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The emerging "standard of reasonableness" for search and seizure in American public schools: Pre and post - New Jersey v. T.L.O.

Page, Stephen Leon, Ed.D.

The University of North Carolina at Greensboro, 1987

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THE EMERGING "STANDARD OF REASONABLENESS" FOR SEARCH AND SEIZURE IN AMERICAN PUBLIC SCHOOLS: PRE AND POST-NEW JERSEY V. T.L.O.

by

Stephen L. Page

A Dissertation Submitted to
the Faculty of the Graduate School at
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Approved by

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Search and seizure involving public school children is a relatively recent issue in American public education. Prior to 1985 search situations were litigated in virtually every level of state and federal court except the United States Supreme Court. In December 1985, the Supreme Court decided New Jersey v. T.L.O. The crux of this decision was the annunciation of "reasonable suspicion" as the standard to which school officials would be held. The Court established an inquiry process to assist in determining the legality of a search, but did not define "reasonableness."

Based on analysis of research presented in this study, it is apparent the definition of "reasonableness" is elusive. Determination of reasonableness remains a process imbued with human judgment. Nevertheless, certain conclusions can be drawn from the research: (1) public school searches and resulting litigation will continued; (2) in loco parentis will no longer serve as a sanctuary for school officials seeking to justify search of a public school student or his property; (3) immunity from civil prosecution will be difficult to obtain for school officials conducting unjustified and illegal searches; (4) the courts will continue to be concerned about students' rights and will not permit unrestrained search by school officials; (5) "reasonable suspicion" supported by articulable facts will be the standard applied to school personnel--not probable cause; (6) defining "reasonable suspicion" will continue to be a problem involving the judicial conceptualization of factors surrounding school related searches; (7) reasonableness will be based on factors influenced by a legal

framework involving articulable facts and a reasonable scope of search based on those facts; (8) other issues related to reasonable suspicion and search and seizure will continue to emerge in future litigation; and (9) the courts will continue to show a strong support for school officials, especially when a relationship can be shown between the area searched and the objected being searched for.

ACKNOWLEDGMENT

I wish to express a sincere thanks to Dr. Joseph E. Bryson and members of my committee for their encouragement and assistance in completing this dissertation.

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CHAPTER I

INTRODUCTION

On January 15, 1985, the Supreme Court in New Jersey v. T.L.O.,[1] addressed for the first time the issue of search and seizure in the public schools. Paramount to the case was a much litigated issue concerning the application of the Fourth Amendment as protection for students against searches conducted on school grounds by school officials. The Court affirmed what had already emerged in numerous lower court decisions that a standard of "reasonable suspicion" should supplant the rigid standard of "probable cause" set forth under the Fourth Amendment. Although the Court spelled out certain guidelines to assist in determining what would be reasonable, it stopped short of producing a full blown definition. How reasonable suspicion or "reasonableness" should be applied will be an outgrowth of subsequent cases that have recently been litigated or are currently before the courts.

An analysis of judicial decisions concerning search and seizure indicates an overwhelming absence of cases prior to the early 1970's. Many authors suggest that the cause for so little attention, prior to the decade, was because earlier searches and seizures were often affairs that remained internal to school and rarely involved outside authorities. They also down played the seriousness of items being searched for and relegated

[1] New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

them to be far less important to the harmony and well-being of school than items being sought for today. The transformation, therefore, proceeded from slingshots, pocketknives and ". . . the fruits of minor thievery" to more serious items, especially guns and drugs.[2]

The earliest search and seizure cases occurred in Tennessee in 1930 and 1944.[3] The scarcity of litigation for the following quarter century is attributed to the courts' failure to apply the Fourth Amendment to public schools. School personnel were not considered governmental persons, but rather private citizens, not held to the Fourth Amendment's prohibitions.[4]

Searches during this period were certainly not uncommon. It was a standard procedure in many public schools to periodically search student lockers and confiscate disallowed items. Serious items such as stolen property and alcoholic beverages often resulted in referral to juvenile authorities or suspension.[5] Two factors, both occurring in the late 1960's, would change this simple and little challenged process. The first factor was the sudden and dramatic introduction of illegal drugs on the public

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[2]Kern Alexander and David M. Alexander, The Law of Schools, Students and Teachers (St. Paul: West Publishing Co., 1984), p. 131.

[3]Phillips v. Johnson, 12 Tenn. App. 354 (1930) and Marlar v. Bill, 181 Tenn. 100, 178 S. W. 2d 634 (1944).

[4]Robert E. Phay, "The Law of Procedure in Student Suspension and Expulsions, " NOLPE Monograph Series, (September 1977), p. 36.

[5]Thomas J. Flygare, The Legal Rights of Students (Bloomington, Indiana: Phi Delta Kappa Educational Foundation, 1975), p. 17.

school campus.[6] The problem was recognized early to be a conflict between the "searches and seizures" provision of the Fourth Amendment and the responsibility of school officials to suppress the possession and use of harmful drugs in the schools.[7] This process must be considered in light of a second factor. Beginning in 1967 with the celebrated due process case of Gault[8] and continuing in 1969 with Tinker,[9] national attention was focused on the constitutional rights of children. This attention was further stimulated in 1975 by Goss and Strickland.[10]

It was therefore the juxtaposition of a number of features including drugs, guns and students' rights activism that fostered and sustained a deluge of search and seizure cases. The definition and establishment of student rights under these circumstances might be viewed as a "sign of the times." But what was also emerging in the courts was an absence of any specific set of standards. On a case to case basis, words phrases and ideas were applied in different manners. The most significant was the

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[6]William D. Valente, Law in the Schools (Columbus: Merrill Publishing Company, 1986), p. 324.

[7]H. C. Hudgins, Jr., Legal Issues in Education, ed. E. C. Bolmeier. (Charlottesville, Virginia: The Michie Company, 1970), p. 108.

[8]In re Gault, 387 U. S. 1 (1967).

[9]Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503 (1969).

[10]Goss v. Lopez, 419 U. S. 565 (1975) and Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992.

application of the word "reasonable."[11] Other important ideas were also brought under judicial review. At issue was whether or not school officials were agents of the state. Could school officials operate under the protection of in loco parentis while conducting searches? A review of early judicial decisions indicates a varied interpretation with issues and standards oscillating from one jurisdiction to another. T.L.O. settled this issue. The court held that the concept of in loco parentis was ". . . in tension with contemporary reality and the teachings of this Court." School officials are therefore the very same representatives of the state as pronounced in Tinker and Goss.[12]

Thus the standard of "reasonableness" will be the major focus of this study. The standard of reasonableness as applied prior to T.L.O., how it was defined and applied in T.L.O., and how the standard has been applied in judicial decisions since T.L.O. will be explored. Recommendations will be made to practicing school officials concerning the application of a rational standard of reasonableness.

STATEMENT OF PROBLEM

Practicing school administrators are burdened daily with a diversified operation that encompasses virtually the entire range of

[11]Diane C. Donoghoe, "Emerging First and Fourth Amendment Rights of the Students," Journal of Law and Education 1, No. 3 (July 1972), p. 465.

[12]New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

business management, human relations, and educational decision-making and with applying laws to the overall process. Police and other state agents, empowered with the right to make arrests, are involved in searches and seizures on a frequent basis and are informed about limitations concerning rights of people whom they serve. School officials, on the contrary, may not be confronted with search and seizure issues except on an infrequent basis and thus are unsure of their obligations and rights of students to whom they are charged to protect. The potential for error can work two ways. First, there can be the danger that the student's constitutional rights are violated and that a search is not justified and possibly illegal. The student is thus harmed and the school official is in jeopardy of being sued. Second, the uninformed school official may extend an unjustified and too liberal protection to an individual and thus put the larger group--the school and its student body--in a position of being endangered by an individual who is harboring dangerous contraband. It is therefore imperative that a school official understand the rights of the student as well as their own administrative obligations in conducting searches of students' persons and their private property on school grounds.

QUESTIONS TO BE ANSWERED

The major purpose of this study is to examine the evolution of reasonableness pre and post-T.L.O. and to produce a workable

recommendation for the use of school officials who must conduct a search in a public school setting.

Below are listed several key questions which need to be answered so that guidelines can be developed:

1. How was the "standard of reasonableness" concept addressed in judicial decisions?

2. How did the Supreme Court address the "standard of reasonableness" in T.L.O.?

3. Did the Supreme Court's case of T.L.O. decision confirm previous judicial decisions by lower courts?

4. Did T.L.O. redefine and establish new constitutional procedures?

5. How have lower courts addressed the "standard of reasonableness" concept since the Supreme Court's T.L.O. decision?

6. Based on an analysis of judicial decisions since T.L.O., what are the emerging trends and issues concerning search and seizure?

METHODOLOGY AND ORGANIZATION OF ISSUES

This is an historical study of legal issues concerning the emerging "standard of reasonableness" for search and seizure of students in American public schools. Thus the methodology is both historical and descriptive. An indepth review and search was made of the Education Index and cross referenced with the Cumulative Index to Journals in Education. Computer assisted searches were then initiated using a

combination of word descriptors from the Thesaurus of the Educational Resources Information Center (ERIC). An investigation was also made using the Cumulative Book Index, the Reader's Guide to Periodical Literature, the Index to Legal Periodicals, and the Legal Resource Index. A search was made of existing studies in the field using Dissertation Abstracts.

General references and a broad overview of issues can be found in the Encyclopedia of Educational Research, the Encyclopedia of Crime and Justice, and in fastbacks published by Phi Delta Kappa. Particularly helpful was Phi Delta Kappa's Legal Research for Educators (1984). Also useful was the National Organization on Legal Problems of Education's (NOLPE) Cases on . . . series which listed case citations on given topics. Search and seizure was updated in 1986. The American Civil Liberties Union also published in 1977 The Rights of Students as part of their "Rights of . . ." series. NOLPE also publishes a School Law Reporter that reviews all current cases.

Legal research was assisted by use of the massive National Reporter System, The American Digest System, Corpus Juris Secundum, and American Jurisprudence. A Uniform System of Citations was useful in sorting through legal citations and putting them into a homogeneous pattern. Black's Law Dictionary was especially helpful for identifying terms and for producing definitions of legal phraseology. A valuable secondary source was the American Law Reports (ALR). The ALR is a combination of case reporter and journal and is useful in giving insight into legal issues

DEFINITION OF TERMS

The terms defined herein are related to issues of search and seizure and occur and reoccur numerous times in the literature. The primary source of these definitions has been Black's Law Dictionary. Overall, this has been the most reliable source and the one most compatible with definitions brought forth in the case law.

Consent search: A search that is made after the subject of the search has consented freely and willingly. No warrant is necessary and it has been accepted that the fruits of such a search are legal and proper.[13]

Exclusionary rule: This rule simply provides that evidence seized in an illegal search cannot be admissible in legal proceedings against the defendant. This is restricted to criminal proceedings of the court but has not been applied to administrative proceedings such as those rendered by the public schools in disciplinary matters. It has been the attempt to exclude evidence seized in school searches from being admitted into criminal proceedings that has generated a significant number of search and seizure cases.[14]

Exigence or Exigency: This term is used to describe compelling circumstances that together or separately may require immediate action

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[13]Henry Campbell Black, Black's Law Dictionary, 5th Ed. (St. Paul: West Publishing Co., 1979), p. 277.

[14]Ibid., p. 506.

or remedy. The courts have applied this term to many search and seizure cases to test for critical conditions or pressing necessity to search.[15]

In loco parentis: The single factor most cited by experts as the reason for practically no litigation on search and seizure prior to the 1970's. It is literally interpreted as "In place of a parent." It bestowed upon school personnel the same rights and protections while dealing with children that the natural parents of the children enjoyed.[16]

Plain view doctrine: Items of contraband which are plainly open for view are sufficient grounds to conduct a warrantless search. So too have school officials enjoyed the same principle while dealing with illegal items on school grounds.[17]

Probable cause: This is the standard called for by the Fourth Amendment to the United States Constitution. For the purpose of search and seizure, it is the standard to which all law enforcement officers are held. It is the standard that goes beyond mere suspicion and belief and is supported by facts and evidence that a reasonably intelligent and prudent man would be compelled to believe that a search was justified.[18]

Reasonable suspicion: Although Black does not apply reasonable suspicion to search and seizure as was done with the term probable cause, nevertheless a comparable definition is used. Reasonable suspicion still

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[15]Ibid., p. 514.

[16]Ibid., p. 708.

[17]Ibid., p. 1036.

[18]Ibid., p. 1081.

requires that an "ordinarily prudent and cautious man" would be compelled to believe an incident had occurred or that contraband was present. Reasonable suspicion is a lesser standard than probable cause and does not require a warrant before conducting a search.[19]

DESIGN OF THE STUDY

This study is divided into five major chapters. Chapter II will be a Review of Literature on Search and Seizure and will cover the historical significance of this issue. Chapter III will be focused upon the issue of a "standard of reasonableness" and the development of the standard as a philosophical basis for conducting searches in public schools. The issues will be reviewed as pre-T.L.O., T.L.O., and post-T.L.O. Chapter IV will be an analysis and review of major litigation on search and seizure since T.L.O. Efforts will be made to show the trends of current litigation as influenced by the Supreme Court's T.L.O. decision. And finally, Chapter V will provide a summary, conclusion, and recommendations for practicing school officials. The questions asked in the introduction chapter will be answered here.

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[19]Ibid., p. 1138.

CHAPTER II

REVIEW OF THE LITERATURE

The search and seizure issue in American public schools has been a problem of relatively recent vintage. Yet, despite the newness of the issue to public education, it is certainly not new to the American thought process. The legal questions revolving around search and seizure are a direct outgrowth of the application of the Fourth Amendment to the United States Constitution. The Fourth Amendment development can be traced back to British Common Law and to the development of early legal rights claimed by sixteenth century lawyers. For example, Sir Edward Coke (1552-1634) stated that ". . . a man's house is his castle, et domus sua cuique tutissimum refugium" and "The house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose."[1] There are thus developed centuries earlier, a rich British Common Law tradition where every man's home was his castle upon which the drafters of the Constitution were greatly influenced.[2] At this time an interesting paradox was unfolding in the American experience. In

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[1]John Bartlett, Familiar Quotations (Boston: Little, Brown and Company, 1938), p. 21.

[2]Lester S. Jason et al., eds., The Constitution of the United States of America, Analysis and Interpretation (Washington: U. S. Government Printing Office, 1973), p. 1041.

Britain, William Pitt, Earl of Chatham (1708-1778) was secretary of state and prime minister.[3] In a speech to Parliament on the Excise Bill, Pitt eloquently exhorted that:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter, the rain may enter--but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.[4]

During this same period, and on the eve of the American Revolution, a much celebrated case unfolded in England, Entick v. Carrington.[5] Agents of the King had conducted widespread searches for materials related to John Wilkes polemical pamphlets. These documents had been less than complimentary of the King and had attacked numerous government policies. Suit was brought by Entick, Wilkes friend, because his house had been searched and virtually all personal papers, charts and pamphlets had been seized. The British court ruled in favor of Entick citing that the search conducted by the state agents had been ". . . contrary to the genius of the law of England." Furthermore there had been no demonstration of probable cause, nor had there been a record made of what had been seized.[6]

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[3]Samuel Eliot Morison, The Oxford History of the American People (New York: Oxford University Press, 1965), p. 165.

[4]Bartlett, p. 230.

[5]19 Howell's State Trials 1029, 95 Eng. 807 (1765).

[6]Jason, p. 1042.

While Pitt was standing before Parliament eloquently arguing for sanctity of an Englishman's home and while an English court heard arguments for private citizen Entick, the issue of search and seizure was very much alive in the American colonies. The paradox was that William Pitt was the government official most responsible for the experience Americans had with search and seizure. Prime Minister Pitt ordered that the Molasses Act of 1733 be strictly enforced by British agents in the colonies. The enforcement was to be accomplished by the detested writs of assistance.[7]

The writ of assistance was a Crown issued document that gave colonial customs officials an almost unrestricted privilege to search homes and businesses suspected of concealing contraband.[8] The search was focused upon molasses being imported from Caribbean islands controlled by Spain and France. Products from these foreign islands were subjected to the hated tax. Since colonists had a strong dependence on the molasses for the operation of their rum distilleries, the law was flagrantly ignored. It was therefore an unpopular law that served as a catalyst to a still more unpopular executive order.[9]

Widespread discontent was the American reaction to writs of assistance. The writs served to further broaden the already widening gap

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[7]Morison, p. 183.

[8]Bernard Schwartz, The Bill of Rights: A Documentary History, (New York: Chelsea House Publishers, 1971), pp. 205-206 and Fundamental Freedoms Project: Search and Seizure Source Book (Columbus, Ohio: Xerox Education Publication, 1973), p. 6.

[9]Morison, p. 183.

that was developing between Britain and the colonies. James Otis, a prominent Boston attorney, challenged the writs in court. In the courtroom was John Adams, who recorded Otis' heated argument. Prior to the trial, Otis had served the Crown as advocate general, but relinquished the position to argue for the colonies. Although Otis was eventually upheld on the local issue he argued, the discontent spawned during this period would resurface again.[10] In June 1767, Parliament passed the Townshend Act in reaction to certain American pamphleteers who had argued against direct internal taxes such as those provided for in the Stamp Act. Parliament hoped that an indirect tax such as that provided by import duties would be less offensive to the colonists. To collect duties on paper, glass, paint and East India Company's tea, an American Board of Commissioners of Customs was established. Writs of assistance were again used to search for contraband that escaped the scrutiny of newly commissioned customs officials. Americans were thus further reinforced in their bitter attitude toward unrestricted search of homes and businesses.[11] The use of search and seizure and the perceived abuse that occurred was one of the most deeply felt grievances held by the Americans against the British government.[12]

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[10]Graebner, Norman A. et al., A History of the American People (New York: McGraw-Hill Book Company, 1970), pp. 116-117 and Morison, p. 183.

[11]William Cohen and John Kaplan, Bill of Rights, Constitutional Law for Undergraduates (Mineola, New York: The Foundation Press, Inc., 1976), p. 516 and Morison, p. 192.

[12]Encyclopedia of Crime and Justice, ed. Sanford H. Kadish, (New York: The Free Press, 1983), p. 1416.

Although neither search and seizure nor writs of assistance were mentioned in the American Declaration of Independence, reference was made of the King's refusal to ". . . assent to laws the most wholesome and necessary for the public good."[13] Americans, did not forget the lessons learned under British colonial rule. Before the newly drafted Constitution's ratification in 1789, a number of states insisted that a statement of human rights be included. Thus the Bill of Rights was drafted and included along with the Constitution for ratification. The Bill of Rights became the first ten amendments to the Constitution. The Fourth Amendment specifically addressed search and seizure.[14] The Fourth Amendment was thus drafted by the framers, for specific practical reasons. The intention was to provide enforceable safeguards against abusive high-handed search and seizure measures experienced by the American colonists. What is abundantly clear is that the amendment was not an outgrowth of abstract philosophical thought or political theory.[15]

The federal judiciary was created by the Constitution. It consists of a Supreme Court and a series of lower federal courts. These courts are charged with the responsibility to interpret the Constitution and to rule on laws passed by Congress. The Fourth Amendment to the Constitution is

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[13]The Declaration of Independence (1776).

[14]Paul Lewis Todd and Merle Curti, Rise of the American Nation (New York: Harcourt, Brace and World, Inc., 1966), pp. 161-189. This popular high school textbook from the 1960's is explicit in its development of the idea that a person is secure in his person and property against unwarranted searches and seizures. It is the opinion of this writer that public school children of the 1960's and 1970's were cognizant of these ideas.

[15]Cohen, p. 513.

part of the supreme law of the land and is subject to interpretation by the federal courts. It is this interpretation and review in relation to American public education that is the subject of this study. And it would be inappropriate to explore the development of litigation concerning search and seizure in the schools without first understanding its development to the public at large.

While it may be true that students were searched while attending school in colonial times, any resulting litigation would have been settled in the colonial courts controlled by the English crown. No such cases have been discovered in researching the period. From 1789 to present times, there have been discernible periods which mark the evolution of the American courts relative to education. The first period has been described as one of "strict judicial laissez faire." This period from 1789 to about 1850 is distinguished by an absence of court activity on educational issues. Federal courts viewed public education as a state and local matter. Even state courts rarely intervened in school matters during this period.[16]

A second period began during the mid 1800's and lasted for the next century. State courts asserted that education was a state and local matter. Relatively few cases were presented to the Supreme Court concerning education. The body of case law concerning education grew at the state level. Many issues which, in fact, would have been contrary to the protections of the Constitution, were allowed to flourish in the states. The third period began in 1950. Referred to as the "reformation stage," this

[16]John C. Hogan, The Schools, the Courts, and the Public Interest (Lexington, Massachusetts: Lexington Books, 1974), p. 5.

period finds the federal courts, as well as the Supreme Court, recognizing that many state sanctioned educational policies and practices were actually out of conformity with constitutional guarantees. During this period the Court has sought to establish constitutional minimums to the state educational structures.[17]

Concomitant with the reformation stage has been an increasing tendency of the courts to expand its powers over the American public schools. This period entitled, "education under the supervision of the courts," continues today. The courts have become directly involved in matters of administration, programs, organization and student rights. In many cases the courts have retained jurisdiction until the mandates of the court have been accomplished.[18]

As public education continued to reach more students in the early twentieth century, the probability for challenges to school rules and regulations increased proportionally with the schools' population. The first significant litigation concerning student rights came in a 1923 Arkansas case, Pugsley v. Sellmeyer.[19] A local school rule prohibited the wearing of transparent hosiery, low-necked dresses and cosmetics. Miss Pugsley chose to wear talcum powder on her face in direct defiance to the rule. The Supreme Court of Arkansas held that the school rule was reasonable and within the rights and powers of the board of education to make and enforce.

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[17]Ibid., pp. 5-6.

[18]Ibid., p. 6.

[19]Pugsley v. Sellmeyer, 158 Ark. 247, 250 S. W. 583 (1923).

The justices clearly stated that the responsibility lay with the local organization and not the courts.

> . . . [C]ourts will not interfere in matters of detail and government of schools, unless the officers refuse to perform a clear, plain duty, or unless they unreasonably and arbitrarily exercise the discretionary authority conferred upon them.[20]

Newton Edwards in his 1940 classic, The Courts and the Public Schools, confirmed this principle established by Pugsley. The courts universally have applied the test of "reasonableness" to school rules and regulations and have not interfered with board of education policies. Citing a number of cases that upheld the schools' rules and regulations, Edwards added this admonition:

> A board regulation is not reasonable or unreasonable per se; its reasonableness is determined by the circumstances of each particular case. A rule which is reasonable in a warm climate may be unreasonable in a cold climate; a rule may be reasonable when applied to a boy of sixteen but unreasonable when applied to a girl of six.[21]

The courts, Newton contended, were reluctant to declare any board policy unreasonable. Judging on the wisdom or expedience of board of education rules and regulations would not be the responsibility of the courts, but left to the discretion of the local authorities.[22]

John C. Hogan wrote about the natural outcome of this type of extended court behavior. While courts were consistently "leaving education

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[20]Ibid., p. 583.

[21]Newton Edwards, The Courts and the Public Schools (Chicago: The University of Chicago Press, 1940), p. 526.

[22]Ibid., p. 526.

to the educators," state case law continued to increase in a volume that permitted practices that failed to meet minimum standard of constitutional guarantees. It was to be a mere matter of time that the attention of the federal courts would be activated to rule on legal issues related to public education. The change that would occur was an outgrowth of federal courts obtaining jurisdiction in education related cases. Prior to the 1950's, courts were being called upon to adjudicate the validity of state statutes under the United States Constitution. After 1950, cases involving the constitutional rights of individuals took the forefront. This was largely a result of the Supreme Court's interpretation that made the Bill of Rights applicable to the states.[23]

And so it has evolved that education cases are not decided in isolation from other cases. In fact, it has been the adjudication of cases from a broad spectrum of issues from all walks of life that have influenced judicial decisions in cases related to education.[24] Although not related specifically to education, these particular cases have created the framework from which the portrait of student search and seizure cases has emerged. Most of these precedent setting cases preceded the major student rights cases of the 1960's and 1970's. These also acted as major catalysts for the judicial focus on search and seizure in the public schools.

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[23]Hogan, p. 8.

[24]E. Edmund Reutter, Jr., The Supreme Court's Impact on Public Education (Topeka, Kansas: National Organization on Legal Problems of Education, 1982), p. 1.

The first major case heard before the Supreme Court on search and seizure was decided in 1886. This case, Boyd v. United States,[25] established that an individual's privacy was protected by the Fourth Amendment. Although Boyd was not physically searched, he was compelled by federal authorities to produce documents that were self-incriminating. Justice Joseph P. Bradley wrote for the majority and explained that to compel a private individual to produce his own private papers, in order that criminal charges could be established against him, was within the scope of protections afforded by the Constitution and contrary to the Fourth Amendment.[26]

Almost three decades later the Court accepted for review a case where an individual was subjected to warrantless arrest and seizure of letters and documents to be used as evidence against him. The defendant contended that the evidence was seized illegally and therefore should be excluded from consideration in the trial against him. Justice William R. Day explained in the Court's decision that no sanctions would be given to law enforcement officers who conduct unlawful seizures in order to gain evidence for criminal proceedings.[27]

> If letter and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such

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[25]Boyd v. United States, 116 U. S. 616, (1886).

[26]Ibid., p. 630.

[27]Weeks v. United States, 232 U. S. 383 (1914).

> searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. . . .[28]

This case established that federal officials could not use illegally seized evidence in federal trials. The Weeks Doctrine did not apply to state courts or to actions by state officials.[29] Over the next four decades a handful of related cases served to clarify the exclusionary rule established by Weeks.[30] The next significant case occurred in 1947. In Wolf v. Colorado,[31] the Court extended the established federal protections of the Fourth Amendment to individuals involved in state criminal proceedings, but declined to extend the exclusionary rule to include state officials. Justice Felix Frankfurter writing for the majority put the use of "logically relevant evidence" above implied individual rights.[32]

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[28]Ibid., p. 393.

[29]Kern Alexander and M. David Alexander, American Public School Law (St. Paul: West Publishing Co., 1985), p. 352.

[30]In Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1921) the Court established that all illegally seized evidence was to be excluded in federal court. In Walder v. United States, 347 U. S. 62 (1954) and Stenfanelli v. Minard, 342 U. S. 117 (1951) the Court allowed the use of illegally seized evidence to determine the credibility of witnesses. In Goldstein v. United States, 316 U. S. 114 (1942) the Court found that only the person whose rights had been violated by an illegal search and seizure could benefit from the exclusion of the evidence.

[31]Wolf v. Colorado, 338 U. S. 25 (1949). See Glendon A. Shubert, Quantitative Analysis of Judicial Behavior (Glencoe: The Free Press, 1959), pp. 341-361 for an analysis of cases between Weeks and Wolf.

[32]Ibid., pp. 28-33.

> We hold therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.[33]

And so for nearly fifty years, the courts applied a dual standard to search and seizure cases. Federal courts and officials were held to a strict standard and state courts and officials to a lesser standard. The lesser standard came to be known as the "silver platter" doctrine because evidence illegally seized by state officials could be admitted in federal courts if it could be established that there had been no collaboration with federal officials.[34] This would come to an end in 1961 in Mapp v. Ohio.[35] Cleveland police illegally entered a private residence and seized pornographic literature which led to the conviction of the owner. On appeal to the Supreme Court, the conviction was overturned and Wolf was reversed insofar as the application of the exclusionary rule.[36]

Justices Felix Frankfurter, John Marshall Harlan and Charles E. Whittaker dissented. Justice Tom C. Clark wrote for the majority:

> The ignoble shortcut to conviction left open to the State [by allowing use of illegally obtained evidence] tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officials

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[33]Ibid.

[34]The Supreme Court and Individual Rights, ed. Elder Witt, (Washington: Congressional Quarterly Inc., 1980), p. 179.

[35]Mapp v. Ohio, 367 U. S. 643 (1961).

[36]Ibid.

> is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.[37]

A knowledge of the issue surrounding the exclusionary rule is essential to an understanding of search and seizure in the public school. A significant number of school cases have involved pupil's attempts to have evidence seized by school officials ruled inadmissible by the courts.

Another issue related to the exclusionary rule was settled in Gouled v. United States.[38] The Supreme Court ruled that the protections of the Fourth Amendment were related only to the "fruits and instruments of crime and contraband" and not to "mere evidence." Aware that they personally could not conduct a legal search for contraband or evidence, federal authorities conspired with a friend of Felix Gouled to seize evidence from Gouled for them. Letters were seized, turned over to the federal authorities and introduced in court. Gouled was convicted of defrauding the government. The Supreme Court reversed the conviction and further extended the protections of the Fourth Amendment.[39] The significance of this can be seen in instances where police have sought to have school officials conduct searches.

The same year the Court further clarified protections of the Fourth Amendment in Burdeau v. McDowell.[40] McDowell, who had been

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[37]Ibid., pp. 659-660.

[38]Gouled v. United States, 255 U. S. 298 (1921).

[39]Ibid.

[40]Burdeau v. McDowell, 256 U. S. 465 (1921).

dismissed from his employment, was convicted in federal court on evidence presented to authorities by his former employers. The evidence was seized after a lock was blasted from McDowell's private office safe. The Court ruled that the Fourth Amendment protects citizens only against searches and seizures conducted by government agents. The protection is not extended to include searches and seizures by "private individuals."[41] The significance of this case surfaced time and again in public school cases as litigants sought relief from searches conducted by school officials. The question was simply, were school officials agents of the state subject to the restrictions of the Fourth Amendment or did they act as private individuals, exempt from such exemptions? And as in Gouled, were they acting in behalf of government agents?

Another issue concerned warrantless searches where the person being searched waived the expectation of a search warrant and gave consent. The judgment in the most significant case was handed down in 1973. Justice Potter Stewart wrote for the majority and concluded that a person who voluntarily consents to a search, without threat ". . . and not the result of duress or coercion, expressed or implied" gives up his protections afforded to him by the Fourth Amendment.[42] A strong dissent was noted from Justices Thurgood Marshall, William J. Brennan, Jr., and William O. Douglas who questioned the logic of the majority. How could a person rationally give up a protection ". . . as precious as a constitutional

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[41]Ibid.

[42]Schneckloth v. Bustamonte, 412 U. S. 218, 248-249 (1973).

guarantee without ever being aware of its existence."[43] The significance of this litigation to searches and seizures in an educational environment is obvious. Subsequent cases emerging from search and seizures in the public school environment have leaned upon this consent doctrine.

Another significant development concerned the searching of automobiles. In Carroll v. United States[44] the Court established a venerable precedent that allows law enforcement officers to conduct warrantless searches of automobiles. Chief Justice William Howard Taft wrote for the Court. Unlike a stationery building or dwelling a ". . . vehicle can be quickly moved out of the locality or jurisdiction in which the warrant might be sought." It is therefore impractical to expect law officials to procure a warrant to search something that might be moved in the interim.[45] The principles established in Carroll was refined over the next half century and the substance of this principle remained intact. The significance to educational cases increased in proportion to the increasing number of students who brought automobiles to school.

Probably no issue better demonstrates the labyrinth of problems and intricacies facing the courts than that of administrative searches. This type of search includes a broad range of governmental responsibilities to inspect for health, fire, and safety hazards in homes and businesses. Tangential cases related to arson investigation, and the regulation of guns

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[43]Ibid., p. 277.

[44]Carroll v. United States, 267 U. S. 132 (1925).

[45]Ibid., p. 153.

and alcohol have further expanded the issue. In Frank v. Maryland,[46] health officials were excluded from restrictions under the Fourth Amendment. This decision was reversed in 1967 in Camara v. Municipal Court.[47] The Court stated:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[48]

The application of this principle would be renewed in cases involving the search of student lockers for library books, forgotten lunches and, of course, contraband.

Eavesdropping cases have also been categorized as Fourth Amendment related. The landmark case, Olmstead v. United States,[49] involved the telephone wiretap of an alleged bootlegger. The Supreme Court reasoned that the Fourth Amendment protected only against "material" searches. Since there was no search of a person or a "thing," it reasoned that no violation had occurred. A dissent written by Holmes chided his colleagues for their decision and expressed his opinion that it was ". . . less evil that some criminals should escape than that the government should play an ignoble part. . ." in such an invasion of privacy.[50] As the Court

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[46]Frank v. Maryland, 359 U. S. 360 (1959).

[47]Camara v. Municipal Court, 387 U. S. 523 (1967).

[48]Ibid., p. 530.

[49]Olmstead v. United States, 277 U. S. 438 (1928).

[50]Ibid., p. 466. Justice Louis D. Brandeis also dissented and expressed vehemently his opinion that wiretapping was clearly a search as defined by the Fourth Amendment, and a crime in itself.

sought to further define its opinion concerning the use of electronic eavesdropping, the opinion of the minority eventually emerged as the opinion of the majority. Olmstead was reversed in 1967 by Katz v. United States.[51] Justice Potter Steward writing for the new majority expressed that the Fourth Amendment protected people, not places. What a person seeks to keep private is protected by the Constitution. In the case of Katz, his use of a telephone booth was private, not from visual inspection, because he clearly was visible to anyone who chose to look, but rather to his spoken word which he sought to keep private by closing the door.[52] The intricacies of electronic eavesdropping continues to unfold and will undoubtedly be the subject of future litigation. The application for public school cases emerged with the use of one-way mirrors, metal detectors and dogs trained to smell for drugs.[53]

The dramatic emergence of search and seizure cases in the late 1960's would not have occurred without the development of case law just discussed. But case law alone could not have been sufficient catalyst to cause this emergence. Another major factor was the change that transpired in the composition of the Court in the early 1950's. No single factor is more significant than the appointment by President Dwight D. Eisenhower of Earl Warren as Chief Justice of the Supreme Court.

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[51]Katz v. United States, 389 U. S. 247 (1967).

[52]Ibid.

[53]Other case law has accumulated relative to search and seizure which seemingly has little direct application to public school cases. These include, but are not necessarily limited to, cases of border searches and other cases related to national security.

Eisenhower announced that his choice was based on Warren's integrity, middle-of-the-road philosophy and on experience in law and government.[54]

Within months of his appointment, Warren wrote the Court's unanimous landmark decision in Brown v. Board of Education.[55] This monumental decision exemplifies the onset of the reformation stage of court development. Warren's conversion from moderate to liberal was not instantly apparent. During the same year that Warren wrote Brown, he voted in Irving v. California[56] to uphold a criminal conviction based on evidence that was illegally seized by California authorities. His conservatism was short lived and by 1956 it was generally recognized that Warren had shifted from a moderate-center position and was aligning himself with the more libertarian members of the court.[57]

Bernard Schwartz portraited Warren as the man who served the country for sixteen years from 1953 to 1969, establishing what would forever be known as the "Warren Court."

> It was a period in which the Supreme Court furiously generated precedent after legal precedent that would touch more American lives, then and later, more directly than any other institution or series of events in the twentieth century save the Great Depression.[58]

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[54]Catherine A. Barnes, Men of the Supreme Court: Profiles of the Justices (New York: Facts on File, Inc., 1978), p. 154.

[55]Brown v. Board of Education of Topeka, 347 U. S. 483 (1954).

[56]Irving v. California, 347 U. S. 128 (1954).

[57]Barnes, p. 155.

[58]Bernard Schwartz and Stephan Lesher, Inside the Warren Court (Garden City, New York: Doubleday and Company, Inc., 1983), p. 3.

The Warren Court oversaw ". . . the greatest American social and political revolutions since the War Between the States." White patrimony ultimately yielded to black power. National paranoia shifted from its focus on communism and McCarthy to crime. There was rampant civil disorder brought on by social conditions and an unpopular foreign war. Civil liberties were expanded along with academic and political freedom, the franchise, the right to assemble and religion. The Court limited the power of ". . . politicians in smoke-filled rooms . . . and defined the limits of police power."[59]

The Court, which in the past had served as ". . . a brake on the social mechanism," now pushed out in front of public opinion and led the way for new standards of societal control and behavior. Never in American history had the general public become so conscious of the changing role of the Supreme Court.[60] School personnel were especially aware of the changes taking place. As one public school principal noted in 1968:

> . . . [W]e have entered a new era of individual rights and the chances are great that the secondary school will be increasingly affected . . . . the new bounds established for freedom of speech, religion, and press; the revolution in pretrial criminal procedure; the revamping of juvenile court processes to accord the young accused rights formerly reserved for adults; the ferment of the college campus--all will most certainly have influence on high schools.[61]

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[59]Ibid., pp. 3-4. An excellent treatment of the Warren Court relative to public education can be found in Hudgins, H. C., Jr., The Warren Court and the Public Schools (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1970).

[60]Paul L. Murphy, The Constitution in Crisis Times (New York: Harper and Row, Publishers, 1972), p. 458.

[61]W. E. Griffiths, "Student Constitutional Rights: The Role of the Principal," N.A.S.S.P. Bulletin 50 (September, 1968), p. 30.

Education had achieved a high priority among the developing social needs of the time. With the high interest in all phases of education, came increased interest in legal aspects. George Johnson referred to this phenomenon as "creeping legalism in education."[62] Although the Court had dealt with pre-college public school disciplinary rules in the past, it had limited its involvement to issues involving religion. In February 1969, the Court issued a landmark decision that would turn "creeping legalism" into full gallop. Tinker v. Des Moines Independent Community School District[63] established guidelines for student rights.[64] The case involved the suspension of students for wearing black armbands as a symbolic protest for the war in Vietnam. School officials had banned the wearing of armbands because of fears that it would create a disturbance at the school.[65] The specific facts of the case have had little impact on public education, but what the court had to say about student rights had an "alarm bell in the night" effect on public education. Tinker undoubtedly has become the most referred to case on student rights.[66] The classic statement of Tinker expressed by the Court is as follows:

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[62]George M. Johnson, Education Law (East Lansing: Michigan State University Press, 1969), p. xix.

[63]Tinker v. Des Moines School District, 393 U. S. 503, 89 S. Ct. 733 (1969).

[64]Reutter, p. 145.

[65]Tinker, p. 736.

[66]Reutter, p. 145.

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[67]

Although the issues involved in Tinker were not directly related to the Fourth Amendment, the resulting references to student rights had direct applicability to cases involving student searches and seizures.[68] Another case of the period also had a profound effect on student rights issues. In re Gault[69] involved a juvenile who had been denied the right to confront or cross examine witnesses in a criminal proceeding against him. Although this case was not specifically related to public education, the findings would have a direct influence on educators' treatment of juveniles. Gault established that juveniles were not to be treated differently from adults on issues of "due process," of notice of charges, of the right to have counsel, and from self-incrimination.[70] Although search and seizure cases increased significantly after 1969, the Court continued to define students' due process rights. In Goss v. Lopez,[71] the Court specifically extended "due process" requirements to the public schools. School officials in Ohio had

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[67]Tinker, p. 736.

[68]It is interesting to note that Tinker represents a complete reversal of the burden of proof as required in Pugsley. The reasonableness of a school rule was shifted to the school personnel, who would be responsible for demonstrating the necessity of a school rule.

[69]In re Gault, 387 U. S. 1 (1967).

[70]Ibid.

[71]Goss v. Lopez, 419 U. S. 565 (1975).

argued that the due process clause of the Fourteenth Amendment applied only to issues where there was a deprivation of life, liberty, or property. Since none of these elements were present in the case against Goss, the educators reasoned that Goss could not seek its protection. The Court in a five-to-four decision, found that students did have a "property" interest in a state-granted public education. Furthermore, the recording of suspensions on student records, reasoned the Court, also established a liberty interest for students.[72]

The literature on search and seizure would not be complete without a commentary on the social conditions of the times. The period directly preceding the onset of search and seizure litigation was marked by student unrest and dissatisfaction. As Diane Donoghoe wrote, these were ". . . signs of our times."[73] Students were becoming increasingly angry with the "establishment" and a feeling was growing that the social structure as well as "oppressive" authority had to be changed.[74] Alfred Kelly compared the United States in 1970 to the United States after the War between the States. There was, he wrote, a prevailing atmosphere of crisis. America was deeply enthralled in an era of political, economic, and social change. Kelly enumerated the various pressures on the United States. These included the emergence of the United States as a world "superpower," and the resulting internal stresses brought on by the Cold War. To this was added stress

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[72]Ibid.

[73]Diane C. Donoghoe, "Emerging First and Fourth Amendment Rights of the Students," Journal of Law and Education 1 (July, 1972), p. 465.

[74]Ibid.

caused by repeated social crisis, internal problems, Vietnam, the black revolution, populist egalitarianism, youth demanding a greater role in societies' decision-making processes, pollution, overpopulation and the New Left.[75]

It is not surprising then that students began to question their rights in all aspects of their existence in school. Prior to 1969, there were only two search and seizure cases litigated. Both cases occurred in Tennessee and are isolated in the literature on search and seizure. The first case involved a teacher's search of a student because the student had been physically present in a room where money was later discovered missing. The teacher sought protection under the principle of in loco parentis. The court said that in loco parentis was extended to school personnel for their performance as teachers, but not for the purpose of recovering money from a student for a third party.[76] The second case involved a teacher's search of a student's pockets after it was discovered that money was missing from a room where he had been found. The court ruled that the teacher was acting in the best interest of the student because the search was conducted merely to clear the student from suspicion.[77]

Although a notable void developed in search and seizure cases for the next quarter-century, the evidence is conclusive that public school searches

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[75]Alfred H. Kelly and Winfred A. Harbison, The American Constitution, Its Origins and Development (New York: W. W. Norton and Company, 1970), p. 1062.

[76]Phillips v. Johns, 12 Tenn. App. 354 (1930).

[77]Marlar v. Bill, 181 Tenn. 100, 178 S. W. 2d 634 (1944).

continued. John C. Walden pointed out the uniqueness of school searches during what he labeled as the "formative years" of public education. When a search did occur, it focused on a minor school rule or a petty theft and the worst result was an outburst by angry parents.[78] Thomas J. Flygare recalled his teaching experience during the same period.

> When I was a teacher . . . the principal would ring the school bell, and all students were instructed to file into the hallway and stand by their lockers . . . . Each locker was then thoroughly searched. Any suspicious items such as squirt guns, girlie magazines, cigarettes, etc., were confiscated.[79]

Prior to 1969, the right of school personnel to conduct searches of students and their property was seldom questioned. The prohibitions of the Fourth Amendment against unreasonable searches was generally accepted to be inapplicable to public school situations.[80] This attitude was to change quickly and dramatically. A primary factor in the equation, and one that would bring attention to public schools from all quarters was illegal drugs.[81] The use of illicit drugs dramatically increased the incidents of school searches and students armed with the newly acquired knowledge of their "rights" were quick to challenge the use of warrantless searches by

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[78]John C. Walden, "Searches in the Schools: Implications of Recent Court Decision," National Elementary Principal 52 (September 1972), p. 97.

[79]Thomas J. Flygare, The Legal Rights of Students (Bloomington: The Phi Delta Kappa Educational Foundation, 1975), p. 17.

[80]Leroy J. Peterson and Lee O. Garber, The Yearbook of School Law 1972 (Topeka: National Organization on Legal Problems of Education, 1972), p. 185.

[81]Martha M. McCarthy and Nelda H. Cambron, Public School Law, Teachers' and Students' Rights (Boston: Allyn and Bacon, Inc., 1981), p. 301.

school officials.[82] Scholars of school law were equally quick to recognize the potential for legal complications brought on by the responsibilities of school officials to suppress the possession and use of harmful drugs by public school students.[83] Data collected over this period by the U. S. Department of Health, Education, and Welfare confirmed the increase of drug use among high school students. Sixty-five percent of high school seniors in the United States admitted to using illicit drugs at least once in their lives. Ninety percent reported that marijuana was readily available on their school's campus.[84] In 1968 the New York Times reported that marijuana use among incoming college freshmen was on the increase. Most of the students were already using the drug by the time they arrived on the college campus.[85]

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[82]William D. Valente, Law in the Schools (Columbus: Merrill Publishing Company, 1986), p. 324.

[83]H. C. Hudgins, Jr., Legal Issues in Education, ed. E. C. Bolmeier (Charlottesville: The Michie Company, 1970), p. 108.

[84]Drugs and the Nation's High School Students (Bethesda: U. S. Department of Health, Education, and Welfare, Publication No. 80-930, 1979), p. 23.

[85]New York Times, January 11, 1968, p. 18, col. 2.

The literature related specifically to public school search and seizure begins with the first modern search and seizure cases in 1969.[86] Writing in the 1970 Yearbook of School Law, Lee O. Garber made this observation:

> As would be expected, cases are beginning to arrive in appellate courts involving public school students and the Fourth Amendment's prohibition against unreasonable searches and seizures. Since possession of certain narcotics constitutes a criminal offense, as well as a problem of school discipline, it is in this connection that the problem is most frequently arising.[87]

Three major cases were heard in 1969 alone.[88] These cases in turn generated significant scholarly analysis. The vast majority of commentary has made its appearance in scholarly journals and as parts or chapters of books on educational law and student rights. Several writers have been prolific while a majority have produced singular articles. The preponderance of literature is relatively narrow in scope and is generally repetitious. Because case law provides a continually unfolding saga, the resulting literature has tended to be cumulative and emphasizes cases most current to the time of the article's publications.

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[86]Three cases prior to 1969 were related to searches conducted on university campuses. The first established that school officials could enter a dormitory room with a warrant if an emergency existed. People v. Kelly, 16 Cal. Rptr. 177 (1961). The second case established the necessity for college officials and police to acquire a warrant before conducting a search of a dormitory room. People v. Cohen, 292 N.Y.S. 2d 706 (1968). The third rejects the concept of in loco parentis for college officials. Moore v. Student Affairs Comm., Troy State Univ., 284 F. Supp. 725 (1968).

[87]Lee O. Garber and E. Edmund Reutter, Jr., The Yearbook of School Law, 1970 (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1970), p. 335.

[88]In re Donaldson, 269 Cal. App. 2d 509; 75 Cal. Rptr. 220 (1969), State v. Stein, 456 P. 2d 1 (1969), and People v. Overton, 301 N.Y.S. 2d 479 (1969).

Much of the literature expands on issues relative to cases before the court at the time of the article's publication. Consider the discrepancies in these article titles: "Search of Lockers with Drug-Sniffing Dogs Does not Violate Students Constitutional Rights" and in contrast "When It Comes to School Drug Searches, Take this Prudent Advice: Beware of the Dog."[89] Although personal opinion emerges in many of the articles, the majority are narrative in nature and serve as reports on the courts' opinions, an interpretation and a statement of its implications.

SUMMARY

A review of pertinent literature on search and seizure in the public schools has shown that the issue of search and seizure is richly entwined in British Common Law and the American colonial experience. Although public school cases did not emerge until midway into the twentieth century, precedents were being established throughout the late nineteenth and early twentieth century as courts sought to apply and interpret the Fourth Amendment to the Constitution.

The emergence was also tied into the dramatic change in American jurisprudence brought on by the Warren Court. The Warren Court was unequaled in its pursuit to establishing equality and protection to all citizens under the Constitution. Concomitant to the actions of the court

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[89]Phyliss Huffman, "Search of Lockers with Drug-Sniffing Dogs Does not Violate Students Constitutional Rights," School Law Bulletin 12 (April, 1981), pp. 17-18 and Benjamin Sendor, "When It Comes to School Drug Searches, Take the Prudent Advice: Beware of the Dog," American School Board Journal 170 (March, 1983), p. 23.

were dramatic economic, political and social stresses being brought onto American society. All of this provided fertile ground for the resulting deluge of search and seizure cases that would commence in 1969.

CHAPTER III

THE EMERGING "STANDARD OF REASONABLENESS" FOR SEARCH AND SEIZURE IN AMERICAN PUBLIC SCHOOLS

INTRODUCTION

The Supreme Court's decision to grant certiorari in the 1985 New Jersey v. T.L.O.[1] search and seizure case involving an assistant principal's search of a fourteen-year-old high school freshman girl produced a landmark decision concerning the application of the Fourth Amendment to searches conducted on school grounds by school personnel. Inherent in the review is the Court's collective wisdom on right of students to be secure in their person and effects against unreasonable searches and seizures balanced against the public school's responsibility to maintain an atmosphere conducive to learning and for safety for both students and teachers.

The volume of prior litigation by the U. S. Court of Appeals, U. S. District Courts and State Appellate Courts is extensive. The Court in deciding T.L.O.[2] relied on a multiplicity of ideas and issues that had emerged from these cases. Of paramount concern was the standard of reasonableness that would justify the physical search of a public school

[1]New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

[2]Ibid.

student. Initially the lower courts relied exclusively on established criminal case law, but as school related cases began to accrue, courts began to rely on other school decisions and the collective arguments and rationale for various findings began to enmesh.

Cases prior to T.L.O. could not benefit from Supreme Court decisions based on school related search and seizure. Thus courts were relatively free to develop their own arguments and rationale based on specific facts of the case. The Fourth Amendment protects individuals against "unreasonable" searches and seizures. The standard established by the constitutional framers called for warrants to be issued ". . . only upon probable cause, supported by oath or affirmation . . . ."[3] It is therefore inferred that a "reasonable" search is permitted, and the Court determined that the search of T.L.O. was reasonable. The determination of reasonableness, the Court said involved a ". . . twofold inquiry as to whether the action was justified at its inception and whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."[4]

Cases subsequent to T.L.O. relied on this twofold inquiry process. The Supreme Court either from its own wisdom, or perhaps its own uncertainty, stopped short of producing an all encompassing formula for determining reasonableness. As cases continue to mount in number, the

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[3]U. S. Const. amend. IV.

[4]New Jersey v. T.L.O., 105 S. Ct. 733, 734 (1985).

definition of reasonableness and what constitutes a reasonable search in the public school setting will emerge.

THE EVOLUTION OF REASONABLENESS--PRE-T.L.O.

The judiciary's concept of reasonableness applicable to educational related issues is not unique to search and seizure. A standard of reasonableness prevailed in the majority of educational related litigation until Tinker[5] in 1969.

> From Pugsley (1923) until Tinker (1969), in school cases, the courts almost uniformly adopted the concept of "reasonableness" as the standard for measuring the constitutionality of an educational practice or a school rule. They refused to consider if such practice was wise or expedient, but asked only whether it was a reasonable exercise of the power and discretion of the school authorities. Where a school rule could not be shown by the plaintiff to be "arbitrary, capricious, or unreasonable," the courts would not interfere, leaving the matter to the educational judgment and discretion of the school authorities . . . .[6]

There is, of course, a certain frustration in dealing with a nebulous conceptual term such as reasonableness. Reasonableness by its very nature is closely tied to and dependent upon specific circumstances of each case. As stated in Chapter Two: "A rule which is reasonable in a warm climate may be unreasonable in a cold climate; a rule may be reasonable when applied to a boy of sixteen but unreasonable when applied to a girl of

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[5]Tinker v. Des Moines Indep. Community School Dist., 89 S. Ct. 733.

[6]John C. Hogan, The Schools, the Courts, and the Public Interest (Lexington, Massachusetts: Lexington Books, 1974), p. 80.

six."[7] As cases involving search and seizure developed after 1969, courts found themselves involved in developing doctrines, phrases and ideologies on a case-to-case basis.

> [T]he deluge of litigation concerning the enumeration, definition, and extent of particular rights possessed by students, and the degree of control permitted the schools in regulating these rights has not brought forth a specific set of standards that can be followed by students and school officials alike. Each case applies a doctrine, phrase, or ideology on a case-to-case basis, using a different interpretation of these words and phrases to meet the specific situation. The best example of this is in the courts' use of the word, "reasonable." It is almost impossible to get a clear definition of this word from the cases. If the court feels a school or university rule or regulation is valid, it is "reasonable", and the actions taken by the school principal or university official will be upheld. It bases this on the need of the public school official to act under the in loco parentis doctrine or on the holding that the action was a "reasonable" attempt to maintain order and discipline in order to carry out the educational functions of the school.[8]

Each case coming before the courts required the inspection of facts and circumstances that ranged along a continuum of probability from "no evidence" to "almost certainty." Application to students of probable cause and reasonableness became a direct outgrowth of the courts' interpretations of the facts of each case. But the problem continued to remain one of interpretation.[9]

> The degree of reasonableness required to justify one particular form of intrusion is not constant; specific guidelines are difficult to ascertain. Some courts, for example, rely on the intrusion at a

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[7]Newton Edwards, The Courts and the Public Schools (Chicago: The University of Chicago Press, 1940), p. 526.

[8]Diane C. Donoghoe, "Emerging First and Fourth Amendment Rights of the Students," Journal of Law and Education, 1, No. 3 (July 1972), pp. 465-466.

[9]Ibid., p. 449.

> particular moment, as perceived from the then-known facts, and weigh this against society's interest[.][10]

In the 1968 Terry v. Ohio.[11] case, "society's interest" was the prevailing issue. Here, a balance was made by the Court to determine if a search conducted by a reasonably prudent man (in this case a police officer) ". . . would be warranted in the belief that his safety or that of others was in danger."[12] Terry involved a type of police procedure known as "stop and frisk." The intent was to make sure potential criminals were not armed upon making contact with an investigating police officer. The Court ruled that for reasons of practicality, the police officer was exempt from obtaining a warrant to search but was not exempt from the "reasonableness" requirement of the Fourth Amendment.[13]

> In order to assess the reasonableness of conduct as a general proposition, it is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen for there is no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.[14]

The police officer in Terry had ". . . to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[15] Mere "hunch" would not be

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[10]Ibid.

[11]Terry v. Ohio, 392 U.S. 1 (1968).

[12]Ibid., p. 27.

[13]Ibid.

[14]Ibid., pp. 20-21.

[15]Ibid., p. 21.

sufficient.[16] It was precisely an adaptation of the Terry standard that many courts applied in school related searches.[17]

LOCKER SEARCHES

Some of the first cases to reach the courts involved the search of students' lockers. In State v. Stein[18] the principal's search of a student's locker was deemed to be reasonable despite the fact that the principal had been prompted by the police to conduct the search. Reasonableness was based on the administrator's claim that he had used his "own judgment" to make the search. The United States Supreme Court apparently agreed with the Kansas appellate court because certiorari was denied.[19]

In another locker case,[20] the Court of Appeal of California found that the warrantless search of a student's locker for drugs was deemed reasonable. The vice-principal had conducted the search predicated on information supplied by an informant who had purchased drugs from the defendant. Although no correlation was shown between the locker and the sale of drugs, the court stated that:

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[16]Ibid., p. 27.

[17]Ann L. Majestic, "Search and Seizure in the Schools: Defining Reasonableness," School Law Bulletin, 16, No. 3 (Summer, 1985), p. 2.

[18]State v. Stein, 456 P. 2d 1 (1969), cert. denied, 90 U.S. 966 (1970).

[19]Michael La Morte et al., Students' Legal Rights and Responsibilities (Cincinnati: The W. H. Anderson Co., 1971), p. 153.

[20]In re Donaldson, 75 Cal. Rptr. 220 (Ct. App. 1969).

> We find the vice principal of the high school not to be a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable searches and seizures. Such school official is one of the school authorities with an obligation to maintain discipline in the interest of a proper and orderly school operation, and the primary purpose of the school official's search was not to obtain convictions, but to secure evidence of student misconduct. That evidence of crime is uncovered and prosecution results therefrom should not of itself make the search and seizure unreasonable.[21]

In still another locker search case, Overton v. Rieger[22] the court found the search conducted by a vice-principal to be valid and reasonable. The search was instigated by the police who produced a search warrant that was later found to be invalid. The discovery of drugs and the subsequent introduction of them into evidence against the defendant was nevertheless permitted because the search had been conducted not by the police but by the school official.[23] The court furthermore was in agreement with the vice-principal's testimony ". . . that whenever in the course of his duties he received a report of the likelihood of the existence of an item of illegal nature in a locker assigned a student, he would undertake to inspect it."[24]

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[21]Ibid., p. 223.

[22]Overton v. Rieger, 311 F. Supp. 1035 (1970), cert. denied, 401 U.S. 1003 (1971).

[23]Ibid., p. 1036.

[24]Ibid., p. 1038.

A two-prong test for reasonableness was expressed in In re W.[25] The search in this case was motivated by information supplied to the school's assistant principal by four informants. The court stated that:

> We believe that the appropriate test for searches by high school officials is two-pronged. The first requirement is that the search be within the scope of the school's duties. The second requirement is that the action taken, the search, be reasonable under the facts and circumstances of the case.[26]

The Tenth Circuit Court of Appeals, in the 1981 Zamora v. Pomeroy[27] case, found that the use of dogs trained to sniff for drugs was not in violation of students' constitutional rights. A student's locker was searched after the dog alerted. The student was not arrested but rather was subjected only to school disciplinary action. The court found the school's action to be reasonable. Reasonableness was based on two key factors. First, the school maintained control and access to all school lockers. Second, the plaintiff, Zamora, had been furnished with a written policy of the school's dual control of lockers and notification that lockers were subject to search at any time. The validity of the search was based on reasonable suspicion.[28]

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[25]In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

[26]Ibid., p. 778.

[27]Zamora v. Pomeroy, 639 F. 2d 662 (1981).

[28]Phyliss Huffman, "Search of Lockers with Drug-Sniffing Dogs Does not Violate Students' Constitutional Rights," School Law Bulletin, 12, No. 2 (April 1981), p. 18.

PERSONAL SEARCH (WEAPONS)

In the 1978 In re Ronald B.[29] personal search of a student reported to be armed was upheld by the Supreme Court, Appellate Division of New York. The court cited and enumerated several factors that when collectively answered would establish the reasonableness of a warrantless search. The factors taken directly from the 1977 McKinnon[30] decision included the student's age, history and school record, seriousness and prevalence of the problem which prompted the search and factors contributing to the exigency to make the search without delay.

Previous contact with a student led the court in In re L. L.[31] to find that a teacher-conducted search was reasonable. Since the student had on previous occasions been in possession of razor blades and a knife, the court weighed factors outlined in In re Ronald B.[32] and concluded that previous contact was sufficient to permit a reasonable search. On appeal the court concluded that subsequent discovery of marijuana and not a weapon did not affect the reasonableness of the case.[33]

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[29]In re Ronald B., 401 N.Y.S. 2d 544 (App. Div. 1978).

[30]State v. McKinnon, 558 P. 2d 781 (Wash. 1977).

[31]In re L. L., 90 Wis. 2d 585, 280 N.W. 2d 343 (1979).

[32]In re Ronald B., 401 N.Y.S. 2d 544 (App. Div. 1978).

[33]In re L. L., 280 N.W. 2d 343, 352 (1979).

PERSONAL SEARCH (STOLEN PROPERTY)

Searches for stolen property have been viewed more stringently by the courts. Two exceptions include D.R.C. v. Alaska[34] and In re Guillermo M.[35] The search for stolen money in D.R.C. was reasonable because school officials were not actual police officers and therefore held to a lesser standard than probable cause.[36] Likewise in the 1982 Guillermo M. decision, the court found that a pat-down by a school employed security guard was not subject to the strict constraints of the Fourth Amendment.[37]

In Potts v. Wright[38] a student reported to her principal that her ring was missing. The principal conducted a search of the room where the ring was last seen. Police were summoned when the ring was not located. Students known to have been in the class where the ring was missing were subjected to a strip search. The court in this case found that the highest standard of "probable cause" required by the Fourth Amendment was necessary. When the search becomes a severe invasion of privacy, there must be strong reasons to justify it. Merely searching for a ring certainly

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[34]D.R.C. v. Alaska, 646 P. 2d 252 (1982).

[35]In re Guillermo M., 181 Cal. Rptr. 856 (1982).

[36]D.R.C. v. Alaska, 646 P. 2d 252, 254 (1982).

[37]In re Guillermo M., 181 Cal. Rptr. 856, 859 (1982).

[38]Potts v. Wright, 357 F. Supp. 215 (E.D. Po. 1973).

cannot be deemed reasonable.[39] And furthermore, the cooperation of school officials in a search conducted by police, could result in personal liability for those involved.[40]

Using his judgment that a coat worn by a student was similar to one reported stolen, a school security guard ordered a student to empty his pockets. Revealed was an envelope of marijuana. The court held that the guard was subject to the full standard required by the Fourth Amendment and ". . . notwithstanding his professed experience in observing student habits in the packaging of marijuana . . . could not have known what he would find in the envelope."[41] In Maryland a court also found that merely "hanging around" a gym locker where a theft of a watch and ten dollars was later reported, did not constitute sufficient reasonableness to justify a search. The recovered watch was later ruled as inadmissible as evidence under the exclusionary rule.[42]

Two other cases concerning the search for stolen property also involved strip search. In Belliner v. Lund[43] school officials were held to the

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[39]Anne M. Dellinger, North Carolina School Law The Principal's Role (Chapel Hill: Institute of Government, 1981), p. 59.

[40]Robert E. Phay and George T. Rogister, Jr., "Searches of Students and the Fourth Amendment," School Law Bulletin, 6, No. 1, (January 1975), p. 1.

[41]People v. Bowers, 72 Misc. 2d 800, 339 N.Y.S. 783, 803 (Crim Ct. 1973).

[42]In re Dominic W., 426 A. 2d 432 (Md. Ct. Spec. App. 1981).

[43]Belliner v. Lund, 438 F. Supp. 47 (1977).

higher standard as outlined in Mapp.[44] A two hour search of fifth graders ordered to strip to their underclothes was deemed invalid because there had been no individualized suspicion. The court did acknowledge that reasonableness would have been sufficient had a particularized suspicion been made.[45] In M. M. v. Anker[46] the court made clear ". . . that as the intrusiveness of the search intensifies, the standard of the Fourth Amendment 'reasonableness' approaches probable cause, even in the school context."[47] It is important to note that the student searched was found in a classroom during a fire drill, refused to give her name to the teacher, claimed a handbag belonged to her and later admitted that it did not, admitted to stealing posters from the classroom, and was known to a teacher as having stolen on previous occasions. When the student refused to reveal what was stuffed in her jeans, a strip search was performed.[48]

PERSONAL SEARCH (DRUGS)

In a majority of cases involving the personal search of students for drugs, the courts have held to a standard of reasonableness. The exceptions have been for good cause. The Texas Court of Civil Appeals

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[44]Mapp v. Ohio, 367 U.S. 643 (1961).

[45]Belliner v. Lund, 438 F. Supp. 47, 53 (1977).

[46]M. M. v. Anker, 607 F. 2d 588 (1979).

[47]Ibid., p. 589.

[48]M. M. v. Anker, 477 F. Supp. 837 (E.D.N.Y. 1979).

refused to exclude from evidence drugs found during a principal's warrantless search of a student. The court held that the student's absence from an assigned class coupled with a visible bulge in a pocket, provided reasonable suspicion to allow the principal to conduct a search.[49] Likewise the Supreme Court of Georgia upheld the search of a student initiated only by suspicious behavior. The principal had noticed the student putting something into his pocket in a suspicious manner.[50]

In the 1977 State v. McKinnon[51] case police furnished a school's principal with detailed information that a particular student was transporting drugs to school. The court held that reasonable suspicion was sufficient to justify the resulting school search. The court stated that:

> Although a student's right to be free from intrusion is not to be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools often times requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order.[52]

In State v. F.W.E.,[53] the Florida District Court of Appeals held as reasonable, a search of a student's pockets based on a conversation

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[49]Ranniger v. State, 460 S.W. 2d 181 (1970).

[50]State v. Young, 216 S.E. 2d 586, cert. denied, 423 U.S. 1039 (1975).

[51]State v. McKinnon, 558 P. 2d 781 (Wash. 1977).

[52]Ibid. Another police initiated search was upheld in People v. Boettner, 80 Misc. 2d 3, 362 N.Y.S. 2d 365 (1974).

[53]State v. F.W.E., 360 So. 2d 148 (Fla. App. 1978).

overheard by the school's principal.[54] Even a strip search was upheld in Rone v. Daviess County Board of Education.[55] The court indicated the search was reasonable since it was based on information that Rone had passed prescription drugs to fellow students and that he had given marijuana to two students the day before the search.[56] In the 1983 R.C.M. v. State[57] pocket search for drugs was deemed reasonable based on the facts that the student searched was out of class without permission, was belligerent, acted erratic, and had red eyes.

In People v. Jackson[58] the search of a student by a coordinator of discipline in a New York high school was deemed reasonable based upon information received, on visual inspection of a bulge in the student's pocket, and suspicious behavior which included running from the coordinator. In the 1978 Mercer v. State[59] decision, reasonableness to search the pockets of Robert Mercer was established by a tip received by the dean of men. The dean in turn threatened to call Mercer's father if he did not empty his

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[54]Ibid.

[55]Rone v. Daviess County Bd. of Educ., 655 S.W. 2d 28 (Ky. Ct. App. 1983).

[56]Ibid., p. 29.

[57]R.C.M. v. State, 660 S.W. 2d 552 (Tex. Crim App. 1983).

[58]People v. Jackson, 319 N.Y. 2d 731 (1971).

[59]Mercer v. State, 450 S.W. 2d 715 (1970).

pockets. Mercer complied and the dean called not only his father but also the police.[60]

In the 1970 In re G.[61] case information supplied by a student informer coupled with the principal's personal observation of intoxicated behavior was sufficient to warrant a reasonable search of a California student. Likewise in People v. Glover,[62] the search of Tommy Glover by a school security guard was judged reasonable based on information supplied by "confidential informants" and on the knowledge of Glover's previous admission to possession of narcotics.[63] And in M. v. Board of Educ. Ball-Chatham Commun. School Dist.[64] the court found the school administrator's search to be reasonable based on information supplied by an informant that a student had a large amount of money and possibly drugs in his possession.[65] In the 1980 In re J.A.[66] case the Illinois Court of Appeals also held as reasonable a search based on a tip received by a school

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[60]Ralph D. Stern, ed., The School Principal and the Law (Topeka, Kansas: National Organization on Legal Problems of Education, 1978), p. 175.

[61]In re G., 90 Cal. Rptr. 361 (1970).

[62]People v. Glover, 173 N.Y.L.J. 19 (Jan. 2, 1975).

[63]Stern, p. 177.

[64]M. v. Board of Educ. Ball-Chatham Commun. School Dist. No. 5, Chatham, Illinois, 429 F. Supp. 288 (1977).

[65]West's General Digest, Fifth Series, (St. Paul: West Publishing Co., 1980), Vol. 5, p. 1637.

[66]In re J. A., 406 N.E. 2d 958 (Ill App. 1980).

dean. Although the tip alone would not have been sufficient to establish "probable cause," the court focused on the role of the dean, whose duties included the protection of the health and safety of all students. The tip was therefore sufficient to provide "reasonable suspicion."

OTHER SEARCHES

A Kentucky court in Bahr v. Jenkins[67] upheld the suspension of a female student based on her refusal to allow school officials to search her purse for firecrackers. The girl had been identified by several informants as the source of the firecrackers. The judge insisted that the maintenance of discipline in the educational environment is a legitimate role of the teacher. Moreover, teachers cannot be expected to go to the court house and obtain a search warrant to conduct a search such as the one attempted to discover the source of a serious school disturbance.[68]

In Stern v. New Haven Community Schools,[69] a Michigan court upheld the use of a two-way mirror in a boys' restroom to observe sale of marijuana by a student to his classmate. Reasonableness of the search was ". . . approached by balancing school's interest in search and student's

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[67]Bahr v. Jenkins, 539 F. Supp. 483 (E.D. Ky. 1982).

[68]Ibid., p. 487.

[69]Stern v. New Haven Community Schools, 529 F. Supp. 31 (E.D. Mich. 1981).

interest in privacy."[70] A Florida Court in Nelson v. State[71] upheld as reasonable the search of a student predicated on the principal's having smelled marijuana smoke in proximity to the student. The court reasoned that crime and drug abuse had ". . . reached such a high level that a state of emergency constantly exists, thus lowering the Fourth Amendment standards."[72] Merely looking suspicious was sufficient, in yet another Florida case W.J.S. v. Florida[73] to merit a "reasonable" search. And in In re John Doe VIII v. New Mexico[74] the observance by a school administrator of a student smoking a pipe during class change was accepted as reasonable cause to justify a personal search. In Ohio, two school officials viewed suspicious behavior that indicated the possible use and sale of marijuana. The court in Tarbuck v. Raybuck[75] also found this to be sufficient justification for a reasonable search.

In People v. Singletary[76] heroin was discovered in a student's sock during a search by the school's dean. The search was deemed reasonable by the court based on the information supplied to the dean by an

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[70]Ibid., p. 32.

[71]Nelson v. State, 319 So. 2d 154 (Fla. 2d Dist. Ct. App. 1975).

[72]Ibid., p. 156.

[73]W.J.S. v. Florida, 409 So. 2d 1209 (1982).

[74]In re John Doe VIII v. New Mexico, 540 P. 2d 827 (N.M. App. 1975).

[75]Tarbuck v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983).

[76]People v. Singletary, 333 N.E. 2d 369 (1975).

unidentified informant.[77] The discovery of hashish in a student's coat was sanctioned by the court in State v. Baccino.[78] The coat was confiscated by the vice-principal because the student was cutting class. The search of the coat was prompted by the administrator's knowledge that the student had ". . . experimented with drugs in the past."[79]

In State of Louisiana v. Mora[80] a physical education teacher observed what he described as suspicious behavior of a student, and searched the student's wallet. The wallet, containing marijuana, had been entrusted to the teacher's care via a class valuables' bag. A divided court found the search to be unreasonable and excluded the drugs from being introduced into evidence.

In People v. Scott D.[81] search of a seventeen year old student, based on a "hunch" that he was dealing drugs, was ruled as improper and his criminal conviction vacated. The student had been observed entering a boys' restroom twice in one hour with another student and then leaving within a few seconds. He had also been under suspicion for six months, been in the company of others under suspicion, and had been identified by a "confidential" informant as a drug dealer.

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[77]Ibid., p. 370.

[78]State v. Baccino, 282 A. 2d 869 (Del. Super. 1971).

[79]Ibid., p. 870.

[80]State of Louisiana v. Mora, 307 So. 2d 317 (1975).

[81]People v. Scott D., 315 N.E. 2d 466 (1974).

In the 1976 Picha[82] case the principal called police to be present for a search of two junior high school students suspected of possessing drugs, the court found that the police involvement called for a higher standard of "probable cause." In the 1980 Doe v. Renfrow[83] decision the court insisted that the strip search of another junior high school student was unreasonable. The search was instigated after a drug sniff dog alerted to the student. The court acknowledged that reasonable suspicion was present for a pocket search but not for the excessively intrusive search that resulted.

Two other cases which involved the use of drug sniffing dogs also resulted in the court's decision to require the higher standard of probable cause for a personal search. In Jones v. Latexo[84] the court stated that . . . "where there were no facts to raise reasonable suspicion regarding specific students, school officials exceeded the bounds of reasonableness in using sniffer dog to inspect virtually the entire student body.[85] And in Horton v. Goose Creek[86] the Fifth Circuit Court of Appeals concurred that the use of sniff dogs to detect drugs on students, without establishing individualized suspicion, was a violation of the student's constitutional rights. Citing

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[82]Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).

[83]Doe v. Renfrow, 631 F. 2d 91 (1980), cert. denied 101 S. Ct. 3015 (1981).

[84]Jones v. Latexo Independent School Dist., 499 F. Supp. 223 (E.D. Texas 1980).

[85]Ibid., p. 226.

[86]Horton v. Goose Creek Indp. School Dist., 667 F. 2d 471 (1982), 690 F. 2d 470 (1982).

United States v. Goldstein,[87] the court in Horton upheld as reasonable the use of dogs to sniff cars and lockers.

School administrators generally have not faired well in search cases that have involved strip searches. In Bilbrey v. Brown[88] a school bus driver observed what she described as "suspicious behavior" of two elementary students who appeared to be exchanging money for what she suspected was drugs. The strip search of one boy by the school's principal was deemed unreasonable.[89] Noted by the court was the school district's own policy requiring "probable cause" to search.[90]

In Kuehn v. Renton School District[91] the courts found that a generalized search of students' luggage by parent chaperones prior to a band trip was unreasonable because there was a total absence of factors to justify a search.

> The reasonable belief standard requires that there be a reasonable belief on the part of the searching school official that the individual student searched possesses a prohibited item. When school officials search large groups of students solely for the purpose of deterring disruptive conduct and without any suspicion of each individual searched, the search does not meet the reasonable belief standard.[92]

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[87]United States v. Goldstein, 452 U.S. 962 (1981).

[88]Bilbrey v. Brown, 738 F. 2d 1462 (9th Cir. 1984).

[89]Ibid., p. 1464.

[90]Ibid., p. 1466.

[91]Kuehn v. Renton School Dist., 103 Wash. 2d 594, 598 P. 2d 1078 (1985).

[92]Ibid., p. 1079.

IN LOCO PARENTIS

In most search and seizure cases prior to T.L.O.[93] the issue of in loco parentis was specifically mentioned or implied in the court's findings. This "in place of parent" doctrine has served to give school personnel the right to search without first obtaining a search warrant as required of "state agents" by the Constitution.[94] But what parent would conduct a search of their own child, call the police and have him arrested, and then turn the evidence over to be used in a criminal proceeding against him?[95]

Many states have statutes establishing school officials with in loco parentis powers to maintain safety and discipline of students.[96] In Axtell v. La Penna[97] the court simply stated that:

> It is clear that . . . in loco parentis . . . was never intended to invest the schools with all the authority of parents over their minor children, but only such control as is necessary to prevent infractions of discipline and interference with the educational process.[98]

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[93]New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

[94]Margaret Verble, "The Law and Classroom Discipline," American Educator (Spring, 1981), pp. 186-188.

[95]Louis A. Trosch et al., "Public School Searches and the Fourth Amendment," Journal of Law and Education, II (January 1982), p. 53.

[96]Philip K. Piele, The Yearbook of School Law 1977 (Topeka, Kansas: National Organization of Legal Problems of Education, 1977), p. 130.

[97]Axtell v. La Penna, 323 F. Supp. 1077 (1971).

[98]Ibid., p. 1080.

In Picha v. Wielgos[99] the court reasoned that state statutes establishing in loco parentis were never intended to allow school officials to transcend the constitutional rights of children--"As its constitutional maximum, an in loco parentis statute merely codifies a substantial state interest against which constitutional rights must be balanced."[100]

Although reasonable suspicion played the biggest part in the court's decision in People v. Jackson[101] the concept of in loco parentis was used to bolster the decision.[102] The court stated that:

> The in loco parentis doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including a search, taken thereunder upon reasonable suspicion, should be accepted as necessary and reasonable.[103]

The courts, however, have not always found school officials to be acting in loco parentis while conducting school searches. Cases where this has occurred have generally followed one of three patterns; (1) the search produced contraband that was turned over to the police for prosecution; (2) involved searches that exceeded reasonable limits such as the intrusive

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[99]Picha v. Wielgos, 410 F. Supp. 1211 (N.D. Ill. 1976).

[100]Ibid., pp. 1218-1219.

[101]People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S. 2d 731 (1971), aff'd 30 N.Y. 2d 734, 333 N.Y.S. 2d 167, 285 N.E. 2d 153 (1972).

[102]Donoghoe, p. 454.

[103]People v. Jackson, 319 N.Y.S. 2d 731, 736 (1971).

strip search; and (3) involved searches that were not justified at their inception by sufficient facts.[104]

The majority of litigation involving school searches has indeed relied on the common sense judgment of officials performing search based on identified and articulated facts. With a small percentage of exceptions, the cases have produced a standard to determine reasonableness on criteria based upon personal judgment, information from secret informants, suspicious behaviors, bulges in pockets, the alert of a drug-sniffing dog, knowledge of past incidents, and outright personal observation. The Supreme Court on several occasions denied certiorari giving tacit approval to the arguments and findings of the lower courts. It was therefore the desire of many that the first Supreme Court case involving search and seizure in the American public schools would be the panacea for all questions involving school searches.

T.L.O., THE IMPERFECT PANACEA

New Jersey v. T.L.O.[105] is the first case granted certiorari by the United States Supreme Court. The case was originally accepted for the purpose of examining the appropriateness of the "exclusionary rule." The

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[104]H. C. Hudgins, Jr. and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions (Charlottesville, Virginia: The Michie Co., 1985), p. 309.

[105]New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

subject of the search, Terry Lee Owens,[106] sought to have excluded from evidence illegal materials discovered in her purse. The Supreme Court apparently concerned that it was being presented "the cart before the horse,"[107] postponed its judgment concerning the exclusionary rule and ordered reargument on the basic issue of what standard should be used to assess the legality of searches by school personnel.[108]

The standard established by the Supreme Court was "reasonableness" and not probable cause. The Court stated:

> . . . [A]ccommodation of privacy . . . interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law; rather, the legality of search of a student should depend simply on the reasonableness, under all the circumstances, of the search.[109]

The determination of reasonableness, stated the Court, depended upon a twofold inquiry. First, was the action taken "justified at its inception." Second, was the search ". . . reasonably related in scope to circumstances which justified interference in the first place."[110]

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[106]David O. Stewart, "And In Her Purse the Principal Found Marijuana," ABA Journal, Vol. 71 (February 1985), p. 51.

[107]George T. Rogister, Jr., et al., "New Jersey v. T.L.O.: The Supreme Court Applies the Fourth Amendment to Public Schools," The Network, V, No. 5, (February 1985), p. 3.

[108]New Jersey v. T.L.O., 105 S. Ct. 733, 736 (1985).

[109]Ibid., pp. 743-744.

[110]Ibid., p. 734.

Justification at its inception, the Court reasoned, should be determined by the presence of "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school."[111] To determine permissible scope the Court stated that:

> . . . a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[112]

The Court applied its twofold inquiry to the search conducted in T.L.O. Since the case involved two searches, the Court inspected both. The search of a purse for cigarettes was deemed reasonable based on a teacher's report that student was smoking. Rolling papers left in plain view after removal of the cigarettes, in turn, established reasonable suspicion for the second search for drugs.[113] The Court further upheld reasonableness of scope of the search. Owens contended that the administrator had exceeded permissible bounds because personal letters, that further implicated her in drug deals, were read.[114] Although the Court upheld scope of the search, it was Justice John Paul Stevens, a dissenter, who explained the necessity of this "rider" to the Court's standard.[115]

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[111]Ibid., p. 744.

[112]Ibid.

[113]Ibid., p. 746.

[114]Ibid., pp. 746-747.

[115]Rogister, p. 5.

> The Court's standard for evaluating the "scope" of reasonable school searches is obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses.[116]

The long standing question concerning the application of in loco parentis was also addressed by the Court. Citing R.C.M. v. State[117] as a typical statement of the application of this doctrine, the Court simply stated that in loco parentis was ". . . in tension with contemporary reality and the teachings of this Court."[118] Just as school personnel were identified as state agents in respect to students' right to free speech in Tinker[119] and to students' right to due process in Goss[120] so too are school personnel representatives of the state in regards to search of students and seizure of their property.[121]

The T.L.O. decision has also left many questions unanswered. Even though initial certiorari was granted in order to answer the exclusionary rule issue, the issue became moot when the Court ruled that search of Owens was valid. Furthermore the Court was silent on locker and property protections, the status of reasonable suspicion and on probable cause when police are involved in the search. Neither did the Court answer issues

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[116]New Jersey v. T.L.O., 105 S. Ct. 733, 765 (1985).

[117]R.C.M. v. State, 660 S.W. 2d 552 (Tex. Crim. App. 1983).

[118]New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985).

[119]Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733 (1969).

[120]Goss v. Lopez, 95 S. Ct. 729 (1975).

[121]New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985).

about individualized suspicion or the use of dogs to ferret out illicit drugs. Collectively these issues are too great in number and too significant to leave practicing administrators without concerns.[122]

It is significant to note the vehement dissent of Justice William Brennan, Jr., who argued that search of Owen's purse was too intrusive and the balancing test established by the majority was flawed.[123] Brennan went on to state:

> I cannot but believe that the same school system faced with interpreting what is permitted under the Court's new "reasonableness" standard would be hopelessly adrift as to when a search may be permissible. The sad result of this uncertainty may well be that some teachers will be reluctant to conduct searches that are fully permissible and even necessary under the constitutional probable-cause standard, while others may intrude arbitrarily and unjustifiably on the privacy of students.[124]

Justice Stevens feared the decision would prompt school personnel to conduct searches for violation of the ". . . most trivial school regulations and guidelines for behavior."[125] Justice Stevens concurred with Justice Brennan that the ". . . search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy."[126] Of special concern to Justice Stevens was his abhorrence for the strip search. Footnoted in his dissent was this comment:

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[122]Rogister, pp. 7-9.

[123]New Jersey v. T.L.O., 105 S. Ct. 733, 752 (1985).

[124]Ibid., pp. 756-757.

[125]Ibid., p. 759.

[126]Ibid., p. 762.

> One thing is clear under any standard--the shocking strip searches that are described in some cases have no place in the school house . . . . ("It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.[127]

REASONABLENESS--POST-T.L.O.

Cases litigated in the courts since T.L.O. all involved actual school searches that were conducted by school personnel prior to the Court's landmark decision. Therefore search participants were not afforded the opportunity of knowing specifics of the Supreme Court's decision nor of the Court's expectation of a twofold inquiry. In virtually all post-T.L.O. cases this twofold inquiry was reviewed and applied to the search at hand. Each case, however, must be examined at on its own merits relative to the specific circumstances for establishing a reasonable search.

In Martens v. District No. 220,[128] an anonymous telephone caller advised a school's dean of students that a student had sold drugs to her daughter at school. An earlier call from a similar anonymous caller provided factual information on another unrelated drug incident. Despite the fact that a police officer was actually involved in the search, the court held that the anonymous tip was sufficient to justify the search. The student, who was asked to empty his pockets by a police officer, who just happened to be on campus at the time, sought to have a pipe, tainted with

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[127]Ibid., p. 765.

[128]Martens v. District No. 220, Bd. of Educ., 620 F. Supp. 29 (D.C. Ill. 1985).

marijuana residue, excluded from evidence at his expulsion hearing. The court, however, found the search not only justified at inception but also reasonable in scope.[129] The reasonableness concept hinged on the "totality-of-circumstances test" developed in the Supreme Court's Gates[130] decision.

The court first reasoned that the anonymous tip was "inherently plausible" since a drug problem was known to exist at the school and that numerous students had been expelled prior to the search. Second, the tip came from the public which the court believed added to its credibility. Third, there was reason to believe the tip was accurate based on similarities of the caller to another caller that had provided factual information. And finally, the allegation gave specific detail to the student's "role as a drug distributor" and to the location where illegal items were allegedly being secreted.[131]

Since the T.L.O. decision did not address police involvement, the Martens' court made clear its finding that the deputy's involvement was only incidental. The law officer had not been involved in investigating the case, did not help develop the facts, and merely advised the student that he should cooperate and empty his pockets.[132]

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[129]Ibid., pp. 30-31.

[130]Illinois v. Gates, 103 S. Ct. 2317 (1983).

[131]Martens v. District No. 220, Bd. of Educ., 620 F. Supp. 29, 32 (1985).

[132]Ibid.

In the 1985 In re Bobby B.[133] case a student, subjected to a warrantless search by an administrative dean of boys, sought to have seized marijuana and cocaine excluded from evidence used against him in a criminal proceeding. The search was conducted after the administrator found the student out of class without a pass. Based on the nervous behavior of the student and the knowledge that a drug problem existed at school, the court applied T.L.O.'s twofold inquiry and found the search to be justified at its inception and reasonable in its scope.

It is interesting to note the only other factor mentioned in determining justification of the search was the dean's stated belief that the area where the student was found was reputed to be frequented by drug dealers. The marijuana was not found in the initial search of the pockets but rather after the dean looked into the student's billfold.[134]

In the 1985 State v. Joseph T.[135] case the search of a student's locker was based on indirect information given to an assistant principal by a student whose breath smelled of alcohol. Again the court applied the twofold inquiry and, as in the cases before, found the search to be justified at its inception and reasonable in scope. The student's appeal to have marijuana and related paraphernalia excluded from his criminal prosecution was denied.[136] It is interesting to note that no nexus was

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[133]In re Bobby B., 218 Cal. Rptr. 253 (Cal. App. 2 Dist. 1985).

[134]Ibid., p. 255.

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

[136]Ibid., pp. 731-736.

established between the locker and suspicion that student had alcohol stored therein. In fact, the admitted consumption of alcohol had taken place at the student's home before school commenced. Nevertheless the court held that while probable cause certainly could not be established, there was sufficient evidence for "reasonable suspicion."[137]

The dissent of Justice J. McGraw is interesting to note:

> In the present case, there were no articulable facts which would lead a reasonably prudent person to suspect the defendant had alcoholic beverages in his locker. The only evidence was that his friend had consumed a beer at the defendant's home before school . . . .[138]

Justice McGraw further objected to the search because when no alcohol was found, the search continued, even to the pockets of the defendant's coat. The presence of alcoholic beverages, Justice McGraw reasoned, could have been ascertained by a mere pat down of the jacket rather than the "detailed examination" that actually took place.[139]

All post-T.L.O. courts have not been so easily persuaded in establishing justification for student searches. In re William G.[140] involved the forcible confiscation of a student's calculator case by an assistant principal predicated on the belief that an "unusual" bulge in the case might contain narcotics. The court found this to be insufficient to justify a search. The court in making this decision applied the T.L.O. twofold inquiry. The court was most persuaded by testimony from the assistant principal that he

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[137]Ibid., p. 737.

[138]Ibid., p. 741.

[139]Ibid.

[140]In re William G., 709 P. 2d 1287 (Cal. 1985).

had no information the student had ever been involved in drugs. Furthermore, suspicion that student was tardy to class and absence of an factors establishing an exigency situation, only enhanced the court's finding that no articulative facts were present to justify a reasonable search.[141]

Two main points were made by the assistant principal. The student attempted to hide the calculator case from view, even to deny its existence, and demanded vehemently that the administrator could not search him or his property without a search warrant. In regards to the demand for a warrant the court wrote:

> There are many reasons why a student might assert these rights, other than an attempt to prevent disclosure of evidence that one has violated a proscribed activity. A student cannot be penalized for demanding respect for his or her constitutional rights.[142]

The preponderance of evidence was significantly greater in State v. Brooks.[143] A locker search that produced hallucinogenic mushrooms was found to be legally sound after being reviewed against the T.L.O. twofold inquiry.[144] The justification was based upon four critical factors which combined produced a reasonable search. These were: (1) information received from student informant; (2) reports by several teachers having witnessed the student on earlier occasions in an intoxicated state; (3) documentation that the parents had been warned and advised on earlier

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[141]Ibid., pp. 1296-1297.

[142]Ibid., p. 1297.

[143]State v. Brooks, 718 P. 2d 837 (Wash. App. 1986).

[144]Ibid., p. 839.

occasions of the school's suspicions; and (4) the student's habit of frequenting an area identified for its high drug use.[145]

Of special note was the court's reliance and recognition of facts established much earlier in McKinnon.[146] These factors used to determine reasonableness include age of the child, history, school record, the extent of the problem to which the search is directed, the need to search without delay (exigency) and the "probative value and reliability of the information used as a justification for the search."[147]

In the 1985 Cales v. Howell Public Schools[148] decision a United States District Court in Michigan found that the strip search of a fifteen year old female student was reasonably related to the scope of the search despite their concomitant finding that the search was not even justified at its inception. Justice John Paul Stevens' footnote in T.L.O. raised the constitutional issue related to a strip search.[149]

The subject of the search came to the attention of a male administrator when she was observed "ducking" behind cars in the student parking lot by a school security guard. The administrator searched the

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[145]Ibid., p. 837.

[146]State v. McKinnon, 558 P. 2d 781 (Wash. 1977).

[147]State v. Brooks, 718 P. 2d 837, 840, 841 (Wash. App. 1986).

[148]Cales v. Howell Public Schools, 635 F. Supp. 454 (E.D. Mich. 1985).

[149]This footnote to Justice Stevens' dissent outlines the Justice's abhorrence to strip search as a reasonable exercise of school authority under any circumstances.

girl's purse and found "readmittance" slips belonging to the school's office. A second assistant principal (female) was instructed by the first (male) to strip search.[150] The court held that "funny" behavior in a parking lot did not justify the search at its inception.[151] On question of immunity, the court reasoned that the strip search for drugs by female administrator was reasonable related to the objective of the search, and therefore she was entitled to "qualified immunity." Not so with the male assistant who was knowledgeable of the necessity to establish reasonable suspicion based on evidence.[152]

The District Court of Appeal of Florida, Fifth District, upheld in R.D.L. v. State[153] that an assistant principal's search of a student's locker was constitutional. Three specific facts led the court to believe that search was justified at its inception. The defendant had been observed in an area where a theft had occurred; the defendant had been observed concealing a "pot of honey" stolen from a home economics classroom; and stolen articles fell to the floor when the defendant was ordered to open his locker. Having determined the search was justified at its inception, the court also found the locker search to be reasonably related to the circumstances. Yet a

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[150]Cales v. Howell Public Schools, 635 F. Supp. 454, 455, 456 (E.D. Mich. 1985).

[151]Ibid., p. 457.

[152]Ibid., p. 458.

[153]R.D.L. v. State, 499 So. 2d 31 (1986).

Pennsylvania case In Interest of Dumas[154] found that an assistant principal's search of student's locker for drugs was unconstitutional. In this case a student's locker was searched after the assistant principal was advised by a teacher the student had taken cigarettes from his locker and gave one to a classmate. The court reasoned that the seizure of cigarettes from the student's hands was justified but not the continued search for cigarettes in the locker.

SUMMARY

The Supreme Court's decision in T.L.O.[155] established that school personnel could conduct legal searches of students based on "reasonable suspicion" and not probable cause. The school search cases that continued to accumulate after 1969 focused on issues that had been individually litigated in criminal cases prior to that date. Pre-T.L.O. cases when viewed collectively, relative to establishing reasonableness, provide a composite similar to the Court's decision in T.L.O. The Supreme Court acknowledged that in loco parentis concept was in tension with the Court's decisions in the last twenty years. However, the Court left questions unanswered about lockers, autos, drug-detecting canines, suppression of evidence, and police involvement.

Although many pre-T.L.O. courts varied on interpretation of issues and placed different weights on key factors, a standard of reasonableness

[154]In Interest of Dumas, 515 A. 2d 984, 986 (1986).

[155]New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

was indeed emerging. Several key tests used by the Justices in deciding T.L.O. were first communicated in pre-T.L.O. cases. The two-pronged test cited In re W.[156] and the factors established in McKinnon,[157] for example, were incorporated in the T.L.O. decision.

The key issue in the T.L.O. decision was the development of a twofold inquiry to determine the legality of a school search. The first question of this inquiry simply asked if the search was justified at its beginning. Were there sufficient factors to justify confrontation and a concomitant need to search? The second question involved the measures adopted by the school personnel to conduct the search. Were the measures (the scope) reasonably related to the factors that justified the search in the first place? The Court's T.L.O. decision was found for the State of New Jersey on a narrow margin and dissent was lengthy and vehement.

Cases that have been litigated since T.L.O. have predictably relied on the twofold inquiry. There is, however, the ever present subjectivity that must be applied to factors related to a search. The fact still remains that justices will disagree over issues and apply their own judgment concerning reasonableness. Cases post-T.L.O. have exhibited this inevitable pitfall. The simple fact remains that human judgment will continue to assign values and weights to issues and circumstances. No test has been developed to weigh specific factors. What may be acceptable factors to justify a search at its inception to one court, may indeed be unacceptable to another.

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[156]In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

[157]State v. McKinnon, 558 P. 2d 781 (Wash. 1977).

The Court in its wisdom did not attempt to produce a formula whereby all factors could be plugged in and the answer would emerge on the opposite end of the equals mark.

CHAPTER IV

REVIEW AND ANALYSIS OF COURT DECISIONS

INTRODUCTION

This chapter presents a review and analysis of significant judicial decisions both before, after, and including the Supreme Court's T.L.O. decision. Care has been taken to select cases that best represent issues relative to search and seizure before T.L.O. This is especially difficult because of the plethora of cases and the diversity of issues. The landmark T.L.O. decision is reviewed in detail as well as the significant search and seizure cases litigated after T.L.O. Discussion of each case is presented as it pertains to its unique issues concomitant with the emergence of reasonableness as a standard for school personnel to conduct searches. The cases reviewed are listed below:

1. Pre-T.L.O.:

   State v. Stein (1969)
   In re W. (1973)
   People v. Scott D. (1974)
   State v. Young (1974)
   State v. McKinnon (1977)
   Doe v. Renfrow (1979)
   Stern v. New Haven Community Schools (1981)
   Bilbrey v. Brown (1984)

2. New Jersey v. T.L.O. (1985)

3. Post-T.L.O

Martens v. District No. 220 (1985)
In re Bobby B. (1985)
State v. Joseph T. (1985)
In re William G. (1985)
Cales v. Howell Public Schools (1985)
State v. Brooks (1986)
R.D.L. v. State (1986)
In Interest of Dumas (1986)

The landmark United States Supreme Court decision of New Jersey v. T.L.O. was dependent upon review of many cases decided in lower courts. Although contradictions did emerge, there is little argument that a rationale slowly developed to indicate that school personnel, because of the unique student relationship, would be held to a lesser standard than would other governmental agents. The cases after T.L.O. have each relied heavily on the Court's decision but have varied in their application of its inquiry process.

SEARCHES PRE-T.L.O.

Overview

Historically, the development of standards to guide school personnel in conducting student searches has evolved quickly and over a relatively short period of time. The Supreme Court, although given several opportunities to review lower court decisions, was not involved in any school decision involving search and seizure prior to its 1985 decision in T.L.O. Nevertheless, the Court's involvement in earlier criminal cases provided the lower courts significant guidelines as a standard of reasonableness began to emerge.

The pre-T.L.O. cases selected here in no way reflect all search related issues. Selection was particularly based on the court's establishment of a

procedure to assist school personnel as they evaluated specific situations and partially unique circumstances involved in the case.

State v. Stein

203 Kan. 638, 456 P. 2d 1 (1969)
cert. denied 90 S. Ct. 966 (1970)

Facts

On January 23, 1968, police officers visited Ottawa High School in Ottawa, Kansas and requested that the locker of student Madison Stein be searched. The principal, along with Stein and the two law enforcement officers, went to Stein's locker which Stein voluntarily consented to open. The officers were investigating the burglary of Butler's Music Store in Ottawa which had occurred the night before. Cash, coins and guns had been taken in the theft and Stein was a suspect.[1]

Having voluntarily opened the locker, Stein further consented to the police officers' search of items in the locker. The officers found a key secreted in the bottom of a pack of cigarettes which Stein said opened a locker at the Kansas City Union Station where he had left some clothes. A check by police revealed that the key instead fit a locker at the Lawrence Bus Depot.[2]

The police went to the bus depot and in the locker found the items stolen from Butler's Music Store. Stein was charged with burglary and grand theft. Stein sought to suppress the evidence based on an assertion

[1]State v. Stein, 456 P. 2d 1, 2 (1969).

[2]Ibid.

that the school locker search was in violation of his constitutional rights. The officers, he maintained, had failed to give him a Miranda warning.[3] Nevertheless, Stein was convicted. He appealed his conviction to the Supreme Court of Kansas.

Decision

The Supreme Court of Kansas upheld Stein's conviction in the lower court. No Miranda warning was necessary, and Stein's consent was ruled as voluntary by the court. Further the court ruled that a special relationship existed when a school maintained dual control of its lockers. The court stated:

> Although a student may have control of his school locker as against fellow students, his possession is not exclusive against the school and its officials. A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe this right of inspection is inherent in the authority vested in school administrators and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student bodies preserved.[4]

Discussion

This case is included in the review of pre-T.L.O. cases because of the statement concerning dual control of lockers. The last case reviewed in this study (the post T.L.O. decision of In Interest of Dumas[5]) continues to hold

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[3]Ibid.

[4]Ibid., pp. 2-3.

[5]In Interest of Dumas, 515 A. 2d 984 (1986).

the Stein opinion regarding the legality of locker searches. The Miranda question was somewhat unique to this case.

The involvement of police officers is also important. Since the Supreme Court did not address this issue in T.L.O., the lower court decisions remain important precedents. The court in Stein relied heavily on People v. Overton,[6] where the vice-principal gave permission to police to search a student's locker.[7] Likewise in In re Fred C.[8] the court found that when information was furnished to the school by police the resulting locker search was not a "police search." But in Picha v. Wielgos[9] the involvement of police raised the required standard for search from reasonable suspicion to probable cause.

In re W.

29 Cal. App. 3d 777,
105 Cal. Rptr. 775 (1973)

Facts

On September 27, 1971, Oscar Groves, high school assistant principal, was informed by four students that a sack of marijuana was in locker number B-51. Groves proceeded to the locker and opened it with his

[6]People v. Overton, 20 N.Y. 2d 360, 229 N.E. 2d 596, 249 N.E. 2d 366 (1969).

[7]Michael La Morte et al., Students' Legal Rights and Responsibilities (Cincinnati: The W. H. Anderson Co., 1971), p. 151

[8]In re Fred C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972)

[9]Picha v. Wielgos, 410 F. Supp. 214 (N.D. Ill. 1976).

master key. Inside was the bag of marijuana. Having identified the locker as belonging to Christopher W., Groves notified the school's principal and together they inspected the locker. Christopher W. was then summoned and required to open the locker. Christopher acted surprised upon finding the marijuana and denied any knowledge of the sack. Christopher was suspended from school and advised to get legal counsel.[10]

The following day, Christopher returned to school and continued to deny any knowledge of the marijuana. The police were notified and an investigation was begun. Christopher then spoke privately to the school's principal and under a promise of "confidentiality" confessed that the marijuana was his, but he feared for his life if he revealed the source. He was allowed to return to school. Christopher sought to have the standards of the fourth amendment applied to the search of school lockers and have his adjudication as a ward of the court overturned.[11]

Decision

The California Court of Appeal upheld the ruling of the county court. The court held that while the Fourth Amendment imposed limits on school personnel's authority, the doctrine of in loco parentis expanded that authority. But this alone was not enough. The court further delineated a test to be applied to determine the reasonableness of a search.[12] The court stated:

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[10]In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

[11]Ibid., pp. 789-790.

[12]Ibid., p. 791.

> We believe that the appropriate test for searches by high school officials is two-pronged. The first requirement is that the search be within the scope of the school's duties. The second requirement is that the action taken, the search, be reasonable under the facts and circumstances of the case. Although in loco parentis is applicable, the Fourth Amendment limits that power to acts that meet above requirements. In this case, prevention of the use of marijuana is clearly within the duties of school personnel, and the action taken, the verification of the report, was reasonable. The evidence was properly admitted.[13]

Discussion

It is interesting to note that the Supreme Court in Terry v. Ohio[14] first expressed a standard for determining reasonable search that precedes the test expressed here. Terry first sought to determine if the search was justified at its inception and second, if the search ". . . was reasonably related in scope to the circumstances which justified the interference in the first place."[15] The same test was adopted by the Court in New Jersey v. T.L.O.[16]

The court further confirmed that school personnel are not required to give Miranda warnings to students. Christopher suggested that the principal's acceptance of his "confidential" confession was in essence a denial of legal counsel. The principal had testified in court that Christopher had confessed to him. The court reasoned that it was an issue

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[13]Ibid., p. 794.

[14]Terry v. Ohio, 392 U.S. 1 (1968).

[15]Ibid., p. 20.

[16]New Jersey v. T.L.O., 105 S. Ct. 733, 744 (1985)

of ". . . misplaced trust. The principal honored Chris' trust as long as he legally could. It was only in court that he revealed the confession."[17]

People v. Scott D.

315 N.E. 2d 466 (1974)

Facts

This New York case involved the search of a seventeen-year-old high school student named Scott. Within a one-hour period, Scott had been observed by a teacher entering a boys' restroom with a fellow student and then exiting within five to ten seconds. The teacher reported the suspicious behavior to the co-ordinator of school security.[18]

Based on information from "confidential sources" Scott had been the object of surveillance for six months. During this time he had been observed eating lunch with another student suspected of drug involvement. The co-ordinator notified the school's principal of the "unusual behavior." The principal ordered the student to be brought to his office. Scott was then searched by the co-ordinator in the presence of the dean of boys and the principal.[19]

In his wallet was found thirteen glassine envelopes of white powder. This discovery prompted a strip search of Scott during which a vial

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[17]In re. W., 105 Cal. Rptr. 775, 795 (1973).

[18]People v. Scott D., 315 N.E. 2d 466, 467 (1974).

[19]Ibid., pp. 467-468.

containing nine pills was found. These items were introduced into evidence against Scott in criminal court. After the court denied Scott's motion to suppress evidence found in the search, he pleaded guilty to criminal possession of drugs and was adjudged a youthful offender.[20] Scott appealed to the Court of Appeals of New York.[21]

Decision

The Court of Appeals of New York reversed both lower courts and vacated Scott's conviction, holding the search was unjustified based on the circumstances presented to the court.[22] Looking to the issue of in loco parentis, the court held that school personnel sometimes were ". . . to a degree like parents. It is not true, however, that school teachers possess all parental perogatives."[23] Furthermore the Overton decision concerning the search of a student's locker was not applicable and ". . . impersuasive with respect to a student's person."[24]

The court further recognized that school personnel faced with "urgent social necessities" must not be held to the same standards required of those ". . . outside the school precincts."[25] The factors to determine if sufficient cause is present to conduct a reasonable serach are: (1) the

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[20]Ibid. p. 468.

[21]Ibid., p. 466.

[22]Ibid.

[23]Ibid., p. 468.

[24]Ibid., p. 469.

[25]Ibid.

child's age; (2) the child's history and record in school; (3) the prevalence and seriousness of the problem to which the search is directed; and (4) "the exigency to make the search without delay."[26]

Looking at all factors, the court did not believe that two excursions into a restroom could generate more than "equivocal suspicion" that an illegal activity was taking place. The court believed that any number of "innocent activities" could have prompted Scott's behavior. The "confidential information," the court further reasoned, was sufficient to justify surveillance but not a search. The court also added that the defendant's having had lunch with another student under suspicion was ". . . all but meaningless, because contact among students in the school would be so likely and so susceptible of innocent explanation."[27]

Discussion

This case enumerated a series of factors to be inspected in determining the reasonableness of a school search. Subsequent cases relied on the same factors in making their rulings. The court in Scott D. was influenced by lack of articulable facts that specifically related to drugs. Nothing more than suspicious behavior had occurred. Since the original search of the wallet was ruled illegal, the strip search which followed was certainly unjustified. The court, however, made this interesting observation.

> If there were sufficient basis for a school search, and the glassine envelopes were found in defendant's wallet, the further indignity of a strip search was warranted, to make sure that defendant did not

[26]Ibid., p. 470.

[27]Ibid.

possess a still larger supply of drugs and to establish the role he played in carrying the drugs. That the search was conducted in the presence of witnesses, although adding to the indignity, was likewise warranted both to provide corroboration of the findings and to prevent or counteract false claims of the contraband having been planted on the person searched.[28]

State v. Young

216 S.E. 2d 586 (1975)

Facts

This case involves the search of a seventeen year old high school student by an assistant principal. The student, Russell Young, was observed by the administrator in the company of two classmates. Upon seeing the assistant principal, one student ". . . jumped up and put something down, ran his hand in his pants." This suspicious behavior prompted the assistant principal to take all three boys to his office where he ". . . directed them to empty their pockets." A small amount of marijuana was found in Young's jacket pocket. Young was charged and convicted in criminal court after his motion to suppress the evidence was denied.[29]

Decision

The Georgia Court of Appeals reversed Scott's conviction and found that the assistant principal was acting as a governmental agent and therefore should be held to the same requirement for "probable cause" as a

[28]Ibid., pp. 470-471.

[29]Young v. State, 209 S.E. 2d 96, 97 (1974).

police officer.[30] Eight months later the Supreme Court of Georgia reversed the appellate court's decision. Certiorari was granted so that the court could determine the application of the Fourth Amendment to school searches and the application of the exclusionary rule for evidence obtained by school personnel during a search conducted under standard less than probable cause.[31] In determining the basis for the exclusionary rule, the court stated: "There is nothing sacrosanct about the exclusionary rule; it is not embedded in the Constitution and it is not a personal constitutional right."[32] Furthermore, in Georgia where the exclusionary rule is embedded in statutory law, the court pointed out that it was applicable exclusively to law enforcement officers.[33]

The court then reviewed the numerous cases which involved determining whether or not school personnel were state agents or private persons. In so doing, the court broke new ground and identified a third group.[34]

> We conclude that there are really three groups: private persons; governmental agents whose conduct is state action invoking the Fourth Amendment; and governmental law enforcement agents for whose violations of the Fourth Amendment the exclusionary rule will be applied.[35]

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[30]Ibid., p. 98.

[31]State v. Young, 216 S.E. 2d 586, 588 (1975).

[32]Ibid., pp. 589-590.

[33]Ibid., p. 590.

[34]Ibid., p. 591.

[35]Ibid.

The court concluded that school personnel fit into the middle group. While school personnel are definitely governmental agents required to abide by the dictates of the Fourth Amendment, they are not police officers. Only law enforcement officials, the court reasoned, could invoke the application of the exclusionary rule. Therefore evidence seized by school personnel, even by an unjustified search, could not be suppressed as evidence in a criminal proceeding.[36]

The court now turned its attention specifically to the search of Young and determined that the evidence seized should not be suppressed. Furthermore, the court found that the assistant principal's search without police involvement was not in violation of the Fourth Amendment. The court sought to balance governmental interest with that of the individual.[37] The court stated:

> [A]dministrators must be allowed to search without hindrance or delay subject only to the most minimal restraints necessary to insure that students are not whimsically stripped of personal privacy and subjected to petty tyranny. The search we consider here met this minimal standard.[38]

The court specifically believed that the "furtive gesture" of one student and the collective and "obvious consciousness of guilt" of all three was sufficient to justify the search. This, coupled with the absence of police involvement, made the search reasonable.[39]

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[36]Ibid.

[37]Ibid., p. 592.

[38]Ibid., pp. 592-593.

[39]Ibid., pp. 593-594.

Discussion

This case is significant because it deals in detail on an issue that the Supreme Court was originally asked to decide in T.L.O. The Supreme Court, however, ordered attorneys to prepare arguments on the more basic issue of determining the proper application of the Fourth Amendment to school related searches.[40] In so doing, the Court never answered the exclusionary rule issue.

State v. McKinnon

558 P. 2d 781 (1977)

Facts

On November 4, 1974, the Chief of Police for Snoqualmie, Washington telephoned the principal of the local high school to advise him that several high school students were selling drugs on campus. The chief had received his information from a "confidential informant." He provided the principal with details which included how students were dressed and where they had drugs hidden on their person. The principal advised the chief that he would question the students and let him know the outcome.[41]

[40]New Jersey v. T.L.O., 105 S. Ct. 733, 736 (1985).

[41]State v. McKinnon, 558 P. 2d 781, 782 (1977).

The principal interviewed one student (Yates) and the vice-principal another (McKinnon). Both administrators required the students to empty their pockets. The principal then reached into the student's pocket identified by the chief of police and found two packages of white pills. The principal then entered the room where the assistant principal and McKinnon were located and likewise found several packages of pills in the pocket identified by the police.[42]

The chief of police was then summoned and placed both Yates and McKinnon under arrest. While on the way to the police station, the chief observed McKinnon hide a package under the seat of the patrol car. McKinnon was ordered to retrieve the package. This bag, along with another that McKinnon voluntarily surrendered, both contained marijuana. Both boys sought to have the evidence suppressed at their criminal proceedings contending that their Fourth Amendment rights had been abridged by an unreasonable search.[43] Both boys were found guilty in separate trials.[44]

Decision

The Supreme Court of Washington upheld the lower court convictions and denied the students' appeal to suppress the evidence. The court relied on Young[45] to reaffirm that school administrators are not law

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[42]Ibid.

[43]Ibid., p. 783.

[44]Ibid., p. 781.

[45]State v. Young, 216 S.E. 2d 586 (1975).

enforcement officers and are not subject to the same "probable cause" standard.[46] People v. D.[47] was the source of factors used by the court to determine reasonable grounds. These included age, history, record, seriousness of the problem, and the exigency to search.[48] Applying these facts, the court recognized the seriousness of selling drugs in school and the need for the search to be conducted without delay. Despite claims to the contrary, the court further determined that the police involvement was minimal and did not exceed that of providing information to the principal. At no time did the chief recommend that a search be conducted.[49] The court reasoned that:

> If the principal had received this information from sources other than the police, he then would be under a duty both to conduct a search and notify the police of his discoveries. We find no difference here where the information was merely relayed to the principal by the chief of police.[50]

Discussion

The court in McKinnon, just as the Supreme Court would later be in T.L.O., was not compelled to rule on the exclusionary rule because the court found that the search was reasonable. The court, however, was split in its decision and the dissenting opinion pointed out that only seven minutes passed from the time the police called the principal, the search

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[46]State v. McKinnon, 558 P. 2d 781, 784 (1977).

[47]People v. Scott D., 315 N.E. 2d 466 (1974).

[48]State v. McKinnon, 558 P. 2d 781, 784 (1977).

[49]Ibid., p. 785.

[50]Ibid.

was made, and police were summoned to make an arrest. This, the dissenting justices reasoned, strongly inferred ". . . that the school official acted in conjunction with and as an agent of the police."[51] The fruits of the search were also used for criminal prosecution and not as a basis for disciplinary at school.[52] Nevertheless, it was the seriousness of the situation and the exigency to conduct the search without delay, that provided the majority to view the search as legal and justified.

Doe v. Renfrow

475 F. Supp. 1012 (1979)

Facts

On March 23, 1979, six units of drug detecting dogs were introduced to the campuses of Highland Junior and Senior High Schools in Highland, Indiana. The dogs, specially trained to alert to the smell of drugs, were requested by the Highland Town School District Board. Concern had mounted over the past several months as incidents of drug use continued to mount at both schools. Classroom disruptions was on the rise while school morale was declining.[53]

A plan was devised which included the joint operation of school administrators, police and dog trainers. On the morning of the search, teachers were given sealed envelopes to be opened after first morning class

[51]Ibid.

[52]Ibid., p. 786.

[53]Doe v. Renfrow, 475 F. Supp. 1012, 1015 (1979).

began. The instructions were to keep all students in class until the "canine teams" could complete their search of the school. A team consisted of one dog handler, a teacher or administrator, and a uniformed police officer. The dogs were led into the classrooms and allowed to walk up and down the aisles of desks. When a dog alerted to a student, the student was required to empty his pockets.[54]

The dogs alerted approximately fifty times during the two and one half hour search. If the dog continued to alert after the pocket search proved fruitless, the student was taken from the room and strip searched. Thirteen-year-old Diane Doe was one of eleven students taken from the classroom. She was led to the school nurse's station where she was met by two women, one a friend of Doe's mother. Doe, when questioned about using marijuana, denied any involvement. She was then asked to remove her clothes. A brief inspection of her body, which included lifting her hair to see if substances were hidden there, was conducted. No drugs were found and Doe was permitted to return to her class.[55]

Drugs were found on seventeen other students. Disciplinary action was limited to the school and all seventeen were either expelled or allowed to withdraw voluntarily. Two other students were suspended because they had drug paraphernalia in their possession.[56] Diane Doe, however, filed suit against the school, the police, and the dog handler, on grounds that her constitutional rights under the Fourth Amendment had been violated by the

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[54]Ibid., pp. 1015-1016.

[55]Ibid., pp. 1016-1017.

[56]Ibid., p. 1017.

search. The court, on hearing Doe's appeal, sought to answer questions basic to the search.[57]

> This Court is specifically confronted with the following issues: (1) whether the investigative procedure used by the school officials with the assistance of law enforcement officers, for the sole and exclusive purpose of furthering a valid educational goal of eliminating drug use within the school, was a seizure and search under the Fourth Amendment; (2) whether the use of dogs to detect marijuana and marijuana paraphernalia in the classroom was, standing alone, a search under the Fourth Amendment; (3) whether the admitted search of a student's clothing upon the continued alert of a trained drug detecting canine was violative of rights protected by the Fourth Amendment; and (4) whether the nude body search conducted solely upon the basis of a trained drug detecting canine's alert violated the plaintiff's right to be free from unreasonable search and seizure.[58]

Decision

The court first looked at the pocket search. Because school officials specifically requested that no criminal prosecutions be initiated, the search for drugs was viewed as an attempt to remove a serious threat from the school's environment. Reasoning that the school has a legitimate interest in eliminating drug use on campus, the court found this aspect of the search reasonable both and justified. The court, however, cautioned that had the police involvement been different, and drugs were being searched for to be used in criminal prosecutions, then the higher standard of "probable cause" would be required.[59]

The court next turned to the use of the dogs and found that the alert was reasonable cause to believe that Diane Doe had marijuana in her

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[57]Ibid., p. 1018.

[58]Ibid.

[59]Ibid., p. 1024.

possession. With that belief, the defendants in this case did not violate Diane's Fourth Amendment rights by requiring her to empty her pockets.[60]

Finally, the court turned to the strip search. Here the court found that a nude search of a student based solely on the alert of a "trained drug-detecting canine" was unreasonable.[61] Judge Allan Sharp writing for the court stated:

> Subjecting a student to a nude search is more than just the mild inconvenience of a pocket search, rather, it is an intrusion into an individual's basic justifiable expectation of privacy. Before such a search can be performed, the school administrators must articulate some facts that provide a reasonable cause to believe the student possesses the contraband sought. The continued alert by the trained canine alone is insufficient to justify such a search because the animal reacts only to the scent or odor of the marijuana plant, not the substance itself. There is always the possibility that one's clothing may have been inadvertently exposed to the pungent odor of the drug.[62]

On May 26, 1981 the United States Supreme Court denied a petition for a writ of certiorari. Justice William Brennan, Jr., dissented and in so doing provided a preview of what would later become a footnote in T.L.O. Specifically, Brennan believed the Court should review the case because of the "warrantless, student-by-student dragnet inspection" performed by "police-trained German shepherds."[63]

Discussion

This case involves much more than determining the legality and advisability of using trained drug-detecting canines. Once again the court

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[60]Ibid.

[61]Ibid.

[62]Ibid.

[63]Doe v. Renfrow, 101 S. Ct. 3015, 3016 (1981).

had to inspect the degree of police involvement and look at factors justifying reasonable search. The court did imply that an intrusive strip search might be justified if there existed a preponderance of articulable facts.[64] The merit of this can be readily seen in the search of Diane Doe. On the morning of the search, Diane had played with her family dog which was in heat. The alert dog, it was later reasoned, alerted to Diane's dog, not to drugs.[65]

Stern v. New Haven Community Schools

529 F. Supp. 31 (1981)

Facts

On November 15, 1979, David Stern, a tenth-grade student at New Haven High School, in New Haven, Michigan, was observed through a two-way mirror in a boys' restroom, purchasing marijuana from a fellow student. The observation was made by Brett Harris, an employee of the school. Harris reported the incident to Joe Barnette, principal, who then summoned Stern. Barnette advised Stern that if he cooperated fully and turned over the marijuana, the police would not be called. Stern cooperated and gave Barnette the marijuana. When the second student proved less cooperative, Barnette notified the police.[66]

Stern brought suit against the school system alleging that his constitutional rights had been violated. Stern further alleged the two-way

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[64]Doe v. Renfrow, 475 F. Supp. 1012, 1024 (1979).

[65]Ibid., p. 1017.

[66]Stern v. New Haven Community Schools, 529 F. Supp. 31, 33 (1981).

mirror was an "invasion of privacy" causing intentional emotional stress and the principal's call to police was a "breach" of his promise.[67]

Decision

The court categorically denied all motions and allegations and turned full attention to one remaining issue. Did plaintiff Stern, ". . . have a reasonable expectation of privacy in the place searched, the boys' restroom. . . ." The court in answering this question about Stern, sought to balance the school's interest to search against Stern's interest to protect his privacy.[68] The court stated:

> The Court is of the opinion that defendants' limited view of the boys' restroom through a two-way mirror neither invaded nor violated any of plaintiff minor's federally secured rights under the Fourth Amendment.[69]

The court further noted that surveillance was done exclusively with school personnel and not police authorities. Furthermore, despite notification of police by the principal, no criminal charges were filed, and only school disciplinary action was taken against Stern. The court viewed all facts in relation to the school's compelling duty to maintain discipline and to foster a good educational environment.[70]

Discussion

This case is reviewed because of the unique procedure used by school officials to gain knowledge of student behavior. The court did not find use of

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[67]Ibid., p. 31.

[68]Ibid., p. 36.

[69]Ibid.

[70]Ibid., pp. 36-37.

a two-way mirror to be a serious infringement on student rights. The court made clear the mirror provided only a limited restroom view. Although two-way mirrors were not a factor in T.L.O. the Supreme Court did discuss them during arguments. At one point Justice John Paul Stevens asked Deputy Attorney General, Allan J. Nodes, the lawyer arguing for the State of New Jersey, "Is there no expectation of privacy in a restroom?" The reply was, "Not from two-way mirrors placed over the sinks."[71]

Bilbrey v. Brown

738 F. 2d 1462 (1984)

Facts

On September 8, 1978, Roberta Cunningham, a school bus driver for the Columbia County School Board, observed two fifth grade boys, Anthony Gartner and Joseph Bilbrey, exchange something on the playground. Cunningham suspected drugs but was unable to specifically identify what had been exchanged. She reported her suspicions to the principal, Joseph Taylor. Taylor than directed Gary Robinson, a teacher, to take the boys to a school locker room. After informing Bilbrey that they were going to search him for drugs, Robinson performed a pat-down search which failed to produce any contraband. Taylor then directed Bilbrey to strip to his

[71]David O. Stewart, "And in Her Purse the Principal Found Marijuana," American Bar Association Journal, 71, (February, 1985), p. 53.

underwear. An inspection of the removed clothes likewise provided no drugs or evidence of wrongdoing.[72]

Bilbrey and Gartner brought suit against the members of the Columbia County School Board, the superintendent, the principal, two teachers, and the school bus driver, alleging that their constitutional rights had been violated by an illegal search.[73] The United States District Court for the District of Oregon found that constitutional rights had been violated but school personnel were entitled to immunity and were not subject to any pecuniary liability. Bilbrey and Gartner appealed to the United States Court of Appeals, Ninth Circuit.[74]

Decision

The Ninth Circuit confirmed the lower court's ruling in regards to the violation of constitutional rights but reversed the court's decision on granting immunity. Several factors influenced the court in making this decision. First, the Board of Education's own policy established clear guidelines for school authorities to follow when conducting a student search. Second, the guidelines should have been known by the principal and teacher. Third, the guidelines were not followed.[75]

The court further recognized the established tenet that as the intrusiveness of the search increases the standard for establishing

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[72]Bilbrey v. Brown, 738 F. 2d 1462, 1464 (19th Cir. 984).

[73]Ibid.

[74]Ibid., p. 1462.

[75]Ibid., pp. 1465-1466.

justification approaches probable cause.[76] A dissenting opinion, however, believed the lower court erred in its pronouncement that the law was settled on the issue of applying the Fourth Amendment to school searches. The dissent pointed out that neither the Ninth Circuit nor the United States Supreme Court had addressed the issue.[77] There were also extenuating circumstances that increased the likelihood that Bilbrey and Gartner may have been in possession of drugs. Gartner's older brother, for example, on an earlier occasion was reported to have offered marijuana to the bus driver. There was also a reported concern that a growing drug problem at the high school might spill over to the elementary school. Furthermore, Bilbrey had been observed on another occasion hiding a paper bag which he exchanged with Gartner for money. These facts, the dissent stated, were sufficient to grant immunity to the defendants.[78]

Discussion

Here the court was presented with mere suspicious behavior, which was not sufficiently supported by articulable facts, as grounds to strip search a fifth grade boy. The courts rejected the search and declared it illegal. Those involved were not granted immunity because of "good faith" involvement, but rather were remanded to face monetary penalties determined by a jury. The dissenting judge pointed out that T.L.O. had

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[76]Ibid., p. 1467.

[77]Ibid., p. 1472.

[78]Ibid., pp. 1472-1473.

been granted certiorari by the Supreme Court, confirming his opinion that constitutional law remains unsettled on school searches.[79]

NEW JERSEY V. T.L.O.

Overview

The Supreme Court in New Jersey v. T.L.O. granted certiorari for the first time to a school related search and seizure. The Court, originally asked to review issues related to the "exclusionary rule," chose instead to have attorneys argue the more basic issues concerning the proper standard to be applied to school personnel during a search of a student or his property. This case is truly a landmark decision in education. It established that school personnel will not be held to the same standard as law enforcement authorities, yet proclaimed that in loco parentis was in "tension" with the basic beliefs of the Court. While certain questions were being answered, others were left unanswered. T.L.O. will doubtfully be the last word on search and seizure from the nation's highest court.

New Jersey v. T.L.O.

105 S. Ct. 733 (1985)

Facts

On March 7, 1980 at Piscataway High School in Middlesex County, New Jersey, Assistant Principal Theodore Choplick received a teacher's report that student Terry Lee Owens and a companion were smoking in a

[79]Ibid., p. 1473.

girls' restroom. Owens, a fourteen year old freshman, denied that she was smoking. Whereupon Choplick demanded her purse and opened it for inspection. Immediately visible was a pack of cigarettes which Choplick seized, exposing a pack of cigarette rolling papers. Choplick, relying on his knowledge of cigarette rolling papers and their association with marijuana use, continued his search. Found was a small amount of marijuana, a pipe, empty plastic bags of the type used to carry marijuana, a substantial amount of money in one dollar bills, a list of names, and two personal letters which implicated Owens in drug use.[80]

Choplick informed both police and Owens' mother of the incident. Charges were filed and she was brought before the Juvenile and Domestic Relations Court of Middlesex County on delinquency charges. Despite a confession to the police, Owens sought to have the evidence seized by Choplick excluded from the hearing based on her assertion that her constitutional rights had been violated. The court denied the motion to suppress the evidence and instead placed Owens on one year's probation. The court reasoned that the search for cigarettes was justified based on the school rule infraction. Justification for the second search for drugs was based on the plain view doctrine.[81]

Owens appealed but the appellate court concurred that there had been no Fourth Amendment violation. Owens continued her appeal to the New Jersey Supreme Court which reversed the earlier appellate decision and granted the request to suppress the evidence. The court stated that ". . .

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[80]New Jersey v. T.L.O., 105 S. Ct. 733, 734 (1985).

[81]Ibid., p. 737.

if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." The court based its finding on four observations: (1) the possession of cigarettes was not a violation of school rules at Piscataway High School, (2) the possession of cigarettes is not conclusive evidence that the person is a smoker, (3) the Assistant Principal had received no information that cigarettes might be in the purse, (4) and finally, even after drugs were found, the continued intrusion into personal letters was unreasonable.[82]

The State, on behalf of Choplick, appealed to the United States Supreme Court. The Court initially granted certiorari to examine the appropriateness of the exclusionary rule but decided instead to have attorneys reargue the case based on ". . . the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities. . . ."[83]

Decision

The Court held that the Fourth Amendment does prohibit unreasonable searches by school officials and school personnel cannot find protection in the doctrine of in loco parentis. Because school personnel are representatives of the state and paid by the state, they cannot claim immunity from Fourth Amendment strictures based on a surrogate parent relationship.[84]

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[82]Ibid., pp. 737-738.

[83]Ibid., p. 738.

[84]Ibid., p. 741.

The Court further stated that while students have a legitimate expectation of privacy, the necessity to obtain a warrant based on probable cause would not be required of school personnel. The school setting, with its need to maintain swift and informal disciplinary procedures, requires ". . . some easing of the restrictions to which searches by public authorities are ordinarily subject."[85]

The legality of a search, the Court reasoned, must be reasonable in all circumstances related to the case. To determine reasonableness the Court adopted a twofold inquiry. Based on the Court's Terry[86] decision, the first question was: "Was the search justified at its inception?" The second question was: "Was the search reasonably related in scope to the circumstances which originally justified the search?"[87]

The Court reasoned that in this case two separate searches had taken place. The first for cigarettes, the second for drugs. The validity of the second search depended on the justification and validity of the first. The Supreme Court took exception to the Supreme Court of New Jersey's somewhat "crabbed" view of the circumstances and found to the contrary that the search for cigarettes was just a "common-sense conclusion." The discovery of rolling papers thus was sufficient to justify the continued search for marijuana. The discovery of a list of names, in turn, justified the examination of personal letters. "In short," the Court stated, "we

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[85]Ibid., p. 743.

[86]Terry v. Ohio, 392 U.S. 1 (1968).

[87]New Jersey v. T.L.O., 105 S. Ct. 733, 744 (1985).

cannot conclude that the search for marijuana was unreasonable in any respect."[88]

Justice Byron White wrote the opinion for the majority with Justices Lewis Powell, Jr., Sandra Day O'Connor, and Harry Blackmun concurring. O'Connor and Powell joined to write a concurring opinion as did Blackmun. Justices William Brennan, Jr., Thurgood Marshall, and John Paul Stevens dissented. Brennan and Marshall joined to write:

> In adopting the unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems[89]

Both Brennan and Marshall further believed the search of Owens' purse to be unjustified and the balancing test used by the Court to be flawed. Both agreed that the new test to determine reasonableness would only serve to further confuse teachers leaving them ". . . hopelessly adrift as to when a search may be permissible."[90] Justice Stevens' dissent focused on the likelihood that the new standard would permit school personnel to search students ". . . suspected of violating only the most trivial school regulations and guidelines for behavior."[91] Stevens further echoed the fear that school

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[88]Ibid., pp. 745-746.

[89]Ibid., p. 750.

[90]Ibid., p. 752 and p. 754.

[91]Ibid., p. 759.

children would receive a negative lesson on fairness and on the concept of "liberty and justice for all."[92]

Discussion

This landmark decision established that school personnel are not held to the same standard as other government agents when conducting searches that are justified at their inception and reasonably related in scope to the justification. While the Court was specific about its standard of reasonableness, no mention was made concerning the search of lockers and automobiles;the use of sniff-dogs; the allowable degree of police involvement; nor the exclusionary rule. And despite the establishment of a twofold inquiry, the simple fact remains that justification to search is contingent on human interpretation of facts. It is apparent in this 4:3 decision that facts preceding a search can be viewed significantly different from one person to another.

SEARCHES POST-T.L.O.

Overview

All of the searches reviewed here actually occurred prior to the Supreme Court's ruling in T.L.O. Therefore school officials could not benefit from the Court's decision. Lower courts, of course, have benefited and virtually all decisions have been analyzed with the T.L.O. decision as a basis for review.

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[92]Ibid., p. 761.

Martens v. District No. 220, Bd. of Educ.

620 F. Supp. 29 (1985)

Facts

On April 29, 1982, Joan Baukus, the Dean of Students at Reavis High School in Stickney, Ohio, received an anonymous tip from an adult female that Michael Martens, a student at Reavis, was selling drugs at school. The caller gave specific details about what Martens' activities and where he secreted drugs and related paraphernalia. Baukus had received a similar tip the same day from a person she believed was the same caller. As a result of this earlier tip, Baukus had discovered marijuana in another student's locker.[93]

Baukus called Martens to her office. Martens denied that he had any drugs on his person but refused to empty his pockets. Unable to reach Martens' parents, Baukus allowed a sheriff's deputy, who just happened to be at the school, to talk with Martens. The deputy suggested to Martens that he comply with the dean's request. Martens emptied his pockets revealing a pipe tested to have marijuana residue.[94]

Martens was suspended from school by the administration and was eventually expelled by the Board of Education, District No. 220. Martens brought suit based on an alleged violation of his Fourth Amendment rights

[93]Martens v. District No. 220, Bd. of Educ., 620 F. Supp. 29, 30 (1985).

[94]Ibid., pp. 30-31.

and on the introduction of illegally seized evidence at his expulsion hearing.[95]

Decision

The court initially delayed its decision pending the outcome of the Supreme Court's T.L.O. decision. Immediately thereafter the court applied for the first time the twofold inquiry recommended by the Supreme Court in T.L.O. The search of Martens was justified at its inception because of the anonymous telephone call. Furthermore the emptying of pockets was well within a reasonable scope based on the collective facts of the case.[96]

Discussion

One factor takes this case beyond principles established by T.L.O. Police were directly involved in the search of Martens. The court, however, satisfied itself that police involvement was quite minimal and since criminal proceedings were initiated, there was no requirement to establish probable cause. Of interest also is the court's analysis of factors giving credence to "reasonableness." First, the school was experiencing a significant drug problem. Second, the anonymous tip came from "a member of the public" which the court believed added to its credibility. Third, the tip was similar to the earlier tip which proved accurate. And

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[95]Ibid.

[96]Ibid., p. 32.

finally, the tip was not a "blanket" allegation but rather spelled out in detail what Martens was doing.[97]

In re Bobby B.

218 Cal. Rptr. 253 (1985)

Facts

On October 21, 1984, Mr. Carlos Martinez, Dean of Boys at Lincoln High School in Los Angeles, was inspecting restrooms while students were in class. Bobby Ramon and another boy were found in a restroom without a pass. According to Martinez, Ramon acted in a suspicious manner which prompted the Dean to require the boy to empty his pockets to look for "pot." Discovered were two marijuana cigarettes and about a gram of cocaine. All items were located inside of Ramon's wallet which Martinez searched. Bobby Ramon brought suit to have the evidence discovered by Martinez suppressed.[98]

Decision

Both appellant and respondent referred to the T.L.O. decision in their arguments. The court applied the "two-prong"[99] test of T.L.O. and found the search to be legal. Justification at the inception was based on Martinez's testimony that a significant drug problem existed at Lincoln

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[97]Ibid.

[98]In re Bobby B., 218 Cal. Rptr. 253, 254 (1985).

[99]The court substituted two-pronged for twofold used by T.L.O. The "two-pronged" test was used in In re W. 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

High, especially in the restrooms. Prevalent problem, student out of class unauthorized and nervous behavior combined to justify the search. In applying the "second-prong" the court reasoned that a pocket search, even into the appellant's wallet, was based on reasonable suspicion. The court closed by stating: "Such search was mandated by necessity, reasonable in scope and judicially approved."[100]

Discussion

It is interesting to note the contrast of In re Bobby B. to T.L.O. Although Bobby Ramon was in a restroom without permission, he was not smoking. There was no smell of marijuana smoke, he was not observed passing anything to the other student. In fact, there was no information at all to suggest that Martinez even knew Ramon or suspected him of being involved with drugs. Without individualized suspicion, this case appears to give validity to Justice Stevens' fear that intrusive searches would be instigated for relatively minor offenses. In this case, the only rule broken was to be in the restroom without a pass.

State v. Joseph T.

336 S.E. 2d 728 (1985)

Facts

On March 11, 1982, Joseph Martray, an assistant principal at Follansbee Middle School in Brooke County, West Virginia, detected the smell of alcohol on a student's breath. When confronted, the student

[100]In re Bobby B., 218 Cal. Rptr. 253, 254, 255, 256 (1985).

confessed that he had consumed a beer that morning before coming to school at the home of Joseph T. The assistant principal asked two teachers to search the latter student's locker using the school's dual control key. Found in a jacket located in the locker were pipes, cigarette rolling papers, and a plastic box containing marijuana cigarettes. All items were left in the jacket and findings were reported to Martray. The assistant principal summoned Joseph and returned with him to the locker, reopened it, and examined the contents. Joseph, referred to the juvenile authorities, sought to suppress the evidence. The circuit court denied the motion and placed the defendant on probation.[101]

Decision

The Supreme Court of Appeals of West Virginia in a 2:1 decision upheld the lower court's findings based on the Supreme Court's ruling in T.L.O. The court did note that two issues, relevant to their case, were not addressed in the Supreme Court's decision. These included search of school lockers by school authorities and the question concerning exclusion of evidence from subsequent criminal proceedings if a search was found to be unreasonable.[102]

The court relied heavily on several pre-T.L.O. locker search cases in forming its opinion. The two-pronged test of In re W.[103] was formulated by a court faced with a situation quite similar to the facts surrounding the

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[101]State v. Joseph T., 336 S.E. 2d 728, 730, 731 (1985).

[102]Ibid., p. 733.

[103]In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

search of Joseph T. Marijuana discovered by an assistant principal in a dual controlled locker, was returned to the locker until the student could be brought to the locker. The locker was then opened in the student's presence. The court developed the two-pronged test asking first, was the search within the scope of the school's duties and second, was the search reasonable under all facts and circumstances.[104]

The other cases relied on by the court were In re Donaldson,[105] Horton,[106] and T.L.O. The court applied the twofold inquiry of T.L.O. and found the search of Joseph T. to be legal in both circumstances.[107] Reviewing the assistant principal's suspicion about the appellant having alcohol in his locker the court wrote:

> Although Martray's suspicion, that the appellant may have brought alcoholic beverages to the school, may not have reached the level of "probable cause," we are of the opinion that Martray instituted the search of the appellant's locker under circumstances consistent with the "reasonable suspicion standard . . . ."[108]

A dissenting opinion in this case believed the search of the locker to be improper because of the absence of "articulable facts" to suspect that alcohol would be found in the locker. The fact that the appellant's friend had consumed a beer at the appellant's home, was insufficient to justify a

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[104]State v. Joseph T., 336 S.E. 2d 728, 733 (1985).

[105]In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).

[106]Horton v. Goose Creek Independent School District, 690 F. 2d 470, reh'g denied, 693 F. 2d 524 (1982), cert. denied, 463 U.S. 1207, 103 S. Ct. 3536 (1983).

[107]State v. Joseph T., 336 S.E. 2d 728, 732 (1985).

[108]Ibid., p. 737.

search of his school locker. Furthermore, the dissent questioned the scope of the search. If indeed the search was to look for alcohol, then a mere pat-down of the jacket, found in the locker, would have been sufficient to determine if alcohol was present. The school personnel went much farther and searched the jacket in detail.[109]

Discussion

Once again justices argue a search case using the the twofold inquiry advanced by T.L.O. This case involved the search of a student's locker. Even though T.L.O. did not address the issue of locker search, it is hard to imagine that a more rigid standard might be expected for a dual controlled storage site as opposed to something so personal as a female's purse. The court's majority chose to apply a somewhat relaxed inspection of the relationship of alcohol on a friend's breath to a suspicion that alcoholic beverages would be found in the locker. The minority opinion saw a significant absence of a nexus between the facts and the resulting suspicion.

Again the element of human judgment, based on the weighing of personal values and on the individual justices interpretation of prior cases and issues, has led to a split decision. In this case, the majority found the search to be reasonable. The appellant's attempt to suppress as evidence the marijuana and paraphernalia was denied based on the fact that the search was ruled as justified and reasonable.[110]

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[109]Ibid., p. 741.

[110]Ibid., p. 738.

In re William G.

709 P. 2d 1287 (1985)

Facts

On October 1, 1979, William G., a student at Chatsworth High School in Los Angeles, was walking with two male companions across the school's campus. Assistant Principal, Reno Lorenz, observed the boys from a distance of approximately thirty-five yards. He noticed that William was carrying a small black case which was drawing the attention of his companions. The case had an unusual bulge.[111]

Lorenz pursued the students and upon reaching them asked where they were going and why they were not in class. William, an early release student, advised the administrator that his classes had ended for the day. In the course of the conversation, Lorenz observed William "palm" the case to his side and then behind his back. The administrator asked William what he was hiding to which the student replied, "Nothing."[112]

Lorenz then attempted to see what William was concealing behind his back. The student protested, "You can't search me," and then, "You need a warrant for this." William was then escorted to the school's office by Lorenz where the case was forcibly taken. Inside was discovered marijuana, a gram weight scale and cigarette rolling papers. William stated that the contents belonged to someone else.[113]

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[111]In re William G., 221 Cal. Rptr. 118, 709 P. 2d 1287, 1289 (1985).

[112]Ibid.

[113]Ibid.

The Los Angeles police were summoned and arrested William. In a police pat-down search of the student, $135 was found in the boy's pockets, but was never introduced into evidence. Immediately William protested that evidence seized by Lorenz should not be used against him. The immediate search, he maintained, was without a reasonable basis.[114]

Lorenz, who admitted in the ajudication hearing that he often helped police in "arresting" juveniles for drug violations, stated that he had no prior knowledge of William and was moved to action only on his established procedure to check students who were out of class. The court denied the request to suppress evidence finding instead that the search was conducted on reasonable grounds. William appealed.[115]

Decision

In another divided opinion, the Supreme Court of California reversed the Los Angeles County Superior Court's ruling and declared that the evidence found on William should be excluded from evidence being introduced against him. The decision focused on the determination of "reasonable suspicion." The court recognized that a majority of courts, in other jurisdictions, had adopted standards below that of "probable cause." Reasonable suspicion was not without its own restriction to be based on objective and articulable facts.[116]

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[114]Ibid.

[115]Ibid., pp. 1289-1290.

[116]Ibid., pp. 1297-1298.

The court reviewed in detail the events leading up to the search of William and found that:

> Lorenz articulated no facts to support a reasonable suspicion that William was engaged in a proscribed activity justifying a search. The record reflects a complete lack of any prior knowledge or information on the part of Lorenz relating William to the possession, use, or sale, of illegal drugs or other contraband . . . . Lorenz' suspicion that William was tardy or truant from class provided no reasonable basis for conducting a search of any kind. The record is also devoid of evidence of exigent circumstances requiring an immediate nonconsensual search.[117]

The court further held that neither the "furtive" effort to conceal the calculator case from view, nor the student's protest that Lorenz could not search him without a "warrant," were facts that would contribute to "reasonable suspicion." Many reasons might exist, other than the desire to conceal evidence, that would cause a person to demand respect for his or her constitutional rights.[118] The court stated:

> If a student's limited right of privacy is to have any meaning, his attempt to exercise that right--by shielding a private possession from a school official's view--cannot in itself trigger a "reasonable suspicion." A contrary conclusion would lead to the anomalous result that a student would retain a right of privacy only in those matters that he willingly reveals to school officials.[119]

Discussion

It is interesting to compare the circumstances in William G. to those in Bobby B.[120] In both cases, suspicion was initiated by the student's presence in an area where they were not supposed to be. In Bobby B., the

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[117]Ibid., p. 1297.

[118]Ibid.

[119]Ibid., pp. 1297-1298.

[120]In re Bobby B., 218 Cal. Rptr. 253 (1985).

court found that suspicious behavior was sufficient to perform a reasonable search, yet in William G., the actual sighting of a calculator case with an unusual bulge, coupled with other overt behaviors, was not considered sufficient. The Justices of the Supreme Court of California also split in their decision. The Chief Justice dissented because of the court's reasoning. He preferred instead the adoption of the "probable cause" standard advocated by United States Supreme Court Justice Brennan.[121] Other dissent focused on the opposite extreme and protested that the circumstances presented in William were sufficient to justify the search at its inception and maintain its reasonableness in scope to the factors justifying the search in the first place.

Cales v. Howell Public Schools

635 F. Supp. 454 (1985)

Facts

On April 30, 1980, Ruth Cales, a fifteen year old tenth grader at Howell High School in Howell, Michigan, was observed by the school's security guard in the student parking lot. The guard's attention was drawn to the student because she was acting in a suspicious manner and was ducking down behind cars. When confronted, Cales gave the security guard a fake name. Cales was taken to the office of Daniel McCarthy, assistant principal. There McCarthy ordered Cales to empty the contents of

[121]Ibid., pp. 1298-1300.

her purse on his desk. Confiscated were some readmittance slips which were improperly in her possession.[122]

McCarthy, suspecting that Cales might be in possession of drugs, ordered that she turn her pockets inside-out. When nothing illegal was found, McCarthy ordered Assistant Principal Mary Steinhelper, to search Cales further. Steinhelper had the tenth grader remove her jeans and inspected her even so far as to require that she bend over in order to ". . . examine the contents of her brassiere." Although McCarthy was not present for the strip search, it was witnessed by Colleen Wise, McCarthy's secretary.[123]

Alleging that her civil rights had been violated, Cales brought suit against the Howell Public Schools, McCarthy, Steinhelper and Wise. The court in making its decision asked the following questions. Did the school district have a policy or custom concerning strip search of students? Did the assistant principal have reasonable suspicion that a search would turn up evidence of drugs or other contraband? Is an assistant principal entitled to qualified immunity for ordering a student's strip search or for conducting one? Finally, can a secretary be liable for merely watching an action that was ordered by her superior.[124]

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[122]Cales v. Howell Public Schools, 635 F. Supp. 454 (1985).

[123]Ibid., p. 455.

[124]Ibid., pp. 454-455.

Decision

The court ruled that the Howell Public Schools could not be held liable for the search. No evidence was brought forth that a board of education policy existed which would, or did, contribute to the alleged violation of Cales' constitutional rights. The court further held that McCarthy, as well as Steinhelper, could be held liable if the search was ruled unreasonable. The test to be applied was that expressed in T.L.O. Was the search justified at its inception and was the search as conducted reasonably related in scope to the facts that justified the search in the first place.[125]

The court applied the facts to the first test. Cales was observed ducking behind cars, gave a false name, and was cutting class. The court stated that:

> It is clear that plaintiff's conduct created reasonable grounds for suspecting that some school rule or law had been violated. However, it does not create a reasonable suspicion that a search would turn up evidence of drug usage. Plaintiff's conduct was clearly ambiguous. It could have indicated that she was truant, or that she was stealing hubcaps, or that she had left class to meet a boy friend.[126]

Cales' various behaviors, the court stated, were such as to indicate a violation of any number of rules or regulations. The court, however, was not going to apply the Supreme Court's decision in T.L.O. in a manner that would allow searches to be based on ambiguous behaviors. The court wrote:

> This Court does not read T.L.O. so broadly as to allow a school administrator the right to search a student because that student acts in such a way so as to create a reasonable suspicion that the student has violated some rule or law. Rather, the burden is on the administrator to establish that the student's conduct is such that it

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[125]Ibid., pp. 456-457.

[126]Ibid., p. 457.

> creates a reasonable suspicion that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of that violation. If the administrator fails to carry this burden, any subsequent search necessarily falls beyond the parameters of the Fourth Amendment. Because the facts here establish that the search was not reasonable at its inception, it is unnecessary to address the second prong of the TLO test.[127]

The court next turned its attention to the qualified immunity of McCarthy, Steinhelper, and Wise. McCarthy, the court reasoned, was not entitled to qualified immunity. The testimony indicated that McCarthy was aware that a search by a school administrator must be based on reasonable suspicion. Since the court concluded that reasonable suspicion was not present, the actions of McCarthy were illegal.[128]

The court found that Steinhelper's involvement was specifically related to the directions given to her by McCarthy. Since Steinhelper was unaware of the facts leading up to Cales being brought to McCarthy's office, she acted only upon the directions of McCarthy to search the tenth grader. Therefore, the court reasoned, her search was reasonably related to the objectives of the search--namely drugs that McCarthy suspected. Wise was also granted immunity based on the court's belief that to merely witness an unconstitutional action at the direction of a superior, was not in itself an illegal act.[129]

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[127]Ibid.

[128]Ibid., p. 458.

[129]Ibid.

Discussion

The court made it clear at the onset that both parties were to argue the case based on the Supreme Court's T.L.O. decision.[130] It is interesting to note that the court's review of the facts, prompting McCarthy to search Cales, led them to the conclusion that the search was unreasonable and therefore unjustified. The second inquiry required by the T.L.O. test was therefore unnecessary. Yet, the court in considering the question of immunity for Steinhelper, found that McCarthy's suspicion, stated to Steinhelper that Cales may be carrying drugs, was sufficient to establish that the methods employed by Steinhelper were reasonably related to the objectives of the search.[131]

This case is evidence that the fears expressed by Supreme Court Justice Stevens may be legitimate.[132] Although the participants of this search could not have been influenced by T.L.O., the court's decision helps to define how the standard of reasonableness will be applied.[133] Although it is likely that Justice` Stevens would have found insufficient cause to justify a reasonable search, it is not likely he would have found that a strip search was reasonably related to McCarthy's suspicion that Cales was carrying drugs.

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[130]Ibid., p. 450.

[131]Ibid., p. 458.

[132]New Jersey v. T.L.O., 105 S. Ct. 733, 759 (1985).

[133]Both the search of Cales, as well as of Owens in T.L.O., took place in the Spring of 1980. It was over four years after McCarthy had had Cales strip searched, that the Supreme Court handed down its decision on school related searches.

State v. Brooks

718 P. 2d 837 (1986)

Facts

On October 19, 1983, Vicki Sherwood, Vice-Principal of Inglemoor High School in Seattle, Washington, received information that student Steve Brooks was selling marijuana out of his school locker. The informant, a fellow student whose locker was located close to Brooks' locker, advised Sherwood that he had observed Brooks selling out of a blue metal box.[134]

Ms. Sherwood had on three other occasions received reports that Brooks was a drug user and had been observed under the influence of drugs at school. She had confronted him each time and had informed his mother of her suspicions. Brooks was also known to frequent an area, identified by Sherwood and others, to be a ". . . site of drug trafficking among students."[135]

The assistant principal immediately informed the school's principal and together they searched locker 372-D, which was being used by Brooks. The blue metal box, found inside the locker, was also locked. Unable to open the box, they placed it back into the locker and sent for Brooks. The locker was again opened and the contents removed. Brooks refused to open the metal box until the principal advised him that the police would be called.[136]

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[134]State v. Brooks, 718 P. 2d 837 (1986).

[135]Ibid.

[136]Ibid., p. 838.

Brooks then consented to open the box which contained hallucinogenic mushrooms. The principal then called the police and Brooks was arrested. Brooks argued that his constitutional rights had been violated by an illegal search and sought to have the evidence excluded from his trial. The motion to suppress was denied and Brooks was found guilty of possession and intent to deliver psilocyn mushrooms.[137]

Decision

Immediately the court seized upon the twofold inquiry conveyed in T.L.O. The legality of a search is based upon the reasonableness of all circumstances related to it. The search must be reasonable at its inception and it must be reasonably related in scope to the circumstances that originally justified the search.[138]

The court then proceeded to enumerate the justifying factors in Brooks. These included first an informant whose information proved accurate. Second, the belief by the assistant principal that Brooks was a drug user. Third, reports by three different teachers that Brooks had been previously observed in an intoxicated state. And finally, a knowledge that Brooks frequented a place notorious as a drug trafficking area.[139] The court stated:

> On the basis of these facts, Sherwood and the school principal searched Brooks' locker and metal box. These searches were justified at their inception because there were reasonable grounds for the school officials to suspect that the search would turn up evidence

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[137]Ibid.

[138]New Jersey v. T.L.O., 105 S. Ct. 733, 739 (1985).

[139]State v. Brooks, 718 P. 2d 837 (Wash. App. 1986).

> that Brooks had violated or was violating either the law or the rules of the school. . . . The search was permissible in its scope because it was limited to the search of the locker and metal box whose purported contents justified the search at its inception.[140]

Discussion

It is apparent that the justices had little difficulty reaching their unanimous decision. The facts leading up to the search of Brooks' locker strongly suggest a likelihood (reasonable suspicion) that Brooks was involved in drugs and was dealing out of a box locked away in a school locker. There were no unusual bulges as in William G.,[141] or "funny" behavior as in Cales.[142] The facts specifically relate and very little subjectivity is required to draw a conclusion.

R.D.L. v. State

499 So. 2d 31 (1986)

Facts

R.D.L., a student at Cobb Middle School in Pinellas County, Florida, was charged with grand theft based on evidence found in his school locker. He had been observed in the school's office where a clock was later reported as missing. He had also been seen with a pot of honey which was reported missing from the school's home economics department. Also missing was

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[140]Ibid., p. 839.

[141]In re William G., 709 P. 2d 1287 (Cal. 1985).

[142]Cales v. Howell Public Schools, 635 F. Supp. 454 (ED. Mich. 1985).

over $3000 worth of school lunch tickets. When directed to open his locker by the school's assistant principal, the stolen tickets fell onto the floor.[143]

Decision

The District Court of Appeal of Florida, Second District, affirmed the lower court's verdict of guilty. R.D.L.'s appeal was based on his assertion that the search was illegal therefore the evidence discovered in the search should be suppressed. The court applied the T.L.O. standards to measure the reasonableness of R.D.L.'s locker search. The decision was unanimous that the search was not only justified at its inception but also was reasonable in its scope.[144]

Discussion

This relatively insignificant case reinforces the fact that lower courts are relying upon the T.L.O. twofold inquiry. The circumstances again point to articulable facts that raise the level of suspicion specifically to the incident at hand.

In Interest of Dumas

515 A. 2d 984 (1986)

Facts

Guy Dumas, a student at Academy High School in Erie County, Pennsylvania, was observed by a teacher giving a cigarette to another student. He had taken the cigarette from a pack he had in his school

[143]R.D.L. v. State, 499 So. 2d 31 (1986).

[144]Ibid., pp. 31-32.

locker. The teacher reported the incident to an assistant principal who immediately confronted both boys, taking the cigarette from one and the pack of cigarettes from Dumas. The boy's locker was then searched. Inside of a jacket, found in the locker, another package of cigarettes was found which contained marijuana.[145]

Charged on a delinquency petition to juvenile court. Dumas moved to suppress the evidence based on his contention that the search had been illegal. The motion to suppress was granted by the Court of Common Pleas, Juvenile Division. The Commonwealth of Pennsylvania appealed.[146]

Decision

The Superior Court of Pennsylvania affirmed the lower court's decision to suppress the evidence. Noting that T.L.O. had been mute on searching lockers, the court still applied the twofold inquiry to the case.[147] In applying the first inquiry the court reasoned that the assistant principal was justified in believing that Dumas had violated school rules by possessing cigarettes. But it was here that reasonable suspicion ended, and the court agreed with the earlier decision.

> However, once he [the assistant principal] had seized the pack of cigarettes from Guy's hands, the court found that it was not reasonable to suspect that there would be more cigarettes in his locker. We agree. Further, although . . . [the assistant principal] . . . suspected Guy of being involved with marijuana he was unable to articulate any reasons for this suspecion. The mere fact that Guy

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[145]In Interest of Dumas, 515 A. 2d 984 (1986).

[146]Ibid., pp. 984-985.

[147]Ibid., p. 986.

> possessed cigarettes does not lead to the conclusion that he would also possess marijuana.[148]

Discussion

The court again applied the T.L.O. twofold inquiry and found that justification was not present at the inception. A separate concurring opinion offers additional insight into the thinking of the court. First it was recognized that the school official ". . . did not have a reasonable and articulable basis to believe that the search would uncover evidence that the law or rules of the school were violated or being violated."[149] But had the school communicated to the students that periodic inspections and searches could be made, then the student's expectation of privacy would be lessened. In this case the court found that:

> The record does not indicate that the school made any special restrictions with regard to the nature of the items which could be stored in the locker. The school did not notify students that use of the lockers would be subject to random or periodic inspection or search.[150]

But had the school in Dumas accomplished the above, then the student would not have had a reasonable expectation of privacy. As the concurring justice wrote:

> I find no constitutional entitlement to a private school locker. Hence, I would find no prohibition to prevent the adoption of reasonable restrictions on the use of school lockers.[151]

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[148]Ibid.

[149]Ibid.

[150]Ibid.

[151]Ibid., p. 987.

Simply stated, the court believes that any school can make reasonable and lawful searches if it announces a dual control of lockers and advises students that periodic inspections and searches can be made. Failure to advise students increases the degree of privacy that must be afforded to students using school lockers.[152]

SUMMARY

The review and analysis of court cases related to search and seizure is essential to an understanding of the magnitude and dimension of the problem. The courts have relied on established precedent when possible and on their own judgment when it was not possible. The preceding eight pre-T.L.O. cases are, at best, representative of school search cases from 1969 to 1985. The cases reviewed and analyzed in this study were selected for a peculiar contribution or because they but represented an idea from a larger body of related litigation. T.L.O. settled only a couple questions related to search. The most essential placed school officials in a category aside from other governmental officials and required only a standard of "reasonable suspicion" for search justification.

The eight cases immediately following T.L.O. relied heavily on the Supreme Court's ruling. Yet T.L.O. was not a panacean decision. Important questions remained unanswered. The determination of reasonableness was left to inspection through an established inquiry process that offered little assistance in judging the weight of the variables.

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[152]Ibid.

Courts after T.L.O. were therefore faced with making many of the same judgments faced by pre-T.L.O. courts.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

SUMMARY

Search and seizure involving public school children is a relatively recent issue in American public education, having its birth in the 1960's students' rights movement. Prior to this time, there undoubtedly were searches being conducted in the schools, but the issue remained a local one with only two exceptions finding their way into the courts. Although many searches were remarkably similar in facts surrounding the incident, they were often as dissimilar in their outcome. Search situations emerged nationally and involved lockers, automobiles, pocketbooks, personal belongings and clothes. They have involved drug-detecting dogs, mirrors, pat-downs, and outright strip searches.

Based on the analysis of research presented in this study, it is apparent that the definition of "reasonableness" is elusive. Justices have looked at the exact same factors in a search situation and have divided over the issue of "reasonableness." Despite the Supreme Court's decision in New Jersey v. T.L.O., which settled standards issue for school personnel to conduct searches, subsequent courts have continued to struggle with the same concept of reasonableness.

The issue therefore remains important and timely. There is every indication that crime and misbehavior continue in the public schools which

will necessitate periodic inspection of students and their property. Parents will continue to question the legality of school searches. Attorneys, knowing that many issues related to school searches have gone unanswered, will represent students.

Search and seizure in the American public schools is a constitutional issue. It involves a basic issue of student rights and freedom. It involves the application of the Fourth Amendment to children assigned to a public institution that maintains a limited custodial environment. It involves the rights and obligation of school personnel to maintain this environment to a level that is safe and conducive to learning. It involves school officials who have been difficult to define in their relationship to those whom they are charged to keep, to teach, and to protect.

It is important to school personnel to be cognizant of issues concerning school search, in order to make sound educational and legal decisions. This study, which includes a comprehensive review of issues related to school search and seizure, will assist school officials in making those decisions.

Summary

The introductory material in Chapter 1 identified the 1985 landmark decision of New Jersey v. T.L.O. as the first Supreme Court decision related to search and seizure and the application of the Fourth Amendment to public school pupils. "Reasonable suspicion" was established as the standard by which school personnel would be held. Cases litigated in lower

courts prior to T.L.O., were concentrated in the 1970's and early 1980's. Prior to the student rights' movement, only two search and seizure cases were recorded that involved public school students. Although searches undoubtedly occurred, they remained a local issue. It was not until the juxtaposition of a number of features including drugs, guns and student activism that cases began to reach the courts.

Chapter 2 sought to put search and seizure into an historical perspective. The concept of a person's freedom from unreasonable search and seizure had its beginning in the British Common Law. The American experience, especially with writs of assistance, placed a high demand for this personal right and thus emerged the Fourth Amendment to the United States Constitution. Spanning the next two centuries criminal case law provided courts with sufficient search and seizure litigation to establish a series of legal precedents. Landmark cases identified in the literature were reviewed.

An exhaustive review of literature specifically related to public school search and seizure was not attempted. Although numerous articles, chapters in books, and papers have been written on the subject, only a few have been scholarly in their approach. Reference to specific studies was used because of some particular contribution. The overwhelming majority of literature has come from the courts' own written decisions.

Chapter 3 was specifically related to the "emerging standard of reasonableness." A significant number of cases prior to T.L.O. were inspected for specific contribution to facts and issues related to search. Insight can be gained by this process. Although the Supreme Court in

T.L.O. established that "reasonable suspicion" was the acceptable standard for school searches, other significant issues went unanswered. These included: (1) the status of the exclusionary rule; (2) the use of drug detecting dogs; (3) the use of one-way mirrors and electronic surveillance; (4) the involvement of police in conjunction with school personnel; and (5) the legality of strip searches. Reasonableness at best remains an elusive term. Establishing a framework predicated on common sense parameters is the only acceptable way to deal with "reasonableness." Cases subsequent to T.L.O. are devoid of discussion about in loco parentis and status of school personnel, but continue to struggle with specific facts of search, in determining its legality.

No attempt has been made to review all school search and seizure cases in Chapter 4. The selection of pre-T.L.O. cases was made based on two factors. The first concerned specific criteria that was developed by the court to assist in defining reasonableness. For example, we see the two-prong test of In re W., and age, history, record, prevalence of problem and exigency factors from Scott D. The second factor involved representation that the case made to a specific issue. Therefore, cases were included that related to issues of in loco parentis, police involvement, the exclusionary rule, drug-detecting dogs, two-way mirrors, and strip search.

The review of T.L.O. is important to this study because it allows for focus on the key issue of "reasonableness." The actual searches that occurred which precipitated litigation after T.L.O. took place prior to the Court's decision. The significance of this is those who were involved in conducting the searches, were not aided by any knowledge gained from the

landmark decision. Attorneys in the post-T.L.O. cases referred to T.L.O. in their arguments yet, no claim was made that the search was motivated or inspired by the decision. These post-T.L.O. cases continue to demonstrate similar frustrations and concerns over what constitutes "reasonableness."

As a guide to the educational and legal research, six questions were formulated and listed in Chapter 1 of this study. The answer to these questions are incorporated in Chapters 3 and 4 and are summarized here in numerical order:

1. How was the "standard of reasonableness" concept addressed in judicial decisions?

This concept was considered in most litigation prior to T.L.O. Some courts chose to tie reasonableness to other concepts. The most popular was that of in loco parentis. Without a strong reliance on factors establishing reasonable suspicion or probable cause, the court chose to use this "in place of parent" doctrine to justify the search. Other courts chose a middle-ground and viewed the school official as a "private citizen" uninhibited by the Fourth Amendment. And, of course, several courts viewed the school official as a governmental agent bound to the same requirements of police.

In each situation stated above, there existed a set of intertwining circumstances which made each case unique. The courts were also involved in evaluating the scope of the search relative to the child's age, history and record in school, the prevalence of the problem which caused the search, and the exigency to conduct the search. These factors were

often balanced against the nature of the search and the courts' perception of the degree to which the school needed to maintain order and safety.

By the time the Supreme Court granted certiorari to New Jersey v. T.L.O., the lower courts were taking an ecletic approach to decision making. Although the majority of courts found "reasonable suspicion" as the standard for school officials, there remained great latitude in determining what was or was not "reasonable."

2. How did the Supreme Court address the "standard of reasonableness" in T.L.O.?

The Supreme Court summarily dismissed any notion that school officials would be held to the probable cause requirement imposed on law enforcement. Furthermore, the Court eliminated the application of in loco parentis as justification. The legality and justification of a search would depend upon "reasonable suspicion" considering all circumstances. A twofold inquiry was to be applied to the circumstances. First, was the search justified at its inception? In other words, could it be shown that there were sufficient grounds to believe that the search would turn up evidence to show a rule or law was broken. Second, was the search reasonably related in scope to the circumstances which initially caused the search? In other words, was the procedure used to search reasonable related to the object of the search in light of the age and sex of the student and the seriousness of the infraction.

The Court did not delineate a set of circumstances to define reasonable searches nor did it seek to clarify "reasonableness" any further. From the inspection of circumstances surrounding the assistant principal's search of Terry Lee Owens, one can make an assessment of circumstances which justified "reasonable suspicion" in that particular case. Those circumstances might then be applied to a situation at hand.

3. Did the Supreme Court's T.L.O. decision confirm previous judicial decisions by lower courts?

The Supreme Court, in its own opinion succinctly stated that it was joining a "majority of courts" in rejecting the requirement for probable cause. The balance, the court reasoned, was one between privacy interests of school children and the substantial need of school officials to maintain order. The Court, nevertheless, deviated from the majority on the issue of in loco parentis. This concept, the Court reasoned, was in "tension with contemporary reality." As stated earlier, many lower court decisions involved search related issues that were neither confirmed nor rejected by the Court.

4. Did T.L.O. redefine and establish new constitutional procedures?

The Fourth Amendment specifically states that persons are to be secure from "unreasonable" searches and seizures unless a warrant has been issued. This warrant must be based on a sworn statement which

includes specific information as to what is being searched for and its location. The converse would simply be that persons would not be secure from "reasonable" searches. The Court in T.L.O. did establish new constitutional procedures in that a specific category of governmental officials is exempted from the standard required of virtually all other officials. Although this standard was applied regularly by lower courts, T.L.O. confirmed it. The specific procedure, as stated previously, was a twofold inquiry.

5. How have lower courts addressed the "standard of reasonableness" concept since the Supreme Court's T.L.O. decision?

All cases litigated since T.L.O. have made specific reference to the Supreme Court's decision. The lower courts, for the most part, have applied the twofold inquiry procedure and have carefully inspected the circumstances surrounding the search incident. But just as in pre-T.L.O. cases, the ultimate outcome is still subject to basic human judgment. Without a specific list of criteria for establishing a justifiable search, the court must substitute its own judgment based on facts of the case superimposed upon the framework established by T.L.O.

6. Based on an analysis of judicial decisions since T.L.O., what are the emerging trends and issues concerning search and seizure?

Eight post-T.L.O. cases were reviewed in this study. The most significant trend has been for the courts to apply the twofold inquiry established by the Supreme Court in T.L.O. The circumstances surrounding the searches are remarkably similar to those in most pre-T.L.O. searches. With one exception, the courts have demanded the presence of substantial articulable facts for justification of the search at its inception. Even the exception was found to be justified based on suspicion and the preponderance of a drug problem at the school.

Three other issues emerged that could signal future litigation. The first involves the presence and participation of police in a student's search. This issue was not addressed in T.L.O. The second involves strip search. One case following T.L.O. involved an intrusive strip search which the court stated would have been reasonable if the original pocket search for drugs had been justified. This issue was not addressed in T.L.O. Third, the issue of admissibility of evidence continued to be part of student initiated litigation. The exclusionary rule, which was the original issue being reviewed by T.L.O., was not part of the Court's final decision because the search was found to be justified.

Conclusions

Analyzing and drawing conclusions from legal research is a difficult task. Although legal issues appear to be similar from one case to another, the circumstances of each individual case can cause a different decision. Nevertheless, certain conclusions can be drawn from the research

concerning the emerging standard of reasonableness for search and seizure in the American public schools.

1. Searches in the public school will continue to be performed and will continue to be litigated.

2. In loco parentis will no longer serve as a sanctuary for school officials seeking to justify the search of a public school student or his property.

3. Immunity from civil prosecution will be difficult to obtain for school officials conducting unjustified and illegal searches.

4. The courts will continue to be concerned about student rights and will not permit unrestrained search by school officials. A balance between the student's rights and the school's need to maintain order and an atmosphere conducive to learning will continue to be made.

5. "Reasonable suspicion" supported by articulable facts will be the standard applied to school personnel.

6. Defining "reasonable suspicion" will continue to be a problem involving the judicial conceptualization of factors surrounding school related searches.

7. Reasonableness will be based on factors surrounded by a legal framework involving articulable facts and a reasonable scope of search based on those facts. This "twofold inquiry" will remain dependent on human interpretation.

8. Other issues related to reasonable suspicion and search and seizure will continue to emerge in future litigation.

9. The courts have continued to show a strong support for school officials, especially when a relationship can be shown between the area searched and the object being searched for.

Recommendations

The stated purpose of this study was to provide school officials, who are involved in the day-by-day operation of the schools, information that would assist them in making decisions about search and seizure. Although the Supreme Court's T.L.O. decision did not produce a panacea, it did eliminate the need to establish "probable cause" and it did produce a general framework upon which a search might be evaluated.

Although the trend is to apply this framework, it must be understood that the right to search students is not unlimited. Reasonable suspicion was the standard that emerged from most pre-T.L.O. cases and reasonable suspicion has specific criteria. Students and their parents will continue to challenge the school's right to search. School officials must operate from a basis stronger than a "hunch." Articulable facts that can be tied together by an ordinarily cautious and prudent man to show that a search is justified will continue to be the basis of the standard.

The board of education and the central office administration of each school system should develop a search and seizure policy and require that all personnel be knowledgeable of its requirements. This can be accomplished by a comprehensive staff development involving all employees. The twofold test in T.L.O., the two-pronged test in In re W. and the child's age, history, record in school, prevalence of the problem and the

exigency considerations from Scott D. should be incorporated into the policy.

Those charged with frontline involvement with students are the most likely to become involved in a search. Almost all litigation researched in this study indicates that the application of good judgment and common sense will lead to a reasonable and justifiable search. It has been the excesses that glare out as exceptions. Strip searching fifth graders on mere suspicion, for example.

A battery of simple questions, asked prior to a search, can reduce the risk of performing an illegal search. These questions, accompanied by a brief rationale, are as follows:

1. Are the facts supportive of a reasonable expectation that the student is secreting contraband? If only a "hunch" exists or if the factors surrounding the suspicion can be attributed to other causes, reevaluate the search and be cautious of the justification. Courts have not been sympathetic to overzealous administrators even when the search was productive.

2. What are the supporting factors, evidence and circumstances that make the central stimuli for search more plausible? Unless the central cause is conclusive and overpowering, it is recommended that other supporting factors be present in order to be assured of a reasonable search.

3. Is the rule or regulation significant enough to justify a search in the first place? Common sense must prevail. If the rule is no gum in class, and the student is observed making chewing motions, is it worth the risk to require pockets to be emptied?

4. Is the search procedure employed equitable to the item being searched for? Research has shown that reasonable suspicion is sufficient to justify a search based upon articulable facts, but as the intrusiveness of the search increases, the standard for justification approaches probable cause. Strip search, for example, should not be employed until all questions are answered in the positive and the outcome can be balanced with the search. The majority of strip search cases have been found to be unjustified and unreasonable.

5. Are the circumstances so compelling that a search must be conducted without delay and without accumulating articulable facts? Research has shown that the exigency of a situation can be a central factor in justifying a search. When danger is imminent or when the welfare of the student or student body is threatened, a search should proceed without delay.

Unfortunately the need to search students is not likely to diminish in the near future. With the high pressure job of administering a public school, goes the responsibility to make the school's environment safe for students and conducive to learning. The execution of a justifiable search is one aspect of accomplished leadership. Today's school administrator cannot shirk this responsibility and is therefore compelled to be knowledgeable, as well as competent, about school searches. The emergence and maintenance of "reasonable suspicion" from past, present and future litigation, makes this task easier, but not easy.

Recommendations for Further Study

Because so many courts were involved in litigation relative to search and seizure, it would be interesting and informative to develop a computer program to assist in analyzing the cases. The complexity of issues, the various judicial levels and the large number of cases, prevents a comprehensive non-assisted analysis. Some studies have made comparisons of one or two issues, but even here the list was not exhaustive. An input sheet that could be fed directly into the computer via an optic scanner would hasten the process and allow for standardized updates. If input factors included specific facts related to the search, data involving the court hearing the case, plus other logistical information, the data could be cross-referenced, categorized, and equated.

A possible use of this could be to allow practicing administrators faced with a search to check the outcome of previous litigation based on similar circumstances. It could possibly produce probability coefficients that could be assigned to particular court districts or circuits.

A study of police involvement and the introduction of evidence in criminal proceedings could also be expanded from this study. Because the Supreme Court did not categorically address each issue litigated over the years, numerous questions are being left for the lower courts to decide. A study predicting the Supreme Court's position on these issues would be enlightening.

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