Students And The Fourth Amendment: "The Torturable Class"*

This comment surveys the various views courts have adopted in restricting the application of the fourth amendment protections for searches conducted in schools by school officials. It evaluates the considerations underlying the legal approaches and argues that outright denial of constitutional protections is both unjustifiable and unneccessary. The comment concludes by suggesting a compromise approach which would recognize practical necessities without ignoring the constitutional guarantee of freedom from unreasonable searches.

INTRODUCTION

The United States Supreme Court has held that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Moreover, the Court has held that neither the fourteenth amendment nor the Bill of Rights applies to adults alone.[2] Lower courts, however, have generally refused to use the fourth amendment[3] to protect the rights of students[4] subjected to

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* G. Greene, *Our Man in Havana, in Triple Pursuit*, in A GRAHAM GREENE OMNIBUS 376 (1971), *cited in* Smyth v. Lubbers, 398 F. Supp. 777, 785 (W.D. Mich. 1975) ("Students are no longer members of what Graham Greene's Secret Police Captain Segura called the 'torturable class.' ").

[1] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

[2] *In re* Gault, 387 U.S. 1, 13 (1967).

[3] "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." U.S. CONST. amend. IV.

[4] *See* Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) (upholding general exploratory search of junior high school and high school students by drug detection dogs), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981); Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968) (upholding search of university dormitory room by dean and state narcotic agents); *In re* C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (4th Dist. 1972) (upholding search of high school student for marijuana, by police officer called by school officials); *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (3d Dist. 1969) (upholding search by vice principal of high school of high school student's locker for amphet-

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searches and seizures by school officials.[5]

A typical case raising the issue of constitutional rights in the schools might involve the following scenario. A high school student is called into the principal's office. Acting on the basis of an anonymous tip, the principal orders the student to empty his pockets.[6] A small amount of marijuana, or other contraband, is found and the student is prosecuted. The student unsuccessfully argues that the state obtained the contraband from a search which violated the fourth amendment and that the evidence should be excluded at trial.

The scenario has a number of possible variations. Elementary school, university, and trade school students might also be searched. In addition to searches of the person (including strip searches), the search might involve a school locker, dormitory room, or other property. The search might be conducted by a teacher, administrator, school guard, or even a police officer. Drug detection dogs are sometimes used.

The scenario is not a remote one. In one survey,[7] almost one-half of

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amines); State *ex rel.* T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (1980) (upholding search of 15-year-old student's purse for marijuana and cigarettes). *But see* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (unsuccessful search of entire fifth grade class for three missing dollars unconstitutional); People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706, *aff'd*, 61 Misc. 858, 306 N.Y.S.2d 788 (1969) (search of university dormitory room by police and university officials unconstitutional). *See generally* Buss, *The Fourth Amendment and Searches of Public Schools*, 59 IOWA L. REV. 739 (1974); Donoghoe, *Emerging First and Fourth Amendment Rights of the Student*, 1 J. L. & EDUC. 449, 450-60 (1972); Frels, *Search and Seizure in the Public Schools*, 11 HOUS. L. REV. 876 (1974); Phay & Register, *Searches of Students and the Fourth Amendment*, 5 J. L. & EDUC. 57 (1976); Trosch, Williams, and DeVore, *Public School Searches and the Fourth Amendment*, 11 J. L. & EDUC. 41 (1982); Young, *Searches and Seizures in Juvenile Court Proceedings*, 25 JUV. JUST. 26 (1974); Comment, *Public School Searches and Seizures*, 45 FORDHAM L. REV. 202 (1976); Comment, *Students and the Fourth Amendment: Myth or Reality?*, 46 UMKC L. REV. 282 (1977); Annot., 49 A.L.R. 978 (1973).

[5] The scope of this article extends to public school officials as well as officials from private schools with sufficient government contacts to bring constitutional protections to bear. *See, e.g.*, People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968) (holding search of dorm room at Hofstra University unconstitutional), *aff'd*, 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969); *see also* Note, *Legal Relationship Between the Student and the Private College or University*, 7 SAN DIEGO L. REV. 244 (1970).

[6] While the student generally complies with the demand, some searches are conducted by force.

[7] *See* Comment, *Students and the Fourth Amendment: Myth or Reality?*, 46 UMKC L. REV. 282, 307 (1977). An illustration of the current use of such searches is the new program using drug detection dogs currently being developed by the Burbank Unified School District in California. Under the proposal, police could make unannounced campus patrols with dogs that can detect cocaine, heroin, and marijuana. The

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the students surveyed reported searches of their persons or lockers.[8] Moreover, the threat to privacy can be extreme. For example, one case involved the strip search of an entire classroom of fifth grade children, in an unsuccessful attempt to locate three missing dollars.[9]

The fourth amendment protects individuals against unreasonable searches by government officials that intrude on a reasonable expectation of privacy.[10] Searches conducted without a warrant issued upon probable cause[11] are per se unreasonable[12] unless they fall into a few well-delineated exceptions.[13] In analyzing school searches, courts have used a confusing array of legal theories, usually to avoid the fourth amendment requirements of a warrant and probable cause. This comment will first analyze these numerous legal theories. It will then examine the underlying policies that pervade these theories. The problem in this area is determining the amount of control the courts should exercise over school personnel and the scope of the reasonable expectation of privacy in schools. Finally, after a brief examination of the existing exceptions to the requirements of the fourth amendment, an alternate approach for the school search situations will be suggested. This proposed approach would allow school officials to function effectively, without impinging upon indispensable rights[14] of students.

Sacramento Bee, Jan. 3, 1983, § A, at 5.

[8] Comment, note 7 *supra*, at 307.

[9] Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

[10] Terry v. Ohio, 392 U.S. 1, 9 (1968).

[11] The Supreme Court has construed probable cause to search to mean the facts and circumstances within the officer's knowledge and any other reasonable trustworthy information which would be sufficient to warrant a person of reasonable caution to believe that contraband would be found in a particular place or on a particular person. Carroll v. United States, 267 U.S. 132, 162 (1925).

[12] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973), *cited in* State v. Mora, 307 So. 2d 317, 320 (La.), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900 (La.), *cert. denied*, 429 U.S. 1004 (1976).

[13] *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971), *cited in* State v. Mora, 307 So. 2d 317, 320 (La.), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900 (La.), *cert. denied*, 429 U.S. 1004 (1976). The main exceptions to the warrant and probable cause requirements of the fourth amendment are plain view, consent, emergency, border, auto, stop and frisk, and administrative searches. For a discussion of these exceptions, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

[14] The Supreme Court has stated:

> These [fourth amendment rights] . . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and

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I. Legal Theories

Courts have developed a rich variety of legal theories to decide the school search cases.[15] In their desire to allow school officials independence from judicial supervision,[16] courts have employed, at one extreme, theories[17] that eliminate all fourth amendment protections.[18] At the other extreme, a few courts have applied full constitutional protections.[19] As a compromise, many courts have analyzed school searches

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> seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

[15] Interestingly, these theories have never included an assertion that the fourth amendment or the exclusionary rule does not apply to juveniles. Probably the most forceful language used by a court in support of applying the exclusionary rule is found in State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907 (1967):

> Is it not more outrageous for the police to treat children more harshly than adult offenders, especially when such is violative of due process and fair treatment? Can a court countenance a system where, as here, an adult may suppress evidence with the usual effect of having the charges dropped for lack of proof, and on the other hand, a juvenile can be institutionalized — lose the most sacred possession a human being has, his freedom — for "rehabilitative" purposes because the Fourth Amendment is unavailable to him?

Id. at 316, 230 A.2d at 911. For other cases applying the protections of the fourth amendment to juveniles, see Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); *In re* Marsh, 40 Ill. 2d 53, 237 N.E.2d 529 (1968); *In re* Harvey, 222 Pa. Super. 222, 295 A.2d 93 (1972); Cuilla v. State, 434 S.W.2d 948 (Tex. Civ. App. 1968).

[16] *See, e.g.*, D.R.C. v. State, 646 P.2d 252, 260 n.12 (Alaska Ct. App. 1982) (Upholding the search of a high school student, the court stated, "we would conclude that the need for freedom and flexibility in maintaining school discipline precludes considerations of judicial integrity from dictating a contrary result.").

[17] *See* notes 24-82 and accompanying text *infra*.

[18] The fourth amendment protects individuals from governmental searches of their "persons, houses, papers, and effects" without a warrant and probable cause. Weeks v. United States, 232 U.S. 383, 391-92 (1914). A search occurs when an individual's reasonable expectation of privacy is violated. Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring). The requirements of a warrant and probable cause are subject to several specially established and well-delineated exceptions. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); *Katz v. United States*, 389 U.S. at 585. Furthermore, evidence seized by the federal government in violation of the fourth amendment is inadmissible in federal proceedings under the exclusionary rule. Weeks v. United States, 232 U.S. 383, 398 (1914). Mapp v. Ohio, 367 U.S. 643, 655 (1961) extended the exclusionary rule to state proceedings.

[19] *See* notes 83, 117, 123 and accompanying text *infra*.

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under reduced fourth amendment standards.[20] Finally, in addition to fourth amendment issues, some courts have considered the impact of other constitutional, statutory, and regulatory provisions on searches and seizures by school officials.[21]

A. State Action

The fourth amendment protects individuals from unreasonable governmental intrusions.[22] Searches by private persons are not restricted under the fourth amendment, because they involve no state action.[23] Several courts have held that searches conducted by school officials were, in effect, searches by private individuals, and therefore not subject to the constitutional restrictions placed on governmental activity.[24] These courts reasoned that the school officials were acting *in loco parentis.* This doctrine of *in loco parentis,* which originated in *Blackstone's Commentaries,*[25] is based on the theory that a parent may delegate parental authority to the schoolmaster, "who is then *in loco parentis,* and has such a portion of the power of the parent . . . as may be necessary to answer the purposes for which he is employed."[26]

The problem with the "no state action" theory is that it extends the *in loco parentis* doctrine to unconstitutional proportions.[27] A school offi-

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[20] *See* notes 94-120 and accompanying text *infra.*

[21] *See* notes 124-29 and accompanying text *infra.*

[22] *See* note 10 *supra.*

[23] *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

[24] *See, e.g., In re* G., 11 Cal. App. 3d 1193, 1198-99, 90 Cal. Rptr. 361, 364 (1st Dist. 1970); *In re* Donaldson, 269 Cal. App. 2d 509, 511, 75 Cal. Rptr. 220, 222 (3d Dist. 1969); *In re* Boykin, 39 Ill. 2d 617, 619, 237 N.E.2d 460, 462 (1968); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 384, 323 A.2d 145, 147 (1974); Ranniger v. State, 460 S.W.2d 181, 183 (Tex. Civ. App. 1970); Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970).

[25] 1 W. BLACKSTONE, COMMENTARIES.

[26] *Id.* at *453. The most prominent case relying on this theory is *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (3d Dist. 1969), in which a California appellate court ruled on the search, by the vice principal, of a 15-year-old high school student's locker. The court, noting that school officials have the responsibility to maintain order, and to facilitate education, held that the school stands *in loco parentis* to the students, and shares the parental authority to obtain obedience. The court treated the school official as a private party, who was therefore not subject to the constitutional restraints placed on state actions. To find the parental activities performed by the officials, however, the court relied on state laws mandating compulsory school attendance, establishing a statutory duty for school officials to care for the health of the student, and a legislative mandate to attack drug use in schools. *Id.* at 512, 75 Cal. Rptr. at 222.

[27] *See, e.g.,* Picha v. Wielgos, 410 F. Supp. 1214, 1218 (N.D. Ill. 1976) ("[I]t is evident that the *in loco parentis* authority of a school official cannot transcend constitu-

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cial's authority to discipline students does not alter the fact that the school official is a government official, and must exercise his authority within constitutional limitations. Courts have noted that it is state law which imposes the compulsory attendance requirement,[28] and that public school officials enforcing the requirement are state employees who rely on state authority for their actions.[29] In fact, the "no state action" theory has been rejected by commentators[30] and also, in recent years, by courts evaluating searches by school officials.[31] One court bluntly stated that Blackstone's doctrine of *in loco parentis* has little utility in evaluating the situation of contemporary compulsory public education.[32]

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tional rights."). For cases holding that the *in loco parentis* doctrine cannot override the constitution to cancel state action, see Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980); State v. Baccino, 282 A.2d 869 (Del. Super Ct. 1971); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970) (Hughes, J., dissenting).

[28] Bellnier v. Lund, 438 F. Supp. 47, 51 (N.D.N.Y. 1977); D.R.C. v. State, 646 P.2d 252, 255 (Alaska Ct. App. 1982).

[29] State v. Baccino, 282 A.2d 869, 871 (Del. Super. Ct. 1971); State v. Mora, 307 So. 2d 317, 319 (La.), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900 (La.), *cert. denied*, 429 U.S. 1004 (1976); People v. D., 34 N.Y.2d 483, 486, 315 N.E.2d 466, 468, 358 N.Y.S.2d 403, 406 (1974); State v. Walker, 19 Or. App. 420, 424, 528 P.2d 113, 115 (1974).

[30] *See* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 768 (1974); Trosch, Williams & DeVore, *Public School Searches and the Fourth Amendment*, 11 J. L. & EDUC. 41, 44 (1982); Comment, *Search and Seizure: Is the School Official a Policeman or Parent?*, 22 BAYLOR L. REV. 554, 556 (1970); Comment, *Students and the Fourth Amendment: Myth or Reality?*, 46 UMKC L. REV. 282, 296-97 (1977).

[31] *See* State v. Young, 234 Ga. 488, 494, 216 S.E.2d 586, 591 (1975), *cert. denied*, 423 U.S. 1039 (1975) ("[I]t [is] too plain to be controverted that school officials are state officers acting under color of law . . . ."). For cases rejecting the no state action theory, see Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 229-30 (E.D. Tex. 1980); Bellnier v. Lund, 438 F. Supp. 47, 52 (N.D.N.Y. 1977); Picha v. Wielgos, 410 F. Supp. 1214, 1218 (N.D. Ill. 1976); D.R.C. v. State, 646 P.2d 252, 255 (Alaska Ct. App. 1982); State v. Baccino, 282 A.2d 860, 871 (Del. Super. Ct. 1971); *Ex rel.* J.A., 85 Ill. App. 3d 567, 572-73, 406 N.E.2d 958, 962 (1980); State v. Mora, 307 So. 2d 317, 319 (La.), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900, 901 (La.), *cert. denied*, 429 U.S. 1004 (1976); People v. Ward, 62 Mich. App. 46, 49-50, 233 N.W.2d 180, 182 (1975); State *ex rel.* T.L.O., 178 N.J. Super. 329, 340, 428 A.2d 1327, 1333 (1980); Doe v. State, 88 N.M. 347, 351, 540 P.2d 827, 831 (Ct. App. 1975); People v. D., 34 N.Y.2d 483, 486, 315 N.E.2d 466, 468, 358 N.Y.S.2d 403, 406 (1974); State v. Walker, 19 Or. App. 420, 424, 528 P.2d 113, 115 (1974).

[32] D.R.C. v. State, 646 P.2d 252, 255 (Alaska Ct. App. 1982). Furthermore, using the doctrine of *in loco parentis* to reach a conclusion that the school official is a private party is simply not consistent with decisions of the Supreme Court. The Court held as early as 1943 that, "[t]he fourteenth amendment, as now applied to the States, protects

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B. *Fourth Amendment Protections Applicable Only to Law Enforcement Personnel*

In *D.R.C. v. State*,[33] the Alaska Court of Appeals, despite finding there was state action,[34] held that the fourth amendment did not restrict the activities of school officials. Relying on the history of the amendment,[35] the court found its purpose was only to constrain actions by law enforcement personnel.[36] The court distinguished cases applying the fourth amendment to government officials other than police officers[37] from cases involving school officials on the ground that the former involved area-wide exploratory searches by specialized law enforcement officers, while school officials were only engaged in disciplinary matters, and did not enforce penal statutes or regulations.[38]

Several courts, despite applying the fourth amendment to all government officials, have limited the application of the exclusionary rule to

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the citizens against the state itself and all its creatures — Board of Education not excepted." Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943). In another case the Court stated, "[i]f an individual is possessed of state authority and proports to act under this authority, his action is state action." Griffin v. Maryland, 378 U.S. 130, 135 (1964). The Supreme Court also discounted the *in loco parentis* doctrine in *In re* Gault, 387 U.S. 1 (1967), stating that:

> The Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historical credentials are of dubious relevance. The phrase . . . was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child.

Id. at 16.

[33] 646 P.2d 252 (Alaska Ct. App. 1982) (upholding search of high school student by assistant principal and teacher looking for stolen money).

[34] *See* note 32 and accompanying text *supra.*

[35] *See* Boyd v. United States, 116 U.S. 616 (1886); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937), *cited in* D.R.C. v. State, 646 P.2d 252, 259 (Alaska Ct. App. 1982).

[36] The court also relied on cases stressing deterrence as the purpose of the exclusionary rule *see* United States v. Janis, 428 U.S. 433, 446 (1976), *reh'g denied*, 429 U.S. 874 (1976); United States v. Calandra, 414 U.S. 338, 347 (1974), and concluded this purpose would not be served by excluding evidence seized by school officials. D.R.C. v. State, 646 P.2d 252, 258 (Alaska Ct. App. 1982); *see also* notes 39-42 and accompanying text *infra.*

[37] *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (OSHA inspectors); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border patrol officials); See v. City of Seattle, 387 U.S. 541 (1967) (fire inspectors); Camara v. Municipal Ct., 387 U.S. 523 (1967) (housing inspectors); Jones v. United States, 357 U.S. 493 (1958) (alcohol tax agents).

[38] D.R.C. v. State, 646 P.2d 252, 258-59 (Alaska Ct. App. 1982).

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law enforcement personnel[39] by using reasoning similar to that found in *D.R.C. v. State.*[40] The principal opinion expounding this view is the Georgia Supreme Court's decision in *State v. Young*,[41] a case involving a search of a high school student. The court concluded that the exclusionary rule was not constitutionally required, and had never been applied except in the context of a constitutional violation by a law enforcement officer. Balancing the benefits and burdens of applying the exclusionary rule, the court concluded that its major and perhaps only goal was to deter unlawful acts, and this purpose would not be served by excluding evidence seized by school officials. In making this determination, the court demonstrated a general hostility to the exclusionary rule.[42]

The theories which limit the application of protections of the fourth amendment and the exclusionary rule to violations by law enforcement personnel have been rejected by legal commentary[43] and most case law.[44] The purpose of the fourth amendment is to safeguard the privacy and security of individuals against arbitrary invasions by all public offi-

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[39] *See* United States v. Coles, 302 F. Supp. 99, 103 (N.D. Me. 1969); D.R.C. v. State, 646 P.2d 252, 258 (Alaska Ct. App. 1982) (dicta); State v. Young, 234 Ga. 488, 493-94, 216 S.E.2d 586, 591 (1975), *cert. denied*, 423 U.S. 1039 (1975); State v. Mora, 307 So. 2d 317, 321 (La.), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900 (La.), *cert. denied*, 429 U.S. 1004 (1976) (dissent); State v. Wingerd, 40 Ohio App. 2d 236, 240, 318 N.E.2d 866, 869 (1974) (dicta).

[40] 646 P.2d 252 (Alaska Ct. App. 1982); *see* text accompanying notes 33-38 *supra*.

[41] 234 Ga. 488, 216 S.E.2d 586 (1975) (assistant principal's search of a high school student for marijuana upheld).

[42] *Id.* at 494, 216 S.E.2d at 591 ("The tide is turning, we think properly, away from the exclusionary rule; and we decline to extend it to apply to searches by non-law enforcement persons.").

[43] *See* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 753-60 (1974); Note, *Student Searches — The Fourth Amendment and the Exclusionary Rule*, 41 MO. L. REV. 626, 628-30 (1976); Comment, *Students and the Fourth Amendment: Myth or Reality?*, 46 UMKC L. REV. 282, 306-07 (1977).

[44] *See* Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980). "The failure to apply a corollary of the exclusionary rule in this context would leave school officials free to trench upon constitutional rights of students in their charge without meaningful restraint or fear of adverse consequences. Such a result would be intolerable, particularly in our schools." *Id.* at 239. For other cases which reject limiting the fourth amendment and the exclusionary rule to law enforcement officials, see Smyth v. Lubbers, 398 F. Supp. 777, 787 (W.D. Mich. 1975); State v. Baccino, 282 A.2d 869, 871 (Del. Super. Ct. 1971); *Ex rel.* J.A., 85 Ill. App. 3d 567, 572-73, 406 N.E.2d 958, 962 (1980); People v. D., 34 N.Y.2d 483, 487, 315 N.E.2d 466, 469, 358 N.Y.S.2d 403, 407 (1974).

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cials.[45] The notion that school officials would not be deterred by the exclusionary rule because of the ostensible "special purposes" of school searches, is unpersuasive since school officials have a duty to investigate unlawful activity.[46]

The Supreme Court recently provided the answer to the contention that the fourth amendment should be limited to its application at the time of its enactment. The Court stated:

> silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search . . . . What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.[47]

The fact that the fourth amendment was not originally used to constrain school officials does not preclude its use as a safeguard of the rights of students today.

Finally, any theory absolutely denying the protections of the Constitution conflicts with the Court's language in *Tinker v. Des Moines Independent Community School District.*[48] The Court in *Tinker* invalidated a regulation prohibiting students from wearing armbands to protest the war in Vietnam on first amendment grounds; the Court's holding, however, addresses the broader question of the applicability of the Constitution in schools. The Court rejected both the idea that schools may be operated as "enclaves of totalitarianism,"[49] and the premise that school officials have "absolute authority over their students."[50] "Students in schools as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect . . . ."[51] The *Tinker* Court emphasized that the protection of constitutional freedoms is even more important in schools than elsewhere.[52]

C. *Reasonable Expectation of Privacy*

The Supreme Court has held that the fourth amendment only ap-

[45] Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Ct., 387 U.S. 523 (1967).

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

[47] United States v. Chadwick, 433 U.S. 1, 8-9 (1977), *cited in* United States v. Ross, 102 S. Ct. 2157, 2165 (1982) (upholding search of container in an automobile).

[48] 393 U.S. 503 (1969).

[49] *Id.* at 511.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 512.

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plies when an individual's reasonable expectation of privacy is violated.[53] Although no court has asserted that students waive all expectations of privacy simply by their forced attendance at school, several courts have ruled that at least certain types of school searches do not infringe upon students' reasonable expectations of privacy.[54]

Many of the cases discussing the reasonable expectation of privacy involve searches of school lockers.[55] These cases have noted the nonexclusive nature of the students' right to possession, and concluded the student has a reasonable expectation of privacy only in relation to other students.[56] They hold that this expectation of privacy does not extend to school officials because the locker is school property and the school usually retains a master key or list of combinations to all lockers.[57]

Although these factors arguably indicate a lesser expectation of privacy by students in their school lockers, they do not eliminate all reasonable expectations of privacy. The Supreme Court has specifically stated that the fourth amendment protects people, not places.[58] What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[59] Thus, neither the fact that the school owns the lockers, nor the nonexclusive nature of the student's possession due to the school's retained access is conclusive. Moreover, courts have granted protection in similar situations involving nonexclusive possession, including cases involving a telephone booth,[60] and a

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[53] Katz v. United States, 389 U.S. 347 (1967) (ruling defendant had reasonable expectation of privacy in telephone call conducted from public telephone booth and thus was protected by fourth amendment).

[54] Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) (drug detection dogs used to sniff high school and junior high school students), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981); People v. Haskins, 48 A.D.2d 480, 369 N.Y.S.2d 869 (1975) (search of college dormitory room); A.B.C., Alleged Delinquent, 50 Pa. D. & C.2d 115 (1970) (search of school locker); *see also In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (3d Dist. 1969) (search of school locker); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969) (search of school locker), *cert. denied*, 397 U.S. 947 (1970); People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969) (search of school locker).

[55] *See In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (3d Dist. 1969); State v. Stein, 203 Kan. 648, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970); People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969); A.B.C., Alleged Delinquent, 50 Pa. D. & C.2d 115 (1970).

[56] *See* cases cited note 55 *supra*.

[57] *See* cases cited note 55 *supra*.

[58] Katz v. United States, 389 U.S. 347, 351 (1967).

[59] *Id.* at 351-52.

[60] *Id.*

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taxicab.[61]

Two courts have faced the issue of whether university students have a reasonable expectation of privacy in their dormitory rooms. Both courts found that an expectation of privacy existed in this situation.[62] Like lockers, a dormitory room is owned by the school, and officials have master keys to gain entrance. In addition, students are normally required to sign a contract that includes a clause allowing university officials to enter their rooms. Nevertheless, these courts found fourth amendment protections to be applicable, primarily because of the overwhelming similarity of a dormitory room to a home.[63]

The use of drug detection dogs to sniff students' persons and lockers for contraband[64] has also raised the issue of the limits of a student's reasonable expectation of privacy.[65] One case held that the use of dogs to detect drugs on the students' persons did not violate their reasonable expectation of privacy, and thus was not a search.[66] However, this position has been vehemently rejected by the commentators,[67] and by subsequent cases.[68] Noting that the dogs came into physical contact with the

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[61] Rios v. United States, 364 U.S. 253 (1960); *see also* Stoner v. California, 376 U.S. 483 (1964) (hotel room); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (desk).

[62] Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975); Piazzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971).

[63] Homes receive special protection under the fourth amendment. United States v. United States Dist. Ct., 407 U.S. 297, 313 (1972) ("[P]hysical entry of home is the chief evil against which the wording of the Fourth Amendment is directed.").

[64] The propriety and appropriate standards under the fourth amendment for the use of drug detection dogs is an issue that is in no way limited to school searches. The many cases and extensive commentary on this subject outside the school search area are beyond the scope of this article. However, for an excellent review of the issues involved, with extensive citations to cases and commentary, see Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982).

[65] *See* Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982); Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

[66] Doe v. Renfrow, 475 F. Supp. 1012, 1020 (N.D. Ind. 1979), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

[67] Gardner, *Sniffing for Drugs in the Classroom — Perspectives on Fourth Amendment Scope*, 74 NW. U.L. REV. 803 (1980); Comment, *Searches by Drug Detection Dogs in Pennsylvania Public Schools: A Constitutional Analysis*, 85 DICK. L. REV. 143 (1980); Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980); Note, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U.L.J. 119 (1979).

[68] *See* Horton v. Goose Creek Indep. School Dist., 677 F.2d 471, 480 (5th Cir. 1982); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 233 (E.D. Tex. 1980);

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students while sniffing them,[69] one federal court stated that, "society recognizes the interest in the integrity of one's person, and the fourth amendment applies with its fullest vigor against any indecent or indelicate intrusion on the human body."[70] The courts are more evenly split as to the propriety of using dogs to sniff school lockers for drugs,[71] but the most recent federal circuit court of appeals opinion found some expectation of privacy.[72] The court reasoned that although the use of certain aids to human senses, such as a flashlight, fall within the plain view exception to the fourth amendment, the use of drug detection dogs was not allowable under this exception, because a trained dog could detect odors that no human being could perceive.[73]

D. *Consent as an Exception to the Fourth Amendment*

Consent given by the person to be searched is a recognized exception to the fourth amendment's protections.[74] This consent, which is a

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see also Doe v. Renfrow, 451 U.S. 1022, 1025-26 (1981) (Brennan, J., dissenting from denial of certiorari); Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (Swygert, J., dissenting from denial of rehearing).

[69] One federal district court has characterized the physical intrusion in even harsher terms, noting that the dog was a large German Shepherd trained as an attack dog that "slobbered" on one child, and that the use of such dogs could be "both intimidating and frightening, particularly to the children, some as young as kindergarten age . . . ." Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 233-34 (E.D. Tex. 1980).

[70] Horton v. Goose Creek Indep. School Dist., 677 F.2d 471, 480 (5th Cir. 1982).

[71] For cases finding a reasonable expectation of privacy, see Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980). *But see* Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

[72] Horton v. Goose Creek Indep. School Dist., 677 F.2d 471, 480 (5th Cir. 1982) (drug detection dogs used to sniff persons, lockers, and automobiles of high school and elementary school students).

[73] *Id.* at 479.

[74] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (car owner's consent to search his car held voluntary under totality of circumstances). Other exceptions to the fourth amendment requirements occasionally arise in school search cases. In one instance, the search of a library carrel was validated through the emergency exception. People v. Lanthier, 5 Cal. 3d 751, 488 P.2d 625, 97 Cal. Rptr. 297 (1971) (the search revealed marijuana to which preservative had been added, causing an odor). This exception allows police to conduct warrantless searches in certain emergency situations if there is probable cause for the search and if "the exigencies of the situation make that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1948) (warrantless search of house to break up illegal lottery held unconstitutional because exigencies of situation did not mandate immediate entry); *see* Michigan v. Tyler, 436 U.S. 499 (1978) (immediate investigation by fire officials at possible arson site may be necessary

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waiver of an individual's reasonable expectation of privacy, must be voluntarily given and not the result of duress or coercion, either express or implied.[75] Furthermore, consent is not voluntary if it is the result of a demand by a superior authority.[76] The issue of consent arises in the school search situation whenever a student empties her pockets or acquiesces to a search upon the demand of a school official. However, the courts have not attempted to use the exception to justify searches in this situation,[77] because the consent is given only in acquiescence to the superior authority of a school official.

The issue of consent also arises in dormitory room searches.[78] Dormitory contracts and school regulations[79] usually include a clause al-

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without warrant to prevent recurrence and preserve evidence); Warden v. Hayden, 387 U.S. 294 (1967) (after pursuing and arresting robbery suspect, police were allowed to search house without warrant to ensure police safety by apprehending possible accomplices and weapons).

Contraband within the plain view of a government official can be seized, provided he is lawfully in the position to have that view. Harris v. United States, 390 U.S. 234 (1968); Ker v. California, 374 U.S. 23 (1963). One commentator has suggested that, given the high degree to which students are subject to supervision in schools, this exception provides school officials with sufficient control and freedom of action to make any weakening of usual fourth amendment restrictions unnecessary. Trosch, Williams, & DeVore, *Public School Searches and the Fourth Amendment,* 11 J. L. & EDUC. 41, 47 (1982).

[75] Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (suspect's consent must be voluntary but police need not inform suspect of any right to refuse consent).

[76] Canida v. United States, 250 F.2d 822, 825 (5th Cir. 1958).

[77] *See, e.g.,* State *ex rel.* T.L.O., 178 N.J. Super. 329, 335, 428 A.2d 1327, 1330 (1980) (court noted that juvenile was not advised of right to withhold consent, but upheld search on other grounds). *But see* State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969) (consent held voluntary), *cert. denied,* 397 U.S. 947 (1970).

[78] *See* Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975); Piazzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd,* 442 F.2d 284 (5th Cir. 1971); Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968); People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (2d Dist. 1961); People v. Haskins, 48 A.D.2d 480, 369 N.Y.S.2d 869 (1975); People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968), *aff'd,* 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969); State v. Wingerd, 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970). *See generally* Bible, *The College Dormitory Student and the Fourth Amendment — a Sham or a Safeguard?,* 4 U.S.F.L. REV. 49 (1969); Delgado, *College Searches and Seizures: Students, Privacy, and the Fourth Amendment,* 26 HASTINGS L.J. 57 (1974); Note, *The Dormitory Student's Fourth Amendment Right to Privacy: Fact or Fiction?,* 9 SANTA CLARA L. REV. 143 (1968).

[79] *See, e.g.,* Commonwealth v. McCloskey, 217 Pa. Super. 432, 435-36, 272 A.2d 271, 273 (1970) (clause allowing entry to check for damages and unauthorized appliances).

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lowing school officials to enter the room.[80] These provisions, however, have generally been interpreted not to be a waiver of constitutional rights.[81] Knowledge of university regulations, or a required acquiescence to a form housing contract does not constitute a voluntary waiver of a constitutional right.[82]

E. Warrant Issued Upon Probable Cause

The legal theories discussed above have, in some manner, justified the refusal to apply the fourth amendment to protect students from searches and seizures by school officials. At the other end of the spectrum stands one case, *State v. Mora*,[83] and two dissenting opinions,[84] which would allow searches by school officials only with a warrant issued upon probable cause.[85] These opinions generally note that searches conducted without a warrant and probable cause are per se unconstitu-

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[80] *See, e.g.*, Moore v. Student Affairs Comm., 284 F. Supp. 725, 728 (M.D. Ala. 1968) ("The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary the room may be searched and the occupant required to open his personal baggage and any other personal material which is sealed."); Piazzola v. Watkins, 316 F. Supp. 624, 625, (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971) (clause identical to that in *Moore*).

[81] *See* Smyth v. Lubbers, 398 F. Supp. 777, 788 (W.D. Mich. 1975); Piazzola v. Watkins, 316 F. Supp. 624, 626 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971); Moore v. Student Affairs Comm., 284 F. Supp. 725, 729 (M.D. Ala. 1968); People v. Cohen, 57 Misc. 2d 366, 368, 292 N.Y.S.2d 706, 709 (1968), *aff'd*, 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969); Commonwealth v. McClosky, 217 Pa. Super. 432, 435-36, 272 A.2d 271, 273 (1970). *But see* People v. Kelly, 195 Cal. App. 669, 676-79, 16 Cal. Rptr. 177, 183-84 (2d Dist. 1961) (authority of school official to search dormitory room based on housing contract upheld); State v. Wingerd, 40 Ohio App. 2d 236, 238, 318 N.E.2d 866, 868 (1974) (finding consent of student at time of search).

[82] Smyth v. Lubbers, 398 F. Supp. 777, 788 (W.D. Mich. 1975).

> The state cannot condition attendance . . . on a waiver of constitutional rights . . . . Furthermore, a blanket authorization in an adhesion contract that the college may search the room for violation of whatever substantive regulations the college chooses to adopt . . . is not the type of focused, deliberate, and immediate consent contemplated by the Constitution.

Id.

[83] 307 So. 2d 317 (La.) (search of high school student's wallet by gym instructor for marijuana), *vacated*, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900 (La.), *cert. denied*, 429 U.S. 1004 (1976).

[84] State v. Young, 234 Ga. 488, 507, 216 S.E.2d 586, 594 (search of person of high school student by assistant principal), *cert. denied*, 423 U.S. 1039 (1975) (Gunter, J., dissenting); State v. McKinnon, 88 Wash. 2d 75, 83, 558 P.2d 781, 785 (1977) (Rosellini, J., dissenting) (search of person of high school student by principal).

[85] *See* note 11 *supra*.

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tional.[86] Such requirements may be waived only if the search falls into a specifically established and well-delineated exception;[87] the search of a student by school officials does not fall within such an exception. These opinions concede the need to maintain discipline in schools, but assert that this discipline must be maintained within constitutional parameters.[88]

F. Lowered Standards for Searches

In recent years, the majority of courts have attempted to find a middle ground between denying all fourth amendment protections and requiring the full safeguards of a warrant and probable cause. These courts have completely waived the warrant requirement, and allowed a standard of suspicion lower than probable cause to justify the search. Most of the cases[89] refer to this lesser standard as "reasonable suspicion."[90] Other courts have referred to this lower standard as "good cause,"[91] "reasonable cause to believe,"[92] or have simply stated that the

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[86] *See* note 12 *supra.*

[87] *See* note 13 *supra.*

[88] State v. Young, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975). "[I]t must be conceded that the maintenance of order and discipline in a public school is one thing, and the acknowledgement and enforcement of constitutional rights in a criminal prosecution is an entirely different thing." *Id.* at 508, 216 S.E.2d at 599 (Gunter, J., dissenting).

[89] *See, e.g.*, Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (no reasonable suspicion for strip search of entire fifth grade class); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971) (upholding search of high school student's coat for hashish); *Ex rel.* J.A., 85 Ill. App. 3d 567, 406 N.E.2d 958 (1980) (upholding search of high school student's coat for marijuana); People v. Ward, 62 Mich. App. 46, 233 N.W.2d 180 (1975) (upholding search of high school student for LSD); State *ex rel.* T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (1980) (upholding search of high school student's purse for cigarettes and marijuana); Doe v. State, 88 N.M. 347, 540 P.2d 827 (1975) (upholding search of junior high school student for marijuana); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (1970) (upholding search of high school student for narcotics).

[90] The phrase "reasonable suspicion" was actually introduced by Justice Douglas in his dissenting opinion in Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting) to describe the standard used by the majority. The majority opinion set forth this standard: "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons . . . ." *Id.* at 30.

[91] *In re* C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (4th Dist. 1972) (upholding search of high school student for marijuana).

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search must be "reasonable."[93]

Although these courts use similar terminology, the actual level of suspicion required to authorize a search varies greatly. At one extreme are courts which purport to apply some fourth amendment protection, but which have actually found almost any behavior by the student ample to justify the search.[94] A "furtive gesture,"[95] or even the refusal to consent to the search[96] have been used to satisfy constitutional standards. These courts ostensibly acknowledge the validity of constitutional protections in schools, while in reality they withhold all safeguards by leaving virtually unlimited discretion in the school officials.[97] In contrast, some courts have used a standard that is lower than probable cause, yet still meaningful.[98]

One line of cases has used specific factors to determine the sufficiency of suspicion necessary to justify a school search.[99] These factors include: the child's age, history, and record in school; the prevalence and seri-

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[92] M. v. Board of Educ. Ball-Chatham Community Unit School Dist. No. 5, 429 F. Supp. 288 (S.D. Ill. 1977) (upholding search of high school student for marijuana); Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968) (upholding search of college dormitory room).

[93] *In re* G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1st Dist. 1970) (upholding search of high school student for drugs); State v. Young, 234 Ga. 488, 216 S.E.2d 586 (upholding search of high school student for marijuana), *cert. denied*, 423 U.S. 1039 (1975).

[94] *See In re* C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (4th Dist. 1972) (upholding search of high school student by police officer who was called by the vice principal); State v. Young, 234 Ga. 488, 216 S.E.2d 586 (validating search of high school student for marijuana), *cert. denied*, 423 U.S. 1039 (1975).

[95] State v. Young, 234 Ga. 488, 496, 216 S.E.2d 586, 593, *cert. denied*, 423 U.S. 1039 (1975). The court frankly acknowledged that it wished to allow searches "without hindrance or delay, subject only to the most minimal restraints . . . . " *Id.*

[96] *In re* C., 26 Cal. App. 320, 325, 102 Cal. Rptr. 682, 685 (4th Dist. 1972).

[97] *See* Note, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U.L.J. 119, 127 (1979).

[98] *See, e.g.*, Bellnier v. Lund, 438 F. Supp. 47, 54 (N.D.N.Y. 1977). "It is entirely possible that there was reasonable suspicion, and even probable cause, based upon the facts, to believe that *someone* in the classroom has possession of the stolen money. There were no facts, however, which allowed the officials to particularize with respect to which students might possess the money, something which has time and again found to be necessary to a reasonable search under the Fourth Amendment." *Id.* at 54 (emphasis in original); People v. D., 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974) (invalidating search because insufficient suspicion).

[99] *See* State *ex rel.* T.L.O., 178 N.J. Super. 329, 342, 428 A.2d 1327, 1334 (1980); Doe v. State, 88 N.M. 347, 352, 540 P.2d 827, 832 (1975); People v. D., 34 N.Y.2d 483, 489, 315 N.E.2d 466, 470, 358 N.Y.S.2d 403, 408 (1974); State v. McKinnon, 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977).

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ousness of the problem in the school at which the search was directed; and the exigency to search without delay.[100]

The factors articulated by these courts are at best only marginally helpful in determining the propriety of school searches. The child's history and record in school may give some indication of the probability of success of the search, but this information lacks the particularized suspicion required by the Supreme Court.[101] The exigency to make an immediate search is a factor that is normally considered in waiving the warrant requirement, but this factor should not be relevant in finding the level of suspicion necessary to justify the search.[102] The relevance of age as used to justify school searches is based on the Supreme Court's assertion that in the first amendment context, children have lesser constitutional rights than do adults.[103] However, this contention probably does not survive the holding in *Tinker*[104] that children in school cannot be deprived of their freedom of speech. The Court's insistence on protecting the constitutional rights of children in schools should be equally applicable in the fourth amendment context.[105] For example, the right to be free from unreasonable searches should not be different for a minor and adult standing together on the street.[106] Finally, although the seriousness of the problem which occasioned the search is of concern, it is indistinguishable from the government's general interest in law and order, and therefore cannot justify lowering of the probable cause

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[100] *See* cases cited in note 99 *supra*.

[101] The Supreme Court has stated that, "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this court's Fourth Amendment jurisprudence." Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968); *see also* note 95 *supra*.

[102] *See* notes 154-59 *infra*.

[103] The Supreme Court stated that "even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of its authority to control adults . . . .' " Ginsberg v. New York, 390 U.S. 629, 638 (1968) (upholding from first amendment challenge a statute designed to protect minors from pornography).

[104] 393 U.S. 503 (1969).

[105] *See* note 52 and accompanying text *supra*.

[106] State v. Young, 234 Ga. 488, 216 S.E.2d 586 (Gunter, J., dissenting), *cert. denied*, 423 U.S. 1039 (1975).

> It may be that in some first amendment contexts the age of a person is relevant to the constitutional balance. Yet nobody has suggested that a high school student standing on the street has less freedom from governmental intrusions upon his privacy than an adult standing beside him. The relevance of age to fourth amendment problems is difficult to perceive.

Id. at 509, 216 S.E.2d at 600.

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requirement.[107]

In addition to using different standards of suspicion to approve school searches, courts have also based these lower standards on different rationales. First, some courts use the *in loco parentis* doctrine which has been used to deny protection entirely.[108] The decisions here, however,[109] have balanced the *in loco parentis* doctrine against the student's constitutional right to be free from unreasonable searches.[110]

The second rationale used to justify school searches on less than probable cause may be referred to as the supervisory search theory. In *Moore v. Student Affairs Committee of Troy State University*,[111] a federal district court in Alabama approved the search of a dormitory room based on a tip that did not satisfy probable cause. Relying on cases validating searches by supervisors in the military[112] and the Customs Office,[113] the court concluded that the fourth amendment did not prohibit reasonable searches by supervisory personnel charged with maintaining order and security.[114] Since the *in loco parentis* doctrine has been applied almost exclusively to juveniles in high school or elementary school,[115] the supervisory search theory has been used instead for

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[107] Most searches are made in vindication of the State's interest in enforcing the criminal law . . . . Ordinarily, a lower standard than probable cause is justified only when some additional interest is involved. . . . [I]n the context of the present case, the government's interest in discipline and security is indistinguishable from the general law enforcement interest.

Id. at 509-10, 216 S.E.2d at 600.

[108] *See* note 24 and accompanying text *supra*.

[109] *See* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); M. v. Board Educ. Ball-Chatham Community Unit School Dist. No. 5, 429 F.Supp. 288 (S.D. Ill. 1977); State v. Baccino, 282 A.2d 869 (Dei. Super. Ct. 1971); *Ex rel.* J.A., 85 Ill. App. 3d 567, 406 N.E.2d 958 (1980); State *ex rel.* T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (1980); *In re* State in Interest of G.C., 121 N.J. Super. 108, 296 A.2d 102 (1972); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (1970).

[110] *See, e.g.*, People v. Jackson, 65 Misc. 2d 909, 913, 319 N.Y.S.2d 731, 736 (1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972) ("The *in loco parentis* doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including a search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable.").

[111] 284 F. Supp. 725 (M.D. Ala. 1968) (upholding search of college dormitory room by school Dean and state narcotic agents).

[112] United States v. Grisby, 335 F.2d 652 (4th Cir. 1964).

[113] United States v. Collins, 349 F.2d 863, 868 (2d Cir. 1965).

[114] "It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security." Moore v. Student Affairs Comm., 284 F. Supp. 725, 730-31 (M.D. Ala. 1968).

[115] *Id.* at 729.

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cases involving university students or persons in similar situations, including, for example, students at a job training center.[116]

Several of the courts applying the supervisory search theory[117] limit the use of a lower standard of probable cause to searches incident to school administrative proceedings. If the search is conducted for a criminal prosecution, the usual requirement of a warrant with probable cause applies. The same court that validated the search in *Moore*[118] ruled that a subsequent search at the same university conducted without a warrant was unconstitutional, because the search was aimed at discovering evidence for a criminal prosecution, rather than a school disciplinary proceeding.[119] This distinction based on the goal of the search has been criticized as impractical since a dual purpose underlies many school searches.[120]

Whatever rationale or descriptive label is used, the lower standard of probable cause does not afford meaningful protection. The use of vague terms such as "reasonable suspicion" or "good cause" has instead allowed courts to couch their denial of protection in constitutional terms. While this approach may initially appear preferable to the flat denial of fourth amendment protections, in practice it does little to protect students' rights to be free from unreasonable searches.

G. The Effect of Police Participation

Courts generally agree that police participation in a school search, if extensive enough, will mandate the full constitutional safeguard of a warrant issued on probable cause.[121] Courts, however, disagree on the

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[116] U.S. v. Coles, 302 F. Supp. 99 (D. Me. 1969).

[117] *See, e.g.*, Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975) (search of college dorm room unconstitutional); Piazzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970) (search of university dormitory room instigated by police unconstitutional), *aff'd*, 442 F.2d 284 (5th Cir. 1971).

[118] Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968).

[119] Piazzola v. Watkins, 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971).

[120] *See* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 753-60 (1974).

[121] *See, e.g.*, Piazzola v.Watkins, 316 F. Supp. 624, 628 (M.D. Ala. 1970) (search of dormitory room instigated and executed largely by state police to be unconstitutional), *aff'd*, 442 F.2d 284 (5th Cir. 1971); *In re* G., 11 Cal. App. 3d 1193, 1199, 90 Cal. Rptr. 361, 364 (1st Dist. 1970) (recognizes rule, but rejects contention of joint activity of police and school officials in the case); *In re* Donaldson, 269 Cal. App. 2d 509, 510-11, 75 Cal. Rptr. 220, 221 (3d Dist. 1969) (recognizes rule that joint operation by police and private individual will taint evidence seized with state action); *Ex rel.* J.A., 85 Ill. App. 3d 567, 572, 406 N.E.2d 958, 962 (1980) (recognizing rule); People v.

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exact level of police involvement necessary to invoke the warrant requirement. Several courts approved police-instigated searches when school officials had no independent basis for the search.[122] Other courts disallowed all searches with police involvement either before or during the search.[123] Police participation in instigating or conducting school searches should be accompanied by the usual fourth amendment safeguards of a warrant and probable cause. The police should not be allowed to escape constitutional constraints placed on their actions by using school officials as their agents. Furthermore, the justification used for lowering or exempting school officials from fourth amendment restraints is based on their special role as educators. This reasoning does not apply when police instigate or conduct school searches.

H. *Other Bases for Attacking School Searches*

Although the fourth amendment is the primary means used to attack the validity of searches by school officials, challenges may also rest on other constitutional, statutory, and regulatory grounds. For example, a state constitutional provision, corresponding to the fourth amendment of the federal Constitution, may grant citizens greater protection from searches than does the United States Constitution.[124] Several claimants

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Stewart, 63 Misc. 2d 601, 603, 313 N.Y.S.2d 253, 257 (1970) ("Where there is shown some involvement of a police agent who assisted in obtaining evidence, then such evidence is excluded."); People v. Cohen, 57 Misc. 2d 366, 368, 292 N.Y.S.2d 706, 709 (1968) (search of dormitory room by school officials and police unconstitutional), *aff'd*, 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969); Commonwealth v. McCloskey, 217 Pa. Super. 432, 436, 272 A.2d 271, 273 (1970) (search of dormitory room by school officials and police unconstitutional); State v. McKinnon, 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977) (recognizing rule).

[122] One New York court validated a search when the only basis which the school official had to allow police to search a student's locker was an invalid search warrant presented by the police. People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969). A California court even concluded that the police officer who searched a student was only acting as an agent of the school official. *In re* C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (4th Dist. 1972). This case provoked one commentator to remark: "That sort of turning reality on its head clearly defies further comment." Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 767 (1974).

[123] *See* Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976) (invalidating search of junior high school student by school nurse after police were called); People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968) (invalidating search of college dormitory room instigated by school officials with police participation), *aff'd*, 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969).

[124] This greater protection is possible since a federal court will not review judgments of state courts resting on adequate and independent grounds. *See* Herb v. Pitcairn, 324

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have asserted that state constitutional or statutory provisions requiring the exclusion of illegally seized evidence apply to school searches.[125] One defendant asserted unsuccessfully that his state guaranteed right to privacy[126] was violated by a school search.[127] Finally, one court has suggested that school boards should issue regulations to control school searches.[128] Fourth amendment protections are the primary safeguards against unreasonable school searches, but alternative means are available, and can occasionally offer increased protection.[129]

II. THE POLICIES UNDERLYING THE LEGAL THEORIES

Despite the multitude of legal theories underlying the decisions in the school search area, the basic issue is what formal safeguards should be imposed on school officials. Essentially, all the legal theories can be analyzed as stemming from one of two conflicting views, or resulting from a compromise between the two. This comment will refer to these polar concepts as the constitutional model and the parental model. The

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U.S. 117 (1945). A Louisiana case, State v. Mora, provides an example of the use of a state constitutional search provision. The court in *Mora* relied on both state and federal constitutions to require a warrant and probable cause for school searches. State v. Mora, 307 So. 2d 317 (La.) (invalidating search of student's person), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900 (La.), *cert. denied*, 429 U.S. 1004 (1976).

[125] *See* State v. Young, 234 Ga. 488, 216 S.E.2d 586 (Georgia statute incorporating exclusionary rule into state law interpreted same as federal exclusionary rule), *cert. denied*, 423 U.S. 1039 (1975); State v. Mora, 307 So. 2d 317 (La.), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900, 902 (La.) (Dixon, J., concurring), *cert denied*, 429 U.S. 1004 (1976). Justice Dixon noted that at the time of the search the exclusionary rule was incorporated in state law, and that it had subsequently been incorporated into the Louisiana Constitution (LA. CONST. art. 1, § 5). *Id.*

[126] *See, e.g.*, ALASKA CONST. art. 1, § 22; CAL. CONST. art. 1, § 1; HAWAII CONST. art. 1, § 6; LA. CONST. art. 1, § 5.

[127] *See* D.R.C. v. State, 646 P.2d 252, 260 (Alaska Ct. App. 1982). Because at least one of these privacy provisions has been interpreted as restricting both private individuals and government officials, *see* State v. Helfrich, 600 P.2d 816 (Mont. 1979), this theory might allow a court to bypass the state action theory; *cf.* White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (California privacy provision used as basis to enjoin police surveillance and information gathering at university).

[128] *See* D.R.C. v. State, 646 P.2d 252, 261 (Alaska Ct. App. 1982). At least occasionally, such regulations might offer protection. An opinion letter issued by the Attorney General of Nevada instructs school authorities who have reason to suspect that a student's locker contains narcotics or contraband to inform law enforcement personnel, who can get a warrant. The opinion states that entry into a student's private locker is an invasion of privacy, not supported by law. Op. Nev. Att'y Gen. 98 (1970).

[129] *See* notes 124-28 *supra*.

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constitutional model is based on the belief that full fourth amendment safeguards should be imposed on school officials to protect the students' individual rights. Under the parental model, school officials should be able to act essentially as "parents," unsupervised by the courts.[130]

A. *The Parental Model*

The parental model focuses on three related points: the nature of the school as an institution, the fact that students are usually not adults, and the problem of drug abuse.[131] Courts have noted that school officials are charged with maintaining an atmosphere conducive to education,[132] and that part of this responsibility is to protect students from harmful influences.[133] School officials protect students from what one court called "the omnipresent evil of drug and narcotic abuse."[134] These concerns are deemed especially significant in schools because of the age and immaturity of students.[135] The parental model was bluntly endorsed by one court: "The elaborate criminal trial model has no place in the schoolhouse."[136]

B. *The Constitutional Model*

Courts which employ the constitutional model focus not on the teacher's duty to maintain order and combat drug abuse, which is conceded, but instead on the need for safeguards in the pursuit of these goals. One court has observed:

> The price of a modern education is not the waiver or surrender of Constitutional privileges. One does not salvage a democratic society by adopting undemocratic techniques. The Bill of Rights is not a sometime thing; the Founding Fathers spoke not in relative, but in absolute, terms. An unlawful search and seizure is unlawful; it cannot be partially lawful and partially unlawful. The slightest intrusion on the rights of one citizen endangers the security of all citizens.
>
> We cannot escape our responsibility by resorting to the coercive weap-

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[130] The *in loco parentis* doctrine should be distinguished from the parental model. The former doctrine is a legal fiction used to affectuate the policy of the latter.

[131] *See generally* Buss, *The Fourth Amendment and Searches in Public Schools*, 59 IOWA L. REV. 739, 769-76 (1974).

[132] Doe v. Renfrow, 475 F. Supp. 1012, 1020 (N.D. Ind. 1979), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

[133] *Id.*

[134] *In re* G., 11 Cal. App. 3d 1193, 1196, 90 Cal. Rptr. 361, 362 (1st Dist. 1970).

[135] State *ex rel.* T.L.O., 178 N.J. Super. 329, 338, 428 A.2d 1327, 1332 (1980) (upholding search of 15-year-old student's purse).

[136] Doe v. State, 88 N.M. 347, 353, 540 P.2d 827, 833 (1975).

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> ons of a police state. We cannot stamp out drug addiction, marijuana smoking, glue sniffing and assorted illegal practices at a campus by breaking into dormitories. Abandonment of constitutional protections and reliance upon illegal methods can lead only to the destruction of democratic processes.[137]

In addition, the need for protection against the intrusion of privacy is arguably greater for children than for adults. Many courts have mentioned, as a matter of special concern, the potential psychological harm to young students which intrusive searches may cause.[138] This possibility of psychological harm is even more ominous since the innocent as well as the guilty suffer from unreasonable searches. One example of this is the case in which an entire fifth grade class was strip searched after one student told the teacher three dollars were missing from a coat pocket.[139] The indignity and trauma created by the search was fruitless: no money was found.[140]

Requiring the safeguard of a warrant issued on probable cause would not lessen the psychological harm inflicted by searches conducted on children. It would, however, limit the scope and number of such searches and the resulting damage to cases in which the search was necessary.

III. PROPOSED APPROACH

Whatever standard of fourth amendment protection is applied in school searches, the pure parental model should be repudiated. The rejection of this outdated approach, which banishes fourth amendment rights from schools, is supported by the Supreme Court's ruling in

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[137] People v. Cohen, 57 Misc. 2d 366, 367, 292 N.Y.S.2d 706, 707-08 (1968), *aff'd*, 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969).

[138] *See, e.g.*, Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 233-34 (E.D. Tex. 1980); Bellnier v. Lund, 438 F. Supp. 47, 53 (N.D.N.Y. 1977); D.R.C. v. State, 646 P.2d 252, 260 (Alaska Ct. App. 1982). A New York court has emphasized, "although the necessities for a public school search may be greater than for one outside the school, the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable." People v. D., 34 N.Y.2d 483, 490, 315 N.E.2d 466, 471, 358 N.Y.S.2d 403, 410 (1974).

[139] Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

[140] In another case, an elementary school student was singled out by a drug detection dog. School authorities strip searched the girl after she denied possessing any drugs. The search was unsuccessful. Apparently the dog had singled her out because she had played with her own dog that morning. Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

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Tinker v. Des Moines Independent School Community District.[141] Most courts have acknowledged that *Tinker* requires at least some fourth amendment rights in schools.[142] Even if the policies of the constitutional model fall short of compelling the use of a warrant issued on probable cause, they still strongly weigh against withholding all fourth amendment protections. One court, reflecting these considerations, stated: "It is essential that the youth of this nation learn that the magnificence of our constitution is founded upon genuine rights and not mere platitudes."[143]

Finally, the great majority of recent cases reject the pure parental model.[144] *D.R.C. v. State,* [145] one of the few recent cases that refused to apply the fourth amendment to searches by school officials, illustrates the problems of using the inflexible pure parental model. Despite its ruling, the court recognized that searches may unfairly humiliate or frighten the student.[146] Moreover, the court recognized that school searches may create animosity which disrupts the very educational environment they seek to preserve.[147] In fact, the *D.R.C.* court seemed to turn away from the absolute rejection of fourth amendment protections in school searches. For example, judgment was expressly withheld on the issue of the validity of strip searches and exploratory searches by drug detection dogs.[148] The court's holding that the fourth amendment does not apply to school officials, if taken literally, would clearly allow such searches. This case demonstrates that, at the very least, the issue of school searches demands a more flexible response than the parental

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[141] 393 U.S. 503 (1969).

[142] For cases citing *Tinker* for this proposition, see Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 231 (E.D. Tex. 1980) (students have fundamental rights which must be respected); State v. Baccino, 282 A.2d 869, 872 (Del. Super. Ct. 1971) (student's constitutional rights cannot be ignored); State *in re* G.C., 121 N.J. Super. 108, 114, 296 A.2d 102, 105 (1972) (students entitled to at least some fourth amendment rights); Doe v. State, 88 N.M. 347, 351, 540 P.2d 827, 831 (1975) (acts by school officials constitute state action); State v. McKinnon, 88 Wash. 2d 75, 79, 558 P.2d 781, 783 (1970) (students do not lose their constitutional rights in school).

[143] State v. Mora, 307 So. 2d 317, 322 (La.), *vacated sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified,* 330 So. 2d 900 (La.), *cert. denied,* 429 U.S. 1004 (1976).

[144] The last case to find no state action in a school search was Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (1974). The only case applying the pure parental model in recent years is D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982).

[145] 646 P.2d 252 (Alaska Ct. App. 1982).

[146] *Id.* at 260.

[147] *Id.* at 261.

[148] *Id.* at 256 n.9.

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model offers.

The problem of establishing the proper fourth amendment standards to be applied in the school search situation remains. Clearly such searches must be reasonable,[149] and the established exceptions to the fourth amendment apply here as elsewhere.[150] But in the usual situation in which no established exception applies, should a warrant and probable cause be required, or should a lower standard of suspicion without the formality of a warrant suffice? To answer this question, it is first necessary to examine the nature of the established exceptions to the warrant and probable cause requirement and determine whether school searches fall within the policies of these perceptions. These exceptions fall into three general types.[151]

The first type is not actually an exception at all, but rather a determination that no reasonable expectation of privacy exists, and thus, the fourth amendment does not apply. This type of exception includes both the plain view doctrine[152] and consent.[153]

The second type of exception waives the warrant requirement when there are exigent circumstances necessitating immediate action. The courts, however, do require that the government actor have probable cause to conduct the search. The prototype of this variety of search is the emergency doctrine.[154] For example, the *Carrol-Chambers-Ross*[155] line of cases allowing warrantless automobile searches in some circumstances if there is probable cause fall into this category. Search incident

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[149] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[150] For example, if a teacher saw a student weaving down a school hall, the teacher would have reasonable suspicion to stop the student for investigation under Terry v. Ohio, 392 U.S. 1 (1968).

[151] Another exception to the fourth amendment is the border search exception. Warrantless searches at international borders for aliens or contraband are held to be reasonable because of the legitimate interest in self-protection, where there is reasonable cause to believe that laws are being violated. Carroll v. United States, 267 U.S. 132 (1925). Entry into the United States from a foreign country has been held to be sufficient cause in itself. Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961); *see also* Blefare v. United States, 362 F.2d 870 (9th Cir. 1966), and cases cited therein. The border search exception, however, has been limited to "the border itself" and "its functional equivalents." Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

[152] *See* note 74 *supra*.

[153] *See* notes 74-76 and accompanying text *supra*.

[154] *See* note 74 *supra*.

[155] United States v. Ross, 102 S. Ct. 2157 (1982); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). These cases allow police who have stopped an automobile and have probable cause to search it to conduct a warrantless search of the auto and any containers within.

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to arrest[156] is also a related exception. Probable cause to search need not be present, but this exception to the warrant requirement requires probable cause to arrest.

The final type of exception involves relaxing the probable cause requirement, either with or without requiring a warrant. This loosening of the probable cause requirement is justified, not merely by special circumstances, but by the fact that the invasion of privacy is limited. A prime example is the stop and frisk search authorized by *Terry v. Ohio*.[157] The Court emphasized the search in that case was reasonable on less than probable cause only because it was a limited intrusion. Another example of this type of search is the administrative search authorized by *Camara v. Municipal Court*.[158] Again, the Court emphasized that the inspections allowed in that case were neither personal in nature nor aimed at the discovery of evidence of crime, and involved a relatively limited invasion of citizens' privacy.[159]

The first type of exception to the requirements of the fourth amendment clearly does not apply to the school search situation. A student does not waive a reasonable expectation of privacy simply by forced attendance in school. On first examination, the second type of exception, which allows a waiver of the warrant requirement, does not appear to apply either: exigent circumstances associated with these exceptions are rarely present in the school search situation. The student is in the school and most often will remain there. Moreover, the school search cases indicate that evidence is not likely to be in immediate danger of destruction.

Nevertheless, circumstances peculiar to the school environment arguably justify waiver of the warrant requirement, as long as school officials act solely in their educational capacity, rather than working with police or preparing for prosecution. The concerns addressed by the parental model — that because of their age, students may be especially susceptible to harmful influences such as drug abuse which can destroy the educational atmosphere — must also be considered. Although these concerns cannot override all constitutional rights, they are special cir-

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[156] *See* Chimel v. California, 395 U.S. 752 (1969) (police officer making a valid arrest may search the suspect and area within his immediate control).

[157] 392 U.S. 1 (1968) (when arresting officer has reasonable suspicion to believe he is dealing with an armed and dangerous person, he may stop and frisk that person for a weapon).

[158] 387 U.S. 523 (1967) (warrant for the search of houses may issue upon a showing that there are reasonable administrative or legislative standards for conducting the inspection with respect to particular dwelling).

[159] *Id.* at 537.

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cumstances which arguably justify waiving the warrant requirement. Furthermore, a teacher or principal acting only in her educational capacity should not be forced to call the police to obtain a warrant, which would have the added result of ensuring criminal prosecution for a problem that might be better handled solely as a school matter. However, if the police are consulted or if school policy is to prosecute students, this rationale for waiving the warrant requirement based on the special nature of the school official as an educator rather than a law enforcement officer would not apply.

Even assuming the warrant requirement is waived, full probable cause should be required before a search is permitted. The school search situation does not fit into the third type of exception to the fourth amendment, which allows relaxing the probable cause requirement. School searches do not necessarily involve limited intrusions, and students do not have a lesser reasonable expectation of privacy simply because they are in school.[160] Allowing searches based on probable cause but without a warrant when school officials act solely in their educational capacity and without the aid of police should satisfy the concerns of the constitutional model, but still allow school officials to take reasonable steps to preserve order and discipline. This standard has been implemented by at least one school board and has subsequently received judicial approval.[161]

Using this proposed standard, the search in the scenario presented in the introduction to this comment would have been unconstitutional.

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[160] Certainly it could be argued that students have a lesser expectation of privacy because of the close supervision which they are subjected to in school. However, students are subject to compulsory school attendance and have not chosen this supervision. The government may not justify eliminating or reducing constitutional freedoms against unreasonable searches by simply doing so, and then arguing that the fact that the fourth amendment has been ignored means individuals had no reasonable expectation to rely on it. In a related context, a federal court in Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 234 (E.D. Tex. 1980) stated:

> [T]he mere announcement by officials that individual rights are about to be infringed upon cannot justify the subsequent infringement. Again through the medium of comparison, if the Government announced that all telephone lines henceforth be tapped, it is apparent that, nevertheless, the public would not lose its expectation of privacy in using the telephone.

Finally, the premise that students in school have a reduced reasonable expectation of privacy does not seem consistent with *Tinker*, in which the Supreme Court emphasaized that constitutional protections are especially important in schools. *See* note 52 and accompanying text *supra*.

[161] *See* Bilbrey v. Brown, 481 F. Supp. 26, 27 n.1 (D. Or. 1979) (the school regulation only allowed searches if there was probable cause of illegal act or school violation).

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That hypothetical involved the search of a student's person, following an anonymous tip alleging marijuana use. Such a tip would be insufficient to establish probable cause.[162] The principal, however, would not have been without recourse. The student could be stopped and questioned.[163] Moreover, at least if the tip had any basis in fact, increased supervision or even smelling the student's breath[164] would probably yield probable cause that would justify a search of the student's person.

Probable cause should be required for most school searches, but there are two situations in which the lower standard of reasonable suspicion may be sufficient. School locker searches, and searches by drug detection dogs arguably involve a lesser intrusion into a reasonable expectation of privacy, and thus, fit into the third type of fourth amendment exception, which allows a standard of suspicion lower than probable cause. However, allowing these searches on reasonable suspicion should not be simply a ruse to give school officials unfettered discretion. Courts should certainly require suspicion which is particularized to the person searched.[165]

Two other school search situations, because of their superintrusive nature, should be safeguarded by the full panoply of fourth amendment protections. Strip searches constitute an invasion of privacy that cannot be justified without the protections of a warrant and probable cause.[166] This is especially true when the objects of the search are children who may face lasting psychological harm from such searches.[167] Additionally, searches of dormitory rooms should not be allowed without fulfilling the requirements of probable cause and a warrant. A dormitory room is where a student lives and is clearly analogous to the home.[168] One court has emphasized this similarity:

> University students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure. To suggest that a student who lives off campus in a boarding house is protected but that one who occu-

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[162] Aguilar v. Texas, 378 U.S. 108 (1964) (reliability of informant information must be shown to constitute probable cause).

[163] *See* Adams v. Williams, 407 U.S. 143 (1972) (tip from anonymous informant held to satisfy reasonable suspicion standard necessary for a *Terry* stop).

[164] The plain view exception has been extended to odors. United States v. Walker, 522 F.2d 194, 196 (5th Cir. 1975) (odor of marijuana).

[165] *See* note 95 *supra.*

[166] *See, e.g.,* Doe v. Renfrow, 475 F. Supp. 1012, 1020 (N.D. Ind. 1979) (validating exploratory search by drug detection dogs and resulting search of pockets, but holding strip search went too far, and was unconstitutional), *modified,* 631 F.2d 91, *reh'g denied,* 635 F.2d 582 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022 (1981).

[167] *See* note 138 and accompanying text *supra.*

[168] *See* note 63 *supra.*

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pies a dormitory room waives his constitutional liberties is at war with reason, logic, and law.[169]

CONCLUSION

Concerns about the effect of relaxing constitutional protections to combat societal problems are not new. As early as 1928, Justice Brandeis warned, "[o]ur government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy."[170]

These words have special meaning when considered in the context of our schools. If schools are to prepare students to function effectively in our society, they must abide by the Constitution, and in doing so, teach the students by example. The standards suggested in this article, which provide justifiable levels of protection based on the type of search situation confronted, must be implemented to ensure students are not treated as a "torturable class."[171] Certainly the schools' educational function should not be impaired, but protecting the school environment cannot result in a denial of students' constitutional rights. It is precisely concerns such as these that led the Supreme Court to state: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[172]

William Tucker Cotton
Lisa Anne Haage

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[169] People v. Cohen, 57 Misc. 2d 366, ___, 292 N.Y.S.2d 706, 713 (1968), *aff'd*, 61 Misc. 2d 858, 306 N.Y.S.2d 788 (1969).

[170] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[171] *See* note * *supra*.

[172] Shelton v. Tucker, 364 U.S. 479, 487 (1960).

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