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An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students' Rights with School Safety

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I. INTRODUCTION

> A public school student, on his way to class, enters the school building through an exterior doorway. There is a bulge protruding from the student's jacket which is noticed by a teacher monitoring the hallways.[1] Acting on impulse, the teacher approaches the student and grabs him. The teacher then reaches underneath the student's jacket for the bulge and finds a . . . .

Statistics show that students in the United States collectively bring nearly 135,000 guns to school everyday.[2] Data suggests that twenty percent of our nation's high school students bring some type of weapon to school at least once a month.[3] Statistics also "show 'alarming increases' in drug use by students in grades six through twelve."[4] As weapons, violence, and

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1. This scenario was inspired by the case *Juan C. v. Cortines*, 647 N.Y.S.2d 491 (App. Div. 1996), *rev'd on other grounds*, 679 N.E.2d 1061 (N.Y. 1997).

2. *See* Deborah Austen Colson, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. § 1983*, 30 HARV. C.R.-C.L. L. REV. 169, 170 (1995) (citing ROBERT L. MAGINNIS, FAMILY RESEARCH COUNCIL, VIOLENCE IN THE SCHOOL HOUSE: A 10-YEAR UPDATE 3 (1994)).

3. *See id.*; *see also* Steve Friess, *Poll Shows Teens Living Healthier*, LAS VEGAS REV.-J., Jan. 25, 1998, at 1B (reporting that of 1464 randomly chosen Nevada high school students, 21% said they had brought a weapon to school in the past thirty days); Leslie Ansley, *Many Teens Feel Unsafe in School*, USA TODAY, Aug. 13, 1993, at 01A (according to write-in survey "about half" of 65,193 teens in grades six through twelve knew someone who carried a weapon to school).

4. Andrew Mollison, *Officials Huddle Today Over Rising Drug Use by Young Kids Getting High: Use of Heroin, Crack Cocaine, LSD, Inhalants and Marijuana by 12-to 17-Year-Olds Reported on the Increase*, ATLANTA CONST., Nov. 1, 1995, at A7; *see* Larry Craig, *Clinton's Failing War on Drugs*, GOV'T PRESS RELEASE, Nov. 7, 1997, *available in* 1997 WL 12104713 (reporting the University of Michigan's "Monitoring the Future" survey to show that nearly one out of twenty high school seniors and one in every thirty tenth graders use marijuana *daily*); John W. Gonzales, *State Appeals*

drugs in public schools continue to be a problem,[5] situations like the one above will become more prevalent.[6] Though what is found in the student's possession may lessen any public discomfort over the teacher's actions,[7] under current Supreme Court precedent,[8] this search is likely a violation of the student's

to Parents as Study Says Kids Dabbling More in Drugs, HOUSTON CHRON., Jan. 11, 1998, at 1 (reporting that the Texas Commission on Alcohol and Drug Abuse biennial survey of 107,000 secondary students found that "nearly two-thirds . . . used illicit substances . . . in the previous year. . . . Use [of marijuana] among eighth-graders has tripled in five years"); *Pride: Illicit Drug Use in Junior High Continues to Rise*, ALCOHOLISM & DRUG ABUSE WKLY., Nov. 3, 1997, at 3, *available in* 1997 WL 9026822 ("The most surprising finding in the [10th annual Parents' Resource Institute for Drug Education (PRIDE)] survey is the across-the-board increase in illicit drug use by youngest students, ages 11 to 14 . . . .").

5. *See* New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) ("Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.").

6. *See, e.g.*, France Griggs, *Grim Truth: Preventing a Paducah Impossible*, CINCINNATI POST, Dec. 3, 1997, at 1A (reporting that the Cincinnati Public School District projects it will conduct 33% more searches of students in 1998 than in 1997).

7. At the core of the Fourth Amendment debate in public schools are two issues, safety and privacy. One may have strong feelings about public schools being safe places and find the confiscation of contraband to be a lofty goal, no matter what the costs. Such feelings are exemplified in the newspaper article titled *Ruling Leaves Our Schools at Risk*. Eliot Spitzer & Dennis Saffran, *Ruling Leaves Our Schools at Risk*, TIMES UNION (Albany), Feb. 9, 1997, at E2 (supporting legislation making the reasonableness of a search of a public school student irrelevant in a school disciplinary hearing when a dangerous weapon is found). On the other hand, strong feelings may arise over violations of students' privacy rights, as noted in this newspaper headline, *Strip Searches of Students Anger Parents in Oregon*. Lauren Dodge, *Strip Searches of Students Anger Parents in Oregon*, FORT WORTH STAR-TELEGRAM, Feb. 1, 1998, at 13 (quoting comments from several parents outraged over the strip search of their children). These competing concerns, and striking the appropriate balance between them, are the focus of this Comment.

8. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court held that the legality of a search of a student would depend "on the reasonableness, under all the circumstances, of the search." *Id.* at 341. The reasonableness of a search is determined by answering the following questions: "[F]irst . . . 'whether the . . . action was justified at its inception,' second, whether the search as conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

The Court proceeded to provide meaning to these phrases for their application in the school setting:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively

Fourth Amendment right[9] to be free from "unreasonable searches and seizures."[10]

In criminal proceedings, the constitutional guarantees of the Fourth Amendment are protected by the exclusionary rule, which requires that evidence obtained during an illegal search[11] or seizure[12] be suppressed from the corresponding adjudicatory

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> intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 341-42 (footnotes omitted).

9. In the juvenile delinquency proceeding which the fact scenario is based on, the court made the factual finding that "'the outline of the gun was not visible'" to the person conducting the search, and the slight bulge underneath the jacket "was not in any particular shape or form and was not remotely suspicious." Juan C. v. Cortines, 647 N.Y.S.2d 491, 492 (App. Div. 1996), *rev'd on other grounds*, 679 N.E.2d 1061 (N.Y. 1997). Subsequently, the juvenile court found the search to be unreasonable, suppressed the gun, and dismissed the juvenile delinquency petition. *See id.*

Other cases seem to support the conclusion that this scenario is a violation of the reasonableness standard. In *Cales v. Howell Public Schools*, 635 F. Supp. 454 (E.D. Mich. 1985), the court held that the search by a school official was illegal as the search was not justified at its inception.

> This court does not read *T.L.O.* so broadly as to allow a school administrator the right to search a student because that student acts in such a way so as to create a reasonable suspicion that the student has violated some rule or law. Rather, the burden is on the administrator to establish that the student's conduct is such that it creates a reasonable suspicion that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of that violation.

Id. at 457; *see also In re* Appeal in Pima County Juvenile Action, 733 P.2d 316 (Ariz. Ct. App. 1987) (holding no reasonable suspicion for principal to search student since the principal had no personal knowledge regarding the boy's conduct and received no report creating a reasonable suspicion that drugs would be found).

10. U.S. CONST. amend. IV. The Fourth Amendment provides:

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

Id.

11. In the school setting, "[a] student search is an attempt [by school officials] to gain access to any item that is shielded from public view and located in a protected place or thing. . . . Virtually any attempt to find or discover something hidden from public view will be considered a search in the school setting." JON M. VAN DYKE & MELVIN M. SAKURAI, CHECKLISTS FOR SEARCHES AND SEIZURES IN PUBLIC SCHOOLS 2-1 to 2-2 (1998).

12. "[A] seizure is any governmental action which materially interferes with a student's possessory interests in personal property. In the school setting something is seized when school officials confiscate or take it away from a student." *Id.* at 6-1 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

proceeding.[13] The Supreme Court has concluded that the Fourth Amendment's exclusionary rule does not bar illegally seized evidence in every instance,[14] but the Court has not determined whether the appropriate remedy for violation of the student's Constitutional rights in a public school disciplinary proceeding[15] is the exclusionary rule.[16] Consider, for instance, how the exclusionary rule might apply in the situation posed at the beginning of this Comment. Let us assume that the teacher finds a gun bulging from the student's jacket. The student is brought before the school disciplinary board, facing discipline for bringing a weapon onto school grounds. Most likely the student would move to have the gun excluded from the hearing as inadmissible evidence. For this to occur, the board must first find that there was a search or seizure, that the search or seizure was unconstitutional, and that the exclusionary rule precludes the board from considering the illegally seized evidence.[17] If the board answers these questions affirmatively,

13. *See, e.g.*, State v. Young, 216 S.E.2d 586, 590 (Ga. 1975) (defining the exclusionary rule as "'a judicially-created remedy designed to safeguared Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974))). *See generally infra* Part II.B.

14. *See infra* Part II.C.

15. A public school disciplinary proceeding is synonymous with a "[p]ublic school administrative disciplinary hearing[; both terms refer to] whatever internal adjudicative-investigative forum the public school employs to determine the appropriate disciplinary response to a student's violation of a school regulation." Kathleen K. Bach, Note, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After* New Jersey v. T.L.O., 37 HASTINGS L.J. 1133, 1134 n.5 (1986).

16. At the outset, it should be noted that this Comment deals exclusively with the situation where the search or seizure is conducted by school authorities (rather than the police or school authorities acting in conjunction with the police) and the evidence seized is sought to be used in a school disciplinary hearing rather than in a criminal or juvenile delinquency proceeding.

Some jurisdictions have held that the exclusionary rule should apply to exclude the fruits of unlawful school searches conducted by school officials from criminal trials and delinquency proceedings. *See, e.g.*, State v. Mora, 330 So. 2d 900 (La. 1975), *vacated for clarification*, 423 U.S. 809 (1975). Other courts have determined that the rule should not apply in these instances. *See, e.g.*, State v. Lamb, 224 S.E.2d 51 (Ga. Ct. App. 1976).

17. It is important to distinguish between the restrictions placed on searches by the Fourth Amendment and the remedies for violation of the Fourth Amendment. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Supreme Court established the standard by which school officials are to conduct searches. *See* discussion *supra* note 8. This Comment deals with the remedies available when a school official violates the standards for searches, set forth by the Court in *T.L.O.*

then the exclusionary rule would bar admission of the fruits of the illegal search, the gun, as evidence in the hearing. Most likely, this would leave only the teacher's testimony that she saw a bulge in the student's jacket as evidence of the student bringing a weapon onto school grounds. Thus, the student would not be punished for bringing the gun to school.

This example raises a difficult question: What is the proper balance between a school's duty to provide a safe learning environment and its duty to protect the privacy afforded students under the Fourth Amendment? Currently, courts, and school districts taken to court, have two options: either to apply or not to apply the exclusionary rule in the school disciplinary hearing. This Comment will explain why these narrow options fail to achieve a satisfactory balance between school safety and students' rights and will explore an alternative approach, which if implemented, would both protect students' rights and further school safety.

Part II of this Comment begins with a synopsis of the constitutional rights afforded students in public schools. This Part also focuses on application of the exclusionary rule in criminal proceedings and looks at Supreme Court cases addressing the issue of whether the exclusionary rule should apply to contexts outside of the criminal setting. Part II concludes with a capsulation of those cases addressing the issue of whether the exclusionary rule applies to school administrative hearings.

Part III provides the arguments and policies both in favor of, and against, applying the exclusionary rule in school administrative disciplinary hearings. Part IV offers an alternative approach to the exclusionary rule in the school administrative hearing, based on proposed policy guidelines. The model policy will be analyzed in light of the arguments for and against the exclusionary rule. This analysis will show how the vast majority of concerns, expressed by both sides, are satisfied under the model policy. Additionally, Part IV focuses on the incentives for, and benefits accruing to, school districts that implement a form of the suggested proposal. This Comment concludes in Part V that the proposed approach achieves a more satisfactory balance of the competing interests than would either applying or not applying the exclusionary rule to school disciplinary hearings.

II. THE CONSTITUTION AND THE STUDENT

A. The Public School Student's Constitutional Rights

The doctrine *in loco parentis*[18] encompasses the common law view of the legal status of minors in the public school setting. Under this doctrine, school officials stand in place of parents during school hours, assuming both the authority and responsibility of the parents in disciplinary actions against the student.[19] The doctrine's foundation rests on the premise that individual constitutional rights mature only when one reaches the state-defined age of majority.[20]

The Supreme Court initially departed from the common law view in *Tinker v. Des Moines Independent Community School District*[21] by striking down a school regulation as a violation of the student's First Amendment rights, which are not "shed . . . at the schoolhouse gate."[22] The Court held that for "school officials to justify prohibition of a particular expression of opinion," it must show that such expression would "'substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[23] The Court has expanded those constitutional rights not "shed at the schoolhouse gate" beyond the First Amendment. In *Goss v. Lopez*,[24] the Court held that in order to satisfy due process requirements, a student, who is to be suspended for 10 days or less, must be given oral or written notice of the charges, and if denied, the student must receive an explanation of the evidence the authorities have and an opportunity to present his or her side of the story.[25] Ten years later in *New Jersey v. T.L.O.*,[26] the

18. *See generally* 59 AM. JUR. 2D *Parent and Child* § 75 (1996) (defining the term *in loco parentis*).

19. *See T.L.O.*, 469 U.S. at 336 ("Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment." (citing R.C.M. v. Texas, 660 S.W.2d 552 (Tex. App. 1983))).

20. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

21. 393 U.S. 503 (1969).

22. *Id.* at 506.

23. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

24. 419 U.S. 565 (1975).

25. *See id.* at 581.

26. 469 U.S. 325 (1985). Though the Court was originally faced with the issue of whether the exclusionary rule should apply to evidence illegally seized by school

Court recognized a student's Fourth Amendment right to be free from "unreasonable searches and seizures" by school officials. In reaching this holding, the Court found that school officials were state agents and could not "claim the parents' immunity from the strictures of the Fourth Amendment."[27] The Court noted that "'the concept of parental delegation' [*in loco parentis*] as a source of school authority is not entirely 'consonant with compulsory education laws.'"[28]

The Supreme Court, faced with balancing the "schoolchild's legitimate expectation of privacy" with the "school's . . . legitimate need to maintain an environment in which learning can take place," concluded that a lesser standard than probable cause should apply in the school setting.[29] The Court held that the legality of a search by school officials should be based on its "reasonableness, under all the circumstances."[30] The Court reasoned that such a standard would "spare teachers and school 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."[31]

In its application of the reasonableness standard to the facts of *T.L.O.*, the Court held that the search was reasonable and therefore did not address the remedies for violation of students' Fourth Amendment rights.[32]

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officials in a criminal prosecution, the Court answered the question of what standard was to be applied to school searches and seizures under the Fourth Amendment. The Court in *T.L.O.* was similarly faced with "accommodat[ing] the interests protected by the Fourth Amendment and the interest of the States in providing a safe environment conducive to education in the public schools." *Id.* at 332 n.2.

27. *Id.* at 337. "In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents . . . ." *Id.* at 335.

28. *Id.* at 336 (quoting Ingraham v. Wright, 430 U.S. 651, 662 (1977)). *See infra* note 101 for discussion on compulsory education (or compulsory attendance) laws.

29. *T.L.O.*, 469 U.S. at 340.

30. *Id.* at 341. See discussion *supra* note 8 for the Court's elaboration on application of the "reasonableness, under all the circumstances" standard in the public school setting.

31. *Id.* at 343. *But see id.* at 354, 365-66 (Brennan, J., concurring in part and dissenting in part) (criticizing the Court's adoption of the "reasonableness" standard "whose only definite content is that it is *not* the same test as the 'probable cause' standard").

32. *See id.* at 343-48.

B. Origins of the Exclusionary Rule

The debate among members of the Supreme Court concerning the exclusionary rule "has always been a warm one."[33] Under the common law, if the tendered evidence was relevant, "the method of obtaining it was unimportant"[34] for purposes of admissibility, and the remedy for breach of a defendant's Fourth Amendment rights was an action for damages.[35] Today, the exclusionary rule bars the admission of illegally seized evidence in criminal cases at both the state and federal levels.[36]

In *Weeks v. United States*[37] the Supreme Court held that the Fourth Amendment prohibited the use of evidence secured through an illegal search and seizure in a federal criminal prosecution.[38] Reflecting on the history of the amendment, the Court noted that the framers' intent in drafting the Fourth Amendment was to stop the unreasonable searches and seizures then permitted under the general warrants issued by government authority and sanctioned by the writs of assistance.[39] The Court advanced two arguments for application of the exclusionary rule. First, allowing unlawfully seized evidence to be used against a citizen accused of a crime nullifies the citizen's right to be free from "unreasonable searches and seizures" rendering the Fourth Amendment of "no value."[40]

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33. United States v. Janis, 428 U.S. 433, 446 (1976). "Except for the unanimous decision . . . in *Weeks v. United States*, the evolution of the exclusionary rule has been marked by sharp divisions in the Court. Indeed, *Wolf, Lustig, Rochin, Irvine, Elkins, Mapp*, and *Calandra* produced a combined total of 27 separate signed opinions or statements." *Id.* at 446 n.15.

34. Olmstead v. United States, 277 U.S. 438, 462-63 (1928).

35. *See id.*; Wolf v. Colorado, 338 U.S. 25, 32 n.1 (1949) (listing state court decisions and state statutes providing civil and criminal remedies against the searching law enforcement official or issuer of the search warrant), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

36. *See Mapp*, 367 U.S. at 657.

37. 232 U.S. 383 (1914).

38. *See id.* at 398. However, there is some debate as to whether the case held only that evidence illegally seized could be returned to its rightful owner even if this made the evidence unavailable for trial. *See* Lawrence Crocker, *Can The Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY, 310, 313 (1993). In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Court definitively held illegally seized evidence inadmissible in a prosecution in federal court.

39. *See* United States v. Chadwick, 433 U.S. 1, 7-8 (1977); *Weeks*, 232 U.S. at 390.

40. *Weeks*, 232 U.S. at 394.

Second, those charged with upholding the Constitution cannot sanction "unwarranted practices destructive of rights secured by the Federal Constitution."[41]

In 1949, the Supreme Court in *Wolf v. Colorado* declined to impose the exclusionary rule as a matter of due process requirements through the Fourteenth Amendment to the States.[42] Twelve years later in *Mapp v. Ohio*, the Court reversed *Wolf* and imposed the exclusionary rule upon the States.[43] Though judicial integrity was the Supreme Court's theory backing the exclusionary rule in *Mapp*,[44] the Court has more recently asserted that the exclusionary rule was "designed to safeguard Fourth Amendment rights . . . through its deterrent effect."[45] That is, the rule exists "to remove incentives for the government to engage in any future conduct that is either technically or intentionally unconstitutional."[46]

C. The Exclusionary Rule Outside the Criminal Trial

Because the exclusionary rule is viewed as a deterrent rather than a form of redress, it has not been interpreted to apply in all adjudicatory proceedings.[47] While it is obvious that the exclusionary rule applies in state and federal criminal prosecutions, it is less clear, with a few exceptions, where else the exclusionary rule applies. The rule has been held not to apply to collateral criminal proceedings, such as grand jury

41. *Id.* at 392.

42. 338 U.S. 25, 31 (1949) ("[I]n practice the exclusion of evidence may be an effective way of deterring unreasonable searches, [but] it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

The division among the members of the Court was, to some degree, based on the issue of whether the exclusionary rule was mandated by the Fourth Amendment, or rather a judicially created rule. *See Wolf*, 338 U.S. at 39-40 (Black, J., concurring) ("[T]he federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence . . . ."). *But see id.* at 48 (Rutledge, J., dissenting) ("The view that the Fourth Amendment *itself* forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established." (emphasis added)).

43. 367 U.S. 643 (1961).

44. *See id.* at 646-50.

45. United States v. Calandra, 414 U.S. 338, 348 (1974).

46. *Id.* at 347.

47. *See, e.g.*, VAN DYKE & SAKURAI, *supra* note 11, at 7-2.

proceedings,[48] nor does the rule bar collateral use of the illegally seized evidence, such as for impeachment purposes.[49] The Court has also held that illegally seized evidence is admissible in deportation hearings,[50] and civil tax litigation,[51] but shall be excluded in forfeiture proceedings.[52] Originally, the Court utilized a multi-factored test to determine whether the proceeding was "quasi-criminal" in nature, thus justifying the application of the exclusionary rule.[53] More recently the Court has utilized a balancing test to determine whether the rule should apply in a particular proceeding.

1. The quasi-criminal test

In *One 1958 Plymouth Sedan v. Pennsylvania*, the Supreme Court held that evidence seized in the course of an illegal search of an automobile must be excluded in a proceeding for forfeiture of the automobile.[54] The Court classified the forfeiture proceeding as "quasi-criminal" based upon a two-prong inquiry: (1) whether the proceeding's objective is "to penalize for the commission of an offense against the law"[55] and (2) whether the penalty rendered would be a greater punishment than criminal prosecution.[56] Comparing the potential criminal and civil sanctions, the Court found that the forfeiture of the car, valued at $1000, would be greater than the maximum $500 penalty defendant could be liable for under the criminal law. The Court concluded that it would be "anomalous" to require the exclusion of illegally seized evidence in the criminal proceeding but not in the forfeiture proceeding.[57]

2. The balancing test

Though some courts have continued to apply the quasi-criminal test to determine whether the exclusionary rule should

48. *See Calandra*, 414 U.S. at 354.
49. *See* United States v. Havens, 446 U.S. 620, 627-28 (1980).
50. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
51. *See* United States v. Janis, 428 U.S. 433 (1976).
52. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).
53. *See id.*
54. *See id.*
55. *Id.* at 700.
56. *See id.* at 701.
57. *See id.*

apply to a particular proceeding,[58] other courts have questioned the test's continued viability in light of more recent Supreme Court precedent.[59] Thus a new test has emerged.

To determine whether the exclusionary rule should be applied in a civil proceeding under this newest test, the Court balances the benefits of applying the exclusionary rule to the proceeding against the societal costs flowing from the application of the rule.[60] The balancing test has most recently been used by the Court to conclude that the exclusionary rule does not apply in civil tax litigation nor in deportation hearings. In *United States v. Janis*, the Court held that the exclusionary rule did not prohibit the Internal Revenue Service from using evidence illegally obtained by the Los Angeles Police Department in a civil tax assessment.[61] In its balancing analysis, the Court concluded that the costs of excluding the unlawfully seized evidence from the federal civil proceeding outweighed the "sufficient likelihood" that the rule would deter the conduct of state police.[62] Because this case dealt with evidence obtained by one agency but used by another, the Court left undecided the question of whether the exclusionary rule should apply in a civil proceeding against an "intrasovereign" violation of the Fourth Amendment;[63] that is where the party conducting the illegal search is also the party seeking to have the evidence admitted at the adjudicatory proceeding. The Court answered this question eight years later in *INS v. Lopez-Mendoza*.[64]

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58. *See* James v. Unified Sch. Dist. No. 512, 899 F. Supp. 530 (D. Kan. 1995); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980); Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975), discussed *infra* Part II.D.

59. *See, e.g.*, Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976).

> Following the invitation of . . . *Plymouth Sedan* lower courts applied the exclusionary rule to civil proceedings. While not overruled, th[is] case[] ha[s] been severely undermined by recent Supreme Court decisions upholding a tax assessment based upon illegally seized evidence, *Janis*, and allowing the Government to propound questions based upon illegally seized evidence to a grand jury witness, *Calandra*.

Id. at 1000 (citations omitted).

60. *See* United States v. Janis, 428 U.S. 433, 454 (1976).

61. *See id.*

62. *Id.* at 454.

63. *See id.* at 455-56 & n.31.

64. 468 U.S. 1032 (1984).

In *Lopez-Mendoza*, the Court addressed the issue of whether the exclusionary rule should apply in a deportation hearing, so as to exclude evidence illegally seized by Immigration and Naturalization Service ("INS") officials.[65] Applying the same balancing test applied in *Janis*, the Court held that the exclusionary rule did not apply to INS "intrasovereign" violations of the Fourth Amendment.[66] Though the deterrent effect of the exclusionary rule is greater in "intrasovereign" violations, the Court noted factors which weakened the deterrent effect the rule would have under the circumstances.[67]

The "most important" factor, in the Court's view, was that the INS "has its own comprehensive scheme for deterring Fourth Amendment violations by its officers."[68] The INS's scheme included the following procedures to safeguard Fourth Amendment rights: (1) "rules restricting stop, interrogation and arrest practices"; (2) "instruction and examination in Fourth Amendment law" for new agents and "periodic refresher courses" for others;[69] and (3) "procedure[s] for investigating and punishing immigration officers who commit Fourth Amendment violations."[70] Persuaded by these factors, the Court held that the societal costs of applying the rule outweighed its benefits and declined to extend the protection of the exclusionary rule in such a proceeding.[71]

D. Federal Court Precedent Addressing Application of the Exclusionary Rule in the School Disciplinary Setting

Whether the exclusionary rule should apply in the school disciplinary setting has been addressed in federal court on multiple occasions.[72] Three federal district courts have held

65. *See id.*

66. *See id.* at 1051.

67. The Court noted that immigration judges and the attorneys that practiced before them were not well-versed in Fourth Amendment law and that the deterrent value of the exclusionary rule in a deportation proceeding "is undermined by the availability of alternative remedies." *Id.* at 1045.

68. *Id.* at 1044-45.

69. *Id.*

70. *Id.*

71. *See id.* at 1050 ("By all appearances the INS has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this makes the likely additional deterrent value of the exclusionary rule small.").

72. State courts have addressed the issue as well, though less frequently. The

that the exclusionary rule should apply in the school disciplinary hearing to assure protection of the student's constitutional rights.[73] In *Smyth v. Lubbers*, college officials found marijuana while conducting a search of plaintiffs' rooms without a warrant or consent.[74] The court conducted its analysis under the "quasi-criminal" test[75] and found that since violation of the regulation required proof that the criminal law had been violated and that "the punishment in fact imposed by the College is more severe than that likely to be imposed by any state or federal court for the same offense,"[76] the district court concluded that it would be "anomalous here, too, not to apply an exclusionary rule."[77]

Similarly in *Jones v. Latexo Independent School District*, six students were suspended from school as a result of a search utilizing a dog trained to detect drugs, which located drug paraphernalia in the students' possession.[78] The court found the search unconstitutional and was faced with deciding whether the exclusionary rule should keep the illegally seized evidence out of the school disciplinary hearing.[79] While the *Jones* court referenced *Janis*, it found the situation in *Janis* "quite unlike" that presented before it.[80] Using the "quasi-criminal" test, the district court found that plaintiffs "suffered a penalty as a result of the illegal searches carried out by defendants . . . [and

most recent state decision addressing the issue is the highly publicized case *Juan C. v. Cortinez*, 647 N.Y.S.2d 491 (App. Div. 1996), *rev'd on other grounds*, 679 N.E.2d 1061 (N.Y. 1997). *Juan C.* is the first case in which a state constitution was held to bar illegally seized evidence from a school disciplinary hearing. For an insightful look at the case and its procedural history, see Mai Lihn Spencer, Note, *Suppress or Suspend: New York's Exclusionary Rule in School Disciplinary Proceedings*, 72 N.Y.U. L. REV. 1494 (1997).

73. *See* Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980); Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975); Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex. 1972).

74. 398 F. Supp. at 781.

75. *See* discussion *supra* Part II.C.1.

76. *Smyth*, 398 F. Supp. at 794 (weighing two year suspension from college against one year probation with the possibility that the charges would be dismissed if the probation was not violated).

77. *Id.* The court also focused on the fact that application of the exclusionary rule was the only effective way to protect students' constitutional rights since damages, only recoverable from those acting in bad faith, would provide little deterrence. *See id.*

78. 499 F. Supp. 223, 227 (E.D. Tex. 1980).

79. *See id.* at 237-38.

80. *Id.* at 238.

though] the punishment imposed [expulsion] was non-criminal in nature, it was . . . a deprivation rather than merely the restitution of monies wrongfully retained, as in *Janis*."[81] On this basis the court found that the exclusionary rule should apply. Finally, in *Caldwell v. Cannady*, the court, with little analysis, held that precedent required the school board to exclude evidence that had been obtained unconstitutionally.[82]

More recently, the federal courts addressing the issue have declined to extend the exclusionary rule to school disciplinary hearings.[83] In *James v. Unified School District No. 512*, a student expelled from high school for possession of a firearm on campus alleged a violation of his constitutional rights and sought injunctive relief that would allow him to take exams and attend school the following year.[84] Addressing the issue of whether illegally seized evidence should be barred from the school disciplinary hearing, the court noted that "case law does not prohibit using the fruits" of a Fourth Amendment violation in school disciplinary hearings.[85] Rather than utilizing the balancing test, the court relied, to some degree, on Tenth Circuit precedent that the exclusionary rule was applicable in civil cases that could be characterized as "quasi-criminal."[86] The *James* court cited two cases[87] and without further analysis held that "[s]chool disciplinary hearings are not 'quasi-criminal' proceedings" and "plaintiff . . . cannot avail himself of the exclusionary rule in this context."[88]

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81. *Id.*

82. 340 F. Supp. 835, 839 (N.D. Tex. 1972).

83. *See* Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996); James v. Unified Sch. Dist. No. 512, 899 F. Supp. 530 (D. Kan. 1995).

84. 899 F. Supp. at 532.

85. *Id.* at 533.

86. *See id.* at 533-34 (citing Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979) (holding exclusionary rule applicable in OSHA administrative hearing)).

87. *See* Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987); Herbert v. Reinstein, 1994 WL 587095, at *5 (E.D. Pa. 1994), *rev'd*, 70 F.3d 1255 (3d Cir. 1995).

88. *James*, 899 F. Supp. at 534. From *James*, it appears that the *Plymouth Sedan* "quasi-criminal" test is dispositive regarding applicability of the exclusionary rule since the court did not attempt to balance the societal costs or benefits of application of the rule. However, other courts subscribe to the notion that the *Plymouth Sedan* test is only the first of two steps in determining whether the exclusionary rule applies. "[T]he exclusionary rule . . . [applies] if the proceeding can be characterized as 'quasi criminal' and if the invocation of the rule would outweigh the costs to society under *Janis*." Pike v. Gallagher, 829 F. Supp. 1254, 1265 (D.N.M.

Most recently, the Eighth Circuit addressed the issue in *Thompson v. Carthage School District*.[89] In *Thompson*, the court relied heavily on *United States v. Janis*, *INS v. Lopez-Mendoza*, and the balancing test.[90] The court found that the societal cost of excluding the evidence would be very high since application of the rule would "frustrate[] the critical governmental function of educating and protecting children" by preventing the discipline of those students who disrupt the educational process or endanger others.[91] The Eighth Circuit also concluded that "[a]pplication of the exclusionary rule would require suppression hearing-like inquiries inconsistent with the demands of school discipline."[92]

Weighing the benefits of the exclusionary rule, the court focused on the rule's deterrent effect and whether it would in fact deter Fourth Amendment violations in the school setting.[93] Noting that the exclusionary rule would have a strong deterrent effect, because it was an intrasovereign violation, the court proceeded to distinguish the case from *Lopez-Mendoza*. The court first noted that unlike INS agents and illegal immigrants, students and school officials do not have an adversarial relationship but rather a "'commonality of interests'"[94] and "'[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare'" and education.[95] Second, the court noted that children's legitimate privacy expectations were somewhat limited at school.[96] The court concluded that under these circumstances there is little need

1993) (footnote omitted). Although *Pike* utilized the "quasi-criminal" test as another factor in its balancing test, it conceded that it was "unclear if the Supreme Court requires a threshold finding that the nature of the civil proceeding is 'quasi-criminal' or if the nature of the proceeding is merely one factor in applying the *Janis* balancing test." *Id*. at 1265 n.6 (footnotes omitted).

An additional alternative is that the *Plymouth Sedan* test has been subsumed by the balancing test. *See* discussion *supra* note 59.

89. 87 F.3d 979 (8th Cir. 1996).

90. *See supra* Part II.C.2.

91. *Thompson*, 87 F.3d at 981.

92. *Id*.

93. *See id*.

94. *Id*. (quoting New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring)).

95. *Id*. (quoting New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring)).

96. *See id*.

for the deterrent effect afforded by the exclusionary rule and any deterrent effect that application of the exclusionary rule would provide could "not begin to outweigh the high societal costs of imposing the rule."[97] The court thus concluded that the exclusionary rule did not apply to the school disciplinary proceeding.

As these cases demonstrate, the federal courts are in a conundrum, not only as to whether or not the exclusionary rule should apply in school disciplinary hearings, but also whether the appropriate test to determine whether the rule applies is the balancing test or the "quasi-criminal" test. Uniformity among the federal courts in this area of the law is lacking, and it is unlikely that the Supreme Court will address the issue any time soon, if at all.[98]

III. ARGUMENTS FOR AND AGAINST THE EXCLUSIONARY RULE

An exploration of arguments on both sides of the battle over the exclusionary rule in school administrative hearings serves two functions. First, it provides the reader with an overview of the issues and concerns regarding applying or not applying the rule. Second, these arguments provide a checklist by which to evaluate the proposal articulated in Part IV of this Comment. That is, the proposal will be analyzed and evaluated against the concerns expressed by both sides to exemplify its superiority to the exclusionary rule in the school disciplinary hearing.

A. Arguments Against Applying the Exclusionary Rule

1. Compromised school safety

As was touched on previously, a monumental concern of applying the exclusionary rule to school disciplinary hearings is that the rule would compromise school safety.[99] Before

97. *Id.* at 982.

98. *See* L. Goering, *Constitutional Law: Privacy Penumbra Encompasses Students in School Searches*, 25 WASHBURN L.J. 135, 146 n.82 (1985) (noting a possible reason for not deciding whether the exclusionary rule should have applied in *T.L.O.* was because there were not enough Justices to get rid of it).

99. For an illustration of this concern in a slightly different context, see *Thompson*, 87 F.3d at 981, where the court began with a hypothetical situation where the application of the exclusionary rule barred the expulsion of a high school student who had confessed to the murder of his classmate, because the student was not read his Miranda Rights prior to giving his confession. The court concluded: "We doubt any

exploring the arguments as to how the rule would compromise school safety, it may be helpful to understand why school safety is held in such high regard legally, as well as socially.

As Justice Powell noted in *T.L.O.*, the "special characteristics of elementary and secondary schools . . . make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting."[100] For example, all fifty states require compulsory school attendance.[101] Because states require school attendance, even over parental objection,[102] the state and the school have a "moral duty to maintain student discipline and to protect children from violence that occurs while they are attending the very schools to which the state has bound them to attend."[103] Another special characteristic of public schools is the legal duty placed upon the state to protect students.[104] This duty comes from two sources: (1) state statutes and school board regulations,[105] and (2) the *in loco parentis* doctrine, under which teachers and school administrators may be held liable for their failure to act when a student is in danger in the school

parent would compromise school safety in this fashion." *Id*.

100. New Jersey v. T.L.O., 469 U.S. 325, 348 (1984) (Powell, J., concurring).

101. *See* Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. Rev. 817, 821 (1992); *see, e.g.*, ALA. CODE § 16-28-3 (1987) (requiring attendance for children ages 7 to 16); IDAHO CODE § 33-202 (Supp. 1992) (requiring children age 7 to 16 to attend school); 105 ILL. COMP. STAT. ANN. 5/26-1 (West 1993) (requiring compulsory attendance for children ages 7 to 16); WASH. REV. CODE ANN. § 28A.225.10 (West 1997) (requiring compulsory attendance for children ages 8 to 18).

102. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

103. Beci, *supra* note 101, at 821; *see T.L.O.*, 469 U.S. at 350 ("[T]he school has the obligation to protect pupils from mistreatment . . . .").

104. *See* Gordon J. v. Santa Ana Sch. Dist., 208 Cal. Rptr. 657, 666 (Ct. App. 1984) ("[W]e do not discount their sincere and accurate emphasis on the duty of the school administration to protect law abiding students from delinquents among them . . . .").

105. *See T.L.O.*, 469 U.S. at 336 ("[P]ublic school officials . . . act in furtherance of publicly mandated educational and disciplinary policies."); *see, e.g.*, IDAHO CODE § 33-512(4) (1997) (charging school officials with duty to protect health of pupils); NEB. REV. STAT. § 28-1204.03(5) (1997) ("Schools have a duty to protect their students and provide an environment which promotes and provides an education in a nonthreatening manner."); N.J. STAT. ANN. § 18A:25-2 (West 1997) (providing school officials with authority to prevent disorderly conduct by students).

setting.[106] Against this backdrop, and in light of common sense, it is easy to see why student safety is of such high concern.

Opponents of the exclusionary rule argue that its application in the disciplinary setting would compromise school safety in numerous ways. First, application of the rule to disciplinary hearings, through its suppression of credible evidence, may prohibit the school from expelling or suspending a "dangerous" student, which would frustrate the protection of children by preventing discipline "of [those] students who disrupt education or endanger other students."[107] Second, allowing a student who is perceived as "dangerous" to continue to attend the public school would possibly cause other students, school officials and parents to feel threatened and less safe at school.[108] Third, allowing a student caught "red handed" to go unpunished for breaking school rules would send a message to other students that they can break the rules and get away with it. Such a result would undermine the discipline of students and thereby frustrate the education and protection of children.[109] Finally, application of the exclusionary rule would have a "chilling effect on effective disciplinary enforcement."[110] That is, school officials would refrain from searching students because of their concern that the results of the search would be

106. *See* Beci, *supra* note 101, at 823. For analysis and argument that under certain circumstances school teachers and officials should have a federal constitutional duty to protect students from violence, see Colson, *supra* note 2.

107. Thompson v. Carthage Sch. Dist., 87 F.3d 979, 981 (8th Cir. 1996).

108. *See Gordon J.*, 208 Cal. Rptr. at 667 (noting that the costs of implementing the exclusionary rule include "damage to the morale of parents and teachers, [which cost] is too dear").

109. *See* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 51-52 (1996). Professor Dupre, a public school teacher prior to entering law school, remarks:

> Parents of diverse social and economic backgrounds, white and black, wealthy and middle class, are removing their children from public schools due to concerns about order and safety. . . . The chaos that has overtaken many of our public schools did not happen overnight. Serious discipline problems do not arise spontaneously in a school. They creep in as children realize that schools are unwilling or unable to take disciplinary action for lesser conduct. Each time that misconduct by an individual student went unquestioned because the teacher or principal was afraid that it did not meet the . . . standard[s] set forth by the Supreme Court we took one more step toward the turmoil that exists in the public school community today.

Id.

110. Spencer, *supra* note 72, at 1538.

suppressed. By foregoing such a search, the school official will not be able to discipline the students, and more importantly may fail to take needed action to protect other students from harm.[111]

2. More cumbersome adjudication

Another argument against the exclusionary rule is that application of the rule would create "more cumbersome adjudication" by requiring additional hearings, to determine if evidence should be suppressed, that are inconsistent with the demands of school discipline.[112] The rationale behind this theory is that the exclusionary rule and its implementation in the disciplinary proceeding would divert valuable educational and administrative resources from the educational process.[113]

3. The exclusionary rule does not deter constitutional violations in the school setting

The final argument is that in the school setting, the exclusionary rule does not fulfill its purpose, to deter state actors from violating the constitutional rights of its citizens,[114] to such a degree so as to warrant its application. Proponents of the rule recognize that the relationship being dealt with in the school setting is an "intrasovereign" one, and that this in and of itself would likely have a strong deterrent effect on the actor. However, the anti-exclusionary rule camp argues that the special characteristics of our public schools weaken this argument substantially. First, the relationship between the student and the school official is quite unlike the relationship where the exclusionary rule initially was applied, between law enforcement officials and criminal suspects.[115] The teacher's goal is to educate, encourage and help their students, far

111. *See* New Jersey v. T.L.O., 469 U.S. 325, 350 (1984) ("The primary duty of school officials is the education and training of young people. Without first establishing discipline and maintaining order, teachers cannot begin to educate the student.").

112. *Thompson*, 87 F.3d at 981.

113. *See* Bach, *supra* note 15, at 1169.

114. *See supra* notes 45-46.

115. *See Thompson*, 87 F.3d at 981. ("School officials . . . are not law enforcement officers. They do not have an adversarial relationship with students.").

different from that of a police officer's goals to thwart and apprehend suspected criminals. Since no accurate empirical data exists as to whether the exclusionary rule actually works in the criminal setting,[116] the student-teacher relationship casts even more doubt upon the rule's deterrent effects among this type of nonadversarial relationship.

A corollary argument is that since a school official's primary duty is not law enforcement, the official will have less training in search and seizure law and therefore may, in good faith, not know that a search is illegal, or even be aware of the consequences of the exclusionary rule. Under these circumstances, the exclusionary rule would not provide any deterrence. Additionally, because of the intense pressure placed on school officials to protect students from the threat of drugs and weapons, "school officials are not likely to be deterred by the exclusionary rule and are more likely to engage in a search simply to dispel their fears that students are in possession of such harmful items."[117]

B. Arguments in Favor of the Exclusionary Rule

1. The rule's deterrent effect

The major rationale advanced for adoption of the exclusionary rule in the school disciplinary setting is the same rationale advanced for its application in the criminal setting, its deterrent effect.[118] The idea behind the exclusionary rule is that school officials will be deterred from violating students' constitutional rights if they know that the results of their illegal search will not be available in the corresponding adjudication. Advocates of the rule feel that "[a] strong deterrent is needed to prevent random" or harassing searches of schoolchildren and their belongings.[119]

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116. *See* United States v. Janis, 428 U.S. 433, 450-52 (1976) ("[A]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed."); *see also* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (concluding that no effective quantitative measure of the exclusionary rule's deterrent efficacy had been devised).

117. Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 155 (1993).

118. *See* Bach, *supra* note 15, at 1146.

119. Spencer, *supra* note 72, at 1523.

Compulsory attendance laws[120] give further support to the argument in favor of the application of the exclusionary rule. Since students are required to attend public schools, the students' rights should be provided the utmost protection in a place where they are legally bound to be and in a setting which calls for "constant submission to authority."[121] This protection, the argument goes, will be best provided by the exclusionary rule because the relationship is an intrasovereign one.[122] Also, this camp advances the notion that the exclusionary rule is likely to be more effective in the school setting than in the criminal setting because the community and administration involved in this setting are smaller.[123] Individuals in the school system conducting illegal searches are more likely to be reprimanded for unconstitutional behavior because a school's administration is smaller, more intimate and capable to act more quickly than the criminal justice system.

> [A] school official receives greater feedback about his disciplinary activities. Unlike the three-tiered criminal justice system, the school's administrative disciplinary process frequently occurs entirely within the school or the local school district. Far less bureaucratic compartmentalization impedes the flow of relevant information. Moreover, the school adjudication is far more expeditious than a criminal proceeding. As a result, feedback on the propriety and consequences of search activity is more immediate and relevant, even though the offending searcher may not, beyond giving testimony, participate personally in the adjudication.[124]

2. Only viable alternative to protect students' rights

Another argument that this group advances is that without the exclusionary rule there is currently no viable alternative to ensure the protection of students' rights.[125] An alternative fre

120. *See* discussion *supra* notes 100-02 and accompanying text.

121. Spencer, *supra* note 72, at 1523.

122. *See supra* note 63 and accompanying text.

123. *See* Spencer, *supra* note 72, at 1525.

124. Bach, *supra* note 15, at 1165-66.

125. *See, e.g.*, Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 239 (E.D. Tex. 1980) ("Failure to apply the exclusionary rule would leave school officials free to trench upon the constitutional rights of students without restraint or fear of adverse consequences."); Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976) ("The

quently suggested to replace the exclusionary rule in deterring illegal searches and seizures is lawsuits against the authority who conducted the search or seizure. Under 42 U.S.C. § 1983 individuals can sue state officials, including school districts and individuals,[126] in federal court for violation of rights secured by the United States Constitution or federal laws.[127]

In theory this approach holds promise, but in the school context the option is practically foreclosed. Generally, young people lack the resources necessary to commence costly affirmative litigation,[128] or the students may not even be aware that their rights have been violated or that a damage remedy exists.[129] As well, "attorneys are probably not enthusiastic about taking such cases, given that they are lengthy, complex and have little likelihood of success."[130] Nor is the law very favorable to the student as school authorities enjoy some immunity under state statutes and students can only recover by showing that the official acted in bad faith.[131] All these factors lead to the conclusion that suits against the offending official are not realistic; one commentator concludes that the exclusionary rule remains the only "effective means of

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Supreme Court has basically left students remediless for Fourth Amendment violations in the federal courts.").

126. *See, e.g.*, Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978). However, a § 1983 action may not be brought against a state or state agency. *See, e.g.*, Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

127. *See* Beci, *supra* note 101, at 827. A § 1983 action may provide either injunctive relief, where there is a clear pattern of conduct by school officials violating constitutional rights on an ongoing basis, *see, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976), or compensatory damages, if the violations are isolated incidents. *See, e.g.*, Bivens v. Six Unknown Named Agents of the FBI, 403 U.S. 388 (1971).

> A school official is liable, under 42 U.S.C. § 1983, to a wronged student only if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Wood v. Strickland, 420 U.S. 308, 322 (1975).

128. *See* Smyth v. Lubbers, 398 F. Supp. 777, 794 (W.D. Mich. 1977).

129. *See* Spencer, *supra* note 72, at 1528.

130. *Id.*; *see* Irene Merker Rosenberg, *A Door Left Open: Applicability of the Exclusionary Rule to the Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29, 41 (1996) ("Recovery for Fourth Amendment violations is difficult, damages are not high, young people tend not to make good witnesses, and attorneys may well decline to prosecute such actions." (footnote omitted)).

131. *See, e.g.*, *Smyth*, 398 F. Supp. at 794.

informing school officials of their Fourth Amendment mistakes and assuring that such errors are not repeated."[132]

3. Judicial and administrative integrity

Another concern regarding not applying the exclusionary rule is the importance of judicial and administrative integrity in the context of school disciplinary settings.[133] "The 'imperative of judicial integrity' generally refers to the need for the judiciary to refrain from associating itself with and thus apparently approving of the government's use of illegally obtained evidence in a criminal prosecution."[134] The essential aim of this concern is to maintain respect for and trust in the law and those individuals charged with enforcing the law. Because schools are characterized as "the central socializers of American children" the concern for integrity is particularly significant.[135] As the Supreme Court remarked, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of the American schools."[136] Keeping our public schools free "from the taint of illegal, unconstitutional behavior is of paramount importance."[137] The lesson that those in a position of authority must themselves obey the rules is especially important in the controlled setting of a public school, where students are, for the most part, at the mercy of school officials and "struggle to find consistency in the rules, rewards, and punishment systems."[138] Young people are very impressionable and school officials are expected to be role models. Justice Stevens comments:

> The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one

132. *See* Rosenberg, *supra* note 130, at 42.

133. *See supra* notes 45-46 and discussion in text, noting that this was a past rationale under Supreme Court precedent.

134. Bach, *supra* note 15, at 1150 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960) (Stewart, J., concurring)).

135. Spencer, *supra* note 72, at 1531.

136. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

137. Spencer, *supra* note 72, at 1532 (footnotes omitted).

138. *Id.* at 1534-35.

> contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstances.[139]

Application of the exclusionary rule to the school disciplinary proceeding would "make[] an important statement to young people that 'our society attaches serious consequences to a violation of constitutional rights,' and that this is a principle of 'liberty and justice for all.'"[140]

Similarly, those parents and students who see or experience racial discrimination or misconduct on the part of the school officials will lose faith in a system that benefits from such misconduct.

> Most educators consider the shaping of character to be the school's primary task. While a child must learn to conform his behavior to societal rules and to respect the rights of others, it is also true that a child must learn that others, including adults, must also conform to these rules.[141]

The importance of maintaining judicial integrity is bolstered by the special relationship the school has with the local community.[142]

> Each school site has intensely local and personal affiliations.
>
> Local school boards usually are elected bodies which must be responsive to local community pressures. The typical school-

139. New Jersey v. T.L.O., 469 U.S. 325, 385-86 (1985) (Stevens, J., concurring in part and dissenting in part).

140. *Id.* at 374 (Stevens, J.,concurring in part and dissenting in part) (quoting Stone v. Powell, 428 U.S. 465, 492 (1976) and 36 U.S.C. § 172 (1994) (pledge of allegiance)).

141. Bach, *supra* note 15, at 1162-63.

142. *Cf.* Ingraham v. Wright, 430 U.S. 651, 670 (1977). Justice Powell made the following statement, in the context of the Eighth Amendment, regarding the relationship between the school and the local community:

> The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution . . . and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment. The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Id.

> community relationship promotes the free flow of information, by means of student reporting or regular public meetings, about the daily activities and disciplinary policies of the school.[143]

IV. AN ALTERNATIVE APPROACH

In brief summation, public school students have been afforded Fourth Amendment rights under the Federal Constitution to be free from unreasonable searches and seizures by school officials.[144] The lower courts have split on whether the exclusionary rule is the appropriate remedy for violation of such rights.[145] As has been shown, there are valid concerns as to why the exclusionary rule should or should not be applied in the school disciplinary setting.[146] The following alternative approach bridges the gap between these competing interests by (1) protecting students' rights, (2) providing a safe learning and working environment for students and school officials, and (3) providing school districts with much needed direction in Fourth Amendment jurisprudence.

This proposed approach is based upon a two-prong theory. First, to effectively deter constitutional misconduct on the part of teachers and school administrators, school officials must be educated about the rights of school children as articulated by the Supreme Court. Second, if the student's rights are violated, the offending school official "must suffer some negative consequence as a direct result of the misconduct."[147] The

143. Bach, *supra* note 15, at 1163.

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

145. *See supra* Part II.D.

146. *See supra* Part III.A-B.

147. Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 67 (1994).

following is a model proposal[148] which provides a framework to achieve the goals of this approach:

> § 1. Standard. No student shall be searched unless the school official reasonably suspects that evidence violating the law or school policy will be found in a particular place. The scope of such search is not to exceed the search's original objective and the method of the search shall not be excessively intrusive in light of the nature of the suspected infraction and the age and sex of the student.
>
> § 2. Training and Education. New school officials shall receive instruction and examination in search and seizure law, and all other school officials receive refresher courses on a yearly basis.
>
> § 3. Reporting Procedure. All searches or seizures conducted by school officials are to be reported within a reasonable time to the appropriate school district administrator for review.[149]
>
> § 4. Violations. Those individuals found to violate any of the standards articulated in § 1 may be subject to any or all of the following disciplinary action: additional training and education under § 2, administrative leave, suspension of pay, or other disciplinary action found to be an effective deterrent.

148. This language is suggested as a starting point for fashioning new policy and/or enhancing existing policy and is based upon federal case law. State law should be considered in adding to or supplementing this language as should the special circumstances of your school district. For instance, Louisiana requires that school officials obtain a warrant before conducting a search. *See* State v. Mora, 307 So. 2d 317 (La. 1975), *vacated for clarification*, 423 U.S. 809 (1975). As well, the exclusionary rule is the appropriate remedy in a school disciplinary hearing for violation of a student's rights under Article 1, Section 12 of the New York Constitution. *See* Juan C. v. Cortines, 647 N.Y.S.2d 491 (App. Div. 1996), *rev'd on other grounds*, 679 N.E.2d 1061 (N.Y. 1997).

Additionally, the proposed language addresses only suggested policy. If such a policy were implemented, its success would depend to a great extent on the policy being translated into procedures to specifically guide school officials through the process. There are numerous resources offering practical and detailed instruction on compliance with search and seizure law in public schools. For a concise and somewhat unique approach, see JOHN H. DISE ET AL., SEARCHES OF STUDENTS, LOCKERS AND AUTOMOBILES (Crisis Intervention Series, 1994). For a more comprehensive approach, see VAN DYKE & SAKURAI, *supra* note 11.

149. For examples of search and seizure report forms see VAN DYKE & SUKARAI, *supra* note 11, at 11-1 to 11-4.

§ 5. Notice. School officials shall provide regular notification to students and parents of the school's disciplinary policies and procedures.

A. Origins of the Proposal

Before providing an analysis of the proposal, the origins of the proposal and its sections should be explained. The proposal is intended to be used by school districts as a model comprehensive scheme to deter Fourth Amendment violations by school officials. The proposal contains all the factors which the Supreme Court found to be "most important" in refusing to apply the exclusionary rule to an INS deportation hearing in *Lopez-Mendoza*.[150]

Section 1 is essentially the reasonableness standard, established by the Supreme Court in *New Jersey v. T.L.O.*, used to determine the legality of searches and seizures of students by school officials in public schools.[151] Section 2 provides for the instruction and examination of school officials in Fourth Amendment law. Section 3 addresses the procedures for reporting and investigating searches or seizures conducted by school officials. The proposal's bite is found in section 4, which contains the deterrence strategy. School officials who commit Fourth Amendment violations are subject to different types of disciplinary action, the purpose behind the discipline being to deter future violations of section 1 of the proposal. Section 5 of the proposal was included to create dialogue about the proposal, and the broader issue of constitutional rights, between students, parents, teachers, and school officials. Enactment and compliance with each of these sections by a school district would essentially negate the need for the exclusionary rule in the school disciplinary hearing.[152]

B. The Rationale Behind the Proposal

To evaluate the model proposal against the concerns expressed in Part III, the fact scenario at the beginning of this Comment will be utilized. Once again, assume that the teacher

150. INS v. Lopez-Mendoza, 468 U.S. 1032, 1048 (1984); *see generally supra* Part II.C.2.

151. *See* New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

152. *See* discussion *infra* Part IV.B.

finds a gun on the student. If the exclusionary rule applies, the gun is inadmissible at the disciplinary hearing, and the student's Fourth Amendment rights are protected. However, the costs and fears of applying the rule, articulated by those opposing the exclusionary rule in Part III.A, may come to fruition. On the other hand, if the exclusionary rule does not apply, then school safety and discipline has not been undermined, yet the student's rights are violated and left unprotected, as there are no negative consequences for violation of these rights.

Now assume that the student and teacher were in a school district that had implemented the proposed policy in this Comment. Under the strictures of the policy, namely the education and training requirement, there is a greater likelihood that the search of the student would have been conducted in a constitutional manner. However, even the best training programs will not be one hundred percent effective in deterring all illegal searches and seizures. Therefore, assume that the teacher searches the student in a manner which is inconsistent with section 1 of the policy and finds a gun. Pursuant to section 2, the teacher contacts the appropriate administrative official and tells her about the search of the student and finding the gun. The administrative official then reviews the circumstances of the search with the student and other relevant parties. If the administrative official has reason to believe that section 1 of the policy has been violated, then a hearing will be conducted to answer two questions: (1) whether the teacher's search of the student violated section 1 of the policy and (if question one is answered affirmatively), (2) in light of the circumstances surrounding the teacher's search, as well as the teacher's past conduct regarding searches, what should be the appropriate consequences for the teacher under section 4 of the policy for the violation of section 1. Along with this investigation and hearing, the student will be involved in a disciplinary hearing before the school disciplinary board. Rather than excluding the gun from the hearing to protect the student's rights, this disciplinary process is utilized to protect

students' rights, and the student faces the appropriate consequences for bringing a gun to school.[153]

This alternative method is superior to the exclusionary rule in the school administrative hearing because it meets the vast majority of concerns voiced by both camps over the exclusionary rule.[154]

1. Meeting the concerns of the anti-exclusionary rule camp

The primary concern of the anti-exclusionary rule camp is that the exclusionary rule makes public schools less safe by suppressing reliable evidence needed to discipline the student. Under the proposed policy, instead of reliable evidence being suppressed, the appropriate disciplinary action would be taken against the school official who conducted the illegal search. Therefore the safety concerns expressed against application of the exclusionary rule are alleviated, yet students' rights still have a viable means by which they are protected.

For instance, the student who brought the gun to school will be disciplined so that he or she is no longer a threat to the students and faculty at the school. Nor will students, parents or school officials fear coming to school or have concerns about a "dangerous student" being in attendance at the school. Because the gun-wielding student does not go unpunished, as he would under the exclusionary rule, other students' respect for the law and rules will not be undermined and the student body will be sent the clear message that those who break the rules will be held accountable for their actions, teachers and students alike.

Another argument advanced by the anti-exclusionary rule camp is that, under the balancing test, the exclusionary rule in the school setting would not provide enough additional

153. One valid concern with the proposal is that it places the fox in charge of guarding the hen house. That is, what checks are there to make sure that the school officials will impose just discipline on other school officials found to violate section 1 of the policy? The first check is that school officials who do not impose discipline that effectively deters future violations run the risk of losing one of the key benefits of the proposal, advantage in litigation. A court will see through the mere adoption of the *Lopez-Mendoza* factors and mandate the exclusionary rule since the school district's tactics have not been an effective deterrent. Secondly, the student still has the option of bringing a § 1983 action to compensate for egregious or recurring violations of his or her Fourth Amendment rights. *See generally supra* notes 125-26 and accompanying text.

154. *See supra* Part III.A-B.

deterrent effect on school officials to warrant its application. The proposed policy does not question this conclusion, but responds as follows. First, when the counterbalancing costs of the exclusionary rule, namely the decrease in school safety, are taken out of the balancing equation, courts would be more likely to apply the exclusionary rule in the school administrative hearing setting. The proposed policy to a large degree neutralizes the adverse costs of protecting Fourth Amendment rights. The additional deterrence provided by this proposal is less expensive, in terms of societal costs under the balancing test, than the cost of the exclusionary rule's added deterrent effect. In addition, unlike the exclusionary rule's all or nothing approach, the school district has greater latitude under the proposed policy to determine the best way to deter its officials from violating the student's constitutional rights. By tailoring the punishment to fit the crime, the degree of deterrence gained by implementation of this policy has the potential to be even greater than the degree of deterrence obtained under the rigid exclusionary rule.[155]

The final argument advanced by the anti-exclusionary rule camp is that the rule would create more cumbersome adjudications. As far as this concern is a valid one,[156] the proposed policy does not mitigate this concern. Under either deterrent scheme, the board must first decide whether the search or seizure was reasonable.[157] Unless there is no protection afforded students' constitutional rights, then this determination would always have to be made by the school disciplinary board. With this understanding, the question then becomes, which do we value more, the marginal cost of additional administrative functions or the protection of students' constitutional rights? Viewed in this light, the additional resources required to conduct such investigations and hearings are of minimal cost.

155. For instance, one can easily imagine a situation where the teacher's motivations to search the child are driven by something other than punishing the child through the school disciplinary process. If the exclusionary rule is the only deterrent, the rule will not effectively deter this type of unconstitutional behavior.

156. *See* Bach, *supra* note 15, at 1169 (arguing that this is not a valid concern).

157. *See* discussion *supra* note 8.

2. Meeting the concerns of the pro-exclusionary rule camp

Next, it must be determined how the proposed policy stacks up against the pro-exclusionary rule camp. The concern is that without the exclusionary rule, there will be no effective deterrent to protect the students' rights. This author does not dispute that a § 1983 action, by itself, is not an effective deterrent, but advances the position that punishing directly those who violate the students' Fourth Amendment rights will provide at least as good a deterrent effect as the exclusionary rule, without the high societal costs,[158] as it provides for and allows a more flexible approach to deter offenders of the Fourth Amendment.[159] The main benefit of the proposed policy is that privacy rights are protected without the high costs associated with applying the exclusionary rule.

This proposed policy also successfully addresses the judicial integrity concern expressed by advocates of the rule. As previously noted, supporters of the exclusionary rule fear that students will lose respect for school officials and the law when they see an adult break the rules and go unpunished for this activity. The proposed policy teaches this lesson to students in a very direct way, as opposed to the exclusionary rule's imputation of punishment upon the illegal searcher through the suppression of evidence. The teacher will be reprimanded for violating the student's rights under section 4 of the proposed policy. Thus, the students will more directly and effectively learn the lesson that school officials must respect the law and the rights of school children.

An additional benefit of the proposed policy over the exclusionary rule is its consistency. Referring back to the hypothetical at the beginning of this Comment, assume that the

158. *See* Caldwell & Chase, *supra* note 147, at 67 (concluding that police officers who violate the Fourth Amendment should suffer negative consequence as a direct result of their misconduct to be effectively deterred).

159. *See* discussion *supra* note 155 and accompanying text. One commentator has noted that "[s]chool administrators are better equipped than judges to develop policies that best meet their local educational goals." Karen M. Clemes, Note, Lovell v. Poway Unified School District: *An Elementary Lesson Against Judicial Intervention in School Administrator Disciplinary Discretion*, 33 CAL. W. L. REV. 219, 242-43 (1997). As well, amidst the "ever increasing task of maintaining school order," *id.* at 241, "schools should be given substantial constitutional leeway in carrying out their traditional mission of responding to particularized wrongdoing." *Id.* at 243.

teacher conducting the search finds nothing in the student's jacket. Even though nothing was found by the teacher, the search is still a violation of the student's constitutional rights. The exclusionary rule has no application in this scenario as there is no disciplinary hearing since the student was not breaking any of the school rules. Compare this result with the result under the proposed policy. Assuming the teacher is found to have violated section 1, the teacher will be subject to discipline under section 4. Not only does the proposed policy provide greater protection to students' constitutional rights, from the student's perspective it would seem more fair and consistent. It does not make sense that a teacher should be punished for violating a student's constitutional rights only when the student is culpable of violating school policy. This could easily be interpreted by students as providing a greater amount of protection to those students who are "less deserving of protection."

C. Utility of the Proposed Policy

> [A] peculiar strength[] of our form of government [is] each State's freedom to "serve as a laboratory; and try novel social and economic experiments." *No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.*[160]

1. The proposed policy as a sword

Implementation of the proposed policy can be viewed as a sword to be wielded by school districts in two respects. First, in those jurisdictions that have determined the exclusionary rule does not apply, there is currently little incentive for school officials to obey the strictures of the Fourth Amendment. The fact that students' constitutional rights essentially go unprotected under current federal precedent should concern school officials, teachers, parents, and students. Adopting some form of the proposed policy would symbolically and practically send the message to students and parents, as well as teachers

160. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (emphasis added) (footnote omitted) (quoting New State Ice Co., v. Liebmann, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting)).

and administrators, that students' constitutional rights are to be respected and will be protected.[161]

Second, implementation of the proposal by a school district would be a solemn cry for autonomy. Decisions concerning student discipline in public schools traditionally were made by officials at the state and local level.[162] Within the past three decades the federal courts have departed significantly from their traditional deference to state and local disciplinary decisions.[163] The Supreme Court's intervention in the day to day running of public schools "has made it more difficult for public schools to reclaim the order and discipline necessary to educate students."[164]

A school district which adopts a form of the proposed policy would be taking a large step toward preserving its own autonomy by limiting the need and or opportunity for courts to mandate school districts to conduct themselves in a manner according to the courts' bidding. The need for courts to intervene would decrease as implementation of the proposed policy would send a resounding signal to the courts regarding the capability and desire of local governments to take control and determine how best to meet their educational goals.[165]

2. The proposed policy as a shield

Implementing and following a policy similar to the one proposed by this Comment will provide school districts a shield to protect themselves from civil liability, conflicts or incidents damaging to the relationship and trust between the community and school, and unwanted precedent from the federal courts.

161. Parents become upset when their children's consitutional rights are violated or perceived to be violated. *See* Dodge, *supra* note 7, at 13. ("They take it for granted that just because they are kids, they don't have rights."); Inara Verzemnieks & Chastity Pratt, *Hunt for Thief at Duniway Went Too Far*, PORT. OREGONIAN, Jan. 31, 1998, at B-1 (noting that school officials and police issued written apologies to students and parents for search that "went too far"); *NBC News Sunrise: Oregon Parents Protest Strip Searches of Their Daughters* (NBC television broadcast, Feb. 3, 1998), *text available in* 1998 WL 5280939 (noting protest by angry parents whose daughters were strip searched while in school).

162. *See* Bach, *supra* note 15, at 1134.

163. *See id.* at 1134-35 & n.9.

164. Dupre, *supra* note 109, at 49.

165. *See* Robert B. Harper, *School Searches, A Look into the 21st Century*, 13 MISS. C. L. REV. 293, 296 (1993); Clemes, *supra* note 159, at 242-43.

First, school districts will protect themselves from liability under § 1983 suits, for which the school district might be required to pay money damages for egregious violations of a student's constitutional rights.[166] Implementation of the training elements of the proposed policy would properly educate school officials on how to conduct searches in a constitutional manner. Such a policy, if adhered to, would provide the school a shield from liability under § 1983.

As well, the school district would be protecting itself from another externality that comes with egregious or recurring violations of constitutional rights, namely community outrage.[167] The notice provision in the model policy (section 5) encapsulates the vision that those school districts adopting some form of the model policy will notify the local community and involve it in its endeavors to protect students' rights and ensure school safety.

Finally, the fact that a school district has its own training procedures and deterrence schemes in place is a critical element in the Supreme Court's analysis of whether the exclusionary rule should be applied in a noncriminal setting.[168] The proposed policy fulfills the same requirements that the Court found to be "most important" in *Lopez-Mendoza*. With the proposed policy in place, school districts facing litigation over whether the exclusionary rule should apply in the school setting would have a step-up over school districts without the proposed policy. In short, since the courts are to measure the exclusionary rule's deterrent effect at the margin, that is, application of the exclusionary rule must cause deterrence in addition to that which already arises by other means,[169] the proposed policy would shield a school district from being required to adopt the exclusionary rule.

166. There are benefits to merely having a clear policy. In at least one post-*T.L.O.* decision, a civil rights action against a school district withstood summary judgment in favor of the school district apparently because the district lacked a clearly stated policy prohibiting the type of unconstitutional search initiated by the school official. *See* Cales v. Howell Pub. Sch., 635 F. Supp. 454 (E.D. Mich. 1985).

167. *See* discussion *supra* note 161.

168. *See* discussion *supra* Part II.C.1.

169. *See* United States v. Janis, 428 U.S. 433, 453 (1975); Bach, *supra* note 15, at 1149.

V. CONCLUSION

"Education 'is perhaps the most important function' of government, and government has a heightened obligation to safeguard students whom it compels to attend school."[170] Public school students should be, and feel, safe in schools. They should be free from violence by other students as well as from unreasonable invasions of privacy by school officials. While the exclusionary rule seems to require one at the expense of the other, the alternative approach articulated in this Comment attempts to secure both the protection of the students' constitutional rights and the physical protection of members of the school community. The alternative approach maintains the flexibility and discretion needed to keep order in public schools. The proposed policy is in line with the Supreme Court's mandate that the policy should "neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children,"[171] but rather maintain the appropriate balance.

J. Chad Mitchell

170. New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

171. *Id.* at 342-43.