

February 2002

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Repository Citation

Jason E. Yearout, *Individualized School Searches and the Fourth Amendment: What's a School District to do?*, 10 Wm. & Mary Bill Rts. J. 489 (2002), <https://scholarship.law.wm.edu/wmborj/vol10/iss2/6>

INDIVIDUALIZED SCHOOL SEARCHES AND THE FOURTH AMENDMENT: WHAT'S A SCHOOL DISTRICT TO DO?*

As high-profile incidents of school violence appear to become more frequent and severe, public perception has deteriorated to the point where many citizens believe that schools are unsafe and administrators lack the power to control student activity. In their efforts to promote a safe learning environment, many school administrators have attempted to create strict guidelines concerning the power of school personnel to prevent illegal and unsafe activity from taking place at school. However, as administrators devise the rules by which to implement these standards, they are given little guidance by the Supreme Court regarding the application of the Fourth Amendment to a school setting. This Note examines the Court's reluctance to provide a clear directive to school districts as to the proper limits of students' Fourth Amendment protections while at school. The author examines the limited precedent of the Supreme Court, as well as the reasoning put forth by various state courts, to reveal the wide range of factors relied upon to differing degrees by courts in determining the constitutionality of a school search. The Note calls for the Court to clarify the constitutional boundaries of school searches and provide administrators with an adequate standard on which to base school policies.

INTRODUCTION

Now more than any time in recent history, both educational administrators and parents of schoolchildren are concerned greatly about the safety of students in public schools at all levels of K-12 education.¹ Indeed, the recent school shootings at high schools in Santee, California and El Cajon, California, in March of 2001, have once again heightened these grave concerns.² As statistics differ on the proximity between the perceptions of danger in American schools and the relatively safe reality,³ school boards and administrators concomitantly fear the legal

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¹ See Carey Goldberg & Marjorie Connelly, *Fear and Violence Have Declined Among Teenagers, Poll Shows*, N.Y. TIMES, Oct. 20, 1999, at A1; Diane Plumberg, *School Safety Upgrades Urged*, THE DAILY OKLAHOMAN, Apr. 28, 2000, at NEWS.

² Jamie Reno & Suzanne Smalley, *Using Students as Metal Detectors*, NEWSWEEK, Mar. 19, 2001, at 28 (describing the shooting at Santana High School in Santee, California); James Sterngold, *Police Say Student Gunman Was Seeking School Official*, N.Y. TIMES, Mar. 24, 2001, at A8 (providing details on the Granite Hills High School shooting in El Cajon, California).

³ Compare *Juvenile Crime*, FBI LAW ENFORCEMENT BULL., July 1998, at 24 (the

ramifications of overzealous preventative tactics in response to the "perceived" threat, particularly in the area of search and seizure.⁴ In theory, the concerns for student safety and prevention of litigation might make for a workable counterbalance in which a prototypical school district could function rationally, inevitably settling on the individual search policy that works best for that school or district.

In practice, however, many school districts are left out on a limb to develop their own guidelines due to the Supreme Court's continued lack of specific guidance in this area of the law. To date, the Court has rendered only two decisions concerning the Fourth Amendment's application in the school search setting: *New*

number of juveniles arrested for violent crimes as defined by the FBI's Uniform Crime Reporting Program (UCR) decreased for two consecutive years in 1995 and 1996), and U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIMES AND SAFETY V (1999) (reporting that "young people are less likely to be victimized at school than when they are away from school" and that the overall victimization rate actually has declined between 1993 and 1997 for some types of school-based crime), and W. David Watkins & John S. Hooks, *The Legal Aspects of School Violence: Balancing School Safety with Students' Rights*, 69 MISS. L.J. 641, 643-46 (1999) (arguing in part that "America's schools are generally safe"), with William Celis III, *Schools Getting Tough on Guns in the Classroom*, N.Y. TIMES, Aug. 31, 1994, at A1 (stating that in 1994, the National School Boards Association estimated that approximately 135,000 guns were brought to the nation's 85,000 public schools on any given day).

⁴ See, e.g., *Young v. New Haven Bd. of Educ.*, 1999 WL 43249 (Conn. Super. Ct. 1999) (holding a discharge action in which a physical education teacher was terminated for initiating individual semi-strip searches of students in her gym class after one student reported that \$91 was missing from her backpack was wrongful); Regina Apigo, *Surprise Visit by Sniffers at 6 Schools Nets 1 Knife*, THE PRESS-ENTERPRISE (Riverside, Cal.), Feb. 5, 2000, at B03 ("District officials said they hoped the drug-sniffing dog program would deter students from bringing drugs or weapons to school"; "[o]ne student refused to have her backpack sniffed because, she said, it violated her civil rights. She was suspended for three days."); Rhea R. Borja, *Henrico Teacher May Lose Job; Spoke to Students*, ACLU About Random Search, THE RICHMOND TIMES-DISPATCH, Apr. 28, 2000, at A1 (reporting that after a random search of students in her high school science class by school administrators, a teacher talked to her students in class about the search, sought advice from the ACLU, and then wrote a letter to the principal suggesting guidelines for random searches; the teacher was fired by school administrators for her efforts. An assistant principal at the high school, who was also one of the officials that conducted the search, said, "I was shocked by [the letter's] tone. Random searches are a deterrent . . . I felt the accusations make our team look bad."); Andrew Goldsmith, *First Districtwide Handbook Spells Out Rules for Students*, THE PROVIDENCE JOURNAL-BULLETIN, May 26, 2000, at 2C (reporting that according to the school district's new handbook, "[n]o right or expectation of privacy exists for any student as to the use of any locker issued or assigned to a student by the school . . . lockers may be searched at any time without prior notice").

Jersey v. T.L.O. and *Vernonia School District 47J v. Acton*.⁵ The latter case held that a random drug testing policy for students engaged in an extracurricular activity did not violate the Fourth Amendment;⁶ the former case will be analyzed in detail *infra*. While one court has construed this pair of cases to establish a dichotomy of analysis between school searches of individuals, as in *T.L.O.*, and more random, broad “sweeps” akin to a DUI roadblock,⁷ this note will focus primarily on the individually-oriented issues on which the *T.L.O.* Court did not rule.

Some states have attempted to fill the jurisprudential void not within the judicial branch, but via executive action from the governor, the state department of education, or select statewide task forces.⁸ Other states have attempted to tackle the problem through the legislative process.⁹ However, solutions such as broad recommended guidelines, although well-meaning, suffer from the same critical problem as the current lack of judicial clarity regarding school searches: their generality and “one size fits all” approach to the Fourth Amendment rights of students fails to give each school district adequate direction, particularly in light of several commonplace fact scenarios on which lower courts currently disagree. Indeed, in the vast majority of cases, “school security, like security for other applications, is not simple and straightforward.”¹⁰ “No two schools will have identical and successful security programs — hence, a security solution for one

⁵ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

⁶ *Acton*, 515 U.S. at 646.

⁷ See *Commonwealth v. Cass*, 709 A.2d 350 (Pa. 1998), *cert. denied* *Cass v. Pennsylvania*, 525 U.S. 833 (1998).

⁸ Ronald Susswein, *The New Jersey School Search Policy Manual: Striking the Balance of Students' Rights of Privacy and Security After the Columbine Tragedy*, 34 NEW ENG. L. REV. 527 (2000); see also Diane Plumberg, *School Safety Upgrades Urged*, THE DAILY OKLAHOMAN, Apr. 28, 2000, at NEWS (describing the results of Oklahoma's Task Force on School Violence, which included supporting “unannounced drug and weapon searches” and “creat[ing] a climate of respect”).

⁹ See, e.g., CAL. EDUC. CODE § 49050 (West 1993) (prohibiting strip searches); IOWA CODE ANN. § 808A.2 (4a) (West 1994 and Supp. 1999) (prohibiting strip searches); 70 OKLA. STAT. ANN. § 24-102 (West 1998) (“Pupils shall not have any reasonable expectation of privacy towards school administrators or teachers in the contents of a school locker, desk, or other school property[.]” and schools shall inform pupils of the same in their student discipline code.); S.C. CODE ANN., § 59-63-1150 (Law. Co-op. Supp. 1999) (“All school administrators must receive training in the ‘reasonableness standard’ under existing case law . . .”).

¹⁰ Mary W. Green, *The Appropriate and Effective Use of Security Technologies in U.S. Schools: A Guide for Schools and Law Enforcement Agencies*, in NAT'L INST. OF JUST. RESEARCH REPORT NCJ 178265, Sept. 1999, at v.

school cannot just be replicated at other schools with complete success.”¹¹ The Supreme Court has further complicated the situation by consistently denying *certiorari* to subsequent cases that could clarify the Court’s stance on this increasingly troublesome, and frequently complex, quandary.¹² This Note will argue that the Supreme Court should examine any of several factual scenarios that school districts regularly confront and establish *per se* rules or, at the very least, articulate more specific factors to consider before undertaking individual searches within public schools.

I. BACKGROUND

The Fourth Amendment provides in pertinent part that “[t]he 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”¹³ These protections are implicated against the states, and thus their educational institutions, via the Fourteenth Amendment and do not attach to the acts of private actors.¹⁴ This general protection afforded to students in the school setting gave rise to an intriguing constitutional dilemma: how to adequately balance the individual student’s interest to be free from unreasonable searches and seizures (or, more generally stated, the personal privacy interest) with the state’s interest in maintaining a safe learning environment for all students. In 1985, the Supreme Court attempted to resolve this dilemma in the landmark case of *New Jersey v. T.L.O.*,¹⁵ a case that has now become “established” as a key principle in Fourth Amendment jurisprudence.¹⁶

A. T.L.O. Facts

In *T.L.O.*, a teacher at Piscataway High School in Middlesex County, New Jersey, discovered two girls smoking in a bathroom, one of whom was respondent

¹¹ *Id.*

¹² See, e.g., *Cass*, 709 A.2d at 350; *Jenkins v. Talladega Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995), *cert. denied*, 516 U.S. 995 (1995); *Isiah B. v. Wisconsin*, 500 N.W.2d 637 (Wis. 1993), *cert. denied*, 510 U.S. 884 (1993); *United States v. Attson*, 900 F.2d 1427 (9th Cir. 1990), *cert. denied*, *Attson v. United States*, 498 U.S. 961 (1990).

¹³ U.S. CONST. amend. IV.

¹⁴ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the Fourteenth Amendment applies the Fourth Amendment to the states).

¹⁵ 469 U.S. 325 (1985).

¹⁶ *Greenleaf v. Cote*, 2000 WL 863217, at 3 (D. Me. 2000).

T.L.O., a high school freshman.¹⁷ The teacher escorted the two girls to the vice principal's office, where they were questioned about the incident.¹⁸ T.L.O.'s companion admitted that she had violated the school's rule against smoking on school grounds, but T.L.O. denied that she had been smoking and claimed that she did not smoke at all.¹⁹ The vice principal asked T.L.O. to come into his office and demanded to see her purse, in which he found a pack of cigarettes; as he reached into the purse for the cigarettes, he also saw a pack of cigarette rolling papers.²⁰ In the vice principal's experience, rolling papers possessed by high school students were "closely associated" with marijuana use, so the vice principal then thoroughly searched the purse.²¹ That "search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing."²² The vice principal notified the girl's mother and the police and turned over the evidence of drug dealing obtained from the search of the purse to the police.²³ At police request, T.L.O.'s mother took her daughter to police headquarters, where she ultimately confessed to selling drugs at Piscataway High School.²⁴

Based on the confession and the vice principal's search, the state charged T.L.O. with delinquency in juvenile court, where T.L.O. moved to suppress both the contents of the purse search, which she claimed violated the Fourth Amendment, and the confession, which she contended was tainted by the search.²⁵ The juvenile court denied her motion, and she appealed to the New Jersey Supreme Court, which reversed the decision.²⁶ The court concluded that, although a warrantless search by a school official passes Fourth Amendment scrutiny so long as the official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order[.]" the vice principal's search of the purse did not meet that reasonableness requirement.²⁷ The Supreme Court granted New Jersey's subsequent petition for certiorari.²⁸

¹⁷ *T.L.O.*, 469 U.S. at 328.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *T.L.O.*, 469 U.S. at 328.

²³ *Id.*

²⁴ *Id.* at 329.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *T.L.O.*, 469 U.S. at 330-31.

²⁸ *State in Interest of T.L.O.*, 463 A.2d 934 (N.J. 1983), *cert. granted*, *New Jersey v.*

Writing for the majority, Justice White first concluded that the constraints of the Fourth Amendment do apply to public school officials as representatives of the State, not solely as surrogates for individual parents, when conducting searches of students.²⁹ The Court, however, in striking “the balance between the schoolchild’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place” held that a less stringent test applies to evaluate these types of searches than is used to review searches by law enforcement officers.³⁰ Specifically, a search’s legality in the school setting depends “simply on the reasonableness, under all the circumstances, of the search.”³¹ Evaluating reasonableness involves a two-part inquiry: the search must be “justified at its inception,” and it must be “reasonably related in scope to the circumstances which justified the interference in the first place[.]”³² Interestingly, the language forming this test was quoted directly from *Terry v. Ohio*, the landmark “stop and frisk” case.³³ The Court’s stated goal in proceeding down this path was to “spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause” and proceed on a more common-sense approach while ensuring that students’ interests “will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.”³⁴

As to the search of T.L.O., the incident in question actually involved two searches, the first being for cigarettes and the second for marijuana.³⁵ According to the Court, the teacher’s account of finding the two girls smoking cigarettes in the bathroom gave rise to reasonable suspicion for the vice principal to search T.L.O.’s purse for cigarettes.³⁶ The Court was not persuaded by the fact that discovery of the cigarettes would not have proven conclusively that T.L.O. was in fact smoking, but instead found that this type of search would be justified despite the fact that the evidence, “if found, would constitute ‘mere evidence’ of a violation.”³⁷ During the course of the search, the vice principal discovered cigarettes as well as rolling papers, and the latter created sufficient reasonable suspicion for the more broad search of the purse for marijuana or evidence related to it.³⁸ The continued

T.L.O., 464 U.S. 991 (1983).

²⁹ *T.L.O.*, 469 U.S. at 333-34, 336-37.

³⁰ *Id.* at 340.

³¹ *Id.* at 341.

³² *Id.*

³³ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

³⁴ *T.L.O.*, 469 U.S. at 343.

³⁵ *Id.* at 343-44.

³⁶ *Id.* at 345.

³⁷ *Id.*

³⁸ *Id.* at 346.

examination of the purse's contents once the marijuana was discovered, the Court reasoned, was also constitutionally permissible to gather further evidence of illegal or otherwise prohibited activity, such as the list of people who owed T.L.O. money.³⁹ Thus, the Court concluded that the search of T.L.O.'s purse was reasonable in all respects.⁴⁰

B. *Open Issues*

Despite its facially-broad applicability, the Court in *T.L.O.* expressly declined to rule or provide guidance on a number of issues related to the reasonableness test. First, the Court specifically refused to consider whether the exclusionary rule is the appropriate remedy for a search conducted by school officials.⁴¹ The focus of this Note is more concerned with impacts on school districts, however, so this open question will not be addressed.⁴² Second, the Court similarly avoided deciding "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies[.]"⁴² With the proliferation of police officers, private security, and other "resource officers" in public schools in recent years, the regular interaction between school officials and law enforcement (actual, *de facto*, or otherwise) has increased greatly, thus creating a larger constitutional dilemma for schools than the Court likely anticipated in 1985. Third, no decision was rendered as to whether students have reasonable expectations "of privacy in lockers, desks, or other school property provided for the storage of school supplies."⁴³ Some school districts attempt to dodge this concern by affirmatively declaring in their student handbooks that no privacy rights exist in lockers and that lockers may be searched at any time without notice.⁴⁴ While certainly innovative, it remains unclear whether providing students

³⁹ *T.L.O.*, 469 U.S. at 346.

⁴⁰ *Id.* at 347.

⁴¹ *Id.* at 333 n.3. Compare *id.*, with *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996) (holding in part that exclusionary rule did not apply to high school student's § 1983 wrongful expulsion action).

⁴² For a discussion of the exclusionary rule's applicability to searches conducted by school officials, see generally D. Shane Jones, *Application Of The "Exclusionary Rule" To Bar Use Of Illegally Seized Evidence In Civil School Disciplinary Proceedings*, 52 WASH. U.J. URB. & CONTEMP. L. 375 (1997); Mai Linh Spencer, Note, *Suppress Or Suspend: New York's Exclusionary Rule In School Disciplinary Proceedings*, 72 N.Y.U. L. REV. 1494 (1997).

⁴³ *T.L.O.*, 469 U.S. at 341 n.7.

⁴⁴ *Id.* at 337 n.5.

⁴⁴ See, e.g., 70 OKLA. STAT. ANN. § 24-102 (West 1998) ("Pupils shall not have any reasonable expectation of privacy towards school administrators or teachers in the contents

with notice of this type is enough to make reasonable what otherwise might be considered unreasonable. Fourth, as the search of *T.L.O.* was based on individualized suspicion that she had been smoking, the Court did not have occasion to "decide whether individualized suspicion is an essential element of the reasonableness standard" it adopted for these types of searches.⁴⁵ However, the increased prevalence of "sweeps" through classrooms or schools as a deterrent to disruptive or unlawful activity in public schools has created numerous constitutional concerns.⁴⁶

The Supreme Court recently attempted to address some of these concerns in *Vernonia School District 47J v. Acton*.⁴⁷ At issue in the case was a school district policy of performing random urinalysis drug tests on students who participated in the schools' athletic programs, motivated by the discovery that athletes were "leaders of the drug culture" and the concern for increased risk of sports-related injury as a result of drug use.⁴⁸ The Court found that, unlike *T.L.O.*, this type of search was not based on individual suspicion of wrongdoing, even though the Fourth Amendment carries "no irreducible requirement of such suspicion[.]"⁴⁹ Characterizing the search policy as both a school search and a categorical drug test, the Court balanced three factors in declaring the district's policy constitutional: the individual expectation of privacy, the character of the intrusion, and the governmental interest in conducting the search.⁵⁰ Whereas *Acton* attempted to answer several interesting questions (and raises others) regarding the application of the Fourth Amendment in schools, this Note will explore those areas of the quandary more closely related to searches of individuals that the Court has not addressed at all, instead of concentrating on concerns that the Court has recently attempted to clarify.

Not only did the *T.L.O.* Court expressly pass on the four topics discussed *supra*, but it also left open (and continues to ignore) another situation that regularly frustrates school districts and their administrators. The potential legality of searching students' cars that are parked on school grounds presents equivalent, if not greater, constitutional headaches. Indeed, state courts currently are split on the issue of whether a comparable privacy interest arises in cars as compared to a

of a school locker, desk, or other school property[.]" and schools shall inform pupils of the same in their student discipline code.); Goldsmith, *supra* note 4, at 2C.

⁴⁵ *T.L.O.*, 469 U.S. at 342 n.8.

⁴⁶ See generally Borja, *supra* note 4.

⁴⁷ 515 U.S. 646 (1995).

⁴⁸ *Id.* at 649.

⁴⁹ *Id.* at 653.

⁵⁰ *Id.* at 664-65.

student's person, her backpack, or her locker.⁵¹ Additionally, courts seem quite uncertain as to whether the relevant inquiry in these types of cases concerns where the search occurs (on or off campus) or who conducts the search (i.e. school officials, campus police, or outside officers).

In total, this Note will examine three separate factual scenarios that school districts regularly encounter and about which they are increasingly concerned. The Court should examine these problems in an effort to provide guidance to school districts and law enforcement in this troublesome area of Fourth Amendment jurisprudence. This Note will explore the following areas: individual searches of lockers (as distinguished from school-wide "sweeps", discussed *supra*); car searches on school grounds; and the use of "resource officers" or other law enforcement agents in conducting these searches.

II. ANALYSIS

A. Locker Searches

Other than items that are carried on a student's person, such as backpacks, perhaps the area on which students most rely for storage of their personal items is their lockers. Additionally, locker areas are places where students frequently socialize between classes and broaden their educational experience by interacting with others in a non-academic setting. Unfortunately, all too often students use their lockers in furtherance of activities that run afoul of state laws or school rules.⁵² One natural question involves whether students have a reasonable expectation of privacy in the lockers that the school allocates to them. Furthermore, if such a privacy interest in fact exists, one must also consider whether it arises to the same extent as the privacy right in one's person and the effects within his or her immediate control. Finally, would the same quantum of proof discussed in *T.L.O.* be required in order to initiate an individual locker search, or is the privacy interest sufficiently less as to authorize a lesser level of suspicion? Sadly, the Supreme Court has expressly declined to review these questions within the context of the

⁵¹ See *infra* notes 98-175 and accompanying text.

⁵² See, e.g., *State v. Joseph T.*, 336 S.E.2d 728 (W. Va. 1985) (a student was suspected of having an alcoholic beverage in his locker, and a warrantless search of the locker revealed a substantial amount of marijuana).

Fourth Amendment,⁵³ and a great deal of confusion and uncertainty has resulted in effectively administering the Fourth Amendment's tenets in public schools.

1. Existence or Nonexistence of the Privacy Interest

The decision as to whether a student's privacy rights extend to her locker can enter the *T.L.O.* two-part analysis at either stage. For example, a question could arise as to whether a search was "justified at its inception" when a school official searched only the locker, or when the official started his inquiry at that point.⁵⁴ Similarly, if an individual student search started with the student's person and effects and then proceeded to her locker, one could examine whether the official's search as a whole was "reasonably related in scope" to finding the contraband sought.⁵⁵ Nevertheless, in either event, the threshold question arises as to the student's underlying privacy interest in an area in which she may frequently store personal items.⁵⁶ To date, state and federal courts have yet to arrive at a workable consensus on this issue.

For a variety of reasons, some states have concluded that students possess legitimate expectations of privacy in their lockers. In *S.C. v. State*,⁵⁷ the Mississippi Supreme Court reached this conclusion, albeit on state constitutional grounds, from the language of *T.L.O.* that described its version of "high school 'reality[;]'" it found that "there is no reason to conclude that [students] have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."⁵⁸ However, the *S.C.* court went on to limit that right due to the conclusion that a "student's expectation of privacy in a school locker is considerably less than he would have in the privacy of his home or even, perhaps, his automobile."⁵⁹ Mississippi's jurisprudence remains unclear as to the extent it limits this privacy interest in *S.C.*, because the court primarily based its finding of reasonableness on

⁵³ See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 n.7 (1985).

⁵⁴ *Id.* at 341.

⁵⁵ *Id.*

⁵⁶ *Id.* The *T.L.O.* court lumped desks and lockers together along with other "school property provided for the storage of school supplies." *Id.* at 337 n.5. Curiously, when examining the student's privacy interest generally, the Court noted that students may legitimately carry personal effects and items, in addition to those items necessary for classroom study, and retain their privacy interest as to those items. *Id.* at 339. The *T.L.O.* court declined, however, to complete the next inferential step and delineate in which types of places students retain privacy interests for those personal effects. *Id.*

⁵⁷ 583 So.2d 188 (Miss. 1991).

⁵⁸ *Id.* at 191 (quoting *T.L.O.*, at 339).

⁵⁹ *Id.* at 192.

an exigency suggested by the potential presence of a gun in the defendant's locker.⁶⁰

Pennsylvania's courts also have elicited the view that students possess some privacy interest in their lockers. In *Dumas v. Commonwealth*,⁶¹ the court relied upon the same *T.L.O.* language as did the court in *S.C.*, and the *Dumas* court's conclusory language is rather striking in its common-sense approach:

These are the types of items which students store in lockers and for which lockers are provided. We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which the student takes to school but would lose that expectation of privacy merely by placing the purse or jacket in school locker provided to the student for storage of personal items.⁶²

In so concluding, the court analogized the situation to the privacy expectation an employee would have in a locker located at his or her workplace.⁶³ However, the court did not grant an absolute right to students; rather, like the privacy right that attaches to one's person and items within one's immediate control, the locker privacy right is not "absolute" and must still be balanced in the *T.L.O.* analysis against "the school's need to maintain order and discipline."⁶⁴ In a concurring opinion, however, two judges did not reach this conclusion absolutely. They chose not to join the majority because the "record does not indicate that the school made any special restrictions with regard to the nature of the items which could be stored in the locker," nor did they "notify students that use of the lockers would be subject to random or periodic inspection or search" or "follow a uniform policy or consistent practice regarding locker searches."⁶⁵ As a result, the students' privacy right remained "unrestricted" in terms of reasonableness.⁶⁶ The opinion went out of its way to note, however, that because of the fact that drugs and violence "have found a foothold in our schools and threaten the vital educational process," students may store personal items in their lockers "by license and not by right." The concurring judges found that a student possesses "no constitutional entitlement to a private school locker."⁶⁷ Of great importance to the concurring judges in *Dumas* was the presence or absence of notice to the students:

⁶⁰ *Id.*

⁶¹ 515 A.2d 984 (Pa. Super. Ct. 1986).

⁶² *Id.* at 985.

⁶³ *Id.*

⁶⁴ *Id.* at 986.

⁶⁵ *Id.* at 986 (Kelly, J., concurring).

⁶⁶ *Dumas*, 515 A.2d at 987 (Kelly, J., concurring).

⁶⁷ *Id.*

[I]n order for a school to make the transition from a practice of allowing students to maintain the privacy in their lockers to a practice of regular or periodic inspection or search, ample notice must be given of any such limitations. The importance of notice to the students of any change in the policy regarding the privacy of school lockers cannot be overstated. Because no such notice was given in the instant case, the search was unconstitutional and the evidence must be suppressed.⁶⁸

Recently the Supreme Court of Pennsylvania generally reaffirmed the conclusion the majority reached in *Dumas* while taking a similar approach to school-wide locker searches,⁶⁹ analogizing them more to traffic roadblocks under a state constitutional theory.⁷⁰ Additionally, Massachusetts latched onto the court's analysis in *Dumas*, among other cases, in reaching a similar conclusion on both federal and state constitutional grounds.⁷¹ Interestingly, the facts in the *Snyder* case offered a rebuttal for the concurrence in *Dumas* because the "school administration explicitly acknowledged in the students' rights and responsibility code that each student had the right '[n]ot to have his/her locker subjected to unreasonable search.'"⁷² Maryland and Illinois have also joined many states in utilizing a common-sense approach to extending a student's reasonable expectation of privacy to the locker.⁷³

However, not all courts have concurred in this analysis. The Supreme Court of Wisconsin encountered this very question in *Isiah B. v. State*,⁷⁴ a case that raised many of the arguments against recognizing a student's privacy interest in her locker. Madison High School incurred a series of gun-involved complaints during the fall of 1990 that peaked on one November weekend. On Friday night, students reported that they were fired at when leaving the school basketball game, and when a riot nearly erupted at a school dance on Saturday night, gunshots were exchanged.⁷⁵ In

⁶⁸ *Id.* at 988 (Kelly, J., concurring).

⁶⁹ *Commonwealth v. Cass*, 709 A.2d 350, 359 n.8 (Pa. 1998), *cert. denied*, *Cass v. Pennsylvania*, 525 U.S. 833 (1998).

⁷⁰ *Cass*, 709 A.2d at 361.

⁷¹ *See Commonwealth v. Snyder*, 597 N.E.2d 1363, 1366 (Mass. 1992) (citing *State ex rel. T.L.O. v. Engerud*, 463 A.2d 934 (N.J. 1983)); *State v. Michael G.*, 748 P.2d 17 (N.M. Ct. App. 1987); *Dumas v. Commonwealth*, 515 A.2d 984 (Pa. Super. Ct. 1986); *State v. Joseph T.*, 336 S.E.2d 728 (W. Va. 1985).

⁷² *Snyder*, 597 N.E.2d at 1366.

⁷³ *See, e.g., In re Patrick Y.*, 723 A.2d 523, 528 (Md. Ct. Spec. App. 1999); *People v. Taylor*, 625 N.E.2d 785 (Ill. 1993).

⁷⁴ 500 N.W.2d 637 (Wis. 1993).

⁷⁵ *Id.* at 638.

response to an “atmosphere of tension and fear” that “dominated” the school the following Monday, the principal directed school security personnel to begin a “random” search of lockers “as a preventative measure while he continued investigatory interviews.”⁷⁶ Part of the principal’s authorization for this measure came from the Milwaukee Public School Handbook, which indicated that lockers were the property of the school and subject to inspection or search as the school deems appropriate or necessary.⁷⁷ The security guard inspected between seventy-five and one hundred lockers before coming upon Isiah B.’s locker.⁷⁸ The school had no individualized suspicion regarding Isiah, nor did he have any prior history of weapons violations or any activity that might potentially link him to the threat of violence at the school that day.⁷⁹ Upon opening Isiah’s locker, the officer found a coat, removed it, and found it to be unusually heavy.⁸⁰ He then patted down the coat’s exterior and felt what he believed to be a gun, at which point he notified the principal.⁸¹ A further search of the coat revealed not only the suspected gun, but also an undisclosed amount of cocaine.⁸² Subsequently, the state filed a delinquency petition against Isiah B. alleging one firearms count and one drug distribution count.⁸³ Isiah moved to suppress the gun and cocaine as fruits of an illegal search under the Fourth Amendment, and the circuit court denied the motion.⁸⁴

At oral argument, the State of Wisconsin argued that students have no reasonable expectations of privacy in their lockers, and thus, no search took place for Fourth Amendment purposes.⁸⁵ The majority of the court accepted the State’s argument, albeit on somewhat questionable terms. It ruled that because the

⁷⁶ *Id.*

⁷⁷ *Id.* at 639. The full text of the policy is as follows:

School lockers are the property of Milwaukee Public Schools. At no time does the Milwaukee school district relinquish its exclusive control of lockers provided for the convenience of students. Periodic general inspections of lockers may be conducted by school authorities for any reason at any time, without notice, without student consent, and without a search warrant.

Id. at 639 n.1 (quoting a Milwaukee Public School Handbook).

⁷⁸ *Isiah B.*, 500 N.W.2d at 639.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Isiah B.*, 500 N.W.2d at 639.

⁸⁴ *Id.*

⁸⁵ *Id.* at 641.

Milwaukee school system had a written policy distributed to students that gave them notice of the school's retention of "ownership and possessory control of school lockers," Milwaukee's students have no reasonable expectation of privacy in their lockers, making the circuit court's ruling proper.⁸⁶ Further, "[i]f school authorities do not have a locker policy like the one in this case, students might have a lowered reasonable expectation of privacy in their lockers."⁸⁷ Thus, the Wisconsin court seems to have hinged the existence of a student's Fourth Amendment right on the existence or nonexistence of adequate notice in the form of regulations promulgated in a student handbook that few students are likely to read, let alone take seriously. Unfortunately, the record in *Isiah B.* clearly indicates that the majority was persuaded not by Fourth Amendment dictates but by the perceived "presence of dangerous weapons in schools [a]s a recent and extremely serious problem."⁸⁸

However, not all of the Wisconsin Supreme Court justices followed that logic. Justice Abrahamson concurred in part (arguing that the case should be remanded to determine whether the imminent threat of violence that day posed exigent circumstances that justified a random search of lockers as carried out here) and dissented in part.⁸⁹ Her dissent focused primarily on the majority's anti-locker privacy conclusion. In addition to relying in part on the quoted language from the *Dumas* case,⁹⁰ cited *supra*, her main argument was that, while providing notice to students that a locker may be searched could potentially *diminish* the expectation of privacy there, the government (or a school as a state actor) cannot simply eradicate Fourth Amendment rights by proclaiming that it intends to do so or by giving advance warning of the upcoming infringements on personal liberty.⁹¹ Finally, Justice Abrahamson vehemently denounced the majority's use of the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Isiah B.*, 500 N.W.2d at 642 (citing 1993 statistics indicating that "37% of male, Wisconsin high school students carry weapons . . . 35% of the weapons . . . carried were guns, 49% knives or razors, [and] 16% clubs, bats[,] . . . pipes or other weapons").

⁸⁹ *Id.* at 642 (Abrahamson, J., concurring).

⁹⁰ *Id.*

⁹¹ *Id.* at 645 (citing *United States v. Davis*, 482 F.2d 893, 905 (9th Cir. 1973) ("The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched."); *Jeffers v. Heavrin*, 701 F. Supp. 1316, 1321 (W.D. Ky. 1988) ("[M]ere knowledge that one may be subject to search does not render one without any reasonable expectation of privacy[.]"); *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 234 (E.D. Tex. 1980) ("[M]ere announcement by officials that individual rights are about to be infringed upon cannot justify the subsequent infringement[.]"); *Chenkin v. Bellevue Hosp. Ctr.*, 479 F. Supp. 207, 213 (S.D.N.Y. 1979) (plaintiff's expectation of privacy in his bag was not rendered unreasonable by his employer's announced policy of searching employees' bags)).

perceived danger in schools as a flimsy excuse by which to modify constitutional standards.⁹² She further reminded the court of such cases as *Hirabayashi v. United States*⁹³ and *Korematsu v. United States*⁹⁴ as lessons "in what can happen if we do not abide by our constitutional principles when adapting the [C]onstitution to crises."⁹⁵

2. Is Notice Enough? Enough For What?

Milwaukee's approach to tackling the thorny subject of privacy interests in lockers is not a novel one.⁹⁶ Perhaps this prevailing strategy at the school district level is adopted to accomplish two things. First, it will act as a significant deterrent to students who wish to bring contraband on campus; this is likely a school district's chief objective. Second, should contraband be found in a student's locker and his parents wish to challenge the search, a school need only point to the section in the student handbook detailing its locker search policy. The existence of the policy would likely discourage many parents from pressing the issue with legal counsel. While the goals of school districts in implementing such locker policies are certainly noble, they should avoid relying completely on those policies to justify *any* locker search. This is because many states properly recognize that a locker search remains subject to *T.L.O.*'s two-part reasonableness inquiry, regardless of how a school district may have tried to allocate or deny privacy interests to students.⁹⁷ Thus, a blanket statement by a school indicating that lockers may be searched at *any* time without notice or consent may end up being counter-productive from a school's perspective because, while such a policy may discourage some litigation by parents of aggrieved students, it also may invite school personnel to unduly rely on the policy as controlling rather than *T.L.O.*, creating additional potential Fourth Amendment violations in the process.

⁹² *Isiah B.*, 500 N.W.2d at 645.

⁹³ 320 U.S. 81 (1943) (upholding curfews for persons of Japanese ancestry during World War II).

⁹⁴ 323 U.S. 214 (1944) (affirming *Hirabayashi* and upholding relocation of Japanese citizens to camps).

⁹⁵ *Isiah B.*, 500 N.W.2d at 645. Justice Abrahamson also adopted Justice Scalia's view of the Constitution as a document that "is meant to protect against, rather than conform to, current 'widespread belief.'" *Id.* at 646 (citing *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting)).

⁹⁶ See, e.g., 70 OKLA. STAT. ANN. § 24-102 (West 1998); Goldsmith, *supra* note 4.

⁹⁷ For an analysis of cases upholding the proposition that a state may not abrogate a constitutional protection by merely providing notice of that abrogation, see *supra* note 91 and accompanying text.

B. *Car Searches*

Another area in which students' privacy rights clash squarely with the state's educational interest in providing a safe and disciplined learning environment involves warrantless searches of students' cars that are located on school grounds. As noted *supra*, some states had considerable difficulty in finding that a student has a privacy right within a school-provided locker.⁹⁸ The privacy interest in one's car, then, could be considered one step removed from a locker because students have far less access to their cars than to their lockers during the school day. Also, cars generally receive less Fourth Amendment protection against warrantless searches than other items within one's immediate control, due in part to their mobility.⁹⁹ Finally, the Court in *T.L.O.* specifically found that warrants are particularly unsuited to the school environment for searches undertaken by school officials.¹⁰⁰

However, *T.L.O.* also recognized that students may "find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them *onto school grounds*."¹⁰¹ Indeed, one might contend that a student's car fits into a similar classification as his or her locker because both are used for storage to some degree and are located on school grounds. A car could also be considered as more personal to a student than a school-supplied locker, thus deserving greater protection. It might also be more "necessary" in terms of storage, particularly at the high school level; while students are not required to use their lockers to store their items, for many older students the use of their cars is the only feasible way to get to and from school and still meet all of their outside obligations, including after-school jobs or participation in extra-curricular activities. Thus, in a given situation a particular student might in fact have a greater expectation of privacy in something to which access is limited during the school day.

State courts have struggled since *T.L.O.* to define both the scope and level of students' privacy rights, as car searches in this context have presented unique policy problems such as these. Unfortunately, the Supreme Court's "reasonableness under all the circumstances" standard tells school districts little about the proper constitutional approach for car searches on school grounds.

1. Existence or Non-Existence of the Privacy Right

⁹⁸ See *supra* notes 74-95 and accompanying text.

⁹⁹ See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1976); *Carroll v. United States*, 267 U.S. 132, 153-54, 155-56 (1925).

¹⁰⁰ *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

¹⁰¹ *Id.* at 339 (emphasis added).

One threshold question that state courts frequently encounter, although it rarely presents itself squarely, is whether students in fact have a reasonable expectation of privacy in a car parked on school grounds. Mississippi recently confronted this issue in *Covington County v. G.W.*¹⁰² In *G.W.*, a student informed teacher Candy Knight that G.W., a seventeen-year-old minor, was drinking beer in the school parking lot.¹⁰³ Knight sent a note to Assistant Principal Richard Thames during school hours advising him of this; the note was then delivered to Principal Billy Ray Smith.¹⁰⁴ Smith and a school security officer went to the parking lot and discovered empty beer cans in the back of G.W.'s truck.¹⁰⁵ They asked G.W. to unlock his vehicle and allow them to search it, and G.W. complied.¹⁰⁶ The search revealed seven unopened beer bottles that were located in a locked toolbox.¹⁰⁷ Principal Smith questioned G.W., and the student admitted that the beer was his and that he had purchased it within the county; however, G.W. did not appear to be under the influence of alcohol at the time of the search.¹⁰⁸ G.W. was suspended for five days, but the Chancery Court in Covington County found that the school did not provide G.W. proper notice as outlined in the school handbook and ordered that G.W. be placed back in school.¹⁰⁹ The school district appealed.¹¹⁰

In its unanimous opinion, the Supreme Court of Mississippi held, *inter alia*, that the search of G.W.'s vehicle was reasonable and proper under the Fourth Amendment.¹¹¹ In so finding, the court noted that based on the information from a student and the presence of empty beer cans in G.W.'s truck, "[a]t the very minimum, reasonable suspicion was established."¹¹² G.W. claimed that the school should have secured a warrant before searching his car, but the court dismissed that argument for two reasons. First, it relied squarely on the language in *T.L.O.* that warrants are unsuited to the school environment when school officials conduct searches.¹¹³ Second, it placed a significant amount of reliance on the fact that "all students who bring a vehicle onto school premises must register the vehicle. G.W.'s registration form was signed by his mother and specifically states that 'vehicles will

¹⁰² 767 So. 2d 187 (Miss. 2000).

¹⁰³ *Id.* at 188.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *G.W.*, 767 So. 2d at 188.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 194.

¹¹² *G.W.*, 767 So. 2d at 193.

¹¹³ *Id.*

be routinely checked/searched.”¹¹⁴ Thus, this court seems to have applied some fashion of the questionable notice analysis regarding school lockers, detailed in Section 2A, *supra*,¹¹⁵ to a student’s car.

G.W. also contended that he had a greater expectation of privacy in his car than in his locker.¹¹⁶ The Mississippi Supreme Court rejected this argument as well, concluding that, “[w]hile this may be true when one is driving down the street, we can hardly say such a higher expectation of privacy should be had in a car on school property as opposed to a school locker.”¹¹⁷ In so concluding, however, the court relied on a pre-*T.L.O.* case in emphasizing the “realities of the school setting,” the high value society places on education, and the need for an “orderly atmosphere which is free from danger and disruption.”¹¹⁸ Curiously, this court nine years earlier in *S.C. v. State* had hinted that a student’s privacy rights might be greater in his car than in his locker.¹¹⁹ However, both *S.C.* and *G.W.* were greatly concerned with the potential presence of drugs and other contraband in its schools, and both cases upheld the searches in question, thus from a policy standpoint the two can be resolved in that manner.¹²⁰ Nevertheless, while Mississippi does not recognize a “higher” privacy interest in one’s car,¹²¹ the *G.W.* court implicitly must have found some interest, or else the principal would not have even needed reasonable suspicion to conduct the search. This interest, though, is not greater than the rather limited interest a student has in his or her locker.¹²²

Other states have encountered similar questions and arrived at comparable conclusions. In *F.S.E. v. State*,¹²³ a high school assistant principal smelled

¹¹⁴ *Id.*

¹¹⁵ See generally *supra* notes 52-97 and accompanying text.

¹¹⁶ *G.W.*, 767 So. 2d at 193.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 193-94 (citing *State v. D.T.W.*, 425 So. 2d 1383, 1386 (Fla. Dist. Ct. App. 1983)).

¹¹⁹ 583 So. 2d 188, 191 (Miss. 1991).

¹²⁰ A significant number of state courts, like the court in *G.W.*, seem to spend more time focused on the intolerable presence of drugs and weapons in their states’ schools than on the particular rights and responsibilities of the parties. See, e.g., *G.W.*, 767 So. 2d at 193-94. Courts have been cautioned, however, both to refrain from using a judicial dispute as a vehicle to dictate legislative policies to localities (such as city governments and school districts) and to avoid altering the boundaries of constitutional protections to meet an ever-changing public sentiment. See, e.g., *Isiah B. v. State*, 500 N.W.2d 637, 646 (Wis. 1993) (citing *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting)); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

¹²¹ *G.W.*, 767 So. 2d at 193.

¹²² *Id.*

¹²³ 993 P.2d 771 (Okla. Crim. App. 1999).

marijuana on F.S.E., and when she asked the student about it, F.S.E. told the assistant principal that there was a "roach" in the ashtray of his car, which was parked on school grounds.¹²⁴ He told the assistant principal that he was late for school because he had a flat tire on the way there and some "gentleman" came along, helped him fix the tire, got in the car and smoked the marijuana.¹²⁵ The assistant principal tried unsuccessfully to reach F.S.E.'s parents, and then called a police officer to come to the school and assist her.¹²⁶ Once the officer arrived, the three went to F.S.E.'s car, where the assistant principal directed F.S.E. to open the car and get the roach out of the ashtray.¹²⁷ F.S.E. complied and handed the roach to the officer; the assistant principal then said that she would like to verify the flat tire in the trunk.¹²⁸ F.S.E. opened the trunk and, while doing so, moved a blanket inside the trunk, which caused a second officer who had just arrived on the scene to become concerned.¹²⁹ The second officer moved the blanket and discovered a plastic bag containing a sizable amount of marijuana.¹³⁰

The Oklahoma Court of Criminal Appeals concluded that F.S.E.'s Fourth Amendment rights were not violated by this search.¹³¹ It relied on *T.L.O.* in finding that "[a] school official may search a student or the student's property while either are on school premises without a warrant when there is a reasonable suspicion to believe that school policy or the law has been or is being violated."¹³² In applying *T.L.O.* the court reasoned as follows:

In the present case the Assistant Principal based the search upon a reasonable suspicion. She smelled marijuana. Further, Appellant's own admission to the existence and purported source of the smell satisfies any reasonable suspicion standard. Second, the scope of the search in this case is reasonably related to the circumstances. Appellant advised the Assistant Principal that marijuana was in his car parked on school grounds and after that was retrieved from the car by Appellant, the Assistant Principal asked to see the flat tire to verify Appellant's reason for having the marijuana cigarette in his car. This was not unreasonable.¹³³

¹²⁴ *Id.* at 772.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *F.S.E.*, 993 P.2d 771, 772 (Okla. Crim. App. 1999).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 325 (1985)) (emphasis added).

¹³³ *F.S.E.*, 993 P.2d at 772.

Thus, by upholding the search itself, this court appears to have classified the searched car as part of "the student's property" for Fourth Amendment purposes and implicitly recognized that students have some expectation of privacy in their car when parked on school premises — even if that privacy interest is overcome by a showing of reasonable suspicion.

The Colorado Supreme Court reached a similar conclusion in *People ex rel. P.E.A.*¹³⁴ *P.E.A.* involved the search of a student's car that was suspected of having driven two other students, who intended to sell marijuana at the school, to school that day.¹³⁵ The purpose of the search was to locate the drugs that the other two students had intended to distribute, as searches of their persons revealed nothing.¹³⁶ In finding the car search reasonable under *T.L.O.*,¹³⁷ the Colorado court made some important legal findings. First, the court concluded that students "have a legitimate expectation of privacy, because they carry noncontraband as well as highly personal items with them on school grounds."¹³⁸ That expectation, according to this court, is then balanced in the *T.L.O.* analysis against the state's interests in maintaining discipline and a sound learning environment in arriving at the two-part reasonableness standard.¹³⁹ School officials met that standard in *P.E.A.* due to the close connection between the defendant and the other two students, the limited ways the students could have transported marijuana into the school, and the gravity of the threat of having marijuana sold and distributed at the school.¹⁴⁰

2. Standard of Proof for a Warrantless Search

In all of the above cases, state courts have found that students possess some privacy interest in their cars when parked on school grounds. This conclusion usually is made implicitly by considering the reasonableness of the search of a student's car. After all, if students may not expect any privacy in their cars, then a car search need not satisfy any reasonableness requirement. Many courts have struggled, though, to determine what level of protection students are afforded in their cars under the Fourth Amendment.

A significant number of courts have concluded that the same level of reasonable suspicion as required by *T.L.O.* is required to search a student's car. The *G.W.* court

¹³⁴ 754 P.2d 382 (Colo. 1988).

¹³⁵ *Id.* at 384.

¹³⁶ *Id.*

¹³⁷ *Id.* at 389-90.

¹³⁸ *Id.* at 387.

¹³⁹ *P.E.A.*, 754 P.2d at 387-88.

¹⁴⁰ *Id.* at 389.

seemed to adopt this philosophy in ruling that the search of G.W.'s truck "was justified and was reasonably related to the student's assertion that G.W. had been in the parking lot drinking."¹⁴¹ Likewise, the *F.S.E.* court examined both the student and his property, including his car, within the reasonableness inquiry.¹⁴² Finally, the Colorado Supreme Court in *P.E.A.* determined that the "connection between P.E.A. and F.M. establishes the articulable facts and concomitant rational inferences necessary to create a *reasonable suspicion* that P.E.A. possessed drugs or other contraband [in his car]."¹⁴³

However, the reasonable suspicion standard may not be as sweeping as some courts might think. In *Coronado v. State*,¹⁴⁴ Kim Benning, an assistant principal, found out that Coronado had attempted to sell drugs to another student.¹⁴⁵ Benning questioned Coronado, patted him down, and searched him, finding no contraband but discovering three hundred dollars in Coronado's billfold.¹⁴⁶ When Benning asked if he sold drugs, Coronado replied, "[n]ot on campus."¹⁴⁷ A week later, the school secretary informed Benning that Coronado was leaving school to attend his grandfather's funeral.¹⁴⁸ Benning contacted both a sheriff's officer assigned to the school and the school's security guard, telling them that Coronado was attempting to leave and that Benning "suspected his motives for leaving campus."¹⁴⁹ Benning saw Coronado and asked him where his car was parked; he replied that he did not drive.¹⁵⁰ Benning contacted Coronado's relatives, who told her that his grandfather had not died and that Coronado drove a Buick to school that morning.¹⁵¹ Coronado continually was evasive in his answers to Benning and the officers present, including questions as to which car was his and where it was located.¹⁵² When testifying, Benning conceded that he did not observe Coronado commit any illegal act and was only trying to determine whether he was "skipping school."¹⁵³ Benning then patted down Coronado, finding nothing illegal, and searched him, which included having Coronado remove his shoes and socks, empty his pockets, and pull

¹⁴¹ Covington County v. G.W., 767 So. 2d 187, 194 (Miss. 2000).

¹⁴² *F.S.E. v. State*, 993 P.2d 771, 772 (Okla. Crim. App. 1999).

¹⁴³ *P.E.A.*, 754 P.2d at 389 (emphasis added).

¹⁴⁴ 835 S.W.2d 636 (Tex. Crim. App. 1992).

¹⁴⁵ *Id.* at 637.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Coronado*, 835 S.W.2d at 637.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 637-38.

¹⁵³ *Id.* at 638.

down his pants.¹⁵⁴ When this proved fruitless, the assistant principal and one of the officers searched Coronado's locker, which yielded nothing.¹⁵⁵ They then took Coronado to his car, where they demanded that he open it.¹⁵⁶ When he complied with that demand, one of the officers searched the car and discovered bags of white powder, a triple beam balance, and what appeared to be marijuana.¹⁵⁷ Neither Benning nor the officers ever told appellant of the right to refuse a search of his locker or vehicle.¹⁵⁸

The Court of Criminal Appeals of Texas, sitting *en banc*, determined that the search of Coronado's locker and car failed the second prong of the *T.L.O.* analysis.¹⁵⁹ The court concluded that the search was "reasonable at its inception" because Benning had reasonable grounds to suspect that Coronado might be "skipping" school.¹⁶⁰ Thus, Benning was justified in questioning Coronado about his reasons for leaving and in patting him down for safety reasons.¹⁶¹ However, the subsequent searches of Coronado's clothing and person, his locker, and his car were not "reasonably related in scope to the circumstances which initially justified Benning's interference" with him.¹⁶² Nothing from the pat-down search indicated that Coronado had any contraband with him or in his immediate control, so absent any other statements or discoveries by Benning, nothing justified expanding the search as it was done in this case.¹⁶³ Indeed, the court characterized these actions as "unproductive, progressively intrusive searches culminating in the search of appellant's vehicle" and "excessively intrusive in light of the infraction of attempting to skip school."¹⁶⁴ Thus, the main difference between *Coronado* and the other car cases cited *supra* is that the infraction in question here had no connection to the student's car at all. In evaluating the reasonableness of a car search, then, one may infer that some reasonable connection between the car itself and the charge initiating the search "at its inception" is the key inquiry.

Some states, however, have yet to delineate the standard of proof necessary to sustain a search of a student's car on school grounds. Ohio's courts in *In re*

¹⁵⁴ *Coronado*, 835 S.W.2d at 638.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 638-39.

¹⁵⁷ *Id.* at 639.

¹⁵⁸ *Id.*

¹⁵⁹ *Coronado*, 835 S.W.2d at 641.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Coronado*, 835 S.W.2d at 641.

*Dengg*¹⁶⁵ encountered a case in which the Streetsboro City Schools granted permission to Streetsboro's Police Department to search its high school's lockers for contraband by using drug-sniffing dogs.¹⁶⁶ When that search was completed, the dogs and their handlers "were dispatched" to the school's parking lots.¹⁶⁷ During the search of the lot, a dog "hit" on a vehicle owned by *Dengg*'s father.¹⁶⁸ An officer opened and searched the vehicle and found a drug pipe containing marijuana residue in the vehicle's console.¹⁶⁹ *Dengg* was charged with possession of drug paraphernalia, and at a suppression hearing, a magistrate ruled that the warrantless search of *Dengg*'s vehicle was not reasonable and should be inadmissible.¹⁷⁰ The trial court adopted the magistrate's determination, and the state appealed.¹⁷¹

In reversing the magistrate's ruling and declaring the search of *Dengg*'s car reasonable, the court in a 2-1 decision analyzed the situation curiously. It first declared that the canine drug sniff did not constitute a "search" within the meaning of the Fourth Amendment or under Ohio precedent.¹⁷² Then the court concluded that the drug dog's indication of the presence of drugs created probable cause on its own, despite the lack of individualized suspicion towards *Dengg*.¹⁷³ Finally, once the police established "probable cause to believe that the evidence of a crime will be discovered," they could conduct a warrantless search of the car under the so-called "automobile exception" articulated in *United States v. Ross*,¹⁷⁴ as well as by the Ohio Supreme Court.¹⁷⁵ In so holding, the court ducked two critical issues. First, the court expressly refused to apply *T.L.O.*'s reasonableness standard to justify warrantless police searches of cars on school property unless they fit a specific warrant exception (thus the reference to the "automobile exception").¹⁷⁶ Second, by ruling that the canine detection gave rise to probable cause, not

¹⁶⁵ 724 N.E.2d 1255 (Ohio Ct. App. 1999).

¹⁶⁶ *Id.* at 1256.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Dengg*, 724 N.E.2d at 1257.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1259. Compare *Doe v. Renfrow*, 631 F.2d 91, 92 (7th Cir. 1980) (holding dog sniff of student did not constitute a search), with *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1268 (9th Cir. 1999) (holding that dog sniff of students was Fourth Amendment search and was unreasonable under the circumstances), and *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 481-82 (5th Cir. 1982) (rejecting *Renfrow* rationale and recognizing drug dog's sniff of a person as a search).

¹⁷³ *Dengg*, 724 N.E.2d at 1260.

¹⁷⁴ 456 U.S. 798 (1982).

¹⁷⁵ *Dengg*, 724 N.E.2d at 1259-60 (citing *State v. Mills*, 582 N.E.2d 972, 982-83 (1992)).

¹⁷⁶ *Id.* at 1259.

reasonable suspicion, the court avoided setting the standard for car searches on school property when they are conducted by "school officials or their designees."¹⁷⁷

Despite the uncertainty that *Dengg* created, the vast majority of states have implicitly granted students a reasonable expectation of privacy in cars parked on school property, unless the court elects to apply *G.W.*, *supra*. Therefore, in order to search a student's car, one must obtain a reasonable suspicion that the *car*, not just the student himself as in *Coronado*, may contain evidence of violation of a law or school rule. However, the constitutional problems associated with school searches done by people who are not school officials, but by law enforcement personnel, may overshadow these concerns.

C. Use of Police "Resource Officers" or Security Personnel in Searching Students on School Grounds

The above analysis of students' Fourth Amendment rights on school grounds has presumed that the searches were carried out by school personnel. The analysis becomes more complex, however, when law enforcement officers themselves initiate or complete a search of a student when on school grounds. Indeed, the *T.L.O.* Court specifically declined to discuss the proper standard for assessing a school search's legality when carried out "in conjunction with or at the behest of law enforcement agencies."¹⁷⁸ Furthermore, since *T.L.O.* was decided, more and more police officers and quasi-law enforcement personnel are regularly stationed on public school campuses.¹⁷⁹ This trend, when combined with the Supreme

¹⁷⁷ *Id.*

¹⁷⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 n.7 (1985). Nevertheless, the Court in that footnote hinted at what that standard could be by citing as follows: "*Cf. Picha v. Wielgos*, 410 F.Supp. 1214, 1219-1221 (N.D. Ill. 1976) (holding *probable-cause standard* applicable to searches involving the police.)" *Id.* (emphasis added).

¹⁷⁹ See, e.g., Aaron Baca, *Police, District Create Plan for Safer Schools*, SANTA FE NEW MEXICAN, Dec. 3, 1994, at B1 (community-based policing plan would include stationing officers "on the campus of each secondary school -- including the district's four junior high and middle schools"); Angie Gaddy, *School Safety Valve*, SPOKESMAN-REVIEW (SPOKANE, WA), Aug. 21, 1999, at V1 (plainclothes sheriff's detective placed full-time at Central Valley High School as part of sheriff's "vision of seeing a uniformed officer at every Spokane Valley high school"); Stacy D. Johnson, *Students to See Changes*, THE DAILY OKLAHOMAN, Sept. 7, 1992, at COMMUNITY III ("Security measures will be stepped up this year as full-time campus officers patrol not only high schools but middle schools, too."); Ledyard King, *Schools, Deputies Disagree on Crimes*, SUN-SENTINEL (FT. LAUDERDALE), Apr. 4, 1996, at 1A (53 sheriff's officers were stationed in Broward County schools in 1996); Rene Romo, *Police Patrol School; Cruces Seeks Funding*, ALBUQUERQUE JOURNAL, Oct. 13, 1999, at B3 ("Four police officers were stationed Tuesday at Mayfield [High

Court's inaction in settling what standard of review to apply when law enforcement initiates or carries out a school search, has created a great deal of confusion for public school administrators regarding what level of proof they (or the police) may need when searching a student himself, his locker, his car, or anything else which might contain a student's possessions. This problem has been exacerbated by the fact that state courts have tried to fill this void that *T.L.O.* left open, but have done so in a conflicting fashion.

1. The Chasm Among States — Reasonable Suspicion or Probable Cause?

When confronted with officer involvement in school searches, states take a wide variety of approaches, some of which appear to be *per se* rules establishing standards of probable cause or reasonable suspicion whenever law enforcement of any variety enters the picture. Florida has recently taken such a stance in two state appellate decisions rendered in the past five years.

First, in *State v. D.S.*,¹⁸⁰ Karen Robinson, a middle school assistant principal, received four reports that D.S., a student, was offering to sell drugs at the school.¹⁸¹ She contacted a second assistant principal, and the two officials escorted D.S. to Robinson's office, where a Dade County Public School Police Officer was sitting at Robinson's desk doing paperwork.¹⁸² The officer continued his work as Robinson stated to D.S. that she believed he had contraband on him and ordered D.S. to empty his pockets onto the table.¹⁸³ After D.S. placed a plastic bag of marijuana on the table, Robinson asked the officer to come forward and informed him that D.S. had marijuana on him, which violated school rules.¹⁸⁴ The next day, Florida filed a petition for delinquency against D.S.¹⁸⁵

D.S. moved to suppress the marijuana at trial, arguing that probable cause was required to search him because a school police officer was present when the search was conducted.¹⁸⁶ The trial court agreed, relying on *M.J. v. State*,¹⁸⁷ which stated that an officer must have probable cause for a search where he "directs, participates,

School] in response to an incident last week in which they said three masked students carrying a bat, tire iron and metal rod entered an algebra class looking to attack another student."').

¹⁸⁰ 685 So. 2d 41 (Fla. Dist. Ct. App. 1996).

¹⁸¹ *Id.* at 42.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *D.S.*, 685 So. 2d at 42.

¹⁸⁶ *Id.*

¹⁸⁷ 399 So. 2d 996 (Fla. Dist. Ct. App. 1981).

or acquiesces in a search conducted by school officials.”¹⁸⁸ The District Court of Appeals of Florida, Third District, reversed this ruling on three grounds. It first concluded that the mere presence of the officer did not trigger the *M.J.* analysis because he did not participate, direct, or acquiesce in the search.¹⁸⁹ It then found that *M.J.* did not correctly state Florida law.¹⁹⁰ Rather, the court held that “school board police officers, who participate in searches initiated by school officials, or who act on their own authority,” need only satisfy the reasonable suspicion standards set out in *T.L.O.*¹⁹¹ Finally, the court ruled that even if probable cause was required, the record provided ample evidence that such a standard would have been met.¹⁹² The critical factor for the court in applying the reasonable suspicion standard to the facts in *D.S.* appears to be that the officer was an employee of the Dade County school board as authorized by Florida statute.¹⁹³ Thus, had an outside police officer entered the school and affirmatively searched a student, Florida’s courts might submit that search to a probable cause analysis. However, Florida has not encountered such a case to date and, indeed, has reaffirmed the distinction the *D.S.* court drew.¹⁹⁴

Other states, though, have favored the probable cause approach. In *State v. Tywayne H.*,¹⁹⁵ two uniformed police officers provided security at an after-prom dance held in the local high school’s gymnasium.¹⁹⁶ Two other officers arrived shortly after the dance began, and all four were present at about 12:45 a.m., when two students entered the gym through a side door.¹⁹⁷ The four officers surrounded the two students, one of whom smelled of alcohol, the other admittedly having consumed one beer outside.¹⁹⁸ The officers asked the students to step outside, frisked them, and uncovered a semi-automatic handgun.¹⁹⁹ The trial court denied the students’ motion to suppress the gun, and Tywayne H. appealed.²⁰⁰

¹⁸⁸ *Id.* at 998.

¹⁸⁹ *D.S.*, 685 So. 2d at 42.

¹⁹⁰ *Id.* at 43.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 42 (citing FLA. STAT. ANN. § 230.23165). Interestingly, this statute has since been repealed by 1992 FLA. LAWS ch. 92-136, § 68.

¹⁹⁴ See *State v. Whorley*, 720 So. 2d 282, 283 (Fla. 1998) (“The cases uniformly hold that . . . school board employees need only reasonable suspicion to justify the search.”) (emphasis added).

¹⁹⁵ 933 P.2d 251 (1997), cert. denied, *State v. Tywayne H.*, 123 N.M. 83 (1997).

¹⁹⁶ *Tywayne H.*, 933 P.2d at 253.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

The New Mexico Court of Appeals reversed the lower court's ruling.²⁰¹ Specifically, it found support in both *T.L.O.* and *Acton* that the rationale for lowering the standard for searches done by school officials does not necessarily apply to searches on school grounds conducted by police officers.²⁰² The court found significant support in Justice Powell's concurrence in *T.L.O.*:

The special relationship between teacher and student . . . distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.²⁰³

In this case, the court found that the search was conducted "completely at the discretion of the police officers," the only contact with a school official being one officer's question to a coach concerning whether students were allowed to enter the gym through the side door.²⁰⁴ Thus, without any intervention or direction provided by school officials, the court applied the probable cause standard to this search and excluded the evidence it obtained.

Other state courts have indicated that at some future date they may adopt such a bright-line standard. The Colorado Supreme Court in *P.E.A.* noted that, if the questioning that led to the search of the student's car "had been by law enforcement officials," then it would have evaluated the search under a probable cause analysis.²⁰⁵ Similarly, the *Dengg* court refused to apply a reasonableness standard for warrantless police searches on school grounds "until relevant precedent or legislative enactments direct us to hold otherwise."²⁰⁶

Other states are beginning to retract their earlier bright-line positions. New Mexico's Court of Appeals, for example, seems to have hedged on the probable

²⁰¹ *Tywayne H.*, 933 P.2d at 258.

²⁰² *Id.* at 255.

²⁰³ *Id.* (quoting *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring)).

²⁰⁴ *Tywayne H.*, 933 P.2d at 254.

²⁰⁵ *People ex rel. P.E.A.*, 754 P.2d 382, 386 (Colo. 1988).

²⁰⁶ *In re Dengg*, 724 N.E.2d 1255, 1259 (Ohio Ct. App. 1999).

cause standard.²⁰⁷ In doing so, that court made the following observations:

Any other conclusion, such as requiring probable cause of school resource officers when school officials only need reasonable grounds to search, might serve to encourage teachers and school officials, who generally are untrained in proper pat down procedures or in neutralizing dangerous weapons, to conduct a search of a student suspected of carrying a dangerous weapon on school grounds without the assistance of a school liaison officer . . . [I]t could be hazardous to discourage school officials from requesting the assistance of available trained police resources. . . . The proper standard . . . should not promote unreasonable risk-taking.²⁰⁸

The New Mexico appellate court also noted that school resource officers in most schools serve multiple purposes, including both preventing crime and assisting school administration in maintaining order and an environment conducive to learning.²⁰⁹ Thus, a *per se* rule governing officers in all scenarios, including those where they are not necessarily acting in a law enforcement capacity, would seem to penalize both the school and law enforcement for trying to fill multiple roles within the school. Not only does this more fact-specific approach make it more difficult to provide guidance to individual school districts, it also raises two unclear sub-issues: (1) what type of police officers may adopt the role of "school official;" and (2) what level of outside police involvement raises the level of scrutiny to probable cause.

2. Who Counts as Part of a "Law Enforcement Agency" or "School Official?"

Approaches to answering this question vary significantly. For example, *Farias v. State*²¹⁰ involved two separate investigations by a school district police officer and a truancy officer that converged in an inventory search of Farias's car on school grounds.²¹¹ In upholding the search under a reasonable suspicion analysis, the Texas appellate court did not differentiate between the two officers in applying *T.L.O.* and *Coronado* to the facts of this case.²¹² One might assume from this approach, then, that this court did not look as much to the nature of the officers'

²⁰⁷ *In re Josue T.*, 989 P.2d 431 (1999), *cert. denied*, 128 N.M. 149 (1999).

²⁰⁸ *Id.* at 437-38 (emphasis added).

²⁰⁹ *Id.* at 437 (citing *In re Angelia D.B.*, 564 N.W.2d 682, 690 (Wis. 1997)).

²¹⁰ 1995 WL 737473 (Tex.App.-Hous. (1 Dist.) 1995).

²¹¹ *Id.* at *1.

²¹² *Id.* at *3-*4.

involvement, but rather, to the sheer location of the investigation — the school — in mechanically applying *T.L.O.* Likewise, in *State v. Felicelli*,²¹³ the Wisconsin Court of Appeals characterized the “police liaison officer,” who supervised an assistant principal’s search of a student, as a “school official” on par with the assistant principal.²¹⁴ Many courts, however, struggle in differentiating between police officers who regularly patrol schools and those who act as “resource” officers in schools, providing support to school administration.

The Superior Court of Pennsylvania in *Commonwealth v. Williams* confronted one potential statutory solution to this judicial quandary.²¹⁵ Robert Fazden, Chief of the School Police for the City of Pittsburgh School District, was called to the area of a local high school to investigate possible truant activity.²¹⁶ On a city street adjacent to school property, he “found two truant students and directed them to proceed directly to school.”²¹⁷ While doing this, he had an encounter with a car whose three occupants “stopped and looked at him, made a U-turn, gave him the proverbial finger, and left the area.”²¹⁸ Fazden located the car parked on a city street a block or two away from the incident, off school property.²¹⁹ He then confronted its occupants, directed them to school, and notified school personnel, requesting they hold the students until the matter could be resolved.²²⁰ Chief Fazden then returned to the parked vehicle and looked into it.²²¹ He “saw on the back floor, in plain view, a sawed-off shotgun that was partially wrapped in clothing, and a shotgun shell.”²²² City police were called to investigate the scene, but without waiting for them to arrive, other school police joined Chief Fazden in opening the car.²²³ Seeing the barrel of a revolver protruding from under the driver’s seat, they looked under that seat and found two more revolvers.²²⁴ The school police turned the weapons over to city police, who arrived about five minutes later.²²⁵

²¹³ 600 N.W.2d 54 (Wis. Ct. App. 1999).

²¹⁴ *Id.* (“[T]he information provided by the informant gave school officials reasonable grounds for believing that a search of Felicelli’s person would reveal that [he] possessed marijuana[.]”) (emphasis added).

²¹⁵ 749 A.2d 957 (Pa. Super. Ct. 2000).

²¹⁶ *Id.* at 958.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Williams*, 749 A.2d at 958.

²²¹ *Id.* at 959.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Williams*, 749 A.2d at 959.

Chief Fazden and his officers were School Police Officers as defined by Pennsylvania statute.²²⁶ As such, their duties were specifically delineated, and according to this court, so were the places at which a School Police Officer could act.²²⁷ In particular, one portion of the statute empowers the officers “[t]o enforce good order in school buildings, on school buses and on school grounds in their respective school districts.”²²⁸ The court read the language of this statute as circumscribing the authority of School Police Officers in a manner akin to university campus police and housing authority police.²²⁹ In doing so, it refrained from extending the officers’ jurisdiction to “engage in judicial legislation to effectuate a policy of fostering gun-free school zones.”²³⁰ Because the court determined that the officers exceeded their statutory authority in searching the car off-campus, it never reached the question of whether the search was constitutionally permissible. Thus, in lieu of significant guidance from the judicial branch, school districts might consider tackling this problem by asking for legislative grants of special police to public schools, rather than working out individual relationships between each school and its local police force. Alternatively, this legislative grant might simply authorize schools to contract with local police forces, or individual officers, and spell out the particular activities in which these officers may participate. These solutions have the potential of greatly reducing the uncertainty surrounding which officers qualify as school officials. However, the trade-off for such Fourth Amendment clarity would likely involve much higher public school costs, an exchange which those who fund public schools may be unlikely to accept. In addition, one significant benefit of school partnerships with local police forces has been that the two entities seem to work well together in dealing with troubled youth who may present discipline problems both in school and in the community. This is particularly true in terms of information-sharing – for often public schools may not be aware of a student’s criminal record, nor may local police readily have access to a first-time juvenile offender’s grades or school disciplinary records. Thus, schools may feel significant administrative, as well as fiscal, costs if forced to adopt Pennsylvania’s approach due to judicial inaction in this area.

Public schools may not only balk at further straining already tight budgets, but many may also simply not recognize the magnitude of the Fourth Amendment questions that school resource officers can create. As a result, courts will then be left with the difficulty of delineating when an officer ceases acting on behalf of the

²²⁶ 24 P.S. § 7-778.

²²⁷ *Williams*, 749 A.2d at 960-61 (citing 24 P.S. § 7-778(c)(1)).

²²⁸ *Williams*, 749 A.2d at 960.

²²⁹ *Id.* at 961.

²³⁰ *Id.* at 962.

school and begins acting as part of law enforcement. Courts to date have developed widely divergent responses as to what factor(s) weighs most heavily in such analysis; in some jurisdictions, the locus of the search remains paramount, while other courts look to the officer's statutory grant of jurisdiction, and still other states believe the nature of the offenses being investigated tip the scales. Such a vast array of decisions practically begs the Supreme Court to step in and define precisely how to interpret its *T.L.O.* directives, as it recently has done in other areas of Fourth Amendment jurisprudence.

One state may have discovered a workable solution to this quandary. Washington's state courts recently affirmed in *State v. B.A.S.*²³¹ their approach of outlining relevant factors in a school search situation. Auburn Riverside High School's attendance officer observed B.A.S. and three other young boys outside the school and concluded they had been off campus, which violated the school's closed campus policy.²³² After checking the attendance records and confirming that B.A.S. was missing class, the officer escorted the four to his office and, invoking the school's search policy, asked B.A.S. to empty his pockets. The purpose of this search was to ensure that the students had not brought any prohibited items onto campus.²³³ The search revealed a black case containing several baggies filled with marijuana.²³⁴ B.A.S. was then charged in juvenile court with possession of marijuana and unsuccessfully challenged the search on Fourth Amendment grounds.²³⁵

The Court of Appeals of Washington, Division 1, unanimously reversed the juvenile conviction, finding that the attendance officer's suspicion of a closed campus policy violation did not create reasonable suspicion that a subsequent search would reveal evidence of B.A.S. having violated that policy, or any other law or school rule.²³⁶ In so holding, the court made the following observations:

Washington courts have established the following factors as relevant in determining whether school officials had reasonable grounds for a search: the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of

²³¹ 13 P.3d 244 (Wash. 2000).

²³² *Id.* at 245.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *B.A.S.*, 13 P.3d at 246.

the information used as a justification for the search.²³⁷

The court concluded that the search of B.A.S. met none of these factors. Specifically, it reasoned that “[t]here must be a nexus between the item sought and the infraction under investigation,” rejecting the state’s “blanket supposition that ‘[b]y violating school rules, a student necessarily draws individualized suspicion on himself’” sufficient to justify an automatic search for contraband.²³⁸ The *B.A.S.* court also concluded that the underlying purpose of the school’s search policy, which was to “ensure the safety of students at school and to ensure that prohibited items are not brought onto the school grounds,” was not enough standing alone to provide a reasonable basis for searching a student suspected of going off campus.²³⁹

Washington’s approach to officer searches of students, as well as to school searches generally, seems to answer many of the safety concerns raised by other state courts that limit the privacy interests of students. For example, because one factor in Washington’s balance involves the prevalence and seriousness of the problem at which the search is directed, presumably the state’s case would have been stronger if Auburn Riverside had recently encountered serious problems with drugs or weapons.²⁴⁰ Similarly, had B.A.S.’s history or school record indicated repeated problems with bringing contraband on campus, then the officer might have had reasonable suspicion to search him; the *B.A.S.* court completely shut down the state’s attempt to establish *per se* reasonable suspicion by virtue of a rule violation of any type.²⁴¹ But perhaps the most compelling part of Washington’s school search analysis is that it predates *T.L.O.*²⁴² This fact illustrates how easy it would be for the Supreme Court to adopt similar points of analysis from which lower courts could more clearly derive a framework for evaluating reasonable suspicion from case to case.

3. How Much Participation Triggers Probable Cause?

Unfortunately, for many state courts, the line to draw with officer searches seems to be one of degree rather than of type, further diluting what little direction

²³⁷ *Id.*

²³⁸ *Id.* at 246-47.

²³⁹ *Id.* at 247.

²⁴⁰ *Id.*

²⁴¹ *B.A.S.*, 13 P.3d at 247.

²⁴² *Id.* at 246 n.8 (“Although our Supreme Court first enunciated these factors in a pre-*T.L.O.* case, *State v. McKinnon*, 88 Wash.2d 75, 81, 558 P.2d 781 (1977), the express holding in that case was that a school official need only have ‘reasonable grounds’ to search a student, and the *McKinnon* factors are therefore consonant with the holding in *T.L.O.*”).

has been given to school districts in this area of the law. Specifically, the focus to date has zeroed in on the level of participation or role taken by the law enforcement agent.

Courts that have surveyed the range of discussions and analyses by other jurisdictions have generally lumped these decisions into three categories. First, when a school official initiates a search or the police involvement is minimal, the *T.L.O.* two-prong reasonableness standard has been applied.²⁴³ Second, the same standard has been applied when a school police or liaison officer acts on his or her own authority.²⁴⁴ Finally, some courts have held that probable cause attaches where "outside" police officers initiate a student search as part of their own investigation, or in cases where school officials, in the language of *T.L.O.*, act "at the behest of" these "outside" officers.²⁴⁵

If a consensus exists in this area, it might be that the probable cause/reasonable suspicion question turns on who gets the proverbial ball rolling. For example, probable cause seems to enter the analysis only when outside officers initiate an investigation or search. Presumably, many courts that hold school police to a reasonable suspicion standard would hold outside police to a similar standard if they simply happened to be in the area at the time of the incident and were requested by school administrators to assist. The Oklahoma court in *F.S.E.* hinted at this distinction when it declared that a school official "may utilize law enforcement to assist with an investigation or search of a student while on school premises so long as the . . . official has a reasonable suspicion . . . and is acting in conjunction with the police and not at the behest of the police"²⁴⁶ Similarly, the Supreme Court

²⁴³ See, e.g., *In re Josue T.*, 989 P.2d 431, 436 (N.M. Ct. App. 1999); *In re Angelia D.B.*, 564 N.W.2d 682, 687 (Wis. 1997) (citing *Cason v. Cook*, 810 F.2d 188, 191-92 (8th Cir. 1987) (applying the reasonable grounds standard where a school official acted in conjunction with a liaison officer in response to a report of stolen items); *People v. Alexander B.* (*In re Alexander B.*), 220 Cal. App. 3d 1572, 270 Cal. Rptr. 342, 343-44 (Cal. Ct. App. 1990) (applying reasonable grounds standard where school official initiated an investigation and requested police to detain a group of students and search for a weapon); *J.A.R. v. State*, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997) (applying reasonable grounds standard where a liaison officer conducted a search of a student after a school official had initiated the investigation)).

²⁴⁴ See, e.g., *Josue T.*, 989 P.2d at 437-38; *Angelia D.B.*, 564 N.W.2d at 687 (citing *People v. Dilworth*, 661 N.E.2d 310, 317, *cert. denied*, *Dillworth v. Illinois*, 517 U.S. 1197 (1996); *In re S.F.*, 607 A.2d 793, 794 (Pa. Super. Ct. 1992) (applying reasonable grounds standard to search conducted by plainclothes police officer for the school district)).

²⁴⁵ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985); see, e.g., *State v. Tywayne H.*, 933 P.2d 251 (1997); *F.P. v. State*, 528 So. 2d 1253, 1254-55 (Fla. Dist. Ct. App. 1988).

²⁴⁶ *In re F.S.E.*, 993 P.2d 771, 773 (Okla. Crim. App. 1999) (citing *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987)) (emphasis added).

of Wisconsin has recently noted that, although a police investigation encompassing the search of a student usually lacks Justice Powell's "commonality of interests" between teacher and student, an investigation initiated by school officials in conjunction with police differs because "the school has brought the police into the school-student relationship."²⁴⁷

However, some courts, particularly when analyzing car searches, have focused much of their analysis on where the search takes place. Indeed, the *G.W.* court emphasized the notice provided to students that their cars could be searched at any time.²⁴⁸ The *F.S.E.* court also brought the search in question under the reasonable suspicion rubric by characterizing the car as part of the student's "property" that was subject to search.²⁴⁹ As such, the future remains unclear as to how a court might resolve a scenario where the issue of who initiates the investigation or search and the location of the search itself squarely clash. For instance, could outside police search a student's car on school grounds if the school handbook provides, as in *G.W.*, that cars will be routinely checked or searched? The *dicta* from many of the courts limiting students' privacy interests has hinted at widespread fear of crime in public schools, so that indication might weigh in favor of the search.²⁵⁰ However, some states have elected to demand probable cause when outside patrol engages in *any* search on school grounds. These lines of gradation do little to help the majority of school districts, though, whose policies and arrangements with law enforcement agencies range between the polar extremes. Unfortunately, these extremes seem to be the only places where any Fourth Amendment clarity exists.

III. CONCLUSION

As illustrated *supra*, the lack of constitutional clarity in these areas is precisely why the Supreme Court needs to intervene and clear up the constitutional standards in these increasingly complex fact situations. State courts are striving to answer these concerns, but they can only provide limited guidance. Some legislative and executive solutions may present themselves in certain cases, but the Supreme Court possesses the best vantage point from which to help school districts by providing the necessary guidance in formulating adequate guidelines for school searches. Not only would a uniform explication of *T.L.O.* potentially reduce the number of state judicial challenges to questionable school searches, but a clearer standard would

²⁴⁷ *Angelia D.B.*, 564 N.W.2d at 688 (citing *T.L.O.*, 469 U.S. at 349 (Powell, J., concurring)).

²⁴⁸ *Covington County v. G.W.*, 767 So. 2d 187, 193 (Miss. 2000).

²⁴⁹ *F.S.E.*, 993 P.2d at 772.

²⁵⁰ *See, e.g., supra* note 88 and accompanying text.

also allow school districts from different states to accurately collaborate regarding school search policies and ultimately arrive at policies that serve the goals of the school and protect student rights. Sixteen years have passed since the Court decided *T.L.O.*, and many significant constitutional questions remain open. Now is the time for the Court to grant *certiorari* and resolve some of these pressing questions before the thicket of state and federal decisions becomes too unworkable to sort out.

Should the Court endeavor to clarify what *T.L.O.*'s "reasonableness under all the circumstances" test actually means, it needs to begin by outlining which factors are most important in the two-part balance. The three commonplace fact scenarios this note outlines all encounter the same fundamental problem: different courts emphasize wildly different factors. Some courts place heavy weight on the locus of the search; others focus on who completes the search; still other courts examine who initiates the investigation leading up to the search; and a significant number of state courts (and state legislatures) rely heavily on the provision of notice to students that searches may occur at any time. Surely this wide spectrum of analysis is not the kind of jurisprudential result the *T.L.O.* court envisioned when it decided that case. As the title of this note suggests, the existence of such dissonant state decisions has led to mass confusion for schools themselves, which feel pressure to both adopt overzealous search policies to ward off threats of violence and hesitate in applying these policies for fear of legal action. At least one state's judicial system (Washington) has substantially answered many of these concerns by iterating what factors are relevant in a school search.²⁵¹ The Court has a unique opportunity to clarify and revisit its analysis from sixteen years ago in the same manner, and should do so quickly. The welfare of school districts, as well as of schoolchildren themselves, may hang in the balance.

Jason E. Yearout

²⁵¹ *State v. B.A.S.*, 13 P.3d 244, 246 (Wash. Ct. App. 2000) (citing *State v. McKinnon*, 558 P.2d 781 (Wash. 1977); *State v. Slattery*, 787 P.2d 932 (Wash. Ct. App. 1990); *State v. Brooks*, 718 P.2d 837 (Wash. Ct. App. 1986)).