CONSTITUTIONAL LAW—SCHOOL OFFICIALS IN CARRYING OUT SEARCHES ACT AS REPRESENTATIVES OF THE STATE AND ARE SUBJECT TO THE LIMITS OF THE FOURTH AMENDMENT WHICH REQUIRES THAT A SEARCH OF A STUDENT BE REASONABLE UNDER ALL THE CIRCUMSTANCES OF THE SEARCH.—*New Jersey v. T.L.O.* (U.S. Sup. Ct. 1985).

A teacher discovered respondent T.L.O.,[1] then a fourteen-year-old freshman in high school, smoking in a lavatory with another girl.[2] Upon questioning by the vice-principal, T.L.O. denied having smoked in the lavatory, claiming that she was not a smoker.[3] The vice-principal[4] demanded to see her purse.[5] He opened the purse and removed a pack of cigarettes.[6] He also discovered cigarette rolling papers.[7] The discovery of cigarette rolling papers caused the vice-principal to suspect that a more thorough search[8] of the purse would reveal evidence of drug use.[9] At the police station a second search revealed a small quantity of marijuana, drug paraphernalia, a list of people who owed T.L.O. money and letters which implicated her in drug dealing.[10] A confession was obtained from T.L.O. at the police station that she had been selling marijuana at the high school.[11]

The State of New Jersey brought delinquency charges against T.L.O. in the state's juvenile court.[12] The juvenile court denied a motion to suppress

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1. "T.L.O." are the initials of Terry Lee Owens. Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A. J. 51 (1985).

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

3. *Id.* at 736-37.

4. Ironically, the vice-principal who searched T.L.O.'s purse is now employed in a ladies handbag business. Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A. J. at 51, 54 (1985).

5. New Jersey v. T.L.O., 105 S. Ct. at 737.

6. *Id.* Possession of cigarettes was not a violation of school rules. State *ex rel.* T.L.O., 94 N.J. 331, _, 463 A.2d 934, 942 (1983). The New Jersey Supreme Court found that since mere possession of cigarettes was not a violation of a school rule, it had no direct bearing on the suspected violation. *Id.* at _, 463 A.2d at 942.

7. New Jersey v. T.L.O., 105 S. Ct. at 737.

8. *Id.* In his dissent, Justice Brennan wrote that the "mere presence without more of such a staple item of commerce" is not sufficient to support an inference that T.L.O. was in possession of marijuana. *Id.* at 758 (Brennan, concurring in part and dissenting in part).

9. *Id.* at 745.

10. *Id.* at 737. A more detailed list is found in the New Jersey Supreme Court's opinion: metal pipe, empty plastic bags, "one plastic bag containing a tobacco-like substance," an index card which read "People who owe me money", $40.00 in mostly one-dollar bills and letters from T.L.O. and another student with language indicating drug dealing by T.L.O. State *ex rel.* T.L.O., 94 N.J. 331, _, 463 A.2d 934, 936 (1983).

11. *Id.* at _, 463 A.2d at 936.

12. *Id.* at _, 463 A.2d at 936-37.

evidence found in her purse and her confession.[13] It found that the fourth amendment[14] did apply to searches conducted by school officials but the search did not violate the fourth amendment.[15] Because the vice-principal had a reasonable suspicion that a school rule had been violated, he was justified in making a limited search of the purse.[16] Upon discovery of rolling papers in "plain view,"[17] further searching was warranted to discover the nature and extent of drug related activities.[18] The juvenile court found T.L.O. delinquent.[19]

The appellate division affirmed the finding that there had been no fourth amendment violation, but vacated the adjudication of delinquency and remanded to the juvenile court to determine whether T.L.O.'s confession was made subsequent to a knowing and voluntary waiver of her fifth amendment rights.[20] The New Jersey Supreme Court, upon T.L.O.'s appeal on the fourth amendment issue, found that the evidence seized in her purse should have been suppressed and reversed the appellate division.[21] The New Jersey Supreme Court agreed with the juvenile court's standard of "reasonableness," but found that since possession of cigarettes did not violate school rules, a search for mere impeaching evidence was unreasonable.[22] The United States Supreme Court *held*, reversed.[23] The fourth amendment's prohibition against unreasonable searches and seizures applies to school officials conducting searches and the legality of a search will depend upon the reasonableness, under all the circumstances, of the search. *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985).

The Court's decision in *T.L.O.* which guaranteed fourth amendment protections against unreasonable school searches is consistent with prior de-

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13. State *ex rel.* T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (Middlesex Co. Ct. 1980).

14. The fourth amendment provides:

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

U.S. CONST. amend. IV.

15. State *ex rel.* T.L.O., 178 N.J. Super. at _, 428 A.2d at 1334.

16. *Id.* at _, 428 A.2d at 1334.

17. New Jersey v. T.L.O., 105 S. Ct. 733, 737 (1985). The "plain view" doctrine provides that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Harris v. United States, 390 U.S. 234, 236 (1968).

18. State *ex rel.* T.L.O., 178 N.J. Super. _, 428 A.2d at 1334.

19. *Id.* at _, 428 A.2d at 1334.

20. State *ex rel.* T.L.O., 185 N.J. Super. 279, ___, 448 A.2d 493, 493 (Super. Ct. App. Div. 1982).

21. State *ex rel.* T.L.O., 94 N.J. 331, _, 463 A.2d 934, 944 (1983).

22. *Id.* at _, 463 A.2d at 942. The search for evidence to impeach T.L.O. might have been valid but for the New Jersey Supreme Court's finding that the vice-principal had no more than a "hunch" that the purse contained cigarettes. *Id.* at _, 463 A.2d at 942.

23. New Jersey v. T.L.O., 105 S. Ct. at 747.

cisions which established fourteenth amendment[24] due process[25] and first amendment[26] free speech rights to students.[27] The extension of constitutional protections to students began as early as 1943 with *West Virginia State Board of Education v. Barnette*.[28] In *Barnette*, the Court struck down a board of education's requirement that students recite the pledge of allegiance while saluting the flag on grounds that the rule was an unconstitutional violation of students' first[29] and fourteenth amendment rights.[30] The Court in *Barnette* stated that boards of education were not to be considered as private entities not subject to fourth amendment constraints; "[t]he [f]ourteenth amendment, . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."[31]

School officials have also been subject to first amendment constraints.[32] In *Tinker v. Des Moines Independent Community School District*,[33] the Court wrote that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[34] In *Tinker*, school officials could not prohibit students from exercising their rights to express their views on the Vietnam War through the non-disruptive act of wearing black arm bands at school.[35] The Court also concluded that students are "possessed of fundamental rights which the State must respect, just as they themselves respect their obligations to the State."[36]

Due process protections for students were established in *Gross v. Lo-*

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24. The fourteenth amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, §1.

25. *See infra* notes 28-31 and accompanying text.

26. The first amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

27. *See infra* notes 32-36 and accompanying text.

28. 319 U.S. 624 (1943).

29. *Id.* at 641. Parents of school children who were required to salute the flag sought an injunction against the rule on the grounds that their religious belief as Jehovah's Witnesses prevented them from saluting the flag. *Id.* at 629.

30. *Id.* at 637.

31. *Id.*

32. *See infra* notes 33-36 and accompanying text.

33. 393 U.S. 503 (1969).

34. *Id.* at 506. This finding was reaffirmed recently in *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), where the Supreme Court held that a school board could not remove books from school libraries because some members disapproved of some of the ideas in the books. *Id.* at 872.

35. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). The Court recognized the special importance of protecting students constitutional rights while they attend school. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 512 (citations omitted).

36. *Id.* at 511.

pez[37] where the Court found that the due process clause of the fourteenth amendment required the observance of "fundamentally fair procedures" for expulsion or suspension of students.[38] Notice and opportunity to be heard were found to be minimal due process requirements.[39] The *T.L.O.* decision and its predecessors,[40] by extending constitutional protections to students while on the school grounds, help prevent a hypocritical condition where teachers entrusted with educating students in principles of our constitutional system teach by example that those rights do not apply to students while they are within the boundaries of the school.[41]

Although the Court concluded that its finding that the fourth amendment applies to the states and to their public school officials through the fourteenth[42] was sufficient to determine that the fourth amendment applies to school searches,[43] it went on to dispose of two arguments proposed by the State of New Jersey.[44] The Court rejected the state's argument that the history of the fourth amendment indicates that the amendment was only intended to apply to searches and seizures by law enforcement officers.[45] The language of the fourth amendment does not state that it applies only to law enforcement authorities but rather prohibits "unreasonable searches and seizures" generally.[46] The Court noted that " '[t]he basic purpose of this [a]mendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' "[47] In order to protect this interest, the fourth amendment has been interpreted to apply to "governmental action."[48] These activities may include investigations by civil as well as criminal authorities.[49] The fourth amendment has been applied to administrative

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37. 419 U.S. 565 (1975). Nine high school students brought a class action suit after having been suspended without a hearing from school for ten days for misconduct. *Id.* at 567. They successfully argued that the state statute which permitted the suspensions without a hearing unconstitutionally deprived them of their right to public education. *Id.*

38. *Id.* at 574. Even the least amount of exclusion from the education process was determined to be significant. *Id.* at 567.

39. *Id.* at 584. Additional requirements such as right to counsel and right to confront and cross-examine witnesses were not deemed necessary where informal hearings gave the student an opportunity to be heard. *Id.*

40. *See supra* notes 28-37 and accompanying text.

41. New Jersey v. T.L.O., 105 S. Ct. at 750 (Brennan, J., concurring in part and dissenting in part).

42. *Id.* at 740.

43. *Id.*

44. *See infra* notes 45-46 and accompanying text.

45. New Jersey v. T.L.O., 105 S. Ct. at 740.

46. *See supra* note 14 and accompanying text. *See generally* Camara v. Municipal Court, 387 U.S. 523 (1967).

47. New Jersey v. T.L.O., 105 S. Ct. at 740 (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

48. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

49. Camara v. Municipal Court, 387 U.S. at 528. *See generally* See v. City of Seattle, 387

searches based on the rationale that the same danger of encroaching on individuals' right to privacy is present when the search and seizure is conducted by an agency as when it is done by the police.[50]

A finding that the fourth amendment applies to governmental action is not dispositive of the question of whether it applies to school officials.[51] Some courts have found that teachers and administrators are acting in *loco parentis* when searching a student for evidence of school rule violations rather than conducting the search as an arm of the government.[52] This *loco parentis* argument, simply stated, is that parents delegate part of their parental authority to school officials who may exercise the power of parental discipline as may be reasonably necessary to enable them to carry out their task of educating students.[53]

There is a fatal flaw in the *loco parentis* argument in which the source of the power of school officials to discipline students originates from students' parents, which the Court[54] and some legal scholars[55] have recognized: school officials have an independent source of authority derived from compulsory education laws.[56] Parents are not given a choice as to whether or not they may delegate their parental disciplinary power to school officials.[57]

U.S. 541 (1967).

50. Camara v. Municipal Court, 387 U.S. at 533.

51. *See infra* note 52 and accompanying text.

52. *See In re* G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970) (search of a student's pockets was valid); *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969) (vice-principal, in searching a locker was not acting as a governmental official); People v. Jackson, 165 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972) (school official's search immediately prior to the arrival of the police was a private action); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (N.Y. Crim Ct. 1970) (dean of students considered a private person for the purposes of a search of a student); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970) (school official demanded disclosure of the contents of student's pockets).

53. *See* People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731, *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 33 N.Y.S.2d 167 (1972).

54. New Jersey v. T.L.O., 105 S. Ct. at 741. The *loco parentis* argument was stated in *Mercer*: "[A] parent may delegate part of parental authority to the schoolmaster '. . . who is then *in loco parentis*, and has such a portion of the power of the parent . . . as may be necessary to answer the purposes for which he is employed.' " Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970) (quoting 1 W. BLACKSTONE, COMMENTARIES 453).

55. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 765-68 (1974) [hereinafter cited as Buss].

56. *Id.* at 767.

57. *Id.* The teacher may have significantly different interests in a search than a parent:

> One of the things that makes *in loco parentis* such an erroneous phrase in this context [school search] is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate, and permanent child-parent relationship.

Id. at 768.

Most of the reported cases which have characterized school official searches of students as private action have involved a search for illegal drugs.[58] This action is properly characterized as a police action, investigation of criminal activity and protection of the remaining student body from harmful effects of such anti-social conduct.[59] A system that permits school officials to conduct a search in a manner that would invalidate the search if a law enforcement officer had been involved only operates as an incentive for school officials to conceal cooperative efforts where educators become agents of the police.[60] In finding that teachers and school administrators are participating in "governmental action" when conducting a search of a student, the Court avoids stretching the *loco parentis* rationale beyond its common sense limits.[61]

Having determined that the fourth amendment controlled searches and seizures of students by school officials, the Court next confronted the more difficult issue of what standard would govern school searches.[62] The Court relied on *Camara v. Municipal Court*[63] for the proposition that the reasonableness of a search requires "balancing the need to search against the invasion which the search entails."[64] The state's need to search to maintain security and order in the schools is necessarily balanced against the students' reasonable expectation of privacy while they are on school grounds.[65]

New Jersey argued that students subjected to pervasive supervision by school officials do not have a legitimate expectation of privacy in articles which are not required to be brought on school grounds for educational purposes.[66] All justices concurred in the finding that students have a reasonable expectation of privacy when they are on school grounds.[67] The Court found that a student's expectation of privacy for personal items brought to school was not incompatible with the state's interest in maintaining discipline, and recognized that students have a significant interest in carrying personal items onto school grounds.[68]

The state's interest in maintaining discipline in the school was weighed

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58. *See generally* Annot., 49 A.L.R.3d 978 (1973).

59. Buss, *supra* note 55, at 765-68.

60. *Id.* at 788.

61. *See supra* note 57 and accompanying text.

62. New Jersey v. T.L.O., 105 S. Ct. at 741.

63. 387 U.S. 523 (1967).

64. *Id.* at 537.

65. New Jersey v. T.L.O., 105 S. Ct. at 741.

66. *Id.* at 742. The Court noted that many items students bring to school are not disruptive to school order and are needed for extracurricular or recreational activities. *Id.*

67. *Id.* Justices Powell and O'Connor, however, asserted that students "have a lesser expectation of privacy than members of the population generally." *Id.* at 747. (Powell, J., concurring).

68. *Id.* at 742. Some of the items the Court specifically referred to were keys, money and personal hygiene items. *Id.*

against a student's privacy interest.[69] The majority concluded that a warrant was not required before searching a student at school because such a requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[70] This exception to the warrant requirement was based on the extraordinary interest of the government in establishing disciplinary procedures which are flexible, speedy and informal.[71] Requiring a warrant would frustrate the purpose behind the search.[72]

The Court next turned to the standard to be applied in determining the reasonableness of a warrantless search.[73] A majority of the Court found that school searches of students fall into the category of circumstances in which probable cause is not required in order to have a reasonable search.[74] In balancing the student's interest against that of the government, the Court concluded "the legality of a search of a student should depend simply on the reasonableness, under the circumstances, of the search."[75] A two part test was devised to make this determination.[76] First, a finding must be made that the search was "justified at its inception."[77] Second, the search must be "reasonably related in scope to the circumstances which justified the interference in the first place."[78] If the school official reasonably suspects that the search of a student will result in finding evidence of a violation of either

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69. *Id.*

70. *Id.* at 743. Justice Powell, joined by Justice O'Connor, focused on the special characteristics of the school setting. *Id.* at 747 (Powell, J., concurring). "[T]here 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." *Id.* at 748.

71. *Id.* at 743. *See generally* Ingraham v. Wright, 430 U.S. 651 (1977).

72. *Id.* at 743. The Court was split on which standard of reasonableness should apply to a school search. Justice Blackmun concurred in the judgment but wrote that school officials' need for immediate response to school misconduct was an exception to the probable cause requirement and so a balancing test was unneccessary. *Id.* at 750 (Blackmun, J., concurring). Justice Brennan, joined by Justice Marshall, found the departure from a probable cause requirement for a full-scale search unacceptable. *Id.* (Brennan, J., concurring in part and dissenting in part). Justice Stevens would have established the rule that school officials could search students if the suspected violation was "seriously disruptive to school order." *Id.* at 763 (Stevens, J., concurring in part and dissenting in part).

73. *Id.* at 743.

74. *See infra* note 94 and accompanying text. Justices Brennan and Marshall would have required probable cause for a school search to be reasonable. *Id.* at 750 (Brennan, J., concurring in part and dissenting in part). Justice Stevens would not have required probable cause but rather that the suspected violation must seriously threaten to disrupt school order. *Id.* at 763. (Stevens, J., concurring in part and dissenting in part).

75. *Id.* at 743-44. This standard appears to be similar to the Court's "totality of the circumstances" test for determining probable cause, as stated in Illinois v. Gates, 462 U.S. 213 (1983). New Jersey v. T.L.O., 105 S.Ct. at 756 (Brennan, J., concurring in part and dissenting in part). No distinction is given by the majority. *Id.*

76. *Id.* at 743-44.

77. *Id.* at 744 (citing Terry v. Ohio, 392 U.S. 1, 20 (1967)).

78. *Id.*

the law or of a school rule, the search is "justified at its inception."[79] It is reasonable in scope if it reasonably relates to the objectives of the search and is not excessively intrusive.[80] The age and sex of the student, and the type of violation are factors that should be considered when determining the reasonableness of the scope of the search.[81]

The majority concluded that the "reasonable under all the circumstances" test[82] will enable teachers and administrators to conform to fourth amendment requirements by applying reason and common sense to searches rather than having to make a difficult probable cause determination.[83] They found that this standard is adequate to protect both the student's and school's interests.[84] The Court's decision to subject school officials to fourth amendment requirements when searching a student is based on sound precedent and logic.[85] Its finding that a "reasonable under all the circumstances" balancing test to determine the legality of a full-scale search of a student is, however, subject to several criticisms.[86] As Justice Brennan pointed out in his dissent, even the majority had a difficult time agreeing on the rationale for its conclusion.[87] To understand *T.L.O.*'s departure from fourth amendment jurisprudence, it is necessary to recognize that the search which was conducted on T.L.O. was a full-scale search.[88] The significance of this fact will become clear when placed in the context of the United States Supreme Court's treatment of various kinds of searches.

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79. *Id.* The focus of Justice Stevens' dissent is that the Court should not treat all violations equally. *Id.* at 763 (Stevens, J., concurring in part and dissenting in part). "For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin or violent gang activity." *Id.* (Stevens, J., concurring in part and dissenting in part). Justice Stevens would apply a different standard of reasonableness in accordance with the seriousness of the offense. *Id.* (Stevens, J., concurring part and dissenting in part).

80. *Id.* at 744.

81. *Id.*

82. *Id.* "[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances of the search." *Id.* at 743-44.

83. *Id.* at 744. The Court merely stated that this will be a result of the "reasonable under the circumstances" test and does not elaborate on how teachers might have a difficult time with the "totality of circumstances" probable cause test of *Illinois v. Gates*. *Id.* at 756.

84. *Id.* at 744. *But see* Buss, *supra* note 55, at 788-92.

85. New Jersey v. T.L.O., 105 S. Ct. at 755 (Brennan, J., concurring in part and dissenting in part).

86. *Id.*

87. *Id.* at 758-59 (Brennan, J., concurring in part and dissenting in part). Justice Brennan wrote, "[p]erhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences." *Id.* (Brennan, J. concurring in part and asserting in part). Concurring opinions were written by Justice Powell who was joined by Justice O'Conner, and by Justice Blackmun. *Id.* at 747-48 (Powell, J., concurring); *id.* at 748-50 (Blackmun, J., concurring).

88. Id. at 737. The Court found that "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectation of privacy." *Id.* at 741-42.

The degree of intrusion into the searched person's privacy is a significant fact which has had a bearing on what the Court considers to be a reasonable search.[89] This conclusion becomes apparent when examining what Justice Brennan refers to in his dissent as the three basic principles of fourth amendment jurisprudence.[90] First, a warrantless search is per se unreasonable, unless the search meets an exception to the warrant requirement which the Court has recognized.[91] Second, probable cause to believe that a crime has been committed and that evidence of it will be found in the places searched is required where the search may be characterized as a full-scale search.[92] Third, a balancing test may be used to determine reasonableness of a search, provided sufficient weight is given to the individual's privacy interest.[93] The Court has not always required probable cause for a search and seizure to be legal: "[w]here a careful balancing of governmental and private interests suggests that the public is best served by a [f]ourteenth [a]mendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."[94]

The first criticism which may be made about the Court's decision to apply a balancing test to a search which it acknowledges to be a substantial

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89. Terry v. Ohio, 392 U.S. 1, 28-29 (1968). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The [f]ourth [a]mendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Id.*

90. New Jersey v. T.L.O., 105 S. Ct. at 751 (Brennan, J., concurring in part and dissenting in part).

91. *Id.* at 750. *See, e.g.*, United States v. Place, 462 U.S. 696 (1983) (dentention of luggage and subsequent use of trained dogs to sniff for drugs was upheld even though done without warrant); Steagald v. United States, 451 U.S. 204 (1982) (search of suspect's home by drug enforcement officer's who possessed valid arrest warrant held unlawful due to the absence of search warrant); Mencey v. United States, 437 U.S. 385 (1978) (warrantless search of homicide suspect's home held unconstitutional even though homicide had occurred there); Chemel v. California, 395 U.S. 752 (1969) (arrest warrant allowed for search of arrestee but did not justify further search of closed areas within his home); Katz v. United States, 389 U.S. 347 (1967) (unauthorized wire tapping held to be unconstitutional invasion of privacy); Johnson v. United States 333 U.S. 10 (1948) (warrantless search of motel room by police officers held violative of fourth amendment even though officers had smelled opium outside room and found drug paraphenelia in room). The probable cause standard has been established by reading the second clause of the amendment (" no Warrant shall issue but upon probable cause . . .") in conjunction with the first clause ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .") and thereby requiring probable cause for a search to be reasonable. W. RINGEL, SEARCH AND SEIZURES ARRESTS AND CONFESSIONS § 1.1 (1984).

92. New Jersey v. T.L.O., 105 S. Ct. at 751 (Brennan, J., concurring in part in dissenting in part). *See generally* Beck v. Ohio, 379 U.S. 89 (12964); Wong Sun v. United States, 371 U.S. 471 (1963); Brinegar v. United States, 388 U.S. 160 (1949).

93. New Jersey v. T.L.O., 105 S. Ct. at 751 (Brennan, J., concurring in part in dissenting in part). See *generally* Dunaway v. New York, 442 U.S. 200 (1979); Terry v. Ohio, 392 U.S. 1 (1968).

94. New Jersey v. T.L.O., 105 S. Ct. at 743.

invasion of privacy is that it is unprecedented.[95] The Court fails to cite any cases where a standard of less than probable cause was applied to a search as intrusive as the search of T.L.O.'s purse, but rather finds authority for the new standard in cases where there was less than a full-scale search.[96] In *Terry v. Ohio*,[97] the Court ruled that police may conduct a limited "stop and frisk" with less than probable cause where there is a belief that the person stopped is armed and presents a threat to the officer's safety.[98] The Court, however, specifically limited the search to a frisk of the outer clothing for weapons.[99] Because a reasonable search under *Terry* requires that the search be justified from its inception and that it is not beyond the scope which justified the initial search, an officer could not make a more thorough search for evidence on the person stopped without probable cause.[100] The precedent established in *United States v. Brignoni-Ponce*[101] and *United States v. Martinez-Fuerte*[102] permits border patrol officers to stop motorists for a brief period near the country's border without probable cause that a crime is being or has been committed.[103] In *Brignoni-Ponce* the justices noted that "[b]ecause of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border . . . [the officer] may stop the car briefly and investigate . . ." upon a suspicion that the car contains illegal aliens.[104] Probable cause would be required for further search or detention.[105]

In *Delaware v. Prouse*,[106] police officers could not exercise unconstrained discretion in making spot checks of motor vehicles.[107] In *Prouse*, a police officer made a random stop of a car and upon approaching it noticed the smell of burning marijuana.[108] He arrested the driver and seized marijuana which was in plain sight.[109] In dicta, the Court stated that states may stop vehicles with less than probable cause so long as the stops were less

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95. *Id.* at 753-54 (Brennan, J., concurring in part in dissenting in part).

96. *Id.* at 743. The Court cited Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 329 U.S. 1 (1968); and Camara v. Municipal Court, 387 U.S. 523 (1967).

97. 392 U.S. 1 (1968).

98. *Id.* at 30.

99. *Id.* at 27.

100. *Id.* at 29. Under the holding of *Terry v. Ohio*, a teacher would be able to search a student upon a reasonable suspicion that the student was carrying a gun. New Jersey v. T.L.O., 105 S. Ct. at 757 (Brennan, J., concurring in part and dissenting in part).

101. 422 U.S. 873 (1975).

102. 428 U.S. 543 (1976).

103. *Id.* at 566.

104. United States v. Brignoni-Ponce, 422 U.S. at 881.

105. *Id.* at 882.

106. 440 U.S. 648 (1979).

107. *Id.* at 663.

108. *Id.* at 650.

109. *Id.*

intrusive than the search conducted in *Prouse*.[110]

Finally, *Camara v. Municipal Court*[111] does not support the balancing test used in *New Jersey v. T.L.O.*. *Camara* provided that housing inspectors, in an effort to enforce housing code violations by searching all houses in a particular neighborhood, must obtain a warrant to search an individual's home.[112] A standard which is less than that of probable cause, however, may be applied when determining reasonableness of a search.[113] The Court distinguished administrative searches from criminal investigative searches.[114] The government's focus in an administrative search is to enforce administrative regulations rather than to apprehend criminals.[115] Administrative searches were also believed to be less intrusive than criminal searches. "Because the inspections are neither personal in nature nor aimed at the discovery of evidence of a crime, they involve a relatively limited invasion of the urban citizen's privacy."[116] The common theme found in each of these cases is that a less stringent standard than probable cause may be employed when the nature of the search does not involve a full-scale search of a person, his car, or his dwelling.[117]

A second criticism of the Court's new standard was asserted by Justice Brennan in his *Camara* dissent.[118] He argues that the Court's new standard to be applied to school searches is unnecessary because a probable cause determination based on a "totality of the circumstances" test[119] may be ap-

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110. *Id.* at 663. The controlling facts in the case were that the police had no methods for determining which cars would be stopped. *Id.* The Court did not address the degree of intrusion other than stating that less intrusive searches might be permitted on less than probable cause. *Id.*

111. 387 U.S. 523 (1967).

112. *Id.* at 534. A municipal housing code which permitted housing inspectors to make neighborhood searches without probable cause was upheld on the ground that it was the only means of making the inspections since probable cause could not be obtained for each individual house. *Id.* at 538.

113. *Id.* The standard set forth in *Camara* to determine reasonableness is whether administrative safeguards protected against arbitrary searches. *Id.* at 538-39. " '[P]robable cause' to issue a warrant to inspect must exist if reasonable legislative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* at 538.

114. *Id.* at 537.

115. *Id.*

116. *Id.*

117. New Jersey v. T.L.O., 105 S. Ct. at 754 (Brennan, J., concurring in part and dissenting in part).

118. *Id.* at 755-56.

119. Illinois v. Gates, 462 U.S. 213, 238 (1983). The "totality of the circumstances" test replaced the *Aguilar-Spinelli* test for determining probable cause based upon an information obtained from an informant. *Id.* The old test had two-prongs, each needing to be independently established. Spinelli v. United States, 393 U.S. 410, 415-16 (1969). "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the [informant] . . . was 'credible' or his information 'reliable.' " Aguilar v. Texas, 378 U.S. 108, 114 (1964).

plied to searches of students by school officials.[120] He wrote that the majority is incorrect in balancing the government's need for effective methods of maintaining order against the student's privacy interest, but rather "it is the costs of applying probable cause as opposed to applying some lesser standard that should be weighed on the government's side."[121] For example, in *Terry v. Ohio*, the cost of requiring probable cause before an officer could frisk a person suspected of carrying weapons would be the increased danger to the safety of the officer.[122] The government does have an interest in protecting its police but the lesser standard was justified only because the danger could not be decreased without abandoning the probable cause standard.[123] If the government's interest can be protected through application of the more stringent probable cause standard, a lesser standard should not be adopted.[124]

The "reasonable under the circumstances" test established in *New Jersey v. T.L.O.* is an attempt to "spare teachers and administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[125] This appears to be contradictory to the Court's recent conclusion in *Illinois v. Gates*[126] that "probable cause is . . . a practical, non-technical conception."[127] "In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[128] The Court fails to clarify any distinction between the "reasonable under all the circumstances" standard, which is said to be less than probable cause, and the *Illinois v. Gates* probable cause test of "totality of the circumstances."[129] The distinction is left to be made through further litigation. Until this is done, school officials will have to struggle with the difficult task of determining what factors must be present for a search to be reasonable.[130]

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120. New Jersey v. T.L.O., 105 S. Ct. at 756 (Brennan, J., concurring in part and dissenting in part).

121. *Id.* at 755.

122. 392 U.S. at 3.

123. *Id.* at 20-21.

124. New Jersey v. T.L.O., 105 S. Ct. at 755 (Brennan, J., concurring in part and dissenting in part).

125. *Id.* at 744.

126. 462 U.S. 213 (1983).

127. *Id.* at 231. (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)).

128. *Id.* (citing Brinegar v. United States, 338 U.S. at 175).

129. New Jersey v. T.L.O., 105 S. Ct. at 743-44.

130. *Id.* at 757 (Brennan, J., concurring in part and dissenting in part). Justice Brennan wrote "The sad result of this uncertainity may well be that some teachers will be reluctant to conduct searches that are fully permissible and even necessary under the constitutional probable cause standard, while others may intrude arbitrarily and unjustifiably on the privacy of students." *Id.*

Both Justices Brennan and Stevens wrote that the Court should not apply the same standard of reasonableness to all types of school searches.[131] Under the majority's rule the "reasonable under the circumstances" standard would apply alike to violations of the dress code and carrying weapons on school grounds.[132] No rule was deemed too trivial to require probable cause to search.[133] The importance of requiring students to conform to prescribed school conduct was justification to apply a standard less than probable cause.[134]

The *New Jersey v. T.L.O.* decision thus clarifies that school officials will be subject to the fourth amendment's requirement that searches be "reasonable" when they search students, but establishes a new standard for reasonableness of that search "whose only definite content is that it is *not* the same test as the 'probable cause' standard."[135] The decision to consider teachers and school administrators as acting as an "arm of the government"[136] when conducting a school search is consistent with prior decisions extending constitutional protections to school children.[137] The standard used to determine when a search is reasonable, however, has no support in prior Court decisions.[138] The Court applied a balancing test, "reasonable under all the circumstances of the search",[139] to an extensive search into a student's purse.[140] While the Court admits that this is a significant intrusion into the student's legitimate expectation of privacy,[141] it applies a standard which is less than probable cause.[142] Not until *New Jersey v. T.L.O.* has the Court ruled that such an extensive search of a person could be constitution-

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131. See generally Justice Steven's dissent. *Id.* at 759-60. (Stevens, J., dissenting).

132. *Id.* at 757(Brennan, J., concurring in part and dissenting in part); *id.* at 763 (Stevens, J., concurring in part and dissenting in part).

133. *Id.* at 744. In a footnote the Court wrote:

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities.

Id. at n.9.

134. *See supra* note 133 and accompanying text.

135. New Jersey v. T.L.O., 105 S. Ct. at 750 (Brennan, J., concurring in part and dissenting in part).

136. *See supra* note 52 and accompanying text.

137. *See supra* notes 28-39 and accompanying text.

138. New Jersey v. T.L.O., 105 S. Ct. at 750 (Brennan, J., concurring in part and dissenting in part).

139. *Id.* at 743-44.

140. *Id.* at 737.

141. *Id.* at 741-42. The Court characterized the search as "a severe violation of subjective expectations of privacy." *Id.* at 742.

142. *Id.* at 743-44.

ally upheld on a finding that there was less than probable cause.[143] The Court may not have been required to apply a standard which it proclaims to be less than probable cause, since by following the *Illinois v. Gates*, "totality of the circumstances" test for probable cause the Court may have achieved the same result. The *T.L.O.* decision may now serve as precedent for upholding as constitutional intrusive searches of a person without the existence of probable cause.

Patrick C. Brau

143. *Id.* at 750.