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Public School Searches and the Fourth Amendment

Brian J. McLaughlin
University of Dayton

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PUBLIC SCHOOL SEARCHES AND THE FOURTH AMENDMENT

It will not do to decide the same question one way between one set of litigants and the opposite way between another.

—B. Cardozo[1]

I. Introduction

The United States Supreme Court has historically been vigilant in protecting fourth amendment rights. Indeed, a significant feature of fourth amendment litigation is the Court's willingness to engage in detailed factual analysis. Moreover, the extent of the Court's concern was until recently exemplified in its articulation of an exclusionary rule in fourth amendment procedure.[2] This same degree of concern, however, does not transcend the arena of public school searches. In fact, until recently, a school official's power to search a student's person or locker had been upheld without question.

Although the Supreme Court has recognized that students are protected by the United States Constitution,[3] and has shown a willingness to expand upon such protection,[4] the Court has never dealt directly with the issue of school searches *vis-à-vis* the fourth amendment. Consequently, the question of school searches has produced a proliferation of divergent and conflicting opinions at the state level. The harsh reality of such treatment is demonstrated by the fact that no jurisdiction affords full fourth amendment protection to students subjected to public school searches.[5] In fact, many courts have given school officials vir-

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1. B. Cardozo, The Nature of the Judicial Process 33 (1921).

2. The formulation of the exclusionary rule was based upon a desire to provide an effective recourse to those whose fourth amendment rights had been violated. The rule provides that illegally obtained evidence is not admissible at trial. Weeks v. United States, 232 U.S. 383 (1914). Modern United States Supreme Court decisions have focused upon the exclusionary rule's deterrent capabilities *vis-à-vis* police misconduct. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 656 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960). Substantial inroads seem to have been made on the doctrine recently, however. *See* United States v. Leon, 52 U.S.L.W. 5155 (U.S. July 5, 1984); Massachusetts v. Sheppard, 52 U.S.L.W. 5177 (U.S. July 5, 1984).

3. *See infra* text accompanying notes 20–25.

4. *See infra* text accompanying notes 23–25.

5. *See* cases cited *infra* notes 6–7. This comment is concerned with searches conducted by school authorities. Some jurisdictions have indicated that the fourth amendment fully applies when school searches have been conducted by law-enforcement officials. *See, e.g.*, Picha v. Wielgos, 410 F. Supp. 1214, 1220–21 (N.D. Ill. 1976); *cf.* Doe v. Renfrow, 475 F. Supp. 1012,

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tual immunity from the constraints of the fourth amendment,[6] and those jurisdictions which do theoretically apply the fourth amendment have implemented a lower standard to reach similar results.[7]

This comment will suggest that such treatment of fourth amendment protections cannot be justified because it is inconsistent with the objectives of the fourth amendment. To be consistent with the purpose of the fourth amendment, a court's analysis must begin with a presumption that full fourth amendment protection, subject only to specifically established exceptions, is applicable whenever a search is conducted for purposes of either criminal or school disciplinary action. To reach this result, it will be necessary to discard traditional notions which have permitted courts do avoid the application of fourth amendment jurisprudence to school searches. Additionally, the United States Supreme Court must delineate any circumstances justifying an exception to the general application of the fourth amendment.

II. BACKGROUND

A. *The Fourth Amendment—An Overview*

The fourth amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[8] As the language suggests, the fourth amendment does not prohibit all searches and seizures, only unreasonable ones.[9] The reasonableness of a search is determined by a balancing of competing interests. On balance is the government's interest in conducting a search versus the individual's interest to be free of any intrusions into his or her privacy. If the individual's interest is greater than that of the government, the search is unreasonable, and thus unconstitutional.

The fourth amendment also provides that "no [search] Warrants

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1024 (N.D. Ind. 1979) (indicating that had the role of the police been different, so may have been the reasoning and result of the court).

6. The fourth amendment does not apply to school searches. *See, e.g.*, *In re* G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970); *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (1975); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

7. The fourth amendment applies but under a lower standard of reasonableness. *See, e.g.*, Bilbrey v. Brown, 481 F. Supp. 26 (D. Or. 1979); *In re* W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); *In re* C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); *In re*. G.C., 121 N.J. Super. 108, 296 A.2d 102 (1972); Doe v. State, 88 N.M. 347, 540 P.2d 827 (1975); People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Term. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977); L.L. v. Circuit Court, 90 Wis. 2d 585, 280 N.W.2d 343 (1979).

8. U.S. CONST. amend. IV.

9. *Elkins*, 364 U.S. at 222.

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shall issue, but upon probable cause . . . ."[10] The probable-cause aspect has been incorporated into the reasonableness requirement of the first clause and consequently the Court's focus has shifted from reasonableness to probable cause.[11] In interpreting "reasonableness," therefore, the United States Supreme Court has held that a search conducted without a warrant is "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[12] Under this framework, then, a search is reasonable, and thus constitutionally permissible, only when probable cause exists to issue a warrant.[13]

Furthermore, it is well established that in order to be subject to the fourth amendment, the search in question must have been conducted by a government official.[14] Indeed, the origin and history of the fourth amendment make it clear that the constitutional guaranty against unlawful searches and seizures applies only to actions of government agents.[15] The security afforded by the fourth amendment is not offended by unlawful acts of private individuals in which the government has not participated.[16]

Although the United States Supreme Court has vigorously protected the rights set forth in the fourth amendment, the rights have not been so fervently defended in the area of school searches. It is likely that this dichotomy may be attributed to the treatment our society has historically accorded students and juveniles in general.

B. Origins of a Problem—The Adult/Juvenile Dichotomy

Historically, the criminal law did not differentiate between the adult and the minor. In fact, until the turn of the nineteenth century, minors were subject to all the technicalities and formalities of the criminal law.[17] Since the founding of the juvenile court system,[18] however,

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10. U.S. CONST. amend. IV.

11. Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856, 859 (1979).

12. Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971).

13. *Coolidge*, 403 U.S. 443 (1971); *Katz*, 389 U.S. 347 (1967); *see also* Camara v. Municipal Court, 387 U.S. 523, 534 (1967).

14. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

15. *Id. See also* Gouled v. United States, 255 U.S. 298, 305–06 (1921); Weeks v. United States, 232 U.S. 383, 390–92 (1914).

16. *See, e.g.*, United States v. McGuire, 381 F.2d 306, 313 n.5 (2d Cir. 1967); United States v. Jordan, 79 F. Supp. 411, 412 (E.D. Pa. 1948).

17. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909); Note, *Fourth Amendment Protection for the Juvenile Offender: State, Parent, and the Best Interests of the Minor*, 49 FORDHAM L. REV. 1140, 1141–42 (1981).

18. The first juvenile court was founded in Illinois on July 1, 1899. *See generally* S. DAVIS,

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the adult and the juvenile have coexisted under different constitutional protections. One effect of this condition was that the due-process protections once available to the juvenile were no longer present.[19] Accordingly, any assertion of constitutional protection by the juvenile inevitably failed.

Fortunately, modern United States Supreme Court decisions have recognized and expanded upon the constitutional protections of the juvenile. The seminal case recognizing juvenile rights is *In re Gault.*[20] There the Court determined that "neither the Fourth Amendment nor the Bill of Rights is for adults alone."[21] The Court held, therefore, that because "[d]ue process of law is the primary and indispensable foundation of individual freedom,"[22] it cannot be denied to juveniles.

Building upon the foundation of *Gault*, the Court later expanded constitutional protection of juveniles to specifically include students in school. In *Tinker v. Des Moines Independent Community School District*,[23] the Court recognized that juveniles *as students* do not lose their constitutional rights when they enter the schoolhouse.[24] The Court held that "[s]tudents in school as well as out . . . are 'persons' under [the] Constitution."[25]

It is clear, then, that the Supreme Court has favored the expansion of constitutional security afforded to juveniles as students.[26] It would appear that the natural consequence would be for the courts to adopt this attitude in the arena of school searches *vis-à-vis* the fourth amendment. However, this has not been the case. In fact, student attempts to rely upon the fourth amendment have failed with a high degree of reg-

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RIGHTS OF JUVENILES, THE JUVENILE JUSTICE SYSTEM § 1.1 (1980).

19. The juvenile court system functioned under a separate judicial framework, and was "designed to be more than a court for children." S. DAVIS, *supra* note 18, § 1.2, at 1–2. Central to the juvenile court system was the concept of *parens patriae*. Under this concept, children were not to be dealt with as criminals; it was rather to be assumed that juveniles were not fully responsible for their conduct, and were "capable of being rehabilitated." *Id.;* Mack, *supra* note 17, at 109. The sole concern of the juvenile court system focused upon the problems and misconduct of minors. The state and the juvenile offender were to work with the judge, both in determining whether the minor was guilty of criminal misconduct, and in "establishing the treatment that would be most effective in remedying the problem." Note, *supra* note 17, at 1143 (footnote omitted).

20. 387 U.S. 1 (1967).

21. *Id.* at 13.

22. *Id.* at 20.

23. 393 U.S. 503 (1969).

24. *Id.* at 506.

25. *Id.* at 511.

26. *See* Goss v. Lopez, 419 U.S. 565 (1975) (students possess procedural rights when facing school disciplinary action); Wood v. Strickland, 420 U.S. 308 (1975) (damages are an available remedy for students whose constitutional rights have been violated).

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ularity.[27] Such repeated failure is not consistent with the objectives of the fourth amendment, nor with the Supreme Court's recognition of other related constitutional rights. The remainder of this comment will analyze the various treatment by courts of public school students *vis-à-vis* the fourth amendment.[28]

III. THE SCHOOL SEARCH

A. Toward the Abolition of Traditional Notions—Private Conduct and the In Loco Parentis *Doctrine*

It is clear that most school searches have been upheld with regularity.[29] Nevertheless, the law on school searches remains complex. Complexity arises out of the role of the school official, the age of the student, the nature of the school system, and the possibility that seized items may be used in criminal proceedings as well as in school disciplinary actions.[30] Each of these factors has played a part in forming the traditional notions surrounding a school search.

The classification of the school official has been a principal ingredient in many courts' validations of otherwise unconstitutional searches. In fact, this classification has permitted courts to avoid the fourth amendment question altogether. By classifying the school official as a private individual, courts have clothed the school official with virtual immunity from the constraints of the fourth amendment,[31] because the fourth amendment is not applicable to the conduct of private citizens.[32] Consequently, the question of school searches has been shadowed by a determination of whether a school official is a government agent or a private citizen when conducting a search.[33] Close analysis of such a practice clearly reveals its impropriety. To designate a public school official as anything but a government agent is sheer fallacy, as the following discussion will demonstrate.

The leading case holding a school official to be a private individual when conducting a school search is *In re Donaldson*.[34] There, the California Court of Appeals reasoned that school authorities have an obli-

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27. *See, e.g.*, cases cited *supra* notes 6–7.

28. The focus of this comment concerns public school students; no attempt will be made to deal with the concerns of post-secondary students. Also beyond the scope of this comment is the question of immunity for public school administrators.

29. *See, e.g.*, cases cited *supra* notes 6–7.

30. *See infra* text accompanying note 56.

31. *See* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 765–67 (1974).

32. *See supra* notes 13–14.

33. *See generally* Note, *Public School Searches and Seizures*, 45 FORDHAM L. REV. 202, 209–15 (1976).

34. 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).

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gation to maintain order and discipline so that a school may operate in an atmosphere conducive to education. The primary purpose of any search, therefore, is to further educational objectives and not to obtain criminal convictions. Thus, according to the court, a school official should not be elevated to the status of a law-enforcement officer merely because evidence of a crime is uncovered during such a search.[35] Consequently, the court held that a school official was not a government agent within the meaning of the fourth amendment.[36]

The court's reasoning in *Donaldson*, however, simply begs the question. To say that a school official is not a government agent for fourth amendment purposes merely because he or she is not a police officer clearly misinterprets the design of the amendment. The language of the fourth amendment does not single out searches conducted by police officers, but rather guarantees security against all unreasonable searches.[37] The United States Supreme Court has construed the fourth amendment to cover any action taken on behalf of a state or state agency.[38] Moreover, the fourth amendment does not single out searches designed to obtain criminal convictions. It is clear from the cases that a search motivated by something other than the prospect of obtaining evidence of a crime is also subject to the constraints of the fourth amendment.[39] When viewed in proper perspective, then, the reasoning of *Donaldson* proves erroneous.

Other jurisdictions which have classified the school official as a private individual have invariably relied upon the concept of *in loco parentis*.[40] The philosophy underlying the *in loco parentis* doctrine is that a school official stands in the place of the student's parent and is vested with the parent's rights, duties, and responsibilities[41] while the child is at school.[42] Under this conceptual framework, a school official conducting a search is merely acting in place of the parent for the purpose of protecting the welfare of the student—not as a government agent for the purpose of obtaining a criminal conviction. However, there are many problems inherent in such an approach.

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35. *Id.* at 511, 75 Cal. Rptr. at 222. *See also* Commonwealth v. Dingfelt, 227 Pa. Super. 380, 384, 323 A.2d 145, 147 (1974) (school officials are not law-enforcement officers of the government, but private citizens).

36. 269 Cal. App. 2d at 511, 75 Cal. Rptr. at 222.

37. *See, e.g., Elkins*, 364 U.S. at 222.

38. *See* Camara v. Municipal Court, 387 U.S. 523 (1967).

39. *Id.; see also* Terry v. Ohio, 392 U.S. 1 (1968).

40. *See, e.g.*, cases cited *supra* note 7.

41. S. Davis, *supra* note 18, § 3.7(b), at 3–23; Black's Law Dictionary 708 (5th ed. 1979).

42. *See* Note, *Balancing in Loco Parentis and the Constitution: Defining the Limits of Authority over Florida's Public High School Students*, 26 U. Fla. L. Rev. 271, 273 (1974).

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One problem that arises from a court's reliance upon the *in loco parentis* doctrine is that the rationale cuts equally in the opposite direction. When a school official is acting *in loco parentis*, the official is invariably acting pursuant to state law. This is true because although the doctrine was formulated at common law, it has subsequently been codified by a majority of jurisdictions.[43] In such instances, a school official will not merely be stepping into the shoes of a parent, but rather will be statutorily charged with legal "powers of control, restraint and discipline over the student"[44] in order to protect against any interference with the school's educational objectives.[45] Once it is established that school authorities are acting under authority derived from state law, there can be no doubt that the school official is acting as a public official on behalf of the state and not in the place of the parent.

Several jurisdictions, recognizing that a school official's powers and responsibilities are derived from state law, have properly accepted the position that a public school administrator is a government agent. The New York Court of Appeals in *People v. Scott D.*[46] determined that the public school authority's "special responsibilities" and "correspondingly broad powers" are derived from state law and delegated by the local school boards.[47] Consequently, the court held that public schoolteachers act not as private individuals but "perforce as agents of the state" in exercising their authority and performing their duties.[48] Similarly, in Delaware, a school official is a state employee,[49] and has not been held immune from fourth amendment strictures.[50] In *State v. Baccino*,[51] the Delaware Superior Court added further reasoning. There, the court determined that for a federal court to recognize a cause of action against a school administrator, the official's conduct must be regarded as state action; therefore, once a school official's conduct is deemed state action, a court would be hard-pressed to simultaneously classify the same conduct as that of a private individual.[52] From this perspective, it is difficult to see how a school official could be

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43. *See, e.g.*, DEL. CODE ANN. tit. 14, § 701 (1974).

44. S. DAVIS, *supra* note 18, § 3.7(b), at 3-24.

45. Schiff, *The Emergence of Student Rights to Privacy under the Fourth Amendment*, 34 BAYLOR L. REV. 209, 210 (1982).

46. 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974).

47. *Id.* at 486, 315 N.E.2d at 468, 358 N.Y.S.2d at 406.

48. *Id.*

49. DEL. CODE ANN. tit. 14, § 701 (1974).

50. State v. Baccino, 282 A.2d 869, 871 (Del. Super. Ct. 1971).

51. *Id.* at 869.

52. *Id.* at 871. *See also* 42 U.S.C. § 1983 (1976 & Supp. V 1983) (civil action for deprivation of rights). To demonstrate a cause of action under § 1983, one must prove a nexus between state involvement and deprivation. *See* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

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characterized as a private individual when conducting a search. Therefore, the shield of immunity often applied by courts to uphold a school search does not withstand scrutiny.

As previously stated, many courts have relied upon the *in loco parentis* doctrine when confronted with the question of the fourth amendment's application to school searches. Courts have sought to preserve the doctrine as it antedates the fourth amendment, thereby avoiding the fourth amendment issue entirely. Any attempt to preserve the doctrine in fourth amendment litigation, however, is clearly erroneous and results in improperly confusing the doctrine with various statutes designed to regulate the behavior of school officials. As a result, the consequences of this approach are somewhat anomalous.

Central to the *in loco parentis* doctrine is the issue of parental protection of juveniles. In the context of the fourth amendment, however, there is an absence of parental protection in regard to the student subjected to a search;[53] the courts have in fact confused the parental relationship between the student and the school with the law-enforcement relationship.[54] The confusion is clear from the fact that when evidence is uncovered in an administrative search, the likelihood that a criminal prosecution will follow is great.[55] In fact, educators may be duty-bound to turn such evidence over to the police. In all probability, however, a parent would rarely do so. In addition, any protection offered by the school is not directed toward the individual searched as it would with pure *in loco parentis*; rather, the protection is directed toward the school as a whole, to guard other students from the deviant behavior of the individual.[56] In this context, then, the meaning of *in loco parentis* has been misconstrued. Such erroneous reasoning is not confined to cases involving criminal penalties. It also exists when a student is faced with school disciplinary action. To be sure, when fruits of a search may be used to expel or suspend a student, the search can hardly be characterized *in loco parentis*—for the child's welfare.

It becomes apparent, then, that any attempt to validate the intrusive conduct of school officials, either by avoiding the issue entirely as the courts do by characterizing the action as private,[57] or by placing reliance upon the concept of *in loco parentis*,[58] is clearly inconsistent with both the objectives of the fourth amendment and recent United

53. Buss, *supra* note 31, at 768.
54. *Id.*
55. *See, e.g.*, *Camara*, 387 U.S. at 531.
56. Buss, *supra* note 31, at 768.
57. *See supra* text accompanying notes 31–36.
58. *See, e.g.*, cases cited *supra* note 7.

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States Supreme Court decisions.[59] Indeed, the unquestioned authority granted to school officials has generally given way of late to broader student rights. Today, it is recognized that schools are not "enclaves of totalitarianism,"[60] and that students are "persons" under the Constitution.[61] This being true, there can be no justification for the unequal treatment of public school students in respect to the guaranty of the fourth amendment.

B. *The Reasonable Suspicion Standard*

The preceding discussion focused on one approach taken by courts when faced with the issue of school searches. A second common approach appears to be the result of a confrontation between the asserted constitutional rights of students and the courts' use of the *in loco parentis* doctrine.[62] As a result, many jurisdictions have applied the fourth amendment, but have minimized its protection by articulating a reduced standard of reasonableness. Rather than requiring probable cause to validate a school search, those jurisdictions which have applied the fourth amendment to school searches appear to have settled upon the less stringent standard of "reasonable suspicion."[63]

The reasonable suspicion standard, as enunciated by the New York Court of Appeals in *People v. Jackson*,[64] appears more acceptable than the traditional methods previously discussed since it at least purports to apply the fourth amendment to school searches. The practical effect of the reasonable suspicion approach, however, is little different from that of previous approaches. The public school student is given virtually no protection against the intrusive conduct of school administrators, and the behavior of the school official continues to be upheld with extreme regularity.[65] The primary reason for this result is due to the courts' continued reliance upon the concept of *in loco parentis*.

The weight of the *in loco parentis* doctrine upon the reasonable suspicion standard is evident in court decisions. In *Jackson*, for example, the court determined that the *in loco parentis* doctrine must be examined in testing the sufficiency of reasonableness.[66] The court held that "[w]ithout proper recognition of the doctrine, the reasonableness

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59. *See supra* text accompanying notes 20–26.
60. *Tinker*, 393 U.S. at 511.
61. *Id.*
62. *See* Note, *supra* note 42, at 274.
63. *See, e.g.*, cases cited *supra* note 7.
64. 65 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 176 (1972).
65. *See, e.g.*, cases cited *supra* note 7.
66. 65 Misc. 2d at 912, 319 N.Y.S.2d at 735.

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of the official's conduct" could not be properly examined; with full recognition of the doctrine, the action of the school official could be "understood and accepted as necessary and reasonable."[67]

Similarly, in *State v. Baccino*, the Delaware Superior Court adopted the reasonable suspicion rule in light of the " 'distinct relationship' between the high school official and the student."[68] The court determined that although the student's constitutional rights could not be ignored,[69] a lower standard would "adequately protect [a] student from arbitrary searches . . . and give the school official enough leeway to fulfill [his or her] duties."[70]

Reliance upon the concept of *in loco parentis* to reach a lower standard of reasonableness places unconstitutional limits upon the guaranty of the fourth amendment. In fact, the purported protections are virtually nonexistent because such an approach merely parrots the traditional notions of *in loco parentis* and permits courts to uphold otherwise impermissible school searches. As one court pointed out, the emphasis on the school official's obligations to maintain discipline and to guard students from the actions of unresponsible peers is no more than a return to the "time-honored *in loco parentis* concept."[71] It is clear that in balancing the school's duty to maintain order and discipline against the student's privacy interests, a court will always be able to find, at the very least, that a reasonable suspicion was present. In effect, therefore, the privacy interest of the student will not be given the serious consideration which the fourth amendment demands.

A related problem with the reasonable suspicion standard is that those jurisdictions which adhere to the lower standard have failed to provide an adequate justification for allowing intrusion into a student's privacy based on something less than probable cause. Instead, the courts have merely stated the conclusion that the lower standard of reasonableness is necessary due to the nature of the school environment. In *State v. McKinnon*,[72] for example, the Washington Supreme Court simply stated that to hold a school official to the same standard of probable cause as a law-enforcement officer would create an unrea-

67. *Id.*

68. 282 A.2d at 871 (quoting People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Term. 1971)).

69. *Id.* at 872.

70. *Id.*

71. State *ex rel.* G.C., 121 N.J. Super. 108, 116, 296 A.2d 102, 106 (1972). In adopting the lower standard, the court was willing to admit that there was an incursion into the student's constitutionally protected rights—"rights that are no less precious because they are possessed by juveniles." *Id.* at 115, 296 A.2d at 106.

72. 88 Wash. 2d 75, 558 P.2d 781 (1977).

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sonable burden on the school administration.[73] The problem with such an "explanation" is that one cannot be sure *what* burdens the court is referring to, or *why* such burdens permit an intrusion into a student's privacy. Although the United States Supreme Court has allowed exceptions to the warrant requirement and has permitted searches to be conducted under less exacting standards,[74] it has done so only when the search has fallen within a specifically defined and carefully guarded category of exceptions.[75] Under the reasonable suspicion approach, however, the courts have failed to articulate such an exception.

At least one state supreme court recently expressed displeasure with the reasonable suspicion standard. In *State ex rel. T.L.O.*,[76] the New Jersey Supreme Court articulated a standard of reasonableness which purports to tighten the rules applicable to a school search. The decision overturned a lower-court ruling that had relied upon a reasonable suspicion standard to uphold the conduct of school officials in performing a school search.[77] In suppressing the fruits of the search, the court held that a school official must have "*reasonable grounds to believe* that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order . . . ."[78] In order to satisfy this test, the problem prompting the search must be prevalent and serious, it must be necessary to make the search without delay, and the justification for the search must be based on significant and reliable evidence.[79] In addition, " 'as the intrusiveness of the search intensifies, the standard of Fourth Amendment "reasonableness" approaches probable cause.' "[80]

What if any practical effect this "new" standard will have on the question of school searches remains to be seen. While it appears that the court is willing to require more to uphold a search that it has in the past, the question persists as to whether the test is functionally different from the old reasonable suspicion standard. The test appears at least to be more acceptable than the reasonable suspicion standard to the ex-

73. *Id.* at 81, 558 P.2d at 784.

74. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 561–63 (1976) (border search); Terry v. Ohio, 392 U.S. 1, 27 (1968) (stop and frisk).

75. *See supra* note 12 and accompanying text.

76. 94 N.J. 331, 463 A.2d 934 (1983).

77. State *ex rel.* T.L.O., 178 N.J. Super. 329, 428 A.2d 1327, *vacated*, 185 N.J. Super. 279, 448 A.2d 493 (1982).

78. 94 N.J. at 346, 463 A.2d at 941 (emphasis added).

79. *Id.* The court also noted that there must be more than "a good hunch" because although there is no doubt that good hunches would uncover more evidence of crime, more is required by the Constitution to sustain a search. *Id.* at 347, 463 A.2d at 942–43.

80. *Id.* at 346 (quoting M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979).

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tent that it "requires more than a well-grounded suspicion"[81] and attempts to articulate specific instances which would justify a search on something less than probable cause. Depending upon what practical effect the approach achieves, the court may have taken a step, albeit a small one, toward recognizing the appropriate force to be given to students' fourth amendment rights. It also remains to be seen whether other jurisdictions will follow suit.

IV. CONCLUSION

The law on school searches is obviously complex and the issues surrounding the application of the fourth amendment to such searches are far from settled.[82] One thing which remains clear, however, is that student attempts to assert fourth amendment rights continue to fail with discomforting regularity. It appears to make little difference whether a court classifies a school official as a government agent or a private citizen. The practical effect of either designation is the same. When the court classifies the official's conduct as that of a private citizen, the student's claim fails because the fourth amendment does not restrain private action. When the school authority is designated a government agent, the court merely shifts its reasoning in its application of the fourth amendment and the search is once again upheld because (under the *in loco parentis* doctrine) the student's rights are balanced with less weight than in the application of the fourth amendment to the general population.

What is needed to resolve this problem is a unified, well-articulated approach that begins with the presumption that students are entitled to full fourth amendment protection subject only to well-defined exceptions.[83] Because of the realities of the classroom, it must be accepted that there will be a need in certain instances for an exception to the full constraints of the amendment. One appropriate case, for example, would be that in which the safety of other students, as well as that of the school official, requires *immediate action*[84]—as in the removal of dangerous or illegal items. This does not mean that a teacher may simply search a student whenever wrongdoing is suspected, or when there is adequate time to obtain a warrant.[85] Indeed, when ample time exists, a warrant must be obtained, as the search would not fall within any specific category of exceptions.

81. *Id.* at 351, 463 A.2d at 945 (Schreiber, J., dissenting).
82. *See, e.g.*, cases cited *supra* notes 6–7.
83. *See supra* note 12.
84. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).
85. One must keep in mind that such an approach deals exclusively with searches by school officials, which entail elements of dangerous and illegal activities.

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In order for such an approach to be realizable and free from abuse, it is imperative that the United States Supreme Court deal with the subject directly. The Court must accurately define the appropriate exception to the full constraints of the fourth amendment. In this way, the privacy interests of the student will be given proper consideration, and the courts will no longer be deciding the same question of law one way between one set of litigants and the opposite way between another.

Brian J. McLaughlin

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