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Kay Cowden Medlin

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SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS

A public high school gym teacher, acting without a search warrant, searched the defendant student's gym bag and found a small quantity of marijuana. The trial court denied a motion to suppress the marijuana and the Louisiana Supreme Court reversed, holding that a public school teacher is a state agent subject to the probable cause and warrant requirements of the fourth amendment¹ and the Louisiana constitution.² *State v. Mora*, 307 So. 2d 317 (La. 1975).³

The protection afforded a minor student by the fourth amendment is perhaps open to some speculation due to his age and the unique situation presented by the school environment. While the amendment has never been applied specifically to minors, the construction given to other Bill of Rights guarantees supports extending to minors the protec-

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

2. La. Const. art. I § 7 (1921), in effect at the time of the search, provided: "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 such search or seizure shall be made except upon warrant therefor issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." This guarantee is now found at LA. CONST. art. I § 5.

3. Upon granting petition for writ of certiorari, the United States Supreme Court vacated and remanded the decision for clarification of the grounds used in reaching the decision. 423 U.S. 809 (1975). The Louisiana Supreme Court in a 4-3 decision held that the decision was based on both federal and state constitutional grounds and state statutory law. 330 So. 2d 900 (La. 1976). The four-member majority included three of the same justices in the majority of the original decision. Justice Barham, who wrote the original majority opinion, had resigned in the interim and his successor authored the decision on remand. The decision on remand almost certainly bars a hearing by the United States Supreme Court. In remanding the decision to the Supreme Court of Louisiana, the United States Supreme Court cited *California v. Krivda*, 409 U.S. 33 (1972), involving a similar clarification order that resulted in denial of rehearing at 409 U.S. 1068 (1972), after the state court held the decision was based on both federal and state constitutional grounds. *See, e.g.*, *Herb v. Pitcairn*, 324 U.S. 117 (1945) (The Court will not review judgments of state courts resting on adequate and independent state grounds.). Both Justice Summers and Chief Justice Sanders in their separate dissenting opinions in the decision on remand recognize the likelihood that the remand decision creates a barrier to further review by the United States Supreme Court.

tion of the fourth amendment as well. For example, in *In re Gault*,⁴ the United States Supreme Court held that minors subjected to juvenile proceedings are entitled to procedural due process safeguards including adequate notice of charges,⁵ the right to counsel,⁶ protection against self-incrimination,⁷ and the right to confrontation and cross-examination of witnesses.⁸ In addition, *Gault* provides the most comprehensive statement of the application of the Bill of Rights to minors in the broad declaration of the Court that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁹ Further support for the federal constitutional rights of minor students is found in the language of *Tinker v. Des Moines Independent School District*¹⁰ that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹¹ The more recent decision of *Goss v. Lopez*¹² expands the concept of students' rights by requiring an informal hearing before suspension for ten days or less in order to meet due process requirements.¹³

While *Gault*, *Tinker*, and *Goss* provide adequate support for the application of the fourth amendment protection to a minor student, the standards applied are not necessarily equivalent to those applied to adults; all three cases recognize the competing interest of the state in protecting the minor and require less stringent protection than that afforded adults.¹⁴ Other cases weighing the same conflicting interests have recognized the existence of the minor's constitutional rights but held that the state's interest in the

4. 387 U.S. 1 (1967).

5. *Id.* at 33.

6. *Id.* at 35.

7. *Id.* at 55.

8. *Id.* at 56.

9. *Id.* at 13.

10. 393 U.S. 503 (1969).

11. *Id.* at 506.

12. 419 U.S. 565 (1975).

13. Justice Powell, dissenting, recognizes that the decision analogizes the rights of students in elementary and secondary schools to the rights of adults. 419 U.S. 584, 591 (Powell, J., dissenting).

14. *Gault* applied the essentials of due process without requiring conformity with all the requirements of a criminal trial; the hearing requirements of *Goss* do not, for example, require the presence of an attorney; *Tinker* applies first amendment rights while emphasizing the authority of the state and school officials to maintain control in the schools.

minor's protection outweighs the protection afforded the minor by the right.¹⁵

Although the fourth amendment¹⁶ and the exclusionary rule¹⁷ have been held applicable to the states, imposition of the exclusionary rule will not lie unless the search is unreasonable and made by a person classified as a state agent.¹⁸ Thus, courts facing factual situations similar to that in *Mora* have allowed use of the questioned evidence by noting the absence of one or both of these requirements.¹⁹ Some courts have relied on the doctrine of *in loco parentis*, based on a presumed delegation of parental authority to the teacher, to deny the teacher state agent status and avoid suppression of the evidence.²⁰ Use of the doctrine by a Texas Court of Appeals in *Mercer v. State*²¹ represents an extreme example of this

15. *Ginsberg v. State*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

16. *Wolf v. Colorado*, 338 U.S. 25 (1949).

17. *Mapp v. Ohio*, 367 U.S. 643 (1961). LA. CODE CRIM. P. art. 703 incorporates the *Mapp* rule and provides in pertinent part: "A. A defendant aggrieved by an unconstitutional search or seizure may move to suppress, for use as evidence at the trial on the merits, any tangible objects or other property, or documents, books, papers or other writings, on the ground that they were so obtained." For an argument that an exclusionary rule is implicit in LA. CONST. art. I § 5, see Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 22 (1974). Justice Dixon notes in *Mora*, No. 54,884, La. Sup. Ct., March 29, 1976, that the exclusionary rule was embodied in LA. CODE CRIM. P. art. 703 at the time of the search and is now contained in LA. CONST. art. I § 5.

18. *Burdeau v. McDowell*, 256 U.S. 465 (1921) (Fruits of an illegal search conducted by a private individual are not subject to the *Mapp* rule.). For an excellent discussion encouraging extension of the exclusionary rule to private searches and seizures, see Note, 53 VA. L. REV. 1314 (1967). See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 22-23 (1974), for a discussion of the possibility that LA. CONST. art. I § 5 does not limit the exclusionary rule to evidence obtained through state action.

19. See, e.g., *In re W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (Ct. App. 1973); *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (Ct. App. 1972); *In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (Ct. App. 1970); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Ct. App. 1969); *State v. Baccino*, 282 A.2d 869 (Del. Super. Ct. 1971). Cf. *People v. Bowers*, 72 Misc. 2d 800, 339 N.Y.S.2d 783 (Crim. Ct. 1973).

20. See, e.g., *In re G.C.*, 121 N.J. Super. 108, 296 A.2d 102 (Juv. Ct. 1972); *People v. Jackson*, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. T. 1971), *aff'd* 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (1972); *People v. Stewart*, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (Crim. Ct. 1970); *Ranninger v. State*, 460 S.W.2d 181 (Tex. Civ. App. 1970); *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App. 1970).

21. 450 S.W.2d 715 (Tex. Civ. App. 1970).

reasoning as the court claims that teachers have "plenary parental power over pupils while in school,"²² and concludes that the teacher could not have acted for the state while acting *in loco parentis*. The fallacy inherent in this fiction of the teacher as the parents' replacement is that the parents, but not the teacher, could have searched and remained silent with no legal requirement to report the crime.²³

In contrast, both the majority²⁴ and the dissent²⁵ in *Mora* reach the correct conclusion by avoiding the use of the doctrine to determine whether the teacher was a state agent; both characterized the teacher as a state agent based upon his function and strict accountability to the state. Although both Louisiana²⁶ and common law jurisdictions²⁷ recognize the existence of the doctrine, it was never meant to extend to the realm of criminal conduct.²⁸ Further, in a system of compulsory education,²⁹ the fiction of parental authorization or delegation formerly implied from the parents' sending the child to the educational institution is greatly weakened.³⁰

22. *Id.* at 717.

23. *Id.* at 721 (Hughes, J., dissenting).

24. 307 So. 2d at 319.

25. 307 So. 2d at 323.

26. LA. CIV. CODE art. 220 provides: "Fathers and mothers may, during their life, delegate a part of their authority to teachers, schoolmasters and others to whom they entrust their children for their education, such as the power of restraint and correction, so far as may be necessary to answer the purposes for which they employ them. They have also the right to bind their children as apprentices."

27. 1 W. BLACKSTONE COMMENTARIES 452-53 (G. Sharswood ed. 1860) states: "He [father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed." See, e.g., *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), cert. denied, 400 U.S. 850 (1970); *Wexell v. Scott*, 2 Ill. App. 3d 646, 276 N.E.2d 735 (Ct. App. 1971).

28. "The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence." *In re Gault*, 387 U.S. 1, 16 (1967).

29. E.g., LA. R.S. 17:221 (Supp. 1966).

30. Buss, *Procedural Due Process for School Discipline: Probing the Con-*

In addition to public school teachers' own state employment and consequent duty to carry out state policy,³¹ their frequent connections with the police in search situations substantiate the argument that teachers are acting as state agents. Teachers are often trained by local police in methods of detection and identification of marijuana;³² in *Mora* the school's "drug coordinator" was called to identify the substance found by the gym teacher.³³ Furthermore, factual situations in many cases involving teacher searches indicate that police are called immediately or even assigned to and waiting outside the school.³⁴ Such close connections between school officials and the police culminating in the teacher's delivery of the evidence to the police constitutes a relationship similar to that between state and federal officials disapproved in *Elkins v. United States*,³⁵ which held inadmissible evidence obtained by state officials in a manner which would have required exclusion if the evidence had been obtained by federal officials.

Although the language of the fourth amendment mandates that the warrant shall issue "upon probable cause," warrantless searches and warrants issued on a showing of less than the traditional probable cause have received judicial sanction in certain narrowly defined circumstances.³⁶

stitutional Outline, 119 U. PA. L. REV. 545, 559-62 (1971). See *Board of Ed. v. Barnette*, 319 U.S. 624 (1943), which recognized the effect of compulsory attendance in distinguishing the infringement upon the religious liberty of those voluntarily attending college from a similar infringement on students in public high schools.

31. LA. R.S. 17:416 (1950), as amended by La. Acts 1970, No. 194, § 1; La. Acts 1970, No. 306, § 1; La. Acts. 1974, No. 683, § 1; La. Acts 1975, No. 216, § 1.

32. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 788 (1974) [hereinafter cited as Buss]. Training programs in detection of narcotics are available to teachers in East Baton Rouge Parish upon request of school principals. Telephone interview with Sergeant Welborn of the Baton Rouge City Police Dept., April 13, 1976.

33. 307 So. 2d at 321.

34. See, e.g., *In re Boykin*, 39 Ill. 2d 617, 237 N.E.2d 460 (1968). In East Baton Rouge Parish public schools, city police officers are assigned to the schools as school liaison officers to facilitate police contact with the schools. Telephone interview with Sergeant Welborn of the Baton Rouge City Police Dept., April 13, 1976.

35. 364 U.S. 206 (1960).

36. See *Terry v. Ohio*, 392 U.S. 1 (1967) (stop and frisk for weapons allowed without probable cause); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (administrative search for housing code violations could establish

While the cases carefully limit the instances in which searches will be permitted and in some instances restrict the scope of the permissible search,³⁷ some courts see justification for use of a lesser standard in the school context, finding "special circumstances" which justify balancing the needs of the school for discipline and order against the students' right to full fourth amendment protection.³⁸ The *Mora* dissent provides an excellent example of this type of reasoning as Justice Summers determines that a standard of "reasonable suspicion" would best meet the conflicting goals of control for the school and privacy for the student.³⁹

In accordance with the theory that a stringent probable cause standard need not be applied, the fourth amendment warrant requirement has rarely been applied to public school searches.⁴⁰ Without any attempt to meet the "specifically established and well-delineated exceptions"⁴¹ to the warrant requirement, those courts that even discuss the requirement almost unanimously reject the necessity of a warrant as an unnecessary inconvenience and distraction.⁴² The inconvenience, however, must be weighed against the cost to students'

probable cause with little difficulty); *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967) (border searches do not require warrant issued upon probable cause). For a discussion of the application of the fourth amendment to airport searches, see Note, 34 LA. L. REV. 860 (1974).

37. *Terry* allows only a frisk of the person for "the discovery of weapons which might be used to harm the officer or others nearby." 392 U.S. at 26.

38. See, e.g., *State v. Baccino*, 282 A.2d 869 (Del. Super. Ct. 1971); *People v. Jackson*, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. T. 1971); *In re G.C.*, 121 N.J. Super. 108, 296 A.2d 102 (Juv. Ct. 1972).

39. 307 So. 2d at 324. Courts using *in loco parentis* in these instances reason that this special position makes the teacher's interference more reasonable. See Buss at 744.

40. See *People v. Bowers*, 72 Misc. 2d 800, 339 N.Y.S.2d 783 (Crim. Ct. 1973). The role of the school's security guard in searching the defendant student distinguishes *Bowers* from the *Mora* situation in which the teacher was alone in searching and was still subject to the warrant requirement.

41. *Katz v. United States*, 389 U.S. 347, 357 (1967). Some of these "exceptions" include: *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest); *Harris v. United States*, 390 U.S. 234 (1968) (plain view); *Warden v. Hayden*, 387 U.S. 294 (1967) (in "hot pursuit"); *Schmerber v. California*, 384 U.S. 757 (1966) (exigent circumstances); *Carroll v. United States*, 267 U.S. 132 (1925) (exigent circumstances—search of automobile).

42. See, e.g., *In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (App. Ct. 1970).

fourth amendment rights.⁴³ In *Camara v. Municipal Court*,⁴⁴ the United States Supreme Court weighed the needs of the city in searching for violations of the city housing code with the citizens' rights to be protected from unreasonable search and seizure and held that, despite the inconvenience, these administrative searches required a warrant. In *Goss v. Lopez*,⁴⁵ the Court found an informal hearing and a written notice prerequisites for a ten-day suspension from public school despite protests of administrative inconvenience by school officials.⁴⁶ Both cases imposed such stringent procedural safeguards even in the absence of a search for criminal evidence; when criminal evidence is the object of a search, the argument for the necessity of a warrant is even more compelling.

Faced with the difficult question of the application of the probable cause and warrant requirements in the "special circumstances" of the public school, the Louisiana Supreme Court in *Mora* clearly rejects the attempt to except public school teachers' searches from the traditional standards. Undoubtedly, the enforcement by the court of the warrant requirement in a search by a public school teacher will require changes in the administrative procedure of the Louisiana public school system.⁴⁷ However, the dire consequences predicted by the dissent⁴⁸ seem exaggerated. The narrow holding of *Mora* does not encompass administrative searches⁴⁹ con-

43. Buss at 744.

44. 387 U.S. 523 (1967).

45. 419 U.S. 565 (1975).

46. See *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969): "In order for the State in person of the school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

47. An interesting question that may be raised as a result of *Mora* is the possibility of parental consent to the search of the minor. Because the student himself is protected by the fourth amendment, the success of such a delegation is doubtful even outside reliance on *in loco parentis*.

48. "Here, the majority has fastened upon the school officials of our state an onerous search warrant requirement at a time when violence and lawlessness in some of our schools are acute." *State v. Mora*, 330 So. 2d 900, 903 (La. 1976) (Sanders, C. J., dissenting).

49. See Buss at 754-55. In assessing the role of *Camara* in school searches, Buss outlines four categories to distinguish an administrative search from a search for criminal evidence: (1.) The general inspection for cleanli-

ducted in the schools but only searches for evidence of criminal conduct. The decision does not mean that teachers may no longer search even for evidence of a criminal violation; it means only that compliance with the procedural safeguards guaranteed by the fourth amendment must be assured.

Kay Cowden Medlin

INTERNAL REVENUE SERVICE AUTHORITY
TO ISSUE "JOHN DOE" SUMMONSES ON BANKS

A routine report from the Federal Reserve Bank to the Internal Revenue Service (IRS) in 1970 noted the receipt of two \$20,000 deposits of deteriorated \$100 bills from another bank.¹ In an investigation of that transaction, the IRS issued a "John Doe" summons,² directed to the bank which received the money originally, to learn its source.³ The Sixth Circuit, noting that the IRS lacked authority to summon a third party bank's records except in an investigation of a specified taxpayer, reversed the district court order of compliance with the summons.⁴ The government appealed, and the United States Supreme Court *held* that the IRS has authority under INT. REV. CODE of 1954, §§ 7601-02⁵ to issue, pursuant to a

ness of lockers; no particular student is singled out in advance; a minor sanction or no sanction for failing to meet the prescribed standards. (2.) Search for evidence of violation of a school regulation for which a sanction such as expulsion may be imposed; focus is on one student. (3.) Search for evidence of a violation of a school regulation which is, in substance, also a criminal violation. (4.) Search undertaken not to enforce a school rule, but to obtain evidence that a student has committed a criminal offense.

1. The deterioration suggested a long period of storage, triggering the IRS's interest in whether the related transactions had been reported for tax purposes. *United States v. Bisceglia*, 420 U.S. 141, 142-43 (1975).

2. Commonly refers to a summons directed to a third party seeking disclosure of information as to, or the identity of, some unknown taxpayer(s).

3. Originally the IRS sought whatever records would provide information on the source of the money. The receiving bank refused to comply, and the Service applied for enforcement in federal district court under INT. REV. CODE of 1954, § 7604. To avoid unnecessary disclosures, the court narrowed the request to all slips showing cash deposits of \$20,000 or of \$5,000 or more involving \$100 bills for the pertinent one-month period. *United States v. Bisceglia*, 72-1 U.S. Tax Cas. ¶ 9474 (E.D. Ky. 1972) (memorandum opinion).

4. *Bisceglia v. United States*, 486 F.2d 706 (6th Cir. 1973).

5. INT. REV. CODE of 1954, § 7601 provides: "The secretary or his delegate