. 1976) (exclusionary rule applies to exclude the fruits of unlawful school searches from criminal trials and delinquency proceedings). See also Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 742 n.20 (1974) ("[T]he need for a deterrent to unreasonable searches by the police is as strong when children are the victims as when adults are, and the fact that the children are confined in school when the search is conducted would seem to make the need greater rather than less.").

²⁸ 105 S. Ct. at 788. Although certiorari was granted to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful searches, the Court stated that the remedy issue should not be decided without considering the limits, if any, the fourth amendment imposes on school officials and ordered argument on that question. *Id.* The Court's opinion ultimately did not address the question whether the exclusionary rule applies to evidence obtained from unlawful searches conducted by school officials because the Court found Mr. Choplick's search to be lawful. In fact, the Court noted that "our determination that the search at issue in this case did not violate the fourth amendment implies no particular resolution of the question of the applicability of the exclusionary rule." *Id.* at 739 n.3. The Court's decision to consider the appropriate fourth amendment standard, even though certiorari was granted only to determine the applicability of the exclusionary rule, was influenced by the struggle of state and federal courts considering the constitutional validity of school searches. See *id.* at 739 n.2

²⁹ 105 S. Ct. at 747. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined Justice White.

³⁰ *Id.* at 741.

³¹ *Id.* at 740 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). For

the argument that school officials are exempt from the fourth amendment because they are exercising parental rather than state authority.³² This view, the Court found, "is in tension with contemporary reality and the teachings of this Court."³³

After holding that the fourth amendment applies to searches conducted by school officials, the Court then announced the fourth amendment standard governing searches in public schools. The Court held that a school official is justified in conducting a search "when there are reasonable grounds for suspecting that the search will turn up evidence" that a law or school policy has been violated by a student.³⁴ To arrive at this standard, the Court balanced the interest of school teachers and administrators in maintaining an educational environment against the students' legitimate expectations of privacy.³⁵ The Court employed a balancing test to determine a reasonableness standard for searches conducted in public schools because several Supreme Court cases have recognized the validity of searches based on standards less demanding than probable cause when a compelling governmental interest outweighed the intrusiveness of the search involved.³⁶ Consequently, the Court stated that adopting a standard for searches conducted in public schools that is less demanding than probable cause was justified by the substantial need of school officials to maintain order in the schools.³⁷ The

previous cases upholding the applicability of the fourth amendment to public officials, see *infra* text accompanying notes 66-69.

³² 105 S. Ct. at 741.

³³ This argument was not raised by the State of New Jersey, which conceded that public school officials are state agents for purposes of the fourth amendment. See *id.* at 740. However, it was addressed by the Court because several federal and state courts had held that the special relationship between school officials and students exempts school officials from the dictates of the fourth amendment. *Id.* The Court, referring to the *Tinker* and *Gault* decisions stated that "[i]f school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students." *Id.* See also *infra* text accompanying notes 70-80.

³⁴ The full standard stated by the Court was that "[a] search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* This standard will be referred to as the "reasonable grounds" standard in this Note. The Court clearly limited this standard to searches carried out by school authorities acting alone. The appropriate standard for assessing the legality of searches conducted by school officials in conjunction with law enforcement officers was not addressed by the Court. *Id.* at 744 n.7.

³⁵ See *id.* at 744.

³⁶ See *id.* at 743. For a discussion of the Supreme Court cases using a standard less demanding than probable cause see *infra* text accompanying notes 81-138.

³⁷ *Id.* The Court noted that "[m]aintaining order in the classroom has never been

Court also added that a search satisfying this standard "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."³⁸

The Court applied the "reasonable grounds" standard to the facts and held that Mr. Choplick's search was reasonable for fourth amendment purposes.³⁹ The Court stated that Mr. Choplick's search for cigarettes was reasonable since evidence of cigarettes in T.L.O.'s purse, although not conclusive of the charge that she had been smoking in the lavatory, "would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking."⁴⁰ The Court then indicated that the further search for marijuana when the school official saw a package of rolling papers in T.L.O.'s purse was also reasonable because the discovery of rolling papers gave rise to a reasonable suspicion that T.L.O. had marijuana as well as cigarettes in her purse.⁴¹ Thus, the Court held that the New Jersey Supreme Court's decision to exclude the evidence from T.L.O.'s juvenile delinquency proceeding on fourth amendment grounds was erroneous.

B. THE CONCURRING OPINIONS

According to a concurring opinion written by Justice Powell, with whom Justice O'Connor joined, the Court should have placed greater emphasis on the special characteristics of elementary and secondary schools in reaching the conclusion that students are not entitled to the same constitutional protections granted adults and juveniles in non-school settings.⁴² Justice Powell stressed that due to the compelling interest of teachers in maintaining an educational atmosphere and the lack of an adversarial relationship between

easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *Id.* at 742.

³⁸ *Id.* at 744. The Court included this limitation on the scope of school searches to satisfy the requirement that searches must be "reasonably related in scope to the circumstances which justified the interference in the first place." *See* *Terry v. Ohio*, 592 U.S. 1, 20 (1968).

³⁹ *Id.* at 746. The Court noted that although the standard applied by the New Jersey Supreme Court was similar to the "reasonable grounds" standard, the New Jersey Supreme Court's decision to invalidate the search of T.L.O.'s purse "reflects a somewhat crabbed notion of reasonableness." *Id.* at 745.

⁴⁰ *Id.* at 745. The Court cited Fed. Rule Evid. 401 for the proposition that to be relevant to an issue, evidence need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable for less probable that it would be without the evidence." *Id.* at 746.

⁴¹ *Id.* at 747.

⁴² *Id.* at 747 (Powell, J., concurring).

teachers and students, constitutional rules do not apply "with the same force and effect in the schoolhouse as [they do] in the enforcement of criminal laws."⁴³ Consequently, Justice Powell maintained that the Court was justified in adopting a fourth amendment standard less demanding than the probable cause standard granted to adults and children in non-school settings.

In addition to the concurring opinion of Justice Powell, Justice Blackmun separately concurred in the judgment of the Court. Justice Blackmun stated that in adopting the "reasonable grounds" standard, the Court should have stressed that the use of a balancing test is an exception to the traditional probable cause standard justified by the substantial need of school officials to maintain order in the public schools.⁴⁴ Although Justice Blackmun agreed with the standard formulated by the Court, he stated that only when "special needs, beyond the normal need for law enforcement" made the warrant and probable cause requirement impracticable, was a court entitled to substitute its balancing of interests for that of the Framers.⁴⁵ Nevertheless, Justice Blackmun concluded that "the special need for an immediate response to behavior that threatens either the safety of school children and teachers or the educational process" warranted use of the "reasonable grounds" standard derived from a balancing test.⁴⁶

C. THE DISSENTING OPINIONS

The dissent, written by Justice Brennan, with whom Justice Marshall joined, agreed with the Court's holding that the fourth amendment applies to searches conducted by public school officials.⁴⁷ The dissent, however, disagreed with the Court's use of a balancing test instead of the traditional probable cause standard. The dissent noted that in the Court's past decisions, probable cause had been a prerequisite for a full-scale search.⁴⁸ The Court's only

⁴³ *Id.* Powell took a view shared in numerous cases. For example, in *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court considered a claimed "invasion of [a] minor's constitutionally protected freedoms." *Id.* at 638. The Court "recognized that even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . .'" *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). *But c.f. Tinker*, 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution.").

⁴⁴ 105 S. Ct. at 748-50 (Blackmun, J., concurring).

⁴⁵ *Id.* at 749 (Blackmun, J., concurring).

⁴⁶ *Id.* at 750 (Blackmun, J., concurring).

⁴⁷ *Id.* (Brennan, J., dissenting).

⁴⁸ *Id.* at 751 (Brennan, J., dissenting). *See, e.g., Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (probable cause affords "the best compromise that has been found

prior support for a balancing test had been in the narrow context of minimally intrusive searches that served crucial law enforcement interests.⁴⁹ Since the search of T.L.O.'s purse was a full-scale search, the dissent indicated that the constitutional probable cause standard should have been applied by the Court.⁵⁰ The dissent stated that under a probable cause standard, the New Jersey Supreme Court's decision would have been affirmed since the presence of rolling papers did not give Mr. Choplick probable cause to continue rummaging through T.L.O.'s purse.⁵¹

In a separate dissenting opinion, Justice Stevens stated that the Court should have affirmed the New Jersey Supreme Court's ruling that the exclusionary rule applied to the evidence found in T.L.O.'s purse without discussing the appropriate fourth amendment standard in public schools.⁵² Justice Stevens believed that by announcing the "reasonable grounds" standard, the Court needlessly and inappropriately reached out to decide a constitutional question: the only issue presented by the State of New Jersey's petition, Stevens argued, was whether the fourth amendment's exclusionary rule applies to searches made by school officials.⁵³ In finding that the rule did, Justice Stevens concluded that the application of the exclusionary rule in criminal proceedings arising from illegal school searches conveys an important message to students, who attend school to learn about the values essential to a democratic society, that "our society attaches serious consequences to a violation of constitutional rights."⁵⁴

Justice Stevens also argued that, even if the issue of the fourth amendment standard for school searches was before the Court, the Court misapplied the standard of reasonableness embodied in the

for accommodating the opposing interests of enforcing the law and protecting the citizens from unreasonable searches.").

⁴⁹ 105 S. Ct. at 751 (Brennan, J., dissenting). See *Terry v. Ohio*, 392 U.S. 1 (1968) (police officers may "frisk" suspects who they reasonably believe to be dangerous).

⁵⁰ *Id.* The Court should have focused on the warrant and probable cause requirements because Mr. Choplick's search "encompassed a detailed and minute examination of T.L.O.'s purse, in which the contents of private papers and letters were thoroughly scrutinized."

⁵¹ *Id.* The dissent stated that the unconstitutionality of Mr. Choplick's decision to continue to rummage through T.L.O.'s purse after finding rolling papers made it unnecessary to consider whether the initial search by Mr. Choplick was valid. *Id.*

⁵² *Id.* at 759, 760 (Stevens, J., dissenting).

⁵³ *Id.* at 759 (Stevens, J., dissenting). According to Justice Stevens, the applicability of the exclusionary rule in public schools was the only issue in the case because the State of New Jersey had properly declined to submit to the Court the purely factual dispute of whether Mr. Choplick's search violated the fourth amendment. *Id.* at 761.

⁵⁴ *Id.* at 761 (Stevens, J., dissenting) (quoting *Stone v. Powell*, 428 U.S. 465, 492 (1976)).

fourth amendment. Justice Stevens noted that the "reasonable grounds" standard adopted by the Court would permit teachers to search students for evidence when even the most trivial school regulation had been violated.⁵⁵ To prevent such an infringement on students' privacy, Justice Stevens proposed a standard that "would permit teachers and school administrators to search a student when they have reason to believe that the search will uncover *evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process.*"⁵⁶ Based on this standard, Justice Stevens concluded that the forcible opening of T.L.O.'s purse was unconstitutional at its inception because a smoking infraction "was neither unlawful nor significantly disruptive of school order or the educational process. . . ."⁵⁷

IV. ANALYSIS

The *T.L.O.* decision is flawed in several respects. First, although the Court initially stressed the importance of students' rights to privacy in holding that the fourth amendment's prohibition on unreasonable searches and seizures applies to searches conducted by school officials, the Court then minimized the fourth amendment protection afforded to students by using a balancing test to carve out an unprecedented exception to the probable cause standard for full-scale searches conducted in public schools.⁵⁸ Second, even if the balancing test employed by the Court was warranted by traditional fourth amendment analysis, the "reasonable grounds" standard adopted by the Court will promote unjustified searches in public schools since the privacy rights of students were not given adequate weight in the Court's balancing of the relevant interests.⁵⁹

A. THE FOURTH AMENDMENT APPLIES TO SEARCHES CONDUCTED BY SCHOOL OFFICIALS

In holding that the fourth amendment applies to searches conducted by school officials, the Court first disposed of the argument that the fourth amendment was intended to regulate only searches and seizures conducted by law enforcement officers.⁶⁰ Although the

⁵⁵ *Id.* at 759 (Stevens, J., dissenting) (relaxed standard adopted by the Court "will permit school administrators to search students suspected of violating only the most trivial school regulations and guidelines for behavior.").

⁵⁶ *Id.* at 763 (Stevens, J., dissenting) (emphasis in original).

⁵⁷ *Id.* at 766-67 (Stevens, J., dissenting).

⁵⁸ See *infra* text accompanying notes 81-139.

⁵⁹ See *infra* text accompanying notes 140-60.

⁶⁰ 105 S. Ct. at 740.

fourth amendment was originally intended to constrain actions by law enforcement officers,⁶¹ the Court has held that the purpose of the fourth amendment is to safeguard the privacy of individuals against arbitrary invasions by all public officials. In *United States v. Chadwick*,⁶² the Court stated:

Silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.⁶³

Thus, the fact that the Framers did not intend for the fourth amendment to constrain the actions of school officials does not preclude the fourth amendment from being a safeguard of the rights of students today.

Historically, the only types of searches which the Court has placed outside of the requirements of the fourth amendment are those conducted by private individuals with no state connections.⁶⁴ The "origin and history [of the fourth amendment] show that it was intended as a restraint upon the actions of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."⁶⁵ Consequently, the fourth amendment has been held to restrict the actions of housing inspectors,⁶⁶ OSHA inspectors,⁶⁷ and firemen.⁶⁸ Furthermore, the requirements of the fourth amendment apply to state actors because the Supreme Court has ruled that any fundamental rights protected from federal action by the fourth

⁶¹ See *Boyd v. United States*, 116 U.S. 616 (1886) (fourth amendment was created by men who remembered "[t]he practice . . . in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods" without any check on the actions of the officers).

⁶² 433 U.S. 1 (1977).

⁶³ *Id.* at 8-9.

⁶⁴ See, e.g., *Burdeau v. McDowell*, 256 U.S. 465 (1921). In *Burdeau*, the Court held that documents wrongfully obtained by individuals through an unlawful search may be presented as evidence by the United States in a criminal proceeding as the individuals obtained the documents without the participation or knowledge of any government official. *Id.*

⁶⁵ *Id.* at 475.

⁶⁶ See *Camara*, 387 U.S. at 528 ("[t]he basic purpose of this Amendment . . . is to safeguard privacy and security of individuals against arbitrary invasions. . . .").

⁶⁷ See *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (OSHA inspectors need warrants pursuant to the fourth amendment to conduct searches of commercial premises).

⁶⁸ See *Michigan v. Tyler*, 436 U.S. 499 (1978). The Court in *Tyler* held that "official entries to investigate the cause of a fire must adhere to the warrant procedures to the Fourth Amendment." *Id.* at 508. The Court added that "the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime." *Id.* at 504.

amendment are also protected from state action under the fourteenth amendment.⁶⁹ Thus, the Court's conclusion in the present case that school officials in public schools, who are employees of the state, are subject to the fourth amendment is consistent with the fourth amendment's purpose of safeguarding the privacy of individuals against unreasonable searches by all public officials, not only those conducted by law enforcement officers.

In extending the fourth amendment to searches conducted by school officials, the Court also strongly rejected the reasoning of some courts "that school officials are exempt from the dictates of the fourth amendment by virtue of the special nature of their authority over school children."⁷⁰ These courts have used the *in loco parentis* theory, which proposes that school officials stand in the place of the students' parents while the students are in school, to hold that school officials conducting searches are not restricted by the fourth amendment because they are merely acting in place of the parents for the purpose of protecting the welfare of students, not as government agents for the purpose of obtaining a criminal conviction.⁷¹ The philosophy underlying the *in loco parentis* theory is that since a school official exercises parental authority, he is vested with the parents' rights, duties, and responsibilities to protect the students' health.⁷² The *in loco parentis* theory has been effectively used by courts to negate the fourth amendment protection of students.⁷³

For three reasons, the Court properly rejected the *in loco parentis*

⁶⁹ See *Mapp v. Ohio*, 367 U.S. 643 (1961). The fourteenth amendment states:

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

U.S. CONST. amend. XIV, §1.

⁷⁰ 105 S. Ct. at 740-41. The common law doctrine of *in loco parentis* states:

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

12 BLACKSTONE, COMMENTARIES 453.

⁷¹ See, e.g., *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969). In the *Donaldson* case, the court held that the *in loco parentis* theory justified a search by school officials of a student's book locker. *Id.* at 513, 75 Cal. Rptr. at 223. The school officials, who searched the student's locker after receiving a tip that the student had been selling drugs in the school, found marijuana in the locker. The court indicated that the school official was simply following his obligation "to maintain discipline in the context of a proper and orderly school operation" and not acting as "a governmental official within the meaning of the fourth amendment." *Id.* at 511, 75 Cal. Rptr. at 222.

⁷² See generally S. DAVIS, RIGHTS OF JUVENILES, THE JUVENILE COURT SYSTEM 1.1 (1980).

⁷³ See, e.g., cases cited *supra* note 71.

theory as being "in tension with contemporary reality and the teaching of this Court."⁷⁴ First, the Court argued that school officials are acting "in furtherance of publicly mandated educational and disciplinary policies."⁷⁵ As such, a school official acquires power over students directly by reason of the school policies or state statutes. This argument by the Court is consistent with the fact that most jurisdictions now have laws compelling school attendance and specifically granting powers and responsibilities to school officials.⁷⁶ A school official statutorily charged with maintaining discipline in the school is clearly exercising state authority regardless of whether the *in loco parentis* theory applies to the official's conduct.⁷⁷

Second, the Court's argument that the *in loco parentis* theory is no longer a realistic doctrine is supported by the significant changes in public schools over the past fifty years. Teachers today usually have many students in each class and therefore rarely form close relationships with students on an individual basis. The days of the small one-room school-house where teacher and students spent the entire day together are gone.⁷⁸ The increasingly impersonal nature of schools makes the theory that school officials act as students' surrogate parents untenable.

Finally, even in schools which have retained a personal atmosphere, the responsibilities of teachers differ from those of parents. School officials are employed to educate children and to formulate school curriculum for all the students, not to serve the interest of individual students.⁷⁹ Moreover, "the literal translation of *in loco parentis* means "in the place of the parent" and yet it can hardly be argued that a parent would search his child, have him arrested, and turn over the evidence to the police to be used in criminal proceedings."⁸⁰ School officials do not show the genuine parental protec-

⁷⁴ 105 S. Ct. at 741.

⁷⁵ *Id.*

⁷⁶ Several courts have noted that public school officials are state employees whose responsibilities are derived from state authority. See *State v. Baccino*, 282 A.2d 860, 871 (Del. Super. Ct. 1971); *State v. Walker*, 19 Or. App. 420, 424, 528 P.2d 113, 115 (1974).

⁷⁷ See *People v. Scott D.*, 34 N.Y.2d 483, 486, 315 N.E.2d 466, 468, 358 N.Y.S.2d 403, 406 (1974) (school officials act not as private individuals but "perform as agents of the state," because public school authority's "special responsibilities" and "correspondingly broad powers" are derived from state law).

⁷⁸ Note, *School Officials May Conduct Student Searches Upon Satisfaction of Reasonableness Test in Order to Maintain Educational Environment*, 14 SETON HALL 738, 756 (1984).

⁷⁹ See Buss, *supra* note 27, at 768 (*in loco parentis* theory is erroneous phrase in school context because courts using *in loco parentis* theory focus "almost entirely on protection of the other students and on coercive power over the searched student" instead of "parental protective concern for the student who is threatened with the school's power.").

⁸⁰ Case Comment, 5 FLA. ST. U. L. REV. 526, 531 (1977). In fact, the fallacy of the argument that school officials are acting with parental authority is demonstrated by the

tion and concern underlying the *in loco parentis* theory. Thus, since the *in loco parentis* theory is concerned with the protection of children, using the theory to exempt school officials from the fourth amendment requirements when searching students is untenable.

B. USE OF A BALANCING TEST TO DERIVE A "REASONABLE GROUNDS" STANDARD

While correctly holding that the fourth amendment applies to searches conducted by school officials, the Court seriously erred in minimizing the extent of privacy afforded to students by adopting a "reasonable grounds" standard for searches conducted in public schools. In adopting the "reasonable grounds" standard, the Court stated that "the determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need of search against the invasion which the search entails.'"⁸¹ The Court's use of a reasonableness standard derived by a balancing of the relevant interests, however, is at odds with the "long-prevailing" probable cause standard for fourth amendment analysis.⁸²

Probable cause is the fourth amendment standard which the Court has held in many cases to be the prerequisite for a full-scale search. In 1977, the Court in *Dunaway v. New York*,⁸³ reaffirmed the standard of probable cause as representing "the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of invasion involved in an arrest 'reasonable' under the fourth amendment . . . without the need to 'balance' the interest and circumstances involved in particular searches."⁸⁴ Probable cause depends "upon whether, at the moment the arrest was made . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."⁸⁵ A

fact that many of the cases challenging the validity of searches conducted in public schools are brought by the parents of the students. See, e.g., *Belliner v. Lund*, 438 F. Supp. 47, 54 (N.D.N.Y. 1977), (search of entire fifth grade class for stolen money was found to be invalid under the fourth amendment because school officials were not "particularized with respect to which students might possess the money.").

⁸¹ 105 S. Ct. at 741 (quoting *Camara v. Municipal Court*, 387 U.S. at 536-37).

⁸² See *Henry v. United States*, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history.").

⁸³ 442 U.S. 199 (1979).

⁸⁴ *Id.* at 208.

⁸⁵ *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (police officers did not have probable cause to search person based on unspecified information and knowledge that person had criminal record). A warrant obtained pursuant to the warrant and probable cause provision in the fourth amendment requires a description of the place to be searched or the things

search conducted without a warrant based on probable cause is per se unconstitutional unless it falls within one of the "specifically established and well-delineated exceptions" to the warrant requirement of the fourth amendment.⁸⁶ Consequently, unless the policy reasons behind these isolated exceptions also apply to searches conducted by school officials, the Court should have extended the probable cause standard to students in public schools.

In announcing the "reasonable grounds" standard determined by balancing the relevant interests, the Court primarily relied on two previous decisions in *Camara v. Municipal Court*⁸⁷ and *Terry v. Ohio*.⁸⁸ In both of these cases, the Court carved out an exception to the traditional probable cause standard by using a balancing test to derive a standard less demanding than probable cause.⁸⁹ The Court cited these cases for the proposition that searches may be excepted from the warrant and probable cause requirement when "a careful balancing of governmental and private interests suggests that the public interest is best served by a fourth amendment standard of

to be seized, the time of the proposed execution, and a showing of probable cause. See *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971).

⁸⁶ *Katz v. United States*, 389 U.S. 347, 357 (1967). See also *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971) (seizure of car in drive way was not justified under the "emergency" or "plain view" exceptions because police had ample opportunity to obtain a valid warrant and no contraband or dangerous objects were involved). The circumstances under which the Supreme Court has permitted searches based on less than probable cause, as summarized by one state court, are as follows:

(1) Where the arresting officer has reasonable cause to believe that he is dealing with an armed and dangerous person, he may "stop and frisk" him for a weapon. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

(2) A warrant for the search of a designated area of houses may issue upon a showing that there are "reasonable administrative or legislative standards for conducting the inspection with respect to a particular dwelling," for health and safety purposes. For such administrative searches, the strict requirement of personal knowledge of the officer is relaxed. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523 (1967).

(3) Warrantless searches at borders for aliens or contraband are held to be reasonable because of the legitimate interest in self-protection, where there is reasonable cause to believe that laws are being violated. See, e.g., *Carroll v. United States*, 207 U.S. 132 (1925) (dicta).

(4) Where there is reasonable cause to believe that contraband is being carried, an automobile may be searched without a warrant. The exigent circumstance that the contraband may be carried away out of the jurisdiction and its contents destroyed was the rationale for this exception. See, e.g., *Carroll v. United States*, 267 U.S. 132 (1925).

(5) No warrant is necessary where the defendant consents to the search. See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Katz v. United States*, 389 U.S. 347 (1967).

(6) An object in plain view of the government official can be seized, provided he is rightfully in the position to have that view. See, e.g., *Harris v. United States* 390 U.S. 234 (1968); *Ker v. California*, 374 U.S. 23 (1963).

See *State v. McKinnon*, 88 Wash. 2d at 91 n.2, 558 P.2d at 790 n.2 (1977).

⁸⁷ 387 U.S. 523 (1967).

⁸⁸ 392 U.S. 1 (1968).

⁸⁹ See *infra* text accompanying notes 91-139.

reasonableness that stops short of probable cause.”⁹⁰ An analysis of the *Camara* and *Terry* decisions, however, reveals that the relaxed fourth amendment standards adopted in these cases were isolated exceptions limited to the particular facts involved and do not stand for the rule that courts may always adopt a reasonableness standard for searches in different contexts.

In *Camara*, the Court held that a housing inspector making a routine annual inspection for possible violations of the city’s housing code could not undertake an inspection inside the petitioner’s residence without a warrant.⁹¹ Nevertheless, the Court held that the standard of probable cause controlling issuance of a warrant could be lower than that applying in the case of a search for evidence of a criminal violation.⁹² The Court indicated that a modified probable cause standard was necessary in the context of housing inspection because “the public interest demands that all dangerous conditions be prevented”⁹³ Housing inspectors would not be able to satisfy this public interest if the validity of searches were assessed by the traditional probable cause standard. Furthermore, the Court stated that housing inspections are “neither personal in nature nor aimed at the discovery of evidence of a crime” and “involve a relatively limited intrusion of the urban citizen’s privacy.”⁹⁴ After taking these factors into consideration, the Court held that probable cause would be established “if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.”⁹⁵

In citing *Camara* for the general proposition that a balancing test may be used to develop a fourth amendment standard for school searches, the *T.L.O.* Court ignored several important aspects of the *Camara* decision. First, the Court in *Camara* held that in the special case of housing inspections, probable cause, not reasonableness, would be determined through a balancing test weighing the

⁹⁰ 105 S. Ct. at 743. The Court also cited the following cases after *Camara* and *Terry* to support the use of a balancing test to derive a fourth amendment standard less demanding than probable cause: *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brigoni-Ponce*, 422 U.S. 873 (1975).

⁹¹ 387 U.S. at 534.

⁹² *Id.* at 538-39.

⁹³ *See id.* at 537.

⁹⁴ *Id.*

⁹⁵ *Id.* at 538. The Court indicated that instead of lessening the overall protections of the fourth amendment, the standard adopted “merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic principle behind the constitutional right to be free from unreasonable government invasions of privacy.” *Id.* at 539.

governmental interest against the privacy right of the citizen.⁹⁶ Although probable cause was measured in a new manner, the Court's holding in *Camara* was consistent with the general principle that all searches and seizures are unreasonable unless based on probable cause. Thus, the *T.L.O.* Court's use of a reasonableness standard is contrary to *Camara*.

Second, the *T.L.O.* Court employed the *Camara* balancing test without determining whether the policy reasons for using such a test in *Camara* also apply to a school search situation. The decision in *Camara* stressed that although the fourth amendment applies to administrative searches, the special factors peculiar to housing inspections required a relaxed standard of probable cause for search warrant purposes.⁹⁷ In other words, the impersonal nature of an inspection not aimed at discovery of evidence of a crime, made the search addressed in *Camara* a "relatively limited invasion" of privacy.⁹⁸ The natural inference from the *Camara* decision is that when these special factors are absent, not only must the administrative search be made under the authority of a warrant, but the issuance of the warrant is appropriate only under the traditional probable cause standard, rather than the relaxed standard of *Camara*.⁹⁹

Although initially the search of T.L.O.'s purse may seem to be a purely "administrative search" and thus indistinguishable from the search conducted in *Camara*, the facts in the present case do not show a limited intrusion of the kind associated with the relaxed standard of probable cause in *Camara*. To the contrary, the opening of T.L.O.'s purse was highly personal in nature. The Court itself recognized that "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective

⁹⁶ 387 U.S. at 534-35. See Trosch, Williams & DeVore, *Public School Searches and the Fourth Amendment*, 11 J.L. & EDUC. 41, 44 (1982) [hereinafter Trosch] ("a magistrate must weigh all the factors before deciding if probable cause exists, not whether the search itself is reasonable; without probable cause, the search is unreasonable per se."). See generally LaFave, *Fourth Amendment Vagaries*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1199-1200 (the "difficult question which has troubled several members of the Court in recent years concerning the extent to which [a] balancing process should supplant the probable cause requirement may be attributable in part to the fact that in the seminal *Camara* case the Court was not sufficiently careful in elaborating" when a balancing test is appropriate).

⁹⁷ See *id.* at 537. The Court noted that many dangerous housing conditions are not observable from the outside and cannot be detected by any other canvassing technique besides inspections. *Id.*

⁹⁸ *Id.*

⁹⁹ Buss, *supra* note 27, at 754.

expectations of privacy.”¹⁰⁰ Thus, the Court incorrectly relied on *Camara* because the relaxed standard of probable cause derived from a balancing test in *Camara* does not apply to a search as intrusive as Mr. Choplick’s search of T.L.O.’s purse.

The Court’s reliance on *Terry* for its use of a balancing test to derive a fourth amendment standard for school searches is also incorrect. In *Terry*, a police officer seized a revolver by patting down the petitioner who, together with two other persons, had several times returned to stare in a store window for a few minutes.¹⁰¹ The Court recognized the narrow authority of a police officer to conduct a reasonable search for weapons when “he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”¹⁰² The Court stated that a police officer is justified in making a “frisk” for weapons if “a reasonably prudent man in the circumstances would be warranted in his belief that, his safety or that of others was in danger.”¹⁰³ To arrive at this standard, the Court balanced the limited violation of the individual’s privacy against the opposing interests of crime prevention and the police officer’s safety.¹⁰⁴ The Court concluded that a “frisk” amounts “to a mere minor inconvenience and petty indignity,” which can properly be imposed upon the citizens in the interest of effective law enforcement on the basis of police officer’s suspicion.”¹⁰⁵ The Court warned, however, that the search must be “reasonably related in scope to the justification for its initiation.”¹⁰⁶

Since the *Terry* decision, the Supreme Court and lower courts have allowed limited intrusions of an individual’s personal security based on less than probable cause by border guards¹⁰⁷ and military

¹⁰⁰ 105 S. Ct. at 741-42.

¹⁰¹ 392 U.S. at 7.

¹⁰² *Id.* at 27. This statement by the Court represents the first departure from the traditional probable cause standard. The Court in *Terry* stated that, instead of assessing the validity of the search under the probable cause standard, “the conduct involved in this case must be tested by the Fourth Amendment’s general prescription against unreasonable searches and seizures.” *Id.* at 20.

¹⁰³ *Id.* at 27.

¹⁰⁴ *Id.* at 21-27.

¹⁰⁵ *Id.* at 26 (quoting *People v. Rivera*, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 36, 252 N.Y.S.2d 458, 464 (1964), *cert. den’d*, 379 U.S. 978 (1965)).

¹⁰⁶ *Id.* at 29. The Court stated that the search “must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may accurately be characterized as something less than a ‘full search.’” *Id.* at 26.

¹⁰⁷ See *United States v. Brigoni-Ponce*, 422 U.S. 873 (1975). *Brigoni-Ponce* applied *Terry* in the special context of roving border patrols stopping automobiles to check for

authorities.¹⁰⁸ In each of these cases, the lowering of the fourth amendment standard barrier was partly “justified by the peculiar security needs of the activity involved and . . . by circumstances weakening the searched person’s claim that a protectable interest in privacy has been seriously ignored.”¹⁰⁹ In these cases the relaxation of the probable cause requirement was also limited to the unique setting in which the particular searches were conducted. For instance, in *United States v. Brigoni-Ponce*,¹¹⁰ the Court indicated that a less demanding standard than probable cause for border searches was necessary because “[t]he Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings.”¹¹¹

The *Terry* line of cases demonstrate that some seizures covered by the fourth amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause.¹¹² The common denominator of the *Terry* line

illegal immigrants. The investigative stops usually lasted less than one minute and involved “a brief question or two.” *Id.* at 880. The Court stated that:

[B]ecause of the importance of the governmental interests at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer’s observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.

Id. at 881. See also *Delaware v. Prouse*, 440 U.S. 648 (1979) (random checks for drivers’ licenses and proper vehicle registration not permitted on less than articulable reasonable suspicion); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (fixed checkpoint to stop and check vehicles for aliens).

¹⁰⁸ See *United States v. Grisby*, 335 F.2d 652 (4th Cir. 1964). In *Grisby*, the court indicated that the fourth amendment is applied under a military law or in a military context in a unique and qualified fashion. See *id.* at 654-55. The court held that the seizure of property from the home of a military officer on the basis of a report that the officer had stolen government property was constitutionally valid. *Id.* According to the court, there was “no basis for holding that a search conducted by military authority, which was completely lawful and valid when made as a matter of military law, is unreasonable under the Constitution.” *Id.* at 656. Consequently, the court held that the commanding officer who authorized the search performed the role of a magistrate in the civilian context. *Id.*

¹⁰⁹ Buss, *supra* note 27, at 749. After analyzing the searches conducted at a border or under military authority, Buss concluded that neither of these special settings “provide a persuasive analogy for erosion of fourth amendment protection in the school setting.” *Id.* at 753.

¹¹⁰ 422 U.S. 873.

¹¹¹ *Id.* at 879. Similarly, in *Grisby*, the court stressed that the fourth amendment must be applied differently in the military context where “the exercise of military disciplinary authority, including the conduct of searches, could not be made dependent upon the issuance of valid civilian process if effective military controls are not to be gravely impaired.” 335 F.2d at 655.

¹¹² *Michigan v. Summers*, 452 U.S. 692, 699 (1980) (warrant to search house for con-

of cases is the limited nature of the search accompanied by some compelling governmental interest such as protecting police officers¹¹³ or preventing the illegal entry of aliens.¹¹⁴ The narrow scope of these cases is demonstrated by the Court's limit of the scope of the searches to a frisk for weapons¹¹⁵ or a brief series of questions.¹¹⁶ Searches which exceed the limited intrusions of privacy allowed in these cases cannot be conducted without probable cause. Thus, the *Terry* line of cases does not represent, as the Court in *T.L.O.* apparently believed, that all types of searches may be governed by a standard of reasonableness that stops short of probable cause.¹¹⁷

The Court's reliance on the *Terry* line of cases is faulty because the search conducted by Mr. Choplick of T.L.O.'s purse was intrusive and not justified by a compelling governmental interest. First, the Court's reasoning that the exceptions to the probable cause requirement announced in the *Terry* line of cases apply to school searches as intrusive as Mr. Choplick's search of T.L.O.'s purse "threaten[s] to swallow the general rule that fourth amendment seizures are 'reasonable' only if based on probable cause."¹¹⁸ Unlike the *Terry* line of cases, the search of T.L.O.'s purse was highly personal in nature. A purse usually contains personal items and "it could prove extremely embarrassing for a teacher or principal to

traband implicitly includes limited authority to detain occupants of house while search is being conducted).

¹¹³ See *Terry*, 392 U.S. at 20-24. The Court stressed the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23.

¹¹⁴ See *Brigoni-Ponce*, 422 U.S. at 878-79. The Court stated that "aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services." Furthermore, the Court noted that the "aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation." *Id.*

¹¹⁵ See *Terry*, 392 U.S. at 29.

¹¹⁶ See *Brigoni-Ponce*, 442 U.S. at 211.

¹¹⁷ Nevertheless, as Justice Blackmun indicated in his concurring opinion in *United States v. Place*, 103 S.Ct. 2637, 2652 (1983) (Blackmun, J., concurring), there "appears. . . to be an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the fourth amendment requires only that any seizure be reasonable." For instance, in his opinion for the Court in *Terry*, Chief Justice Warren identified "the central inquiry under the Fourth Amendment" as "the reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security." 392 U.S. at 19. Moreover, Justice White, concurring in *Dunaway*, noted that *Terry* is not "an almost unique exception to a hard-and-fast standard of probable cause." Instead, Justice White said that "the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests." 442 U.S. at 219 (White, J., dissenting).

¹¹⁸ See *Dunaway*, 442 U.S. at 213.

rummage through its contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.”¹¹⁹ Furthermore, students such as T.L.O. do not lose their expectations of privacy upon entering a public school. Students, unlike soldiers subjected to military discipline or persons attempting to enter the country, do not voluntarily surrender their expectations of privacy. Even the Court recognized that students need to bring personal items to school and do not “waive all rights to property in such items merely by bringing them onto school grounds.”¹²⁰ Thus, the Court incorrectly relied on the *Terry* line of cases because the exceptions from the warrant and probable cause requirements announced in these cases do not apply to searches as intrusive as Mr. Choplick’s search of T.L.O.’s purse.

In addition to ignoring the intrusive nature of the search involved, the Court also failed to adequately explain the compelling governmental interest that justified deriving a standard less demanding than probable cause for searches by school officials. The Court’s only justification for departing from the traditional probable cause standard was “the substantial need of teachers and administrators for freedom to maintain order in the schools”¹²¹

Although maintaining an educational environment is a very important interest for school officials, it does not justify the relaxation of the probable cause standard. There is certainly a difference between the difficulty in achieving the overriding security and safety needs in border searches or police investigations of dangerous criminals and satisfying the law enforcement interests that have prompted student searches in public schools.¹²² Unlike school officials, border guards and police officers investigating dangerous criminals need a fourth amendment standard less demanding than probable cause to accomplish their interests. There is no way a border guard could obtain evidence of whether a person was attempting to bring drugs or dangerous weapons into the country if he needed probable cause to stop and briefly question persons crossing the border. Similarly, a police officer would be placed in serious danger if he needed probable cause to “frisk” a dangerous criminal. A school official, however, can achieve his interest of maintaining order in the school through daily supervision of students to determine with probable cause whether a student has violated a school policy or committed a crime. In fact, “[s]chool officials often are in

¹¹⁹ 105 S. Ct. at 751 n.1 (Brennan, J., dissenting).

¹²⁰ *Id.* at 742.

¹²¹ *Id.* at 743.

¹²² See Buss, *supra* note 27, at 752.

a better position than law enforcement officers to identify, interpret and record the totality of circumstances necessary to establish probable cause" because school officials "can observe and supervise students" on a continuing basis.¹²³ Thus, the Court's use of a balancing test is unprecedented because searches conducted in public school do not demonstrate the special law enforcement needs which justify a fourth amendment standard less demanding than probable cause.

Furthermore, the genuineness of the Court's belief that the maintenance of an educational environment justifies a less demanding standard is questionable, considering the Court has limited the application of the "reasonable grounds" standard to searches carried out by school authorities acting alone and on their own authority.¹²⁴ By not extending the standard's application to searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, the Court is perpetuating a dual standard. Most state and federal courts have held that police participation in a school search will mandate the full constitutional safeguard of a warrant issued on probable cause.¹²⁵ If the maintenance of an educational atmosphere in public schools is a sufficient governmental interest to justify an exception to the warrant and probable cause requirement, any person who furthers the maintenance of that environment should be held to the same relaxed standard. Thus, the dual fourth amendment standard for school administrators and police officers, which results from the Court's limitation of the "reasonable grounds" standard to searches conducted by school officials acting alone, undermines the Court's justification that a "reasonable grounds" standard is necessary to maintain order in public schools.

In addition to being an unprecedented departure from the traditional probable cause standard, the Court's adoption of the "reasonable grounds" standard is inconsistent with the trend towards providing students full constitutional protection. The importance of providing students with the same constitutional protections as other persons was first articulated by the Court in *Kent v. United States*¹²⁶ "There is evidence . . . that the child receives the worst of both worlds: that he gets neither the protections accorded to adults

¹²³ Trosch, *supra* note 96, at 55.

¹²⁴ 105 S. Ct. at 749 n.7. "This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question." *Id.*

¹²⁵ See, e.g., *Picha v. Wieglos*, 410 F. Supp. 1214 (N.D. Ill. 1976) (holding probable cause standard applicable to searches involving police).

¹²⁶ 383 U.S. 541 (1966).

nor the solicitous care and regenerative treatment postulated for children."¹²⁷ The trend of the Court since the decision in *Kent* has been towards establishing constitutional protections for students. In 1969, the Court stated in *Tinker* that "students [do not] shed their constitutional rights to freedom of speech or of expression at the school-house gate."¹²⁸ The Court's decision in *Tinker* emphasized that the coercive setting of public schools made preserving the student's freedom of expression an important means of counterbalancing that coercion.¹²⁹ In 1975, the Court in *Gault* held that students were entitled to due process when charged with a violation of school rules.¹³⁰ The *Tinker* and *Gault* decisions indicate that "the appropriateness and importance of [constitutional protections] seems particularly called for by the fact that children are compelled by law to attend school through a substantial portion of their public lives, and are specially pressured by economic and social constraints to remain in school even after that."¹³¹

By adopting a fourth amendment standard less demanding than probable cause for searches conducted in public schools, the Court ignored its previous statements about the importance of safeguarding student's constitutional protections in the public schools. The Court's decisions in *Tinker* and *Gault* would seem to indicate that "the constraints on a student's liberty that result from compulsory attendance and institutional regulation would evoke a deep judicial concern for the student's rights to privacy as protected by the fourth amendment."¹³² The *T.L.O.* Court, however, did not demonstrate that judicial concern. Instead, the Court adopted a standard that provides students with less protection than adults or other children who are not in public schools.

The Court's justification for adopting the "reasonable grounds" standard was the important need to preserve order in the public schools.¹³³ The Court's reliance on the need to maintain order in schools is nothing more than a return to the *in loco parentis* concept. Although the Court indicated that the *in loco parentis* theory did not exempt school officials from the fourth amendment requirements, the Court stated that school officials act as public officials as

¹²⁷ *Id.* at 556.

¹²⁸ 393 U.S. at 506. See *supra* note 1 for facts of the *Tinker* decision.

¹²⁹ *Id.* at 511. "[S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." *Id.*

¹³⁰ 387 U.S. at 33.

¹³¹ Buss, *supra* note 27, at 743.

¹³² *Id.*

¹³³ 105 S. Ct. at 743.

well as surrogates for the parents.¹³⁴ The Court therefore seems to be saying that while the *in loco parentis* theory does not make the fourth amendment inapplicable to school searches, the relationship between school officials and students may be considered in applying the "reasonable grounds" standard.¹³⁵

The implicit inclusion of the *in loco parentis* theory in the "reasonable grounds" standard adopted by the Court seriously minimizes the fourth amendment protection afforded to students in public schools. Courts applying a reasonableness standard influenced by the *in loco parentis* theory have consistently upheld searches conducted by school officials.¹³⁶ For example, in *In re Donaldson*,¹³⁷ the court stated that the *in loco parentis* power gave the school officials authority "to use moderate force to obtain obedience, including the force needed to search lockers."¹³⁸ Moreover, courts adhering to the *in loco parentis* theory to apply a reasonableness standard very seldom discuss how the rights of students are protected.¹³⁹ Thus, the Court's adoption of the "reasonable grounds" standard seriously reduces students' fourth amendment protection and is an extreme departure from the Court's past willingness to protect the constitutional rights of students.

C. IMPACT OF THE "REASONABLE GROUNDS" STANDARD ON COURTS, SCHOOL OFFICIALS, AND STUDENTS

Even if the adoption of the "reasonable grounds" standard were not an unprecedented departure from the probable cause standard, the practical justifications for adopting the standard are not persuasive. In adopting the "reasonable grounds" standard, the Court stated that "the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according

¹³⁴ *Id.* at 741.

¹³⁵ Several courts have adopted this restrained use of the *in loco parentis* theory. For example, one court indicated that the *in loco parentis* relationship between school officials and students was critical in applying the standard of reasonableness, but not that this relationship made the fourth amendment inapplicable. *People v. Jackson*, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

¹³⁶ *See, e.g., In re W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); *State v. Baccino*, 282 A.2d at 871; *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (1977). *See also Note, Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?* 24 ST. LOUIS U.L.J. 119, 127 (1979).

¹³⁷ 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).

¹³⁸ *Id.* at 513, 223.

¹³⁹ *See Buss, supra* note 27, at 772.

to the dictates of reason and common sense."¹⁴⁰

Contrary to the Court's belief, the use of the "reasonable grounds" standard to assess the validity of searches conducted in public schools will actually cause confusion for both school officials and the courts. Unlike the probable cause standard, which has many court decisions and legal authorities defining its meaning,¹⁴¹ there is little authority available defining a "reasonable grounds" standard.¹⁴² Furthermore, the authority that is available concerning the "reasonable grounds" standard reveals that the standard has been applied differently from one court to another.

The phrase "reasonable suspicion," another term used by courts to describe a standard less demanding than probable cause, was first announced by Justice Douglas in his dissenting opinion in *Terry*. Justice Douglas used it to describe the majority's standard for assessing the constitutional validity of "frisks" of dangerous criminals made by police officers.¹⁴³ Since its inception in *Terry*, many courts faced with the issue of searches conducted in public schools have adopted a "reasonable suspicion" standard as a middle ground between granting students full warrant and probable cause protection and completely denying them fourth amendment protection. Although the courts have used similar terminology to describe this relaxed standard, the application of the standard to searches conducted in public schools has been far from uniform. Courts have indicated that the level of suspicion required to satisfy the "reasonable suspicion" standard ranges from a "furtive gesture"¹⁴⁴ to the need to show particular suspicion.¹⁴⁵

¹⁴⁰ 105 S. Ct. at 744.

¹⁴¹ See *id.* at 756 (Brennan, J., dissenting) ("A school system conscientiously attempting to obey the Fourth Amendment dictates under a probable-cause standard could, for example, consult decisions and other legal materials and prepare a booklet expounding the rough outlines of the concept.").

¹⁴² See *id.* at 756-57 (Brennan, J., dissenting) ("[s]chool system faced with interpreting what is permitted under the Court's new 'reasonableness' standard could be hopelessly adrift as to when search may be permissible.").

¹⁴³ See, e.g., 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).

¹⁴⁴ See, e.g., *State v. Young*, 216 S.E.2d 586, 593, cert. denied, 423 U.S. 1039 (1975). The Court in *Young* even stated that it desired to permit searches "without hinderance or delay, subject only to the most minimal restraints. . . ." *Id.*

¹⁴⁵ See, e.g., *Helliner v. Lund*, 438 F. Supp. 47 (N.D. N.Y. 1977) The court in *Helliner* stated:

It is entirely possible that there was reasonable suspicion, and even probable cause, based upon the facts, to believe that *someone* in the classroom had possession of the stolen money. There were no facts, however, which allowed the official particularize with respect to which students might possess the money, something which has time and again found to be necessary to a reasonable search under the Fourth Amendment.

Id. at 54 (emphasis in original).

Many of the courts employing a "reasonable suspicion" standard have relied on the *in loco parentis* theory to justify a less rigorous standard than probable cause.¹⁴⁶ In determining whether "reasonable suspicion" exists, these courts have stated that "[t]he student's right to be free from unreasonable search and seizure must be balanced with the necessity for the school officials . . . to fulfill their duties under the *in loco parentis* doctrine to protect the health and welfare of their students."¹⁴⁷ Based on this balancing test, courts have frequently held that the core of privacy normally protected by the fourth amendment can be invaded by a school official acting *in loco parentis*.¹⁴⁸

The opinions of courts using a "reasonable suspicion" standard influenced by the *in loco parentis* theory, however, shed very little light on the meaning of "reasonable suspicion." Many courts simply emphasize the importance of the *in loco parentis* role of school officials without seriously considering other relevant factors which might argue for or against permitting a search.¹⁴⁹ Although presumably the facts in these opinions provide a clue to what level of suspicion is necessary to satisfy the "reasonable suspicion" stan-

¹⁴⁶ See, e.g. *People v. Jackson*, 65 Misc. 319, N.Y.S.2d at 736; *State v. Baccino*, 282 A.2d at 872.

¹⁴⁷ See, *M. v. Board of Educ. Ball-Chatham Comm. Unit School Dist. No. 5*, 429 F. Supp. 288, 292 (S.D. Ill. 1977).

¹⁴⁸ See, e.g., *Moore v. Student Affairs Committee of Troy State University*, 284 F. Supp. 725 (N.D. Ala. 1968). In *Moore*, the Court held that college administrators needed only "reasonable cause to believe," rather than the higher constitutional standard of probable cause, to justify a warrantless search of a student's dormitory room. The court stated that the less demanding standard was justified "because of the special necessities of the student-college relationship and because college disciplinary proceedings are not criminal proceedings in the constitutional sense." *Id.* at 730. For a case which pushes the *in loco parentis* theory to an extreme, see *Doe v. Henfrow*, 475 F. Supp. 1012 (S.D. Tex. 1979). In *Doe*, the court found that entry by school officials into classrooms with drug-detecting canines was justified under a reasonable suspicion standard influenced by the *in loco parentis* theory. The court indicated that although there was no specific information about the location of drugs, the search was reasonable because school officials were permitted to conduct wholesale searches and the dogs were simply used as aides to the school officials in their *in loco parentis* duty. *Id.* at 1022. The court further found that attention by the dogs to a particular student provided school officials with reasonable cause to justify a search of the student's pocket. *Id.* at 1024. The dog's attention to a particular student, however, did not "provide the necessary reasonable cause to believe the student actually possess[ed] the drug" to conduct a nude search. *Id.*

¹⁴⁹ See Knowles, *Crime Investigation in the School: Its Constitutional Dimensions*, 4 J. FAM. L. 151 (1964). Professor Knowles stated that:

[T]he phrase *in loco parentis* expresses nothing save that the school has certain rights and duties to children in its care. When a court rules that a certain act by a school official is performed *in loco parentis* the court is usually concluding that the act was permissible. . . . Most simply, the phrase *in loco parentis* is no guide to action, but solely a conclusory label attached to permissible school controls. *Id.* at 152 n.1.

dard, none of the opinions seriously analyze the facts to show why they satisfy the standard.¹⁵⁰ For instance in *State v. Baccino*,¹⁵¹ the Court simply indicated that in light of the school official's *in loco parentis* duty to maintain order in the school, a vice principal had a reasonable suspicion that a student possessed drugs in his jacket. Other courts list factors such as the student's age, the nature of the alleged infraction, and the exigency to make the search without delay, finally failing to adequately explain how these factors relate to "reasonable suspicion."¹⁵² Thus, the case law concerning the "reasonable suspicion" standard fails to provide meaningful guidance to school officials in deciding whether a search is constitutional.

The *T.L.O.* Court, like the many state and federal courts which had previously used a reasonableness standard for searches in public schools, did not adequately explain what "reasonable grounds" means. In adopting the "reasonable grounds" standard, the Court simply stated that "[w]e join the majority of courts that have examined this issue in concluding that . . . the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."¹⁵³ The Court then recited the facts of Mr. Choplick's search and concluded "that the search was in no sense unreasonable for fourth amendment purposes."¹⁵⁴ Although the Court explained that "reasonable grounds" only requires sufficient probability,¹⁵⁵ the Court's analysis of the facts fails to give a clear meaning to the standard. In fact, the uncertain meaning of the "reasonable grounds" standard is demonstrated by the Court's admission that although the standard applied by the New Jersey Supreme Court was substantially the same as the standard adopted by the Court, the New Jersey Supreme Court's application of the standard to invalidate the search of T.L.O.'s purse reflected a "somewhat crabbed notion of reasonableness."¹⁵⁶ The opposite re-

¹⁵⁰ Buss, *supra* note 27, at 772.

¹⁵¹ 282 A.2d 869 (Del. Super. 1971). In finding that the principal had a reasonable suspicion, the court noted that the student was discovered out of class illegally and was also known to the vice principal to have experienced with drugs in the past. The court, however, never indicated why these facts satisfy the "reasonable suspicion" standard.

¹⁵² See, e.g., *Doe v. State*, 540 P.2d 827 (1979); *People v. D.*, 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974); *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (1977).

¹⁵³ 105 S.Ct. at 743.

¹⁵⁴ *Id.* at 745.

¹⁵⁵ The Court stated that "the requirement of reasonable suspicion is not a requirement of absolute certainty: 'probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . .'" *Id.* at 746 (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)).

¹⁵⁶ See 105 S. Ct. at 745.

sults achieved by the New Jersey Supreme Court and the United States Supreme Court, who both used a similar reasonableness standard to assess the constitutional validity of the search of T.L.O.'s purse, indicates that the "reasonable grounds" standard does not provide courts or school officials with adequate guidance.

According to Justice Brennan in his dissent, "the amorphous 'reasonableness under all the circumstances' standard freshly coined by the Court today will likely spawn increased litigation and greater uncertainty among teachers and administrators."¹⁵⁷ The probable impact of the uncertainty concerning the meaning of "reasonable grounds" is that school officials will be permitted to make unjustified searches in public schools. Courts applying a reasonableness standard to school searches rarely discuss how the standard is controlled to protect the student's privacy interest.¹⁵⁸ For instance, the *T.L.O.* Court simply concluded that the "reasonable grounds" standard will not "authorize unrestrained intrusions upon the privacy of school children" without seriously considering the harmful effect of unjustified invasions of students' privacy.¹⁵⁹ Furthermore, under the "reasonable grounds" standard, the public school student is given very little fourth amendment protection, as the decisions of school officials to conduct searches under similar reasonableness standards have been upheld with extreme regularity.¹⁶⁰ Courts balancing a school official's interest in maintaining order against a student's legitimate expectations of privacy have almost always found that reasonable grounds for conducting a search exist. Thus, the "reasonable grounds" standard adopted by the Court fails to give serious consideration to the privacy interests of students and will probably result in unjustified searches by school officials.

D. ADEQUACY OF THE PROBABLE CAUSE STANDARD IN THE PUBLIC SCHOOL CONTEXT

The "reasonable grounds" standard adopted by the Court is a departure from the probable cause standard traditionally used to assess the constitutional validity of searches. In his dissenting opinion, Justice Brennan argued that by adopting the "reasonable

¹⁵⁷ *Id.* at 756 (Brennan, J., dissenting).

¹⁵⁸ See Buss, *supra* note 27, at 772. According to Buss, "[t]he failure to discuss in detail how the standard of 'reasonable suspicion' is controlled to protect the student's privacy interests seems to reflect a more general failure to seriously consider the interest of the student who is charged with wrong doing, or the interest in privacy that he champions in his own self-interest." *Id.*

¹⁵⁹ See 105 S. Ct. at 744.

¹⁶⁰ See, e.g., cases cited *supra* note 135.

grounds" standard, "the Court carve[d] out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems."¹⁶¹ To justify the "reasonable grounds" standard, the Court indicated that the "reasonable grounds" standard, as opposed to the traditional probable cause standard, is required because it is easier for school officials to understand and provides them with additional flexibility to preserve order in the public schools.¹⁶² Neither of these arguments are persuasive because the traditional fourth amendment probable cause standard, together with the isolated exceptions where probable cause is not required, adequately provide school officials with an effective and understandable means of maintaining order in public schools.

The Court's first argument that the "reasonable grounds" standard was necessary because it is an easier standard for school officials to apply than the probable cause standard is inconsistent with previous statements made by the Court concerning the applicability of the probable cause standard. The Court first announced in *Carroll v. United States*¹⁶³ that law authorities have probable cause where "the facts and circumstances within their knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that a criminal offense has occurred."¹⁶⁴ In *Brinegar v. United States*,¹⁶⁵ the Court indicated that "the rule of probable cause is a practical, non-technical conception" that depends upon "the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians act."¹⁶⁶ More recently, the Court explained that probable cause is a "common-sense" test that depends on an evaluation of the "totality of the circumstances" and is "practical," "fluid," "flexible," "easily applied," and "non-technical."¹⁶⁷ These statements by the Court reveal that although school officials are not "legal technicians," they are capable of applying the traditional probable cause standard to determine whether a search of a student is valid under the fourth amendment.

The need to provide school officials with more flexibility to maintain order in the public schools than is provided by the tradi-

¹⁶¹ 105 S. Ct. at 750 (Brennan, J., dissenting).

¹⁶² *Id.* at 743-44.

¹⁶³ 267 U.S. 132 (1925).

¹⁶⁴ *Id.* at 162.

¹⁶⁵ 338 U.S. 160 (1949).

¹⁶⁶ *Id.* at 175-7.

¹⁶⁷ *Illinois v. Gates*, 462 U.S. 213, 232, 236, 239 (1983).

tional probable cause standard is also an improper justification for the Court's adoption of the "reasonable grounds" standard. The traditional probable cause standard already provides school officials with the ability to maintain an educational atmosphere in public schools. School officials who suspect that a student has been violating a school policy or committing a crime can usually observe the student while he is in school to determine whether "the totality of circumstances" provide probable cause to confirm their suspicions.¹⁶⁸

Furthermore, although school searches will rarely fall within one of the recognized exceptions to probable cause,¹⁶⁹ these exceptions provide school officials with a means of taking immediate action in certain situations where the school environment is threatened. In his concurring opinion, Justice Blackmun indicated that "because drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel."¹⁷⁰ Justice Blackmun then stated that the "reasonable grounds" standard is necessary because "[s]uch immediate action would not be possible if a teacher were required to serve a warrant before searching a student."¹⁷¹ Justice Blackmun's reasoning ignores that exceptions to the probable cause standard exist that could be applied in a school setting when immediate action is necessary.

One exception that could be used to justify school searches in situations where immediate action is required is the "plain view" doctrine. The "plain view" doctrine provides that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."¹⁷² Under the "plain view" doctrine, a school official who observes a student holding items such as drugs or dangerous weapons may seize these items without obtaining a warrant.¹⁷³ The

¹⁶⁸ See *Harris v. United States*, 331 U.S. 145 (1947).

¹⁶⁹ See *Buss*, *supra* note 27, at 799. Most school search cases could not have applied any exception to the probable cause standard because the facts indicate that a warrant could have been obtained or an invalid warrant was obtained.

¹⁷⁰ 105 S. Ct. at 749-50 (Blackmun, J., concurring).

¹⁷¹ *Id.* at 750 (Blackmun, J., concurring).

¹⁷² *Harris v. United States*, 390 U.S. 234, 236 (1968).

¹⁷³ To date, very few cases have employed the "plain view" doctrine in the school context. The limited application of the doctrine to school searches is probably due to the fact that many courts simply require reasonable suspicion to conduct a search and therefore do not need to cite an exception to the warrant and probable cause requirement to constitutionally approve a search. One school search case that did use the

“plain view” exception may be especially helpful in a school setting where school officials can constantly supervise and observe students.

The “emergency” situation is another exception which provides school officials with the ability to conduct a search without a warrant. The “emergency” exception applies when there is probable cause to search coupled with the danger that evidence will be lost if the search is postponed,¹⁷⁴ or when a situation exists where the object of the search is so inherently dangerous that a search must be conducted immediately to prevent injury.¹⁷⁵ School officials may employ the “emergency” exception to search a student who they believe possesses a gun or other dangerous weapon when the search must be conducted immediately to avoid injury.¹⁷⁶ Moreover, school officials who have probable cause to believe that a student possesses drugs may conduct a warrantless search if they sincerely believe that the evidence will be destroyed.¹⁷⁷ Consequently, probable cause is a proper standard for searches in public schools because in those circumstances where a school official needs additional flexibility to maintain order, the “plain view” and “emergency” exceptions to the probable cause standard allow school officials to conduct searches without a warrant.¹⁷⁸

“plain view” doctrine was *Speake v. Grantham*, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971). In *Speake* the court held that the seizure of evidence which was visible through the windows of a student’s vehicle was justified under the “plain view” doctrine. *Id.* at 1269.

¹⁷⁴ See *Roaden v. Kentucky*, 413 U.S. 596, 605 (1973). “[W]here there are exigent circumstances in which police action literally must be ‘now or never’ to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.”)

¹⁷⁵ See *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973) (due to the increased number of hijackings, a search without a warrant of an individual with “a visible bulge in [his] right front trouser pocket,” which a United States marshal believed was a gun, was reasonable under the fourth amendment); *Ker v. California*, 374 U.S. 23, 40 (1963) (search of individual without warrant was constitutionally valid when the individual’s “furtive conduct in eluding [the police] shortly before the arrest was ground for the belief that he might well have been expecting the police.”).

¹⁷⁶ In one case, *Nelson v. State*, 319 So. 2d 154 (Fla. 2d Dist. Ct. App. 1975), the court stated that the “rampant crime and drug abuse” in public schools are so severe that a state of emergency exists justifying a less demanding fourth amendment standard. In addition to being inconsistent with the Supreme Court’s holding that exigent circumstances must be evaluated in each set of facts, see *Terry*, 92 U.S. at 21, the court’s statement in *Nelson* demonstrates the danger that the exceptions to the probable cause requirement may be used by courts to minimize the protection of students. Nevertheless, since these exceptions were carefully drawn and “well-delineated,” courts and school officials cannot simply cite an exception as justification for a warrantless search. See *Katz*, 389 U.S. at 347.

¹⁷⁷ See *Roaden*, 413 U.S. 496.

¹⁷⁸ In the instant case, it is clear that Mr. Choplick’s search would not have been justi-

Finally, in addition to providing school officials with an adequate means of maintaining an educational environment, the probable cause standard, unlike the "reasonable grounds" standard adopted by the Court, also sufficiently protects the privacy interests of the students. The main reason the few exceptions to the warrant requirement have been "jealously and carefully drawn" is that adherence to the probable cause standard is necessary to protect persons from unreasonable invasions of their privacy.¹⁷⁹ In *Katz v. United States*,¹⁸⁰ the Court said that "[w]herever a man be, he is entitled to know that he will remain free from unreasonable searches and seizures."¹⁸¹ Moreover, the Court stated in *Shelton v. Tucker*¹⁸² that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" where students are being educated for citizenship.¹⁸³ These statements by the Court indicate that, due to the importance of schools in teaching students about democratic principles, students should be provided with full constitutional protection against unreasonable searches and seizures by school officials.

The traditional probable cause standard, unlike the "reasonable grounds" standard which affords less constitutional protection to students than adults or other children, adequately protects students' right to privacy. Applying the probable cause standard to searches conducted in public schools would demonstrate to students the importance of the fourth amendment's protections to all persons in our democratic society. Thus, instead of adopting the "reasonable grounds" standard, the Court should have applied the traditional probable cause standard for searches conducted by school officials because the probable cause standard would provide school officials with a means of maintaining an educational environment while also protecting the privacy interests of students.

fied by either the "plain view" or "emergency" exceptions. First, the "plain view" doctrine did not justify the search for marijuana in T.L.O.'s purse because Mr. Choplick only saw rolling papers, not marijuana, while looking for cigarettes in T.L.O.'s purse. Second, the "emergency" exception did not apply to the search of T.L.O.'s purse because Mr. Choplick did not have probable cause to believe that T.L.O. possessed marijuana that she was going to destroy. Moreover, the presence of marijuana in T.L.O.'s purse did not pose the serious danger to students and teachers that would have allowed Mr. Choplick to search the purse for "emergency" reasons.

¹⁷⁹ See *Dunaway*, 442 U.S. at 214 (Court's "reluctance to depart from the proved protections afforded by [probable cause]" is demonstrated by "the narrow limitations emphasized in the cases" adopting a standard less demanding than probable cause).

¹⁸⁰ 389 U.S. 347 (1967).

¹⁸¹ *Id.* at 359.

¹⁸² 364 U.S. 479 (1960).

¹⁸³ *Id.* at 487.

V. CONCLUSION

The Court's adoption of the "reasonable grounds" standard for assessing the validity of searches conducted in public schools was unprecedented and unnecessary. Probable cause has long been accepted as the traditional fourth amendment standard, and searches conducted without probable cause are per se unreasonable unless they fall within one of the "specifically established and well-delineated exceptions" to the warrant and probable cause requirement.¹⁸⁴ Although maintaining order in public schools is an important goal, it does not justify carving out an exception to the probable cause requirement for full-scale searches which seriously intrude upon the privacy interests of students. The need of school officials to maintain order in public schools is adequately protected by the traditional fourth amendment probable cause standard. The Court's adoption of the "reasonable grounds" standard was therefore an unwarranted intrusion upon the fourth amendment protection of students.

Despite the Court's adoption of a relaxed fourth amendment standard in *T.L.O.*, students may not necessarily be subjected to unnecessary intrusions of privacy. Although the fourth amendment is the primary means used to assess the validity of searches conducted by school officials, there are other constitutional and statutory grounds for challenging the validity of a search. First, states which have constitutional provisions corresponding to the fourth amendment of the Federal Constitution may insist on a more demanding standard than "reasonable grounds."¹⁸⁵ The "reasonable grounds" standard only represents the minimum amount of protection against unreasonable searches and seizures that must be provided to stu-

¹⁸⁴ *Katz*, 389 U.S. at 357.

¹⁸⁵ See 105 S. Ct. at 745 n.10. This greater protection is possible since a federal court will not review judgments of state courts resting on adequate and independent grounds. See *Herb v. Pitcarin*, 324 U.S. 117 (1945). For example, in *State v. Mora*, 307 So. 2d 317 (La.), vacated sub nom., *Louisiana v. Mora*, 423 U.S. 809 (1975), modified, 330 So. 2d 900 (La.), cert. denied, 429 U.S. 1004 (1976), the Louisiana Supreme Court held that the constitutional validity of searches conducted in public schools should be evaluated by the warrant and probable cause standard. *Id.* at 520. The United States Supreme Court vacated the judgment of the Louisiana Supreme Court and remanded for a determination whether the judgment was based on federal or state constitutional grounds. The Louisiana Supreme Court indicated that it relied on both the federal and state constitutions. 423 U.S. at 941. The writ of certiorari by the State of Louisiana was consequently denied by the Supreme Court. If the Louisiana Supreme Court had indicated that its holding was based solely on federal constitutional grounds, the Supreme Court would have had an opportunity to develop a fourth amendment standard for school searches nearly ten years prior to the Court's decision in *T.L.O.*

dents in public schools.¹⁸⁶ Second, state legislation may be enacted that requires the exclusion of evidence obtained through school searches conducted without probable cause. For example, one state is presently considering legislation which provides that no contraband seized pursuant to a search without probable cause shall be admissible in any adjudication brought under the juvenile court.¹⁸⁷ Thus, although the "reasonable grounds" standard adopted in *T.L.O.* will minimize the fourth amendment protection available to students, alternative means may exist to provide students with adequate protection against unreasonable intrusions of privacy.

NEAL I. AIZENSTEIN

¹⁸⁶ See 105 S. Ct. at 745 n.10. (State courts may insist on a more demanding standard under their own constitutions because they "would not purport to be applying the Fourth Amendment when they invalidate a search.").

¹⁸⁷ See H.R. 0380, 84th Ill. General Assembly, 1st Sess. (1985) (Although searches may be based on reasonable suspicion, no "contraband seized pursuant to a search without probable cause shall be admissible in any adjudicatory hearing under the Juvenile Court or criminal prosecution.").