New Jersey v. T.L.O.: Misapplication of an Appropriate Standard

I. *Introduction*

In *New Jersey v. T.L.O.*,[1] the United States Supreme Court grappled for the first time with the issue of student searches under the fourth amendment.[2] The Court took a needed step forward in acknowledging the privacy rights of students[3] and in articulating a standard that can provide adequate protection for those rights.[4] However, it misapplied this standard to the facts of the case. This error need not undermine the opinion's mandate to educators: they must respect students' right to privacy. In order to understand and fulfill this obligation, educators must have a clear and complete un-

---

1. 105 S. Ct. 733 (1985). Justice White delivered the opinion of the court.

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

U.S. CONST. amend. IV. The basic purpose of the fourth amendment is "to safeguard the privacy and security of the individual against arbitrary invasions by government officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1978). There have been a number of state and lower federal court decisions on the subject of public school searches. *See infra* notes 15-16. For a general discussion see W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 10.11 (1978 & Supp. 1985); W. RINGEL, SEARCH AND SEIZURES, ARRESTS AND CONFESSIONS, § 17.2 (1984); W. LAFAVE AND J. ISRAEL, CRIMINAL PROCEDURE, § 3.9(k) (1985).

3. Several lower courts have held that the fourth amendment right to privacy does not apply to students. *See, e.g.*, In re G.,11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (Cal. D. Ct. App. 1970) (upholding search of student who was reportedly intoxicated); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) (upholding general search of students by drug detection dogs); In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Cal. Dist. Ct. App. 1969) (upholding search of student's locker); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (Pa. Super. Ct. 1974) (upholding search of student who was allegedly selling drugs). For an explanation of the justifications used to deny students fourth amendment protections, see *infra* notes 15-16. *See also* Cotton and Haage, *Students and the Fourth Amendment: The Torturable Class*, 16 U.C.D. L. REV. 709 (1983); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974).

4. The Supreme Court adopted a "reasonableness under all the circumstances" test and set forth a two-step analysis to control its application. *See infra* text accompanying notes 36-40. A number of lower courts have employed a "reasonable suspicion" or "reasonable grounds" standard in assessing the validity of student searches. *See, e.g.*, Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); Horton v. Gosse Creek Independent School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983); People v. Ward, 62 Mich. App. 46, 233 N.W.2d 180 (Mich. Ct. App. 1975); People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974); State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977).

derstanding of the *T.L.O.* decision. This Comment will illuminate and address the opinion's inconsistencies. It will decipher the meaning of the Supreme Court's ruling for educators and students and explain the impact that it should have on our schools.

II. *Facts and Holding*

A teacher reported to the assistant principal of the Piscataway High School that T.L.O.[5] and another student had been smoking in the bathroom. Smoking was permitted in designated areas of the school, but was prohibited in the bathroom. When the assistant principal questioned T.L.O., she denied that she had been smoking in the bathroom and claimed that she did not smoke at all. The assistant principal then asked for her purse. Upon opening it, he saw a package of cigarettes. He reached for the cigarettes, held them before T.L.O. and said, "You lied to me."[6] When he removed the cigarettes, the assistant principal noticed rolling papers in the purse. Because he associated rolling papers with marijuana use, he proceeded to search the entire contents of the purse. This search uncovered a small amount of marijuana, a pipe, several empty plastic bags, approximately forty dollars in small bills and change, an index card listing the names of students who owed T.L.O. money, and two letters implicating T.L.O. in drug dealing.[7]

The assistant principal turned the evidence of drug dealing over to the police and suspended T.L.O. from school for ten days. T.L.O. was then taken to police headquarters, where she admitted to selling marijuana to other students. The state brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court.[8]

The trial court denied T.L.O.'s motion to suppress the evidence found in her purse.[9] An appellate court affirmed the trial court's ruling that the evidence had not been obtained in violation of the

5. None of the judicial opinions reveal the student's name. Her initials are used to preserve anonymity because of her juvenile status. Some articles have disclosed T.L.O.'s name. In order to respect the student's privacy, this Comment will not do so.

6. *In re* T.L.O., 94 N.J. 331, 336-37, 463 A.2d 934, 936 (1983).

7. *Id.*

8. T.L.O. was adjudicated a delinquent and sentenced to probation for one year with special conditions regarding curfew, school attendance and completion of a therapy program. Hogan & Schwartz, *The Fourth Amendment and the Public Schools*, 7 WHITTIER L. REV. 527, 532 (1985)

9. State *ex rel.* T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (Juv. and Dom. Rel. Ct. 1980). Counsel for T.L.O. argued that the search of her client was illegal and therefore that the evidence obtained should be withheld from admission in accordance with the exclusionary rule. *See infra* note 12.

fourth amendment.[10] The New Jersey Supreme Court reversed. It found that the search in question was unreasonable and ordered suppression of the evidence found in the purse.[11]

The United States Supreme Court initially granted certiorari to decide whether evidence unlawfully seized by a school official should be excluded from admission in a juvenile delinquency proceeding.[12] However, the Court decided that it would not address this issue "in isolation from the broader question of what limits, if any, the fourth amendment places on the activities of school authorities."[13] Consequently the Court ordered oral argument on the legality of the search of T.L.O.'s purse.[14]

All members of the Court agreed that the fourth amendment's prohibition against unreasonable searches and seizures applies to searches of students conducted by public school officials. The

---

10. State *ex rel.* T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (N.J. Super. App. Div. 1982).

11. State *ex rel.* T.L.O, 94 N.J. 331, 463 A.2d 934 (1983). In so holding, the Supreme Court of New Jersey employed a reasonableness standard that does not differ significantly from that used by the United States Supreme Court. *See infra* note 37 and text accompanying notes 36-40. Yet the two courts reached opposite conclusions: the New Jersey court invalidated the search while the Supreme Court upheld it. The Supreme Court attributed this discrepancy to "a somewhat crabbed notion of reasonableness" on the part of the state court. 105 S. Ct. at 745. This Comment argues, however, that the contradictory results can be attributed to the Supreme Court's misapplication of the reasonableness standard. *See infra* text accompanying notes 50-57.

12. In Weeks v. United States, 232 U.S. 383 (1914), the exclusionary rule was adopted by the federal courts to safeguard the guarantees of the fourth amendment. Pursuant to this rule, evidence obtained in violation of the fourth amendment is inadmissable in a criminal proceeding. *Id.* at 398. In 1961, the rule was held applicable to the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

The state's petition for certiorari in *T.L.O.* was granted in October of 1983. On March 28, 1984, the Court heard argument on the appropriateness of the exclusionary rule as a remedy for student searches conducted in violation of the fourth amendment. 105 S. Ct. at 733. Counsel for T.L.O. maintained that the exclusionary rule mandated suppression of the evidence illegally taken from her client's purse. The State's Attorney insisted that the rule was not applicable to this search because excluding evidence from court would not tend to deter school officials from engaging in illegal searches. 52 U.S.L.W. 3731 (U.S. April 10, 1984). For support of the position taken by defense counsel, see Reamey, *New Jersey v. T.L.O.: The Supreme Court's Lesson on School Searches*, 16 ST. MARY'S L. J. 933, 943-45 (1985).

13. 105 S. Ct. at 738.

14. 53 U.S.L.W. 3165 (U.S. Sept 18, 1984). Justices Stevens, Marshall, Brennan and Blackmun would have applied the exclusionary rule to school searches, and therefore dissented from the decision to order reargument. 104 S. Ct. 3583 (1984). Chastising the majority, Justice Stevens wrote: "Of late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen." *Id.* at 3584. Professor Yale Kamisar has asserted that the reargument was ordered because a majority could not be obtained in favor of abolishing the exclusionary rule for searches conducted by school officials. *See* Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A. J. 54 (1985).

Court rejected the state's argument that school officials could claim immunity from the fourth amendment under the doctrine of *in loco parentis*,[15] and found that school officials are exercising public rather than private authority when conducting searches of students.[16] In addition, the Court asserted that students have legitimate expectations of privacy while on school grounds, and that these privacy rights must be respected in accordance with the dictates of the fourth amendment.[17]

In order to establish the standard of reasonableness governing

---

15. William Blackstone described the doctrine of *in loco parentis* as it applies to the relationship between school officials and students:

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

1 W. BLACKSTONE, COMMENTARIES 453. A number of courts have held that school officials act in an *in loco parentis* capacity in conducting searches of students. Having determined that school personnel exercise authority derived from parents, these courts have found that student searches were either not subject to the constraints of the fourth amendment or were governed by a lesser standard. *See, e.g.*, D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982); In re G., 11 Cal. App. 3d 1193, 30 Cal. Rptr. 361 (Cal. Dist. Ct. App. 1970); In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Cal. Dist. Ct. App. 1969); R.M.C. v. State, 660 S.W.2d 552 (Tex. App. 1983); In re Donald B., 61 A.D. 204, 401 N.Y.S.2d 544 (N.Y. App. Div. 1978).

The doctrine of *in loco parentis* has come under increasing attack in recent years. *See* Dutton, *Justifying School Searches: the Problems with the Doctrine of In Loco Parentis*, 8 J. JUV. L. 140 (1984). Parents can choose to withhold evidence which would incriminate their child from the police without incurring criminal liability. Few parents would entrust this choice to school authorities. Also, unlike parents, teachers may not be primarily concerned with the interests of the child being disciplined, but rather may act to protect the student body at large. *Id.* Still, prior to *T.L.O.*, the doctrine had not been completely abandoned by courts considering school searches. *See, e.g.*, *R.M.C.*, 660 S.W.2d at 554 (court acknowledged waning use of the doctrine of *in loco parentis* but found itself bound by prior law to apply it). One commentator has noted: "The phrase *in loco parentis* has become a substitute for analysis, and consequently is deserving of the description which the Supreme Court once gave to the similar term *parens patriae*: a 'Latin phrase [which has] proved to be a great assistance to those who sought to rationalize the exclusion of juveniles from the constitutional scheme.' " W. LAFAVE, *supra* note 2, at 456 (quoting In re Gault, 387 U.S. 1 (1967)).

16. The fourth amendment does not protect the individual against searches conducted by private citizens not acting on behalf of the government. Burdeau v. McDowell, 256 U.S. 465 (1921). On the basis of this exception, a number of courts had taken the view that school personnel who conducted searches on their own initiative acted as private citizens rather than governmental agents and were thus not subject to fourth amendment limitations. *See, e.g.*, In re J.A., 85 Ill. App. 3d 567, 406 N.E.2d 958 (Ill. App. Ct. 1980); People v. Stewart, 63 Misc.2d 601, 313 N.Y.S.2d 253, 256-57 (N.Y. Crim. Ct. 1970); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145, 147 (Pa. Super. Ct. 1974); Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970). However, if characterized as a "disciplinary officer" or "security officer," the school official was considered a public authority subject to the constraints of the fourth amendment. *See, e.g.*, People v. Jackson, 65 Misc. 2d 697, 319 N.Y.S.2d 731 (N.Y. App. Term 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); People v. Bowers, 77 Misc.2d 697, 356 N.Y.S.2d 432 (N.Y. App. Term 1974).

17. 105 S. Ct. at 742.

school searches, the Court attempted to balance the privacy rights it had acknowledged against the need to maintain discipline in schools. It found that in order for school officials to protect the safety of students adequately, the constitutional protections surrounding privacy rights must be modified. Consequently, the Court eliminated the requirement that a warrant be obtained before a search is conducted[18] and modified the constitutional probable cause standard as a prerequisite for a full-scale search.[19] It adopted a "reasonableness under all the circumstances" standard. Applying this standard to the facts of the case, the Court found that T.L.O.'s privacy rights had not been violated.

The decision rendered by the Court has three distinct substantive parts: first, the determination that the fourth amendment applies to student searches; second, the articulation of the standard governing such searches; and third, the application of the standard to the facts of the case.[20] A careful review of the opinion reveals that apparent conflicts between parts one and two can be reconciled, but that part three sharply contradicts the two preceding sections. In order to

---

18. The warrant requirement interposes a neutral magistrate between an officer "engaged in the often competitive enterprise of ferreting out crime" and the objects of the officer's search. Johnson v. United States, 333 U.S. 10, 14 (1948). This requirement is meant to ensure an objective and disinterested determination that prior to the search the officer has information which establishes probable cause. *See infra* note 19. In accordance with the language of the fourth amendment, a warrant must describe the place to be searched and the person or thing to be seized. Thus the scope of the search is limited by the factual basis of the probable cause showing. There are clearly delineated exceptions to the warrant requirement, all of which stem from exigency concerns, i.e. the press of time that makes obtaining a warrant either impossible or infeasible. *See infra* note 40. The dissenting Justices agreed that teachers would be unable to carry out essential teaching functions and to protect students' safety if they were required to obtain warrants before conducting searches. For an argument against abandoning the warrant requirement in schools, see Buss, *supra* note 3, at 748-53.

19. Probable cause is a term of art that summons up a highly developed legal doctrine. The seminal statement on the nature of the probable cause requirement is found in Carroll v. United States, 267 U.S. 132, 162 (1925): Probable cause exists where "the facts and circumstances within [the officials'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that a criminal offense has been committed and that evidence will be found in the place searched. The history of the probable cause standard is discussed in Henry v. United States, 361 U.S. 98, 100-01 (1959).

20. It is important to note that the opinion is limited to these three areas of inquiry. The Court made clear in extensive footnotes just how narrow a decision this was. It did not address: (1) the applicability of the exclusionary rule to the fruits of unlawful searches conducted by school officials, 105 S. Ct. at 739 n.3; (2) whether students have legitimate privacy interests in lockers and desks, and the standard that should govern searches of these areas, *id.* at 741 n.5; (3) the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with the police, *id.* at 744 n.7; and (4) whether student searches can be conducted in the absence of individualized suspicion, *id.* at 744 n.8.

abide by the opinion, educators must acknowledge and attempt to resolve this contradiction.

III. *Students' Privacy Rights and the Fourth Amendment*

In the first part of the *T.L.O.* opinion, the Court reviewed its prior efforts to apply constitutional analysis to the classroom[21] and reaffirmed the position that constitutional safeguards must remain operative in schools. First, the Court rejected the contention that school officials act in a private, rather than in a governmental or law enforcement, capacity when conducting searches of students, and are therefore not bound by the fourth amendment.[22] The Court explicitly recognized that teachers are state officials and that students are citizens. Because the Constitution places limits on state action which prohibit the exploitation of governmental power, teachers must respect students' rights when exercising their authority.

Second, the Court dismissed the argument that an *in loco parentis* relationship justifies a denial of fourth amendment protection.[23] "Such reasoning," said the Court, "is in tension with contemporary reality and with the teachings of this court." It observed: "In carrying out searches and other disciplinary functions . . . school officials act as representatives of the State, not merely as surrogates of the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."[24]

The Court acknowledged that the teacher-student relationship does not mirror the parent-child relationship. It is assumed that parents act with benevolent intent to protect their children; therefore, within this relationship, children arguably do not need fourth amendment safeguards. Parents are expected to exercise sound discretion and act in their children's best interest. Teachers, however,

---

21. *See, e.g.*, Tinker v. Des Moines Indep. Community School District, 393 U.S. 503, 506 (1969) (under the first amendment right to free speech, students cannot be prevented from wearing armbands as a war protest: "students [do not] shed their constitutional rights . . . at the schoolhouse gate"); Goss v. Lopez, 419 U.S. 565 (1975) (fourteenth amendment due process clause applies to school suspension hearing; fundamentally fair procedures consist at a minimum of notice to the student of the charges against him and the opportunity to be heard); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (requirement that students recite pledge of allegiance while saluting flag struck down as violative of students' first and fourteenth amendment rights); Board of Education v. Pico, 457 U.S. 853 (1982) (first amendment imposes restrictions on a school board's exercise of its discretion to remove books from high school and junior high school libraries).

22. *See supra* note 16.

23. *See supra* note 15.

24. 105 S. Ct. at 741.

do not have the same kind of inherently intimate connection with their students. Within schools, the fourth amendment must prevent arbitrary and unnecessary actions on the part of teachers.[25]

Finally, the Court held that students have legitimate expectations of privacy. It rejected the state's argument that these privacy rights are "fundamental[ly] incompatible . . . with the maintenance of a sound educational environment."[26] The Court repudiated the notion that children's interests in bringing items of personal property into school are minimal.[27]

Each of these assertions represent noteworthy advancements in the effort to obtain constitutional protection for students' right to privacy. The Court effectively overruled lower court holdings that the fourth amendment is inapplicable in the school context.[28] Common justifications previously employed to excuse school officials from obeying fourth amendment requirements are no longer valid. The Court recognized that students, no less than all citizens, are entitled to be secure in their persons and belongings and cannot be subjected to searches without cause.

IV. *Reasonableness as the Governing Standard*

In the second part of its opinion, the Court determined the standard which should be used to test the validity of school searches. It adopted a "reasonableness under all the circumstances" standard, which it defined in terms of a two-step analysis.[29] Some commentators have questioned the reasonableness standard, arguing that the

---

25. *See* Dutton, *supra* note 15, at 144-45.

26. 105 S. Ct. at 742.

27. Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters and diaries. Finally, students have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities.

Id.

28. *See supra* note 3.

29. *See infra* text accompanying notes 35-40. The Court indicated in *T.L.O.* that individual states may "insist on a more demanding standard under [their] own constitution[s] or statutes." 105 S.Ct. at 745 n.10. Prior to *T.L.O.*, some state courts had held that the fourth amendment of the federal constitution required a showing of probable cause in order for a student search to be legal. Picha v. Wielgos, 410 F. Supp. 1214, 1221 (N.D. Ill. 1976); State v. Mora, 307 So.2d 317, 323 (La. 1975), *vacated*, 423 U.S. 809, *on remand*, 330 So.2d 900 (La. 1976). In the future, courts may interpret their state constitutions as requiring a showing of probable cause to validate a student search.

probable cause test should remain in effect in schools.[30] The standard developed by the Court in fact parallels probable cause and retains important distinctions that have been developed in fourth amendment doctrine. Factors unique to the school environment justify the Court's decision to employ a standard that diverges slightly from that used in the criminal law. When properly applied, the reasonableness standard can adequately protect the privacy interests articulated in the first part of the *T.L.O.* opinion.

A brief review of fourth amendment law is instructive here. Under traditional fourth amendment analysis, full-scale searches cannot be conducted in the absence of probable cause; that is, the facts prompting the search must lead a reasonably cautious person to believe that a crime has been committed and that evidence will be found in the place searched.[31] Ordinarily a police officer must make a showing of probable cause before a magistrate in order to obtain a search warrant.[32] Even if exigent circumstances excuse the officer from obtaining a warrant, she cannot conduct a full-scale search without having probable cause to do so.[33] In either instance, the absence of probable cause renders the search illegal. Fourth amendment law is flexible, however, and does allow for a lowering of the probable cause standard in cases involving minimally intrusive searches which serve crucial law enforcement functions.[34] In

30. *See* Reamey, *supra* note 12, at 947-49; Reperowitz, *School Officials May Conduct Student Search Upon Satisfaction of Reasonableness Test in Order to Maintain Educational Environment—In re* T.L.O., 94 N.J. 331, 463 A.2d 934 (1983), 14 SETON HALL L. REV. 738, 744, 752-58 (1984) (criticizes New Jersey Supreme Court's use of reasonableness standard). Justice Brennan claimed in dissent that the abandonment of probable cause would result in a "dangerous weakening of the purpose of the Fourth Amendment," 105 S. Ct. at 752, and would "spawn increased litigation and greater uncertainty among teachers and administrators." *Id.* at 756. Brennan did, however, note that the standard adopted by the Court "may turn out to be probable cause under a new guise." *Id.* at 757 n.7.

31. *See supra* note 19.

32. There are five well-recognized exceptions to the warrant requirement: first, when consent is given (Bumper v. North Carolina, 391 U.S. 543 (1968)); second, when the object of the search is in "plain view" (Harris v. United States, 390 U.S. 234, 236 (1968)); third, when a search is conducted incident to a lawful arrest (United States v. Robinson, 414 U.S. 218, 224 (1973)); fourth, when exigent circumstances exist (Vale v. Louisiana, 399 U.S. 30, 34-35 (1970)); and fifth, when in hot pursuit (Warden v. Hayden 387 U.S. 294 (1967)).

33. Wong Sun v. United States, 371 U.S. 471, 479-80 (1963); *See also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 109-10 (1985).

34. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (police officer may stop and frisk individual exhibiting suspicious behavior if the officer believes suspect is armed and dangerous); United States v. Hensley, 105 S. Ct 675 (1985) (reliance on a "wanted flyer," which supports a reasonable suspicion that a person has committed an offense, justifies a stop to check identification, pose questions or detain the person briefly while attempting to obtain further information); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (after stopping person for driving automobile with an expired license plate, police justified in or-

such situations, the reasonableness of the search is determined by balancing the privacy interests involved against the cost to the government of applying probable cause as opposed to some lesser standard.[35]

In *T.L.O.*, the Court held that the validity of a student search rests "on the reasonableness, under all the circumstances, of the search."[36] The Court defined this standard in terms of a two-fold inquiry: the search must be justified at its inception and permissible in its scope. The former requirement is met "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."[37] This language closely parallels that traditionally used to define probable cause. However, because the standard was designed for the school setting, it encompasses regulations that may fall outside the criminal law, thereby acknowledging the need of school officials to enforce rules inapplicable in other contexts.

The methods used in a student search are permissible when they "are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[38] This statement incorporates the flexibil-

---

dering driver to get out of car, and, upon observing bulge in driver's jacket, officer could perform a "pat down" to see if person was armed); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (routine stopping of a vehicle at a fixed checkpoint near the Mexican border for brief questioning of the vehicle's occupants need not be based on reasonable or individualized suspicion); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973) (person boarding airplane subject to search based on mere or unsupported suspicion).

35. The use of this test is perhaps best demonstrated in *Terry*, 392 U.S. at 24-29. In that case the Court found that it would be too costly to require probable cause prior to a frisk of a suspect's outer clothing "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." *Id.* at 24.

36. 105 S. Ct. at 743-44.

37. *Id.* at 744. The New Jersey Supreme Court and other state courts which have applied a reasonableness standard have required a reasonable suspicion that the search would produce evidence of a violation of law or a violation of a school rule related to the maintenance of order and discipline. *See, e.g.*, Doe v. State, 88 N.M. 347, 540 P.2d 827, 832 (N.M. Ct. App. 1975); State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781, 784 (1977). The United States Supreme Court required a reasonable suspicion that the search would produce evidence of a violation of law or a school rule of any kind; that is, the Court did not specify which type of school rules, if violated, could trigger a search. In his dissent, Justice Stevens interpreted this as an attempt to broaden the basis for permissible searches within schools. 105 S. Ct. at 766. The definition of the reasonableness standard articulated by the Court, however, guards against such a result. The Court specifically stated that the nature of the infraction must be taken into consideration in determining the validity of student searches. This directive should restrict the number of searches prompted by negligible violations. *See infra* text accompanying notes 38-40.

38. 105 S. Ct. at 744.

ity provided for in traditional fourth amendment analysis. By factoring in the "intrusiveness of the search," the Court recognized that full-scale searches must be distinguished from minimal intrusions upon privacy. In taking into account the student's sex and age, the Court perceived that the search of a student by a teacher of the opposite sex may constitute an excessive intrusion upon the student's privacy and that expectations of privacy may vary with age.[39] By considering "the objectives of the search" and "the nature of the infraction," the Court provided the means for maintaining the crucial distinction between searches conducted for the ordinary purpose of maintaining order in the school environment and those serving more serious law enforcement functions.[40]

The reasonableness standard was designed to cover searches conducted solely by school officials. The Court specifically stated that it was not addressing the standard which should govern searches conducted in conjunction with or at the behest of the police.[41] After examining the school setting, the Court determined that educators require a degree of flexibility in enforcing rules that is not afforded law enforcement officials. The Court was persuaded by a "uniqueness of the school environment" theory developed by lower courts.[42] This theory is premised on the need to maintain an atmos-

39. Several courts have determined that the student's age should be taken into consideration in determining the reasonableness of a student search. *See, e.g., McKinnon*, 558 P.2d at 784; People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466, 470, 358 N.Y.S.2d 403 (1977); Bellnier v. Lund, 438 F. Supp. 47, 53; State *ex rel.* T.L.O., 94 N.J. 331, 463 A.2d 934, 942 (1983).

40. Under traditional fourth amendment doctrine, an officer engaged in the routine enforcement of the criminal law must have probable cause before conducting a search. However, in situations involving more critical law enforcement concerns (for instance, when an officer's life is in danger), a limited search may be permitted under a lower level of suspicion. *See supra* note 34.

41. 105 S. Ct. at 744 n.7.

42. *See, e.g.*, Horton v. Gosse Creek Independent School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983) (noting that the unique nature of the school environment is created by the school's duty to protect students and by the mandatory gathering together of individuals "too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities," *id.* at 480, the court held that student searches may be permitted on the basis of a "reasonable cause standard." *Id.* at 481). *See also* M. v. Board of Educ. Ball-Catham Community Unit School District No. 5, 419 F. Supp. 288 (S.D. Ill. 1977) (students' fourth amendment rights balanced against school administrators' need to maintain an educational environment); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (special responsibility of school officials to provide safe atmosphere taken into account in assessing reasonableness of search); Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968) (maintenance of university's "educational atmosphere" justified finding room inspection facially valid). The New Jersey Supreme Court in *T.L.O.* also adopted a reasonableness standard based on the special nature of the school environment. Earlier cases are summarized in Buss, *supra* note 3, at 769-70.

phere conducive to learning.

In support of this theory the Court noted that "[m]aintaining order in the classroom has never been easy . . .," and suggested that the task has become more difficult in recent years due to the proliferation of crime in schools.[43] It observed that preserving discipline in schools requires the enforcement of rules that prohibit conduct which is otherwise permissible for adults. Within schools "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action."[44] According to the Court, some measure of informality is required in order for schools to be secure environments where learning can take place.

These assertions seem undeniable. When a large number of children are gathered together in a closed setting, discipline and safety issues will inevitably arise. Conduct must be regulated. The types of rules needed and their importance may vary depending on such factors as the age of the students and the size of the classroom. Teachers need to discipline behavior that would disrupt the classroom environment and impede the progress of learning.

The increase of crime in schools has intensified the problem of maintaining safety and order. Drug use, violence, and the use of dangerous weapons in schools have raised concern nationwide.[45] While the prevalence of these problems varies considerably from one school to the next, their widespread existence seriously affects the ability of educators to ensure students' safety.

Nonetheless, the Court chose not to bring the warrant requirement and the probable cause test into the schoolhouse. Teachers are faced with a wide spectrum of disciplinary concerns, yet their primary duty is to educate. They should not be expected or encouraged to function exactly like police officers. Standards developed for criminal suspects could be overly burdensome and ineffective in schools. Traditional fourth amendment doctrines

---

43. 105 S. Ct. at 742. The Court relied heavily on a 1978 Department of Health, Education and Welfare study, NAT'L INST. OF EDUC., DEP'T OF HEALTH EDUCATION AND WELFARE, VIOLENT SCHOOLS — SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS (1978), which showed that drug use and violent crime have become a major problem in some schools.

44. 105 S. Ct. at 743 (quoting Goss v. Lopez, 419 U.S. 565, 580 (1975)).

45. *See* NAT'L INST. OF LAW ENFORCEMENT AND CRIM. JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., SCHOOL CRIME: THE PROBLEM AND SOME ATTEMPTED SOLUTIONS (1980); N.J. DEP'T OF EDUC., FINAL REPORT ON STATEWIDE ASSESSMENT OF INCIDENTS OF VIOLENCE, VANDALISM, AND DRUG ABUSE IN THE SCHOOLS (1981); GOVERNOR'S (MICH.) TASK FORCE, SCHOOL VIOLENCE AND VANDALISM REPORT (1979); CAL. STATE DEP'T OF EDUC., PRELIMINARY REPORT ON CRIME AND VIOLENCE IN THE PUBLIC SCHOOLS (1981); N.J. SCHOOL B'DS ASS'N, SCHOOL VIOLENCE SURVEY (1977).

were not designed to address the non-criminal behavior that is particularly troublesome in schools. Moreover, while schoolchildren have legitimate expectations of privacy, these expectations may differ from those of adults. Laws governing contact between police and adult citizens may be excessively restrictive in a first-grade classroom.[46]

The *T.L.O.* Court sought to make necessary adjustments to fourth amendment doctrines without compromising the privacy rights of students. It adopted a standard which calls for a case-by-case analysis that takes into account those factors which are significant in a school context.[47] It is a workable tool for educators, and, if applied properly, the results it yields should not diverge significantly from those obtained under traditional fourth amendment analysis. Similar standards have in fact been used by lower courts to invalidate school searches and thereby protect students' right to privacy.[48]

The first two parts of the *T.L.O.* opinion complement one another. The Court announced that students have rights to privacy and fashioned a standard to protect those rights. The third part of the opinion, in which the Court attempted to apply its standard to the facts of the case, effectively ignored these achievements. A review of the facts demonstrates that the search in question constituted an unreasonable violation of a student's privacy rights. The Court did not recognize this because it failed to apply properly the very standard it had designed to protect those rights.[49]

---

46. *Cf.* People v.Scott D., 34 N.Y.2d 483, 315 N.E.2d 466, 468-69, 358 N.Y.S.2d 403 (1974); State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781, 784 (1977) (discussing the need for adjustments to traditional fourth amendment doctrines within schools).

47. In his dissent, Justice Brennan stated, "I would not think it necessary to develop a single standard to govern all school searches, any more than traditional Fourth Amendment law applies even the probable-cause standard to *all* searches and seizures." 105 S. Ct at 757. The standard articulated by the Court, however, is no less adaptable than traditional fourth amendment law. The Court instructed school officials to consider the particular circumstances that might prompt a search, and to "regulate their conduct according to the dictates of reason and common sense." *Id.* at 744. In defining the reasonableness standard, the Court retained the flexibility that concerns Justice Brennan. *See supra* text accompanying notes 36-40.

48. *See, e.g., Scott D.*, 315 N.E.2d 466 (drugs obtained in search prompted by insufficient cause excluded under reasonableness standard); *Bellnier*, 438 F. Supp. 47 (under reasonableness standard, strip search of entire fifth grade class in attempt to locate missing three dollars held to violate students' constitutional rights); Horton V. Gosse Creek Independent School Dist., 690 F. 2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983) (canine inspection of students' persons to deter abuse of drugs and alcohol when there is no individualized suspicion is unconstitutional under reasonable cause standard); State *ex rel.* T.L.O., 93 N.J. 331, 463 A.2d 934 (1983) (search in question held invalid under reasonableness standard).

49. In dissent, Justice Brennan, joined by Justice Marshall, also argued that the Court improperly assessed the facts of the case at bar. 105 S. Ct. at 758.

V. *Application of the Reasonableness Standard*

In assessing the facts of the *T.L.O.* case, the Court limited its consideration to whether the assistant principal had reasonable grounds for suspecting that the search would produce evidence that T.L.O. had violated the school rule prohibiting smoking in the bathroom. The Court mistakenly concluded that he did.

In fact, smoking was allowed in designated areas of the school; the presence or absence of cigarettes in T.L.O's purse was not conclusive evidence that she had been smoking in the bathroom. This becomes clear if we momentarily alter the conversation that preceded the search. Suppose that instead of claiming that she did not smoke at all, T.L.O. had said, "I do smoke, but only in designated areas, and never in the bathroom." The presence of cigarettes in her purse would not be evidence of wrongdoing, and the assistant principal would have had no cause for conducting the search.

The Court went astray in focusing on the student's credibility, which was admittedly undermined by the presence of cigarettes in her purse.[50] School officials do not have the discretion to conduct a search in order to find out whether a student is fibbing. Under the standard adopted by the Court, a search must be expected to uncover evidence that a student has violated the law or a school rule. Whether a student has failed to tell the truth is irrelevant to the decision to conduct a search and should not be taken into account in assessing the validity of a search. Thus if the Court considered the search of T.L.O. to be justified by her alleged lie, it stepped outside the standard it had set forth. Lying is not an offense that overrides fourth amendment rights and triggers an invasion of privacy.

Moreover, the Court ignored the second step of the required analysis. The Court did not realistically consider whether the measures adopted by the assistant principal were "reasonably related to the object of the search and not excessively intrusive in light of the

---

50. 105 S. Ct. at 745-46. In its attempt to explain why the search for cigarettes was reasonable, the Court never discussed the relevance of cigarettes as evidence of the alleged violation alone. Instead, it combined any such discussion with reference to the issue of T.L.O.'s credibility:

> [I]t cannot be said that T.L.O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. . . . [P]ossession of cigarettes . . . would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. . . . The relevance of T.L.O.'s possession of cigarettes to the question of whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary nexus. . . .

Id.

age and sex of the student and the nature of the infraction." The infraction here involved at most disregard for a relatively minor school regulation.[51] (The discovery of marijuana should be put aside for a moment, for the search was not prompted by the suspicion that the purse contained drugs.) In fact, it is conceivable that the search was not motivated by any infraction, but rather stemmed from the assistant principal's annoyance at what he believed to be a lie. If this is true, then the assistant principal abused his authority and unjustifiably invaded T.L.O.'s privacy. In addition, the Court focused no attention on the nature of the search or the age and sex of the student. A male school official emptied and examined the entire contents of a teenaged girl's pocketbook. He may have uncovered personal items which might have embarrassed the student, such as contraceptives or letters.[52] This was not a minimally intrusive search serving a function crucial to law enforcement or school safety, but was rather an invasion of privacy undertaken for the routine purpose of maintaining discipline.[53]

The Court's error arose in part because it divided the search in question into two searches: first, the search for cigarettes, and second, the search for marijuana.[54] As noted, with respect to the first search, the Court never applied the second prong of the required two-step analysis. Had it proceeded properly, the Court would have concluded that the search for cigarettes was impermissible in scope. Because this search was unreasonable, there was no need to examine the legality of the subsequent search for marijuana: it should never have taken place. The Court only proceeded to the second

51. T.L.O.'s companion, who admitted to violating the rule against smoking in the bathroom, received a minor sanction; she was assigned to a short-term smoking clinic. State *ex rel.* T.L.O., 94 N.J. 331, 336-37, 463 A.2d 934 (1983). Had the infraction been considered more serious, the response would probably have been suspension or expulsion from school. T.L.O.'s ten-day suspension obviously stemmed from the result of the search — the discovery of drugs — and not from the initial violation.

52. In the first part of its opinion, the Court recognized students' legitimate need to carry items of personal property. 105 S. Ct. at 742. *See supra* text accompanying notes 25-27.

53. Earlier in the opinion, the Court acknowledged the serious nature of this search:

> We have also recognized that searches of closed items of personal lugggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." United States v. Ross, 456 U.S. 798, 822-23 . . . A search of a child's person or of a closed purse carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

105 S. Ct. at 741-42. *See also* Arkansas v. Sanders, 442 U.S. 753, 762 (1979) ("luggage is a common repository for one's personal effects and therefore is inevitably associated with the expectation of privacy").

54. 105 S. Ct. at 745.

prong of the reasonableness inquiry when it discussed the search for marijuana — and even there it did so in a cursory and unsatisfactory manner. The unfortunate result of the Court's methodology is that the nature of the violation prompting the initial search was forgotten. The fact that T.L.O. was being disciplined for allegedly smoking a cigarette in the bathroom became no longer relevant. The entire incident was mistakenly seen as a crackdown on drug use in schools. While the evidence uncovered in this search is troubling, it cannot be used *ex post* to justify the improper intrusion on this student's privacy.[55]

The Court's misapplication of the reasonableness standard in *T.L.O.* results in a significant divergence from traditional fourth amendment analysis. Important distinctions based upon the gravity of the offense and the extent of the search evaporate. Smoking a cigarette in the bathroom becomes equated with the use of a dangerous weapon. Examining the contents of a purse becomes analogous to briefly detaining a student in the hall.[56] Under this broad application of the standard, students could be subjected to excessive intrusions on privacy for disregarding the most trivial school guidelines.[57] A mechanism for shielding students' legitimate privacy in-

55. *See* People v. Scott D., 34 N.Y.2d 483,, 315 N.E.2d 466, 471, 358 N.Y.S.2d 403 (1974). The New York Court of Appeals, after invalidating a search which uncovered 13 glassine envelopes containing a white powder and a vial containing nine pills, admonished:

> [T]he conduct of the school teachers was, of course, commendable in their assiduousness to uproot a grave problem in their school. They were proven "right" by what they found on the defendant following the search. More is required, however, if arbitrary power is to be avoided, and that is to require a basis for the search at least to the minimal degree suggested [by the reasonableness standard].

56. Justice Stevens warned in his dissent, "[f]or the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroine addiction or violent gang activity." 105 S. Ct. at 763. The Court's decision to adopt the reasonableness standard need not give rise to this concern. *See supra* note 37 and accompanying text. The Court's misuse of the standard, however, leads to the result feared by Justice Stevens in this case.

57. It is conceivable that student searches may occur even in the absence of an infraction. In the wake of the *T.L.O.* decision, the board of education of the Carlstadt-East Rutherford Regional High School District in Bergen County, New Jersey, voted to require all of the high school's 500 students to undergo blood and urine tests, which would be used, *inter alia*, to detect drug and alcohol abuse. N.Y. Times, Nov. 10, 1985, at E8, col.1. It is possible that the failure of the Supreme Court to protect the privacy rights of T.L.O. misled New Jersey school officials into believing that they have unbridled discretion to conduct student searches. According to Jeffrey Fogel, Executive Director of the New Jersey chapter of the American Civil Liberties Union, the *T.L.O.* decision renders the Carlstadt-East Rutherford drug detection program illegal, since *T.L.O.* applied the fourth amendment to student searches, and "one of the *sine qua nons* of the fourth amendment is individualized rather than group suspicion." *Id.* Mr. Fogel also asserted that the program violates students' civil liberties and "turns the notion of innocent until proven guilty on its head." *Id.*

terests was developed but then discarded in the *T.L.O.* case.

The misuse of the reasonableness standard also allowed the Court to skirt the exclusionary rule question raised in state court, thereby leaving students doubly vulnerable. The exclusionary rule only prohibits the admission of evidence obtained illegally. Because the Court found that the search of T.L.O. was legal, it did not even consider the question of whether the evidence obtained should have been excluded from court hearings. Under the Court's use of the reasonableness standard, students on school grounds receive significantly less protection against invasions of privacy than do criminal suspects. Yet the evidence obtained in school searches can be admitted in criminal court and used against students in criminal proceedings. Previously the Court drew a distinction between the school setting and the criminal justice system. It found that students have privacy rights, but that the school environment required a modification of traditional fourth amendment standards. The decision to treat the school setting as unique should not be disregarded. If students are to be offered significantly less fourth amendment protection while in school, the evidence obtained in the school context should be used only within that institution's own non-criminal sanctioning process. When school officials involve police in a search or intend to instigate a criminal prosecution, their conduct should be regulated by established fourth amendment law and the evidence they obtain should be judged accordingly.

VI. *Conclusion*

The Court's misapplication of the reasonableness standard did not invalidate its affirmation of students' privacy rights. The Court adopted a standard which can adequately protect these rights while allowing teachers the flexibility needed to guard students' safety and maintain order in schools. Unless they are acting in concert with the police, school officials are not required to obtain warrants or to comply with the probable cause standard used in criminal law.[58] Teachers are expected to recognize the legitimate privacy interests of their students and to refrain from conducting unreasonable searches.

The force of the *T.L.O.* opinion lies in the two-pronged test governing the reasonableness of student searches. This test prohibits searches prompted by insufficient evidence and defines the methods

58. *But see supra* note 29.

permissible in conducting searches. It explicitly requires educators to consider the particular circumstances surrounding an alleged rule violation. If school officials adhere to the test articulated by the Supreme Court, they will be restrained from unjustifiably invading students' privacy.

While the Court advanced the rights of students nationwide, it upheld an infringement on the rights of the student petitioning for relief. The Court inadequately considered the evidence which prompted the search of T.L.O.. It ignored her age and sex and the nature of the alleged infraction at issue in her case. The Court failed to utilize the test it had designed to preserve students' privacy. In the final analysis, *T.L.O.*'s holding that students' are entitled to fourth amendment protection was of little comfort to the student whose claim of an unreasonable search brought the issue before the Supreme Court.

—Jane M. Lavoie