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ARTICLES

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I. Introduction

> "After they're standing in front of me with no clothing, first they check their head. They bend down and shake their head, go through their hair with their fingers, check their ears, back and inside of their ears, check inside the eyelids, on the bottom of the eyelids, check their nose, inside their mouth, under the tongue, sideways and the tongue. Then we go down to their armpits and then lift their breasts up. Then they pull their naval [sic] so I could check and see there's nothing in there. After that they jump three times on each leg, squat down three times; and at the end of the third squat, they stay down and cough. And then they turn around, do the same thing, jumping three times on each leg, and then they squat down three times. On the third squat, they stay down. They pull their buttocks apart and they cough again."[1]

A strip search is a "visual inspection of an individual's body, including those portions usually hidden by undergarments."[2] While most

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1. Basurto v. McCarthy, No. Civ. S. 86-1457 EJG (E.D. Cal. filed Dec. 15, 1986) (quoting the searching officer's description of the search he performed), *quoted in* Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 1-2 (1991).

2. Shatz et al., *supra* note 1, at 1.

strip searches are not as invasive as the one described above,[3] even milder strip searches have been characterized as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive"[4] and "profoundly intrusive event[s]."[5] Yet as two cases reported in 1993 indicate,[6] public schools continue to conduct strip searches, and despite the severity of the intrusion involved, courts often uphold these searches against Fourth Amendment challenges.[7]

This Article describes the obstacles students in the public schools[8] currently face in invoking the Fourth Amendment to challenge strip searches and proposes a new standard for evaluating such challenges. Part II develops the Fourth Amendment background, focusing especially on *New Jersey v. T.L.O.*,[9] the Supreme Court's only decision applying the Fourth Amendment to schools. Next, Part III examines two of the important barriers plaintiffs face in seeking relief for constitutional violations—the standing requirements and immunity doctrines of 42 U.S.C. § 1983, the statute under which most challenges to strip searches are brought.[10] Part IV discusses the strip search cases decided before

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3. *Id.* at 2 & n.5 (explaining that most school officials will not conduct searches in as thorough a manner as the one the law enforcement officer performed in *Basurto*).

4. Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983).

5. *In re* French, 164 Cal. Rptr. 800, 802 (Ct. App. 1980).

6. Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993); State v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993).

7. Since 1985, four strip search cases have been reported. In two of those, the searches were upheld. Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993); Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).

8. This Article focuses on strip searches in the elementary and secondary schools, so it does not address the Fourth Amendment's application to public colleges and universities. This focus makes sense because all the reported student strip search cases involve elementary and secondary schools, as does the Supreme Court's decision in *New Jersey v. T.L.O.*, which forms the analytical basis for the Article. College students are likely to receive greater protection from strip searches than younger students, if for no other reason than that the state's interest in maintaining order and discipline in the school (a parent-like role) is much weaker in the college setting. Moreover, college students are almost always adults, and, although the Court claims that children have the same constitutional rights as adults, it often shies away from enforcing them as vigorously as it would for adults. Shatz et al., *supra* note 1, at 6-7 ("With the exception of *Thompson v. Oklahoma*, holding that the death penalty cannot constitutionally be applied to children who murdered before age sixteen, the Court has never granted children greater constitutional protection than adults. Rather, the Court's pattern has been to hand down decisions affirming that children enjoy the protection of certain constitutional rights while, at the same time or subsequently, holding that the constitutional provisions granting such rights do not apply with the same force to children.") (footnotes omitted).

9. 469 U.S. 325 (1985).

10. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

and after *T.L.O.* and sets out the present state of the law on this subject. Finally, Part V argues that, although the *T.L.O.* decision and subsequent Fourth Amendment cases offer little hope that the Supreme Court will adopt a more restrictive general standard for student searches in the near future, there are good reasons that tighter controls should be placed on severe invasions such as strip searches. Part VI concludes that while student strip searches are alive and well under current Fourth Amendment jurisprudence, they are a relic of less enlightened times and should be confined to very narrow circumstances.

II. Background: The Fourth Amendment and *New Jersey v. T.L.O.*

> Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.[11]

Although school students might have other protections against strip searches,[12] the Fourth Amendment is their most important shield, both because it is the only legal safeguard that applies to all American schoolchildren and because its constitutional stature conveys a national commitment to respect for the individual. This Part examines the Fourth Amendment standards that apply to public schools. First, section A sets out the general principles underlying Fourth Amendment jurisprudence. Section B then discusses *New Jersey v. T.L.O.*, the seminal case on the constitutionality of school searches. Finally, section C examines developments in Fourth Amendment jurisprudence since *T.L.O.*

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

11. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (citation omitted) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).

12. For example, some courts have invalidated strip searches on state constitutional grounds. *See, e.g.*, State v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993) (holding that strip search was invalid under both the Fourth Amendment and the West Virginia Constitution).

A. Fourth Amendment Background

The Fourth Amendment to the Constitution of the United States 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 persons or things to be seized.[13]

The amendment was adopted in response to the years of abuses that the American colonists had suffered at the hands of British officers.[14] During the pre-Revolutionary period, these officers conducted "widespread and discretionary searches authorized by writs of assistance"[15]—general warrants that allowed authorities to search nearly anyone or anything at any time with "neither probable cause nor particularity of description of persons or premises, nor even judicial approval prior to the search."[16] The amendment sought to put an end to these abuses by sharply curbing the government's power to intrude on the privacy of individual citizens.[17]

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13. U.S. CONST. amend. IV.

14. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 53-55 (1937); Jacob W. Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 462 (1976) [hereinafter Landynski, *Justice Black's Fourth Amendment*]; Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103, 1107 & nn.32-34 (1992).

15. Yarosh, *supra* note 14, at 1107.

16. Landynski, *Justice Black's Fourth Amendment*, *supra* note 14, at 462. *See also id.* (stating that "[t]he main object behind the drafting of the amendment was to prevent the recurrence of the detested general warrant which had been employed by the British in an attempt to stamp out smuggling in the American colonies") (footnote omitted); New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) ("It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown.").

17. *See, e.g.*, Katz v. United States, 389 U.S. 347, 359 (1967) ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."); *id.* at 350 (stating that although "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,'" the Amendment does "protect[] individual privacy against certain kinds of governmental intrusion"); Maryland v. Garrison, 480 U.S. 79, 84 (1987) (stating that the main purpose of the warrant requirement is to limit government officers' discretion in order to avoid the arbitrary harassment of citizens); Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (holding that a search or seizure of a person must be "particularized with respect to that person").

For a contrast that strikingly illustrates the constitutional importance of limiting officer discretion, compare Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding a sobriety checkpoint that operated under specific, carefully defined guidelines) with Delaware v. Prouse, 440 U.S. 648, 661 (1979) (holding random highway patrol stops unconstitutional because

As its text indicates, the Fourth Amendment has two basic commands: (1) that searches and seizures be reasonable and (2) that search or arrest warrants meet specific requirements. The Reasonableness Clause's role in proscribing government behavior seems clear enough, and indeed reasonableness is the basic and essential threshold issue in every Fourth Amendment case.[18] The reasonableness of a particular government action (and therefore its permissibility) is judged by balancing "'its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[19]

The Warrant Clause's role is not easily ascertainable. While it seems obvious that whenever an officer obtains a warrant, it must meet the clause's requirements, the clause does not make clear when an officer is required to obtain a warrant. That is, it is not clear whether a warrant is required in every case for a search or seizure to be constitutional. The Supreme Court has taken two basic approaches to this question. The conventional approach holds that the Warrant Clause in part defines the Reasonableness Clause; a "'reasonable' [and therefore constitutional] search is one which meets the warrant requirements specified in the [Warrant Clause]."[20] An alternative approach asserts that the two clauses are independent of each other, so that whether the Warrant Clause requirements are met is only one factor to be considered in determining whether a search or seizure is reasonable.[21]

The Supreme Court generally adheres to the first approach. In the landmark case of *Katz v. United States*,[22] for example, the Court held that searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the [F]ourth [A]mendment—subject only to a few specifically established and

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they permitted "standardless and unconstrained discretion"). *See also* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989) (upholding administrative blood test for drug use, in part because the purpose and extent of the intrusion were very narrowly defined); United States v. Martinez-Fuerte, 428 U.S. 543, 577 (1976) (Brennan, J., dissenting) (stating that the warrant requirement was intended to prevent "[a]ction based merely on whatever may pique the curiosity of a particular officer").

18. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (stating that the Fourth Amendment "does not proscribe all searches and seizures, but only those that are unreasonable").

19. *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

20. JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-43 (1966) [hereinafter LANDYNSKI, SEARCH AND SEIZURE]; *see also* New Jersey v. T.L.O., 469 U.S. 325, 359 (1985) (Brennan and Marshall, JJ., concurring in part and dissenting in part) ("The second Clause . . . gives content to the word 'unreasonable' in the first Clause.").

21. Yarosh, *supra* note 14, at 1109-10; LANDYNSKI, SEARCH AND SEIZURE, *supra* note 20, at 42-43.

22. 389 U.S. 347 (1967).

well-delineated exceptions."[23] Later cases have consistently affirmed *Katz*.[24]

Despite its general predilection for the warrant requirement, the Supreme Court—as the *Katz* language suggests—has created a number of exceptions to the rule, several of which deserve mention here. First, if an officer is in "hot pursuit" of a suspect or an actual emergency exists, the exigency exception allows him to search the suspect without a warrant.[25] Second, no warrant is needed if the individual consents to the search.[26] Third, if the search is incident to arrest—that is, if the subject of the search has already been arrested—then no warrant is necessary to search the person and her immediate surroundings.[27] Fourth, police officers may conduct brief warrantless searches for weapons (pat-downs) if they reasonably suspect a person of criminal activity.[28] Fifth, if engaged in overseeing a tightly regulated industry such as mining or liquor selling, an officer may search without a warrant as long as the administrative scheme adequately limits his discretion.[29] (This is known as an administrative search.) Finally, some warrantless searches are permissible simply because the government has a special need, beyond the normal need for crime control, which the warrant and probable cause requirements would frustrate.[30]

When a case falls under this last exception to the Warrant Clause, the Court asks only whether the search or seizure was reasonable given the "totality of the circumstances."[31] Therefore, to sustain its action, the government must show only that its interests in conducting the search or seizure outweigh the individual's legitimate expectations of privacy.[32]

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23. *Id.* at 357.

24. *E.g.*, Minnesota v. Dickerson, 113 S. Ct. 2130, 2135 (1993) (quoting the *Katz* language); Horton v. California, 496 U.S. 128, 133 n.4 (1990) (same).

25. Warden v. Hayden, 387 U.S. 294 (1967).

26. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (stating that "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent").

27. Chimel v. California, 395 U.S. 752, 762-63 (1969) (permitting an arresting officer to search the person arrested and "the area into which an arrestee might reach in order to grab a weapon or evidentiary items" "in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape" and "in order to prevent [the] concealment or destruction" of evidence).

28. Terry v. Ohio, 392 U.S. 1 (1967).

29. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor selling); Donovan v. Dewey, 452 U.S. 594 (1981) (mining).

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

31. Illinois v. Gates, 462 U.S. 213, 230 (1983).

32. Minnesota v. Olson, 495 U.S. 91 (1990). In *Olson*, the Court stated: "Since the decision in [*Katz*], it has been the law that 'capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" *Id.* at 95 (quoting Rakas v. Illinois, 439 U.S. 128, 143

This entails showing that the warrantless search or seizure was both reasonable in its inception and reasonable scope.[33]

In sum, most searches and seizures are reasonable—and therefore constitutional—only if the Warrant Clause requirements are met. Yet in several situations, warrantless searches are permitted. As section B will demonstrate, searches that take place in the public schools fall into the second category. More specifically, they come under the special needs doctrine and therefore are legitimate as long as they are reasonable at their inception and reasonable in scope.

B. Searches in Public Schools: New Jersey v. T.L.O.

New Jersey v. T.L.O.[34] was the Supreme Court's first opportunity to consider what restrictions the Fourth Amendment places on the conduct of public school officials. This section describes the facts of the case and discusses the opinions of the Justices.

The defendant in *T.L.O.* was a fourteen-year-old high school freshman. She and another girl were caught smoking cigarettes in a lavatory in violation of school rules. They were taken to the principal's office and questioned by an assistant vice principal, Theodore Choplick. T.L.O.'s companion admitted that she had violated the rule, but T.L.O. denied that she had been smoking in the lavatory and said that she did not smoke at all.[35]

Choplick took T.L.O. into his private office and asked to see her purse. He opened the purse and found a pack of cigarettes inside. He removed these from the purse and accused T.L.O. of lying to him. In reaching for the cigarettes, Choplick noticed a package of cigarette rolling paper, which in his experience was closely associated with marijuana use. Suspecting that a more extensive inspection might reveal further evidence of drug use, he searched the purse thoroughly. This time he found "a small amount of marihuana, 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 marihuana dealing."[36]

(1978)). "A subjective expectation of privacy is legitimate if it is '"one that society is prepared to recognize as 'reasonable.'"' *Id.* at 95-96 (quoting *Rakas*, 439 U.S. at 143-44 n.12, which in turn was quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

33. Terry v. Ohio, 392 U.S. 1, 20 (1967).

34. 469 U.S. 325 (1985).

35. *Id.* at 328.

36. *Id.*

Choplick notified T.L.O.'s mother and the police of his discoveries and turned over the evidence he had found to the police. T.L.O.'s mother took her to the police station, where T.L.O. confessed to selling marijuana. Based on this evidence, the State brought charges against T.L.O. in juvenile court. T.L.O. moved to suppress the evidence that Choplick had taken from her purse by alleging that the search was unconstitutional under the Fourth Amendment; and, therefore, the evidence was barred by the "exclusionary rule."[37] She further argued that, because her confession was "tainted by the allegedly unlawful search"[38]—that is, it was the "fruit of the poisonous tree"[39]—it too should be suppressed.[40]

The juvenile court denied T.L.O.'s motion to suppress, and the Appellate Division "affirmed the trial court's finding that there had been no Fourth Amendment violation."[41] The New Jersey Supreme Court disagreed. It held that, because the possession of cigarettes was not against school rules, the only possible reason for the search was to discredit T.L.O.'s claim that she had not been smoking. The court found this reason insufficient to justify the search. Even if a reasonable suspicion that T.L.O. had the cigarettes would have justified the search, Choplick had not been told anything that would have raised a reasonable suspicion of wrongdoing. Moreover, even if Choplick was justified in searching through the purse, his initial find could not possibly have

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37. The exclusionary rule dictates that evidence discovered during an unconstitutional search is inadmissible. The Supreme Court first announced the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). The Court explained:

> If letters and private documents can . . . be seized [in violation of the Fourth Amendment] and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established be years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393. In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court held that the exclusionary rule applied equally to the states: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.

38. *T.L.O.*, 469 U.S. at 329.

39. "This figure of speech is drawn from Wong Sun v. United States, 371 U.S. 471 (1963), in which the Court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence." Oregon v. Elstad, 470 U.S. 298, 305-06 (1985). While the exclusionary rule bars the use of direct products of an illegal search, *see supra* note 37 and accompanying text, the fruit of the poisonous tree doctrine bars the use of indirect products of the search, such as confessions. *Elstad*, 470 U.S. at 306.

40. *T.L.O.*, 469 U.S. at 329.

41. *Id.*

warranted his subsequent extensive examination of T.L.O.'s papers and effects. In light of these arguments, the court held that the search violated the Fourth Amendment and that the juvenile court should have granted T.L.O.'s motion to suppress. The State of New Jersey appealed and the Supreme Court granted certiorari.[42]

The first question facing the Court was whether the Fourth Amendment applied to school officials at all. Some lower courts had concluded that

> school officials are exempt from the dictates of the [amendment] by virtue of the special nature of their authority over schoolchildren. Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students; their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.[43]

The Court found this reasoning "in tension with contemporary reality and the teachings of this Court"[44] and held that the Fourth Amendment applied to teachers and school administrators just as it does to other government officials.[45]

Having concluded that the Fourth Amendment applied, the *T.L.O.* Court considered what standard should govern searches of schoolchildren. "Although the underlying command of the [amendment] is always that searches and seizures be reasonable," it said, "what is reasonable depends on the context within which a search takes place."[46] The need for the search must always be balanced against the invasion contemplated. "On one side of [that] balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the

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42. *Id.* at 331.

43. *Id.* at 336 (citation omitted). As an example of some courts' willingness to invoke the *in loco parentis* rationale, the Supreme Court cited R.C.M. v. State, 660 S.W.2d 552 (Tex. Ct. App. 1983). *T.L.O.*, 469 U.S. at 336. In contrast, the New Jersey Supreme Court had held in *T.L.O.* itself that the Fourth Amendment applied to searches by school officials. *Id.* at 330; *see also* State *ex rel.* T.L.O., 463 A.2d 934 (N.J. 1983).

44. *T.L.O.*, 469 U.S. at 336.

45. *Id.* The Court noted that it had already applied the Fourth Amendment to the activities of building inspectors, Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Occupational Safety and Health Act inspectors, Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978); and firemen entering private property to fight a fire, Michigan v. Tyler, 436 U.S. 499, 506 (1978). *T.L.O.*, 469 U.S. at 335. Since *T.L.O.*, the Court has held that the Fourth Amendment applies to searches of government employees' offices by workplace supervisors, O'Connor v. Ortega, 480 U.S. 709, 715 (1987), and to workplace testing of urine samples for drugs, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989).

46. *T.L.O.*, 469 U.S. at 337.

government's need for effective methods to deal with breaches of public order."[47]

The Court began its balancing inquiry by evaluating the nature of school students' privacy interest. It said that the type of invasion of privacy that occurred in *T.L.O.*—a limited personal search—would be "a substantial invasion of privacy"[48] in other contexts and that it should also be seen as such in the school context. The Court dismissed the state's argument that students have no legitimate expectations of privacy because it rested on two "severely flawed" premises: that privacy is fundamentally incompatible with the educational environment and that children have a minimal interest in the personal items they bring to school.[49] Rather, it concluded that "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."[50] There was no dissent among the Justices on this point.

The Court then turned to the other side of the balance: the government's interest in dealing effectively with breaches of the public order. All nine Justices agreed that the state had a strong interest in "maintaining discipline in the classroom and on school grounds."[51] All also agreed that this need for close supervision justified bypassing the warrant requirement; requiring teachers and administrators to obtain a warrant every time they needed to search a student would place an excessive burden on the educational system.[52] In other words, the Court

47. *Id.*

48. *Id.*

49. *Id.* at 338.

50. *Id.* at 339.

51. *T.L.O.*, 469 U.S. at 339; *id.* at 350 (Powell and O'Connor, JJ., concurring) (emphasizing the state's "compelling interest in assuring that the schools meet [their] responsibility" of educating and training children); *id.* at 353 (Blackmun, J., concurring) (recognizing government's "special need" to closely oversee the school environment); *id.* at 357 (Brennan and Marshall, JJ., concurring in part and dissenting in part) (acknowledging that "extraordinary governmental interests do exist" in the school context); *id.* at 376 (Stevens, Brennan, and Marshall, JJ., concurring in part and dissenting in part) (accepting "'the substantial need of teachers and administrators for freedom to maintain order in the schools'") (quoting the majority opinion, *T.L.O.*, 469 U.S. at 341).

52. *T.L.O.*, 469 U.S. 325, 340-41 (1985); *id.* at 350 (Powell and O'Connor, JJ., concurring) ("it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws"); *id.* at 353 (Blackmun, J., concurring in judgment) ("the special need [for order in the school setting] justifies the Court in excepting school searches from the warrant and probable-cause requirement"); *id.* at 357 (Brennan and Marshall, JJ., concurring in part and dissenting in part) (governmental interests in the school setting "are sufficient to justify an exception to the warrant requirement"); *id.* at 376 (Stevens, Brennan, and Marshall, JJ., concurring in part and dissenting in part) ("warrantless searches of students by school administrators are reasonable when undertaken"

held that searches in the schools fall under the "special needs doctrine," an exception to the Warrant Clause that permits searches without a warrant where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[53] When the special needs doctrine applies, the court engages in a balancing of interests independent of the warrant requirement. For a search to be upheld under the doctrine, three conditions must be met: (1) there must be an important governmental interest other than the usual interest in crime control; (2) it must be the case that requiring a warrant and probable cause would be impractical and would frustrate the purpose behind the search; and (3) the search must be reasonable in light of the governmental interest.[54] Although not all explicitly said so, all the Justices seemed to agree that the special needs doctrine applied to the facts of *T.L.O.*[55]

For the most part, then, the Justices agreed that schoolchildren have a significant interest in protecting their privacy, and that the state has an interest in maintaining order and discipline which is strong enough to justify warrantless searches. But they differed over how to strike the balance between these two interests.

The majority opinion, which remains the controlling precedent in all student search cases, held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[56] The Court prescribed a two-part inquiry. First, one must consider "whether the . . . action was justified at its inception." Second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[57] The Court continued:

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to promptly and effectively respond to an "explosive atmosphere").

53. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment).

54. *Id. See also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 622 (1989) (applying the same standard); Terry v. Ohio, 392 U.S. 1, 20 (1967) (applying a similar standard).

55. *T.L.O.*, 469 U.S. at 337 (adopting the special needs balancing framework); *id.* at 349-50 (Powell and O'Connor, JJ., concurring) (recognizing that teachers are not subject to the same constitutional restraints that law enforcement officers face); *id.* at 353 (Blackmun, J., concurring in judgment) ("the special need [for order in the school setting] justifies the Court in excepting school searches from the warrant and probable-cause requirement"); *id.* at 356 (Brennan and Marshall, JJ., concurring in part and dissenting in part) (accepting the doctrine but arguing that the government's interest was not sufficient to invoke the balancing analysis); *id.* at 376-77 (Stevens, Brennan, and Marshall, JJ., concurring in part and dissenting in part) (supporting a balancing test, but arguing that the majority improperly evaluated the reasonableness of the search).

56. *T.L.O.*, 469 U.S. at 341.

57. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967)) (citation omitted).

> [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. Such a search 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.[58]

Having set out this standard for student searches, the Court applied its rule to the facts of the case before it. It concluded that the search of T.L.O.'s purse was reasonable at its inception because, although possession of cigarettes did not violate school rules, smoking did, and T.L.O. had denied that she smoked at all. Evidence that she possessed cigarettes was therefore relevant to the charges of smoking because it "would both corroborate the report that she had been smoking and undermine the credibility of her defense [that she did not smoke]."[59] So as long as Choplick "had a reasonable suspicion that T.L.O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute 'mere evidence' of a violation."[60] While the New Jersey Supreme Court had held that Choplick could not have had a reasonable suspicion that T.L.O.'s purse would contain cigarettes, the Supreme Court found it perfectly sensible to assume that, if T.L.O. had been smoking, she might still have the cigarettes with her, and the most logical place to keep them would have been her purse. Noting that "'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment,'"[61] the Court held that "it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes."[62] In other words, the search was reasonable at its inception.

The search was also reasonable in scope, said the Court. The first search for the cigarettes was reasonable because "if [T.L.O.] did have the cigarettes [which she denied], her purse was the obvious place in which to find them."[63] The second search was reasonable because, having seen the rolling papers in the purse, Choplick had reasonable cause to suspect that T.L.O. might be carrying marijuana. Therefore he was justified in

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58. *Id.* at 341-42.
59. *Id.* at 345.
60. *Id.* (quoting Warden v. Hayden, 387 U.S. 294, 307 (1967)).
61. *T.L.O.*, 469 U.S at 346 (quoting Hill v. California, 401 U.S. 797, 804 (1971)).
62. *Id.*
63. *Id.*

extending his search to other areas of the purse. And when he found the card with names of people to whom T.L.O. owed money, "the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence."[64] Since the search satisfied both prongs of the reasonableness inquiry, the Court upheld its constitutionality. Since teachers have a substantial need "for freedom to maintain order in the schools,"[65] probable cause was not required. The Court declined to resolve the issue of whether individualized suspicion remains a requirement for a student search.[66]

In addition to the majority opinion, which continues to govern the Fourth Amendment's application to the schools,[67] there were four separate opinions filed in *T.L.O.*[68] As noted above,[69] each opinion struck its own balance between the privacy rights of students and the institutional needs of school authorities. The two concurrences diverged only slightly from the majority opinion. Justice Powell merely placed more emphasis on the interests of the elementary and secondary schools "that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting."[70] Justice Blackmun, concurring only in the judgment, scolded the majority for taking a slightly overbroad approach in its "implication that the balancing test [of the special needs doctrine] is the rule rather than the

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64. *Id.* at 347.

65. *Id.* at 341.

66. *T.L.O.*, 469 U.S. at 342 n.8. The Court stated:

> We do not decide whether individualized suspicion is an essential requirement of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to ensure that the individual's reasonable expectation of privacy of privacy is not 'subject to the discretion of the official in the field.'"

Id. (citations omitted) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976); Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

67. *See infra* notes 89-91 and accompanying text.

68. *T.L.O.*, 469 U.S. at 348-50 (Powell and O'Connor, JJ., concurring); *id.* at 351-53 (Blackmun, J., concurring); *id.* at 353-70 (Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.* at 370-86 (Stevens, Brennan, and Marshall, JJ., concurring in part and dissenting in part).

69. *See supra* text preceding note 56.

70. *T.L.O.*, 469 U.S. at 348 (Powell and O'Connor, JJ., concurring).

exception" in Fourth Amendment cases, but otherwise went along with the Court.[71]

Justice Brennan's and Justice Stevens's opinions were much less tolerant of the majority's approach. Justice Brennan's main point was that, although it is unreasonable to require a warrant in the school setting, the probable cause requirement should still be observed. He correctly noted that "[a]n unbroken line of cases in this Court have held that probable cause is a prerequisite for a full-scale search."[72] Since Choplick's "thorough excavation"[73] of T.L.O.'s purse was clearly a full-scale search (not something lesser like a pat-down search[74]), Brennan argued that the probable cause standard should apply. Brennan would have held that Choplick's initial search for cigarettes was reasonable, but that his subsequent search for marijuana was not supported by probable cause. "The mere presence without more of such a staple item of commerce [as cigarette rolling papers] is insufficient to warrant a person of reasonable caution in inferring both that T.L.O. had violated the law by possessing marihuana and that evidence of that violation would be found in her purse."[75] The majority's use of a balancing test "to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis"—one that "finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens."[76] The Constitution, Brennan argued, mandates the probable cause standard unless "the intrusion is much less severe [than a full-scale search] and the need for greater authority compelling";[77] the Court does not have the authority "to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good."[78]

Justice Stevens, concurring in part and dissenting in part, struck a somewhat different chord in his criticisms of the Court's decision. First, he argued that the Court should have decided the exclusionary rule question, which had been the basis for the grant of certiorari but which

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71. *Id.* at 352 (Blackmun, J., concurring in judgment).

72. *Id.* at 358 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

73. *Id.* at 355 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

74. The Court *had* allowed searches based on less than probable cause for brief pat-down searches by police to check for weapons. Terry v. Ohio, 392 U.S. 1 (1967).

75. *T.L.O.*, 469 U.S. at 368-69 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

76. *Id.* at 358 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

77. *Id.* at 367 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

78. *Id.* at 370 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

the Court *in a footnote* decided not to decide. Stevens argued that the exclusionary rule should apply to all searches that violate constitutional rights, regardless of which government official conducts them.[79] Emphasizing the importance of teachers and school administrators as role models to our youth, he said:

> If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights," and that this is a principle of "liberty and justice for all."[80]

In addition to his exclusionary rule criticism, Stevens argued that, because the Court set forth a standard that treats all violations of school rules similarly, it would "permit school administrators to search students suspected of violating only the most trivial school regulations and guidelines for behavior."[81] To borrow Stevens's illustration, under the majority's standard, searches for evidence of a dress code violation would be governed by the same standard as searches for evidence of a narcotics violation.[82] Stevens conceded that the Court's standard, at least in theory, accounted for "the nature of the infraction,"[83] but he argued that in practice this requirement would be overlooked. "The Court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults' privacy only creates uncertainty in the extent of its resolve to prohibit the latter."[84] In support of his claim, Stevens pointed to the *T.L.O.* decision itself: "[T]he majority's application of its standard in this case—to permit a male administrator to rummage through the purse of a female high school student in order to obtain evidence that she was smoking in a bathroom—raises grave doubts in my mind whether its effort will be effective."[85] Unlike the Court,

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79. *Id.* at 372 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

80. *T.L.O.*, 469 U.S. at 374 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part) (footnotes omitted) (quoting Stone v. Powell, 428 U.S. 465, 492 (1976) and 36 U.S.C. § 172 (1982) (pledge of allegiance to the flag)).

81. *Id.* at 371 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

82. *Id.* at 377 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

83. *Id.* at 342 (opinion of the Court). See *supra* text accompanying note 58 for the full text of the majority's standard.

84. *T.L.O.*, 469 U.S. at 381 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

85. *Id.* at 381-82 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in

Stevens asserted that "the nature of the suspected infraction is a matter of first importance in deciding whether any invasion of privacy is permissible."[86] In place of the Court's overly permissive standard, he proposed a rule that "would permit teachers and school administrators to search a student [only] 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.*"[87]

Despite these powerful voices in dissent, there was little doubt about the rule that the *T.L.O.* decision set forth. Searches of public school students by teachers and school administrators may be conducted without a warrant and do not require probable cause. Searches must be based on a reasonable suspicion of wrongdoing and must be reasonable in their inception and in their scope—that is, "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[88]

C. *Developments Since* T.L.O.

In the nine years that have passed since *T.L.O.*, the Supreme Court has not revisited the issue of the Fourth Amendment's application to school officials. Lower court decisions indicate that *T.L.O.* continues to govern the Fourth Amendment's application to the public schools. In the all of the reported student strip search cases since 1985, for example, the courts have acknowledged that the *T.L.O.* standard governs and have applied it to the facts before them.[89] As the Sixth Circuit stated in *Williams v. Ellington*,[90] "*New Jersey v. T.L.O.* . . . remains the preeminent Supreme Court case discussing Fourth Amendment rights of school students within the confines of the educational environment."[91]

Moreover, developments in other areas of the Supreme Court's Fourth Amendment jurisprudence reveal that the fundamental reasoning of *T.L.O.* remains intact. As Justice Brennan noted in his opinion, *T.L.O.* was the first Supreme Court case to uphold an invasive search undertaken without a warrant supported by probable cause, and to install a balancing

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part).

86. *Id.* at 382 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

87. *Id.* at 378 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

88. *Id.* at 342 (opinion of the Court).

89. *See* Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993); Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987); Cales v. Howell Pub. Schs., 635 F. Supp. 454 (E.D. Mich. 1985); State v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993).

90. 936 F.2d 881 (6th Cir. 1991).

91. *Id.* at 886.

test in its place.[92] Since *T.L.O.*, several decisions have continued this use of balancing tests to evaluate Fourth Amendment issues. For example, in the 1987 case of *Griffin v. Wisconsin*,[93] the Court upheld a warrantless search of a probationer's home. Although the Court had long held that "expectations of privacy are greatest within an individual's own home,"[94] in *Griffin* it applied a balancing test much like that used in *T.L.O.*, holding that the state's probation system presented special governmental needs beyond the normal need for law enforcement that made the warrant and probable cause requirements impracticable despite the considerable intrusion involved.[95] In 1989, the Court decided *Skinner v. Railway Labor Executives' Ass'n*[96] and *National Treasury Employees Union v. Von Raab*,[97] both of which upheld drug testing of government employees conducted without a warrant or probable cause.[98] The *Von Raab* Court went especially far, using a balancing test to uphold a search that was conducted without individualized suspicion and involved a considerable intrusion on those searched—two requirements that similar searches had been forced to meet in prior cases.[99] Decisions

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92. *T.L.O.*, 469 U.S. at 358-62 (Brennan and Marshall, JJ., concurring in part and dissenting in part) (thoroughly examining the Court's Fourth Amendment cases and finding none in which probable cause was not required for a full-scale search like the one upheld in *T.L.O.*).

93. 483 U.S. 868 (1987).

94. Yarosh, *supra* note 14, at 1124. *See* Payton v. New York, 445 U.S. 573, 589 (1980) ("The [F]ourth [A]mendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ."); Silverman v. United States, 365 U.S. 505, 511 (1961) (stating that at the core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

95. *Griffin*, 483 U.S. at 876 ("[T]he special needs of Wisconsin's probation system make the warrant requirement impracticable . . . . A warrant requirement would interfere to an appreciable degree with the probation system . . . .").

96. 489 U.S. 602 (1989).

97. 489 U.S. 656 (1989).

98. At least one article has characterized *Skinner* and *Von Raab* as administrative search cases. *Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 269 (1989). Seen in this way, the cases might seem inapposite to any discussion of *T.L.O.*'s vitality. But not only did the majority opinion in *Von Raab* note that the drug-testing program served "special governmental needs," 489 U.S. at 665, which would seem to suggest that the case falls within the special needs doctrine, but the same article acknowledged that the cases and particularly *Von Raab* go far beyond the "very narrow set of circumstances," *Supreme Court—Leading Cases*, *supra*, at 275, to which administrative search doctrine had previously applied, blurring the lines between that doctrine and the rest of Fourth Amendment jurisprudence. *Id.* at 278-79. Moreover, *T.L.O.* itself has been called an administrative search case. Franz v. Lytle, 997 F.2d 784, 789 (10th Cir. 1993). Since any expansion of the kind of balancing doctrine used in *T.L.O.* tends to extend rather than limit the force of *T.L.O.*'s authority, whether one calls the cases in which the expansion takes place administrative search cases or special needs cases is largely irrelevant.

99. The Court downplayed the intrusiveness of the search by emphasizing the importance of the governmental interest served, arguing essentially that those tested "had diminished expectations of

like *Griffin* and *Von Raab* do not directly extend *T.L.O.*, but they clearly carry on its reasoning and underlying spirit. *T.L.O.* remains the controlling authority on searches of students in the public schools.

III. Section 1983: A Formidable Hurdle for Strip Search Victims

> [A] municipality may not be held liable under § 1983 based on a theory of respondeat superior; instead, a government is responsible under § 1983 only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ."[100]
>
> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[101]

Fourth Amendment challenges to school searches fall into two general categories: exclusionary rule cases and section 1983 cases. Challenges of the first type arise when the subject of the search is prosecuted based on evidence recovered during the search and invokes the "exclusionary rule," which dictates that evidence discovered during an unconstitutional search is inadmissible.[102] Because the exclusionary rule by nature applies only to the particular factual situation before the court, it is of little help to students seeking general relief from searches.[103] And because it is a defense, the rule cannot be the basis for compensating the victims of unconstitutional searches.

Fourth Amendment challenges under 42 U.S.C. § 1983 do not suffer these disadvantages. Adopted as part of the Ku Klux Klan Act of 1871, section 1983 provides that anyone who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

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privacy because they knew that their fitness for the job 'depend[ed] uniquely on their judgment and dexterity.'" *Supreme Court—Leading Cases*, *supra* note 98, at 272-73 (quoting *Von Raab*, 489 U.S. at 672).

100. Williams v. Ellington, 936 F.2d 881, 884 (6th Cir. 1991) (citation omitted) (quoting Monell v. Department of Social Servs. of N.Y., 436 U.S. 658, 694 (1978)).

101. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

102. *See supra* note 37 and accompanying text (discussing the origins and meaning of the exclusionary rule). An example of a case in which a student invoked the exclusionary rule to challenge the constitutionality of a strip search is State v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993).

103. One exception to this generalization may be that exclusionary rule cases can establish the constitutionality of particular searches, and these decisions can then be relied on to overcome immunity barriers in later section 1983 cases. See the discussion *infra* section A.

District of Columbia," deprives another "of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[104] Despite its broad language and provision for affirmative relief through an award of damages or an injunction, however, section 1983 has its own limitations. This Part describes the hurdles that confront plaintiffs seeking relief under section 1983.

For many years after section 1983 was adopted, plaintiffs could obtain relief only if the action alleged to violate their constitutional rights was undertaken pursuant to established law, custom, or practice. Of course, this "official violations" rule left many of the most egregious violations unredressed, since "the vast majority of civil rights violations are caused by officers or officials who act contrary not only to the Constitution, but to official policy."[105]

In its 1961 decision in *Monroe v. Pape*,[106] the Supreme Court departed from the official violations rule, construing section 1983's "under color of state law" language to include actions by government officials undertaken without authorization or approval as well as official violations.[107] In so holding, the *Monroe* Court opened the door to considerable section 1983 litigation. Over the succeeding years, the Court continually expanded the statute's coverage by removing both procedural and substantive barriers. It read the state action requirement broadly, held that the section protected property as well as liberty interests, and rejected the argument that plaintiffs must exhaust state remedies before invoking section 1983. Section 1983 cases were brought more frequently.[108] "As the number of cases . . . continued to grow, however, so did the arguments for finding some means of limiting access to the federal courts for what some viewed as 'insignificant' or merely state law tort cases."[109] Gradually, the Supreme Court began to impose hurdles to section 1983 actions, hurdles that today pose significant problems for section 1983 plaintiffs. Section A below examines the

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104. 42 U.S.C. § 1983 (1988). Section 1983 does not create any substantive rights; it merely provides a civil cause of action against an individual who, acting under color of state law, violates federal rights. Allen v. Board of Comm'rs of County of Wyandotte, 773 F. Supp. 1442, 1447 (D. Kan. 1991). The full text of § 1983 is reproduced *supra* at note 10.

105. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 28 (1989).

106. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Servs. of N.Y., 436 U.S. 658 (1978).

107. *Id.* at 183-85.

108. Rudovsky, *supra* note 105, at 24.

109. *Id.* at 30.

obstacles now facing plaintiffs seeking damages; section B discusses the obstacles to those seeking injunctions.

A. Obstacles to Claims for Damages: The Immunity Doctrines

Plaintiffs seeking damages under section 1983 face a number of immunity doctrines that protect governments and government actors from liability. Governmental immunity is an ancient concept that originated in England long before the Constitution was adopted.[110] The modern immunity doctrine derives some of its authority from these common-law roots, but it also has constitutional and statutory bases.[111] Several types of immunity are currently recognized. The federal government and the states enjoy absolute immunity from suit (though they may consent to be sued[112]). Municipalities are immune from suit in some circumstances. Finally, individual government officials receive either absolute or qualified immunity, depending on the role they are playing.

For school search purposes, the most significant forms of immunity are municipal and individual immunity. The importance of individual immunity is obvious: student plaintiffs will want to be able to impose liability on government officials for their individual behavior. Municipal immunity is important because for purposes of section 1983, municipalities include school boards, which employ the teachers and administrators who conduct student searches.[113] They may be liable in their own right or on behalf of individuals sued in their official capacities. The following subsections discuss the development and current status of individual and municipal immunity.

1. Individual Immunity.—Because school officials—unlike the President, judges, prosecutors, and legislators[114]—do not receive absolute individual immunity, they enjoy only qualified immunity.[115]

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110. BLACK'S LAW DICTIONARY 751, 1396 (6th ed. 1990).

111. Rudovsky, *supra* note 105, at 35 (stating that state immunity is based on the Eleventh Amendment, presidential immunity on the separation of powers principle, municipal immunity on statutory interpretation of § 1983, and individual immunity on a combination of all three elements).

112. *See supra* note 110.

113. *See, e.g.*, Williams v. Ellington, 936 F.2d 881, 883-85 (6th Cir. 1991) (applying municipal immunity doctrine to a case involving a school board). *But see* Board of Trustees of Hamilton Heights Sch. Corp. v. Landry, 622 N.E.2d 1019, 1025 (Ind. Ct. App. 1993) (holding that under Indiana law, school corporation was an arm of the state and therefore could not be considered a local government unit subject to suit under § 1983).

114. Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President); Stump v. Sparkman, 435 U.S. 349 (1978) (judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators).

115. *E.g.*, Williams v. Ellington, 936 F.2d 881, 886 (6th Cir. 1991) (granting school officials qualified immunity).

The qualified immunity doctrine is not a creature of statute or a constitutional rule. It is a judicial construct "defined primarily by the [Supreme] Court's own policy judgment that an individual's right to compensation for constitutional violations and the deterrence of unconstitutional conduct should be subordinated to the governmental interest in effective and vigorous execution of governmental policies and programs."[116]

The Supreme Court first seriously considered the idea of qualified immunity in *Scheuer v. Rhodes*.[117] *Scheuer* was a section 1983 damages case in which the plaintiffs sued the governor of Ohio and other high-ranking state officials for causing the deaths of student demonstrators shot by the Ohio National Guard at Kent State University in the spring of 1970.[118] The Court rejected the officials' claim of absolute executive immunity, but held that "a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."[119]

The Supreme Court's next major qualified immunity case was *Wood v. Strickland*,[120] which involved the due process rights of students in school expulsion proceedings. The Court, refining the standard set out in *Scheuer*, held that, while common-law principles provided school board members with qualified immunity,[121]

> a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[122]

In other words, *Wood* established that an official would be immune from liability unless he acted in violation of constitutional rights of which he should have known (the objective component) or acted with malice (the subjective component).

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116. Rudovsky, *supra* note 105, at 36.
117. 416 U.S. 232 (1974), *modified*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).
118. *Id.* at 235.
119. *Id.* at 247.
120. 420 U.S. 308 (1975), *modified*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).
121. *Id.* at 320.
122. *Id.* at 322.

The current qualified immunity doctrine has its roots in the Supreme Court's next major decision on the subject, *Harlow v. Fitzgerald*.[123] In *Harlow*, the Court "reconsidered and radically reformulated the immunity doctrine."[124] Noting the time- and resource-intensive aspects of resolving claims made under the subjective component of the *Wood* test (since these claims presented state-of-mind issues that could not be resolved through summary judgment),[125] the *Harlow* Court reduced the test to its objective prong only. The Court concluded: "We therefore hold that government officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known*."[126]

The final piece in the qualified immunity puzzle is *Anderson v. Creighton*.[127] In *Anderson*, the Court considered a warrantless search of plaintiffs' home for a fugitive suspected of committing a bank robbery. The FBI agents who had conducted the search asserted that they had information that the fugitive was in the plaintiffs' home, that his car matched the plaintiffs', and that they believed he was likely to be armed and dangerous. Plaintiffs disputed these contentions and argued that the Fourth Amendment doctrine clearly established that their home could be searched for a fugitive only if the agents had probable cause to believe that the suspect was on the premises and if exigent circumstances suspended warrant requirement. The government conceded this argument, but defended that the agents were entitled to immunity unless they reasonably should have known that their particular conduct violated the Constitution.[128]

In upholding the search, the Court revisited (and revised) its decision in *Harlow*. Writing for the majority, Justice Scalia argued that under the *Harlow* rule, plaintiffs could "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights" such as the right to be free from unreasonable searches and seizures.[129] No one would argue that such broad abstract rights are not "clearly established," so immunity would effectively vanish. In other words, "[t]he operation of [the *Harlow*] standard . . . depends substantially upon the level of

123. 457 U.S. 800 (1982).
124. Rudovsky, *supra* note 105, at 42.
125. *Harlow*, 457 U.S. at 815-16.
126. *Id.* at 818 (emphasis added).
127. 483 U.S. 635 (1987).
128. Rudovsky, *supra* note 105, at 47-48.
129. *Anderson*, 483 U.S. at 639.

generality at which the relevant 'legal rule' is to be identified." To avoid this problem, the *Anderson* Court added a second level of protection for government officials, granting them immunity as long as they "reasonably should have known at the time of the incident that [their] *particular conduct* violated the Constitution"[130]:

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[131]

Anderson itself indicates how the inquiry should now proceed. The Court held that whether "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances"[132] was clearly established was not the issue (as it would have been under *Harlow*). Rather, the trial court should resolve "the objective (albeit fact-specific) question whether a reasonable officer could have believed [this FBI agent's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."[133]

Anderson makes it much easier for government officials to avoid liability. Not only do plaintiffs have to allege a more "particularized" right than under *Harlow*, but they also have to prove that it was unreasonable for the alleged violator not to know of the right. Moreover, as a practical matter, the *Anderson* rule gives government officials two bites at the apple in Fourth Amendment cases. If their search was reasonable under the amendment, they of course escape liability. But even if it is not reasonable, officials may escape liability if they can show that a reasonable official could have believed the search was lawful. One commentator notes the absurdity of this result: "The notion that one can reasonably and in good faith act in an objectively unreasonable manner is more than a semantic contradiction."[134] In other words, if an officer acts in violation of the Fourth Amendment—that is, unreasonably—it does not make sense to turn around and claim that he nonetheless acted

130. Rudovsky, *supra* note 105, at 48 (emphasis added).
131. *Anderson*, 483 U.S. at 640 (citation omitted).
132. *Id.*
133. *Id.* at 641.
134. Rudovsky, *supra* note 105, at 50-51.

reasonably because his conduct was not clearly prohibited. Yet that is the law after *Anderson*. Thus, although *Anderson* raises the immunity hurdle for all section 1983 claims against individual officials, it is especially problematic for Fourth Amendment plaintiffs.

2. Municipal Immunity.—The seminal case on municipal immunity is *Monell v. Department of Social Services of New York.*[135] In *Monell*, the Court overruled its holding in *Monroe v. Pape* that "local governments are wholly immune from suit under § 1983."[136] Instead, it held that "Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[137] Even as *Monell* opened the door to suits against municipalities, however, it limited recovery to cases in which "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[138] It is not enough that the government actor is an employee of the municipality; the municipality's policy must be the "moving force" that causes the actor to commit the alleged violation.[139]

Subsequent Court decisions applying *Monell* reveal that this standard bars recovery in a great number of cases. In *Oklahoma City v. Tuttle*,[140] for example, a man was shot and killed by a police officer who was using excessive force to apprehend him. The man's widow sued the city under section 1983, alleging that its "policy" of inadequate police training caused the death. The Court held that because there was no proof of any action taken by municipal policymakers that could have caused the officer's conduct, the city could not be held liable; to impose liability in circumstances where "no wrong could be ascribed to municipal decisionmakers . . . would be to impose it simply because the municipality hired one 'bad apple.'"[141]

More recent decisions have clarified and perhaps even broadened the scope of municipal immunity established in *Monell*. In *City of St. Louis v. Praprotnik*,[142] the Court more clearly defined "official policy." In

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135. 436 U.S. 658 (1978).

136. *Id.* at 663.

137. *Id.* at 690.

138. *Id.* at 690 (citation omitted).

139. *Id.* at 694. *See also* City of Canton v. Harris, 489 U.S. 378, 385 (1989) ("[O]ur first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.").

140. 471 U.S. 808 (1985).

141. *Id.* at 821.

142. 485 U.S. 112 (1988).

Praprotnik, a city employee had been laid off after fifteen years' service. He sued the city under section 1983, alleging that he was laid off in retaliation for appealing an earlier suspension and that this action violated his First Amendment and due process rights.[143] The Court held that, because the employee had not shown that he was laid off pursuant to a municipal policy, the city was entitled to municipal immunity. In its opinion, the *Praprotnik* Court recognized that "the definition of municipal liability manifestly needs clarification,"[144] particularly because *Monell* did not explain what it meant to have an "official policy." The Court set out two requirements that a policy must meet to qualify as official. First, "only those municipal officials who have 'final policymaking authority' [as defined by state law] may by their actions subject the government to § 1983 liability."[145] Second, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business."[146] *Praprotnik*'s somewhat narrow reading of "policy" to cover only actions sanctioned by the person responsible for that area of city government reduces section 1983 plaintiffs' chances of success in suits against municipalities.

If *Praprotnik* expanded municipal immunity beyond the bounds of *Monell*, *City of Canton v. Harris*[147] went even further. In *Canton*, the Court addressed a case in which a municipality was charged with failing to act in a particular situation. The Court required plaintiffs to meet a high standard of proof, holding that "the inadequacy of [a city's] police training may serve as the basis for § 1983 liability only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact."[148]

Monell and its progeny reveal that a plaintiff's section 1983 claim will not survive the municipal immunity defense unless he can show that a strip search was undertaken pursuant to an official policy promulgated by a responsible official or officials or that the school board was deliberately indifferent to students' needs. In many cases, this standard will not be met because there will be no established policy or because the individual conducting the search will not be implementing an official

143. *Id.* at 113-16.
144. *Id.* at 121.
145. *Id.* at 123 (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986)).
146. *Id.*
147. 489 U.S. 378 (1989).
148. *Id.* at 388 (emphasis added).

school board policy. Municipal immunity, like individual immunity, is difficult for plaintiffs seeking damages to overcome.

B. Obstacles to Injunctive Relief: The Standing Hurdle

Just as courts have restricted damages actions under section 1983 through the various immunity doctrines, they have used the constitutional requirement of standing to deny plaintiffs injunctive relief. The doctrine of "standing to sue" requires that plaintiffs have "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[149] It derives from the requirement of the Constitution that prevents courts from hearing matters that do not raise a "case or controversy"[150] and from principles of judicial restraint that deter the courts from considering matters in which plaintiffs are thought to lack an incentive to pursue their causes diligently.[151] Standing typically requires that plaintiffs show three things:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical . . . .'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[152]

In the early 1970s, the Supreme Court took a liberal approach to standing. In a classic case on the subject, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[153] the Court allowed environmental groups to challenge "the ICC's failure to suspend a surcharge on railroad freight rates as unlawful under the Interstate Commerce Commission Act."[154] The plaintiffs, who claimed to use the outdoor areas of metropolitan Washington, met the injury in fact

149. BLACK'S LAW DICTIONARY 1405 (6th ed. 1990).

150. U.S. CONST. art. III.

151. Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

152. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (citations and footnotes omitted).

153. 412 U.S. 669 (1973).

154. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 97 (2d ed. 1991).

requirement because the rate increase might boost the use of nonrecyclable goods, which in turn could damage the environment in which the plaintiffs frolicked.

SCRAP was a fringe case even in 1973, and "[i]t is not at all clear . . . that [it] could command a majority today."[155] In fact, the Court now seems to be using standing aggressively to limit access to the federal courts. For example, in its most recent decision on the issue, *Lujan v. Defenders of Wildlife*,[156] the Court ruled that the Defenders of Wildlife, a conservation group, lacked standing to seek an injunction forcing the Secretary of the Interior to reinstate a regulation that required all federal agencies to consult with the Secretary before doing anything at home or abroad that would jeopardize any endangered or threatened species.[157] While acknowledging that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose[s] of standing," the Court held that plaintiff had to show "not only that listed species were in fact being threatened by [the now unrestricted] funded activities abroad, but also that one or more of the group's members would thereby be 'directly' affected apart from their '"special interest" in th[e] subject."[158] Plaintiff's showing that two of its members had seen American agencies' impact on endangered species abroad would not be enough unless the group could prove not only that the members intended to return to the affected areas but that they already had some concrete plans to do so—in other words, that the injury was imminent.[159]

For present purposes, the key case on standing is *City of Los Angeles v. Lyons*.[160] In *Lyons*, the plaintiff had been the victim of a particular chokehold used by police to restrain arrestees, which rendered him unconscious and damaged his larynx. He sued to enjoin the Los Angeles Police Department from using the chokehold to restrain suspects unless it was necessary to prevent the immediate use of deadly force.[161] The Court held that the plaintiff lacked standing to seek injunctive relief. As in any other case, the *Lyons* Court said, the plaintiff must establish that he has a '"personal stake in the outcome."'[162] Because '"[p]ast

155. *Id.* at 98.

156. 112 S. Ct. 2130 (1992).

157. The Secretary had limited the regulation so that it applied only to agency activities in the United States and on the high seas.

158. 112 S. Ct. at 2137-38 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

159. *Id.* at 2138.

160. 461 U.S. 95 (1983).

161. *Id.* at 97-98.

162. *Id.* at 101 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects,'" the case or controversy requirement was not met.[163] Moreover, the *Lyons* Court established an additional hurdle that confronts plaintiffs seeking injunctive relief. It held that, even if such plaintiffs satisfied the case or controversy requirement for standing, they would still need to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law."[164] Without showing a "real or immediate threat" that he would be subjected to the chokehold again, plaintiff lacked standing to seek injunctive relief.[165]

Under *Lyons* and *Lucas*, unless a section 1983 plaintiff can show a substantial likelihood of being subjected to another strip search—presumably a difficult thing to show—she will be denied an injunction on the basis of standing. Like claims for damages, actions for injunctive relief are severely limited by the Supreme Court's section 1983 jurisprudence. As one commentator put it, "the Court . . . has engaged in an aggressive reconstruction of the scope of § 1983. This reorientation of civil rights jurisprudence has blunted the impact of § 1983."[166] As will be discussed in Part V, these developments in the law of section 1983 affect the substantive law in a way that limits the relief available to students who are subjected to strip searches.

IV. Student Strip Searches Before and After *New Jersey v. T.L.O.*

> [W]e balance the [F]ourth [A]mendment rights of individual students with the interest of the state and the school officials in the maintenance of a proper educational environment to educate today's youth.[167]
>
> *Tarter v. Raybuck* (1984)

> [Our] flexible standard allows a school administrator or court to weigh the interest of a school in maintaining order against the substantial privacy interests of students in their bodies.[168]
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> *Cornfield v. Consolidated High School District No. 230* (1993)

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163. *Id.* at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)).
164. *Id.* at 103 (quoting *O'Shea*, 414 U.S. at 502).
165. *Lyons*, 461 U.S. at 105.
166. Rudovsky, *supra* note 105, at 25-26.
167. Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).
168. Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993).

Before *New Jersey v. T.L.O.* set forth the standard by which searches in the public schools are to be evaluated, courts had some difficulty deciding whether strip searches were constitutional, perhaps because of the necessarily fact-specific nature of each inquiry. As the quotations above suggest and as this Part will show, *T.L.O.* has done little to change or clarify the law in this area. Section A below examines strip search cases that arose before *T.L.O.* and outlines the key factors that courts considered in evaluating the searches' constitutionality. Section B applies the same treatment to cases arising after *T.L.O.* and concludes that, although the general Fourth Amendment standard for school searches is now in less doubt, courts continue to differ over what constitutes a constitutional strip search.

A. Strip Search Cases Before New Jersey v. T.L.O.

Of course, strip searches had been conducted in schools and challenged in the courts long before *T.L.O.* was decided. This section examines the most important pre-1985 cases in detail and summarizes the state of the law as it existed before *T.L.O.*

The *T.L.O.* Court asserted that at the time of its decision, the lower courts had not completely resolved whether the Fourth Amendment applied to school officials at all.[169] And indeed in one case, *D.R.C. v. State*,[170] a court had held that a strip search did not violate the Fourth Amendment because the officials conducting the search were not involved in either of the activities at which the Amendment's restrictions are aimed—"investigations of those suspected of crime by those performing the function of police officers" and "area-wide exploratory investigations, with or without a suspect, carried out by specialized law enforcement officers in order to prevent crime (including violation of health and safety regulations)."[171] But *D.R.C.* was the only strip search case found[172] that took this view; the vast majority of courts that had ruled on strip searches had held that the Fourth Amendment applied to school officials as it did to other government actors.[173]

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169. *See supra* notes 43-45 and accompanying text.

170. 646 P.2d 252 (Alaska Ct. App. 1982).

171. *Id.* at 260.

172. The strip search cases considered in this paper were all reported after 1976. There may have been earlier cases, but a Westlaw search uncovered only the cases cited herein.

173. *See, e.g.*, Bellnier v. Lund, 438 F. Supp. 47, 52-53 (N.D.N.Y. 1977) (setting out the four theories of the Fourth Amendment's application to public schools and deciding to apply the amendment "but with a lesser standard than probable cause with respect to student searches"); Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984) (applying the Fourth Amendment); Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) (same), *cert. denied*, 470 U.S. 1051 (1985).

Similarly, the courts were in fairly close agreement about what standards should govern the constitutionality of strip searches under the Fourth Amendment. The cases discussed below illustrate these standards.

1. The Basic Approach: Tarter v. Raybuck.[174]—The Sixth Circuit's decision in *Tarter v. Raybuck* typifies the strip search cases from this period. In *Tarter*, school officials saw David Tarter, a high school student, exchanging money and plastic bags containing what they believed was marijuana. They took Tarter and several others aside and asked them to empty their coat pockets. The officials found no evidence that incriminated Tarter, but one of them smelled marijuana on Tarter's breath. Tarter was taken to the office, where he was informed of the officials' suspicions. Two of the male officials then took Tarter into a smaller room, where they had him empty his pockets and remove his jacket, boots, and shirt. Again, no incriminating evidence was found. The officials then asked Tarter to remove his pants. Tarter refused to do so, and the search ended. Tarter sued under section 1983, alleging that the unlawful search violated his constitutional rights.[175] The district court upheld the search, and the Sixth Circuit affirmed.[176]

While the Sixth Circuit recognized that the Fourth Amendment applies to school officials, it also noted that "the basic concern of the [amendment] is reasonableness, and reasonableness depends upon the particular circumstances. Although incursions on the [F]ourth Amendment should be guarded jealously, not infrequently the ordinary requirements of the [amendment] are modified to deal with special circumstances."[177] The court found that such circumstances existed in the school context and adopted a balancing test: "[W]e balance the [F]ourth [A]mendment rights of individual students with the interest of the state and the school officials in the maintenance of a proper educational environment to educate today's youth."[178] More specifically, the court held that

> a school official or teacher's reasonable search of a student's person does not violate the student's [F]ourth [A]mendment rights, if the school official has reasonable cause to believe the search is necessary in the furtherance of maintaining school discipline and order, or his duty to maintain a safe environment conducive to education.[179]

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174. 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).
175. *Id.* at 979-80.
176. *Id.* at 979, 983.
177. *Id.* at 981-82 (citation omitted).
178. *Id.* at 982.
179. *Tarter*, 742 F.2d at 982.

For a search to be reasonable, both the grounds for instituting the search and the extent of the search must be reasonable.

The decision in *Tarter* establishes that (a) strip searches of students are governed by the Fourth Amendment; (b) the permissibility of such searches depends on a rather loosely defined balancing of the student's interests against the government's; (c) to justify strip searches, school officials must show only "reasonable cause," not probable cause; and (d) both the beginning of the search and its ultimate scope must be reasonable. Other pre-1985 cases reached similar conclusions,[180] and it is interesting to note that the general standard set forth in *T.L.O.* itself closely resembles the *Tarter* rule.[181]

2. Individualized Suspicion Required: Bellnier v. Lund.[182]—One of the most cited strip search cases, *Bellnier v. Lund* stands for the proposition that strip searches require individualized suspicion. In *Bellnier*, all the students in a fifth grade classroom were subjected to strip searches to find one student's missing three dollars. The student reported the missing money to the teacher, who asked the class for information about it, but to no avail. Having heard complaints of missing items from other students on previous days, the teacher, with the help of other school officials, began a search of the class. They first searched the students' coats, which were hanging in a separate area of the classroom. Then they asked the students to empty their pockets and their shoes. Next, the school officials took the class members to their respective lavatories and ordered them to strip down to their underwear. The missing money was not found. Finally, the students were returned to the classroom and their desks and books were searched. Again, nothing was found. The entire investigation lasted two hours; the strip searches took about fifteen minutes.[183] The plaintiffs sued the school officials under section 1983, seeking redress for an allegedly unlawful strip search.[184]

The court first reviewed the authorities and concluded that the Fourth Amendment applied, but that the exclusionary rule and the probable cause standard were inappropriate in the school setting, since school officials are more like parents than enforcers of the criminal

180. *See* Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981); M.M. v. Anker, 607 F.2d 588 (2d Cir. 1979); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

181. *See supra* text accompanying notes 56-58.

182. 438 F. Supp. 47 (N.D.N.Y. 1977).

183. *Id.* at 50.

184. *Id.* at 49.

law.[185] It applied a balancing framework quite similar to the one set forth in *Tarter* and reached a similar conclusion:

> This Court holds that, while there need not be a showing of probable cause in a case such as this, there must be demonstrated the existence of some articulable facts which together provided reasonable grounds to search the students, and that the search must have been in furtherance of a legitimate purpose with respect to which school officials are empowered to act, such as the maintenance of discipline or the detection and punishment of misconduct.[186]

Most importantly for present purposes, the court held that the searches at issue did not meet its standard because "[t]here were no facts . . . which allowed the officials to particularize with respect to which students might possess the money, something which has time and again . . . been found to be necessary to a reasonable search under the Fourth Amendment."[187] In other words, an intrusive search cannot be justified without individualized suspicion.[188]

3. Probable Cause for Severe Intrusions?: M.M. v. Anker.[189]—Although it agreed with the general rule that "there are searches in the school enclave that satisfy Fourth Amendment requirements when based on less than probable cause," the Second Circuit in *M.M. v. Anker* also asserted that, "when a teacher conducts a highly intrusive invasion such as the strip search in this case, it is reasonable to require that probable cause be present."[190] Although other decisions were not as explicit about their views and tended to adhere to the more lenient "reasonable grounds" standard, some seemed to agree with the *M.M.* court that the more intrusive the search, the more justification the school officials would have to provide for it. In *Tarter*, for example, the court cautioned that "[w]e note that not only must there be a reasonable ground to institute the search, the search itself must be reasonable."[191] The court continued:

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185. *Id.* at 51-53.

186. *Id.* at 53.

187. *Bellnier*, 438 F. Supp. at 54.

188. Other courts have followed *Bellnier* in this requirement. *See, e.g.*, Tarter v. Raybuck, 742 F.2d 977, 983 (6th Cir. 1984) (emphasizing that "particularized suspicion of specific individuals" is an important factor in determining whether school officials have reasonable grounds for a search), *cert. denied*, 470 U.S. 1051 (1985).

189. 607 F.2d 588 (2d Cir. 1979).

190. *Id.* at 589.

191. Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

> Thus, for example, the authority of the school official would not justify a degrading body cavity search of a youth in order to determine whether a student was in possession of contraband in violation of school rules. There the [F]ourth [A]mendment and privacy interests of the youth would clearly outweigh any interest in school discipline or order which might be served by such a search.[192]

Although it upheld the partial strip search at issue, the *Tarter* court, like that in *M.M.*, indicated that in certain extreme situations, school officials would reach a line they could not cross.

Similarly, in *Doe v. Renfrow*,[193] the Seventh Circuit announced its aversion to strip searches in a brief but often-cited opinion that continues to influence courts today. The plaintiff in *Renfrow* was one of 2780 high school students searched by dog sniffs. Students to whom the dogs "alerted," including the thirteen-year-old plaintiff, were compelled to strip nude and submit to a search for contraband. The plaintiff sued, alleging that both searches—the dog sniff and the strip search—violated her civil rights. The Seventh Circuit affirmed the district court's opinion, which, like most other pre-1985 cases, held that searches in the schools must be supported by "reasonable cause."[194] But in memorable language, the court of appeals reversed the lower court's determination that the school officials were immune from liability, holding that the officials had to be held accountable for their conduct:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law." . . . We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles.[195]

Although not all pre-*T.L.O.* courts agreed with the outrage the Seventh Circuit expressed when faced with extremely intrusive searches, it represents a view that continues to influence strip search decisions today.

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192. *Id.* at 982-83.
193. 631 F.2d 91 (7th.Cir. 1980), *cert. denied*, 451 U.S. 1022 (1982).
194. *Id.* at 92.
195. *Id.* at 92-93 (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975)).

Before 1985, courts had fairly well settled on a standard for evaluating student strip searches that closely resembles the one that *T.L.O.* set out for all school search cases. But the courts had also espoused requirements of individual suspicion and their opinions contained a healthy dose of skepticism about intrusions as severe as strip searches.

B. Strip Search Cases Since T.L.O.

Since 1985, strip searches in the public schools have been governed by *New Jersey v. T.L.O.* Perhaps not surprisingly, the four cases reported since *T.L.O.* reveal that courts have the same concerns today that they did before *T.L.O.* Like section A above, this section synthesizes the various legal standards that have surfaced in the cases and examines how courts have evaluated the constitutionality of strip searches.

1. The Basics: The T.L.O. *Framework.*—All the post-1985 strip search cases have one thing in common: they rely on the framework established in *T.L.O.* Therefore, the probable cause standard does not apply. Rather, searches are upheld if they are reasonable at their inception and reasonable in scope. The appropriate analysis for addressing these reasonableness questions was summarized neatly in the Seventh Circuit's decision in *Cornfield v. Consolidated High School District No. 230.*[196] In *Cornfield,* a teacher had reported that the plaintiff "appeared 'too well-endowed.'"[197] This observation led school officials to believe that the plaintiff was "crotching" drugs. The plaintiff's teacher and the school's dean (both men) took the plaintiff to the boys' locker room. Standing more than ten feet away on either side of the plaintiff, they had him remove his clothing and change into a gym uniform. They watched him change and inspected his clothes but found nothing, so they let him go home. The plaintiff sued under section 1983, alleging that the search violated his constitutional rights.[198] The court first set out the controlling standard, which it derived from *T.L.O.*:

> "Justified at its inception" in the present context does not mean that a school administrator has the right to search a student who merely acts in a way that creates a reasonable suspicion that the student has violated some regulation or law. Rather, a search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to

196. 991 F.2d 1316 (7th Cir. 1993).
197. *Id.* at 1319.
198. *Id.*

> produce evidence of that violation. Second, the search must be permissible in scope: "[T]he 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."[199]

Applying this test to the case before it, the Seventh Circuit found that the search at issue was reasonable. It was justified at its inception because, although the officials had only observed the unusual bulge in plaintiff's crotch once, a number of independent factors supported their suspicions that he possessed drugs, including statements the plaintiff himself had made about dealing drugs and hiding them by "crotching," reports from his bus driver that he smelled of marijuana, and information from other students that he had had drugs on his person in the past.[200] The search was justified in scope because it was the "least intrusive way to confirm or deny [the officials'] suspicions," was conducted "in the privacy of the boys' locker room," and did not involve any physical contact.[201]

The standard espoused in *Cornfield* is essentially the same as that used in the three other post-*T.L.O.* strip search cases.[202] It can be broken down into several components. First, searches are reasonable only if prompted by "reasonable suspicion." Second, any intrusion must be reasonable in light of the objectives of the search. Third, the search must not be excessively intrusive in light of the age and sex of the student. Finally, it must not be excessively intrusive in light of the nature of the infraction.[203] The remaining subsections help give content to these components.

2. Reasonable Suspicion: Cales v. Howell Public Schools.[204]—The first court to apply *T.L.O.* in the strip search context confined itself to the first prong of the two-part *T.L.O.* test—whether the search was reasonable at its inception. The plaintiff in *Cales*, a fifteen-year-old student, was seen in the parking lot of the school during class hours "attempting to avoid detection by 'ducking' behind a parked car."[205] She was taken to the principal's office, where the contents of her purse were dumped out, revealing some school "readmittance slips" that she was not supposed

199. *Id.* at 1320 (quoting *T.L.O.*, 469 U.S. at 341-42).
200. *Id.* at 1322.
201. *Cornfield*, 991 F.2d at 1323.
202. Williams v. Ellington, 936 F.2d 881, 886 (6th Cir. 1991); Cales v. Howell Pub. Schs., 635 F. Supp. 454, 456-57 (E.D. Mich. 1985); State v. Mark Anthony B., 433 S.E.2d 41, 45 (W. Va. 1993).
203. *Cornfield*, 991 F.2d at 1320.
204. 635 F. Supp. 454 (E.D. Mich. 1985).
205. *Id.* at 455.

to have. She was then told to turn her jean pockets inside-out. She subsequently removed her jeans entirely. Plaintiff was then told to bend over so that the school official could "visually examine the contents of her brassiere." She was not touched during the search.[206]

The plaintiff sued under section 1983, alleging that the search violated her constitutional rights. Laying out the Fourth Amendment standard, the court relied on *T.L.O.* for the proposition 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."[207] The officials failed to meet this threshold requirement (the first prong of the *T.L.O.* test) because while "[i]t is clear that plaintiff's conduct created a reasonable suspicion for suspecting that some school rule or law had been violated," it "could have indicated that she was a truant, or that she was stealing hubcaps, or that she had left class to meet a boyfriend. In short, it could have signified that plaintiff had violated any of an infinite number of laws or school rules."[208] The court continued:

> This Court does not read *TLO* so broadly as to allow a school administrator the right to search a student because that student acts in such a way so as to create a reasonable suspicion that the student has violated some rule or law. Rather, the burden is on the administrator to establish that the student's conduct is such that it creates a reasonable suspicion that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of that violation.[209]

The court concluded that the administrators had not met their burden and that therefore the search was unreasonable; any inquiry into the second ("scope") prong of *T.L.O.* was unnecessary.[210] The court in *Cornfield*, applying the same standard, reached the opposite conclusion because there was considerable evidence from a variety of sources that pointed to an identifiable offense—marijuana possession.[211] The other two post-1985 strip search cases contain similar formulations of *T.L.O.*'s first prong.[212]

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206. *Id.*
207. *Id.* at 456 (quoting *T.L.O.*, 469 U.S. at 341-42).
208. *Id.* at 457.
209. *Id.*
210. *Id.*
211. *See supra* notes 196-201 (discussing *Cornfield*).
212. *See* Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); State v. Mark Anthony B., 433

3. The Role of Age and Sex.—The general standard set forth in *T.L.O.* stated that searches should not be "excessively intrusive in light of the age and sex of the student,"[213] and strip search cases since 1985 have at least mentioned these factors in their analyses. As far as sex is concerned, it seems a natural requirement that the searcher and the subject of the search be of the same sex, and there is little dispute on this issue. Indeed, the *Cornfield* court seemed to take the point for granted when it asserted that "[a] nude search of a student by an administrator or teacher of the opposite sex would obviously violate [the] standard."[214]

Similarly, the student's age is a key factor in determining the reasonableness of strip searches, as courts had recognized long before *T.L.O.*[215] But here the *Cornfield* court parted ways with the past. Its discussion of the age aspect of the strip search standard is unique among strip search cases in that the court actually paused to analyze why age should matter. First, it said, older children are more likely to have criminal capacity and therefore more likely to participate in criminal activity. Second, an older child will have a more meaningful capacity to consent to a search. Drawing on the ancient "rule of sevens,"[216] the court said that it "would naturally be much more circumspect about [younger children's] ability to comprehend the impact of a strip search, or to consent to one."[217] In sum, the court concluded that "the legitimate expectations of privacy that students in school may claim are not monolithic," but vary with age.[218]

4. T.L.O. *as a Sliding-Scale Standard.—M.M. v. Anker* and some other cases discussed above[219] indicated that at least some pre-1985 courts were willing to raise the Fourth Amendment requirement to probable cause when highly intrusive searches were involved. As strip search cases since 1985 have recognized, the *T.L.O.* standard embodies a similar sliding scale of reasonableness: the greater the intrusion, the

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S.E.2d 41 (W. Va. 1993).

213. 469 U.S. at 342.

214. Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993).

215. *See, e.g.*, Bellnier v. Lund, 438 F. Supp. 47, 53 (N.D.N.Y. 1977) (listing "the child's age" as one of the "factors which warrant consideration" in analyzing the reasonableness of a search).

216. The rule, a common-law doctrine, held that children under the age of seven were considered to be without criminal capacity. Children over the age of fourteen were said to have the same criminal capacity as adults. Children between seven and fourteen were presumed incapable of committing crimes, but the presumption was rebuttable. *Cornfield*, 991 F.2d at 1321.

217. *Id.*

218. *Id.* Similar rationales help explain why strip search cases do not arise at the college level. *See supra* note 8 (discussing other differences between college students and younger students).

219. *See supra* notes 189-95.

greater the justification for it must be. In *Cornfield*, for example, the court read *T.L.O.* to require that "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search."[220]

The court in *State v. Mark Anthony B.*[221] went even further. In *Mark Anthony B.*, a teacher discovered that $100 in cash was missing from her purse. She reported the incident to a school social worker, who soon learned that the defendant, a fourteen-year-old student, had been assigned minor janitorial duties and had likely been alone in the teacher's classroom. Moreover, the student was serving a two-year probation term for burglary. When confronted, the student admitted to having been in the classroom alone, but denied having taken the money. The social worker had the student pull out his pockets and roll down his socks, but found nothing. He informed the principal of the situation. The principal took the student into the boys' bathroom, looked in his pockets and socks, and then asked the student to take off his pants. The student lowered his pants to his knees. The principal asked him to pull his underwear out in front and back. The money was in the back of the student's underwear. The teacher subsequently initiated criminal proceedings against the student, who sought to exclude the evidence on the grounds that it was obtained through an unlawful strip search.[222]

The West Virginia Supreme Court held that the school officials had satisfied prong one of the test; because the student already had a criminal record and was known to have been alone in the room from which the money was stolen, the officials had reasonable grounds to search him.

The court then turned to the second prong of the test: whether the search as actually performed was excessively intrusive. Noting that "the United States Supreme Court has never decided a case which involved a strip search of students, nor did the *T.L.O.* Court indicate whether its reasonableness standard would apply to strip searches of students,"[223] the court asserted:

> At some point, a line must be drawn which imposes limits upon how intrusive a student search can be. We certainly cannot imagine ever condoning a search that is any more physically intrusive than the one now before us . . . . The *T.L.O.* Court obviously intended for there

220. *Cornfield*, 991 F.2d at 1321.
221. 433 S.E.2d 41 (W. Va. 1993).
222. *Id.* at 42-43.
223. *Id.* at 45.

> to be constraints on how far a search could ultimately extend, even when there are "reasonable grounds" and/or an individualized suspicion to justify the initial search.[224]

The court found that the search in the case before it could not be upheld as reasonable. Although stealing "should never be condoned or encouraged in our schools," it "did not pose the type of immediate danger to others than might conceivably necessitate and justify a warrantless strip search. The scope of this particular search exceeded what could be defined as reasonable under the circumstances."[225] The court concluded: "[I]n the absence of exigent circumstances which necessitate an immediate search in order to ensure the safety of other students, a warrantless strip search of a student conducted by a school official is presumed to be 'excessively intrusive' and thus unreasonable in scope."[226] Like *Cornfield*, *Mark Anthony B.* indicates that *T.L.O.* established a sliding-scale test for evaluating searches in the public schools, and that test often requires significant justification before a strip search will be considered reasonable.

Somewhat in contrast is the Sixth Circuit's recent decision in *Williams v. Ellington*.[227] In *Ellington*, the section 1983 plaintiff, Angela Williams, alleged that school officials had violated her constitutional rights through an unlawful strip search. The principal of the school had received information that Williams and another girl, Michelle, had been sniffing a white powder in class and had offered it to another student. A typing teacher who was asked about the two girls recalled Michelle's strange behavior on one occasion and a note Williams had typed months before that mentioned parties involving "the rich man's drug." The principal talked to both Williams's and Michelle's families, and Michelle's father "expressed concern that she might be using drugs."[228] Then the same girl who had originally told the principal about Michelle and Williams came to him and reported that the two were at it again. After questioning the informant, the principal called the girls out of class and took them to the administrative offices, where he told them of his suspicions. Michelle produced a vial containing "rush," a volatile substance that was legal to possess but not to inhale. Williams's lockers, purse, and books were searched, but yielded no evidence of drugs. Then Williams was strip-searched. She had to empty her pockets,

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224. *Id.* at 48-49.
225. *Id.* at 49.
226. *Id.*
227. *Williams*, 936 F.2d 881 (6th Cir. 1991).
228. *Id.* at 882.

remove her t-shirt, remove her shoes and socks, and lower her pants to her knees. Finally, although there was a factual dispute on the matter, Williams alleged that the official conducting the search pulled out the elastic on her underwear. Again, no evidence of drugs was found.[229]

The court granted the school officials summary judgment on immunity grounds, ruling in part that "it was not unreasonable [for the principal] to believe that the ordered searches were not a violation of Angela Williams' constitutional rights."[230] Addressing the second prong of the *T.L.O.* test (the "reasonable in scope" prong), the court compared the continued searches of Williams and her property to the second search in *T.L.O.*, which the Supreme Court held was justified because the first search had uncovered evidence of drug use (the rolling papers), and held that the searches were not unreasonable. It did so even though (a) almost all of the "reasonable suspicion" the officials could muster involved Michelle, not Williams, (b) the search in this case was much more intrusive than the one in *T.L.O.*, and (c) there was no additional evidence found (like the rolling papers in *T.L.O.*) that would justify continued and increasingly invasive searches. In support of its conclusion, the court asserted that

> [a] thorough review of *T.L.O.* reveals that the Court was careful to protect a school official's right to make discretionary decisions in light of the knowledge and experience of the educator and the information presented to him or her at the time such decision was made. Like police officers, school officials need discretionary authority to function with great efficiency and speed in certain situations, so long as these decisions are consistent with certain constitutional safeguards. To question an official's every decision with the benefit of hindsight would undermine the authority necessary to ensure the safety and order of our schools.[231]

5. Conclusion.—The preceding discussion illustrates some common threads and differing opinions among strip search cases decided since *T.L.O.* What is reasonable will necessarily vary not only with the age and sex of the student, the intrusiveness of the search, the nature of the government interest involved, and the conditions at the particular school, but also with the court faced with deciding what is permissible and what is not. The differing opinions in *Ellington* and *Mark Anthony B.* are a perfect illustration of this phenomenon.

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229. *Id.* at 882-83.
230. *Id.* at 886.
231. *Id.*

In sum, although the Fourth Amendment standard governing strip searches in the public schools is clearer after the *T.L.O.* decision, the substantive law is not much different and there are still considerable discrepancies in its application. All accept the proposition that warrantless strip searches must be reasonable at their inception and reasonable in scope, but what 'reasonable' means is as unclear today as it was just before *T.L.O.* was decided in January 1985.

V. When Are Student Strip Searches Constitutional?

> [I]n the absence of exigent circumstances which necessitate an immediate search in order to ensure the safety of other students, a warrantless strip search of a student conducted by a school official is presumed to be "excessively intrusive" and thus unreasonable in scope.[232]

> Children are not adults. Schools stand in loco parentis and are entitled to do anything that a parent could do under similar circumstances to protect the health, safety and morals of a child and to maintain the proper functioning of the school. If we wonder why our schools are going to hell in a handbasket, it's probably because of decisions like this one.[233]

The sharply divided opinions in *State v. Mark Anthony B.*,[234] excerpted above, and the conflicting decisions discussed in Part IV illustrate the difficulty lower courts are having in applying *T.L.O.* to the strip search context.[235] Some opinions, like the *Mark Anthony B.* majority's, stand firmly against strip searches. Others, like the Sixth Circuit's unanimous decision in *Williams v. Ellington*,[236] defer substantially to school officials. Both seem to find support in *T.L.O.*

Such uncertainty can prove extremely problematic for those who seek to vindicate their constitutional rights. As Part III showed, where there is even a modest amount of uncertainty in the underlying substantive law, section 1983 hurdles bar relief even for those who prevail on the merits.[237] In fact, the *Ellington* decision turned largely on this very issue. Because the court could not find any cases that clearly established the plaintiff's right to be free from strip searches of the kind she suffered, it granted the school officials qualified immunity:

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232. State v. Mark Anthony B., 433 S.E.2d 41, 49 (W. Va. 1993).
233. *Id.* (Neely, J., dissenting).
234. 433 S.E.2d 41 (W. Va. 1993).
235. *See supra* part IV.
236. 936 F.2d 881 (6th Cir. 1991).
237. *See supra* part III.

> To determine what rights are "clearly established," we must look to decisions from the Supreme Court and from courts within this circuit . . . . A diligent but unsuccessful search for additional guidance [beyond that provided in *T.L.O.*] from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in *New Jersey v. T.L.O.*, has left courts later confronted with the issue either reluctant or unable to define what type of conduct would be subject to a 42 U.S.C. § 1983 cause of action. . . . [S]uch courts have been virtually silent in defining these rights. Based upon the rights that were "clearly established" at the time of the search in question, we grant qualified immunity to Defendants sued in their individual capacity.[238]

The court also denied the plaintiff's claim for injunctive relief, holding under *City of Los Angeles v. Lyons*[239] that "because Williams has failed to show any real threat of immediate injury, her claim for injunctive relief does not warrant the issuance of an injunction."[240]

Neither underenforcement of the Fourth Amendment nor uncertainty in the law construing it should deprive schoolchildren of their constitutional rights. In the interests of clarifying constitutional rights and protecting schoolchildren against overzealous government officials, this Part seeks to define more carefully what standard should govern strip search cases. Section A points out weaknesses in the courts' current approach to strip searches under *T.L.O.* Section B then proposes a new, better defined standard for strip searches that would solve many of these problems. Finally, section C gives several examples of how the new standard would function in practice.

A. The Problem: Misapplication of the T.L.O. *Standard*

According to *T.L.O.*, the Fourth Amendment requires that searches of students in the public schools be reasonable at their inception and reasonable in scope. To elaborate:

> [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. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not

238. *Ellington*, 936 F.2d at 885-87.

239. 461 U.S. 95 (1983). For a full discussion of *Lyons*, see *supra* notes 160-65 and accompanying text.

240. *Ellington*, 936 F.2d at 889.

> excessively intrusive in light of the age and sex of the student and the nature of the infraction.[241]

The Court in *T.L.O.* explained that its intent in setting out such a standard was to balance the rights of schoolchildren against the legitimate needs of the school system. While "spar[ing] teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit[ting] them to regulate their conduct according to the dictates of reason and common sense," the standard "should [also] ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools."[242] Although Justice Brennan in *T.L.O.* itself[243] and many commentators since then[244] have argued that this standard is simply too indefinite to protect children's rights, it at least takes a pragmatic approach to the problem by recognizing the compromise that must necessarily be struck between the competing interests. Still, *T.L.O.*'s critics are correct in the sense that, although the decision *could* be used to ensure a fair balance of interests, in practice its "mushiness" gives courts too much leeway to permit infringements on individual rights. Indeed, the *T.L.O.* majority itself arguably misapplied its own standard. In its assessment of whether the search was reasonable at its inception, the Court overlooked the fact that Choplick did not have a "need to search" the purse sufficient to outweigh T.L.O.'s privacy interest: he already had eyewitness evidence that T.L.O. had broken the no smoking rule, so his "need" was minimal, especially in light of the minor nature of the rule. Moreover,

> [t]he result in *T.L.O.* is further puzzling in light of the Court's admonition that the "age and sex of the student and the nature of the infraction" be included in the balancing calculus. The Court in fact never considered these factors in its *T.L.O.* balancing calculus nor explained how or why they are relevant.[245]

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241. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

242. *Id.* at 343.

243. *Id.* at 353-70 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

244. Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 920 (1988) ("Some now fear that by embracing [a balancing or sliding-scale] approach, *T.L.O.* opens the door for wholesale abandonment of principled, rule-oriented jurisprudence in favor of case by case assessments of 'reasonableness' in which the government usually prevails and privacy takes a back seat.") (footnotes omitted).

245. *Id.* at 922 (quoting *T.L.O.*, 469 U.S. at 342) (footnote omitted). *See also* Charles W. Avery & Robert J. Simpson, *Search and Seizure: A Risk Assessment Model for Public School Officials*, 16 J.L. & EDUC. 403, 407-08 (1987):

Courts applying the *T.L.O.* standard to strip searches have similarly underemphasized the students' interest. *Williams v. Ellington*, for example, has been criticized for failing to address such factors as the student's age, the history of drug use in the school as a whole, and the disciplinary record of the student, all of which would have been relevant to the balance.[246] More importantly, the *Ellington* court, in drawing a parallel between the strip search at issue and the much less invasive examination of the student's purse in *T.L.O.*, completely overlooked the nature of the intrusion.[247] One commentator asserted that "[t]he court reached its conclusion . . . with virtually no analysis of the issue."[248] It

> assumed the standard for such searches had been clearly decided in *T.L.O.* . . . [and] applied the [reasonableness] standard in a remarkably cursory fashion . . . . The court gave no consideration whatsoever to whether a strip search was "excessively intrusive in light of the age and sex of the student and the nature of the infraction." In short, the court essentially assumed, for Fourth Amendment purposes, that there was no difference between the search of a student's purse and the search of her pants.[249]

When courts like the Sixth Circuit in *Ellington* neglect the individual rights side of the balance, they permit schools to conduct searches that damage students in a number of ways. First, and most important, looking only at the government's interests means ignoring the fact that a strip search is among the most serious possible intrusions upon someone's privacy. Even if common sense did not make this clear, courts have said repeatedly (on the occasions that they have taken time to consider the

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> The "reasonable suspicion" standard set by the courts lacks the precision and clarity necessary to serve as a ready tool for school officials in fulfilling their duties. For example:
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> 1. How does this standard relate to the general search versus the particularized search?
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> 2. How does police involvement, prior or otherwise, alter the lawfulness of the search?
>
> 3. Under what circumstances, if any, is a strip search justified?
>
> 4. Are articles placed in a student's car or locker given less protection than articles places on a student's person or purse?
>
> 5. In short, what are the consequences and legal safeguards associated with particular types of searches?
>
> Again, what is reasonable?

246. Tamela J. White, Note, Williams by Williams v. Ellington: *Strip Searches in Public Schools—Too Many Unanswered Questions*, 19 N. KY. L. REV. 513, 539-40 (1992).

247. *Id.* at 540.

248. Shatz et al., *supra* note 1, at 31.

249. *Id.* (quoting *T.L.O.*, 469 U.S. at 342).

matter) that strip searches are extremely invasive. The Seventh Circuit in *Doe v. Renfrow*, for example, called a strip search of a thirteen-year-old student "a violation of any known principle of human decency."[250] The Second Circuit called strip searches "highly intrusive invasion[s]" of privacy.[251] And the Ninth Circuit noted the "intrusive handling" that strip searches entail.[252] Ignoring or discounting the seriousness of these invasions flatly disregards not only *T.L.O.*'s requirement that interests be fairly balanced, but also the Constitution's prohibition against unreasonable searches and seizures. It is the children who pay the price with their individual dignity.

The second way in which students are damaged by the present conception of their rights in the strip search context is in the psychological harm they suffer when subjected to invasive searches. Although adults are affected by strip searches as well, children are especially susceptible to psychological harm. "Evidence from psychologists supports the assumption that any search of a school age child or adolescent has a greater impact than would such a search of an adult because the development of a sense of privacy is critical to a child's maturation."[253] Threats to children's privacy are essentially threats to their self-esteem; intrusions as severe as strip searches may be both emotionally and sexually traumatic, to the point that children may experience strip searches as sexual abuse. Moreover, if strip searches are experienced as sexual abuse, the fact that they are usually single events does not diminish their impact on the child, since "[s]tudies have shown that the duration and repetition of child sexual abuse are unrelated to its traumatic effect."[254] In fact, the factors that *are* related to traumatic effect in sexual abuse cases are "the use of force or coercion by the abuser" and "a substantial age difference between the abuser and the victim"—two factors almost always present in school strip search situations.[255]

Although anyone would find strip searches intrusive and degrading, the fact that children are not sufficiently protected against them is particularly dangerous because they are the group most likely to suffer

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250. *Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

251. M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979).

252. Bilbrey v. Brown, 738 F.2d 1462, 1468 (9th Cir. 1984).

253. Shatz et al., *supra* note 1, at 11. Even the Supreme Court has recognized that "[y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage." Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

254. Shatz et al., *supra* note 1, at 13.

255. *Id.*

actual psychological harm. Yet courts have almost uniformly failed to consider these data. "[O]nly once has a [Supreme Court] Justice supported his analysis of children's constitutional rights by reference to the psychological literature on child development,"[256] and among strip search cases, only in *Cornfield* has there been any real analysis of psychological studies.[257]

Finally, the strip search standard as currently applied fails to recognize that "'[f]or good or for ill,'" "'[o]ur [g]overnment is the potent, the omnipresent teacher [and] teaches the whole people by its example.'"[258] The Supreme Court held as early as 1954 that education "is perhaps the most important function" of government,[259] and there is no doubt that our experience in school gives content to many of our fundamental values. If there is anywhere that constitutional protections are to be jealously guarded, then, it should be in the schoolhouse. As Justice Stevens recognized in *T.L.O.*,

> The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth.[260]

Similarly, Justice Brennan pointed out in his dissent from the denial of certiorari in *Doe v. Renfrow* that

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one

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256. *Id.* at 10 (citing Wisconsin v. Yoder, 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting)).

257. Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1321, 1323 (7th Cir. 1993).

258. New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). The entire passage reads as follows: "Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

259. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

260. *T.L.O.*, 469 U.S. at 385-86 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

> her teacher had hoped to convey. I would grant certiorari to teach petitioner and her teacher another lesson: that the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" . . . . Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.[261]

This point is even more compelling when one considers the many children today whose families cannot provide the moral backdrop of right and wrong. The school is the only model of order and regularity that they know, and for it to breach constitutional barriers betrays their faith and trust in their government and the Constitution underlying it to the detriment of us all.

To add insult to injury, in addition to being victims of *T.L.O.*'s misapplication in the strip search context, students who are searched under present law may be barred from recovering in a section 1983 suit because their rights are simply not clearly established. Even those found to prevail on the merits may still lose their relief to the immunity and standing doctrines. In sum, the current application of the *T.L.O.* standard to student strip searches is both too lenient and too ill-defined to protect the interests of schoolchildren.

B. The Solution: A Stricter Standard for Strip Searches

Perhaps the best way to alleviate the problems identified in section A would be to raise the general Fourth Amendment standard set forth in *T.L.O.* and require school officials to abide by stricter guidelines in all their searches. But the Court's opinion in *T.L.O.* itself rejects such an approach as too restrictive of school officials' discretion.[262] Only three of the Justices favored tighter controls.[263] In fact, the *T.L.O.* majority and Justices Powell and Blackmun all emphasized that the states needed

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261. Doe v. Renfrow, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting from denial of certiorari). In his *T.L.O.* opinion, Justice Stevens quoted Brennan's language from *Renfrow*. 469 U.S. at 374 n.9 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

262. *T.L.O.*, 469 U.S. at 339-43 (emphasizing the need for flexibility in overseeing the school environment and defending its standard as one that "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 to the dictates of reason and common sense"). *Id.* at 343.

263. *Id.* at 353-70 (Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.* at 370-86 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

considerable leeway in running their schools and that any stricter standard might compromise their ability to perform their essential duties.[264]

Instead of changing the entire Fourth Amendment framework for school searches, this Article proposes that courts adopt a stricter standard for strip searches only. No one questions that *T.L.O.* establishes a sliding-scale test under which greater intrusions are subject to greater restrictions. Since the courts have uniformly held that strip searches "entail[] perhaps the most severe intrusion upon personal rights,"[265] it makes sense that they should also be subject to the most comprehensive restrictions. The basic *T.L.O.* framework, which suffices as a general standard, could be left intact if only the specific area of strip searches could be more closely controlled.

The opinions in *T.L.O.* itself provide two possible solutions. Justice Brennan advocated using a probable cause standard for all "full-scale intrusions upon privacy interests"[266]—that is, searches of one's person like the one that took place in *T.L.O.*[267] He would have held the search unconstitutional on the basis that Choplick did not have probable cause to "rummage through T.L.O.'s purse" once the initial search for cigarettes was complete.[268]

Justice Stevens took an even less permissive view of school searches. He argued that the Court's standard, which gave school officials the power to search "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,"[269] was too lenient. Instead, he recommended "a standard that varies the extent of the permissible intrusion with the gravity of the suspected offense."[270] Teachers and school administrators may search a student "when they have reason to believe that the search will uncover *evidence that the student*

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264. *Id.* at 343; *T.L.O.*, 469 U.S. at 350 (Powell and O'Connor, JJ., concurring); *id.* at 353 (Blackmun, J., concurring in judgment).

265. Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *aff'd*, 942 F.2d 1352 (9th Cir. 1991), *rev'd on unrelated grounds sub nom.* Reno v. Flores, 113 S. Ct. 1439 (1993). *See also* Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993) ("There can be no doubt that a strip search is an invasion of personal rights of the first magnitude. It is axiomatic that a strip search represents a serious intrusion upon personal rights.").

266. *T.L.O.*, 469 U.S. at 360 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

267. *Id.* at 368 (Brennan and Marshall, JJ., concurring in part and dissenting in part) (asserting that "school searches like that conducted in this case are valid only if supported by probable cause").

268. *Id.* (Brennan and Marshall, JJ., concurring in part and dissenting in part).

269. *Id.* at 342 (majority opinion).

270. *Id.* at 378-79 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process."[271] Stevens would have held that the search of T.L.O.'s purse was unreasonable at its inception because it was initiated to uncover evidence of a violation of a minor school rule. Since Choplick had "absolutely no basis" "to believe T.L.O.'s purse contained any evidence of criminal activity, or of an activity that would seriously disrupt school discipline," his actions were unjustified.[272]

Both Stevens's and Brennan's opinions make sense (indeed, they are quite convincing) in light of the Court's objective in *T.L.O.*, whether one sees that objective as establishing a general standard for searches in the public schools or evaluating the particular search before it. But both Justices' opinions are inadequate to address the strip search context, perhaps because strip searches are an extreme subset of the set of all school searches or because a strip search was not at issue in *T.L.O.* Justice Brennan would raise the standard for initiating a search to probable cause rather than reasonable suspicion, but seemed to place no limits on the extent of the search once it is under way. Justice Stevens, on the other hand, had the right idea when he noted that "[o]ne thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse"[273] but failed to incorporate the idea when formulating a standard. His standard, while perfectly satisfactory for school searches in general, is simply too amorphous to govern strip searches. It would permit school administrators to justify strip searches for such things as theft—a crime but not a threat to school order. And more importantly, it would allow them to search based on any conduct that they deemed "seriously disruptive of the school order"[274]—an overly permissive bow to the officials' discretion.

Nonetheless, elements of both Brennan's and Stevens's opinions can be used to generate a new standard for strip searches. First, strip searches should be conducted only when school officials can demonstrate that they have probable cause to believe that a violation has occurred. As noted above,[275] even the majority in *T.L.O.* recognized the need for a flexible,

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271. *Id.* at 378 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

272. *Id.* at 384 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

273. *Id.* at 382 n.25 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

274. *Id.* at 378 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part) (emphasis removed).

275. *See supra* notes 219-31 and accompanying text. Recall also that several of the pre-*T.L.O.* cases suggested that probable cause should be required in the school setting, *see supra* notes 189-95

sliding scale standard for evaluating the reasonableness of a search. Since strip searches are so much more intrusive than other searches, they should be upheld only where the officials' suspicions rise to the level of probable cause. (Of course, this means that individualized suspicion will also be necessary.)

Second, strip searches should be used only to discover the most serious violations. Again, this requirement stems from the fundamental principle that the search must be commensurate with the objective that motivates it. Strip searches should not be used to uncover evidence of smoking violations or petty theft, but should be reserved for the major problems in schools: weapons and drugs. Indeed, many courts deciding school search cases have looked into the school's history to determine how serious the problem is;[276] this is a good way to avoid, for example, strip-searching a student for drugs when the suspected drug use might be merely an isolated incident at the school.

Third, strip searches are appropriate only where the violations are likely to result in an immediate disruption of school order—the kind of infraction that threatens the safety or health of other students. As with the other limitations, this requirement insures that officials will perform strip searches only in the most serious situations.

In addition to these three special requirements for strip searches, courts should continue to abide by the reasonableness standard set out in *T.L.O.*, which requires that all searches be reasonable in light of 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."[277] Although the student's sex has generally been given due consideration by requiring that searches be performed by officials of the same sex, the age factor had been ignored until *Cornfield.* Courts should follow the Seventh Circuit's lead in being attentive to age as well as sex considerations.

In sum, strip searches must meet not only the general Fourth Amendment requirements of *T.L.O.*, but also the probable cause,

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and accompanying text, and that Justice Stevens asserted that "the shocking strip searches that are described in some cases have no place in the schoolhouse." *T.L.O.*, 469 U.S. at 382 n.25 (Stevens, Marshall, and Brennan, JJ., concurring in part and dissenting in part).

276. *E.g.*, Bellnier v. Lund, 438 F. Supp. 47, 53 (N.D.N.Y. 1977) (listing as one of four "factors which warrant consideration" in evaluating a search "the seriousness and prevalence of the problem to which the search is directed"); Burnham v. West, 681 F. Supp. 1160, 1166 (E.D. Va. 1987) (criticizing school officials who conducted searches for drugs without any evidence of their prevalence at the particular school).

277. *T.L.O.*, 469 U.S. at 342.

seriousness, and "imminent threat to safety or health" tests set out above. Only then will schoolchildren's rights be adequately protected.[278]

C. Application

In order to flesh out the standard proposed above, this section applies it to a number of hypothetical situations, using it in each situation to determine whether the strip search contemplated would be constitutional. In each, imagine that you are a male school official charged with deciding whether or not a strip search is appropriate.

1. Example A.—The Sanford High School has a history of violence. Students have been known to bring guns to school, and several have been injured in fights on or near the school premises. The suspected student, a seventeen-year-old named John Joseph, has participated in at least two fights in the last few months. Other students have reported on a number of occasions that he owns and carries a gun. Today two students whom you trust have told you that Joseph has his gun in school and has threatened to shoot a classmate during recess. You pass Joseph in the hall just before recess and notice an unnatural bulge in his pants about the size of a handgun. You ask Joseph what he is doing in the hall and he looks nervously at the floor and tells you he is going to the bathroom. Further questioning gets you nowhere. Can you strip search Joseph?

In this example, a strip search is appropriate. Both Sanford School and Joseph have a history of violence, and you have several reliable reports that implicate Joseph in past violence and suggest that he may be carrying a weapon today. Moreover, you observe that he has an unusual bulge in his pants and that he is acting nervous. All these facts give you probable cause. The potential harm is certainly serious enough to justify a strip search—Joseph has threatened to shoot another student. And there is an imminent threat to the safety or health of the school's students. Moreover, you and Joseph are of the same sex, and he is old enough that he should not suffer too much from the search.

2. Example B.—Martha Thomas, a sixteen-year-old student at Green Leaf High School, was just brought to you after a teacher saw her remove a small plastic bag from a larger bag and hand the small bag to another student, George Jamison, in exchange for a twenty-dollar bill.

278. Note that the standard proposed here will not do much to help students past the municipal immunity and standing hurdles, which are beyond the scope of this Article's Fourth Amendment focus. These obstacles are not as easily removed, since they are a part of the Supreme Court's overall section 1983 jurisprudence.

The teacher did not see the contents of either bag, but believes that Thomas has the larger one on her person. Her locker and desk have already been searched, but nothing was found. As in Example A, your school is not a pristine environment for learning. But at Green Leaf drugs are the main problem, not violence. Students have reported that Thomas is one of the main dealers of drugs at the school and does a steady business selling marijuana and "magic mushrooms." They also report that she smokes marijuana regularly. When you approach Thomas to question her, she smells of marijuana. Your questioning generates only denials of any wrongdoing.[279] Can you strip search Thomas?

Again, a strip search would be permissible under these circumstances. Thomas is reputed to be a large-scale drug dealer, she was observed conducting what appeared to be a drug deal, and she smells of drugs. Drugs are a major problem at your school and possessing and selling marijuana and "magic mushrooms" are crimes. And drugs, as the Supreme Court acknowledged in *T.L.O.*,[280] are one of the most serious problems facing schools, since they are so disruptive to the learning environment. Since the situation you face meets the probable cause, seriousness, and "imminent threat to safety or health" requirements, a strip search is acceptable. But you must still comply with the basic reasonableness mandate of *T.L.O.*, so you cannot perform the search yourself; you must have a woman do it.

3. Example C.—You are in charge of the Taylor High School. Last week a student reported that two of her classmates, Betty Roberts and Rebecca Allen, were sniffing glue in class. Today you received another report of this behavior from the same informant. You also know that Roberts' father suspects she might be using drugs and that Allen typed something in class a few months ago mentioning parties at which drugs were used. You call the two girls, both fifteen, to your office and ask for an explanation. Roberts produces a tube of glue, which is legal to possess but not to sniff. You have Allen's locker, purse, and bookbag searched, but nothing turns up.[281] Is a strip search of Allen acceptable?

A strip search would not be appropriate here. Drugs are a serious problem, but there is no evidence that your school is beseiged by them or that these girls were dealing drugs. Moreover, the glue you would be

279. This example is loosely based on the recent case of Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993). The Seventh Circuit in *Cornfield* upheld the search.

280. *T.L.O.*, 469 U.S. at 339 ("drug use and violent crime in the schools have become major social problems").

281. This example is loosely based on the recent case of Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991). The Sixth Circuit in *Ellington* upheld the search.

looking for is not itself illegal (as marijuana or crack would be) but would at best be circumstantial evidence that the girls were sniffing it. And even if they were, sniffing glue does not pose a significant threat to other students. In other words, the seriousness and "imminent threat to safety or health" requirements are not met. Most importantly, though, you lack probable cause to strip search Allen. You have already uncovered a tube of glue that matches the informant's description, and inspections of Allen's locker and belongings have yielded nothing that justifies a further intrusion, especially one as invasive as a strip search. So you must stop your inquiry here.

4. Example D.—Next, assume that you are an administrator at the McLean Middle School. Joe Rubin, a fourteen-year-old student, is suspected of stealing twenty dollars from fellow student Bill Taylor's locker. Taylor reported the money missing after he returned to his locker at 11:00 a.m. and found that money he had left there before his 10:15 class was gone. Rubin was caught stealing small items twice last year. He was not the only student in the hallway where the locker is located between 10:15 and 11:00, but other students observed him standing in front of Taylor's open locker at 10:30. You summon Rubin and ask him about the money. He denies taking anything. Searches of his locker produce nothing incriminating. Can you strip search him?

A strip search is not appropriate here. As in *Mark Anthony B.*,[282] there is reason to suspect and question Rubin. He has stolen in the past and several students saw him at the scene of the crime. In other words, the probable cause requirement is met. But the seriousness and "imminent threat to safety or health" elements are missing; theft is not something schools should condone, but neither does it pose a serious threat to classroom order or to the safety of other students the way drugs and violence do.

5. Example E.—Finally, assume that you work at the Thompson Elementary School. You have long suspected, based on reports from teachers and bus drivers, that Tom Gannon, age seven, is a courier for some high school drug dealers. This morning before classes, a teacher saw Gannon take several small vials from an older boy outside the school building. Ten minutes later, the teacher watched as Gannon walked across the street, handed one of the vials to a second older boy, and received some cash. Gannon then entered the school building, where the

282. State v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993). A full discussion of this case is found *supra* accompanying notes 221-26.

teacher called him over and escorted him to your office. You question Gannon about drugs, but he admits no wrongdoing. Can you strip search him to look for the remaining vials?

Again, you cannot. The situation meets all three additional tests proposed in this Article—probable cause, a serious offense, and an imminent threat to the safety or health of the student body—but it does not meet the "reasonable in light of the student's age" requirement of *T.L.O.* itself. Gannon may be engaging in criminal activity, but at age seven he is hardly capable of criminal intent and is less able than an older student would be to consent to a strip search. Moreover, he is likely to be vulnerable to psychological harm should you perform such an invasive search. You will have to combat drug dealing in another way.

The above illustrations reveal that the standard proposed in this Article, which would require strip searches to meet not only the general *T.L.O.* reasonableness standard but also probable cause, seriousness, and "imminent threat to safety or health" tests, is significantly more protective of students' rights than the current standard. The *T.L.O.* standard permits courts considerable discretion in determining the reasonableness of each search. Although the exercise of this discretion often yields good decisions, as in *Mark Anthony B.*, it does not *require* them. In contrast, the proposed standard forces courts to recognize both the individual dignity of schoolchildren and the role that schools play in inculcating each generation with our shared values. And the proposed standard sets out the constitutional requirements more carefully than courts have done under *T.L.O.*, thereby making students' rights much more meaningful by helping them overcome the immunity hurdle.

VI. Conclusion

> That [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[283]

It is clear from the case law on strip searches that while *New Jersey v. T.L.O.* provided courts with a framework for decisionmaking, there is still considerable confusion over what exactly is "reasonable" in student strip search cases. And indeed *T.L.O.* may have encouraged further troubles, since it sought to provide breathing room for teachers and

283. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

school officials: "By focusing attention on the question of reasonableness, the standard [set forth herein] will spare teachers and school administrators the necessities of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[284] Maintaining that kind of breathing room does not make sense where highly intrusive invasions of privacy, like strip searches, are concerned. Courts have room to make the right decisions, but they also have room in which to err. Students deserve greater protection for their constitutional rights to privacy and greater respect for their individual dignity than *T.L.O.* provides. The problem is only exacerbated by the Court's recent construction of section 1983.

Still, if *T.L.O.* exacerbates the problem, it also contains the roots of a solution. Its flexible approach, which places restrictions on searches according to the extent of the intrusion they entail, allows courts leeway to uphold a higher-than-usual standard for student strip search cases. Such a standard, which would require that such searches be conducted only on probable cause and only to prevent serious and imminent harm, would go far toward protecting the privacy and dignity of students whose constitutional rights are now in question. Moreover, it would force schools to obey the dictates of the system whose next generation they are charged with educating.

284. *T.L.O.*, 469 U.S. at 343.