

## Students' Fourth and Fourteenth Amendment Rights After Tinker: A Half Full Glass?

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# STUDENTS' FOURTH AND FOURTEENTH AMENDMENT RIGHTS AFTER *TINKER*: A HALF FULL GLASS?

JACQUELINE A. STEFKOVICH\*

Nineteen sixty-nine was the year that the United States Supreme Court rendered its decision in *Tinker v. Des Moines Independent Community School District*,<sup>1</sup> recognizing that students have rights in schools. It was the year that Students for a Democratic Society ("SDS") staged a successful one-day strike on Columbia University's campus requesting abolishment of the ROTC program. It was also the year of the famed Woodstock music festival and of mass demonstrations for racial equality. Nineteen sixty-nine was a year in which this country was in turmoil. We were engaged in political strife and in a war with a faceless foreign enemy on the other side of the world. By 1969, the Civil Rights Act had passed and, shortly, subsequent legislation would expand the rights of women and other minority groups.<sup>2</sup>

Today, our politics have shifted from creating laws which foster civil rights to law enforcement of a very different kind. In 1994, for example,

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<sup>1</sup> 393 U.S. 503 (1969).

<sup>2</sup> Title VII of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (1988).

Title IX of the Educational Amendments of 1972 provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1988).

The Equal Educational Opportunity Act of 1974 states: "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin . . . ." 20 U.S.C. § 1703 (1988). Section (f) of this Act granted equal educational opportunity to linguistic minorities. *Id.* § 1073(f). For a thorough discussion of these issues, see ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW* (1986).

two leading pieces of legislation included an act aimed at making schools safer<sup>3</sup> and a massive crime bill which, among other things, allows for more police protection.<sup>4</sup> Today, we wage another war. This time, the battleground is not on foreign soil, but on very familiar turf. The war is in our neighborhoods and in our schools.<sup>5</sup> It is a war against drugs and violence.<sup>6</sup> How we have chosen to fight this war<sup>7</sup> provides important commentary on the *Tinker* decision and its progeny, particularly those decisions discussing students' rights to privacy and to due process under the Fourth and Fourteenth Amendments of the United States Constitution.

#### INTRODUCTION

*Tinker v. Des Moines Independent Community School District*<sup>8</sup> involved a group of students who wore black armbands to school in protest of the Vietnam War. The United States Supreme Court overturned a lower

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<sup>3</sup> Safe Schools Act of 1994, 20 U.S.C.A. § 5961 (a)-(b) (West Supp. 1995) (providing that, by year 2000, American schools will be drug and violence free); Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C.A. §§ 7101, 7102 (West Supp. 1995) (explaining Congressional findings that correct widespread illegal use of drugs and alcohol by school age children is presenting grave threat).

<sup>4</sup> Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C.A. §§ 13,701-14,223 (West Supp. 1995). Part of the legislation provides for grants to fund programs with the goal of reducing the number of violent crimes committed by youths. *Id.* § 13,862.

<sup>5</sup> See, e.g., Ed Anderson, *Task Force Targets Drugs, Violence in La. Schools*, THE TIMES-PICAYUNE, Jan. 19, 1994, at A13 (indicating that national polls show drugs and violence in schools are more worrisome to parents than grades); Arden Moore, *Violence Concerns Students; Guns, Fighting, Drugs Found in Most Schools*, SUN-SENTINEL, Mar. 8, 1995, at 14A (discussing findings of study mandated by Florida Legislature that one in four students does not feel safe in school).

<sup>6</sup> See, e.g., Carole Feldman, *'Epidemic of Violence' Grips American Schools; Metal Detectors, Searches of Lockers, Drug-Sniffing Dogs Used to Curb Crime, Nationwide Survey Shows*, ROCKY MTN. NEWS, Jan. 6, 1994, at 3A (discussing that violence in schools is not just urban problem but has increased in rural and suburban areas); Leslie Williams, *N.O. Schools Seeking Answers to Drugs, Violence: Leader Encourages More Reports*, THE TIMES-PICAYUNE, Nov. 20, 1993, at A1 (indicating that "[f]irearms, knives, marijuana, cocaine, simple battery, aggravated battery, sexual battery, aggravated assault, and simple assault" are typical major offenses in New Orleans public schools while such offenses have not been reported in parochial schools).

<sup>7</sup> See Alexi Barrionuevo, *Cracking Down on Violence; Schools Chief Stiffens Gun, Drug Penalties*, DALLAS MORNING NEWS, Oct. 8, 1993, at 1N. Some public schools provide teachers and principals with hand-held metal detectors. *Id.* In addition, some schools already have metal detectors installed indoors, while other schools are inquiring about in-school video monitoring of hallways and other areas. *Id.*; see also Beth Frerking, *Schools Slamming Lockers to Curb Violence, Drugs*, THE TIMES-PICAYUNE, Sept. 4, 1994, at A9 (noting that some schools have removed or wired shut student lockers in effort to decrease storage of drugs and guns, and to reduce number of fights which take place near lockers).

<sup>8</sup> 393 U.S. 503 (1969).

court opinion in favor of the school district and held that these students did have free speech rights in schools as long as their actions did not cause "substantial disruption of or material interference with school activities" or infringe upon the rights of others.<sup>9</sup> Although the *Tinker* decision concerned students' First Amendment rights to freedom of speech and freedom of expression, it served as a precursor for many students' rights cases.

*Tinker* and subsequent Supreme Court decisions expanded students' rights, while also imposing limitations on these rights. In times of danger and emergency, both real and perceived, some of these rights have gone by the wayside. Thus, the judicial system, as well as educators, must be ever vigilant in preserving these rights. This Article discusses the Fourth and Fourteenth Amendment rights granted students by the courts, the limitations imposed on these rights, and the circumstances which have caused subsequent courts to set aside these rights. Part One will examine students' rights to privacy guaranteed under the Fourth Amendment and interpreted by the Supreme Court's decision in *New Jersey v. T.L.O.*<sup>10</sup> and subsequent court decisions. Part Two will discuss students' due process rights guaranteed under the Fourteenth Amendment and interpreted, most notably, by the Supreme Court's decision in *Goss v. Lopez*.<sup>11</sup> Part Three will review the condition of students' Fourth and Fourteenth Amendment rights twenty-five years after *Tinker*.

## I. THE FOURTH AMENDMENT AND STUDENTS' RIGHTS

The Fourth Amendment to the U.S. Constitution guarantees:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.<sup>12</sup>

### A. Students' Rights Under the Fourth Amendment

*New Jersey v. T.L.O.*<sup>13</sup> was the first Supreme Court decision addressing the authority of public school officials to conduct searches of

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<sup>9</sup> *Id.* at 514.

<sup>10</sup> 469 U.S. 325 (1985).

<sup>11</sup> 419 U.S. 565 (1975).

<sup>12</sup> U.S. CONST. amend. IV.

<sup>13</sup> 469 U.S. 325 (1985).

students on school grounds.<sup>14</sup> The Court established "reasonable suspicion" as the standard for conducting these searches.<sup>15</sup>

The incident that prompted the *T.L.O.* case arose when the vice principal of Piscataway (N.J.) High School searched the purse of T.L.O., a female student accused of smoking cigarettes in violation of school rules. T.L.O., a fourteen year old freshman at the time of the incident, was called to the principal's office after a teacher reported seeing her and another female student holding lit cigarettes in the women's lavatory. Although the school permitted smoking in certain restricted areas, smoking in restrooms was a violation of a school rule.<sup>16</sup>

The assistant vice principal questioned both students and T.L.O.'s companion admitted to smoking. T.L.O., however, denied smoking and stated that she did not smoke at all. The assistant vice principal then demanded to see T.L.O.'s purse. Opening the purse, he found a pack of cigarettes and some rolling papers that were the type generally used in smoking marijuana.<sup>17</sup> T.L.O. was suspended from school for ten days; three days for smoking cigarettes and seven days for possessing marijuana.<sup>18</sup>

The assistant vice principal contacted T.L.O.'s mother and turned the evidence over to the police. T.L.O. was accompanied to police headquarters by her mother, where she confessed to selling marijuana at the high school. On the basis of this evidence, the State brought delinquency charges against T.L.O.<sup>19</sup> Under the exclusionary rule, evidence seized illegally may not be introduced into evidence in a subsequent judicial proceeding.<sup>20</sup> At her trial, T.L.O. filed a motion to have the evidence

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<sup>14</sup> *T.L.O.* was, in fact, the only United States Supreme Court decision to rule on the Fourth Amendment rights of public school students until *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995), a drug testing case that was decided the summer after the St. John's University School of Law Tinker Symposium. See *infra* mptes 113-32 and accompanying text for a discussion of the *Acton* case.

<sup>15</sup> *T.L.O.*, 469 U.S. at 329.

<sup>16</sup> *Id.* at 328.

<sup>17</sup> *Id.* at 328, 347. Upon further inspection, the assistant vice principal found some marijuana, a pipe, plastic bags, forty dollars (mostly in one dollar bills), an index card with the words "people who owe me money" written on it followed by a list of names and dollar amounts, and two letters implicating T.L.O. in marijuana dealing. *Id.* at 347.

<sup>18</sup> *T.L.O.*, 469 U.S. at 329 n.1. T.L.O. did not suffer the seven-day suspension for possession of marijuana. *Id.*

<sup>19</sup> *In re T.L.O.*, 428 A.2d 1327 (Middlesex County Ct. 1980).

<sup>20</sup> Jurisdictions disagree on whether the exclusionary rule applies to school officials' violations of students' Fourth Amendment rights. Compare *State v. Young*, 216 S.E.2d 586 (Ga.) (holding exclusionary rule does not apply), *cert. denied*, 423 U.S. 1039 (1975) with *People v. D.*, 315 N.E.2d 466 (N.Y. 1974) (holding exclusionary rule precludes production of evidence obtained

suppressed on the grounds that it had been seized in violation of her Fourth Amendment right to be free from unreasonable search and seizure. T.L.O. considered the search unreasonable because nothing in her purse could prove that she had been smoking.<sup>21</sup>

The New Jersey Supreme Court ruled that the search had violated T.L.O.'s Fourth Amendment rights.<sup>22</sup> While the New Jersey Supreme Court believed that "reasonable grounds" was the appropriate standard to use in this case, it maintained that the assistant vice principal had not had "reasonable grounds" to believe that T.L.O. was carrying evidence of criminal involvement in activities that would seriously interfere with school discipline.<sup>23</sup> The Court held, therefore, that the evidence found in T.L.O.'s purse had to be excluded, and set aside the conviction.<sup>24</sup> The State of New Jersey appealed to the United States Supreme Court, claiming broadly that the exclusionary rule should not apply to searches made by public school administrators.<sup>25</sup>

After oral arguments, the United States Supreme Court scheduled reargument on a different, somewhat narrower, question: In opening T.L.O.'s purse, did the assistant vice principal violate the Fourth Amendment?<sup>26</sup> Ultimately, the Supreme Court overruled the New Jersey Supreme Court's decision, holding by a 6-3 majority that the search had been reasonable.<sup>27</sup>

Thus, *New Jersey v. T.L.O.* resolved several important legal issues. The Court maintained that students have rights under the Fourth Amendment and that a "reasonable suspicion" standard is appropriate for determining the constitutionality of searches similar in magnitude to the search in *T.L.O.*<sup>28</sup> The Court characterized school officials as state actors and, at least in the context of Fourth Amendment jurisprudence, set to rest the *in loco parentis* doctrine which had likened school authorities to parents rather than to government agents.<sup>29</sup>

While the *T.L.O.* decision granted students certain rights, it also imposed limitations on these rights. As a result of this decision, students'

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through unlawful school search in delinquency proceedings).

<sup>21</sup> *T.L.O.*, 469 U.S. at 329.

<sup>22</sup> *New Jersey v. Engerud*, 463 A.2d 934 (N.J. 1983).

<sup>23</sup> *Id.* at 942.

<sup>24</sup> *Id.* at 944.

<sup>25</sup> *T.L.O.*, 469 U.S. at 330-31.

<sup>26</sup> *New Jersey v. T.L.O.*, 464 U.S. 991 (1983).

<sup>27</sup> The majority opinion was accompanied by four concurring and dissenting opinions. *T.L.O.*, 469 U.S. at 325-27.

<sup>28</sup> *Id.* at 341.

<sup>29</sup> *Id.* at 336.

privacy rights in public schools are afforded a lower standard of protection than is usually given to citizens.<sup>30</sup> The Supreme Court balanced the Fourth Amendment rights of students against school officials' obligations to maintain a safe environment and arrived at the "reasonable suspicion" standard for evaluating school searches.

In contrast, under traditional Fourth Amendment analysis, for a search of a citizen to be legal, police officers must have probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched.<sup>31</sup> After *T.L.O.*, public school officials need only to have a "reasonable suspicion" that a law or school rule had been violated to justify searching a student, a far more lenient standard.

The reasonable suspicion standard is satisfied by meeting two requirements. First, the search must be justified at its inception.<sup>32</sup> A search will satisfy this requirement when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."<sup>33</sup> Second, the search must be reasonably related in scope to the circumstances that prompted the search.<sup>34</sup> A search is permissible in 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."<sup>35</sup>

Several important concerns arose concerning the reasonable suspicion standard and the limitations that it placed on students' rights.<sup>36</sup> The first concern was that the standard was vague. In his dissenting opinion, Justice Brennan vehemently opposed the adoption of a new standard predicting that the standard would be difficult to apply and, consequently, would weaken the purpose of the Fourth Amendment.<sup>37</sup> In addition, a number of commentators emphasized the need for increased judicial interpretation fearing that the standard would be abused or misunderstood, and that a lack of clarity would result in more litigation.<sup>38</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Beck v. Ohio*, 379 U.S. 89 (1964); *see Brinegar v. United States*, 338 U.S. 160 (1949).

<sup>32</sup> *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

<sup>33</sup> *T.L.O.*, 469 U.S. at 342.

<sup>34</sup> *Terry*, 392 U.S. at 21.

<sup>35</sup> *T.L.O.*, 469 U.S. at 342.

<sup>36</sup> *Id.* at 343. The Court was concerned about whether this standard would intrude on student's privacy rights. *Id.*

<sup>37</sup> *Id.* at 358 (Brennan, J., dissenting).

<sup>38</sup> *See Charles W. Avery & Robert J. Simpson, Search and Seizure: A Risk Assessment Model for Public School Officials*, 16 J.L. & EDUC. 403, 412 (1987); *Larry Bartlett, New Jersey v. T.L.O.: Not an End to School Search Litigation or Commentaries*, 23 EDUC. LAW REP. 801, 807

Secondly, in developing the standard, the Court did not differentiate between a student's criminal act and a student's violation of a trivial school rule.<sup>39</sup> In his dissenting opinion, Justice Stevens pointed out that for the Court, "a search for curlers and sunglasses . . . is apparently just as important as a search for evidence of heroin addiction or violent gang activity."<sup>40</sup>

Thirdly, there was a great deal of concern as to when the reasonable suspicion standard was applicable.<sup>41</sup> *T.L.O.* was a narrow decision that applied only to searches similar in nature to the search conducted in that particular case.<sup>42</sup> Many issues were left open simply because they were not in dispute in *T.L.O.*

### 1. Individualized Suspicion

Firstly, the *T.L.O.* Court failed to decide whether this standard should be extended to searches with non-individualized suspicion. The search in *T.L.O.* involved individualized suspicion; the assistant vice principal was informed that T.L.O. was suspected of smoking.<sup>43</sup> Individualized suspicion<sup>44</sup> is suspicion that a particular individual has engaged in misconduct or may be in possession of contraband or evidence of misconduct.<sup>45</sup> Nonindividualized suspicion exists where student misconduct is suspected, but the suspicion is directed at the student population in general, or a certain segment of the student population, rather than at a

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(1985).

<sup>39</sup> See *T.L.O.*, 469 U.S. at 340-42 (discussing only criminal conduct).

<sup>40</sup> *Id.* at 377 (Stevens, J., dissenting).

<sup>41</sup> See Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal For An Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897 (1988) (detailing three hypothetical scenarios and difficulty in applying reasonable suspicion standard).

<sup>42</sup> See, e.g., *Franz v. Lytle*, 997 F.2d 784, 790 (10th Cir. 1993) (explaining that standard discussed in *T.L.O.* would not be extended to search of nude girl for evidence of sexual assault by parents).

<sup>43</sup> *T.L.O.*, 469 U.S. at 342 n.8; see Gardner, *supra* note 41, at 898 (asserting that *T.L.O.* decision left open question of whether individualized suspicion is essential element of applicable standard).

<sup>44</sup> For a detailed discussion of individualized suspicion in the context of public schools, see, Gardner, *supra* note 41.

<sup>45</sup> See *Tarter v. Raybuck*, 742 F.2d 977, 983 (6th Cir. 1984) (holding constitutional search conducted with particularized suspicion of specific individual for possession of marijuana after school officials personally observed and received confirmation of individual's identity by fellow student), *cert. denied*, 470 U.S. 1051 (1985); cf. Gardner, *supra* note 41, at 939 (stating that "stop and frisk" of individual is permissible when police officer has "reasonable suspicion" that particular individual has, is, or is about to be involved in criminal activity).



specific individual.<sup>46</sup> Factually not in issue, the *T.L.O.* Court did not specifically decide whether individualized suspicion is an essential element of the reasonableness standard.<sup>47</sup> The Court did note, however, that "the Fourth Amendment imposes no irreducible requirement of individualized suspicion"<sup>48</sup> and that "[i]n other contexts . . . [this Court has] held that . . . 'some quantum of individualized suspicion' is usually a prerequisite to a constitutional search or seizure."<sup>49</sup>

## 2. Degree of Intrusion

Secondly, the Court failed to discuss whether the reasonable suspicion standard should apply to searches more intrusive than the *T.L.O.* purse search. Legal commentators<sup>50</sup> and lower courts<sup>51</sup> have assumed, for the most part, that these searches would have a difficult time conforming to the reasonable suspicion standard. Generally, the more intrusive the search, the greater the need for justification of that search.<sup>52</sup> In his dissenting opinion in *T.L.O.*, Justice Stevens maintained that if deeply intrusive searches are ever reasonable, it must "only be to prevent imminent, and serious harm."<sup>53</sup>

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<sup>46</sup> Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990's and Beyond*, 25 URB. LAW. 117, 146 (1993).

<sup>47</sup> *T.L.O.*, 469 U.S. at 342 n.8. Several courts have required individualized suspicion for searches of students. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) (holding canine sniffing of students for drugs without individualized suspicion illegal), *cert. denied*, 463 U.S. 1207 (1983).

<sup>48</sup> *T.L.O.*, 469 U.S. at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)); *see also Camara v. Municipal Court*, 387 U.S. 523 (1967) (explaining that routine inspection of private property involves minor intrusion that does not require individualized suspicion).

<sup>49</sup> *T.L.O.*, 469 U.S. at 342 n.8. *But see Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2395 (1995) ("In many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse.").

<sup>50</sup> *See, e.g., Avery & Simpson, supra* note 38, at 412 (noting that strip searches are extremely difficult to justify in school setting); Bartlett, *supra* note 38, at 807 (noting that five federal courts held strip searches illegal without warrant or probable cause).

<sup>51</sup> *See, e.g., Romo v. Champion*, 46 F.3d 1013 (10th Cir.) (holding strip search of prison visitor constitutional because there was individualized suspicion), *cert. denied*, 116 S. Ct. 387 (1995). A strip search, no matter how carefully executed, is a highly intrusive search that is embarrassing and humiliating to the individual. *Id.* at 1019.

<sup>52</sup> *See Avery & Simpson, supra* note 38, at 415.

<sup>53</sup> *T.L.O.*, 469 U.S. at 382 n.25 (Stevens, J., dissenting). In his dissent, Justice Stevens indicated that in *Doe v. Renfrow*, the Seventh Circuit Court noted that: "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." *Id.* (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981)); *cf. Tarter v. Raybuck*, 742 F.2d 977, 982-83 (6th Cir. 1984) (dictum) (stating that degrading body cavity search of student would not be

### 3. Searches by Non-School Officials

Lastly, while the Court established reasonable suspicion as the standard for school officials' searching of students, it did not address searches in schools conducted by non-school officials, such as police officers. Concerns were expressed that the police might take advantage of the lesser standard afforded to school officials by assisting administrators or having them hand over evidence of criminal activity "on a silver platter" to law enforcement agencies.<sup>54</sup> The Court clearly stated that it would "consider only searches carried out by school authorities acting alone and on their own authority,"<sup>55</sup> and noted that it would not express an opinion on the appropriate standard for "searches conducted by school officials in conjunction with or at the behest of law enforcement agencies."<sup>56</sup>

#### B. *The Diminution of Students' Fourth Amendment Rights*

Beginning with *Tinker*, the United States Supreme Court has maintained that students have constitutional rights in public schools. Sixteen years later in *T.L.O.*, the Court acknowledged that these rights extend to the Fourth Amendment's protection against unlawful searches and seizures. The *T.L.O.* Court also established limitations upon these rights,

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reasonable), *cert. denied*, 470 U.S. 1051 (1985).

<sup>54</sup> Amicus Curiae Brief of the American Civil Liberties Union of New Jersey at 23, *New Jersey v. T.L.O.*, 469 U.S. 325 (No. 83-712) (1983); *see also* *Elkins v. United States*, 364 U.S. 206 (1960) (striking down "silver platter" doctrine).

<sup>55</sup> *T.L.O.*, 469 U.S. at 341 n.7.

<sup>56</sup> *Id.*

including the imposition of a more lenient "reasonable suspicion" standard.

Due to the vagueness of the reasonable suspicion standard and the narrow reach of the *T.L.O.* opinion, subsequent courts were forced, with little guidance, to interpret the reasonable suspicion standard in different contexts with a resulting diminution of students' rights.<sup>57</sup>

### 1. Individualized Suspicion

The *T.L.O.* Court enumerated the levels of intrusion where individualized suspicion is not a prerequisite to the search as "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"<sup>58</sup> For example, courts have established exceptions related to levels of intrusiveness into students' privacy and issues of safety,<sup>59</sup> even though individualized suspicion has generally been considered a prerequisite for searches.<sup>60</sup> Many lower courts, concerned with drugs and violence in the schools, have held a search reasonable: (1) if the suspicion is narrowed to a small group of students; (2) if there is immediate danger to others; or (3) if there has been a history of problems.<sup>61</sup>

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<sup>57</sup> *Id.* at 365 (Brennan, J., dissenting); see Joseph R. McKinney, *The Fourth Amendment and the Public Schools: Reasonable Suspicion in the 1990s*, 91 EDUC. LAW. REP. 455, 457 (1994) (noting that thirty-one of thirty-six post-*T.L.O.* school search cases were decided in school district's favor after court applied reasonable suspicion standard). McKinney acknowledged that the high level of scrutiny employed by the courts in these cases illustrates their concern for the constitutional rights of students. *Id.*; see also J.M. Sanchez, *Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After T.L.O.*, 21 J.L. & EDUC. 381, 409 (1992) (concluding that courts have used *T.L.O.* to expand school officials' power at expense of students' constitutional protections). But see David B. Rubin, *Passing Through the "Schoolhouse Gate": Constitutional Implications of Preserving Student Safety*, 154 N.J. LAW. 36 (1993) (asserting that students still enjoy constitutional liberties when in school custody and control).

<sup>58</sup> *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979) (citations omitted)). The *T.L.O.* Court did not consider exceptions to individualized suspicion in reaching its decision because the disputed search was based on suspicion of an individual. *Id.*

<sup>59</sup> See, e.g., *T.L.O.*, 469 U.S. 325; *United States v. Martinez-Fuente*, 428 U.S. 543 (1976) (ruling that routine checkpoint stops were consistent with Fourth Amendment).

<sup>60</sup> See, e.g., *Capua v. Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (finding urine drug tests of firefighters and police officers unconstitutional absent individualized suspicion); *Ascher v. Commissioner of Pub. Safety*, 519 N.W.2d 183 (Minn. 1994) (holding roadside sobriety checks unconstitutional without individualized suspicion); *State v. Estrada*, 810 P.2d 817 (N.M. Ct. App. 1991) (holding border patrol searches must be based on individualized suspicion).

<sup>61</sup> See McKinney, *supra* note 57, at 459; see also *Martinez v. School Dist. No. 60*, 852 P.2d 1275 (Colo. Ct. App. 1992) (holding that search was reasonable when student was noticeably intoxicated); *Massachusetts v. Snyder*, 597 N.E.2d 1363 (Mass. 1992) (holding that search of locker for marijuana was reasonable when it was clear that student was dealing drugs to other students); *South Carolina v. Mississippi*, 583 So. 2d 188 (Miss. 1991) (holding that search of

Illustrative is *In re Alexander B.*,<sup>62</sup> wherein the court employed several of these exceptions<sup>63</sup> to uphold a search that lacked individualized suspicion. In *Alexander*, an administrator was breaking up a clash between two groups of students known to be associated with different gangs in the neighborhood. An unidentified member of one group said, "Don't pick on us; one of those guys has a gun."<sup>64</sup> On the direction of the Dean, a police officer standing nearby searched the members of this group, and found a machete knife and scabbard in Alexander's possession.<sup>65</sup>

The *Alexander* Court acknowledged the importance of individualized suspicion,<sup>66</sup> yet distinguished the search from other mass searches by noting that suspicion was focused on a group of five or six students.<sup>67</sup> It further found that "[g]iven the potential danger to students and staff which would have resulted from inaction, a weapons search of the several accused students was reasonable."<sup>68</sup> The court reasoned that "the gravity of the danger posed by possession of a firearm or other weapon on campus" outweighed "the relatively minor intrusion involved."<sup>69</sup> Thus, the court upheld the search even though it lacked individualized suspicion.<sup>70</sup>

In the only recorded case to date on the use of metal detectors in public schools, *People v. Dukes*,<sup>71</sup> the search involved large numbers of

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student's locker was reasonable when school administrators knew student was selling handguns); *In re Gregory M.*, 627 N.E.2d 500 (N.Y. 1993) (noting that search of student's bookbag by security officer was reasonable when student entered with no I.D. and bag made loud thud when it hit floor); *In re Kevin P.*, 587 N.Y.S.2d 730 (N.Y. App. Div. 1992) (holding that search was reasonable when security officer felt gun in waistband); *In re F.B.*, 658 A.2d 1378 (Pa. Super. Ct. 1995) (holding that administrative search for weapons was reasonable to ensure public safety); *Washington v. Slattery*, 787 P.2d 932 (Wash. Ct. App. 1990) (holding that search of student's car was reasonable when official had reliable information that student was selling drugs in parking lot); *In re Isaiah B.*, 500 N.W.2d 637 (Wis.) (holding that random search of students' lockers was reasonable in light of several gun-related incidents at school that placed faculty and students in imminent danger), *cert. denied*, 114 S. Ct. 231 (1993).

<sup>62</sup> 270 Cal. Rptr. 342 (Cal. Ct. App. 1990).

<sup>63</sup> *Id.* at 344. The court upheld the search on the basis of the school officials' reasonable belief that the student possessed a weapon. *Id.* The school had reliable information, suspicion was focused on a small group of students, and the potential gravity of the possession of a dangerous weapon on school grounds outweighed the minor intrusion resulting from the search of high school boys. *Id.*

<sup>64</sup> *Id.* at 343.

<sup>65</sup> *Alexander*, 270 Cal. Rptr. at 343.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 344.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Alexander*, 270 Cal. Rptr. at 345.

<sup>71</sup> 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992).

students<sup>72</sup> and was not conducted in reaction to an immediate situation as in *Alexander*.<sup>73</sup> Instead, the school in *Dukes* justified the searches as a preventative measure resulting from genuine safety concerns that were sparked by students being killed in other New York City schools.<sup>74</sup>

In *Dukes*, a hand-held metal detector, used as part of a routine search by a police officer employed by the school district, signaled the presence of metal in the purse of Tawana Dukes, a student at Washington Irving High School in New York City.<sup>75</sup> The student complied when asked to open the bag. The officer reached into her purse and took out a manila folder which Ms. Dukes agreed to open at the officer's request.<sup>76</sup> Inside the folder, the police officer saw a black switchblade knife which Dukes said she had for her protection.<sup>77</sup> She was charged with criminal possession of a weapon in the fourth degree. Dukes moved to suppress the evidence claiming that her Fourth Amendment rights were violated.<sup>78</sup>

In rendering its opinion, the *Dukes* Court did not use the *T.L.O.* reasonable suspicion standard, but instead applied an administrative search doctrine.<sup>79</sup> Under this doctrine, searches are reasonable only if the intrusion is "no greater than necessary to satisfy the governmental interest underlying the need for the search."<sup>80</sup> These searches, which require

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<sup>72</sup> *Id.* at 852.

<sup>73</sup> *Alexander*, 270 Cal. Rptr. at 344.

<sup>74</sup> The court validated this concern by noting that school records reflected that over 2,000 weapons were recovered during the 1990-91 school year and that there had been a recent shooting in a nearby high school. *Dukes*, 580 N.Y.S.2d at 853.

<sup>75</sup> *Id.* at 851.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 850.

<sup>79</sup> *Dukes*, 580 N.Y.S.2d at 852-53.

<sup>80</sup> *Id.* at 852. Courts have used the administrative search doctrine to justify metal detector searches in other public places, such as airports, where there is an overwhelming governmental interest in deterring air piracy, aircraft hijacking, and other acts of violence; and courthouses, where there is a vital government interest in protecting sensitive facilities from the realization of threatened violence. *See People v. Kuhn*, 351 N.Y.S.2d 649, 653 (1973) (finding predeparture metal detector searches in airport constitutional and reasonable in light of overwhelming public danger); *McMorris v. Alioto*, 567 F.2d 897, 899 (9th Cir. 1978) (justifying courthouse metal detector search as legitimate administrative search to deter violence in courthouse); *see also United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974) (holding airport metal detector searches constitutional and reasonable as precaution against airplane hijacking); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (describing reasonableness standard applied with respect to airport metal detectors). The United States Supreme Court has employed a balancing test to weigh the degree of intrusion against the severity of the danger imposed. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (finding state highway sobriety checkpoint program reasonable under Fourth Amendment); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding mandatory drug-screening urinalysis testing of customs employees required to

neither probable cause nor the issuance of a warrant, are aimed at a group or class of people and are designed to prevent a dangerous event from occurring.<sup>81</sup> Individualized suspicion is not necessary in an administrative search because "any member of the group or class may be the agent who could cause the dangerous event to take place."<sup>82</sup>

School field trip cases illustrate the division among courts as to whether individualized suspicion is necessary for a search to be reasonable.<sup>83</sup> In *Kuehn v. Renton School District No. 403*,<sup>84</sup> the court held unconstitutional the mass searching of students' luggage prior to a high school band concert.<sup>85</sup> The court used a reasonableness standard similar to *T.L.O.* to determine the legality of the search.<sup>86</sup> The *Kuehn* court concluded that such searches are not reasonable if conducted without individualized suspicion and "solely for the purpose of deterring disruptive conduct."<sup>87</sup>

In comparison, in *Desilets v. Clearview Regional Board of Education*,<sup>88</sup> a New Jersey Superior Court concluded that individualized suspicion was not necessary for searching students' luggage prior to a recreational field trip.<sup>89</sup> The court upheld the use of the school district's fifteen year old search policy<sup>90</sup> because of "the unique burdens placed on school personnel in the field trip context" and because the search was limited to that of hand luggage.<sup>91</sup>

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carry firearms or directly involved in drug interdiction); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (allowing drug and alcohol tests of railroad employees, as mandated by Federal Railroad Administration, and as justified by need to curtail alcohol and drug related train accidents).

<sup>81</sup> *Dukes*, 580 N.Y.S. 2d at 851.

<sup>82</sup> *Id.* at 852.

<sup>83</sup> Compare, *Kuehn v. Renton Sch. Dist. No. 403*, 694 P.2d 1078 (Wash. 1985) with *Desilets v. Clearview Regional Bd. of Educ.*, 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993).

<sup>84</sup> 694 P.2d 1078 (Wash. 1985).

<sup>85</sup> *Id.* at 1083.

<sup>86</sup> *Id.* at 1081. The court reiterated the standard used to determine reasonableness that it set forth previously. The school must look at the student's "age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as justification for the search." *Id.* at 1081 (citing *State v. McKinnon*, 558 P.2d 781 (Wash. 1977)). The court found that none of the criteria met in the case and that the school officials did not believe they would find anything else. *Id.*

<sup>87</sup> *Id.* at 1079.

<sup>88</sup> 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993).

<sup>89</sup> *Id.* at 672-73.

<sup>90</sup> *Id.* Although the district was relatively free from serious discipline problems, the court felt the policy was justified. *Id.*

<sup>91</sup> *Id.* at 673.

Although the school's policy was directed primarily at possession of drugs, alcohol, and weapons, the court decided that such a policy would deter students from bringing other potentially dangerous items on field trips, such as sports knives, school-made rockets, a discus, slingshots, or fireworks,<sup>92</sup> merely to "show off."<sup>93</sup> While the school board's policy was aimed at very specific items, the *Desilets* Court expanded the policy's scope, and consequently, diminished students' rights.<sup>94</sup> The court broadened past notions of school safety by recognizing that not only do school officials have a duty to protect students from each other, but that in the context of a field trip, there is an additional "duty to protect the general population from student mischief."<sup>95</sup>

Courts are divided with respect to another suspicionless search, employing canines to sniff out drugs.<sup>96</sup> They have distinguished between sniffing inanimate objects such as lockers or automobiles, which are not considered searches under the Fourth Amendment, and sniffing human beings, which does constitute a search.<sup>97</sup>

The most dramatic differences of opinion among the lower courts have involved mass drug testing of students.<sup>98</sup> These courts have acknowledged that students have Fourth Amendment rights and that blood and urine testing falls within Fourth Amendment protection as it constitutes a search

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<sup>92</sup> See, e.g., *Engel v. Gosper*, 177 A.2d 595 (N.J. Super. Ct. Law Div. 1962) (involving school-made rocket); *Poelker v. Macon Community Sch. Dist.*, 571 N.E.2d 479 (Ill. App. Ct. 1990) (involving student struck by discus before track meet), *appeal denied*, 580 N.E.2d 132 (Ill. 1991); *Nicholson v. Board of Educ.*, 351 N.Y.S. 2d 731 (N.Y. App. Div. 1974) (involving student injured by firecracker).

<sup>93</sup> *Desilets*, 627 A.2d 667.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 672.

<sup>96</sup> See, e.g., *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979) (holding that use of dogs to sniff students for drugs did not constitute search under Fourth Amendment), *aff'd*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981); *Jennings v. Joshua Indep. Sch. Dist.*, 877 F.2d 313 (5th Cir. 1989) (upholding random canine sniffing of students' automobiles), *cert. denied*, 496 U.S. 935 (1990); *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (allowing sniff search of students' lockers by police dogs).

<sup>97</sup> Compare *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) (ruling that using dogs to sniff students' bodies violated Fourth Amendment because students were touched by dogs and because there was no individualized suspicion, but that sniffing of lockers and automobiles was legal), *cert. denied*, 463 U.S. 1207 (1983) with *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980) (holding canine sniffing of students without individualized suspicion unconstitutional and noting that school did not have sufficient interest to search students' cars because students did not have access to such cars during day).

<sup>98</sup> Compare *O'Halloran v. University of Wash.*, 679 F. Supp. 997 (W.D. Wash. 1988) (upholding college urine testing program for athletes) with *Moule v. Paradise Valley Unified Sch. Dist.* No. 69, 863 F. Supp. 1098 (D. Ariz. 1994) (holding random urine testing of athletes violated privacy rights of students), *rev'd*, 66 F.3d 335 (9th Cir. 1995).

of body fluids.<sup>99</sup> Various courts have held that drug testing is unconstitutional if conducted in a highly intrusive manner or if aimed at all students or certain groups of students in the absence of a drug problem.<sup>100</sup> Others have maintained that mass drug testing of students is legal.<sup>101</sup>

In *Schaill v. Tippecanoe County School Corporation*,<sup>102</sup> the United States Court of Appeals for the Seventh Circuit held that a school district's random drug testing of interscholastic athletes and cheerleaders did not violate students' Fourth Amendment rights to privacy. The court recognized that individualized suspicion is generally necessary to conduct a reasonable search, but noted that there are exceptions to this rule.<sup>103</sup> The court maintained that the case at hand fell within these exceptions because: 1) these students had diminished expectations of privacy; 2) unlawful conditions could not be detected by other means; 3) the regulatory scheme limited discretion on the part of government officials; and 4) the searches were conducted for civil, non-punitive, purposes rather than as part of a criminal investigation.<sup>104</sup>

The court reasoned that the students involved had diminished expectations of privacy because they were athletes and, thus, were accustomed to communal undress.<sup>105</sup> In addition, in order to participate in athletics the students were required to submit urine samples as part of their physical examinations.<sup>106</sup> Involvement in interscholastic athletics conditioned the students to expect significant school regulation including rules, set forth by the Indiana High School Athletic Association, regarding residency, minimum grades, and other training rules prohibiting the use of drugs, alcohol, and cigarettes.<sup>107</sup> These factors, combined with the strong emphasis upon drug testing of college and professional athletes, contributed to a diminished expectation of privacy on the part of high school athletes

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<sup>99</sup> See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 617 (1989) (holding that testing blood, urine, and breath is search within meaning of Fourth Amendment).

<sup>100</sup> See *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985) (ruling against drug testing of three female students required to urinate in presence of school officials to ensure genuine sample); *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989) (ruling against drug testing of students involved in extracurricular activities in absence of individualized suspicion when no serious drug problems existed in school), *aff'd*, 930 F.2d 915 (5th Cir. 1991); *Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist.*, 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985) (ruling against drug testing as part of physical examination for all students).

<sup>101</sup> See *infra* text accompanying notes 102-112.

<sup>102</sup> 864 F.2d 1309 (7th Cir. 1988).

<sup>103</sup> *Id.* at 1316-17.

<sup>104</sup> *Id.* at 1322.

<sup>105</sup> *Id.* at 1318.

<sup>106</sup> *Id.*

<sup>107</sup> *Schaill*, 864 F.2d at 1318.



as opposed to students involved in other school activities such as band or chess.<sup>108</sup>

The Court of Appeals for the Seventh Circuit agreed with the district court's determination that drug use at the school could neither be detected nor deterred by alternative methods.<sup>109</sup> In addition, since the students were tested by drawing random numbers, the expectation of privacy was not "subject to the discretion of the official in the field."<sup>110</sup> Lastly, the school's urinalysis program was not designed to uncover criminal activity, and sanctions were progressive, emphasizing rehabilitation rather than punishment.<sup>111</sup> The court concluded by noting that:

The plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose—the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment. In this case, we believe that the Tippecanoe County School Corporation has chosen a reasonable and limited response to a serious evil.<sup>112</sup>

In *Acton v. Vernonia School District*,<sup>113</sup> the United States Court of Appeals for the Ninth Circuit determined that a school's drug testing program violated students' constitutional rights against unlawful search and seizure. The school had a history of drug-related problems, including gangs that had developed around a drug culture and sports-related accidents that the faculty believed were caused by drug use.<sup>114</sup> The plaintiff was a seventh grader who was unable to participate in the football program because he and his parents refused to sign the drug testing consent form required for all athletes.<sup>115</sup>

The court found that a drug problem existed in the school; at least one drug related accident had occurred; and the program was an efficient means to curb drug use and discipline students.<sup>116</sup> Nonetheless, in light of the nature of this suspicionless search, as well as the serious intrusion upon students' privacy rights, the court could not justify the random drug testing

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<sup>108</sup> *Id.* at 1319.

<sup>109</sup> *Id.* at 1321.

<sup>110</sup> *Id.* at 1316 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

<sup>111</sup> *Id.* at 1322.

<sup>112</sup> *Schaill*, 864 F.2d at 1324.

<sup>113</sup> 23 F.3d 1514 (9th Cir. 1994), *vacated*, 115 S. Ct. 2386 (1995).

<sup>114</sup> *Id.* at 1516.

<sup>115</sup> *Id.* at 1517.

<sup>116</sup> *Id.* at 1522.

of students.<sup>117</sup>

Unlike *Schaill*, the *Acton* Court did not characterize grade point averages and training rules as equal to the kind of government regulations that would justify suspicionless searches.<sup>118</sup> In addition, the court disagreed that athletes had a reduced expectation of privacy regarding their bodily functions just because they undressed with each other in locker rooms;<sup>119</sup> finding the elimination of body fluids, under supervision of school officials, to be much more private than communal undress.<sup>120</sup> The court also maintained that participation in athletics was not a privilege, but a desirable component of all students' education and should be available to any student who wished to participate.<sup>121</sup>

The court did not diminish the detrimental effect drug use has both in our schools and in our society and the importance of curbing its abuse. However, unlike other cases upholding random drug testing of employees in hazardous occupations,<sup>122</sup> the Ninth Circuit maintained that the danger from drugs in schools did not constitute a compelling government interest.<sup>123</sup> The *Acton* court did not balance students' privacy rights against the school's "substantial interest in enforcement of its proposed random urinalysis program" as the *Schaill* court did.<sup>124</sup> Ultimately, it was the lack of a compelling interest that led the court to hold the drug testing program unconstitutional.<sup>125</sup> The *Acton* court acknowledged that the circumstances underlying its decision were very much like those in *Schaill*. Referring to the *Schaill* decision, the *Acton* court stated:

Perhaps that court found a more compelling set of facts than we discover here, but we are unable to say so after reading the opinion. We believe, instead, that the Seventh Circuit has unduly minimized the privacy interests of students. It has also given undue weight to the governmental interest by focusing on the general problems generated by the drug

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<sup>117</sup> *Id.* at 1527.

<sup>118</sup> *Acton*, 23 F.3d at 1525. The court compared the school regulations to regulations imposed by the government that justify suspicionless searches and concluded that the *Schaill* Court's analogy was unsound. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Acton*, 23 F.3d at 1523-24 (approving drug testing of train employees in light of number of serious accidents (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)), *vacated*, 115 S. Ct. 2386 (1995); see *National Treasury Employees' Union v. Von Raab*, 489 U.S. 656, 678 (1989) (approving drug testing of front-line and gun-toting workers).

<sup>123</sup> *Acton*, 23 F.3d at 1525.

<sup>124</sup> *Id.* at 1527.

<sup>125</sup> *Id.* at 1527 n.3.

plague, rather than upon the question of whether the danger to safety is so high as to be compelling. We could fill more pages reiterating what we have already said, but, in a nutshell, we simply do not agree with the Seventh Circuit.<sup>126</sup>

Thus, the Ninth Circuit's conclusions regarding the student's expectation of privacy and the interests of the government in random urinalysis testing starkly contrasted with the rationale of the Seventh Circuit, and provided the basis for reversal by the Supreme Court.<sup>127</sup>

The majority opinion of the United States Supreme Court in *Acton* substantially affects student athletes' Fourth Amendment rights while leaving open the question of the constitutionality of mandatory drug testing of an entire student population.<sup>128</sup> The Court's decision was limited to the circumstances in this particular case.<sup>129</sup> The Court acknowledged that although schools do not exercise primary parental power over students,<sup>130</sup> the custodial and tutelary nature of the schools is a factor that diminishes students' privacy expectations.<sup>131</sup> Ultimately, the Supreme Court held that school searches should be based upon a standard of reasonableness, determined by balancing the individual students' interests against the interests of the government.<sup>132</sup>

## 2. Degree of Intrusion

The *T.L.O.* Court did not specifically address the issue of highly intrusive searches. While lower courts<sup>133</sup> and legal scholars have

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<sup>126</sup> *Id.* at 1527.

<sup>127</sup> *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995).

<sup>128</sup> *Id.* at 2396.

<sup>129</sup> *Acton*, 115 S. Ct. at 2396 (stressing danger of assuming that "suspicionless drug testing will readily pass constitutional muster in other contexts"). The Court emphasized several factors in determining that student athletes have a diminished expectation of privacy: (1) the custodial role of the state as schoolmaster; (2) the physical examinations and vaccinations common to all students; (3) and the nature of communal undress with which athletes are familiar. *Id.* at 2392-93. The Court also characterized the government concern as compelling, *id.* at 2395-96, stressing the importance of deterrence, the increased risk of physical harm, and the role of athletes as leaders. *Id.* at 2395. Lastly, the Court concluded that taking a urine sample was a minimal intrusion on the privacy of the athletes. *Id.* at 2393-94.

<sup>130</sup> *Acton*, 115 S. Ct. at 2392.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2396-97.

<sup>133</sup> See, e.g., *Doe v. Renfrow*, 631 F.2d 91 (7th Cir.) (condemning strip search conducted without reasonable cause), *cert. denied*, 451 U.S. 1022 (1980); *Tarter v. Raybuck*, 742 F.2d 977, 983 (6th Cir. 1984) (dictum) (noting unreasonableness of body cavity search for minor infraction); *Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984) (citing unreasonableness of strip search on school bus); *M.M. v. Anker*, 607 F.2d 588 (2d Cir. 1979) (rejecting strip search based upon mere reasonable suspicion); *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 458 (E.D.

considered such searches to be illegal,<sup>134</sup> there have been a number of recent cases upholding strip searches in the interests of safety.<sup>135</sup> Two of these cases, *Williams v. Ellington*<sup>136</sup> and *Cornfield v. Consolidated School District No. 230*<sup>137</sup> come from federal courts of appeals.

In the *Williams* case, Angela Williams, a student at Graves County High School in Kentucky, was strip searched down to her underwear by a female assistant principal.<sup>138</sup> Administrators based their suspicion on the "totality of circumstances" which included reports from both a fellow student and a teacher; and a note found under Angela's desk implying that she and her friends were using the "rich man's drug."<sup>139</sup>

After further investigations, the school's principal requested Ms. Easley, the assistant principal, to help conduct the search.<sup>140</sup> Ms. Easley then took Angela into her office and searched her in the presence of a female secretary. Finding nothing, Easley asked Williams to remove her T-shirt, lower her jeans to her knees, and remove her shoes and socks. No drugs were found. Upon hearing about the search, Angela's father filed suit.<sup>141</sup>

In ruling for the defendant school district, the Sixth Circuit Court of Appeals concluded that the search was reasonable because it was performed

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Mich. 1985) (holding that scope of search must be reasonably related to its objective); *Bellnier v. Lund*, 438 F. Supp. 47, 53 (N.D.N.Y. 1977) (finding strip search of children to find missing three dollars unreasonable); *Picha v. Wieglos*, 410 F. Supp. 1214 (N.D. Ill. 1976) (involving strip search for drugs without reasonable suspicion); *Potts v. Wright*, 357 F. Supp. 215 (E.D. Pa. 1973) (involving strip search of eight female students to find missing ring).

<sup>134</sup> See, e.g., Schreck, *supra* note 46, at 147 (predicting that reasonable suspicion would not be enough for strip search even though probable cause might justify intrusive search); Steven F. Shatz, et al., *The Strip Searching of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 9 (1991) (noting that application of *T.L.O.* reasonableness standard to strip searches is problematic).

<sup>135</sup> See generally Lawrence F. Rossow & Brenda Stubblefield, *Student Strip Search Upheld: Williams* by *Williams v. Ellington*, 75 EDUC. L. REP. 723 (1992) (discussing ramifications of upholding highly intrusive searches); Jacqueline A. Stefkovich, *Strip Searching After Williams: Reactions to the Concern for School Safety?*, 93 EDUC. L. REP. 1107 (1994) (evaluating significance of *Williams* in diminishing Fourth Amendment protection of students).

<sup>136</sup> 936 F.2d 881 (6th Cir. 1991).

<sup>137</sup> 991 F.2d 1316 (7th Cir. 1993).

<sup>138</sup> *Williams*, 936 F.2d at 883.

<sup>139</sup> *Id.* at 882. Ginger informed administrators that Angela and her friend Michelle had "a clear glass vial containing a white powder." *Id.* Angela's teacher noted that Michelle had been exhibiting "flu-like" symptoms. *Id.* Michelle's father revealed that Michelle had stolen \$200 from him which he feared was for drugs. *Id.*

<sup>140</sup> *Williams*, 936 F.2d at 882-83. After being confronted by the principal, Michelle produced a brown vial containing "rush," an over-the-counter legal substance, the inhalation of which is illegal. *Id.* A search of Angela's locker, purse, and pockets revealed no evidence of drugs. *Id.*

<sup>141</sup> *Id.* at 883.

in accordance with a facially valid district-wide policy.<sup>142</sup> Relying upon the *T.L.O.* decision and the standards contained therein, the court held that the school's policy allowed for "the search of a pupil's person if there [was] a reasonable suspicion that the student [was] concealing evidence of an illegal activity."<sup>143</sup> The court further maintained that the search was justified at its inception based upon the "totality of circumstances" that created the suspicion that Angela was concealing evidence.<sup>144</sup>

The court also reasoned that the scope of the search was justified because the student was suspected of carrying a small glass vial containing a white, powdery substance believed to be illicit drugs.<sup>145</sup> Searches conducted immediately before the strip search revealed that the vial was not in the student's locker or in her purse.<sup>146</sup> Therefore, it was reasonable to assume the student had the vial on her person.<sup>147</sup>

In *Cornfield v. Consolidated School District No. 230*,<sup>148</sup> Brian Cornfield, a sixteen year old male high school student, was suspected of concealing drugs after a female teacher's aide reported that she had observed Cornfield and that he appeared "too well-endowed."<sup>149</sup> In accordance with a school policy, school officials requested permission for the search from Cornfield's mother, who refused.<sup>150</sup>

Nonetheless, the officials conducted the search, which consisted of a visual inspection of the student's naked body as well as a physical inspection of his discarded clothes. The search was conducted in the boys' locker room, away from the other students. No one touched the student and school officials stood at a distance from Cornfield while he disrobed.<sup>151</sup>

The Seventh Circuit Court of Appeals upheld the search as reasonable,

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<sup>142</sup> *Id.* at 884.

<sup>143</sup> *Williams*, 936 F.2d at 884. The reasonableness of a search is determined by its justification at its inception and whether its scope is reasonably related to the circumstances which justified it. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985); *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968).

<sup>144</sup> *Williams*, 936 F.2d at 889.

<sup>145</sup> *Id.* at 887.

<sup>146</sup> *Id.*

<sup>147</sup> *Williams*, 936 F.2d at 882-83. The court compared the facts of *T.L.O.* to the circumstances of the present case. In *T.L.O.*, the vice principal's discovery of rolling papers in the student's purse created reasonable suspicion warranting an extended search. *Id.* Similarly, in *Williams*, after the vial containing "rush" was produced, the principal's suspicions were raised, warranting an extended search. *Id.*

<sup>148</sup> 991 F.2d 1316 (7th Cir. 1993).

<sup>149</sup> *Id.* at 1319.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

relying upon both *Williams* and the two-pronged test for reasonable suspicion established by the *T.L.O.* decision.<sup>152</sup> The court maintained that the search was reasonable at its inception because it was based on a series of observations and incidents reported by various teachers and aides during the week prior to the search. These reports included the observation of the unusual bulge in Cornfield's sweat pants (which was corroborated by a number of witnesses), as well as statements from teachers and administrators that Cornfield had said he failed a urinalysis for cocaine and had once "crotched" drugs during a police raid at his mother's house.<sup>153</sup> Although Cornfield denied a number of these allegations, the court maintained that the school officials' observations as well as recent incidents resulted in a "cumulative effect" which was sufficient to create a reasonable suspicion that Cornfield was "crotching" drugs.<sup>154</sup>

The Court felt that the scope of the search was reasonable because a no less intrusive search was available, given the school authorities' suspicion that Cornfield was "crotching" drugs and given that a pat-down search would have been more intrusive than the strip search.<sup>155</sup>

*Mark Anthony B.*<sup>156</sup> provides an interesting contrast to the decisions in *Williams* and *Cornfield*. Despite a similar fact pattern, the West Virginia State Supreme Court refused to uphold the strip search of a student accused of stealing money. In rendering this decision, the Court noted that the student's suspected conduct "did not pose the type of immediate danger to others that might . . . justify a warrantless strip search."<sup>157</sup> The court did, however, imply that if the search were for drugs or weapons, it might be justified.<sup>158</sup>

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<sup>152</sup> *Id.* at 1323.

<sup>153</sup> *Cornfield*, 991 F.2d at 1323. There were other incidents including: a report by Cornfield's school bus driver that he had smelled marijuana where Cornfield had been sitting on the bus; a report by a student who observed that Cornfield had been smoking marijuana on the bus; a tip from another student that Cornfield was selling marijuana to students; and a call from a local police officer stating that he had received information that Cornfield was selling marijuana. Finally, there had been an earlier incident where Cornfield was found in possession of a live bullet at school. *Id.*

<sup>154</sup> *Id.* (citing *Williams*, 936 F.2d 881).

<sup>155</sup> *Id.* The court stressed the student's age as a factor in determining whether a strip search was reasonable. *Id.* at 1320-21.

<sup>156</sup> 433 S.E.2d 41 (W. Va. 1993).

<sup>157</sup> *Id.* at 49. The court concluded that the infraction did not rise to the level necessary to interfere with maintaining order in the school as to make a strip search reasonable. *Id.* ("[T]he reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.") (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985)).

<sup>158</sup> *Id.* at 49.

### 3. Searches by Non-School Officials

With increased incidence of drug use and violence in the schools, police have assumed broader roles than ever before.<sup>159</sup> They may provide "tips" to school officials, request a search, or assist in a search at the behest of school administrators<sup>160</sup> by bringing canines into the schools to sniff lockers, cars, or possibly students.<sup>161</sup> In an increasing number of cases, police are employed by the school system.<sup>162</sup> While probable cause is the required standard for a search conducted by a police officer or an agent of the police, such relationships are not always clear.<sup>163</sup> The extent and complexity of the role of police in schools today, coupled with silence on the part of the *T.L.O.* Court, sometimes leaves school administrators uncertain as to the appropriate standard for searching students in schools.<sup>164</sup>

## II. THE FOURTEENTH AMENDMENT AND STUDENTS' DUE PROCESS RIGHTS

The Fourteenth Amendment to the U.S. Constitution guarantees in part: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law."<sup>165</sup>

<sup>159</sup> See Sara Sklaroff, *Drug Use Among High Schoolers Up After Period of Decline*, 3 EDUC. WEEK, Feb. 9, 1994, at 8.

<sup>160</sup> LAWRENCE F. ROSSOW & JACQUELINE A. STEFKOVICH, NATIONAL ORGANIZATION ON LEGAL PROBLEM OF EDUCATION, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 47-51 (2d ed. 1995).

<sup>161</sup> *Id.*

<sup>162</sup> Jessica Portner, *Cops on Campus*, 13 EDUC. WEEK 26-30, June 22, 1994 (noting that in late 1970's there were fewer than 100 school police officers in this country).

<sup>163</sup> See *Piazzola v. Watkins*, 316 F. Supp. 624 (M.D. Ala. 1970) (demonstrating situation where university officials were cooperating with police in search of student dormitory for narcotics), *aff'd*, 442 F.2d 284 (5th Cir. 1971); see also J.M. Sanchez, *Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After T.L.O.*, 21 J.L. & EDUC. 381, 399 (1992) (discussing standards for police).

<sup>164</sup> See, e.g., *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988) (requiring reasonable suspicion for search by school official when police provided tip and school security guard assisted in search); *F.P. v. State*, 528 So. 2d 1253 (Fla. Dist. Ct. App. 1988) (requiring probable cause for police-instigated search by school resource officer working in school, but paid by local sheriff's office); *Commonwealth v. Snyder*, 597 N.E.2d 1363 (Mass. 1992) (concluding that school officials had probable cause when they searched student's book bag in his locker and found marijuana which was turned over to police and resulted in criminal charges). The roles of the police and school officials with respect to the search often determine which standard to use. See, e.g., *Cason v. Cook*, 810 F.2d 188, 192 (8th Cir.) (applying reasonableness standard when school official worked with, but not at behest of, police), *cert. denied*, 482 U.S. 930 (1987).

<sup>165</sup> U.S. CONST. amend. XIV, § 2.

### A. *Students' Due Process Rights*

*Goss v. Lopez*<sup>166</sup> is the most significant court decision outlining the due process rights of students in public schools.<sup>167</sup> In *Goss*, nine students were suspended from a public high school for up to ten days without a hearing for misconduct resulting from a demonstration in the school cafeteria. These disturbances were part of widespread student unrest in the school system during February and March of 1971.<sup>168</sup>

Six of the nine students were suspended for "disruptive or disobedient" conduct that had occurred in the presence of the school principal who ordered the suspension. One of the students was suspended when he refused to leave after the school principal ordered him out. Another student physically attacked the police officer who was attempting to remove the first student. The remaining four students who were suspended had engaged in "similar conduct."<sup>169</sup> None of these students was afforded a hearing to determine the facts, but each was given an opportunity to attend a meeting after the suspension along with his or her parents "to discuss the student's future."<sup>170</sup>

Of the nine students, three others were also suspended. One offered no testimony. A second was a junior high school student involved in a demonstration in a school other than the one she was attending. This student was arrested and taken to police headquarters but was not charged. A third student, one of the named plaintiffs in this case, was Dwight Lopez who was suspended in connection with a disturbance in his school's lunchroom in which school property was damaged.<sup>171</sup> Lopez, along with these other two students, also was denied a hearing. A three-judge panel ruled in favor of the students and the school district appealed.<sup>172</sup>

The United States Supreme Court affirmed the lower court's decision noting that students "do not 'shed their constitutional rights' at the

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<sup>166</sup> 419 U.S. 565 (1975).

<sup>167</sup> See, e.g., Daniel A. Klein, Annotation, *Expulsion, Dismissal, Suspension, or Other Discipline of Student of Public School, College, or University as Violating Due Process Clause of Federal Constitution's Fourteenth Amendment—Supreme Court Cases*, 88 L. Ed. 2d 1015 (1986); E.H. Schopler, Annotation, *Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 A.L.R.2d 903 (1958 & Supp. 1994).

<sup>168</sup> *Goss*, 419 U.S. at 569.

<sup>169</sup> *Id.* at 569-70.

<sup>170</sup> *Id.* at 570.

<sup>171</sup> *Id.* at 570-71. Lopez testified that he was one of some seventy-five students suspended that day, that he was merely an "innocent bystander," and that he had not been involved in the destruction of the property. *Id.* at 570.

<sup>172</sup> *Goss*, 419 U.S. at 572.



schoolhouse door."<sup>173</sup> The Court also stated that a ten day suspension from school is not *de minimis* but rather represents a substantial deprivation of the students' property interest in educational benefits as well as a liberty interest in reputation,<sup>174</sup> thus, violating the Due Process Clause of the Fourteenth Amendment.<sup>175</sup>

The *Goss* Court determined that at the very least, students should be afforded "some kind of notice" and "some kind of hearing."<sup>176</sup> Students should have an opportunity to be heard so that they are not mistakenly deprived of their constitutional rights.<sup>177</sup> The Court noted that such mistakes can easily happen in the school context.<sup>178</sup> Even though they may be acting in good faith, disciplinarians must rely on the advice of others to uncover misconduct.<sup>179</sup> The Court concluded that:

[D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.<sup>180</sup>

The Court also noted that there need not be any delay between the time when notice is given and the time of the hearing. In addition, the hearing may be informal as long as the school provides the student with a chance to explain his or her side.<sup>181</sup> The Court limited the holding to shorter suspensions, but conceded that longer suspensions or expulsions might require "more formal procedures."<sup>182</sup>

A month after *Goss*, the Supreme Court faced a similar situation in *Wood v. Strickland*.<sup>183</sup> In this case, the Court addressed the issue of whether certain students' expulsion from school infringed upon their due process rights. In *Wood*, three sixteen-year-old female students were expelled from an Arkansas high school for violating a school regulation

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<sup>173</sup> *Id.*, at 574 (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>174</sup> The court stated that compulsory public education creates a property interest requiring due process protections. *Id.* at 573-77.

<sup>175</sup> *Id.* at 576.

<sup>176</sup> *Id.* at 579.

<sup>177</sup> *Goss*, 419 U.S. at 579-81.

<sup>178</sup> "The risk of error [in the disciplinary context] is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." *Id.* at 580.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 581.

<sup>181</sup> *Goss*, 419 U.S. at 582. The type of notice and hearing required depends on the competing interests which must be appropriately accommodated. *Id.* at 579.

<sup>182</sup> *Id.* at 584.

<sup>183</sup> 420 U.S. 308 (1975).

which forbade the use or possession of alcohol or other intoxicating beverages at school or during school-sponsored activities.<sup>184</sup>

The students in question were charged with "spiking" the punch at the meeting of an extracurricular organization.<sup>185</sup> The girls crossed state lines to purchase liquor because their school was located in a "dry" county. They bought six ten-ounce bottles of a soft drink with which they mixed two twelve-ounce bottles of malt liquor. The punch was then served, with no apparent ill effects, at a school-sponsored meeting of both students and parents.<sup>186</sup>

Ten days later, the teacher who sponsored the activity heard a rumor about the "spiking" and asked the girls about it. The teacher advised the girls to admit their prank to the principal so that she could help them before the matter became "distorted."<sup>187</sup> The girls then went to the principal and confessed their involvement.<sup>188</sup>

The principal, Mr. Waller, suspended the three girls from school for a maximum of two weeks pending the decision of the school board, which would be meeting that evening.<sup>189</sup> He told the students that they could tell their parents about the meeting but that the parents should not contact any of the board members. At the board meeting, both the principal and the teacher involved recommended leniency. This recommendation was withdrawn when the superintendent called to report that one of the three girls, without mentioning which one, had been in a fight at a basketball game that evening. The board voted to expel the girls from school for the remainder of the semester, which was approximately three months.<sup>190</sup>

Two weeks later, the board held a meeting with the girls, their parents, and legal counsel who requested that the policy be changed.<sup>191</sup> Neither the teacher nor the principal attended this session. The board read a written statement of the facts wherein the students had admitted to "spiking" the punch. They voted not to change the policy and to keep the three-month expulsion as previously decided.<sup>192</sup>

When this case came before the United States Supreme Court, the

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<sup>184</sup> *Id.* at 311.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 312.

<sup>188</sup> *Wood*, 420 U.S. at 312.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> The girls requested that the board refrain from punishing their actions with such severity as substantial suspension from school. *Id.* at 313. Ultimately, the board refused. *Id.*

<sup>192</sup> *Wood*, 420 U.S. at 313.

students were asking for damages pursuant to 42 U.S.C. § 1983.<sup>193</sup> The Court, however, could not make a decision about damages under this section because such a determination hinges upon whether there was a constitutional violation.<sup>194</sup> Neither the district court nor the court of appeals had made this determination. Therefore, the Court vacated the case, and remanded it to the court of appeals leaving *Goss* as the most important Supreme Court decision to focus on students' due process rights.<sup>195</sup>

### B. *Limitations on Students' Due Process Rights*

*Goss v. Lopez* acknowledged that students have due process rights under the Fourteenth Amendment but limited such rights to notice and a hearing the type and formality of which depended upon the particular situation.<sup>196</sup> The *Goss* Court implied that students might have greater rights if suspended or expelled for longer than ten days.<sup>197</sup> In this regard, Justice White, speaking for the majority, noted:

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required.<sup>198</sup>

As indicated by the outcome in *Wood v. Strickland*, however, these issues remain to be decided at the Supreme Court level.<sup>199</sup>

### C. *Diminution of Students' Due Process Rights*

Even the rather minimal standard of notice and a right to be heard established in *Goss* may be diminished under certain circumstances. As the *Goss* Court noted:

We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon.

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<sup>193</sup> *Id.* at 310. The school board asserted immunity from liability under 42 U.S.C. § 1983. *Id.* at 314.

<sup>194</sup> *Id.* at 327.

<sup>195</sup> *Id.* at 322, 327.

<sup>196</sup> *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See *Wood v. Strickland*, 420 U.S. 308 (1975) (remanded to determine due process issue). On remand, the Eighth Circuit in *Strickland v. Inlow*, 519 F.2d 744, 746-47 (8th Cir. 1975), declared that the students' due process rights under *Goss* had been violated.

Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . .<sup>200</sup>

The Court also seemed reluctant to impose procedures on school disciplinarians, and went so far as to state that what they have required is actually "less than a fair-minded school principal would impose upon himself to avoid unfair suspensions."<sup>201</sup>

Students' Fourteenth Amendment rights were further diminished in the Supreme Court's decision in *Ingraham v. Wright*.<sup>202</sup> This decision dealt with two issues. First, the Court considered whether the Eighth Amendment, which protects citizens against "cruel and unusual punishment," extends to corporal punishment (paddling) of students in schools.<sup>203</sup> Secondly, it looked at whether the Fourteenth Amendment's Due Process Clause requires notice and a right to be heard in these situations.<sup>204</sup>

In answering the first question, the Court looked to the history of the Eighth Amendment and found that it was intended to protect those convicted of crimes<sup>205</sup> and thus, should not be extended to the paddling of students as a disciplinary measure.<sup>206</sup> In determining that corporal punishment in public schools involves a liberty interest protected under the Fourteenth Amendment,<sup>207</sup> the Court emphasized the nature rather than the weight of the interests at stake.<sup>208</sup>

Justice Powell, writing for the majority, noted that there is a long history of allowing paddling as punishment for school children.<sup>209</sup> While students should be afforded some procedural safeguards to ensure that they

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<sup>200</sup> *Goss*, 419 U.S. at 582-83.

<sup>201</sup> *Id.* at 583.

<sup>202</sup> 430 U.S. 651 (1977).

<sup>203</sup> *Id.* at 653.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 664-66. The Eighth Amendment was derived from England's Bill of Rights which was concerned with how judges enforced criminal laws. *Id.*; see *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976).

<sup>206</sup> *Ingraham*, 430 U.S. at 664; see *New Jersey v. T.L.O.*, 469 U.S. 325, 334 n.4 (1985) (citing *Ingraham*).

<sup>207</sup> *Ingraham*, at 672-74 (citing *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972)).

<sup>208</sup> *Id.* at 672 (delineating test for determining whether due process requirements apply). The Court noted that an individual's liberty interest has been interpreted to include "freedom from bodily restraint and punishment." *Id.* at 674. Thus, the Court concluded that "[i]t is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." *Id.*

<sup>209</sup> *Id.* at 674-76.

are not punished unfairly, there is common law—both civil and criminal—which protects students against both excessive and unjustified corporal punishment.<sup>210</sup> In instances where the state has preserved what “has always been the law of the land,” the need for administrative safeguards is much less compelling.<sup>211</sup>

### III. THE CONDITION OF STUDENTS' RIGHTS 25 YEARS AFTER TINKER

It is unfortunate that we have reached the point where so many of our great public institutions resemble medieval fortresses. . . . This sight is a sobering reminder of the price we pay for security. But to envision students and teachers . . . huddled in fear as they attempt to go about their daily work is a far worse image.<sup>212</sup>

If one walked into a public school today, it is conceivable that guards would be at the door, students and visitors would be required to be searched with metal detectors before entering, police would be involved frequently in discipline problems, dogs would be present to sniff for drugs, lockers would be searched routinely, luggage would be searched prior to field trips, drug testing programs would be in place, and students might be physically punished for alleged wrong doings with no opportunity to explain. Students might also be subjected to very intrusive searches—sometimes even total nude searches.<sup>213</sup> All of these types of searches and disciplinary actions, at least in some jurisdictions, have been upheld—always in the name of order and often in the name of safety.

While this composite may present an exaggerated view of schools, the fact remains that we have long held the belief, and rightfully so, that students must feel safe if they are to learn. On the other hand, part of this learning includes a knowledge of our constitutional rights and what better way is there to teach such rights than to model them? Consequently, the

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<sup>210</sup> *Ingraham*, 430 U.S. at 474-76; see, e.g., *Suits v. Glover*, 71 So. 2d 49, 50 (Ala. 1954) (reasoning that teacher could be guilty of assault and battery if punishment was inflicted with malice, or resulted in permanent injury); *Martinez v. School Dist. No. 60*, 852 P.2d 1275, 1279 (Colo. Ct. App. 1992) (noting that student must be apprised of school regulations before being disciplined); see also N.Y. PENAL LAW § 35.10 (McKinney 1987) (limiting teachers' use of physical force to that reasonably necessary to maintain discipline).

<sup>211</sup> *Ingraham*, 430 U.S. at 679 (citing *United States v. Barnett*, 376 U.S. 681 (1964)).

<sup>212</sup> *People v. Dukes*, 580 N.Y.S.2d 850, 853 (N.Y. Crim. Ct. 1992) (“Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.”)

<sup>213</sup> *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993); *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991). For a discussion of similar scenarios, see Robert Berkley Harper, *School Searches—A Look into the 21st Century*, 13 MISS. C.L. REV. 293 (1993) and Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 N.Y.U. L. REV. 1077 (1991).

public as well as educators alike have been ambivalent about issues of safety and students' rights. And this ambivalence has spread to the judiciary. It is reflected in lower court opinions,<sup>214</sup> like *Schaill* and *Acton*, where circuits could not agree upon a standard to be used for student drug testing. It is shown in Justice Ginzberg's concurring opinion in *Acton* where she interprets the majority's opinion as applying only to the drug testing of student athletes.<sup>215</sup> It is demonstrated by the plurality vote in landmark cases such as *Goss*, and by the numerous accompanying opinions in decisions such as *T.L.O.*<sup>216</sup> It has further been noted by scholars<sup>217</sup> as well as the popular press.<sup>218</sup>

Shortly after the United States Supreme Court handed down its opinion in the *T.L.O.* case, Ellen Goodman, a columnist for the *Boston Globe*, speculated that this decision would "make little difference in the every day running of the schools."<sup>219</sup> Ms. Goodman observed:

Many schools already operate like communities built on mutual respect, others have the atmosphere of a 19th century workhouse . . . [I]t should be noted that the Supreme Court didn't make a decision in the literal sense of that word. The Supreme Court hasn't resolved our conflicts about safety and privacy or about the relationship of students to the schools. It has merely reflected and perhaps heightened our ambivalence.<sup>220</sup>

This ambivalence about safety, privacy, and students' relationships to the schools is also illustrated by the different ways in which the justices approached the school search dilemma. For instance, Justice Powell, in his concurring opinion in *T.L.O.* noted that because of "the special characteris-

<sup>214</sup> See, e.g., *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 473 (5th Cir. 1982) (holding that dog sniffs of cars and lockers are not searches within the meaning of Fourth Amendment, but requiring individualized reasonable suspicion for dogs to sniff children's' person), *cert. denied*, 463 U.S. 1207 (1983); *Dukes*, 580 N.Y.S.2d at 852-53 (upholding administrative search utilizing metal detectors at entrance of school); *Desilets v. Clearview Regional Bd. of Educ.*, 627 A.2d 667, 668 (N.J. Super. Ct. App. Div. 1993) (weighing intrusion of searching students' luggage against school interest in protecting students and finding search constitutionally valid). But see *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 236 (E.D. Tex. 1980) (holding unconstitutional use of dog to indiscriminately search students' cars and persons).

<sup>215</sup> *Veronia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2397 (1995). Justice Ginsberg stated: "I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school." *Id.*

<sup>216</sup> In addition to Justice White's majority opinion, Justices Powell and Blackmun each wrote separate concurring opinions and Justices Brennan and Stevens each wrote opinions concurring in part and dissenting in part.

<sup>217</sup> See, e.g., MARK YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* (1992).

<sup>218</sup> Ellen Goodman, *Ambivalent About Searches*, BOSTON GLOBE, Jan. 22, 1985, at 15.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

tics" of elementary and secondary schools, students should have a lesser expectation of privacy than other members of the population.<sup>221</sup> On the other hand, as Justices Powell and O'Connor observed, school officials often possess an attitude of "personal responsibility for the student's welfare as well as for his education."<sup>222</sup> And as Justice Stevens observed

Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.<sup>223</sup>

One reason for this judicial ambivalence is the Court's reluctance to interfere in the day to day workings of the school, i.e., to become a "super censor of [the] school board."<sup>224</sup> Another reason is the understanding that education is a state or local issue rather than a federal issue and that, whenever possible, educational issues should be left up to the states and to the local school districts.<sup>225</sup>

The problem with such approaches, as illustrated in the context of this paper, is that the reluctance on the part of the courts to decide these issues, accompanied by inaction on the part of some states, results in the need for a great deal of discretionary judgment at the local levels.<sup>226</sup> School officials, even the majority of those acting in good faith, are likely to find themselves in a quandary as to what the law requires in such a myriad of circumstances. This situation is a far cry from what the *T.L.O.* Court must have anticipated when they instituted the reasonable suspicion standard in an effort to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause."<sup>227</sup>

In addition, the extraordinary amount of discretionary enforcement coupled with little authoritative guidance as to actual legal issues, may lead to enhanced students' rights or to a diminution of those rights. As the law

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<sup>221</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.").

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 373-74 (Stevens, J., concurring in part and dissenting in part).

<sup>224</sup> *See, e.g., Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 885 (1982).

<sup>225</sup> *See T.L.O.*, 469 U.S. at 340 (recognizing need for school officials to have freedom to maintain order); *Goss v. Lopez*, 419 U.S. 565, 576 (1974) (calling education "perhaps the most important function of state and local governments"); *Williams v. Ellington*, 936 F.2d 881, 886 (6th Cir. 1991) ("Like police officers, school officials need discretionary authority to function with great efficiency and speed in certain situations . . .").

<sup>226</sup> *See supra* notes 123-32, 184-200 and accompanying text.

<sup>227</sup> *T.L.O.*, 469 U.S. at 343.

stands now, the extent to which students may exercise their rights under the Fourth and Fourteenth Amendments could well depend upon the jurisdiction, state, or perhaps even the school system in which the student resides. Indeed, both the *Goss* and the *T.L.O.* Courts mentioned that the states may create laws which give students additional protection.<sup>228</sup>

For example, students facing long term suspensions and expulsions may be afforded *Goss*'s minimal guarantees of notice and the right to be heard, or if they are fortunate enough to live in the right place, they may be allowed opportunities to inspect evidence, present and cross-examine witnesses, and be assisted by legal counsel.<sup>229</sup> Differences in these rights take on added meaning if the nature of the infraction is a criminal act which must be reported to the police, or if the consequences require that the student be tried as an adult. Although some states have outlawed corporal punishment of students, in other states students may be subjected to this type of punishment—often without due process—and sometimes even at the objection of their parents.<sup>230</sup>

With respect to Fourth Amendment protections, consider the issue of strip searching. If a student lives in California, Iowa, Oklahoma, Washington, or Wisconsin, he or she cannot be strip searched by school officials, it is illegal.<sup>231</sup> Furthermore, in Wisconsin it is a criminal offense.<sup>232</sup> On the other hand, if a student does not live in one of these states, but resides in the Sixth or Seventh Circuit, under the *Williams*<sup>233</sup> and *Cornfield*<sup>234</sup> decisions, the school could legally strip search the student without a warrant and without probable cause if the search was "reasonable." There are similar, but less dramatic, inconsistencies regarding luggage searches and canine sniffing.<sup>235</sup> In drug testing of student athletes, the difference of opinion at the federal appeals court level was of such concern that the United States Supreme Court decided to

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<sup>228</sup> See *Goss*, 419 U.S. at 578-79 (noting that courts should flexibly interpret Due Process Clause, but that Fourteenth Amendment requires, at a minimum, some kind of notice and some kind of hearing); *T.L.O.*, 469 U.S. at 343 n.10.

<sup>229</sup> ROBERT J. SHOOP AND DENNIS R. DUNKLEE, *SCHOOL LAW FOR THE PRINCIPAL* 167 (1992).

<sup>230</sup> Twenty states have banned corporal punishment outright. See IRWIN A. HYMAN, *READING, WRITING, AND THE HICKORY STICK* 228 (1990).

<sup>231</sup> CAL. EDUC. CODE § 49050 (West 1988); IOWA CODE ANN. § 808A.2 (West 1994); OKLA. STAT. ANN. § 24-102 (West Supp. 1995); WASH. REV. CODE § 28A.600.230 (3) (1991); WIS. STAT. ANN. § 118.32 (West 1991).

<sup>232</sup> See WIS. STAT. ANN. § 118.32 (West 1991).

<sup>233</sup> *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

<sup>234</sup> *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993).

<sup>235</sup> See *supra* note 214 (discussing cases that demonstrate inconsistencies).



intercede.

A cogent reason often used to justify the diminution of students' rights is safety. A legal basis for this action was foreshadowed in Justice Blackmun's concurring opinion in *T.L.O.*, where he made the observation that in light of the increasingly common use of drugs among students and possession of weapons, "an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel."<sup>236</sup> The problem with Blackmun's observation, and with the lower court cases that have followed it, is that drug possession and weapon possession have been lumped together as if they present the very same danger. If one closely considers the cases mentioned in this paper, however, it is clear that these two issues present very different legal problems. Weapons are much more likely to pose an immediate danger and may be detected through fairly unintrusive searches. On the other hand, while possession of drugs may ultimately cause as much harm as weapons, this danger is insidious, less immediate, and the methods of searching for drugs are frequently more intrusive.

Thus, perhaps the most important legal questions related to safety issues are: How immediate is the danger and how much does the government action infringe upon the rights of students? Taken this way, actions such as metal detector searches are much more likely to pass constitutional muster than highly intrusive (strip) searches for drugs. Even though under some circumstances both types of searches are legal, there still remains perhaps more important questions of practice and policy such as: Do these practices work? And, perhaps more importantly, what is the effect of such actions on school climate?

This paper began with an analogy about war. And while it discussed the purpose of the war on drugs and violence, it failed to mention the enemy. Who is the enemy? One might contend that there are enemies on the outside; people coming into our schools to cause disruption. This is why many of our schools use metal detectors, employ security guards, and regularly call in the police. On the other hand, approaches such as corporal punishment and widespread and intrusive searches are more often aimed at students; those on the inside. Under this model, the enemies are our students.

This adversarial portrayal of schools is not one with which the courts have necessarily agreed. On the contrary, as Justice Powell noted in his concurring opinion in *T.L.O.*:

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<sup>236</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 352-53 (1985) (Blackmun, J., concurring).

The special relationship between teacher and student . . . distinguishes the setting within which school children operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils.<sup>237</sup>

In the last twenty-five years, schools may have become more impersonal as they have grown larger through consolidation or population booms.<sup>238</sup> In addition, with the demise of the *in loco parentis* doctrine and increased police involvement, school authorities may well be more like law enforcement officers than like parents.<sup>239</sup> At the same time, we have a national crime bill and national educational goals, one of which is to ensure safe schools. Moreover, we are currently engaged in a debate about national educational standards, i.e., accountability.

Somewhere along the line, we seem to have lost sight of *Tinker's* message that students have rights in schools. The *T.L.O.* Court asked that we balance students' rights against the obligations of administrators to maintain a safe and orderly school climate, yet the dialogue, both at the local and national level as well as in the new *Acton* decision, seems to focus mostly on the authority side of these scales. The primary role of schools is and always has been to educate, to inspire, to bring forth a "marketplace of ideas,"<sup>240</sup> and to teach our youth about democratic ideals. If we forget this role by turning schools into fortresses or by punishing the many for the wrong-doings of a few, then perhaps we have met the enemy. Perhaps we are the enemy.

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<sup>237</sup> *Id.* at 349-50 (Powell, J., concurring).

<sup>238</sup> Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1671-72 (1986).

<sup>239</sup> *Id.*

<sup>240</sup> *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

