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SCHOOL SEARCHES—A LOOK INTO THE 21ST CENTURY

*Robert Berkley Harper**

I. INTRODUCTION

The following incidents occurred on a typical school day in an inner-city public school:

> A high school teacher observes several students alighting from school buses carrying their "Walkmans," small radios, and cassette tape players. Students are not permitted to possess such music devices while in school. On the same day during a regular class period before lunch at the high school, a teacher discovered defacement of school property by writing with felt tip markers. The student code of conduct prohibits students from bringing felt tip and other markers to school unless the markers are required for a particular class activity. Later that morning, the teacher smells a strong odor of marijuana smoke in two hallway areas near the school cafeteria. Classes are in progress at the time, and no students are in the hallways.[1]

Would it be proper to search the pockets, bags, and/or lockers of the students at the school because of the incidents related above?

Life in public schools has changed dramatically since this author taught mathematics in the Pittsburgh Public Schools two decades ago. With the appearance of weapons and drugs on the school scene, problems faced by school teachers and administrators are much different from this author's job of enforcing the tardiness code or finding gum chewers and students with incomplete homework. Today, school officials are faced with issues of serious gravity, including bomb threats, dangerous weapons and illegal drugs—which could result in serious injury to school students and personnel.[2]

The legal status of searches and seizures in the public schools has also changed dramatically in the past twenty years.[3] No longer are school officials looked upon as parent substitutes whose major concern is serving the best interests of the students.[4] Today, the role of school administrators and teachers has changed from that of surrogate parent to that of an enforcer of the state's laws and the school's rules

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1. The facts of this hypothetical problem are similar to those in Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987), but are not intended as a reference to that opinion.

2. In New Jersey v. T.L.O., 469 U.S. 325 (1985), the United States Supreme Court recognized that in recent years, school disorder has taken "particularly ugly forms" such as drug use and violent crimes. *Id.* at 339. "High school principals are, more and more . . . confronted with the frequent and rising use of illicit drugs and related criminal misconduct by students." Louis A. Trosch et al., *Public School Searches and the Fourth Amendment*, 11 J.L. & EDUC. 41, 41 (1981) [hereinafter Trosch].

3. Trosch, *supra* note 2, at 41.

4. Historically, courts held that school officials conduct in-school searches as *in loco parentis* and, therefore, are not subject to the constraints of the Fourth Amendment. *See, e.g.*, Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970); *In re* Donaldson, 75 Cal. Rptr. 220 (Cal. Ct. App. 1969).

and regulations. Today's teacher is expected to investigate and collect evidence, not only to enforce school discipline, but even in some cases to initiate criminal prosecutions. Many recent cases have arisen that illustrate the significant change in the role of school teacher from that of standing *in loco parentis*[5] of school children, the role this author served in his days as a public school teacher.[6] Many school officials, however, continue to use the term *in loco parentis*, a term that seems strikingly inappropriate in view of the fact that school officials' actions can result in school expulsion and even criminal prosecution of the students.

To clarify the conflicting decisions handed down by lower courts relating to constitutional rights of school students, the United States Supreme Court rendered its landmark *New Jersey v. T.L.O.*[7] opinion in January, 1985. The Court reasoned that school officials are not exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over school children.[8] In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the state, not merely surrogates for the parents of students.[9] Teachers cannot claim the parents' immunity from the strictures of the Fourth Amendment.[10] The Court expressed its view that the common law doctrine of *in loco parentis* has no application to public school officials conducting searches of students.[11] The Court held that "the Fourth Amendment applies to searches conducted by school authorities,"[12] but that under the *Camara*[13] balancing test such a search could be conducted without a warrant and without full probable cause.[14] In order to search school students, there must be "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[,]"[15] and "the mea-

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5. The doctrine of *in loco parentis* is defined as referring to one who is "charged, factitiously, with a parent's rights, duties and responsibilities." BLACK'S LAW DICTIONARY 708 (5th ed. 1979). See *T.L.O.*, 469 U.S. at 332 n.2 for case authority to support this doctrine.

6. In *T.L.O.*, the Court rejected the doctrine of *in loco parentis*, finding the doctrine unrealistic in the modern school setting where teachers act according to public education and disciplinary policies, not by the mandate of individual parents. *T.L.O.*, 469 U.S. at 336-37.

7. 469 U.S. 325 (1985). Initials are commonly used to identify a minor who is a party to a lawsuit. Many states protect the identity of juveniles by statute. *See* 42 PA. CONS. STAT. ANN. § 6308 (1982). The appellee's full name was Terry Lee Owens. David O. Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A. J., Feb. 1985, at 50, 51 [hereinafter Stewart].

8. The Court recognized that the warrant requirement is suspended when the warrant "'is likely to frustrate the governmental purpose behind the search' . . . ." *T.L.O.*, 469 U.S. at 340 (quoting Camara v. Municipal Court, 387 U.S. 523, 532-33 (1969)). The probable cause standard was also dispensed with as not serving the interest of the school authorities in maintaining order. *Id.*

9. *Id.* at 340.

10. *Id.* at 336-37.

11. *Id.* at 337. The doctrine of *in loco parentis* may apply where the student is away from school under the supervision of a school teacher or administrator. *See* Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987).

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

13. Camara v. Municipal Court, 387 U.S. 523 (1969).

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

15. *Id.* at 342.

sures adopted [should be] reasonably related to the objectives of the search . . . ."[16]

After living with *T.L.O.* for over eight years, one would think that school districts and lower courts would have established clear rules as to proper searches to be conducted in our public schools. But, as is illustrated in the opening problem of this article, searches are being conducted by teachers and administrators without a clear understanding of the mandates of the Constitution.[17] Therefore, the purposes of this article are to review the standard for determining the reasonableness of a school-related search by a school official established by the United States Supreme Court in *T.L.O.* and to review the Court's "balancing" of Fourth Amendment constitutional rights against governmental interests. These will be followed by an in-depth discussion of how lower courts construe the constitutional rights of public school students as found in cases decided after *T.L.O.* The article will conclude with recommendations on how courts and public school officials can balance the interest of the school with the privacy interest of the students when confronted with problems relating to school searches and seizures.

II. *T.L.O.*: An Attempt to "Balance"

In *Brown v. Board of Education*,[18] the United States Supreme Court recognized that education is probably the most important function of state and local governments, and it is doubtful that any child can reasonably be expected to succeed in life if denied the opportunity of an education.[19] The schools must maintain a public school environment commensurate with the pursuit of educational goals, while recognizing and protecting the individual rights of the participants: faculty, students, parents, and members of the community.[20] Therefore, school officials and teachers must act in a reasonable manner in furtherance of maintaining school discipline, order, and a safe environment conducive to education.[21]

While school officials are responsible for maintaining an orderly and safe learning environment, they must do so without infringing on students' rights to be free of unreasonable searches and seizures under the Fourth Amendment.[22] The Fifth Circuit Court of Appeals in *Horton v. Goose Creek Independent School District*,[23] stated the dilemma in this way:

> When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, it assumes a duty to protect them from dangers posed by anti-social activities – their own and those of other students – and to provide them with an environment in which

16. *Id.*
17. *See* Stewart, *supra* note 7, at 51.
18. 347 U.S. 483 (1954).
19. *Id.* at 493.
20. *Id.*
21. *See* Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984).
22. U.S. Const. amend. IV.
23. 690 F.2d 470 (5th Cir. 1982).

> education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers. At the same time we must protect the Fourth Amendment rights of students.[24]

The answer confronting society is to find the proper balance between the duty to provide a safe learning environment on one side and the privacy afforded students under the Fourth Amendment on the other side.

The incident prompting the Supreme Court to determine the rights of public school students occurred on March 7, 1980, when a teacher at Piscataway High School in Middlesex County, New Jersey, discovered two girls smoking in a lavatory.[25] Although at the time smoking was permitted in designated areas at the school, the lavatory was not one of those areas.[26] The teacher took the two girls to the principal's office where they met with the Assistant Vice Principal.[27] In response to questioning by the Assistant Vice Principal investigating the incident, one of the girls admitted that she had violated the rule and was smoking.[28] Her companion, T.L.O., however, denied that she had been smoking in the lavatory and further claimed that she did not smoke at all.[29]

The Assistant Vice Principal asked T.L.O. to come into his private office and demanded to examine her purse.[30] After obtaining the purse, he opened it and found a pack of cigarettes, which he removed from the purse and confronted T.L.O. with the accusation that she had lied to him.[31] While searching the purse for the cigarettes, he noticed a package of cigarette rolling papers.[32] Seeing the rolling papers raised his suspicions that the purse might also contain marijuana, a substance commonly associated with rolling papers.[33] With these suspicions in mind, he proceeded to search the purse thoroughly.[34] The search was most revealing with the discovery of a small amount of marijuana, a pipe that might be used to smoke marijuana, a number of empty plastic bags used by drug sellers, a substantial quantity of money in one dollar bills, index cards that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing.[35]

The Assistant Vice Principal called the local police and turned the evidence of drug dealing over to them.[36] He also called T.L.O.'s mother, who took T.L.O

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24. *Id.* at 480.
25. New Jersey v. T.L.O., 469 U.S. 325, 328 (1985).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

home.[37] Later, at the request of the police, T.L.O.'s mother took her to the police station where, after questioning, she admitted selling marijuana at the high school.[38] On the basis of her admissions and the evidence seized by the Assistant Vice Principal, the State brought delinquency charges against T.L.O. in Juvenile and Domestic Relations Court of Middlesex County.[39] T.L.O. received a three-day suspension from school for violating the smoking rules and a seven-day suspension for possession of the illegal drug marijuana.[40] The delinquency charges brought by the State took three years to pass through the New Jersey state courts.[41] After passing through state courts, the first phase of T.L.O.'s case arrived at the United States Supreme Court in 1983.[42]

The Supreme Court originally granted the State of New Jersey's petition for certiorari on the question of whether the exclusionary rule operated to bar the evidence in T.L.O.'s juvenile delinquency proceedings.[43] The State conceded for argument that the New Jersey Supreme Court had correctly decided that the search was invalid under the Fourth Amendment, but argued that the exclusionary rule did not apply to suppress evidence from an illegal search conducted by public authorities who were not police officers.[44] The Supreme Court did not wish to decide this issue without first deciding the broader issue of Fourth Amendment application to school settings.[45] The reargument on that issue resulted in the Court's attempt to balance the privacy rights of public school students against the rights of school officials to search and seize evidence.[46]

On January 15, 1985, the Supreme Court held that students have a legitimate expectation of privacy, and that the Fourth Amendment constrains school officials in searches and seizures, although to a lesser extent than it limits law enforcement officials in similar situations.[47] The Court reasoned that school officials are not exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over school children.[48] At first glance, one would think that the Court was prepared to increase the privacy protection of students because Fourth

37. *Id.*
38. *Id.* at 329.
39. *Id.*
40. *Id.* at 329 n.1.
41. *Id.*
42. New Jersey v. T.L.O., 464 U.S. 991 (1983).
43. *Id.*
44. New Jersey v. T.L.O., 469 U.S. 325, 331 (1985).
45. *Id.*
46. *Id.* at 333.
47. *Id.* at 341.
48. *Id.* at 340.

Amendment protections were being considered.[49] But, as will later be shown, this was not the case.

In *T.L.O.*, the Court carved out a new Fourth Amendment standard for application to public school students.[50] The decision tried to strike a balance among the various state court rulings by holding, on the one hand, that the Fourth Amendment does apply to school searches by school officials, and, on the other hand, by reducing the standard for such a search to reasonable suspicion and by eliminating the warrant requirement.[51] The decision also follows the general view of the courts that the standard for a school search is a lower one than probable cause due to the special nature of the school setting and the governmental interest involved in providing an effective educational environment for young people.[52]

The two most striking aspects of the Court's opinion were its explicating a new warrant exception[53] and permitting searches of school students without full probable cause.[54] The Court dispensed with the warrant requirement because "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[55] Justice White explained for the majority:

> The warrant requirement, in particular, is unsuited to school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.[56]

Thus, by reasoning that the "school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject,"[57] the Court placed school searches within an exception to the warrant requirement and held that school officials need not obtain a warrant before searching students who are within their authority.[58]

The Court also held that school officials may search a student—even without a warrant—without showing traditional probable cause for the search.[59] The Court

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49. Although juveniles have not been given all the rights contained in the Bill of Rights as have adults, it is clear that the Supreme Court has favored the expansion of constitutional rights afforded to juveniles as students in many areas. *See* Breed v. Jones, 421 U.S. 519, 541 (1975) (prohibition of double jeopardy); Goss v. Lopez, 419 U.S. 565 (1975) (procedural due process in civil contexts); *In re* Winship, 397 U.S. 358, 368 (1970) (various substantive and procedural rights in juvenile court proceedings, including requirement of proof beyond a reasonable doubt); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (free speech); *In re* Gault, 387 U.S. 1 (1967) (right to notice, counsel, confrontation and cross-examination, and not to incriminate oneself); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (equal protection against racial discrimination); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (freedom of religion).

50. *T.L.O.*, 469 U.S. at 333.

51. *Id.* at 340.

52. *See, e.g.*, State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975); State v. Young, 216 S.E.2d 586 (Ga. 1975), *cert. denied*, 423 U.S. 1039 (1975).

53. *See infra* notes 55-58 and accompanying text.

54. *See infra* notes 59-63 and accompanying text.

55. *T.L.O.*, 469 U.S. at 340 (quoting Camara v. Municipal Court, 387 U.S. 523, 532-33 (1969)).

56. *Id.* at 340.

57. *Id.*

58. *Id.*

59. *Id.* at 341.

found that the need of teachers and administrators to maintain order in the schools permitted the Court to reduce the probable cause standard to that of "reasonable suspicion."[60] The Court stated that the higher probable cause standard which police must follow is unsuited to the school environment.[61] The Court analyzed the requirement of probable cause in the same manner as it did with the warrant requirement; it concluded that these higher standards would impede school officials in pursuit of educational objectives.[62] In using the reasonableness standard, a two-part analytical process must be followed. First, was the search justified at its inception – in other words, did the searcher have reasonable suspicion? Second, was the search reasonable in scope – in other words, was the search more intrusive than was necessary? The Supreme Court then applied its newly established test to the facts of the *T.L.O.* case.[63]

In applying its standard to the facts before it, the majority in *T.L.O.* reversed the New Jersey Supreme Court and upheld the validity of the actions of the Assistant Vice Principal.[64] The Court justified the initial search for cigarettes, which the Assistant Vice Principal suspected would be in the purse based on the teacher's report that T.L.O. had been smoking in the lavatory, as a reasonable attempt to provide an evidentiary basis to support the alleged offense.[65] Moreover, the Court felt the presence of cigarettes in her purse discredited T.L.O.'s claims that she neither smoked in the lavatory nor smoked at all.[66] Having justified the initial intrusion, the Court found that the Assistant Vice Principal reasonably conducted the subsequent intrusions.[67] The discovery of the rolling papers gave rise to a "reasonable suspicion" that T.L.O. was carrying marijuana in addition to cigarettes.[68] The discovery of the pipe, empty plastic bags, marijuana and money were fruits of the legal search for the contraband, marijuana.[69] The discovery of this additional evidence justified opening the zippered compartment in T.L.O.'s purse and reading the index cards and the letters that were found there.[70] Thus, the Court found that all the evidence discovered was admissible as the fruits of a lawful search and seizure.[71]

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60. *Id.* (quoting Terry v. Ohio, 392 U.S. 1 (1968)). Although never expressly used by the *Terry* majority, "reasonable suspicion" became the term associated with the quantum of evidence that the Court found necessary to conduct a stop-and-frisk. The term "reasonable suspicion" was first used by Justice Harlan in his concurring opinion in Sibron v. New York, 392 U.S. 40 (1968), a companion case to *Terry.* Justice Harlan said: "Under the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause . . . ." *Sibron,* 392 U.S at 71 (Harlan, J., concurring). *See* Jacob W. Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Problem of Stop and Frisk,* 45 CONN. B.J. 146, 156 (1971).

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

62. *Id.* at 340.

63. *Id.* at 343.

64. *Id.* at 348.

65. *Id.* at 345.

66. *Id.*

67. *Id.*

68. *Id.* at 347.

69. *Id.*

70. *Id.*

71. *Id.* at 348.

III. WERE STUDENTS' RIGHTS BALANCED OR SKEWED BY THE COURT IN *T.L.O.*?

In *T.L.O.*, the Supreme Court balanced away the probable cause requirement of the Fourth Amendment and effectively rewrote the amendment to render the warrant clause inapplicable.[72] The Court proposed the "reasonableness standard" because the higher probable cause standard which police must follow is unsuited to the school environment.[73] The Court stated that requiring a search warrant and/or probable cause would "interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[74] The better rule, the Court held, is that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances of the search."[75]

Justice Blackmun wrote a separate concurring opinion in *T.L.O.* emphasizing that the Court missed a "crucial step" in its analysis.[76] According to Justice Blackmun, the Court may only employ a balancing test when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[77] But Justice Blackmun concluded, as did the majority, that the school setting presented such special needs for immediate action by school officials.[78]

Justice Blackmun and the majority in *T.L.O.* did not clearly explain why such special needs exist in public school settings. Nor did they attempt to review general rules of Fourth Amendment jurisprudence to develop this important concept. They merely cited *Camara v. Municipal Court*[79] and *Terry v. Ohio*[80] for the proposition that determining the reasonableness of a search requires a balancing of the need to search against the privacy invasion of those who are the subject of the search.[81] The Court then applied the balancing test discussed in these two cases and concluded that relaxation of the probable cause requirement for school searches was appropriate.[82]

The reliance on *Camara* is misplaced, however, because *Camara* involved a unique kind of search.[83] In *Camara*, the Court used a balancing test only in light of its determination that it could not adequately protect the particular governmental interests involved if it required individualized suspicion.[84] In order to permit routine housing safety inspections based on less than probable cause, the Court

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72. *Id.*
73. *Id.* at 340.
74. *Id.*
75. *Id.* at 341.
76. *Id.* at 351 (Blackmun, J., concurring).
77. *Id.*
78. *Id.* at 356.
79. 387 U.S. 523, 536-37 (1967).
80. 392 U.S. 1 (1968).
81. *T.L.O.*, 469 U.S. at 340; *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring).
82. *Id.* at 340.
83. *Camara*, 387 U.S. at 537-38.
84. *Id.*

adopted a test whereby they balanced the government's need to search against the intrusiveness of the search.[85] The Court held that a governmental unit could use a lesser standard for administrative inspections than is necessary for a criminal investigation.[86] The Court's justification in *Camara* was threefold: first, such inspection programs have a long history of judicial and public acceptance; second, the public interest demands that all dangerous conditions be prevented or abated; and last, because the inspections are neither personal in nature nor aimed at the discovery of evidence of a crime, they involve a relatively limited invasion of the urban citizen's privacy.[87] None of the justifications are present in *T.L.O.* to require the lessening of Fourth Amendment requirements.

Furthermore, the *T.L.O.* Court's approach ignored *Camara's* explicit statement that "'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness."[88] Even more glaring is the fact that *Camara* held that where a citizen refused to permit the search, the governmental official would have to obtain a warrant.[89] A public school student has no such right. *Camara's* special rule was established to govern the area of unique investigative techniques, similar to housing inspections, where a less demanding probable cause test is appropriate.[90] The Court held that this lesser cause exists to obtain a warrant based upon the fact that reasonable legislative or administrative standards for conducting an area inspection are present with respect to a particular building.[91]

Terry v. Ohio,[92] the other major Fourth Amendment case relied upon by the Court in *T.L.O.*, employed a reasonableness analysis rather than a conventional analysis.[93] The *Terry*[94] Court applied a balancing test to determine the reasonableness of the governmental actions in stopping and frisking a citizen in the Cleveland, Ohio, area. The Court balanced the governmental interests in crime detection and protecting officers' safety against an individual's right to personal security and freedom from arbitrary governmental interference.[95] The balancing process weighed three factors: the public interest of the intrusion, the extent of the intrusion into one's privacy, and the extent the intrusion advances the public interest.[96] The Court justified this exception on the grounds that detention is less intru-

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85. *Id.* at 540.

86. *Id.*

87. *Id.* at 528-31.

88. *Id.* at 534.

89. *Id.* at 540. In See v. City of Seattle, 387 U.S. 541 (1967), the Court gave less protection for inspection of businesses.

90. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 400 (1986) [hereinafter KAMISAR].

91. *Camara*, 387 U.S. at 536-37.

92. 392 U.S. 1 (1968).

93. *Id.* at 30.

94. *Id.*

95. *Id.*

96. *See* Brown v. Texas, 443 U.S. 47, 50-51 (1979); Delaware v. Prouse, 440 U.S. 648, 654 (1979).

sive than an arrest, and the search is necessary to protect the officer's safety.[97] When an officer is investigating an incident where criminal activity is afoot, that officer may protect his own safety by frisking for weapons if he has a reasonable suspicion that the detained person may possess a deadly weapon.[98]

According to Chief Justice Warren, writing for the majority in *Terry*, the revolutionary new exception to probable cause was to be applied only in very limited circumstances.[99] He stated that the "sole justification" for the new standard was to protect the police officer and others in his immediate vicinity and that any search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[100] The *Terry* holding was a practical solution to the daily dangers faced by law enforcement officers on the streets of major cities throughout the United States. The holding that a "stop-and-frisk" can be predicated on less than probable cause is an important attempt to provide the necessary tools to minimize those dangers faced by law enforcement personnel as they fight "street crimes."[101]

In both cases, the law enforcement objective did not relate to gathering evidence of criminal conduct; moreover, it would have been impracticable to require a warrant and probable cause. *Camara*, in effect, replaced probable cause with a reasonable standard for administrative inspections by balancing societal interests and needs versus a *slight* invasion of individual privacy and retaining the warrant requirement except in cases of emergencies. In *Terry*, the Court recognized that dispensing with the warrant and probable cause requirements in "stop-and-frisk"[102] scenarios is justified by the practical needs of law enforcement. An officer has no time to obtain a warrant, and, confronted with a potentially dangerous situation, he should not be required to meet the higher standard of probable cause before he can take limited action to protect himself.[103] In *T.L.O.*, however, the Court has not shown that schools are unable to achieve their goals of enforcing rules within the confines of the Fourth Amendment.

The "reasonableness, under all the circumstances" criterion, as articulated and applied by the *T.L.O.* Court to full-scale personal searches of students by teachers, may give even less protection than the "reasonable suspicion" test of *Terry v.*

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97. *Terry*, 392 U.S. at 22-27.

98. *Id.*

99. The Court indicated the limitation of the *Terry* holding, noting:

> [The] narrow question posed by the facts . . . [is] whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest. Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limits upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

Terry, 392 U.S. at 15-16.

100. *Id.* at 29.

101. Moreover, Chief Justice Warren reiterated for the Court that the protections created by the Fourth Amendment must be preserved by stating that the police "must whenever practical obtain advance judicial approval of searches and seizures." *Id.* at 20 (footnotes omitted). The Court added "that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." *Id.*

102. *See supra* notes 92-101 and accompanying text.

103. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

Ohio,[104] and similar cases. A reasonableness analysis is appropriate where the only effective search must be warrantless and not based on probable cause.[105] This is not *always* the case for school searches. A clear example is illustrated by the problem used as an introduction to this article. The search for evidence in the problem does not demonstrate an emergency situation because all the infractions had been committed in the past, and, thus, there is no future danger as in *Terry* or *Camara*.

The *T.L.O.* Court skewed the balance in favor of the state with respect to searches of students. On the side of the balance designated as the state's interest, the Court weighed the state's need for efficient law enforcement rather than the types of special governmental interests that are ordinarily required to deviate from the probable cause standard.[106] In fact, the vast majority of schools do not have the drug and violence problems cited by the majority.[107] In any case, the presence of such problems alone cannot justify abandoning the usual Fourth Amendment safeguards.[108] The Court assumed that school officials would be unable to fulfill their education mission if they were subject to the same Fourth Amendment requirement as law enforcement officials.[109] This assumption is unsupported and probably incorrect; school officials could likely maintain school discipline despite the probable cause requirement.[110] In weighing the competing interests of the individual and the state, the *T.L.O.* Court should have focused more on the infringement of the individual's privacy right and less on the government's need to search.[111]

IV. THE FACTOR MISSING IN THE *T.L.O.* BALANCE: INDIVIDUALIZED SUSPICION

As discussed earlier, the Supreme Court had *T.L.O.* reargued because it felt that it was more important to decide the reasonableness of the search in the case than the issue of the application of the exclusionary rule to public school stu-

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104. 392 U.S. 1, 29 (1968) (officer may briefly stop and frisk persons for weapons based on individualized reasonable suspicion and concern for safety of officer).

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

106. *Id.* at 363. (Brennan, J., concurring in part and dissenting in part).

107. John C. Hogan & Mortimer D. Schwartz, *The Fourth Amendment and the Public Schools*, 7 WHITTIER L. REV. 527, 547 (1985).

108. KAMISAR, *supra* note 90, at 408 (focus should be on maintenance of proper educational environment).

109. *T.L.O.*, 469 U.S. at 340-41.

110. Dale Edward F.T. Zane, Note, *School Searches Under the Fourth Amendment:* New Jersey v. T.L.O., 72 CORNELL L. REV. 368, 391 (1987) [hereinafter Zane].

111. Justice Brennan, in his dissent in *T.L.O.*, argued that the balancing test adopted by the majority risks eviscerating the protections of the Fourth Amendment subordinating personal privacy to social utility. *T.L.O.*, 469 U.S. at 354 (Brennan, J., concurring in part and dissenting in part).

dents.[112] Several other issues were expressly excluded from the *T.L.O.* decision,[113] the most important of which is the question of individualized suspicion as an essential element of the reasonableness standard for school searches.[114] The underlying command of the Fourth Amendment has always been that searches and seizures be *reasonable*.[115] The reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective" standard, whether this be probable cause or a less stringent standard.[116] The searcher must have a belief based upon reason that evidence may be found at a particular place.[117] To permit searches on mere generalized suspicion would vitiate the principles that are the underpinnings of the Fourth Amendment.[118] Searches based on mere suspicion that a crime or infraction has occurred offer no protection to the legitimate expectation of privacy held by each member of the student body of public schools and violates the express command of the Constitution.[119]

Because the individualized suspicion requirement was left open by *T.L.O.*,[120] some school authorities believe that they have the right to search on a general suspicion of wrongdoing.[121] However, to permit a school administrator or teacher to search so long as he or she has reasonable cause to believe that a law or a school rule has been violated by a person in a group of students does not furnish an objective standard that will safeguard the individual student's privacy interest. Reasonable cause to believe—or even certainty—that a violation of rule or law has occurred is no safeguard; instead, when standing alone, it serves merely as an invitation for impermissibly broad searches at the whim of school officials.[122] It is

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112. *See supra* note 44.

113. Specifically, the *T.L.O.* Court noted issues not decided by the case, but relegated discussion of these issues to footnotes. *T.L.O.*, 469 U.S. at 333-42 nn.3-8.

By his own admission, Justice White, author of the *T.L.O.* majority opinion, provided a list of issues not addressed: (1) Does the exclusionary rule apply to the fruits of an unlawful search in the public school? *Id.* at 332 n.2. (2) Do students have privacy rights in connection with their lockers, desks or other storage areas the school provides? If so, what are the standards for searching these areas? *Id.* at 337 n.5. (3) Do the standards change if the police are involved? *Id.* at 341 n.7. (4) Is it necessary to have individualized suspicion before a search takes place? *Id.* at 342 n.8.

114. *Id.* at 342. The Court recently sidestepped this issue again in O'Connor v. Ortega, 480 U.S. 709 (1987) (search of employees by public employers).

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

116. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

117. *Id.* at 661.

118. Any major intrusion of citizens by governmental officials comes within the protection of the Fourth Amendment which provides:

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

U.S. CONST. amend. IV.

119. *T.L.O.*, 469 U.S. at 342 n.8.

120. *Id.*

121. See problem in Introduction where a mass search did occur just as one did in Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987).

122. *See* 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 (1988) [hereinafter Gardner].

sad to admit, but some school officials continue to conduct general searches within public schools.[123]

In most contexts, the Fourth Amendment requires individual suspicion in cases where adults are the subject of searches.[124] Individual suspicion is required in cases of "stop-and-frisk" because an officer must believe that "an individual is armed and dangerous" before a frisk (search for weapons) is permitted.[125] Courts have held that individual suspicion is required in the mass drug testing context generally.[126] Individual suspicion is even required in the prison setting, at least with regard to strip searches of visitors.[127] Is it not just as important to strike the balance in favor of individualized suspicion with respect to searches conducted in the public school settings?[128] Without individualized suspicion, teachers and administrators are permitted to search on bare suspicion that a crime or infraction has occurred, thus granting them powers beyond that granted for searches of adults.[129]

Although the *T.L.O.* Court did not decide whether its "reasonable suspicion" standard included individual suspicion, it did strongly imply that individualized suspicion may be required under the Fourth Amendment.[130] The Court said: "Exceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interest implicated by a search are minimal *and* where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." ' "[131] This statement reminds us that individualized suspicion as a requirement for a valid search of students is of keen jurisprudential significance.[132]

The requirement of individualized suspicion as an essential element of the reasonableness standard would not tie the hands of school officials in emergency situations. Although "some quantum of individual suspicion is usually a prerequisite to a constitutional search[,] . . . the Fourth Amendment imposes no irreducible

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123. *See supra* note 1 and accompanying text.

124. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985).

125. Terry v. Ohio, 392 U.S. 1, 30 (1968).

126. Feliciano v. City of Cleveland, 661 F. Supp. 578, 587-92 (N.D. Ohio 1987) (analyzing cases and holding general drug testing of police academy cadets unreasonable).

127. Hunter v. Auger, 672 F.2d 668, 675 (8th Cir. 1982) (reasonable suspicion must be aimed at the particular strip search candidate).

128. This proposition is in accord with many recent decisions. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 481-82 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 234 (E.D. Tex. 1980); Bellnier v. Lund, 438 F. Supp. 47, 54 (N.D.N.Y. 1977); Kuehn v. Renton Sch. Dist. No. 403, 694 P.2d 1078, 1081 (Wash. 1985).

129. One court has explained the significance of how individualized suspicion relates to the constitutionality of a search: "In any sufficiently large group, there is a statistical probability that someone will have contraband in his possession. The Fourth Amendment demands more than a generalized probability; it requires that the suspicion be particularized with respect to each individual searched." *Kuehn*, 694 P.2d at 1081.

130. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985).

131. *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979) (emphasis added)).

132. *See* Gardner, *supra* note 122, at 926; Jill I. Braverman, *Public School Drug Searches: Toward Redefining Fourth Amendment "Reasonableness" to Include Individualized Suspicion*, 14 FORDHAM URB. L.J. 629, 683 (1986) ("Public school attendance, which is mandated by state education laws, should not automatically subject students to severe encroachments upon their constitutionally protected expectations of privacy.").

requirement of such suspicion."[133] For example, a different result might be obtained where a school official was notified that a bomb was located in a locker or a teacher saw a handgun brandished in the midst of a crowd of students. Here, the immediate and serious risk of harm could be determinative in balancing the interests at stake.[134] Although the Court recognized students' privacy rights in *T.L.O.*, the decision may have negative effects, because it permits searches based upon a violation of a "school rule," as well as criminal law violations.

Justice White must have been aware of this point when, in response to the dissenting statements of Justice Stevens, he wrote for the majority:

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules . . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper education environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to the judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.[135]

This statement by Justice White is irreconcilable with the Court's earlier holding which tests the need "to search against the invasion which the search entails."[136] The invasion is now permitted where the school rule, made by teachers and administrators, serves as the bases for their own searches.[137] The decision of the Court to permit a search to enforce "any school rule" will grant school officials wide latitude to search. Thus, under *T.L.O.*, a teacher is allowed to make a search or frisk on the playground while an officer would not be allowed to make the same search on the streets. The Court seems to be granting broader power to search on the basis of the status relationship between the searcher and searchee as opposed to a clear objective as to the fruits of the search. By granting authority to search in all cases of school rule infractions and declining to impose the requirement of individualized suspicion for searches, the Court has struck a balance that is not only unfair to students but also likely to be vague and unclear to school officials and lower courts.

This decision "generally" permits no judicial evaluation of the purpose of such a school rule in determining the reasonableness of a search.[138] The holding places

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133. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976).

134. *Compare* United States v. Doe, 819 F.2d 206 (9th Cir. 1985) (warrantless entry into residence justified by officer's reasonable, good faith belief that substantial risk of harm justified immediate search for weapon) *with* United States v. Costa, 356 F. Supp. 606 (D.D.C.), *aff'd*, 479 F.2d 921 (D.C. Cir. 1973) (narcotics definitely dangerous but not so immediately dangerous as to justify warrantless entry); *see generally* New York v. Quarles, 467 U.S. 649 (1984) (public safety exception to *Miranda* requirement based on presence of weapon).

135. *T.L.O.*, 469 U.S. at 342-43 n.9 (citations omitted).

136. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

137. This standard is much different than was the case of *Camara* where the search was based on legislative or administrative standards. *See supra* note 91 and accompanying text.

138. *T.L.O.*, 469 U.S. at 342 n.9.

enormous unchecked authority in the hands of the drafters of school rules and those school officials charged with implementing such rules. The Court would permit a school official to conduct a full-scale search to enforce school rules regulating such an innocuous item as the dress code.[139] The Court's willingness to defer to school rules as a basis for the search of a student seems unsound. School rules are an informally created, widely varied set of principles established by members of the school community to aid in governing the educational process in the schools.[140] The persons who formulate these rules are not elected by the people generally, and they are not regulated in their task by the legislature.[141] There may be no member present who has any formal training in the law and understands the legal protections granted to students.[142] To permit a search for evidence for violations of any rules – rules which are often limitless in number and of varying importance and of which the searcher is the author – is virtually an open-ended right granted to school officials to search at will.[143]

The Court should have limited its holding to school rules disciplining conduct highly disruptive of the educational process. The standard, as stated by the Court, would permit searches based on reasonable suspicion of the violation of trivial school rules like the dress code.[144] While most school rules arguably are created to promote order, many rules only indirectly serve this purpose.[145] Searching a locker or bag for a "Walkman" that in no way relates to the educational function being conducted in school may destroy any protection granted by the Fourth Amendment.[146]

The school setting is the place where we want students to understand the "rule of law" and what democracy is all about.[147] The freedom granted school officials to search students is particularly unfortunate because although society wants students to respect the law, their status as students seems to afford them less constitutional protection and privacy than other citizens.[148] Students generally enjoy full Fourth Amendment protection away from school premises.[149] Once in school, however,

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139. *Id.* at 377 (Stevens, J., concurring in part and dissenting in part).

140. Zane, *supra* note 110, at 392.

141. *Id.*

142. *Id.*

143. *T.L.O.*, 469 U.S. at 328. Although the Court recognized students' privacy rights, its approach to permit searches based on reasonable suspicion of the violation of the most trivial school rules may ultimately destroy these rights to students. Zane, *supra* note 110, at 392.

144. *T.L.O.*, 469 U.S. at 377 (Stevens, J., concurring in part and dissenting in part).

145. Zane, *supra* note 110, at 392.

146. *See supra* note 1 and accompanying text. *See also* Charlotte H. Purkey, Comment, *Fourth Amendment Protections in the Elementary and Secondary School Settings*, 38 MERCER L. REV. 1417, 1437 (1987) (The vague definition surrounding "reasonable cause" creates a murky region where there is a potential for discretionary abuse by school officials.); Michael J. Hickman, Comment, *The Supreme Court and the Decline of Students' Constitutional Rights: A Selective Analysis*, 65 NEB. L. REV. 161, 179 (1986) ("The amorphous nature of the reasonableness standard could lead to searches that may be based upon unfounded rumor or arbitrary objective signs, such as the style of a student's hair or clothing, those persons a student associates with, or even race.").

147. New Jersey v. T.L.O., 469 U.S. 325, 385 (1985) (Stevens, J., concurring in part and dissenting in part).

148. *Id.* at 385-86 (Stevens, J., concurring in part and dissenting in part).

149. U.S. CONST. amend. IV.

they may be subject to full-scale searches by school officials under a reasonable suspicion standard as viewed by some courts and school administrators. This clearly violates the *Tinker*[150] maxim that students do not shed their rights at the schoolhouse gate.[151]

V. Lower Court Cases After *T.L. O.*

While the majority in *T.L. O.* acknowledged that the Fourth Amendment is applicable in a school environment, it is significant that the burden of defining the potential reach of the Court's decision will lay heavily upon those who find themselves in opposition to school authority. Under the Court's standard, one plausible interpretation of the *T.L. O.* standard, without the factor of individualized suspicion, is that it is designed to prohibit those searches undertaken without any evidence whatsoever supportive of a suspicion that the search will turn up evidence of a violation. Under this interpretation, only the totally baseless search would be prohibited. Thus, a search would be permitted if there is any basis whatsoever to support the search. But if a requirement of individualized suspicion is read into the *T.L. O.* requirements, searches of public school students would be permitted only in those cases that a school official has a reasonable belief that a particular student has violated the law or a school rule.

There have been over forty state court cases and twenty federal cases following the *T.L. O.* decision. It is not the purpose of this article to discuss all cases litigated after *T.L. O.*, but to give the reader a sense as to how lower courts have interpreted the decision. A review of several lower court cases will show how courts have interpreted *T.L. O.* over the past seven years.

In *State v. Joseph T.*,[152] an assistant principal at a middle school noticed the smell of alcohol on the breath of an eighth grade student.[153] The student admitted upon questioning that he had consumed alcohol at a second student's home on the way to school that morning.[154] The Vice Principal then became suspicious that the second student may have brought some alcohol to school with him.[155] He directed two teachers to open the second student's locker[156] with a master key while the Vice Principal talked with the second student in his office.[157] The teachers could see no alcohol, but they searched the student's jacket and found three wooden pipes, wrapping papers, and a plastic box.[158] The box contained seven handrolled marijuana cigarettes.[159] The teachers then replaced the items in the locker, summoned the student and Vice Principal, and the search was repeated in the student's

150. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).
151. *Id.* at 506.
152. 336 S.E.2d 728 (W. Va. 1985).
153. *Id.* at 730.
154. *Id.*
155. *Id.*
156. Locker searches were left open by the Court in New Jersey v. T.L.O., 469 U.S. 325, 337 n.5. (1985).
157. *Joseph T.*, 336 S.E.2d at 730.
158. *Id.*
159. *Id.*

presence.[160] On the basis of the marijuana revealed in the search, the county circuit court adjudged the student a "delinquent child" under state law.[161] The student appealed, contending that the search of his locker was unlawful.[162] The West Virginia Supreme Court held that the search was consistent with the principles laid down by *New Jersey v. T.L.O.*[163] The West Virginia court stated that if a school official has information that a student consumed alcohol at another student's home in the morning, and the first student smells of alcohol, then the school official has the necessary "reasonable suspicion" that the other student has alcohol in his locker.[164]

The validity of the violation in *Joseph T.* goes without question based upon the crime of furnishing alcohol to a minor. But, once the violation was reported – that a student consumed alcohol at another student's home on the way to school – did it create reasonable cause to believe that alcohol was brought to school? Even more grievous is the scope of the search in this case. Looking into a student's locker for alcohol and not seeing or smelling any, the teacher searched the jacket pockets and even a closed container found in the pocket.[165] A bottle or can of alcohol can easily be found due to the size and shape without reaching into pockets and removing the contents. The taking, from the jacket pockets, of wrapping papers and a plastic box and searching the box, goes beyond the visual observations leading to the search in *T.L.O.*[166]

It seems that the West Virginia Supreme Court has granted school officials sweeping powers to search students. It seems as if the authority to search students is even greater than that granted in *T.L.O.* The granting of such broad power to search, coupled with the extremely broad scope of the search, may well produce a synergistic effect to the detriment of students.

Another case that demonstrates the impact of the *T.L.O.* decision is the California case *In re Bobby B.*[167] The case was decided after *T.L.O.*, and the court used the *T.L.O.* holdings to support its decision.[168] The case illustrates the extent to which state courts have granted school officials authority to conduct searches of students.[169]

The Administrative Boys' Dean at a high school in Los Angeles made his morning rounds which included checking the restrooms for students who were not au-

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160. *Id.*

161. *Id.* at 731.

162. *Id.*

163. *Id.* at 736. The Court did not reach the issue whether the exclusionary rule applies to school students. *Id.*

164. *Id.*

165. *Id.* at 730.

166. Although the majority in *T.L.O.* held that the presence of cigarette papers gave cause to continue the search, Justice Brennan disagrees: "The mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring both that T.L.O. had violated the law by possessing marijuana and that evidence of that violation would be found in her purse." New Jersey v. T.L.O., 469 U.S. 325, 368-69 (1985) (Brennan, J., concurring in part and dissenting in part).

167. 218 Cal. Rptr. 253 (Cal. Ct. App. 1985).

168. *Id.* at 255.

169. *Id.*

thorized to be outside their classrooms.[170] He entered one of the restrooms and found Bobby B. with another boy.[171] He asked the boys to show him their passes for permission to be out of class, but according to him, neither boy produced a pass.[172] His suspicion was aroused because Bobby B. appeared to be searching for answers to the simple questions he asked.[173] The Dean was also aware of narcotics, especially marijuana activity, within the restrooms at the school.[174] He then told Bobby B. to take everything out of his pockets, because he "was looking for pot."[175] The Dean found two cigarettes that appeared to be marijuana and a bundle of cocaine which was located in Bobby B.'s wallet.[176]

Interestingly, at the juvenile court hearing it was found that the defendant's name was on a pass along with the other student who was in the restroom and that the pass was in their possession at the time of the questioning by the Dean.[177] It is also interesting to note that the contraband was found inside the wallet of Bobby B. after he was made to empty his pockets.[178] There is no evidence to suggest, as was the case in *T.L.O.*, that marijuana was located in the student's wallet.[179] However, the court found no violations of the defendant's rights as to this search and permitted the introduction of the contraband found by the school official.[180]

The court stated that in applying the two-prong test of *New Jersey v. T.L.O.*, the conduct of the Dean in conducting the search was justified from its inception.[181] Because the defendant was in the restroom without a pass and was nervous or looked nervous, coupled with the belief of the administrator that there were drugs on campus, was enough to justify the search.[182] The court found it proper for the administrator to make rounds and inspect for drug use in the restrooms and ask questions that led to the search.[183] As to the second prong of *T.L.O.*, whether the search was reasonably related in scope to the circumstances which justified the interference in the first place, the court said "we cannot fault either his reasonable suspicion or the method of the search."[184] The court further stated: "To do otherwise would be an illogical invasion of his [the administrator's] duty to check on drug use on campus."[185]

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170. *Id.* at 254.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 254. "Pot" is a term often used for marijuana.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 256.
181. *Id.*
182. *Id.* at 255.
183. *Id.*
184. *Id.* at 256.
185. *Id.*

This case clearly reminds one of the facts in *T.L.O.* because the information given for the search was that T.L.O. was smoking in the restroom.[186] How did the teacher happen to "catch" the students in the act of smoking in the restroom? If the students' expectation of privacy does not extend to the restrooms, there may be very little protection as it relates to their personal dignity. The issue of privacy in school restrooms was ignored by the courts at all levels in the State of New Jersey as *T.L.O.* proceeded to the Supreme Court of the United States.

The issue of privacy in restrooms was first raised by Justice Stevens during the *T.L.O.* oral arguments.[187] He elicited from the New Jersey's Deputy Attorney General that school officials could install two-way mirrors in a restroom if they suspected that students were smoking cigarettes.[188] Justice Rehnquist commented: "I don't know why two-way mirrors in a restroom would be a violation of privacy."[189] To this Justice Stevens questioned, "Is there no expectation of privacy in a restroom?"[190] By not addressing this most important issue, *T.L.O.* increases the authority of teachers and administrators to "spy" on students, thus, establishing cause to search.[191] The Court has established a concept of "no privacy" as to the observations by school personnel of students, thus giving wide discretion to school officials at the expense of the privacy rights of students.[192]

The telling statement of *In re Bobby B.* is in the court's comment: "To do otherwise would be an illogical invasion of [one's] . . . duty to check on drug use on campus."[193] Professor Saltzburg said that the great victim of drug abuse is the Fourth Amendment.[194] The California court has granted school officials authority to search based upon the fact that drug use occurs in our schools and a student gives a faltering or evasive answer to the official's question.[195] Searching innocent students is considered to be an unfortunate side effect of the effort to keep our schools drug free.[196] This is clearly the view of this California court which suggests the worst regarding school students.

In *Irby v. State*,[197] a teacher informed the Associate Principal of the high school that she heard some students talking about a student (the unidentified informant)

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186. New Jersey v. T.L.O., 469 U.S. 325, 328 (1985).

187. Stewart, *supra* note 7, at 53.

188. *Id.*

189. *Id.*

190. *Id.*

191. *See* Stern v. New Haven Community Sch., 529 F. Supp. 31 (E.D. Mich. 1981) (use of two-way mirror in school lavatory to observe drug sale upheld).

192. Justice Stevens was concerned in *T.L.O.* that the test established was designed to protect against "obviously unreasonable intrusions" but on the other hand may not offer effective protection because it is too flexible. New Jersey v. T.L.O., 469 U.S. 325, 381. The reasonable suspicion standard, "subjectively applied by a school official[,] . . . is really no standard at all." State v. Young, 216 S.E.2d 586, 599 (Ga. 1975) (Gunter, J., dissenting).

193. *In re* Bobby B., 218 Cal. Rptr. 253, 256 (Cal. Ct. App. 1985).

194. *See* Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986).

195. *In re Bobby B.*, 218 Cal. Rptr. at 255.

196. *Id.* at 256.

197. 751 S.W.2d 670 (Tex. Ct. App. 1988).

who had marijuana with him at school, and she sent the student to the Associate Principal's office.[198] When the student gave the marijuana to the Associate Principal, he was asked where he got the marijuana.[199] He said that Sean Irby had given it to him.[200] Sean was seventeen years old and in the eleventh grade at the time of the incident.[201] The Associate Principal went to Sean's classroom and brought him to the office.[202] He was questioned in the presence of two school officials and told that they had reason to believe that he had marijuana on him and asked if he would mind being searched.[203] He said " ' "No." ' "[204] One official looked through the contents of his pockets that he placed on the desk and the other official went through his coat.[205] Marijuana was found concealed in the lining of his coat.[206]

The court found that the search was justified at its inception by reasonable grounds for suspecting the search would discover evidence that the student was carrying marijuana in violation of the law and also in violation of the school's rules.[207] In looking for the drug marijuana, the court found that the search of the student's jacket was reasonable and not excessively intrusive.[208] The school officials would not reveal to the student the name of the other student claiming to have gotten the marijuana from him.[209] The court held that it was not necessary for the school administrator to disclose the name of the unidentified student informant.[210]

Police officers often act upon information from informants that crimes are about to be or have been committed. This privilege has been established to permit officers to carry out their oath to protect society by investigating crimes and capturing criminals. But police officers must act upon information from informants that evidence will be located at a particular place.[211] Just because a student is found with marijuana and tells school officials that he had gotten it from another student, is there evidence that the second student has marijuana on his person?

School officials are granted broad power to search if they are permitted to search a student merely on the basis of another student's statement that contraband was received. Moreover, allowing school officials to act upon information from alleged unnamed student informers may arm them with authority to search on the basis of hearsay or even mere rumor. Even worse, it may cause school officials to view their jobs as that of police officers as did the Associate Principal in *Irby* and

198. *Id.* at 671.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 673.
208. *Id.*
209. *Id.*
210. *Id.*
211. Illinois v. Gates, 462 U.S. 213 (1983).

extend the scope of the search to include even the lining of the coats of school students.[212]

Many cases have arisen that relate to the scope of the search by school officials, permitted in the second prong of the *T.L.O.* test. In *Shamberg v. State*,[213] the "safety/security home-school coordinator" was informed by a teacher that a student was suspected of being under the influence of alcohol.[214] He approached the student in the library and noticed the student's eyes were glassy and his face was flushed.[215] He asked the student to accompany him to a storeroom to talk, but as they walked to the storeroom the student bounced into large objects and swayed as he walked.[216] In the storeroom, the school official detected an odor of alcohol and noticed the student's speech was slightly slurred.[217]

He asked the student where he had gone for lunch and if he had driven his car.[218] The student's evasive response gave rise to suspicion to search the student's car.[219] The search of the car included searching under the seats, under the dashboard, in the glove compartment, and in the ashtray.[220] In the ashtray there were two baggies that contained a white powdery substance.[221] Chemical tests proved that the substance found was cocaine.[222]

The court held that since the school official knew that the student was under the influence of some intoxicant and the student gave evasive responses regarding his car, this led to a common sense conclusion that the student had been consuming or transporting alcohol or drugs in his car.[223] The court also noted that the car was improperly parked on school property, which enhanced the reasonable suspicion of the searcher.[224] But could it be reasonable that since the student knew that his car was improperly parked, that this led to the evasive response to questioning about his car more clearly than the fact that there was contraband in the car?

Even if the search was justified at its inception, there arose an important issue as to the scope of the search. Was it reasonable to search the ashtray of the car? An alcohol container would not fit into an ashtray, thus searching for alcohol would not give justification for a search of the ashtray of a car.[225] The court found that the student was suspected to be under the influence of other drugs in addition to alco-

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212. *See* Wynn v. Board of Educ., 508 So. 2d 1170 (Ala. 1987) (approving the search by a teacher who, attempting to recover six dollars, had students remove their shoes while she felt their socks for the money).

213. 762 P.2d 488 (Alaska Ct. App. 1988).

214. *Id.* at 489.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 492.

224. *Id.*

225. *Id.*

hol.[226] The basis for this suspicion was the degree of the student's impairment and the short length of the lunch period.[227] A school official could reasonably believe that forty minutes was not enough time to ingest enough alcohol to reach that level of intoxication as displayed by the student.[228]

Thus the court reasoned that suspicion would be well founded to search for illegal drugs as well as for alcohol.[229] The evidence of the student's drug or alcohol use supported a reasonable suspicion that the ashtray was the repository for drugs.[230] But is this conclusion correct? Do alcohol and drugs cause similar reactions to individuals? Is it reasonable that a high school student could consume enough alcohol in forty minutes to be highly intoxicated? The court went out of its way to approve the search in this case because drugs were found. Similar results can be found in other jurisdictions to approve searches without clearly following the guidelines of *T.L.O.*

So far, lower court cases have been reviewed from West Virginia, California, Texas, and Alaska. These cases illustrate that there are often very few restrictions on school officials conducting searches. One may conclude that there is to be a general pattern to grant greater authority to school officials to search students, and the scope of the search is without restrictions. The cause to search and the scope of a school search is clearly seen in the problem used in the Introduction to the article. The introductory problem was adapted from the facts in *Burnham v. West*,[231] and the court's discussion in that case is most relevent to our review.

In *Burnham*, Dr. Roy West, principal of a high school, discovered defacement of school property by felt-tip markers and directed the teachers to search students' bookbags, pockets and pocketbooks for similar markers.[232] Under the school rules, students were not permitted to have felt-tip markers on school property unless the markers were required in a particular class.[233] Teachers proceeded to look into bookbags and pocketbooks, and required boys to turn their pockets inside out.[234] There is no evidence that any student was physically touched during the search.[235]

The next month, a teacher told Dr. West that she had observed several students alighting from school buses carrying "Walkmen" or radios.[236] Without making any further inquiry, Dr. West ordered a search of all students' bookbags and pocketbooks for "Walkmen" or similar devices.[237] A search was conducted pursuant to

226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 493.
230. *Id.*
231. 681 F. Supp. 1160 (E.D. Va. 1987).
232. *Id.* at 1163.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*

these instructions.[238] One teacher told students to stand by their desks and place the items in their bookbags and purses on top of their desks.[239] He then looked into the emptied purses.[240] Another teacher placed her hand into a student's purse, but did not find a "Walkman" inside.[241]

About one month later, a teacher reported to Dr. West that she had smelled marijuana smoke in two hallway areas near the school cafeteria.[242] Classes were in progress at the time, and no students were in the halls.[243] Dr. West immediately went to the hallway areas and detected a strong odor of marijuana.[244] He looked for physical evidence but found none.[245] Again, he ordered a search of all students' pocketbooks and bookbags, and of male students' pockets.[246] During this search, one of the students was required to empty her purse onto a teacher's desk, exposing some tampons to the view of the teacher and nearby students.[247] Another teacher sniffed one student's hands to determine if that student's hands had the smell of marijuana.[248] Students were required to turn their pockets inside out and place the contents on top of their desks.[249]

An interesting point found in the case, but not stated in the introductory problem, is that of the teacher taking the hands of a student and sniffing them to see if the student had been smoking marijuana.[250] The court found that this was not a "search"[251] because school children do not have a reasonable expectation of privacy in the air surrounding their person.[252] Therefore, school officials may sample the air for the purpose of maintaining a proper learning environment to the same extent that they would be justified in conducting a purely visual inspection.[253] To permit teachers to sniff student hands for the odor of marijuana is beyond the comprehension of this writer, and this fact alone would cause one to believe that this Virginia federal court was following the general pattern that we have seen in the other cases.

But the court held that the searches conducted by the other teachers violated the Fourth Amendment.[254] To conduct searches of students' pockets and bags for felt-tip markers, radios, and even marijuana when there is no evidence directed at any

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238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 1163-64.
245. *Id.* at 1164.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 1165.

individual was improper.[255] The court made a strong plea for the requirement of individualized suspicion that might safeguard the students' privacy interests.[256] The school officials conducted searches in this case by having students empty their pockets and by looking into their bags and desks.[257] But the appellate court held that to permit a search based merely upon the fact that a school rule had been violated by someone, when standing alone as in this case, serves merely as an invitation to an impermissibly broad search.[258]

The court further stated:

> Such a result might indeed enhance the principal's stated goal of increased order in the school. However, neither the Constitution nor its primary guardian – the federal judiciary – should bow to expediency. The constitutional rights of all citizens should be affirmed and protected in spite of any systemic discomfort created by mandating respect for those rights. Even though it is easier and more effective, from a school administrator's point of view, to be able to authorize general searches without the burden of individualized suspicion, this Court finds no genuine, material issue of fact as to the claimed unconstitutionality of the searches under consideration, and holds that plaintiffs are entitled to summary judgment thereon.[259]

This aspect of *Burnham v. West* provides a powerful argument in favor of adopting individualized suspicion as part of the reasonable suspicion standard of *T.L.O.* In *Burnham,* the court gave the school officials qualified immunity based upon the plaintiff's inability to show that the officials should have known that their actions would violate the student's legitimate privacy interest.[260] On appeal, the officials were held to be protected from statutory liability by the doctrine of sovereign immunity.[261] The court also refused to award punitive damages since sufficient evidence was not introduced to demonstrate a "'reckless or callous indifference' or 'evil intent'" on the part of the school officials.[262] The decision did order "any injunctive relief shown to be appropriate upon further proceedings."[263]

For a student to obtain any redress under a civil cause of action, it appears that the burden of proof placed upon them is a nearly insurmountable obstacle. In most cases, it would be difficult to show injury to personal property or that the officials had ill will or malice toward the student. Few young students would avail themselves of the remedy of self-help, i.e., resisting the search, when they have been taught to respect their elders and not to question authority. Therefore, the addition of the element of individualized suspicion is even more compelling. School officials must learn that they are permitted to search *only* where there is individual-

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255. *Id.*
256. *Id.* at 1166.
257. *Id.* at 1163.
258. *Id.* at 1166.
259. *Id.* at 1168.
260. *Id.*
261. *Id.*
262. *Id.* (quoting Cooper v. Dyke, 814 F.2d 941, 948 (4th Cir. 1987)).
263. *Burnham,* 681 F. Supp. at 1169.

ized suspicion that a particular student has violated the law or a school rule and evidence of that violation will be discovered by conducting a search. Most teachers are dedicated and want "to do the right thing." The addition of the element of individualized suspicion will assist school officials to properly conduct searches and will lessen violations of students' privacy.

VI. RECOMMENDATIONS

T.L.O. is the law of the land, but its lack of clarity remains a problem for school officials and lower courts. The burden is of utmost importance for school officials because most cases of school searches will never come to court. The Supreme Court has reduced the standard for searching school students from probable cause to reasonable suspicion. This standard must be understood by school officials before students are searched. The official must be able to articulate a degree of certainty that a violation of either a school rule or criminal law exists before legally invading a student's right to privacy.[264] Teachers are just as capable as law enforcement officers, or even more so, in making determinations as to what degree of certainty equals "reasonable suspicion" which will enable them to legally invade a student's privacy.[265]

In applying the reasonable suspicion standard of *T.L.O.*,[266] school officials must remember that general searches are illegal. School officials must clearly understand that the element of individualized suspicion must be present before students are searched.[267] They must consider the necessity and purpose of the search and weigh the extent of the invasion upon the student.[268] They must clearly understand that the standard requires a nexus between the search and evidence to be found due to a violation of a substantial school rule or the criminal law.[269]

To assist in a determination of whether a "reasonable suspicion" to search exists, courts have considered several factors to be relevant. A search may be permissible in its scope and objectives as it relates to such factors as the age and sex of the student and nature of the infraction being investigated.[270] Lower courts have considered the child's history and school record,[271] the prevalence and seriousness of the drug or violence problem in the school,[272] the exigencies in conducting a

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264. Justice Brennan warned in *T.L.O.* that the vague reasonableness test of the *T.L.O.* majority will create uncertainty as to what constitutes a proper basis for searching, which will in turn create either undue restraint or excessive eagerness in conducting searches. *New Jersey v. T.L.O.*, 469 U.S. 325, 367 (1985) (Brennan, J., concurring in part and dissenting in part).

265. Most teachers have advanced degrees, whereas few police officers have college degrees. Scholars of diverse viewpoints agree that the probable cause test is now the functional equivalent of a reason to suspect, or substantial possibility standard, thus police officers and school officials are subject to the same standard. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1332 n.348 (1990) [hereinafter Maclin].

266. *Burnham*, 681 F. Supp. at 1164.

267. *Id.* at 1165.

268. *Id.*

269. *Id.*

270. *See* New Jersey v. T.L.O, 469 U.S. 325, 342 (1985).

271. State v. D.T.W., 425 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1983).

272. Doe v. State, 540 P.2d 827, 832 (N.M. Ct. App. 1975).

search without delay and further investigation,[273] and the particular teacher or school official's experience with the student.[274] There must be articulable facts that provide reasonable grounds to search the student, and the search must further a legitimate goal of school officials in the necessity to maintain school discipline and order.[275] With these factors present, school officials will conduct only legal searches that comport to Fourth Amendment protections.

Justice White seems to approve the type of evaluation discussed above from his statement in *T.L.O.* that the Court should balance "the need to search against the invasion which the search entails."[276] He characterizes the values to be weighed as follows: "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."[277] This statement suggests that the Court is engaging in a straightforward cost-benefit analysis.[278] In our capitalist society, economic theory related to the conduct of school officials when attempting to search students can be clearly explained and understood by school officials.

Historically, states delegated power to local school officials to establish a proper curriculum and reasonable rules for the education of children. This delegation is often classified as the education and host functions of public schools, whereby public school authorities have a duty to educate and protect children placed in their charge. Implicit in their authority is the power for school officials to make rules to govern student conduct. Often this authority transcends the power of even the parent while the child is in school. The decisions of school officials will be upheld even when objections are made by parents to the application of a particular rule to their child. The school rule will be enforced even though it may be found not to fulfill parental desires.[279] Because of the enormous authority granted school officials to make school rules, the need for the acceptance of individualized suspicion is of utmost importance in drafting these rules.

School officials often have greater authority over children placed in their care than do courts and law enforcement personnel. Often, school violations committed by students never come before judicial bodies, but are resolved within the con-

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273. People v. Scott D., 315 N.E.2d 466, 470 (N.Y. 1974).

274. State v. McKinnon, 558 P.2d 781, 784 (Wash. 1977).

275. State v. Joseph T., 336 S.E.2d 728 (W. Va. 1985).

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

277. *Id.*

278. This kind of balancing, as Professor Ronald Dworkin notes, is a particularly inappropriate methodology in rights cases since it suggests that rights only exist when it is convenient for the society to recognize their existence. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 92 (1977). It has been suggested that we should be skeptical of the Court's use of classical utilitarian cost-benefit analysis as a basis for protecting rights as fundamental as those raised by the Fourth Amendment. Donald Crowley & Jeffrey L. Johnson, *Balancing and the Legitimate Expectation of Privacy*, 7 ST. LOUIS U. PUB. L. REV. 337, 350 (1988).

279. Stephen R. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 379 (1969) [hereinafter Goldstein].

fines of our schools.[280] Possession of an item that violates a school rule justifies a school-imposed punishment to foster respect for school rules and to modify the behavior of students violating the school rules. School authorities seem to prefer to deal with school violations, including drug problems, through their own techniques. They defer to police to solve problems, and in particular drug problems, to a lesser degree than would be expected. Often the schools will notify the student's parents and not police officers if contraband is seized. The school will use internal means in order to reduce the likelihood of future transgressions.[281] They may compel a student to attend counselling or educational programs to correct anti-social behavior by the use of rehabilitation and education instead of punitive means. For example, the school could have required T.L.O. to attend classes discussing the health risks resulting from smoking instead of bringing in the police and resorting to the courts. Thus, the school could properly use both its education and host functions to promote its established function, the education of children.[282]

Students spend approximately 180 days a year in school where they are subject to school rules and regulations. Decision-making by boards of education charged with the administration of public education is one of the most significant areas of law in terms of its effect on the lives of individuals and groups in our society.[283] A necessary condition to the validity of a school board rule is that it serve the education and host functions of the school.[284] It is essential that school boards be aware of the nature of their functions and of the appropriate criteria on which they can rely to decide that the school interest overcomes that of other institutions in the society.

Because of the immense grant of power to school officials, school rules must be carefully drafted. Public school teachers and administrators are often between competing and compelling interests, especially when they conduct personal searches of students. On one side of the balance is the school official's duty to protect the health, safety and welfare of all the students. On the other side is the students' constitutional right to be secure from unreasonable searches. Thus, school officials should clearly know and understand the significance of individualized suspicion because it is an essential element in conducting searches of students that truly balance educational and societal needs. This is a delicate and difficult duty. It is in the best interests of all concerned that school boards enact comprehensive

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280. A recent study of serious crimes in inner-city Chicago elementary schools indicated that only 15% of cases that required reports to the police by law were reported, and only one percent of these resulted in an arrest. Julius Menacker, *Getting Tough on School-Connected Crimes in Illinois*, 51 EDUC. L. REP. 347, 351 (1989). Menacker explains these percentages as reflecting frustration at the lack of conviction of the offenders. *Id.* Another explanation may be a reluctance on the part of the Chicago school authorities to bring criminal justice issues into the schools, especially at the elementary school level. *See also* Jennings v. Joshua Indep. Sch. Dist., 869 F.2d 870 (5th Cir. 1989) (discussing school policy of calling in police to search student cars suspected of concealing drugs, only after both students and parents have refused to consent to a search).

281. Zane, *supra* note 110, at 393.

282. *Id.*

283. Goldstein, *supra* note 279, at 375.

284. *Id.* at 387.

personal search policies that include the element of individual suspicion to protect the interests of all parties. The question the majority in *T.L.O.* did not ask is whether a democratic society wishes to inculcate the view that state agents may invade freedom under the amorphous "reasonableness, under all the circumstances," without the element of individualized suspicion.[285]

The vast majority of American citizens attend public schools on their way to adulthood.[286] Every citizen and public official passes through the schoolroom, and the values they learn there, they will take with them in life.[287] If students are conditioned by their observations and experiences, especially during their formative school years, what types of impression must they have when searched at school based on general grounds or on the violation of a trivial school rule? Such a background has to distort one's perception of constitutional rights and freedoms.[288]

To assure continued appreciation for our form of government and the bold steps the framers took to guarantee our rights and freedoms, we must create in our students these rights through example.[289]

The Court's holding in *T.L.O.*, without the element of individualized suspicion, may seriously undermine the protection that the Fourth Amendment affords to all individuals, including students. Since students are accorded full Fourth Amendment protections outside schools,[290] it seems absurd that those rights are transformed at the school gates. The discrepancy is likely to cause confusion. Students may seriously question the legitimacy and authority of a system that mandates attendance, attempts to inculcate democratic values, and then fails to accord them full constitutional protection.[291] Such questioning may result in heightened antagonism between students and administrators rather than increased order in the school environment.

VII. CONCLUSION

Justice Black's suggestion in *Korematsu v. United States*,[292] that the forced internment of Japanese American citizens could be justified by a "pressing public necessity,"[293] should remind us how easy it is in times of felt crisis to overwhelm the most fundamental of rights by claims of social utility. Drug abuse and violent

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285. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985). *See* Robert Berkley Harper, *Has the Replacement of "Probable Cause" with "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13 (1988).

286. *T.L.O.*, 469 U.S. at 385-86 (Stevens, J., concurring in part and dissenting in part).

287. *Id.*

288. "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." *T.L.O.*, 469 U.S. at 373-74 (Brennan, J., concurring in part and dissenting in part).

289. "[E]ducating 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." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

290. James A. Flynn, Note, *School Officials May Conduct Student Searches Upon Satisfaction of Reasonableness Test in Order to Maintain Educational Environment*, 14 SETON HALL L. REV. 738, 753 (1984).

291. *Id.* at 753 & n.114.

292. 323 U.S. 214 (1944).

293. *Id.* at 216.

crime in the schools have become major social problems even in our elementary schools.[294] But in this time of perceived danger due to substance abuse and violence, we should not develop to a state where constitutional rights are skewed to protect society from this perceived danger.[295] In reality, we are creating a great danger by lowering constitutional protections.

School searches today must be based on the reasonable suspicion standard as held by the Court in *T.L.O.* Although the Court did not expressly state that individualized suspicion must be included,[296] courts should read this element as being necessary for searches of school students. Also, school boards should address this issue by providing rules and guidelines for school officials which require that there be objective and articulable facts that give rise to the reasonable suspicion to justify the search of a particular student. School teachers and administrators must understand that prior to intruding upon the privacy interest of school students, they must be able to articulate facts which would lead a reasonably prudent person to suspect that a search was needed to find evidence of a school violation or a crime. This is not a major requirement for our public educators who often have advanced degrees, where a similar requirement is made for police officers in stop-and-frisk situations by *Terry v. Ohio*.[297]

The *T.L.O.* decision will be shaping our nation's tolerance for invasive governmental actions in the next century. In light of the actions of lower courts discussed in this article, individualized suspicion is not used by many school officials when searching students. If this conduct continues, we will be facing a dilemma, because students may react to general searches with hostility to authority, and this hostility will distort their interpretations of constitutional freedoms and governmental integrity. They may leave our schools without a clear understanding of the meaning of privacy and the protection granted from the government by the Fourth Amendment. Without a proper understanding of the freedoms on which this nation was founded, the "police state" discussed by George Orwell in his famous novel may not be very many generations away.[298] Also, we may well see that the rights granted to school children in *T.L.O.* without the element of individual suspicion, may well be characterized as a Trojan horse, which looks protective, but contains hidden dangers.[299]

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294. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

295. Maclin, *supra* note 265, at 1333-34. Professor Saltzburg stated: "It is understandable that the judicial branch of government would want to join with the other two in fighting against the use of illegal drugs." Saltzburg, *supra* note 194, at 3.

296. *T.L.O.*, 469 U.S. at 342 n.8.

297. 392 U.S. 1, 27-28 (1968).

298. GEORGE ORWELL, 1984 (1949).

299. Mary-Ellen Zalewski, Note, New Jersey v. T.L.O.: *Qualified Fourth Amendment Rights for Public School Students*, 64 OR. L. REV. 727, 738 (1986).