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Virginia Public Schools- Student Rights

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COMMENTS

VIRGINIA PUBLIC SCHOOLS*—STUDENT RIGHTS

I. INTRODUCTION

"At common law the education of the child by the State was unknown. In Virginia, the idea that the welfare of the State could be advanced by the education of the masses was first advanced by Mr. [Thomas] Jefferson."[1] Virginia, as well as all other states, has established a system of public education.[2] The great benefits of the public school system undoubtedly enhance both the individual and society as a whole. Nevertheless, if Thomas Jefferson, the father of this great institution, were able to observe the current conditions of public schools, he would, as the saying goes, "roll over in his grave."

Today public schools are not merely institutions for the education of young minds. They are institutions of violence, where student assaults on other students and even teachers are commonplace. The schools are also forums for illegal drug use and provide a conduit through which the drugs are bought and sold. Disorder and disrespect are rampant, and many compare the classroom to a "jungle" and the school to a "warzone."

"It is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years."[3] There are many reasons for this deterioration of the public school system, including the breakdown of the family, the greater number of students attending school today than in the past, and the modern attitude that school attendance is a burden and not a privilege. School teachers and

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* "It has been generally held that [the term 'public school'] relates to schools established and maintained at public expense, embracing elementary and secondary schools normally supported by county or local authorities and does not include colleges and universities." State *ex rel.* Kondos v. West Virginia Bd. of Regents, 154 W. Va. 276, ___, 175 S.E.2d 165, 167 (1970); *see also* 16 MICHIE'S JUR. *Schools* § 2 (Repl. Vol. 1987).

1. Flory v. Smith, 145 Va. 164, 167, 134 S.E. 360, 361 (1926).

2. The Virginia Code now requires the maintenance of public schools for all persons within the school district over the age of five on or before September 30 of the school year who have not reached the age of twenty on or before August 1 of the school year. VA. CODE ANN. § 22.1-1 to -3 (Repl. Vol. 1985).

3. Goss v. Lopez, 419 U.S. 565, 591-92 (1975) (Powell, J., dissenting).

officials have virtually no control over these developments, yet they bear the primary responsibility for coping with them. This presents the second reason, equally as great, why Thomas Jefferson would be shocked by the current conditions of the public schools. In their search for a means to deal with the poor conditions in public schools, school officials often run roughshod over student civil liberties. A student in a public school in the 1980's may experience beatings, censorship, suspensions or expulsion (perhaps the most serious measure, considering the importance and value of an education), and searches of his person (whether a "patdown" search or a strip search), his possessions, his locker, his car, or his urine. Furthermore, the student might experience searches by sniffing dogs (if this is indeed a "search") and metal detectors. Conditions in some modern public schools have led many to compare schools to prisons.

This Comment will examine where the current balance has been struck between student rights and the maintenance of order in Virginia public schools. First, this Comment will analyze the justification given for the lessening of rights of public school students. This justification has been used both to limit punishment of students and to restrict student rights. Second, this Comment will discuss the discipline and punishment of students, and will address student rights and remedies for abuse under the common law, state statutes, and the first, eighth, and fourteenth amendments of the United States Constitution. The third section of this Comment will concentrate on student rights under the fourth amendment. The fourth amendment is given expanded consideration due to a number of recent measures adopted by some schools, including some in Virginia schools, and the number of unresolved issues in this area of the law.

II. The Justification for Reducing Student Rights

Historically, there have been two justifications for lessening the rights of public school students. The first justification, well-settled at common law, was the doctrine of *in loco parentis*, meaning "in the place of the parent."[4] Under this doctrine, a school teacher or official was considered to be acting in place of the student's parents. Accordingly, the teacher or school official had the same power to administer punishment as the parents.[5] The teacher's or school official's power under this doctrine also extended into the area of searches. Thus, under this doctrine, courts have held that a search of the student or his property by a teacher or school

4. Black's Law Dictionary 708 (5th ed. 1979).

5. For fairly recent cases recognizing the rule that a teacher stands *in loco parentis* and shares, insofar as matters relating to school discipline are concerned, the parent's right to use moderate force to obtain the child's obedience, see Baikie v. Luther High School, 51 Ill. App. 3d 405, 366 N.E.2d 542 (1977); Gordon v. Oak Park School Dist., 24 Ill. App. 3d 131, 320 N.E.2d 389 (1974); Roy v. Continental Ins. Co., 313 So. 2d 349 (La. Ct. App.), *cert. denied*, 318 So. 2d 47 (La. 1975).

official does not invoke the protections of the fourth amendment since school authorities are considered private individuals, not government agents.[6]

The second justification, the need for order and discipline, arose to deal with the inadequacies of the legal fiction of *in loco parentis*. This justification recognizes that in order for teachers to perform their teaching duties effectively, they must maintain order and discipline in the classroom. Accordingly, teachers and school officials require the power to administer reasonable punishment and conduct reasonable searches. Under this more sound rationale, teachers and school officials are considered to be state agents, not parents.

Maintenance of order is now the primary justification for the lessening of student rights. In fact, the doctrine of *in loco parentis* apparently is dead, especially in Virginia.[7] The main reason for the demise of the *in loco parentis* doctrine was that it necessitates logical fallacies. For example, a teacher *can* discipline a pupil by corporal punishment even if the student's parents expressly tell the teacher not to do so.[8] How then can the teacher be acting in the place of the parents?

That the *in loco parentis* doctrine has been superceded in Virginia by the maintenance of order justification is illustrated by section 22.1-280 of the Virginia Code, which deals with corporal punishment. The Virginia legislature therein allows reasonable corporal punishment of a student by a teacher or principal "[i]n the maintenance of order and discipline."[9] The Virginia statute should be contrasted with other state statutes which are based instead on the theory that the school authority stands *in loco parentis*.[10] The West Virginia statute, for instance, states: "The teacher shall stand in the place of the parent or guardian in exercising authority over the student, and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes . . . ."[11]

The *in loco parentis* doctrine has also lost its prominence as a justifica-

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6. *See infra* notes 144-47 and accompanying text.

7. The doctrine of *in loco parentis* may still survive in some areas of school administration, such as in the context of school rules. For an article on the doctrine's decline and its possible survival in this area, see Zirkel & Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986).

8. Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (state interest in maintaining order in schools limits a parent's right to unilaterally except a child from a regime to which other children are subject); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975) (a parent's wishes cannot restrict school officials from maintaining discipline or choosing the methods used to maintain discipline).

9. VA. CODE ANN. § 22.1-280 (Repl. Vol. 1985).

10. *See, e.g.*, ILL. ANN. STAT. ch. 122, para. 24-24 (Smith-Hurd Supp. 1987); OKLA. STAT. ANN. tit. 70, § 6-114 (West 1972 & Supp. 1987).

11. W. VA. CODE § 18A-5-1 (1984).

tion for conducting searches of students. This is due to the United States Supreme Court's decision in *New Jersey v. T.L.O.*[12] In that case, the Court expressly rejected the *in loco parentis* doctrine.[13] The Court stated: "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."[14] In place of the doctrine of *in loco parentis* the Court recognized that the school's legitimate interest in maintaining order in the school requires flexibility in school disciplinary procedures.[15] The Court noted the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds" and cited the importance of "the preservation of order and a proper educational environment."[16]

The importance of the justification used by the states and courts to give teachers and school officials greater flexibility in dealing with students should be evident. The justification draws boundary lines between what a teacher will be allowed to do and the student's rights.

In Virginia, the maintenance of order justification has superceded the *in loco parentis* doctrine. The effects of this on the law are discussed in the remainder of this Comment.

III. Discipline and Punishment of Students

The Federal District Court for the Eastern District of Virginia has stated: "No school child has a constitutional right to be free from discipline. Indeed, discipline in school is a boon, not a curse."[17] This is consistent with the courts' and legislatures' generally favorable views of discipline in schools.[18] The importance of discipline as a part of education was elaborated upon by Justice Powell in his dissent in *Goss v. Lopez*.[19] Justice Powell wrote:

> Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This

12. 469 U.S. 325 (1985).

13. *Id.* at 336-37. Although the Court rejected the doctrine, the Court limited students' rights in order to accommodate the school's need to preserve order. For authority discussing *T.L.O.*, see Martens v. Board of Educ., 620 F. Supp. 29, 31 (N.D. Ill. 1985); Comment, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After* New Jersey v. T.L.O., 37 Hastings L.J. 1133, 1143 (1986).

14. *T.L.O.*, 469 U.S. at 336.

15. *Id.* at 339-40.

16. *Id.* at 339; *see also infra* notes 146-64 and accompanying text.

17. Bernstein v. Menard, 557 F. Supp. 90, 91 (E.D. Va. 1982), *appeal dismissed*, 728 F.2d 252 (4th Cir. 1984).

18. This is not, of course, to say that all *punishment* is good. Limitations on punishment will be discussed further.

19. 419 U.S. 565 (1975); *see also infra* notes 84-96 and accompanying text.

> understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools.[20]

Yet, the question remains as to how far the power of school officials to discipline students extends. One limitation on this power concerns the right of school officials to discipline students for conduct occurring off school grounds. It is generally established that "the power of school authorities over pupils does not cease absolutely when the pupils leave the school premises."[21] Although no Virginia cases have dealt with the issue of just how far the school's power extends, two main rules have been established by other jurisdictions. First, many states have held that school officials have the power to discipline students for out-of-school conduct, whether or not occurring on school grounds, which has a direct and immediate effect on the discipline or general welfare of the school.[22] Second, a number of states have held that schools may discipline students for misconduct on their way to school or on their way home from school.[23] Stating the converse of this second rule, some courts have developed the limitation that the school may not punish students for conduct taking place after the student has arrived home from school.[24]

Another limitation on the school's power, was set out by the Fifth Circuit Court of Appeals in *Shanley v. Northeast Independent School District*.[25] There the court prevented punishment by school officials of a student for out-of-school conduct involving first amendment protected activity absent a showing of " 'material and substantial' disruption" of the normal operations of the school.[26]

Although school officials' power to discipline students is limited somewhat when the student engages in conduct off school grounds, school authorities are given broad discretion in the discipline and control of stu-

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20. *Goss*, 419 U.S. at 593 (Powell, J., dissenting). To some this view may seem obviously correct. Nevertheless, as Justice Powell pointed out, "[t]here is, no doubt, a school of modern psychological or psychiatric persuasion that maintains that any discipline of the young is detrimental." *Id.* at 598 n.19 (Powell, J., dissenting).

21. Annotation, *Right to Discipline Pupil for Conduct Away from School Grounds or Not Immediately Connected with School Activities*, 53 A.L.R.3D 1124, 1128 (1973); *see also* 68 AM. JUR. 2D *Schools* § 256 (1973).

22. *See, e.g.*, Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969).

23. *See, e.g.*, *Id.* at 524 n.7; Abremski v. Southeastern School Dist. Bd. of Directors, 54 Pa. Commw. 292, 421 A.2d 485 (1980).

24. *See, e.g.*, Jones v. Day, 127 Miss. 136, 89 So. 906 (1921) (school board cannot require pupils to wear uniforms at home).

25. 462 F.2d 960 (5th Cir. 1972).

26. *Id.* at 974.

dents on school premises.[27] However, the discretion to administer punishment is limited. The next two sections of this Comment address limitations on the use of corporal punishment, suspension and expulsion.

A. *Corporal Punishment of Students*

1. Background

"At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child."[28] This basic rule has not changed:

> Classroom use of corporal punishment has survived the transformation of primary and secondary education from the reliance of the [American] Colonials on optional private arrangements to the present system of compulsory education and dependence on public schools. Despite the general abandonment of corporal punishment as a means of punishing criminal offenders in the United States, the practice of corporal punishment in the classroom continues to play a role in the public education of school-children in nearly every part of the United States.[29]

The common-law rule of allowing reasonable corporal punishment has been adopted by statute in Virginia. Section 22.1-280 of the Virginia Code states:

> In the maintenance of order and discipline and in the exercise of a sound discretion, a principal or a teacher in a public school or a school maintained by the State may administer reasonable corporal punishment on a pupil under his authority, provided he acts in good faith and such punishment is not excessive.[30]

Accordingly, in Virginia, corporal punishment of students must be: (1) reasonable and not excessive;[31] (2) administered in good faith; and (3) administered for the purpose of maintaining order and discipline.

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27. *See* Annotation, *Marriage or Pregnancy of Public School Student as Ground for Expulsion or Exclusion, or of Restriction of Activities*, 11 A.L.R.3D 996, 997 (1967).

28. Ingraham v. Wright, 430 U.S. 651, 661 (1977); *Teacher's Use of Excessive Corporal Punishment*, 20 AM. JUR. PROOF OF FACTS 2D 511, 521 (1979) [hereinafter *Excessive Corporal Punishment*]; *see also* Note, *Schools—Corporal Punishment Without Civil or Criminal Liability*, 72 W. VA. L. REV. 399, 399 (1970).

29. *Excessive Corporal Punishment*, *supra* note 28, at 520 (footnotes omitted).

30. VA. CODE ANN. § 22.1-280 (Repl. Vol. 1985).

31. "Excessive punishment refers to a situation where punishment in itself is proper but where the extent of the punishment is questioned . . . ." Annotation, *Criminal Liability for Excessive or Improper Punishment Inflicted on Child by Parent, Teacher, or One* in Loco Parentis, 89 A.L.R.2D 396, 399 (1963). "Not excessive" is treated as being within the concept of "reasonable" for the rest of this comment.

2. Controversy Over Corporal Punishment

The common-law view and the Virginia statute which codified it have been under increasing attack for a number of years. There is substantial controversy over whether corporal punishment should be allowed at all in public schools. On one side are those who argue that corporal punishment is necessary to obtain obedience. These advocates point to the adage, "spare the rod, and spoil the child."[32] On the other side "are many . . . who believe that school officials can and and [sic] should maintain [discipline] without using corporal punishment. [This] view is shared by many professional educators, parents and others."[33] They argue that violence breeds violence and that while corporal punishment will unquestionably control the student, it will also "instill fear, thwart the purposes of education, and produce a person who believes that physical violence is the answer to most problems and confrontations in life."[34]

The controversy over corporal punishment becomes perhaps most heated in those cases where the courts have dealt with whether school officials may administer corporal punishment despite the parents' express commands to the contrary. As was stated earlier, parental approval of corporal punishment is not constitutionally required.[35] In *Hall v. Tawney*, where the Fourth Circuit Court of Appeals decided such a case, the court quoted from *Baker v. Owen*:[36]

> Opinion on the merits of the rod is far from unanimous. On such a controversial issue, where we would be acting more from personal preference than from constitutional command, we cannot allow the wishes of a parent to restrict school officials' discretion in deciding the methods to be used in accomplishing the not just legitimate, but essential purpose of maintaining discipline.[37]

The *Baker* court had added that "[s]o long as the force used is reasonable . . . school officials are free to employ corporal punishment for disciplinary purposes until in the exercise of their own professional judgment, or in response to concerted pressure from opposing parents, they decide that its harm outweighs its utility."[38]

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32. Some Biblical passages also tend to support the use of corporal punishment. For example, *Proverbs* 23:13-14 (King James) states: "Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell."

33. Baker v. Owen, 395 F. Supp. 294, 301 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975).

34. *Excessive Corporal Punishment, supra* note 28, at 523.

35. Ingraham v. Wright, 430 U.S. 651, 662 n.22 (1977); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980); *Baker*, 395 F. Supp. at 299.

36. 395 F. Supp. 294 (M.D.N.C. 1975).

37. *Hall*, 621 F.2d at 610 (quoting *Baker*, 395 F. Supp. at 301).

38. *Baker*, 395 F. Supp. at 301.

To date, only two states, Massachusetts and New Jersey, have totally banned the use of corporal punishment in schools.[39] As the Supreme Court noted in *Ingraham v. Wright*:

> The concept that reasonable corporal punishment in school is justifiable continues to be recognized in the laws of most States . . . . It represents the 'balance struck by this country' . . . between the child's interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child's education.[40]

3. The "Reasonable" Standard

There is no satisfactory answer as to what the common law and the Virginia statute allow as "reasonable" corporal punishment. In *Carpenter v. Commonwealth*,[41] the Supreme Court of Virginia discussed an analogous standard in a case involving an assault and battery committed upon a seven-year-old girl by one *in loco parentis* to her. The court observed that:

> Words such as . . . 'moderate' . . . and 'reasonable' as applied to chastisement are ever changing according to the ideas prevailing in our minds during the period and conditions in which we live. Where a question is raised as to whether punishment has been moderate or excessive, the fact is one for the jury to determine from the attending circumstances, considering the age, size and conduct of the child, the nature of his misconduct, the nature of the instrument used for punishment, and the kind of marks or wounds inflicted on the body of the child.[42]

This comports with the rule of other jurisdictions.[43] A minority of states have taken the view that a presumption of reasonableness exists.[44] This is most likely not the law in Virginia.[45]

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39. MASS. GEN. LAWS ANN. ch. 71, § 37(G) (West Supp. 1976); N.J. STAT. ANN. § 18A:6-1 (West 1968).

40. *Ingraham*, 430 U.S. at 676 (citation omitted).

41. 186 Va. 851, 44 S.E.2d 419 (1947).

42. *Id.* at 863, 44 S.E.2d at 424-25; *see also* Harbaugh v. Commonwealth, 209 Va. 695, 167 S.E.2d 329 (1969) (parent or person *in loco parentis* may be criminally liable for assault and battery if he inflicts corporal punishment which exceeds the bounds of due moderation; whether punishment is moderate or excessive is a question for the jury).

43. *See, e.g.*, Williams v. Cotton, 346 So. 2d 1039 (Fla. Dist. Ct. App.), *cert. denied*, 354 So. 2d 988 (Fla. 1977); Frank v. Orleans Parish School Bd., 195 So. 2d 451 (La. Ct. App.), *cert. denied*, 250 La. 635, 197 So. 2d 653 (La. 1967); *see also* RESTATEMENT (SECOND) OF TORTS § 150 (1965) (factors involved in determining reasonableness of punishment).

44. *See, e.g.*, Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941) (presumption in favor of correctness of teacher's action in inflicting corporal punishment upon the pupil).

45. *See Carpenter*, 186 Va. 851, 44 S.E.2d 419 (no presumption mentioned).

4. Civil and Criminal Liability

When a teacher or school official oversteps the legal boundary and administers unreasonable or excessive corporal punishment, he or she may face civil[46] and criminal[47] liability. "[C]orporal punishment which is reasonable in degree, and which is administered by a teacher . . . as a disciplinary measure, is 'privileged' in the sense that the administration of such punishment does not give rise to a cause of action for damages against the teacher."[48] Where the teacher, however, administers unreasonable punishment, that teacher is no longer immune from civil liability. Where the teacher applies excessive force, he will be liable for so much of the force as is excessive.[49]

Similarly, "a teacher may inflict upon a pupil punishment which is reasonable under the . . . circumstances, without incurring criminal liability for an assault, or a similar offense . . . ."[50] Nonetheless, if the punishment is "inflicted with malice or cause[s] permanent injury or death of the child [it] exceeds the special privilege . . . accorded by the law . . . and renders [the teacher] criminally liable under the same circumstances under which liability would exist in the absence of the special relationship."[51] A Virginia case applying this rule is *Johnson v. Commonwealth.*[52] In *Johnson*, the court upheld the murder conviction of a school teacher who, in the course of disciplining a seven-year-old child had put her across his lap and repeatedly whipped her with a switch so savagely that her bladder was ruptured and she died.[53]

Apparently, under Virginia Code section 63.1-248.3, a teacher who witnesses or in any other way "has reason to believe" that another teacher has inflicted unreasonable or excessive corporal punishment on a student under eighteen years of age has a statutory duty to report the abuse "immediately."[54] Failure to make such a report results in criminal lia-

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46. *See generally* Annotation, *Teacher's Civil Liability for Administering Corporal Punishment to Pupil*, 43 A.L.R.2D 469 (1955).

47. *See generally* Annotation, *Criminal Liability for Excessive or Improper Punishment Inflicted on Child by Parent, Teacher, or One* in Loco Parentis, 89 A.L.R.2D 396 (1963).

48. Annotation, *supra* note 46, at 472 (footnote omitted).

49. RESTATEMENT (SECOND) OF TORTS § 155(a) (1965).

50. Annotation, *supra* note 47, at 404.

51. *Id.* at 410.

52. 111 Va. 877, 69 S.E. 1104 (1911).

53. After she was whipped, the child sat in the classroom perspiring and trembling. Taking notice of this, the teacher told the child to get away from the stove in the schoolroom, to go wash her hands and face, and then decided to send the girl home early. While the child was slowly making her two-mile walk home, the teacher overtook her in his buggy. He asked how she felt, then told her "to run on." When the child finally reached home, she was put to bed. She died a few days later. *Id.* at 881-82, 69 S.E. at 1106.

54. VA. CODE ANN. § 63.1-248.3(A) (Repl. Vol. 1987). A student under eighteen years of age to whom a physical or mental injury is inflicted by other than accidental means is an

bility.[55] To further encourage the making of reports, section 63.1-248.5 gives a teacher making such a report immunity from any civil or criminal liability in connection with making the report, "unless it is proven that the reporting teacher acted with malicious intent."[56]

5. Constitutional Protections

a. Fourteenth Amendment Due Process Safeguards

Other than the common law's provision for civil and criminal liability for teachers who administer excessive corporal punishment, the student has very few other protections against the infliction of corporal punishment. However, a number of cases have dealt with the issue of the existence of constitutional protections and federal remedies.

The most important of these cases was the United States Supreme Court's decision in *Ingraham v. Wright*.[57] In *Ingraham*, a student who was slow to respond to his teacher's instructions was subjected to more than twenty licks with a paddle while being held over a table in the principal's office.[58] "The paddling was so severe that [the student] suffered a hematoma requiring medical attention and keeping him out of school for several days."[59] The student brought an action for deprivation of his constitutional rights under 42 U.S.C. section 1983[60] and a class action for declaratory and injunctive relief filed on behalf of all students in the county school system.[61] The district court dismissed the complaint, and the Supreme Court affirmed.[62]

First, the Court held that the paddling of students as a means of maintaining school discipline does not constitute cruel and unusual punishment in violation of the eighth amendment, reasoning that the eighth

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"abused or neglected child." *Id.* § 63.1-248.2(A)(1). A teacher responsible for the student's care is a person who may be responsible for abusing or neglecting a child. *Id.* § 63.1-248.2(A).

55. *Id.* § 63.1-248.3(B) states: "Any person required to file a report . . . who is found guilty of failure to do so shall be fined not more than $500 for the first failure and for any subsequent failures not less than $100 nor more than $1,000."

56. *Id.* § 63.1-248.5.

57. 430 U.S. 651 (1977).

58. *Id.* at 657.

59. *Id.*

60. Under the Civil Rights Act of 1871, 42 U.S.C. § 1983, a person acting under color of law who deprives another of rights, privileges, or immunities secured by the Constitution is liable to the injured party. For the plaintiff to recover under section 1983, he must establish an invasion of federally-protected constitutional rights.

61. *Ingraham*, 430 U.S. at 653-54.

62. Justice Powell wrote the majority opinion. He was joined by Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist. Justices White, Brennan, Marshall, and Stevens dissented.

amendment does not apply to corporal punishment of students. The Court stated:

> An examination of the history of the [eighth] Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.[63]

Thus, as Justice White pointed out in his dissent, under the Court's decision, "corporal punishment in public schools, no matter how severe, can never be the subject of the protections afforded by the Eighth Amendment."[64]

The Court next addressed the issue of whether the due process clause of the fourteenth amendment required prior notice and an opportunity to be heard.[65] The Court initially determined that corporal punishment of a student by public school authorities did implicate substantial "Fourteenth Amendment liberty interests."[66] Turning to the question of what process was due, however, the Court found that notice and a hearing were not necessary. The Court reasoned that the common-law remedies were adequate to afford due process:

> In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse—considered in light of the openness of the school environment—afford significant protection against unjustified corporal punishment . . . . Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them.[67]

In its conclusion, the majority elaborated:

> In view of the low incidence of abuse, the openness of our schools, and the common-law safeguards that already exist, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility. We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law.[68]

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63. *Ingraham*, 430 U.S. at 664.

64. *Id.* at 683 (White, J., dissenting).

65. The *Ingraham* Court granted limited certiorari and did not address the substantive due process issue. *See infra* notes 69-70 and accompanying text.

66. *Ingraham*, 430 U.S. at 674.

67. *Id.* at 678.

68. *Id.* at 682.

The Supreme Court in *Ingraham* did not review substantive due process claims. The Fourth Circuit in *Hall v. Tawney* noted that *Ingraham* left open the question of a substantive due process claim for corporal punishment of a student.[69] The *Hall* court thought that the failure of the Supreme Court in *Ingraham* to deal with the issue was an "anomaly" brought about by procedural considerations. Specifically, the Supreme Court had not granted certiorari to consider the question of a substantive due process violation.[70] The Fourth Circuit in *Hall* was thus forced to decide the issue without the benefit of the Supreme Court's guidance.

Hall involved the rather violent struggle with and paddling of a student by school authorities, which resulted in the student being hospitalized for ten days.[71] The district court had dismissed the action brought by the student and her parents under 42 U.S.C. section 1983 against various officials and employees of the school system. The Fourth Circuit reversed in part, however, holding that the student's complaint stated a claim for relief against some of the defendants.[72]

The *Hall* court first noted that the procedural due process and eighth amendment claims were foreclosed by *Ingraham*.[73] The court then addressed the substantive due process issue. The court held that although disciplinary corporal punishment does not *per se* violate the public school child's substantive due process rights, "substantive due process rights *might* be implicated in school disciplinary punishments even though procedural due process is afforded by adequate state civil and criminal remedies, and though cruel and unusual punishment is not implicated at all."[74] In determining whether specific corporal punishment administered by state school officials gives rise to an independent cause of action to vindicate substantive due process rights under 42 U.S.C. section 1983, the court rejected the common-law standard of reasonableness. The court pointed out that "not every state law tort becomes a federally cognizable 'constitutional tort' under section 1983 simply because it is committed by a state official . . . ."[75] Rather, the court adopted the same standard used for substantive due process claims in police brutality cases. The court stated:

> [T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so dispro-

69. 621 F.2d 607, 610 (4th Cir. 1980).

70. *Id.* at 610, 611 n.4. The Supreme Court case of Parratt v. Taylor, 451 U.S. 527 (1981), decided after *Hall*, has not necessarily weakened this analysis by the Fourth Circuit in *Ingraham*. Holmes v. Wampler, 546 F. Supp. 500, 505 (E.D. Va. 1982).

71. *Hall*, 621 F.2d at 614.

72. *Id.* at 613.

73. *Id.* at 609.

74. *Id.* at 611 (footnote omitted).

75. *Id.* at 613.

> portionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[76]

Although the *Hall* court found its standard satisfied under the facts of that case, the "shocking to the conscience" standard is a high one. This is illustrated by the case of *Brooks v. School Board.*[77] In dismissing the student's section 1983 action alleging deprivation of fourteenth amendment substantive due process rights, the *Brooks* court based its decision on two factors. First, the court found that the alleged conduct of the teacher in disciplining the student by piercing her upper arm with a straight pin did not descend to the level of a brutal and inhumane, conscience-shocking episode required to establish a substantive due process violation.[78] The court quipped: allegations of defamation did not shock the conscience of the United States Supreme Court in *Paul v. Davis*,[79] and "[s]urely the defamation of one's good name is a more shocking event than being stuck with a pin. If the pen is mightier than a sword, it must be mightier than a pin."[80] The second basis for the court's decision was the student's failure to allege specifically that the teacher had any intent to deprive her of a specific constitutional right. The court held that this was required under section 1983.[81]

The *Hall* court did dismiss the section 1983 action brought against a number of the school officials named as defendants because they had not been directly involved in the infliction of the corporal punishment. To be properly named as a defendant, the teacher or school official must be alleged specifically to have "directed, supervised, participated in, authorized or . . . condoned by knowing acquiescence" the administration of the corporal punishment.[82]

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76. *Id. But see* Justice v. Dennis, 793 F.2d 573 (4th Cir.), *reh'g granted*, 802 F.2d 1486 (4th Cir. 1986). *Justice* involved a section 1983 action against a state trooper for alleged unconstitutional excessive force. The court held that a jury instruction repeating verbatim the *Hall* language did *not* properly state the standard governing the case at bar. *Id.* at 576. The court expressly refused to overrule *Hall* or say it was erroneously decided. *Id.* at 576 n.3. Apparently, then, the *Hall* standard is correct for cases involving corporal punishment in schools. Nevertheless, *Justice* throws considerable doubt on the *Hall* standard even in this context, especially since the *Hall* court stated that it was adopting the police brutality standard. The *Justice* court found that the jury instruction implied that malice or sadism was a requirement for imposing liability on the trooper. *Id.* at 578. The court said this "misstates the law of this circuit." *Id.*

77. 569 F. Supp. 1534 (E.D. Va. 1983).

78. *Id.* at 1536.

79. 424 U.S. 693 (1976).

80. *Brooks*, 569 F. Supp. at 1536. Although this is an amusing play on words, it is a questionable rationale for the court's decision.

81. *Id.* at 1538.

82. *Hall*, 621 F.2d at 615; *see also* O'Connor v. Keller, 510 F. Supp. 1359, 1373-74 (D. Md. 1981).

b. Fourteenth Amendment Equal Protection Clause Safeguards

A school district's use of corporal punishment may also violate the equal protection clause of the fourteenth amendment. Although this issue has not yet been addressed by the Supreme Court, the lower courts are in agreement that "those who claim that the school district's corporal punishment regulations are violative of the equal protection clause must prove that the regulations were unequally applied to students similarly situated with no rational basis for such unequal treatment."[83] This gives the student little added protection because (1) the student bears a high burden of proof, and (2) a claim under the equal protection clause does not attack the infliction of the corporal punishment, but only alleges that the punishment was applied unequally.

B. *Suspension and Expulsion of Students*

The right of public school attendance is necessarily conditioned on compliance by the student with the reasonable rules and requirements of the school authorities. Breaches of these rules or requirements may properly be punished by suspension or expulsion. As the Virginia Supreme Court stated in *Flory v. Smith*:[84]

> [I]t is neither restraint nor infringement for the Legislature to enact laws to debar a child from the mere privilege of acquiring an education at the expense of the state until he is willing to submit himself to all reasonable regulations enacted for the purpose of promoting efficiency and maintaining discipline.[85]

Unlike corporal punishment, there is no controversy concerning expulsion as a method of punishment. Controversy exists only over the procedures used in deciding when this punishment may be used.

1. Procedural Requirements

In *Goss v. Lopez*,[86] a case involving a challenge under the fourth amendment to a student's ten day suspension from school, the United States Supreme Court scrutinized suspensions under a procedural due process analysis. While the Court noted that states are not constitutionally obligated to establish and maintain a public school system,[87] once the

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83. Henderson, *Constitutional Implications Involving the Use of Corporal Punishment in the Public Schools: A Comprehensive Review*, 15 J. L. & EDUC. 255, 269 (1986).

84. 145 Va. 164, 134 S.E. 360 (1926).

85. *Id.* at 171, 134 S.E. at 363.

86. 419 U.S. 565 (1975).

87. Education is not a right protected by the United States Constitution. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

state does so, a student's right to attend is a property interest protected by the due process clause.[88] The Court stated that although the authority possessed by the state to proscribe and enforce standards of conduct in its schools is "very broad," the authority must still be exercised consistently with constitutional safeguards, such as the minimum procedures required by the due process clause.[89]

While pointing out that "[s]uspension is considered not only to be a necessary tool to maintain order but a valuable educational device,"[90] the Court held that a ten day suspension from school is not *de minimis* and could not be imposed in disregard of the due process clause.[91] The Court explained that with a suspension there is a temporary denial of the property interest in educational benefits and that the student's liberty interest in reputation is also implicated.[92]

The Court then laid down the minimum procedural requirements under the due process clause:

> [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.[93]

Further explaining these due process requirements as "rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school,"[94] the Court stated that there need be no delay between the time notice is given and the time of the hearing.[95] Accordingly, the school official may informally discuss the misconduct with the student minutes after it has occurred. The Court pointed out that it was holding only that, "in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is."[96] The Court further stated the general rule that notice and a hearing should precede removal of the student from school. An exception to this, however, exists when the student's presence "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process."[97]

A Virginia case applying *Goss* is *Hillman v. Elliott*,[98] involving a three

88. *Goss*, 419 U.S. at 574.
89. *Id.*
90. *Id.* at 580.
91. *Id.* at 576.
92. *Id.*
93. *Id.* at 581.
94. *Id.*
95. *Id.* at 582.
96. *Id.*
97. *Id.*
98. 436 F. Supp. 812 (W.D. Va. 1977).

day suspension of a student. The court there held that a three day suspension was not *de minimis*, but found on the facts of the case that due process was afforded the student.[99] Notice and a hearing were held to have been provided by a three-way conversation between the principal, the student, and the student's mother, during which the student admitted using abusive language. The court noted that "due process in the school setting does not have to adhere to prescribed patterns."[100] The *Hillman* court also held that nothing prevented the school principal from sitting as a hearing officer in a school discipline case.[101] The court stated that "[t]o be denied due process, plaintiff must show prejudice by the principal stemming from a source *other than knowledge of the case.*"[102]

The Virginia statute dealing with suspensions and expulsions comports with the requirements of *Goss*. Section 22.1-277 sets out the minimum procedures that school boards must prescribe in suspending or expelling students.[103] The requirements differ for suspensions of ten days or less, suspensions of more than ten days, and expulsions.[104] The minimum procedures required by the statute for suspensions of ten days or less are the same as in *Goss*, requiring only an informal meeting between the parties.[105] The right to a full due process hearing is provided in the other two situations.[106]

2. Cause for Suspension or Expulsion

Virginia Code section 22.1-277(A) also gives school authorities the power to suspend or expel pupils from attendance at school for "sufficient cause."[107] Another issue arising in expulsion cases is whether sufficient cause exists for a particular suspension or expulsion.

"[T]he enactment of regulations for the administration of schools and discipline and control of students is primarily a matter for the administrative authorities concerned, who have a wide measure of discretion in this respect."[108] The courts may review such administrative actions, however, to protect against arbitrary or unreasonable exercise of that discre-

99. *Id.* at 815, 817.

100. *Id.* at 815.

101. *Id.* at 816.

102. *Id.* (emphasis added).

103. VA. CODE ANN. § 22.1-277 (Repl. Vol. 1985). Section 22.1-278 provides that school boards must adopt their own regulations governing suspension and explusion of pupils, prescribing at least the minimum procedures set forth in § 22.1-277.

104. *See id.* § 22.1-277.

105. *See id.* § 22.1-277(B).

106. *See id.* § 22.1-277(B) -277(C).

107. VA. CODE ANN. § 22.1-277(A).

108. Annotation, *supra* note 27, at 997.

tion.[109] Section 22.1-87 of the Virginia Code requires circuit courts to review actions of school boards on proper petition.[110] The statute states further that "[t]he action of the school board shall be sustained unless the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion."[111] A Virginia circuit court commenting on its power in such a case pointed out:

> [I]t is not the role of this Court to substitute its judgment for that of the School Board. While a school board does not have unbridled discretion, its decisions must be respected by the courts if it acted within its authority. It even has the right to be wrong if it does not exceed its authority or abuse its discretion.[112]

Nevertheless, there are a number of cases where courts have found insufficient cause to suspend or expel. Perhaps the most far-reaching of these cases is *Tinker v. Des Moines Community School District*.[113] In *Tinker*, high school students were suspended for wearing black arm bands to protest the Vietnam War. The Supreme Court found the suspensions improper, holding that prohibitions against expression of opinion, without any evidence that the prohibition is necessary to avoid substantial interference with school discipline or the rights of others, is impermissible under the first amendment. The Court stated, "in our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."[114] In a dissenting opinion, Justice Black, stated that the majority's decision would subject "all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."[115]

One of the few Virginia cases dealing with the "sufficient cause" issue is the circuit court case of *Johnson v. Bedford County School Board*.[116] *Johnson* involved the successful challenge by a high school student of his expulsion. He had been expelled because he had been charged with a murder which occurred off school grounds. Noting "a person is presumed innocent until proven guilty," the court held that "expulsion of a student

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109. *Id.*

110. VA. CODE ANN. § 22.1-87 (Repl. Vol. 1985). A case involving the expulsion of a handicapped child can be brought under the Education for All of the Handicapped Children Act, 20 U.S.C. §§ 1400-1461 (1982 & Supp. III 1985). It should be noted, however, that scrutiny under the federal procedures is much more strict than under those provided by the Virginia statute. Resort to the federal courts in an inappropriate case may result in a finding that the action is frivolous. *See, e.g.*, Bernstein v. Menard, 557 F. Supp. 92 (E.D. Va. 1983), *aff'd*, 728 F.2d 252 (4th Cir. 1984).

111. VA. CODE ANN. § 22.1-87 (Repl. Vol. 1985).

112. Johnson v. Bedford County School Bd., 2 Va. Cir. 110, 113 (1983).

113. 393 U.S. 503 (1969).

114. *Id.* at 511.

115. *Id.* at 525 (Black, J., dissenting).

116. 2 Va. Cir. 110.

solely because he has been charged with a felony would be an abuse of School Board discretion."[117] The court pointed out, however, that:

> [I]f a student is expelled after an investigation of the facts because his continued presence at school would tend to cause disruption, concern and fear on the part of the student body and teachers, then . . . there is an inherent power in the school board to suspend or expel prior to trial whether the charge is a felony or misdemeanor.[118]

This is because the "[r]ights of other students and teachers must be respected as well as the rights of the person charged."[119]

Suspensions or expulsions have also been attacked for lack of sufficient cause where the reason for them has been the marriage or pregnancy,[120] or the physical or mental illness of the student.[121] Related to the second of these is the issue of the handicapped student.[122] "The discipline of handicapped children . . . involves more complex issues than those that are present in the suspension or expulsion of nonhandicapped children."[123] Special protection for the handicapped child in public schools came with passage by Congress of the Education for All Handicapped Children Act (EAHCA).[124] The EAHCA provisions were held to apply to the attempted expulsion of a handicapped child from public school in *School Board v. Malone*.[125]

In *Malone*, a student with a learning disability was expelled for distributing drugs within the school.[126] The court found first that the expulsion of a handicapped student from school is a "change in placement triggering the procedural protections of the EAHCA."[127] The court determined

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117. *Id.* at 112.

118. *Id.* The court used the following example to illustrate its point:

> [I]f a student is charged with forging a check (a felony), he probably could not be expelled unless he was convicted of the offense. This is because such an offense is not likely to cause disruption of the school process. On the other hand, if he is caught distributing drugs to other students and charged with that offense, he might be suspended or expelled before he is tried if the facts are investigated and the expulsion is for the protection and benefit of other students attending the school.

Id.

119. *Id.* at 113.

120. *See* Annotation, *supra* note 27.

121. *See* Annotation, *Physical or Mental Illness as Basis of Dismissal of Student from School, College, or University*, 17 A.L.R.4TH 519 (1982).

122. *See generally* Note, *School Discipline and the Handicapped Child*, 39 WASH. & LEE L. REV. 1453 (1982).

123. *Id.* at 1463.

124. 20 U.S.C. §§ 1400-1461 (1982 & Supp. III 1985).

125. 762 F.2d 1210 (4th Cir. 1980).

126. A claim under EAHCA challenging the expulsion of a handicapped child is brought pursuant to the Act's provisions rather than pursuant to VA. CODE ANN. § 22.1-87. Thus, the review is before the federal district court, and not a Virginia circuit court.

127. *Malone*, 762 F.2d at 1218.

that the child's unacceptable behavior in this case was caused by his handicap, and concluded that the child could not be expelled.[128] If it is determined under EAHCA procedures that a handicapped child's handicap did not cause his misconduct, that child may then be expelled.[129] In *Malone* the causal connection between the child's handicap and his behavior was very tenuous. There was testimony that the student's learning disability caused him to leap at chances for peer approval, which he received for distributing drugs.[130] The court concluded from this that the student's handicap caused his disruptive behavior.[131]

The court in *Malone* did not decide whether a brief temporary suspension would be regarded as a change in placement reviewable under EAHCA procedures. The court suggested, however, that this would not be a change in placement.[132]

3. Other Exclusions from School

Another issue involving the temporary exclusion of students from school was presented in the Virginia case of *Pleasants v. Commonwealth.*[133] In *Pleasants*, a number of protesting students gathered on school grounds during school hours and demanded the readmission to school of previously suspended students. After a number of hours, the principal told the approximately 150 to 200 students either to return to class or board a bus to go home. When the students continued their disturbance, police officers called to the scene arrested thirty-seven students, at which point the others dispersed.[134] The court held that the students' subsequent convictions for trespass were proper.[135]

The court observed first that the Virginia trespass statute applied to public as well as to private property.[136] The court reasoned further that the principal was a duly authorized agent of the school board and was responsible for maintaining discipline in the school. Accordingly, the principal "was vested with the inherent power to revoke, for good cause, the right of any student to remain upon school property when that student, alone or in concert with others, disrupted regular school activities

128. *Id.*
129. *Id.*
130. *Id.* at 1216.
131. *Id.* Under this line of reasoning, it is difficult to imagine a situation where a handicap would *not* "cause" the student's misconduct. Most psychologists would probably agree that the desire for peer approval is a significant motivation for all adolescent behavior.
132. *Id.* at 1215 n.8.
133. 214 Va. 646, 203 S.E.2d 114 (1974).
134. *Id.* at 647-48, 203 S.E.2d at 115.
135. *Id.* at 650, 203 S.E.2d at 117.
136. *Id.* at 648, 203 S.E.2d at 115 (construing VA. CODE ANN. § 18.2-119 (Repl. Vol. 1982)).

for the maintenance of good order and discipline."[137] The court noted that in this case it was "not only the right, but the duty, of the principal to take reasonable measures to restore order so that the educational process might continue."[138]

The defendants, relying principally on *Tinker v. Des Moines Community School District*[139] argued that such a holding would result in a violation of first amendment rights. The court rejected this argument, however, finding that the students' actions were not "immunized" because their conduct "materially disrupted classwork, created substantial disorder and materially interfered with the rights of others."[140]

IV. Searches and Seizures

The greatest amount of controversy in the area of student civil rights is focused on the applicability of the fourth amendment to public school students. Only a small number of cases nationwide have dealt with this issue. No Virginia cases have addressed the question. Cases from other jurisdictions, however, shed some light on what Virginia courts are likely to decide when they are presented with a fourth amendment challenge to a public school official's search of a student.

A. *Background*

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[141]

Until recently, proponents of the notion that the public school student was not protected by the fourth amendment relied upon two underlying theories. The first theory posited that students were not "persons" protected under the fourth amendment.[142] This view was rejected in *Tinker v. Des Moines Community School District*[143] where the United States Supreme Court stated: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ."[144]

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137. *Id.* at 648-49, 203 S.E.2d at 115-16.
138. *Id.* at 649, 203 S.E.2d at 116.
139. 393 U.S. 503 (1969); *see supra* notes 113-15 and accompanying text.
140. *Pleasants*, 214 Va. at 650, 203 S.E.2d at 117.
141. U.S. Const. amend. IV.
142. Trosch, Williams & DeVore, *Public School Searches and the Fourth Amendment*, 11 J. L. & Educ. 41, 43-44 (1982).
143. 393 U.S. 503 (1969).
144. *Id.* at 511.

The second theory was based on the common-law doctrine of *in loco parentis*. Under this theory the school official did not act as an agent of the state, but rather stood "in the place of the parent."[145] Accordingly, school officials could avoid the restrictions of the fourth amendment because they acted only as private citizens.[146] The majority of cases considering the issue, however, found this theory unsound, pointing out that school officials are employed by the government and are thus state agents.[147] This second theory was finally put to rest by the landmark decision of the United States Supreme Court in *New Jersey v. T.L.O.*,[148] a decision which decided important issues but, unfortunately, left numerous others in its wake.

B. *New Jersey v. T.L.O.*

T.L.O. involved the search of a public high school student's purse by the assistant vice-principal after two teachers discovered the student smoking in a school lavatory in violation of a school rule. The assistant vice principal questioned the student, but she denied that she had been smoking and claimed that she did not smoke at all. Opening the student's purse to search for cigarettes, the assistant vice-principal found not only a pack of cigarettes, but also rolling papers, which are commonly associated with the use of marijuana. He then searched the purse thoroughly. He found marijuana, a pipe, plastic bags, a substantial quantity of money in one-dollar bills, an index card containing a list of other students who owed the student money, and two letters that implicated the student in marijuana dealing. The assistant vice-principal turned the evidence over to the police, to whom the student later confessed that she had been selling marijuana at the high school. The state thereafter brought delinquency charges against the student in the Juvenile and Domestic Relations Court. In her hearing, the student contended that the search violated the fourth amendment and she moved to suppress the evidence found in her purse as well as the confession, which, she argued, was tainted by the allegedly unlawful search.[149]

In an opinion written by Justice White,[150] the Court held that the

145. *See supra* notes 4-6 and accompanying text.

146. *See, e.g., In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (1974); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

147. *See, e.g.*, Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1081 (1985).

148. 469 U.S. 325 (1985).

149. New Jersey v. T.L.O., 469 U.S. 325, 328-29 (1985).

150. Justice Powell, with whom Justice O'Connor joined, filed a concurring opinion. *Id.* at

fourth amendment's prohibition against unreasonable searches and seizures applies to searches conducted by public school officials.[151] All seven justices hearing the case concurred with this point of the opinion.

The Court rejected the *in loco parentis* doctrine argument, stating that "school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."[152] The Court then pointed out that students in school do have legitimate expectations of privacy, even in articles of personal property "unnecessarily" brought into the school. The Court stated:

> Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that '[t]he prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.'[153]

The Court then added: "We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."[154]

The next part of the Court's decision, to which there was dissent by Justices Brennan, Marshall, and Stevens,[155] concerned whether a warrant was required in the school setting, and under what circumstances a school official may legally conduct a search. The Court employed a balancing test. On one side of the scale was the "schoolchild's legitimate expectations of privacy" and on the other was the "school's equally legitimate need to maintain an environment in which learning can take place."[156] The Court explained:

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms:

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348. Justice Blackmun filed a concurring opinion. *Id.* at 351. Justices Brennan, Marshall, and Stevens concurred in part and dissented in part. *Id.* at 353, 370.

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

152. *Id.* at 336-37.

153. *Id.* at 338 (quoting Ingraham v. Wright, 430 U.S. 651, 669 (1977)).

154. *Id.* at 338-39. The Court suggested that if the situation in the schools continues to worsen, the Court may eventually decide to treat school children the same as prisoners. For a Virginia case on a prisoner's expectation of privacy, see Marrero v. Commonwealth, 222 Va. 754, 284 S.E.2d 809 (1981) (upholding random searches of inmates, individually or collectively, and their cells and lockers).

155. *T.L.O.*, 469 U.S. at 338-40.

156. *Id.* at 430.

> drug use and violent crime in the schools have become major social problems. . . . Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children.[157]

The Court held that school officials need not obtain a warrant before searching a student who is under their authority. The Court reasoned that "[t]he warrant requirement . . . is unsuited to the school environment [since] requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[158]

Second, the Court held that "[t]he school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search."[159] The Court stated that the usual standard of probable cause was not required because of the substantial need of teachers and school officials for freedom to maintain order in the schools. The Court concluded that a reasonableness standard was proper. The Court explained:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception' . . . second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place. . . .' Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' 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

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157. *Id.* at 339 (citation omitted). For similar arguments on the importance of giving school officials flexibility so they can maintain order, see the concurring opinion of Justice Powell:

> Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.

Id. at 350 (Powell, J., concurring). See also Blackmun's concurring opinion, in which he states:

> Maintaining order in the classroom can be a difficult task . . . . Indeed, because drug use and possession of weapons have become increasingly common among young people, 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.

Id. at 352 (Blackmun, J., concurring). Even Justice Stevens, dissenting in part, agreed that school administrators must have "broad latitude to maintain order and discipline in . . . classrooms." *Id.* at 385 (Stevens, J., dissenting in part).

158. *Id.* at 340.

159. *Id.*

> school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[160]

Justice Stevens, dissenting in part, felt that the "Court's standard for evaluating the 'scope' of reasonable school searches [was] obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses."[161] He noted further: "One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the school house."[162]

The Court ruled only on the requirements of the fourth amendment of the United States Constitution. As the Court itself noted, other states may insist on a more demanding standard under their own constitutions or statutes.[163]

The Court decided that the search involved in *T.L.O.* was not unreasonable.[164] The assistant vice-principal was correct in initially opening the purse since he had a reasonable suspicion that cigarettes were inside. Once he saw the rolling papers, this gave him reasonable suspicion to believe that marijuana was in the purse, and further search of the purse was therefore proper. After finding the evidence of marijuana trafficking, the assistant vice-principal's suspicion was sufficient to justify his examination of the two letters to determine whether they contained any additional evidence.

Justice Brennan's partial dissent argued for the retention of the probable cause requirement in the school setting. He found the balancing test used by the Court in this case "flawed both in its inception and in its execution."[165] Justice Stevens, also dissenting in part, agreed with the Court about permitting student searches on less than probable cause where a criminal violation was suspected. He would not have allowed, however, searches upon suspicion of a violation of minor school rules.[166] Emphasizing the importance and impact of the Court's decision, Justice Stevens observed:

> The schoolroom is the first opportunity most citizens have the opportunity

160. *Id.* at 341-42 (citations & footnotes omitted) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

161. *Id.* at 381 (Stevens, J., dissenting in part).

162. *Id.* at 382 n.25 (Stevens, J., dissenting in part).

163. 469 U.S. at 343 n.10.

164. *Id.* at 343.

165. *Id.* at 358 (Brennan, J., dissenting in part).

166. *Id.* at 377-78 (Stevens, J., dissenting in part). Under Stevens' test, the school official would have to have "reason to believe that the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process." *Id.* at 378 (Stevens, J., dissenting in part) (emphasis omitted).

> to experience the power of government. Through it passes every citizen and public official, from school-teachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the Government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth.[167]

C. *The Issues Left Unresolved by* T.L.O.

Numerous questions remain unanswered by the Court's decision in *T.L.O.* These are now examined.

1. Application of the Exclusionary Rule

Because the Court in *T.L.O.* decided that the evidence obtained by the public school official was not seized in violation of the fourth amendment, it did not reach the question of whether the exclusionary rule[168] would have applied if the search were constitutionally invalid. Furthermore, the Court stated that it did not "implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities."[169] Although the Court did not consider the issue, Justice Stevens believed the question should have been decided. In his partial dissent, he argued that the exclusionary rule should apply.[170] Justices Marshall and Brennan joined this part of his opinion.

Lower courts have split over whether evidence seized by school authorities in violation of the fourth amendment should be excluded.[171] There is further disagreement over whether illegally seized evidence should be excluded only from criminal proceedings, or from school administrative disciplinary proceedings as well.[172]

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167. *Id.* at 385-86 (Stevens, J., dissenting in part).

168. The exclusionary rule is not a right of the defendant, but rather a court-imposed remedy to control the conduct of police officers or other state agents to whom it applies. *See* Elkins v. United States, 364 U.S. 206, 217 (1960); Comment, *School Search—The Supreme Court's Adoption of a "Reasonable Suspicion" Standard in* New Jersey v. T.L.O. *and the Heightened Need for Extension of the Exlusionary Rule to School Search Cases*, S. ILL. U.L.J. 263, 264-67 (1985).

169. New Jersey v. T.L.O., 469 U.S. 325, 333 n.3 (1985).

170. *Id.* at 371-74 (Stevens, J., dissenting in part).

171. *Compare* State v. Young, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975) (exclusionary rule does not apply) *with* State v. Mora, 330 So. 2d 900, 901 (La.), *cert. denied*, 429 U.S. 1004 (1976) (rule does apply). *See generally* Comment, *supra* note 168.

172. *See, e.g.*, Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 237-38 (E.D. Tex. 1980); Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976). For an article concerning the exclusionary rule's application to the administrative disciplinary hearing context, see Comment, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question after* New Jersey v. T.L.O., 37 HASTINGS L.J. 1133 (1985-86).

2. The Standard for Assessing the Legality of Searches Conducted by School Officials in Conjunction With or at the Behest of Law Enforcement Agencies

T.L.O. involved a search carried out by a school official acting alone, without cooperation or guidance from the police or other law enforcement agency. The Court in *T.L.O.* expressed no opinion on the standard that would be appropriate for determining the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies.[173] Lower court cases that have considered this issue have generally agreed that where police officers conduct the search in a school or where there is collaboration between the police and school officials, probable cause is required for a valid search.[174]

One such case is *Piazzola v. Watkins*.[175] Although this case involved a search conducted at a public university, the issue was essentially the same as in public secondary school cases, because university officials in Alabama could legally search only with reasonable cause.[176] In *Piazzola*, university officials and law enforcement personnel searched student dormitory rooms and the search resulted in a number of criminal prosecutions. Noting that the search was "instigated and in the main executed by State police and narcotic bureau officials" and that the only part the university officials played in the search of the dormitory rooms was "at the request and under the direction of the State law enforcement officers," the court held that the search had to be based on probable cause and not just reasonable cause.[177]

At a minimum, *Piazzola* suggests that probable cause is required for a search in a public school setting where the search is either: (1) actually conducted, wholly or in part, by law enforcement officers; or (2) directed and supervised by law enforcement officers.

Probable cause should be required for a search where there is merely cooperation (and not actual police participation) between school officials and law enforcement officers for the same reason that there must be probable cause for a search conducted by a private individual who acts as an agent of the state. As a general rule, the fourth amendment does not protect against searches by private persons,[178] but an exception has been

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

174. *See, e.g.*, Piazzola v. Watkins, 316 F. Supp. 624, 626 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971); Picha v. Wielgos, 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976).

175. 316 F. Supp. 624.

176. Moore v. Student Affairs Comm., 284 F. Supp. 725, 730-31 (M.D. Ala. 1968).

177. *Piazzola*, 316 F. Supp. at 626-27.

178. The fourth amendment prohibition against unreasonable searches and seizures applies only to government agents and not to private individuals acting on their own initiative. Harmon v. Commonwealth, 209 Va. 574, 166 S.E.2d 232 (1969).

carved out for searches in cases where a private individual has become an agent of the police by virtue of a police order or request, or because of his cooperation in a criminal investigation.[179] The reason for this exception is to prevent police subterfuge in an attempt to avoid warrant and probable cause requirements.[180] In *Coolidge v. New Hampshire*,[181] the United States Supreme Court stated that a search by a private individual falls within the fourth amendment if that individual, "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state."[182]

When school officials conduct the search, a remaining issue is how much cooperation or contact with the police is necessary to render a school official an agent of the police. In *Martens v. Board of Education*,[183] a federal district court indicated that school officials would become police agents, requiring probable cause instead of reasonable suspicion, if law enforcement officers helped develop the facts of the school's reasonable suspicion or directed the school authorities to conduct the search.[184] The court held a school official did not become an agent of the police merely because a police officer at the school suggested that a student, already being detained, empty his pockets as the school authorities had requested.[185] The court stated: "There is, here, no basis for thinking that school official action was a subterfuge to avoid warrant and probable cause requirements."[186]

In *State v. McKinnon*,[187] the court embraced a more liberal view of the degree of police involvement that is necessary before the probable cause requirement will apply to searches by school officials. In *McKinnon*, a confidential informant gave the chief of police a description of high school students who sold drugs and who were carrying the drugs on that day. The chief of police then relayed this information to the principal of the high school. School officials searched the students and found drugs. The principal then called the police, and the students were arrested. At their trial, the students moved to suppress the evidence, arguing that the searches were invalid because they were instigated by the police.[188] The

179. *See, e.g.*, Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); Machlan v. State, 248 Ind. 218, 225 N.E.2d 762 (1967).

180. *See Corngold*, 367 F.2d at 5.

181. 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971).

182. *Id.* at 487.

183. 620 F. Supp. 29 (D.C. Ill. 1985).

184. *Id.* at 32.

185. The court also noted that there was "no indication that a criminal investigation was contemplated, that this was a cooperative effort with law enforcement, or that but for [the police officer's] intervention [the student] would not have been searched eventually." *Id.* (citation omitted).

186. *Id.*

187. 88 Wash. 2d 75, 558 P.2d 781 (1977).

188. *Id.* at ___, 558 P.2d at 783.

court rejected the students' argument, however, holding that the searches needed only to have been based on reasonable grounds. Even though the only basis for the reasonable grounds was information given by the police chief, the court held there was no joint action.[189] The court pointed out that:

> [A]t no time did the chief of police instruct the principal to search the [students] or detain them. . . . [The police chief] merely relayed the information he had received to the principal, and the principal then acted independently in contacting [the students]. . . . The fact that the principal called the chief of police after conducting the search does not indicate complicity. If the principal had received this information from sources other than the police, he then would be under a duty both to conduct a search and notify the police of his discoveries. We find no difference here.[190]

The problem presented by the adoption of different standards for school officials and police officers becomes quite complicated when "youth officers" are involved. Youth officers are police officers who operate inside the public schools. The youth officer program has grown rapidly in recent years and has been adopted by numerous school districts in Virginia. Youth officers have all the powers of police officers, yet they are also like school officials because they are permanently assigned to a particular school. These quasi-police, quasi-school officials serve three purposes: (1) they foster better relations and increase communication between students and police; (2) they help maintain order in the schools; and (3) they handle any criminal matters that arise.[191]

Since the youth officer operates as both a police officer and a school official the question arises as to what standard (probable cause warrant requirement or reasonable suspicion) governs searches by youth officers in the public schools. The *T.L.O.* Court's opinion could be read to support the reasonable suspicion standard. Applying the balancing test used in *T.L.O.*, the youth officer's role in maintaining security and order in the school may be deemed more important than students' rights to privacy. An equally compelling argument can be made, however, that the youth officer must have a warrant based upon probable cause for a constitutionally valid search.[192] This is because the youth officer, unlike other school

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189. *Id.* at ___, 558 P.2d at 784-85.

190. *Id.* at ___, 558 P.2d at 785.

191. The youth officer program has proven successful in accomplishing all three goals. Some of the information on the youth officer program in this article was supplied by John Holliday, a youth officer for the City of Salem, Virginia, Police Department.

192. The probable cause standard would probably not apply, however, where only the violation of a school rule is involved. In this situation, the youth officer arguably would be acting only as a school official.

In some cases, a youth officer has been able to establish probable cause for a search easily. In People v. Tippit, 17 Ill. App. 3d 163, 308 N.E.2d 15 (1974), a police officer assigned to a high school brought two students to the principal's office for loitering in the hall of the

officials, has law enforcement responsibility. Justice Powell noted this important distinction between school officials and police officers in *T.L.O.*:[193]

> 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.[194]

The Washington Supreme Court in *State v. McKinnon* also drew this distinction. The court stated: "The high school principal is not a law enforcement officer. His job does not concern the discovery and prevention of crime."[195]

Another important reason for applying the probable cause warrant standard to youth officer searches is that if this higher standard did not apply, youth officers would be used as a subterfuge by "outside" law enforcement officers (to which the probable cause requirement would apply).[196]

The risk of subterfuge remains even if the probable cause warrant requirement is applied to youth officer searches. This is because the school official needs only reasonable suspicion to conduct a search. The issue is also raised of how much collaboration is needed between school officials and youth officers before the school officials are considered agents of the police and full constitutional protections apply.[197] Unlike the contacts with "outside" police officers, some contacts will occur daily between school officials and the youth officer. The frequency of these contacts exaggerates the problem and makes the need to find a solution more urgent.

No cases have specifically addressed the problem, and unfortunately the Virginia General Assembly has not yet enacted guidelines for the youth officer program. The "outside" police officer collaboration cases,

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school. Another police officer present in the office at the time detected a scent of marijuana. The court held that the marijuana odor gave the officer probable cause to believe an offense was being committed, and therefore the search, which produced a gun but no marijuana, was deemed lawful. *Id.* at ___, 308 N.E.2d at 16-17. This case is in accord with Fourth Circuit cases which have held that probable cause may be supported by the detection of distinctive odors such as marijuana. United States v. Haynie, 637 F.2d 227, 233-34, 236 (4th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981); United States v. Sifuentes, 504 F.2d 845, 848 (4th Cir. 1974).

193. *T.L.O.*, 469 U.S. at 350 n.1 (Powell, J., concurring).

194. *Id.* at 349-50 (Powell, J., concurring). Of course, on the other hand, one of the purposes of the youth officer program is to minimize the adversarial nature of the relationship between students and the police.

195. *McKinnon*, 88 Wash. 2d at ___, 558 P.2d at 784.

196. Moreover, if a court holds that youth officers need only reasonable suspicion, it would also invariably have to hold that any search in a school conducted by *any* law enforcement officer would require only reasonable suspicion to be constitutionally valid.

197. *Cf. supra* text accompanying notes 183-90.

discussed earlier, offer some guidance. Under the cases decided so far, the youth officer could not conduct the search himself,[198] direct the school authorities to conduct the search,[199] or request that they do so[200] without triggering the probable cause requirement. However, the youth officer *may* be able to provide information to a school official which constitutes the sole basis for the school official's reasonable suspicion.[201]

3. Searches of Lockers and Cars

T.L.O. involved the search of a student's purse. The Court did not decide whether a student has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies.[202] The Court also did not consider the issue of searches of students' cars parked in the school parking lot.

Commentators generally have ranked the expectation of privacy in a school locker and in a car parked in the school lot as less than that in a purse or pocket.[203] Among the four items, the locker is the least private "because it belongs to the school and the student's use of it is nonexclusive."[204]

a. Lockers

Several courts have held that students do not possess a reasonable expectation of privacy in their school lockers.[205] Three reasons have been offered to support this holding. The most important reason is that school

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

199. *See McKinnon*, 88 Wash. 2d at ___, 558 P.2d at 785.

200. *See id.*

201. *See id.*

202. New Jersey v. T.L.O., 469 U.S. 325, 337 n.5 (1985). Only areas entitled to a reasonable or legitimate expectation of privacy are protected by the fourth amendment. Katz v. United States, 389 U.S. 347, 351-52 (1967). The expectation of privacy is reasonable if it meets two requirements: (1) an actual or subjective expectation by the defendant; and (2) the expectation is one that society is prepared to recognize as reasonable. Hudson v. Palmer, 468 U.S. 517, 525 (1984).

203. *See* Reamey, New Jersey v. T.L.O.: *The Supreme Court's Lesson on School Searches*, 16 ST. MARY'S L.J. 933, 945 n.82 (1984-85); Trosch, Williams & Devore, *supra* note 142, at 51.

204. Reamey, *supra* note 203, at 945 n.82.

205. *See, e.g.*, Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it."); State v. Stein, 203 Kan. 638, 640, 456 P.2d 1, 3 (1969), *cert. denied*, 397 U.S. 947 (1970) ("it [is] a proper function of school authorities to inspect the lockers under their control and to prevent their use . . . for illegal purposes."); People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969) (school administrators have power to consent to search of student's locker).

officials possess the master key. "The rationale is that even if a student *subjectively* considered his locker to be private, his knowledge of the existence of a master key makes his expectation unreasonable."[206] A second reason is that the locker is, at least jointly, school property. The school administrators thus have the power to consent to the search of a student's locker.[207] However, this rationale is somewhat weak in light of the Supreme Court's removal of the requirement that a person have a property right in the object of the search before he can invoke fourth amendment protection.[208]

A third basis offered to support the proposition that the student does not have a reasonable expectation of privacy in a school locker is that the "[l]ockers are generally located in public areas such as hallways where their contents are exposed to the view of passersby whenever the user opens the door."[209] The United States Supreme Court has stated: "What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection."[210] This rationale is faulty, however, when applied to school lockers. Although contraband in "plain view" would be subject to seizure by a police officer or school official who had a right to be in a position to view the objects,[211] it is quite another matter to say that since the contents of a locker *could* be in plain view, there is no reasonable expectation of privacy in the locker. Other courts have adopted the view that a student does have a reasonable expectation of privacy in the contents of his locker. This view emphasizes the subjective expectation of the student over the reasonableness of the expectation. In *State v. Engerud*,[212] the court stated:

> We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. . . . For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal 'effects' protected by the Fourth Amendment.[213]

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206. Comment, *Searches by Drug Detection Dogs in Pennsylvania Public Schools: A Constitutional Analysis*, 85 DICK. L. REV. 143, 147-48 (1980).

207. The Virginia courts have held that "the consent to search given by one with common authority over property is valid, as against the absent, non-consenting person with whom the authority is shared." Black v. Commonwealth, 223 Va. 277, 283, 288 S.E.2d 449, 452 (1982).

208. Mancusi v. DeForte, 392 U.S. 364 (1968).

209. Delgado, *College Searches and Seizures: Students, Privacy, and the Fourth Amendment*, 26 HASTINGS L.J. 57, 70 (1974-75).

210. Katz v. United States, 389 U.S. 347, 351 (1967).

211. *See, e.g.*, Harris v. United States, 390 U.S. 234, 236 (1968); United States v. Cobler, 533 F. Supp. 407, 410 (W.D. Va. 1982). The plain view doctrine holds that the mere looking at that which is in plain sight is not a search. Duffield v. Peyton, 209 Va. 178, 183, 162 S.E.2d 915, 918 (1968). Accordingly, no warrant or probable cause is required.

212. 94 N.J. 331, 463 A.2d 934 (1983), *rev'd sub nom.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

213. *Engerud*, 94 N.J. at ___, 463 A.2d at 943 (citation omitted) (The court noted, how-

A commentator has observed:

> [A]part from the integrity of his own body, [the student's] locker is one of his few harbors of privacy within the school. It is the only place where he may be able to store what he seeks to preserve as private—letters from a girl friend, applications for a job, poetry he is writing, books that may be ridiculed because they are too simple or too advanced, or dancing shoes he may be embarrassed to own.[214]

Courts adopting this view have held that the proper standard for the search of lockers is reasonable suspicion.[215]

b. Cars

Few cases have considered the issue of searches of a student's car parked in a school parking lot. There is no contention that students do not have a reasonable expectation of privacy in their cars.[216] The student's use of the car is exclusive. The one case found that considered the search of students' cars in the school parking lot by school officials applied the reasonable suspicion standard.[217]

4. Is Individualized Suspicion an Essential Element of the Reasonableness Standard?

In *T.L.O.*, the assistant vice-principal's suspicions centered upon the student whose purse he searched. The Court therefore stated that it did not need to decide "whether individualized suspicion is an essential element of the reasonableness standard" adopted for searches by school authorities.[218] The Court did note, however, that although some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, the fourth amendment imposes no irreducible requirement of such suspicion.[219]

Lower court cases have taken the position that individualized suspicion

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ever, that this expectation would not exist if a master key had been used in the past to make occasional inspections). Also stating this as the New Jersey rule, see Falter v. Veterans Admin., 632 F. Supp. 196, 212 (D.N.J. 1986).

214. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 773 (1974).

215. *See, e.g.*, Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 482 (5th Cir.), *reh'g denied*, 693 F.2d 524, 525 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); State v. Joseph T., 336 S.E.2d 728, 736 (W. Va. 1985).

216. Some have suggested, however, that the plain view exception can be applied to cars in some instances where contraband can be seen by looking into a car window. *See* United States v. Cobler, 533 F. Supp. 407, 410 (W.D. Va. 1982).

217. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 482 (5th Cir.), *reh'g denied*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

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

219. *Id.* (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).

is required for a number of types of school searches. In *Kuehn v. Renton School District*,[220] the Supreme Court of Washington afforded fourth amendment protection to a high school student who challenged his school's policy of searching the luggage of students who were going on a band concert tour. The school's policy was inspired by an incident two years earlier when two students on a similar tour were caught with liquor in their hotel rooms. Holding the search unreasonable because of the lack of individualized suspicion, the court stated:

> The validity of searches of school children by school officials is judged by the reasonable belief standard. The reasonable belief standard requires that there be a reasonable belief on the part of the searching school official that the individual student searched possesses a prohibited item. When school officials search large groups of students solely for the purpose of deterring disruptive conduct and without any suspicion of each individual searched, the search does not meet the reasonable belief standard. Because the search at issue here was conducted without individualized suspicion the student's rights under the Fourth Amendment were violated.[221]

The court in *Bellnier v. Lund* reached the same conclusion.[222] In *Lund*, a class of fifth-grade students were ordered by school authorities to "strip down to their undergarments" after three dollars allegedly were stolen.[223] The court determined that the search was unreasonable since there was "no reasonable suspicion to believe that each student searched possessed contraband or evidence of a crime."[224]

D. *The* T.L.O. *Reasonable Suspicion Standard*

Under *T.L.O.*[225] a search is justified at its inception only if the school official possesses a reasonable suspicion that the search will produce evidence that the student has violated or is violating either the law or school rules. One court explained the standard as follows:

> To justify a search under [the school rules] on the basis of reasonable suspicion, an official must be aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion. . . . In passing on the legality of such a search, we must consider all the surrounding circumstances.[226]

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220. 103 Wash. 2d 594, 694 P.2d 1078 (1985).

221. *Id.* at ___, 694 P.2d at 1079. Interestingly, the *Kuehn* court also found that parent chaperones, who helped in conducting the searches, were state agents, because the parents "conducted the search with the sanction and enforcement authority of the school officials." *Id.* at ___, 694 P.2d at 1081. Thus, the court applied the same standard to searches by parents and school officials—reasonable suspicion.

222. 438 F. Supp. 47 (N.D.N.Y. 1977).

223. *Id.* at 50.

224. *Id.* at 54.

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

226. United States v. Most, 789 F.2d 1411, 1415 (9th Cir. 1986).

The following two cases illustrate this standard.

In *Cales v. Howell Public Schools*,[227] a student was seen by a school security guard[228] "ducking" behind a car in the school parking lot when she should have been in class. When asked to identify herself, the student gave a false name. The student was taken to the assistant principal's office who believed from the foregoing that the girl possessed illegal drugs. A female school official was instructed to search the student. The student first was made to dump the contents of her purse on a desk. She then was instructed to turn her jean pockets inside out. The student subsequently removed her jeans. She then was required to bend over so that the school official could visually examine the contents of her bra. Drugs were not found. The court found that the strip search violated the student's fourth amendment rights because the school officials did not have reasonable suspicion to justify the search.[229] The court stated:

> It is clear that [the student's] conduct created reasonable grounds for suspecting that some school rule or law had been violated. However, it does not create a reasonable suspicion that a search would turn up evidence of drug usage. [The student's] conduct was clearly ambiguous. It could have indicated that she was truant, or that she was stealing hubcaps, or that she had left class to meet a boyfriend. In short, it could have signified that [she] had violated any of an infinite number of laws or school rules.[230]

Because the court found that the strip search was unreasonable at its inception, the court found it unnecessary to address the second prong of the *T.L.O.* test.[231]

In *State v. Joseph T.*, the court applied the reasonable suspicion standard to a search of a student's locker.[232] In that case, a school official noticed the smell of alcohol on a student. The student confessed that on the way to school he had consumed beer at the home of Joseph T., another student. Suspecting that Joseph T. might have brought some type of alcoholic beverage into school, school officials searched his locker. Although no alcoholic beverages were found, the officials found pipes, wrapping paper, and a small plastic box containing marijuana in a pocket of a jacket in the locker.

The court found that, although there was not probable cause, there

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227. 635 F. Supp. 454 (E.D. Mich. 1985).

228. A school security guard has no police power, and is subject to the same standard as school officials.

229. *Cales*, 635 F. Supp. at 457.

230. *Id.*

231. *Id.*

232. 336 S.E.2d 728 (W. Va. 1985).

were reasonable grounds for suspecting that the locker contained an alcoholic beverage in violation of school rules. The court also found that the discovery of the marijuana in the locker was reasonably related to the search for alcoholic beverages.[233] Accordingly, the court held that the search did not constitute a violation of the student's constitutional rights.[234]

In a partial dissent, the chief justice of the Supreme Court of Appeals of West Virginia agreed with the adoption of the reasonable suspicion standard for the search of school lockers.[235] He believed, however, that the school officials did not have reasonable suspicion:

> [T]here were no articulable facts which would lead a reasonably prudent person to suspect the defendant had alcoholic beverages in his locker. The only evidence was that his friend had consumed a beer at the defendant's home before school. This information gave no indication that the defendant had alcoholic beverages in his locker.[236]

The chief justice also observed that even if there was reasonable suspicion, the search exceeded what was necessary to determine if alcoholic beverages were present. "The only objective of the search would have been to discover the existence of alcoholic beverages in the defendant's locker. Yet, rather than pat down the defendant's jacket, the school administrator made a detailed examination into its pockets."[237]

E. *Other Searches*

In recent years, school administrators have begun to use a number of other types of searches to help maintain order and discipline in the public schools. The use of drug-sniffing dogs, metal detectors, and drug testing has sparked considerable controversy. To many, these seem to be extreme measures when applied to school children. Moreover, these measures are frequently *not* based on individualized suspicion. Thus, there is an intrusion into the privacy not only of students who actually are, or are individually suspected to be in violation of the law or a school rule, but also the majority of students who are innocent. Whether this intrusion is outweighed by the school officials' need to maintain order and discipline is, as with the other issues concerning student rights, the focus of the courts' inquiry.

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233. *Id.* at 737.
234. *Id.* at 737-38.
235. *Id.* at 740 (Miller, C.J., dissenting in part).
236. *Id.* at 741.
237. *Id.*

1. Use of Drug-Sniffing Dogs

In *United States v. Place*,[238] the United States Supreme Court stated that the sniffing of luggage by a dog to discover drugs does not constitute a search under the fourth amendment.[239] Although the Court's statement was read by some to be merely dictum, in *United States v. Jacobsen*[240] the Court referred to this statement as a holding.[241] The Court reasoned that the sniff is "much less intrusive" than a typical search and does not tell authorities anything about the presence of non-contraband items.[242] In so holding, the Court adopted the majority view of lower courts.[243] Only the Ninth Circuit had held that the sniffing of objects by a dog was a search.[244] Since the sniffing of objects by dogs is not a search, the fourth amendment is not violated. Therefore, both the police and school officials, are free to use this method.

Following *Place*, the Fifth Circuit held in *Horton v. Goose Creek Independent School District*[245] that the use of drug-detecting dogs to sniff school lockers and cars parked in the school parking lot did not constitute a search.[246] Since the fourth amendment did not apply, the court stated that it need not consider the reasonableness of the use of the drug-detecting dogs.[247] The *Horton* court also held that a positive reaction by a drug-sniffing dog to a locker or car would give the school officials reasonable suspicion to search that locker or car, provided that there was evidence that the dog could reliably identify the *current* presence of drugs.[248]

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238. 462 U.S. 696 (1983).

239. *Id.* at 707.

240. 466 U.S. 109, 123-24 (1984).

241. Lower courts have viewed the *Place* language as conclusive. *See, e.g.*, United States v. Beale, 736 F.2d 1289, 1291 (9th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

242. *Place*, 462 U.S. at 707.

243. Some lower courts have relied upon the "plain smell doctrine" in holding that dog sniffing is not a search. The plain smell doctrine, not expressly adopted by the Supreme Court, is analogous to the plain view doctrine. Courts adopting this doctrine have reasoned that the dog is a mere sense enhancer supplementing the officer's smell, just as a flashlight enhances his sight. Thus, just as no search occurs when the policeman smells a distinctive odor, such as marijuana (as long as a policemen has the right to be where he is when he smells the odor), courts argue that no search occurs when a dog uses its olfactory senses. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 476-77 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *see also*, United States v. Venema, 563 F.2d 1003, 1006 (10th Cir. 1977) (police use of cannabis-detecting dog to sniff the air outside of locker rented from storage company was not a search).

244. *See, e.g.*, United States v. Solis, 536 F.2d 880 (9th Cir. 1976). After *Place* was decided, the Ninth Circuit overruled *Solis* in United States v. Beale, 736 F.2d 1289 (9th Cir. 1984) (sniff of luggage by a narcotics detection dog does not constitute a search).

245. 690 F.2d 470.

246. *Id.* at 477.

247. *Id.*

248. *Id.* at 482.

The Supreme Court has never dealt explicitly with whether dog sniffs of *people* constitute searches. This presents an entirely different problem than dog sniffs of objects since dog sniffs of people are more intrusive. There has been conflict among the lower court cases over whether the use of dogs to sniff students is a search.

Doe v. Renfrow[249] was the first case to consider whether sniffs of school children constituted a search. There, the court held that the use of the dogs by the school, with the assistance of the police, did not constitute a search. The court noted the diminished expectations of privacy by students in a public school, the school officials' duty to maintain order and a sound educational environment, and the minimal intrusion involved.[250] There was no evidence that the sniffing dogs ever actually touched the school children. The opinion in *Doe* has been widely criticized by commentators.[251]

The decision in *Jones v. Latexo Independent School District*[252] has met with more favorable response. There the Federal District Court for the Eastern District of Texas granted a preliminary injunction against the use of dogs to sniff school-children. The court found that the use of sniffing dogs was intrusive and constituted an unreasonable search under the fourth amendment. The court also based its decision on the fact that the school officials had no particularized suspicion.[253]

The Fifth Circuit considered this issue as well in *Horton v. Goose Creek Independent School District.*[254] There, the court held that the sniffing of the students was a search. The court placed great emphasis on the fact that there was evidence that the dogs made contact with the children while sniffing them.[255] The court stated:

> [I]ntentional close proximity sniffing of the person is offensive whether the sniffer be canine or human. One can imagine the embarassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person.[256]

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249. 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd on other grounds*, 631 F. 2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

250. *Id.* at 1022.

251. *See, e.g.*, Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U.L. REV. 803 (1980); Note, *Use of Drug Detecting Dogs in Public High Schools*, 56 IND. L.J. 321 (1981); Comment, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U.L.J. 119 (1979). *Doe* is in accord with the plain smell doctrine, discussed *supra* note 243. Under this doctrine, there would be no difference between sniffs of objects and sniffs of people, where there is no physical contact between the dog and the person.

252. 499 F. Supp. 223 (E.D. Tex. 1980).

253. *Id.* at 235.

254. 690 F.2d 470.

255. *Id.* at 478 (The dogs "put their noses right up against the children's bodies.").

256. *Id.* at 479. The court did not decide whether the use of dogs to sniff people at a distance is a search. *See id.*

The court added that the dogs' "sniffing around each child, putting his nose *on* the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive."[257]

Finding that the dog sniffing of students was a search, the court then considered whether the search was permissible under the fourth amendment. The court observed initially that:

> When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, it assumes a duty to protect them from dangers posed by anti-social activities—their own and those of other students—and to provide them with an environment in which education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers.[258]

The court concluded, however, that "[t]he intrusion on dignity and personal security that goes with the type of canine inspection of the student's person involved in this case cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion, and we hold it unconstitutional."[259]

Summarizing the law in this area, it is well-established that the sniffing by drug-detecting dogs of school lockers and cars parked on school premises does not constitute a "search." *Horton* states that dog sniffing of students would be a search where the dog makes physical contact with the child. It is an unconstitutional search if it is not based on individualized suspicion. If individualized suspicion is required, however, the usefulness of dog sniffing is arguably minimized, if not eliminated. If a school official had reasonable suspicion to believe that a particular student possessed drugs, the official himself could search the student. Finally, the courts are split on whether the sniffing of the school children constitutes a search where the dogs do not touch the students.

2. Use of Metal Detectors

Some schools have installed metal detectors (magnetometers) in school entrances. As they enter, students are screened for knives, guns, or other weapons. As yet, no court has decided whether use of metal detectors in public schools is constitutional. However, some courts have upheld the use of metal detectors in other contexts.[260]

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257. *Id.*

258. *Id.* at 480.

259. *Id.* at 481-82.

260. *See, e.g.*, United States v. Epperson, 454 F.2d 769, 770 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); *see also* United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972). Magnetometer screening is conducted, for example, in airports, courthouses, and prisons.

In *United States v. Epperson*,[261] the Fourth Circuit allowed the use of general magnetometer searches in airports. Employing a balancing test, the court weighed the danger of air piracy against the plaintiff's fourth amendment interests and found that the search was reasonable.[262]

In *United States v. DeAngelo*,[263] the Fourth Circuit found that a magnetometer search was reasonable in light of the fact that the passenger had the choice of travelling by other means and was given notice by signs in the terminal that a search would be conducted.[264] The court concluded, therefore, that the passenger consented to the search because he voluntarily passed through the magnetometer.[265]

Whether magnetometers are found to be constitutionally permissible in Virginia public schools may depend upon whether the court relies upon *Epperson* or *DeAngelo*. If the court finds that, under *DeAngelo*, students must consent to magnetometers before they can be used, then arguably, they should *not* be allowed in the schools because students are compelled to attend school. Unlike the air traveller, the student has no choice but to pass through the magnetometer. Thus there can be no voluntary consent to the search.

On the other hand, if the court applies the *Epperson* court's reasoning, it may hold that the benefits of the search (maintenance of order and discipline in the school), outweigh the intrusion on the students' privacy rights. If the courts adopt the *Epperson* approach, they should scrutinize the history of violent incidents at each particular school before engaging in the balancing test. Not all schools will be troubled with the sort of violence that mandates use of a magnetometer and courts should be careful not to draw unsubstantiated conclusions about their necessity.

It should be noted here that metal detectors are primarily useful for general searches. Thus, even if a court does not employ an *Epperson* balancing test to strike down the use of metal detectors in a public school, the court may hold that they can be used only when school officials have individualized suspicions. If individualized suspicion is required then, as with sniffing dogs, the usefulness of metal detectors will be all but eliminated.

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261. 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).
262. *Id.* at 771-72.
263. 584 F.2d 46 (4th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).
264. *Id.* at 47-48.
265. *Id.* at 48.

3. Use of Drug Testing

The use of drug testing[266] in the public schools is a very recent development. Although there are few cases on the issue of drug testing, there is already "strong authority for the proposition that taking a person's urine and testing it for drugs is a search."[267] Therefore, the fourth amendment applies.

Unlike drug-sniffing dogs and metal detectors, drug testing is useful as a particularized form of a search as well as a general search. School officials cannot determine in other ways whether a student has been taking drugs. Accordingly, drug testing can be limited by school authorities to cases where they have individualized suspicion. Nevertheless, schools have used drug testing as a general search of large groups of students. The validity of this practice depends on whether the courts will require individualized suspicion. Drug testing which is not based on individualized suspicion, has been allowed in other contexts, for example, with personnel in the armed forces,[268] prisoners,[269] and employees in highly regulated industries.[270]

In *Odenheim v. Carlstadt-East Rutherford Regional School District*,[271] a New Jersey court considered the constitutionality of a high school policy requiring *all* students to submit annual urine samples for drug testing. The school had a population of 516 students.[272] In the previous school year, some twenty-eight students had made inquiry or were referred to the student assistant counselor concerning drug use.[273] The school attempted to justify the drug testing by contending that the urine samples were not being taken solely for the purpose of drug screening, but also to be tested for other forms of physical defects as part of the pupil medical examination mandated by New Jersey statute.[274] The school added that under its program, no civil or criminal sanctions would be imposed in the event of a positive test.[275] In the case of a positive urine test, the doctor, parents, and student would discuss whether or not there was a problem.[276]

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266. For purposes of this comment, "drug testing" refers to analysis of a urine specimen for the presence of controlled substances.

267. Jones v. McKenzie, 628 F. Supp. 1500, 1508 (D.D.C. 1986); *see also* Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984); Odenheim v. Carlstadt-East Rutherford Regional School Dist., 211 N.J. Super. 54, 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

268. Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

269. *Storms*, 600 F. Supp. 1214.

270. *See, e.g.*, Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985).

271. 211 N.J. Super. 54, 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1955).

272. *Id.* at ___, 510 A.2d at 710.

273. *Id.*

274. *Id.*

275. *Id.* at ___, 510 A.2d at 711.

276. *Id.*

Despite the school's arguments, the court found the drug-testing program to be a violation of the fourth amendment.[277] Noting that the drug testing violated the reasonable privacy expectations of school children, the court stated:

> [The school's] activities are not reasonably related in scope to the circumstances which initially justified the interference. School policy already provides for exclusion and/or suspension of students who are involved with drug activity. The raw numbers and percentages of students referred to a student assistance counseling as compared with the total student body is not reasonably related in scope to the circumstances which justified the interference, urinalysis, in the first place.[278]

Recognizing the constitutional problems inherent in universal drug-testing programs, some schools have attempted to develop reasonable programs which will pass constitutional muster. The drug-testing program adopted by Salem High School in Salem, Virginia, beginning in the 1986-87 academic year, is typical of this new breed of testing. Under the Salem drug-testing program, a student must sign a form expressly consenting to the submission of urine samples for the purpose of drug testing in order to participate in athletic extracurricular activities (sports and cheerleading). A student who refuses to consent is not allowed to participate in the extracurricular activity. If a urine sample is later requested from a consenting student and it tests positive for drugs, the student and his or her parents must attend counseling. If there is a second positive test, the student is dismissed from the team or squad. An important feature of this program is that the only students who are actually asked to submit a urine sample are those whom school officials reasonably suspect are using drugs. Salem's drug-testing program would therefore meet an individualized reasonable suspicion requirement.

In addition to the fact that the Salem program is limited to situations where there is individualized reasonable suspicion, there are two other important differences between the Salem program and the program invalidated in *Odenheim*. First, the Salem program attempts to use the express consent of the students to avoid any fourth amendment deficiencies. It is well-settled that a search that is consented to is not unreasonable under the fourth amendment.[279] Thus, reasonable suspicion is not required where there is consent to the search. There may be some question,

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277. The court also found the program violative of the due process clause because failure to submit a urine sample could result in "exclusion" of the student from classroom study. The court saw this as an attempt to circumvent procedural due process requirements that would apply to students whom the school wanted to expel or suspend for illicit drug activity. *Id.* at ___, 510 A.2d at 713.

278. *Id.*

279. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citing Davis v. United States, 328 U.S. 582, 593-94 (1945)).

however, whether the Salem students' consent is valid. "Consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and it is not lightly to be inferred."[280] The burden is on the state to prove the voluntariness of a consent to search.[281] "In a school context, students may not realize that they have a constitutional right to object to a search and the Supreme Court has held that mere submission to a show of authority vitiates consent and that coercion is not allowed."[282]

Salem students are barred from participating in extracurricular activities unless they consent to the drug testing. Accordingly, the express consent given by the Salem students may not be voluntary.

This leads to the second difference between the Salem program and the *Odenheim* program. The Salem program does not test *all* students. It offers students a choice, in that they do not have to engage in extracurricular activities and thus do not have to submit to drug testing. This difference gives the school an implied consent argument, just as in the airport magnetometer screening cases, and also arguably makes the search less intrusive and more reasonable.

In *Odenheim*, there was no choice. Students were compelled to attend school and all students attending the school had to submit to drug testing. Moreover, although public school attendance is a right,[283] participating in a school extracurricular activity is only a privilege.[284] For example, courts have held that a student has no right to participate in interscholastic athletics.[285] Thus, there appears to be no remedy available to a student who wishes to participate in an extracurricular activity, but refuses to consent to drug testing and is therefore not allowed to participate.

V. Conclusion

In our public school system today, there is a giant tug of war in progress. Yet, no winner is likely to emerge. Although it is true that public schools should teach the student discipline, it is equally true that the

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280. 16 Michie's Jur. *Searches and Seizures* § 8, at 441 (Repl. Vol. 1987); *accord* Via v. Peyton, 284 F. Supp. 961, 967 (W.D. Va. 1968); Hairston v. Commonwealth, 216 Va. 387, 219 S.E.2d 668 (1975), *cert. denied*, 425 U.S. 937 (1976).

281. Black v. Commonwealth, 233 Va. 277, 283, 288 S.E.2d 449, 452 (1982). There is a presumption against the waiver of constitutional rights. *See* Amos v. United States, 255 U.S. 313 (1921).

282. Trosch, Williams & Devore, *supra* note 142, at 46.

283. *See supra* text accompanying notes 86-88.

284. Some extracurricular activities may be protected, however, by the first amendment. Hamilton v. Tennessee Secondary School Athletic Ass'n, 552 F.2d 681, 682 (6th Cir. 1976).

285. Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155, 1158 (5th Cir. 1970); Hamilton v. Tennessee Secondary School Athletic Ass'n, 552 F.2d 681, 682 (6th Cir. 1976).

schools should teach the student the importance of civil rights. Giving school officials too much power achieves the first goal at the expense of the second. Conversely, when school officials have too little authority the second goal is achieved at the expense of the first. The rights of the student are sacrificed in either scenario and, ultimately, the balancing is of student rights against student rights.

On one side of the scale is the student's right to an education, which is hindered by disorder in the schools. On the other side, is the student's civil rights under the fourth, fifth, and fourteenth amendments. If the scale tips too far in one direction the schools become "war zones." If the scale tips too far in the other direction, they become "prisons." A correct balance must be struck or both students and society will lose.

Todd Holliday