Brigham Young University Education and Law Journal

Volume 2011
Number 2 *Symposium: The Impact of Same-Sex Marriage on Education*

Article 19

Fall 3-2-2011

New Jersey v. T.L.O.: School Searches and the Applicability of the Exclusionary Rule in Juvenile Delinquency and Criminal Proceedings

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NEW JERSEY V. T.L.O.: SCHOOL SEARCHES AND THE APPLICABILITY OF THE EXCLUSIONARY RULE IN JUVENILE DELINQUENCY AND CRIMINAL PROCEEDINGS

I. INTRODUCTION

In 1985, the United States Supreme Court decided *New Jersey v. T.L.O.*,[1] a landmark case interpreting the Fourth Amendment of the United States Constitution.[2] The basic holdings in the case were: first, the restrictions of the Fourth Amendment against unreasonable searches and seizures do apply to public school teachers and other school officials because they are state governmental actors for purposes of the Fourth Amendment;[3] second, the standard of reasonableness for searches performed by such school officials is a mere "reasonableness, under all the circumstances" test;[4] and third, the school official's actions in the case did not violate the Fourth Amendment.[5]

Several subsequent Supreme Court cases dealing with the application of the Fourth Amendment in schools have cited *T.L.O.* or used the test it set forth, but there has been no modification to its core holdings.[6] However, this is not because *T.L.O.* did not leave open any unanswered questions or unresolved issues. Indeed, the Court in its *T.L.O.* opinion intentionally left open and undecided several important issues.

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

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

3. *T.L.O.*, 469 U.S. at 333–37.

4. *Id.* at 337–43.

5. *Id.* at 343–48.

6. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

The purpose of this paper is to discuss one of the issues that remains open and unanswered by the majority opinion: the applicability of the exclusionary rule in juvenile delinquency or criminal proceedings when the evidence has been seized in a school, by a school official, in violation of the Fourth Amendment.

This paper will proceed in the following manner. Part II will begin by providing a description of the *T.L.O.* case and its holdings as well as a summary of subsequent Supreme Court cases dealing with the Fourth Amendment's application in schools. Part III will provide a discussion of the exclusionary rule issue left open by the *T.L.O.* opinion, specifically the applicability of the exclusionary rule to juvenile delinquency and criminal proceedings for violations of the Fourth Amendment in school searches. Finally, Part IV will provide a conclusion.

II. *NEW JERSEY V. T.L.O.*

As a preliminary matter, it is necessary to offer a detailed exposition of the facts and holdings from the *T.L.O.* case in order to understand what the open issues are and why they were deliberately left open by the Supreme Court in the opinion. As the Supreme Court has said, "[t]he Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."[7]

A. Facts

In 1980 at Piscataway High School in New Jersey, a teacher discovered two teenage girls smoking in a school restroom.[8] One of the two girls was fourteen-year-old T.L.O., a high school freshman at the time.[9] Smoking on school grounds was a violation of the school rules, so the teacher escorted the two girls to the office of the school's principal.[10] There they

7. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (citing *T.L.O.*, 469 U.S. at 337–42).

8. *T.L.O.*, 469 U.S. at 328.

9. *Id.*

10. *Id.*

were presented to the assistant vice principal, Theodore Choplick, who questioned the two girls about the alleged smoking in the restroom.[11] T.L.O.'s companion confessed to the violation, but T.L.O. denied the allegations, even asserting that she did not smoke at all.[12]

With T.L.O.'s bold denial, Mr. Choplick requested that she come into his private office.[13] There, Mr. Choplick demanded to see the purse T.L.O. was carrying.[14] Mr. Choplick then opened the purse and noticed a pack of cigarettes.[15] He removed the cigarettes from the purse and held them up to T.L.O. and accused her of lying to him.[16] Additionally, Mr. Choplick noticed when he was removing the cigarettes from the purse that there was also a package of cigarette rolling papers in the purse.[17] In Mr. Choplick's experience at the high school, possession of such rolling papers was consistently linked with marijuana use.[18] Therefore, Mr. Choplick became even more suspicious that T.L.O. was also involved in marijuana use, and that there would be more evidence of it in her purse.[19] He then engaged in a closer inspection of the purse and its contents.[20] In the purse, Mr. Choplick found a small amount of marijuana, a pipe, some empty plastic bags, a significant amount of one-dollar bills, an index card with a list of "people who owe me money," and two letters that evidenced T.L.O.'s participation in marijuana dealing.[21]

With the discovery of this evidence, Mr. Choplick called T.L.O.'s mother and the police.[22] Later, at the police station, T.L.O. confessed to having engaged in marijuana dealing at the high school.[23] Based on the evidence seized from the purse by Mr. Choplick and T.L.O.'s confession, the State brought

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 347.
22. *Id.* at 328.
23. *Id.* at 329.

criminal delinquency charges against T.L.O. in juvenile court.[24] T.L.O. filed a motion to suppress, asking that the evidence seized from her purse be excluded and that her confession be excluded because it was tainted by the illegally-seized evidence.[25]

The trial court concluded that because the search was reasonable, it did not violate the Fourth Amendment, and the evidence should not be suppressed.[26] T.L.O. was found to be delinquent and was sentenced to one year of probation.[27]

On appeal in the juvenile court case, the appellate division affirmed the trial court's determination on the Fourth Amendment question, but the Supreme Court of New Jersey reversed, holding that the search violated the Fourth Amendment rights of T.L.O. and that the evidence should be suppressed according to the exclusionary rule.[28] The United States Supreme Court granted certiorari and reversed the Supreme Court of New Jersey, holding, in essence, that there was no Fourth Amendment violation in the case.[29]

B. Discussion

Justice White's majority opinion notes that certiorari was originally granted in this case to answer the question of "the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities."[30] However, upon consideration, the Court felt it would be wiser to first decide "what limits, if any, the Fourth Amendment places on the activities of school authorities . . . ."[31] Since the Court eventually decided that there was no Fourth Amendment violation in the case, there was no need to address what remedy, if any, would be required in the event that there was a violation.[32]

The Court analyzed the Fourth Amendment by dividing the inquiry into three questions, and thus produced three linked

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24. *Id.*
25. *Id.*
26. State *ex rel.* T.L.O., 428 A.2d 1327, 1333–34 (Middlesex Cnty. Ct. 1980).
27. *T.L.O.*, 469 U.S. at 330.
28. *Id.*
29. *Id.* at 347–48.
30. *Id.* at 327.
31. *Id.* at 332.
32. *Id.* at 333 n.3.

holdings. The first and threshold-type question the Court answered was "whether [the Fourth] Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials."[33] Having answered that question in the affirmative, the next issue was "the inquiry into the standards governing such searches."[34] The Court decided that school officials are not restricted by the Fourth Amendment in the same manner as law enforcement officers—the standard in schools is a more relaxed, "reasonable grounds" test.[35] Having announced the new test, the Court analyzed the facts of the case in light of the newly announced standard and held that T.L.O.'s Fourth Amendment rights were not violated when Mr. Choplick searched and seized the contents of her purse.[36] Each of the three parts of the Court's holding will be discussed in order.

1. Public school officials are subject to the Fourth Amendment

As indicated above, the first and preliminary question that the Court answered was whether public school officials are subject to the restrictions imposed on government by the Fourth Amendment.[37] Answering the question in the affirmative, the Court progressed through the inquiry in logical fashion.[38]

The Court began by acknowledging, first, the undisputed fact that the Fourth Amendment applies to States by virtue of the Fourteenth Amendment.[39] Second, the Fourteenth Amendment indisputably protects the constitutional rights of students from actions of public school officials:

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33. *Id.* at 333.
34. *Id.* at 337.
35. *Id.* at 337–43.
36. *Id.* at 343–48.
37. *Id.* at 333.
38. *Id.* at 333–37.
39. *Id.* at 334. The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. IV, § 1. The Fourth Amendment, and the accompanying remedy of the exclusionary rule was made applicable to the states by the Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961).

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[40]

With these two foundational principles in place, the Court further acknowledged that while the history of the Fourth Amendment may suggest that it "was intended to regulate only searches and seizures carried out by law enforcement officers," the Court has never limited it to only police conduct.[41] This is because "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[42]

Furthermore, the public schools function not as an exercise of mere delegated parental authority, but as an exercise of state authority.[43] This is supported by the "contemporary reality" of compulsory education laws and "publicly mandated educational and disciplinary policies.[44] Thus, public school officials are state actors for purposes of the Fourth Amendment; therefore they cannot claim parental immunity from the constitutional restrictions.[45]

Additionally, the Court had previously held that school officials, as governmental actors, must comply with the requirements of free speech rights under the First Amendment,[46] and the Due Process clause of the Fourteenth

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40. *T.L.O.*, 469 U.S. at 334 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

41. *Id.* at 334–35. The Court noted that Fourth Amendment restrictions have been applied to other non-law enforcement governmental authorities. *See, e.g.*, Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (Occupational Safety and Health Act inspectors); Michigan v. Tyler, 436 U.S. 499 (1978) (firemen); Camara v. Mun. Ct., 387 U.S. 523 (1967) (building inspectors).

42. *T.L.O.*, 469 U.S. at 335 (quoting *Camara*, 387 U.S. at 528).

43. *Id.* at 336.

44. *Id.* (citing Ingraham v. Wright, 430 U.S. 651, 662 (1977)).

45. *Id.* at 336–37.

46. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

Amendment.[47] Therefore, it would only make sense to require that public school officials, still functioning as governmental actors, also conform their actions to the privacy protections of the Fourth Amendment.[48]

2. Standard governing school searches

Having decided that the Fourth Amendment does apply to school officials, the Court then had to analyze the bigger question of what standards of reasonableness would apply to searches and seizures in public schools.[49] With the "underlying command" of the Fourth Amendment being that searches and seizures must be reasonable, the Court established a standard of reasonableness to be applied in searches and seizures performed in public schools. The Court's determination of what is reasonable included a balancing test.[50]

Since what makes a search or seizure reasonable or not depends heavily on the context, the inquiry requires finding the proper balance between "the individual's legitimate expectations of privacy and personal security . . . [and] the government's need for effective methods to deal with breaches of the public order."[51] In this case, the privacy interest of the individual, T.L.O., was in her purse, a personal item that she carried with her.[52] The Court indicated that a student's expectation of privacy in such items of personal property was one that society would be "prepared to recognize as legitimate," a necessity to receive Fourth Amendment protection.[53] However, on the government's side of the balancing test, the school has an "equally legitimate need to maintain an environment in which learning can take place."[54] Given the significant competing considerations, the Court felt it necessary to ease somewhat the restrictions normally imposed by the Fourth Amendment.[55]

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47. Goss v. Lopez, 419 U.S. 565 (1975).
48. *T.L.O.*, 469 U.S. at 336.
49. *Id.* at 337.
50. *Id.*
51. *Id.*
52. *Id.* at 337–38.
53. *Id.* at 338–39 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).
54. *Id.* at 340.
55. *Id.* at 340–43.

Thus, for the unique public school setting, the Court departed from the probable cause and warrant requirements of the Fourth Amendment.[56] This was for several stated reasons. The warrant requirement is ill-suited for the school environment because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[57] Additionally, the warrant requirement has been abandoned in other cases where "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[58] Furthermore, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.'"[59] Thus, the Court rationalized by stating, "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."[60]

The Court then announced that the new standard for school searches would be simply a test of reasonableness under all the circumstances.[61] This inquiry has two parts: "first, one must consider 'whether the . . . action was justified at its inception;'[62] second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[63] The first part of the test will be satisfied under ordinary circumstances "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

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56. *Id.*

57. *Id.* at 340.

58. *Id.* (quoting *Camara*, 387 U.S. at 532–33).

59. *Id.* at 340–41 (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring)).

60. *Id.* at 341. *See, e.g.*, 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, 392 U.S. 1 (1968).

61. *T.L.O.*, 469 U.S. at 341.

62. *Id.* (quoting *Terry*, 392 U.S. at 20).

63. *Id.*

of the school."[64] The second part of the test is satisfied "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[65] Providing justification and support for its newly announced test, the Court stated:

> This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will 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. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.[66]

Having announced the new reasonableness standard for school searches, the main question remaining was how it would be applied to the case at hand.[67]

3. The search was reasonable

Applying the "reasonable grounds" standard to the facts of the case, the Court concluded "that the search was in no sense unreasonable for Fourth Amendment purposes."[68] This case involved two distinct searches, and the first provided the basis for the second.[69] Therefore, "the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place."[70] Since T.L.O. had been accused of smoking but had denied it, the idea that she had cigarettes in her purse was not unreasonable.[71] Accordingly, the Court also stated that

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64. *Id.* at 341–42.
65. *Id.* at 342.
66. *Id.* at 342–43.
67. *Id.* at 343.
68. *Id.*
69. *Id.* at 343–44.
70. *Id.* at 344.
71. *Id.* at 346.

"it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes."[72] Since Mr. Choplick's suspicions of marijuana use were raised when he saw the package of rolling papers in plain sight just as he removed the cigarettes from the purse, his resulting examination of the contents of the purse for evidence of marijuana use was justified.[73] All of the evidence discovered upon further inspection of the purse was therefore seized reasonably, and none of T.L.O.'s Fourth Amendment rights were violated when this evidence was used against her in the juvenile court delinquency charges.[74]

C. Subsequent Supreme Court Decisions on the Application of the Fourth Amendment in Schools

Since the *T.L.O.* decision, twenty-five years of litigation has yielded only three Supreme Court cases dealing with the application of the Fourth Amendment in schools.[75] These cases did not modify the *T.L.O.* standard. Indeed, only one of the cases contained the right set of circumstances that required the actual use of the "reasonable grounds" test.[76] Additionally, none of the cases involved criminal-type charges against a student in juvenile court as did *T.L.O.*;[77] all were civil rights lawsuits.[78] Two of the cases were based on suspicionless searches, and the other was initially based on individualized reasonable suspicion. A brief examination of these cases serves to further show how and in what manner the Court has repeatedly treated school cases specially and differently than non-school cases for purposes of the Fourth Amendment.

1. Vernonia School District 47J v. Acton

The first school search case post-*T.L.O.* was *Vernonia School District 47J v. Acton*, which was based on a

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72. *Id.*

73. *Id.* at 347.

74. *Id.* at 347–48.

75. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009); Bd. of Educ., Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

76. *Redding*, 129 S. Ct. 2633.

77. *T.L.O.*, 469 U.S. at 329.

78. *Redding*, 129 S. Ct. at 2638; *Earls*, 536 U.S. at 826–27; *Vernonia*, 515 U.S. at 651–52.

suspicionless search, in the "special needs" category of Fourth Amendment cases.[79] In the case, a school district, in an effort to curb the tide of drug use in its schools, instituted a policy of mandatory urine testing for all students participating in school sports.[80] The policy required the student and his or her parents to sign a consent form agreeing to the testing before the student could participate in any school sport.[81] A student (Acton) brought suit against the school district because he was denied the opportunity to play on a school football team because his parents would not agree to sign the consent form.[82] Acton claimed that this policy was a violation of the Fourth Amendment.

The Court noted that the *T.L.O.* decision made the Fourth Amendment applicable to school officials.[83] It was also noted that the public school context fell into the "special needs" category of the Fourth Amendment, thus reducing the level of suspicion required from probable cause to reasonable suspicion.[84] However, instead of engaging in the actual "reasonable grounds" test articulated in *T.L.O.*, the Court in *Acton* engaged in a balancing analysis of the privacy interest involved against the governmental interest.[85] While not explicitly stated, it seems that the "reasonable grounds" test was not used in *Vernonia* because the case involved a suspicionless search policy and not an actual search by a school official that had already taken place.[86] After weighing the minimal privacy interest students had and the minimal intrusion into those interests against the heavy interest the School District had in eradicating student drug use and the policy's reasonably effective means of meeting that interest, the Court found no Fourth Amendment violation and ruled in favor of the School District.[87]

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79. *Vernonia*, 515 U.S. at 653.

80. *Id.* at 648–51.

81. *Id.*

82. *Id.* at 651–52.

83. *Id.* at 652 (citing *T.L.O.*, 469 U.S. at 336–37).

84. *Id.* at 653.

85. *Id.* at 654–66.

86. *Cf. id.* at 653 (the search the Court approved of in *T.L.O.* was based on individualized suspicion of wrongdoing).

87. *Id.* at 654–66.

2. Board of Education, Pottawatomie County v. Earls

The next case dealing with the Fourth Amendment in schools was *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[88] another suspicionless search case whose facts were strikingly similar to those in *Vernonia*. In *Earls*, the School Board implemented a policy that required all students who wished to participate in any competitive extracurricular activity to submit to drug testing.[89] A student (Earls) who was a participant in several extracurricular activities, including show choir and marching band, brought an action against the school district.[90] Earls alleged that the policy violated the Fourth Amendment.[91]

The Court ruled in favor of the school, and engaged in an analysis virtually identical to the *Vernonia* opinion. The first consideration was "the nature of the privacy interest allegedly compromised by the drug testing."[92] The determination on this issue was that "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease."[93]

The next consideration was "the character of the intrusion imposed by the Policy."[94] The Court determined that requiring students to produce a urine sample behind the closed door of a bathroom stall was "even less problematic" than the "negligible" intrusion in *Vernonia*.[95] Concluding the issue of the nature of the intrusion, the Court stated, "[g]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant."[96]

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88. Bd. of Education of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002).

89. *Earls*, 536 U.S. at 825.

90. *Id.* at 826–27.

91. *Id.*

92. *Id.* at 830.

93. *Id.* at 830–31 (italics omitted).

94. *Id.* at 832.

95. *Id.* at 832–33 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995)).

96. *Id.* at 834.

As the final consideration in its analysis, the Court considered "the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them."[97] For this analysis of the government's interest, the Court concluded by saying:

> we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. . . . [W]e conclude that the drug testing . . . effectively serves the School District's interest in protecting the safety and health of its students.[98]

It is also significant to note in *Earls* the Court's response to the argument that the drug testing should he based only upon an "individualized reasonable suspicion of wrongdoing."[99] Rejecting that argument, the Court stated, "[i]n this context, the *Fourth Amendment* does not require a finding of individualized suspicion, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students."[100] While Earls had argued that requiring an individualized suspicion would be less intrusive, the Court questioned whether this would, in reality, be less intrusive.[101] The Court suggested that such a requirement would result in an additional burden placed on teachers, who "might unfairly target members of unpopular groups," and could render the whole program ineffective due to "the fear of lawsuits resulting from targeted searches."[102] Furthermore, the Court pointed out that "reasonableness under the Fourth Amendment does not require employing the least intrusive means, because 'the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.'"[103] Additionally, the Court reiterated that "the Fourth Amendment imposes no irreducible requirement of

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97. *Id.* (citing *Vernonia*, 515 U.S. at 660).

98. *Id.* at 838.

99. *Id.* at 837.

100. *Id.* (emphasis in original) (citation omitted).

101. *Id.*

102. *Id.* (citing *Vernonia*, 515 U.S. at 663–64 (offering similar reasons for why "testing based on 'suspicion' of drug use would not be better, but worse")).

103. *Id.* (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 556–57 (1976)).

[individualized] suspicion."[104] Indeed, "[i]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."[105]

In summary, the Court reasoned that in the safety and administrative regulations context, departing from the probable cause requirement may be reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[106] Therefore, the Court ruled that the drug testing policy was not a violation of the Fourth Amendment and ruled in favor of the school district.

3. Safford Unified School District #1 v. Redding

In the only Supreme Court case since *T.L.O.* that involved an actual search of a student by a school official, the Court ruled in *Safford Unified School District #1 v. Redding* that the "strip-search" of a student violated the Fourth Amendment.[107] Using the two-part test articulated in *T.L.O.*, the search was held to be excessive in its scope.[108] However, due to the lack of clearly established law on the subject of school strip-searches, the school officials were entitled to qualified immunity.[109]

In this case, Assistant Principal Kerry Wilson of Safford Middle School received information from two other students that Savana Redding, another student, was possibly in violation of school policy by having and/or distributing prescription strength and over-the-counter pain reliever pills.[110] Wilson confronted and questioned Redding, but she denied having ever given pills to another student and denied having any pills in her possession.[111] Wilson and another school official, Helen Romero, then searched Redding's

104. *Id.* at 829 (quoting *Martinez-Fuerte*, 428 U.S. at 561).
105. *Id.* at 829 (quoting Treasury Emps. v. Von Raab, 489 U.S. 656, 668 (1989)).
106. *Earls*, 536 U.S. at 829 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
107. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2637–38 (2009).
108. *Id.* at 2639–43.
109. *Id.* at 2643–44.
110. *Id.* at 2638–41.
111. *Id.* at 2638.

backpack, but found nothing.[112] Wilson then instructed Romero to take Redding to the school nurse's office and search her clothes for pills.[113] Romero and the school nurse, Peggy Schwallier, then had Redding remove her clothes down to her bra and underwear.[114] Redding was then told to "pull her bra out and to the side and shake it, and to pull out the elastic on her underpants . . . ."[115] No pills were ever found.[116] Redding's mother subsequently filed suit on behalf of her daughter against the school district and the school officials involved.[117]

In its analysis of the facts of the case under the two-part reasonable-grounds test from *T.L.O.*, the Court acknowledged that the search of Redding's backpack and outer clothing was justified at its inception due to the information Wilson had gathered from other students concerning Redding's involvement with pain pills.[118] However, once the search extended to the point where Redding was required to expose herself by shaking out her underwear, this degree of intrusion did not match the kind of suspicion Wilson had.[119] This was because there was no evidence whatsoever that would have indicated a chance that Redding had pills stuffed inside her underwear.[120] Additionally, "Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills."[121] This indicated a lack of reason to believe that there was a "danger to the students from the power of the drugs or their quantity."[122] The Court thought "that the combination of these deficiencies was fatal to finding the search reasonable."[123] Therefore, the Court ruled that the Fourth Amendment rights of Redding had been violated.[124]

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 2640–41.
119. *Id.* at 2642.
120. *Id.* at 2642–43.
121. *Id.* at 2642.
122. *Id.* at 2642–43.
123. *Id.* at 2643.
124. *Id.* at 2637.

The Court in *Redding* had no occasion to address the exclusionary rule question from *T.L.O.* since there were no criminal proceedings.[125] Therefore, the exclusionary rule was inapplicable.[126] Thus, even after several school Fourth Amendment cases, the question concerning the contours of the application of the exclusionary rule in the school search context remains unanswered by the Supreme Court. However, these cases do provide some insight into how the Court typically treats school cases differently than other Fourth Amendment cases.

III. THE EXCLUSIONARY RULE

This section will discuss the applicability of the exclusionary rule in juvenile delinquency and criminal proceedings involving violations of the Fourth Amendment in schools. First, the cases that have dealt directly with the issue and have either applied or rejected the rule will be discussed. Second, a summary of the courts' rationales will be provided. Finally, additional discussion of the issue from scholarly sources will be provided.

A. Cases That Have Applied the Exclusionary Rule

Both before and after the *T.L.O.* decision, most courts across the country have applied the exclusionary rule in the juvenile and criminal proceedings to evidence obtained in a school search or seizure that violated the Fourth Amendment. However, there are differences among the analyses engaged in and the rationales given by the various courts in the majority view. With no guidance from the Supreme Court as of yet, the manner in which to analyze the issue is virtually wide open.

Of the reported cases in which the exclusionary rule was used to suppress the evidence obtained in schools in violation of the Fourth Amendment, a handful of the courts have applied the rule without analysis of whether such application of the rule is appropriate.[127] Two courts have simply applied, without

125. *Id.* at 2638.

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

127. *See* Piazzola v. Watkins, 442 F.2d 284, 290 (5th Cir. 1971) (college dorm room); *In re* Appeal in Pima Cnty. Juvenile Action No. 80484-1, 733 P.2d 316, 318 (Ariz. Ct. App. 1987); T.J. v. State, 538 So. 2d 1320, 1322 (Fla. Dist. Ct. App. 1989) (cites only to normal police cases for support); T.A.O'B. v. State, 459 So. 2d 1106 (Fla.

hesitation or analysis, specific state statutes that require suppression in juvenile delinquency proceedings of evidence seized illegally.[128] There are only a few cases containing some amount of analysis and rationale concerning the acceptance of the exclusionary rule for unconstitutional school searches resulting in juvenile delinquency proceedings.[129]

In *Gordon v. Santa Ana Unified School Distric*t, a California Appellate Court carefully considered whether to apply the exclusionary rule in juvenile delinquency proceedings, and decided that it should apply.[130] The court determined that there was no good reason to treat school searches differently from other government searches when it comes to juvenile and criminal prosecutions.[131] Therefore, in the court's logic, since the Supreme Court has held that the Fourth Amendment is "applicable to attack evidence acquired in administrative searches and offered in criminal prosecutions," it should similarly be available in the context of school searches that result in juvenile prosecutions.[132] Concluding its determination of the applicability of the exclusionary rule, the court gave this statement:

> While we concur with the idea that the Fourth Amendment and the exclusionary rule are not coextensive, we must disagree with a line of demarcation which would treat prosecuted high school students differently from any other defendant. It is no less offensive to the Constitution to permit the introduction of unlawfully obtained evidence in a juvenile or criminal prosecution simply because the site of its

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Dist. Ct. App. 1984); A.B. v. State, 440 So. 2d 500 (Fla. Dist. Ct. App. 1983); M.J. v. State, 399 So. 2d 996, 999 (Fla. Dist. Ct. App. 1981); State v. Mora, 307 So. 2d 317, 320 (La. 1975); People v. D., 358 N.Y.S.2d 403, 410 (N.Y. 1974); People v. Bowers, 356 N.Y.S.2d 432, 436 (N.Y. App. Term 1974); People v. Cohen, 292 N.Y.S.2d 706, 713 (N.Y. Dist. Ct. 1968) (college dorm room); *In re* Fisher, No. 35375, 1977 Ohio App. LEXIS 7380, at *7 (Ohio Ct. App. 1977); Commonwealth v. Williams, 749 A.2d 957, 958 (Pa. Super. Ct. 2000); Dumas v. Pennsylvania, 515 A.2d 984, 986 (Pa. Super. Ct. 1986); Commonwealth v. McCloskey, 272 A.2d 271, 274 (Pa. Super. Ct. 1970) (college dorm room).

128. *See* Doe v. State, 540 P.2d 827, 831 (N.M. Ct. App. 1975); Coronado v. State, 835 S.W.2d 636, 641 (Tex. Crim. App. 1992).

129. *In re* William G., 709 P.2d 1287 (Cal. 1985); Gordon v. Santa Ana Unified Sch. Dist., 162 Cal. App. 3d 530 (Cal. Ct. App. 1984); *In re* Dominic W., 426 A.2d 432 (Md. Ct. Spec. App. 1981); *In re* T.L.O., 463 A.2d 934 (N.J. 1983) *rev'd on other grounds* 469 U.S. 325 (1985); *In re* L., 280 N.W.2d 343 (Wis. Ct. App. 1979).

130. 162 Cal. App. 3d at 540–42.

131. *Id.* at 541.

132. *Id.*

> improper acquisition happened to have been a high school campus. Arguably, it is more so.[133]

Therefore, the rule should be fully available in juvenile and criminal prosecutions when evidence is obtained in schools, by school officials, in violation of the Fourth Amendment.[134]

In the case of *In re William G.*, the California Supreme Court approved of the appellate court's reasoning and provided at least some reasoned analysis of its own for its application of the exclusionary rule.[135] After deciding that the evidence in the case was seized in violation of the Fourth Amendment, the court decided:

> [T]he exclusionary rule is the only appropriate remedy for this violation when . . . the evidence is sought to be admitted in a juvenile or criminal prosecution. The exclusionary rule is intended not only to have a deterrent effect on police misconduct, but to preserve the integrity of the judicial system . . . . [T]he exclusionary rule "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.[136]

Therefore, it seemed that the most important rationale for the court's decision was that the exclusionary rule was important to preserve the integrity of the judicial system.[137] The court did not consider the value of the deterrent effect rationale as it would apply to non-law-enforcement, like the school teacher or official.

In similar reliance on *Mapp v. Ohio*, the Maryland Court of Special Appeals decided in the case of *In Re Dominic W.* that the exclusionary rule did apply.[138] The court's reasons included: (1) a state education statute made it clear that the search was government action and that the school official in the case was an agent of the state, (2) the same state statute also required probable cause for such searches, and (3) the constitution compels the exclusionary rule because of *Mapp v.*

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133. *Id.* at 542.
134. *Id.*
135. *In re* William G., 709 P.2d 1287, 1298 (Cal. 1985).
136. *Id.* at 1298 n.17 (quoting Mapp v. Ohio, 367 U.S. 643, 660 (1961)).
137. *See id.*
138. *In re* W., 426 A.2d 432, 434 (Md. Ct. Spec. App. 1981).

Ohio.[139] However, other than merely citing to *Mapp*, the Maryland court did not explain why exactly it felt that the exclusionary rule was constitutionally compelled in this type of case, nor did it mention any of the general rationales behind the rule.[140] Interestingly, it seemed that the probable cause requirement imposed by the state statute blurred any distinction the court may have drawn between the school setting and normal law enforcement activities.[141]

The Wisconsin Court of Appeals decided *In Interest of L.L.* and determined, with somewhat more substantial analysis, that the exclusionary rule applied in the case.[142] The court initially acknowledged that the Due Process Clause of the Fourteenth Amendment prohibits a state from violating the Fourth Amendment by using illegally obtained evidence in a criminal prosecution.[143] The court further stated that "[t]his prohibition or 'exclusionary rule' has been the principal method of ensuring that the constitutional guarantee against unreasonable searches and seizures does not become an expression without substance."[144] The court then noted that the United States Supreme Court has recognized that while "juvenile delinquency proceedings are not subject to all of the formal requirements of an adult criminal prosecution . . . [they] need to provide the basic elements of due process."[145] The court determined that due process did not allow the use of such illegally obtained evidence because the exclusionary rule is one of the basic elements of due process, and the juvenile delinquency proceeding could result in a deprivation of liberty.[146]

Furthermore, the Wisconsin court criticized the Georgia Supreme Court for its analysis in *State v. Young*[147] –the primary case in the country that has rejected the application of the exclusionary rule to school searches—stating:

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139. *Id.*

140. *Id.*

141. *See id.*

142. *In re* L., 90 Wis.2d 585, 591–93 (Wis. Ct. App. 1979).

143. *Id.* at 592.

144. *Id.* (citing Terry v. Ohio, 392 U.S. at 12).

145. *Id.* at 592 (citing *In re* Gault, 387 U.S. 1, 13 (1967)).

146. *Id. See also In Re Gault*, 387 U.S. at 16–17 (rejecting the argument that since juvenile court proceedings were technically civil and not criminal, the normal Constitutional Due Process requirements did not apply).

147. 216 S.E.2d 586 (Ga. 1975).

> Once the evidence comes into the possession of law enforcement officers and is used in court proceedings against the liberty interests of the person searched, the exclusionary rule must be available to deter prosecutions based on unlawful searches. Without such exclusions, school personnel and other government employees would become the same sort of bypass around the amendment's protections that the Court meant to close by extending the exclusionary rule to state court proceedings in *Mapp v. Ohio*.[148]

Thus, it seems that the Wisconsin court's primary rationales for adopting the exclusionary rule were that (1) it is the principal method of enforcing the Fourth Amendment and (2) due process guarantees that deprivations of liberty will not be justified by evidence that was obtained in violation of the Constitution.[149]

The only other known case that engages in any analysis in its consideration of the application of the exclusionary rule in juvenile proceedings is the New Jersey Supreme Court's opinion in *In re T.L.O.*[150] Before the United States Supreme Court issued its opinion in *New Jersey v. T.L.O.*, the New Jersey Supreme Court had held that (1) the search at issue was a violation of the Fourth Amendment and (2) the proper remedy was the exclusionary rule.[151] Since the United States Supreme Court reversed only on the New Jersey court's determination of whether the search was a violation of the Fourth Amendment, the determination that the exclusionary rule is the proper remedy for such a violation still stands.[152]

In its analysis, the New Jersey Supreme Court acknowledged that while some argue that the exclusionary rule should not apply because the basic purpose of *Mapp v. Ohio* was to deter law enforcement from committing constitutional violations, the Fourteenth Amendment "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."[153] Since the school officials are

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148. *In re L.*, 90 Wis.2d at 593 n.1.

149. *See id.*

150. 463 A.2d 934.

151. *Id.* at 938–39.

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

153. *In re* T.L.O., 463 A.2d 934, 938–39 (N.J. 1983) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

governmental officials for purposes of the Fourth Amendment, the court rationalized:

> It is of little comfort to one charged in a law enforcement proceeding whether the public official who illegally obtained evidence was a municipal inspector, a firefighter, or school administrator or law enforcement official. We believe that the issue is settled by the decisions of the Supreme Court and we accept the proposition that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings.[154]

The court found further support for its decision in a state statute that made the right to be free from unreasonable searches and seizures applicable to juvenile proceedings where "a juvenile is charged with an offense . . . that would be a criminal offense if committed by an adult."[155] The decision on this issue, similar to the Wisconsin court in *In re L.*, seemed to turn on the court's view that an individual's liberty right not to be prosecuted under evidence obtained in violation of the Fourth Amendment is an absolute due process guarantee of the Constitution, no matter what type of governmental official does the violation.[156]

B. Cases That Have Not Applied the Exclusionary Rule

Only few courts, with varying rationales, have rejected the exclusionary rule as a remedy to Fourth Amendment violations in schools.[157] Although they are apparently the minority view, these cases provide valuable and reasoned analysis and add to the quality of the discussion.

United States v. Coles, although not technically a traditional public school case, nor a juvenile delinquency prosecution, provides an analogous situation.[158] The defendant, Coles, was a student or "corpsman" at a Civilian Conservation Center.[159] The Center was "one of the Job Corps centers

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154. *Id.* at 939 (citations omitted).

155. *Id.* at 939 n.5.

156. *See id.* at 938–39.

157. United States v. Coles, 302 F. Supp. 99 (D. Me. 1969) (at Civilian Conservation Center); D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982); State v. Young, 216 S.E.2d 586 (Ga. 1975); State v. Wingerd, 318 N.E.2d 866 (Ohio Ct. App. 1974) (college dorm room).

158. *Coles*, 302 F. Supp. at 101–03.

159. *Id.* at 100.

established and operated by the Office of Economic Opportunity pursuant to the provisions of the Economic Opportunity Act of 1964."[160] This facility is analogous to a public school because

> [t]he purpose of the Job Corps program is to provide, in a group setting, intensive programs of education, vocational training and work experience for low income, disadvantaged young men and women in order to assist them to become more responsible and productive citizens. In order to promote proper moral and disciplinary conditions at the centers, standards of conduct and deportment are to be provided, and the individual directors are given full authority to discipline the corpsmen.[161]

Additionally, the search at issue in the case "was conducted solely for the purpose of ensuring proper moral and disciplinary conditions at the Center, an obligation mandated by federal statute."[162]

The court in *Coles* decided that the exclusionary rule was not appropriate to apply in such an educational-facility type of setting.[163] This was because of the underlying rationale of the exclusionary rule as it was originally formulated by the Supreme Court[164] was "to force law enforcement officers to observe Fourth Amendment rights."[165] Therefore, relying on its determinations that (1) the administrative officer at the center did not have the status or powers of a law enforcement officer, (2) the search was not conducted "at the behest of, or in cooperation with, any law enforcement officer," and (3) the object of the search was not to "procure evidence of a crime or in any way to facilitate an anticipated federal prosecution," the court decided:

> Under these circumstances it cannot be said that excluding the evidence seized by [the Administrative Officer of the Center] would improve standards of federal law enforcement, since [he] is neither a law enforcement officer not is he answerable to one. And exclusion in the present case could

160. *Id.* at 101 (citing 42 U.S.C. § 2701 (1968)).

161. *Id.* at 101 (citations omitted).

162. *Id.* at 102.

163. *Id.* at 102–03.

164. *Id.* at 102 (citing Weeks v. United States, 232 U.S. 383 (1914)).

165. *Id.* (citing Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961)).

> hardly be expected to affect the conduct of those, who . . . are essentially unconcerned with the success of federal criminal prosecutions.[166]

Therefore defendant's motion to suppress was denied, because the court viewed the exclusionary rule as primarily—and historically—a deterrent for law enforcement.[167] No other exclusionary rule rationale was mentioned.

In *State v. Wingerd*—also not a juvenile delinquency case—an Ohio court decided that the exclusionary rule should not be applied to a search of a college dorm room by an official responsible for the operation of the residence hall.[168] However, the court assumed, without discussion, that the search was conducted by a private citizen, not a law enforcement agency.[169] Therefore, the court reasoned, the exclusionary rule is inappropriate because it was "fashioned 'to prevent and not repair,' and [its] target is official misconduct. [It is] 'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[170] It is unclear how the court would have differed had it found that the residence hall supervisor was a governmental actor for purposes of the Fourth Amendment.[171]

The primary case in the country holding that the exclusionary rule does not apply as a remedy to unconstitutional school searches is a Georgia Supreme Court case, *State v. Young*.[172] The court decided that the search at issue did not violate the Fourth Amendment, but unlike the United States Supreme Court in *T.L.O.*,[173] the Georgia court went ahead and decided "that the exclusionary would not apply even if the Fourth Amendment had been violated."[174]

In its analysis, the Georgia court noted that the exclusionary rule does not always apply when there is a Fourth Amendment violation, and the rule has not been used by the

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166. *Id.* at 103.

167. *See id.* at 102–03.

168. 318 N.E.2d at 867–69.

169. *Id.* at 869.

170. *Id.* (quoting Coolidge v. N. H., 403 U.S. 443, 488 (1971) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))).

171. *See id.* at 868–69.

172. 216 S.E. 2d 586.

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

174. State v. Young, 216 S.E.2d 586, 588 (Ga. 1975).

Supreme Court in contexts other than violations by law enforcement officers.[175] Furthermore, the court recognized that the Fourth Amendment and the exclusionary rule are not co-extensive when it stated, "[t]he Fourth Amendment requires only state action; the [exclusionary rule] requires state *law enforcement* action."[176] To determine the scope of the Fourth Amendment and exclusionary rule, "the proper test is a balancing test."[177] For the exclusionary rule, "the expected benefits and the expected detriments of applying the exclusionary rule must be weighed to determine whether that rule may be invoked to suppress the fruits of the search."[178] The court then boldly stated:

> There is nothing sacrosanct about the exclusionary rule; it is not embedded in the constitution and it is not a personal constitutional right: "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[179]

Additionally, the opinion suggests that the attitude of the Supreme Court has shifted away from extending the exclusionary rule to additional contexts outside of the traditional law enforcement context.[180] The Supreme Court explained that the tragic flaw of the exclusionary rule has to do with who truly pays the price of excluding evidence: "It is well to remember that when incriminating evidence is found on a suspect and that evidence is then suppressed, 'the pain of suppression is felt, not by the inanimate State or by some penitent policemen, but by the offender's next victims.'"[181]

The Court decided that for purposes of Fourth Amendment searches, there are three categories of actors: "private persons; governmental agents whose conduct is state action invoking the Fourth Amendment; and governmental *law enforcement* agents for whose violations of Fourth Amendment the exclusionary rule will be applied."[182] Public school officials are

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175. *Id.* at 589 (citing United States v. Calandra, 414 U.S. 338 (1974)).
176. *Id.* (emphasis added).
177. *Id.*
178. *Id.* (citing *Calandra*, 414 U.S at 349).
179. *Id.* at 589–90 (quoting *Calandra*, 414 U.S. at 348).
180. *Id.* at 590.
181. *Id.* (quoting *In re* G.C., 296 A.2d 102, 105 (N.J. Union Cnty. Ct. 1972)).
182. *Id.* at 591.

therefore in the intermediate group, because they are state actors for Fourth Amendment purposes, but not law enforcement officials.[183] Finally, justified by the principles that (1) "the exclusionary rule does not reach as far as does the Fourth Amendment," (2) the rule has only been applied to law enforcement action, and (3) "the tide is turning . . . away from the exclusionary rule," the court held that the exclusionary rule is not a remedy for Fourth Amendment violations committed by school officials.[184] Further justifying this holding, the court recognizes that students still have other remedies to pursue if their Fourth Amendment rights are violated, such as civil rights or tort actions seeking damages.[185]

In the latest known case in which a court held that the exclusionary rule does not apply, an Alaska court in *D.R.C. v. State* based its holding on somewhat different grounds.[186] Even though the court's determination that the Fourth Amendment does not apply to the actions of school officials[187] has since been overruled by the Supreme Court,[188] the discussion of the purposes of behind the exclusionary rule is valuable.[189]

In its discussion of the exclusionary rule, the court noted the rule's purpose: "[t]he enforcement of school regulations, the safeguarding of students during school hours through confiscation of weapons and other contraband, and the maintenance of a drug-free learning environment provide substantial incentives to 'search' that would not be lessened by the suppression of evidence at a subsequent delinquency proceeding."[190] The court further draws upon analysis from a law review article and states:

> As Ziff points out in his note, "[F]or the exclusionary rule to be an effective deterrent, the party committing the search must have foreknowledge of an exclusionary rule plus a substantial interest in seeing that a conviction is obtained." While school officials may search frequently enough to warrant their understanding the applicable rules, they are

183. *Id.*
184. *Id.*
185. *Id.*
186. 646 P.2d 252 (Alaska Ct. App. 1982).
187. *Id.* at 256 n.9.
188. 469 U.S. at 336.
189. *See D.R.C.*, 646 P.2d at 258–61.
190. *Id.* at 258 (citation omitted).

> primarily concerned with maintaining internal discipline rather than obtaining convictions.[191]

The court also reasoned that the historic application of the Fourth Amendment is to (1) "investigations of those suspected of crime by those performing the function of police officers," and (2) the "area-wide exploratory investigations, with or without a suspect, carried out by specialized law enforcement officers in order to prevent crime (including violation of health and safety regulations)," and the school fits neither of those situations.[192] Overall, the court seemed to rely heavily on the fact that school officials are not looking to "ferret out criminals," but are simply trying to maintain school discipline, therefore, the deterrent purposes of the Fourth Amendment would not be served by applying the exclusionary rule in such a setting.[193]

C. Summary of Courts' Rationales

In summary, the rationales used by the courts applying the exclusionary rule have been, essentially: (1) the rule is necessary to preserve judicial integrity,[194] (2) constitutional due process guarantees citizens the right not to be deprived of liberty based on evidence seized in violation of the Fourth Amendment, no matter what kind of government official performs the illegal search,[195] and (3) it is the principal method of enforcing the Fourth Amendment.[196] Conversely, the rationales used by courts deciding *not* to apply the rule have generally and essentially been: (1) the primary goal and history of the rule is deterrence, which is a poor fit for the school setting since school officials, although state actors, are not law enforcement officers trying to ferret out crime,[197] (2) the school's need to maintain safety and discipline makes the cost

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191. *Id.* at 258 n.10 (quoting Harvey L. Ziff, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 614 (1967)).

192. *Id.* at 260.

193. *See id.*

194. *See In re G.*, 709 P.2d 1287 (Cal. 1985).

195. *See* Gordon v. Santa Ana Unified Sch. Dist., 162 Cal. App. 3d 530 (Cal. Ct. App. 1984); *In re* W., 426 A.2d 432 (Md. Ct. Spec. App. 1981); *In re T.L.O.*, 463 A.2d 934 (N.J. 1983); *In re L.*, 280 N.W.2d 343 (Wis. Ct. App. 1979).

196. *See In re G.*, 709 P.2d 1287; *In re L.*, 280 N.W.2d 343.

197. *See* United States v. Coles, 302 F. Supp. 99 (D. Me. 1969); *D.R.C.*, 646 P.2d 252; State v. Young, 216 S.E.2d 586 (Ga. 1975); State v. Wingerd, 318 N.E.2d 866 (Ohio Ct. App. 1974).

of having the rule too high,[198] (3) the rule is not a constitutional right, it is merely a judicially created remedy that does not reach as far as does the Fourth Amendment.[199]

D. Additional Discussion from Scholarly Sources

In addition to what rationales various courts have relied on in their rulings regarding the applicability of the exclusionary rule to juvenile and criminal proceedings based on evidence seized in a school by a school official, some scholars have participated in the discussion. These publications have injected their own assessments, as well as arguments for and against the application of the rule.

Of the existing scholarly publications that actually argue a position on the issue, virtually all argue that the exclusionary rule should apply in juvenile delinquency or criminal proceedings when the evidence is obtained by a school official (assuming no police involvement)[200] in violation of the Fourth Amendment.[201] Others simply discuss the likelihood of the

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198. *See Young*, 216 S.E.2d 586.

199. *See id.*

200. In its *T.L.O.* opinion, the Supreme Court deliberately left undecided the issue of how school searches should be treated for Fourth Amendment purposes when conducted with involvement by law enforcement. 469 U.S. at 342 n.7 ("We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question."). Although there are virtually no clear lines and plenty of gray areas, courts that have addressed the issue of police involvement in the school search have generally held the law enforcement to a higher standard of suspicion if the search was *at the direction of* law enforcement rather than the school official. *See, e.g.*, M.J. v. State, 399 So. 2d 996 (Fla. Dist. Ct. App. 1981) (court held that the search required probable cause because police officer acted in concert with school official in questioning and threatening student until student gave up concealed contraband); Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976) (search had to be based on probable cause because police caused school officials to perform the search). *But see, e.g.*, Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) (level of suspicion was not raised from reasonable suspicion to probable because the mere presence of police did not raise the standard when school official were not acting on any direction of the police).

201. *See, e.g.*, William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 741–42 n.20 (1974); Gerald S. Reamey, New Jersey v. T.L.O.: *The Supreme Court's Lesson on School Searches*, 16 ST. MARY'S L.J. 933, 943 (1985); Brenda Jones Walts, New Jersey v. T.L.O.: *The Questions the Court Did Not Answer About School Searches*, 14 J.L. & EDUC. 421, 430–33 (1985); Charles W. Hardin, Jr., Comment, *Searching Public Schools:* T.L.O. *and the Exclusionary Rule*, 47 OHIO ST. L.J. 1099, 1109–14 (1986); Deborah A. Reperowitz, Note, *School Officials May Conduct Searches Upon Satisfaction of Reasonableness Test in Order to Maintain Educational Environment*, 14 SETON HALL L. REV 738 (1984); Ronald L. Vance,

Supreme Court's future acceptance of the rule,[202] or argue for an alternative approach.[203]

One main point of argument concerning the exclusionary rule's applicability has to do with the deterrence rationale. The basic notion of the rationale is that applying the exclusionary rule in juvenile delinquency or criminal proceedings to evidence seized by school officials in violation of the Fourth Amendment will deter school officials from future violations by removing their incentives to engage in unlawful searches.[204]

Some argue that even if the deterring effect of the exclusionary rule on school officials is uncertain, it still remains the best remedy because all of the existing alternatives are found wanting or impractical.[205] Others argue that the exclusionary rule would not deter constitutional violations in schools because the relationship between school officials and students is too unlike the police-criminal relationship, that is, the school official's primary duty is to educate students, not catch criminals.[206] One scholar noted:

Comment, *School Search—The Supreme Court's Adoption of a "Reasonable Suspicion" Standard in* New Jersey v. T.L.O. *and the Heightened Need for Extension of the Exclusionary Rule to School Search Cases*, 10 S. ILL. U. L.J. 263, 274–82 (1985).

202. Irene Merker Rosenberg, *A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29 (1996).

203. J. Chad Mitchell, Comment, *An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students' Rights with School Safety*, 1998 BYU L. REV. 1207, 1230–40 (1998).

204. *See* Buss, *supra* note 201, at 741–42 n.20; Rosenberg, *supra* note 202, at 38–42; Walts, *supra* note 201, at 431–32; Hardin, *supra* note 201, at 1110–12; Mitchell, *supra* note 203, at 1225–27; Vance, *supra* note 201, at 276–78.

205. *See* Buss, *supra* note 201, at 742 n.20 (alternative methods have been less than effective at deterring police); Rosenberg, *supra* note 202, at 41–2 (as a practical matter, other remedies may not be available); Mitchell, *supra* note 203, at 1227–28 (other remedies are practically foreclosed); Vance, *supra* note 201, at 279–81 (alternative methods of enforcement pose too many difficulties for students to be a viable remedy).

206. Mitchell, *supra* note 203, at 1225 (citing United States v. Janis, 428 U.S. 433, 450–52 (1976); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970)) ("The teacher's goal is to educate, encourage and help their students, far 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, the student-teacher relationship casts even more doubt upon the rule's deterrent effects among this type of non-adversarial relationship."). *See also* Hardin, *supra* note 201, at 1111 ("[A] teacher is not likely to be thinking very much about a juvenile delinquency or a criminal proceeding, and his or her behavior is not likely to be influenced very much by the admissibility of the evidence in such proceedings.").

> On the one hand, it can be argued that school administrators care only about the safety of students and teachers, and therefore they would continue to search students to retrieve drugs and weapons regardless of whether that evidence could be legally used in juvenile court. On the other hand, such students may present serious disciplinary problems, and administrators may want them removed from school. One way to facilitate such a result is to make legal searches so that the evidence can be used in juvenile court, which may result in placement of the child away from the home. Viewed in this manner, the deterrent impact is heightened, for the school administrator is much like a police officer who wants a criminal off the streets.[207]

However, with the relatively recent influx of school disciplinary "zero-tolerance" policies, it is more likely that a student would be subject to an automatic long-term removal from school for certain offenses, therefore the school's interest in and need for the juvenile delinquency proceeding's success in the removal of the student is much less or virtually gone.[208]

Additionally, some argue that an important factor when determining the deterrence value of the exclusionary rule is whether the rule is necessary to inform the officials of their

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207. Rosenberg, *supra* note 202, at 39. *See also* Hardin, *supra* note 201, at 1111 ("While having students stand trial may not be preeminent in the minds of school officials, it is this author's view that school authorities will be deterred from engaging in unconstitutional conduct by application of the exclusionary rule. With widespread drug abuse and increased instances of violent crime currently plaguing American schools, teachers and other school authorities have a keen interest in obtaining the just punishment of those students who engage in such activities. Given this motivation, it seems unlikely that a teacher would engage in an unlawful search knowing that such conduct could jeopardize, if not preclude, the punishment of a wayward student."). *But see* Rosenburg, *supra* note 202, at 40 ("since [school] officials could get student removed from school in a disciplinary proceeding in which illegally seized evidence is used, then presumably they would not be deterred by applying the exclusionary rule in juvenile court unless they wanted the child removed from the community or at least from school for a long time and a school disciplinary proceeding could not accomplish such a result.").

208. *See, e.g.*, Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J. 159, 162–63 (2002) ("When the Gun-Free Schools Act was enacted, it required each state to enforce both a one-year expulsion for any student who brings a firearm to school and a referral to the local criminal or juvenile justice system. Shortly after the passage of the Act in 1994, local school boards and administrators began to exercise wide discretion in the use of zero tolerance policies, and they applied these zero tolerance laws not only to other weapons (i.e. knives), but also to the possession or use of drugs, alcohol, tobacco, and a host of other student behaviors that many would argue cause no serious threats or safety concerns to schools.").

errors, "[t]herefore, without the exclusionary rule there may be no effective means of informing school officials of their Fourth Amendment mistakes and assuring that such errors are not repeated."[209] But given the uncertainty of the true deterring effect of the exclusionary rule on law enforcement in general,[210] it seems to defy logic that such an uncertain effect on school officials would be an adequate rationale for adoption of the rule in the school context.[211] Furthermore, since the Supreme Court's preeminent justification for invoking the exclusionary rule has by far been the deterrence rationale,[212] application of the rule when the deterring effect is so uncertain seems even more unlikely and illogical.

Another rationale for the exclusionary rule is that the rule is necessary to preserve judicial integrity. This rationale "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."[213] Some argue that this concept presents a more compelling reason for the exclusionary rule in the context of schools, since students are taught by example and therefore may lose respect for the judiciary and government when they feel treated unfairly.[214]

However, it seems more likely that young students with less than adult understandings of government would take notice of when a fellow student "gets off" on a technicality when he or she really was guilty of the violation. This apparent injustice teaches the wrong, but unintended, lesson to young students. Therefore, appropriately, some argue that it is not

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209. Rosenberg, *supra* note 202, at 41–42.

210. Oaks, *supra* note 206, at 669–78.

211. *Cf.* Rosenberg, *supra* note 202, at 42 (the fact that school officials are not police officers creates the uncertainty of the deterrent impact of the exclusionary rule on school officials).

212. Stephen K. Sharpe & John E. Fennelly, Commentary, Massachusetts v. Sheppard*: When the Keeper Leads the Flock Astray—A Case of Good Faith or Harmless Error?*, 59 NOTRE DAME L. REV. 665, 671 (1984).

213. Mitchell, *supra* note 203, at 1228. *See also* Hardin, *supra* note 201, at 1112 ("This concept embodies the notion that it is wrong in itself for a court to sanction the use of evidence that has been unlawfully seized, or to use Justice Stewart's words, the 'federal courts [should not] be accomplices in the willful disobedience of a Constitution they are sworn to uphold.' If courts permit 'official lawlessness' by allowing the state's used of tainted evidence, they risk the loss of support and invite disrespect and anarchy.").

214. Hardin, *supra* note 201, at 1112; Mitchell, *supra* note 203, at 1228–30; Vance, *supra* note 201, at 278–79.

right for a student to go free from punishment when they are obviously guilty of possessing contraband.[215] In any event, proponents using the judicial integrity rationale seem to ignore the Supreme Court's treatment of it in *Stone v. Powell*: "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."[216]

It is also argued that implementation of the exclusionary rule compromises school safety. The notion is that because the rule may prohibit the removal of a dangerous student, the rule would allow students to go unpunished for breaking laws and school rules, and it would produce a "chilling effect on effective disciplinary enforcement" by causing school officials to refrain from searching in some appropriate but possibly doubtful circumstances for fear of having the evidence eventually excluded.[217]

As alluded to above, it is emphasized by some that the exclusionary rule is the only realistic way to provide protection for student's Fourth Amendment rights.[218] Conversely, some say that extending the rule to the school context is not necessary because there are already adequate alternatives for enforcement, such as civil rights lawsuits against the school and/or the school official(s).[219] It is argued:

> Critics of the exclusionary rule who assert that the use of civil suits . . . will adequately deter unreasonable searches of students by public school officials overlook the difficulties in pursuing these remedies and the historic failure of these alternatives to protect students' rights. Among other difficulties in bringing civil suits against public school officials are the following: 1) fear of reprisals; 2) jury prejudice in favor

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215. Walts, *supra* note 201, at 431 n.46 (New Jersey's Deputy Attorney General Allan J. Nodes believes that "applying the rule is inappropriate even though a search is based on less than reasonable suspicion if some type of illegal contraband is discovered because the improper search and seizure does not negate the fact that the student is guilty of having possessed the contraband. If that evidence is suppressed in an effort to make up for the improper seizure then the student will possibly avoid punishment or prosecution . . . . '[T]wo wrongs do not make a right,' and . . . letting the guilty student go free because he was illegally searched is improper.").

216. 428 U.S. 465, 485 (1976).

217. Mitchell, *supra* note 203, at 1223–24 (citations omitted). *See also* Vance, *supra* note 201, at 275.

218. Mitchell, *supra* note 203, at 1227–28; Rosenberg, *supra* note 202, at 41–42.

219. Vance, *supra* note 201, at 275–76.

> of government officials; 3) prohibitive litigation costs, and because of the dim prospects for success, the likely unavailability of securing legal representation on a contingency fee basis; 4) ignorance that the official conduct was illegal or actionable; and 5) the likelihood of low damage awards absent physical harm to the claimant. Furthermore, teachers and school administrators have a qualified immunity from damages for claims of constitutional violations stemming from their "good faith" actions.[220]

Furthermore, one scholar, while noting the low likelihood that a school official would ever be subjected to any substantial civil liability, boldly stated, "[t]hey might as well decide that students have no protection under the Fourth Amendment, because the removal of the exclusionary rule could unquestionably have that effect."[221]

While proponents make their arguments and hope that the Supreme Court will apply the exclusionary rule in the school search context,[222] some predict that such a prospect is grim.[223] One scholar posited that in light of Court precedent dealing with the exclusionary rule, several factors, such as the fact that school officials are not police officers, the uncertainness of the deterring impact of the exclusionary rule, and the Court's inclination to grant school officials broad latitude to maintain school safety and appropriate student conduct, the Court is not likely to see the exclusionary rule as appropriate in such a setting.[224]

In sum, scholars and others disagree about which way the basic rationales underlying the exclusionary rule pull when applied to juvenile delinquency and criminal proceedings stemming from unconstitutional school searches. However, it is apparent that most of the primary stated justifications for the exclusionary rule could arguably be used by either side in support for their respective positions. Overall, it seems that the most reasonable and likely answer is that the exclusionary rule should not be applied in a juvenile delinquency or criminal proceeding when the search was conducted in a school and by a school official acting on his or her own authority. This

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220. *Id.* at 279–80.

221. Walts, *supra* note 201, at 433.

222. *Id.*

223. Rosenberg, *supra* note 202, at 42–43.

224. *Id.*

conclusion is most reasonable in light of the primacy of the deterrence rationale in Supreme Court precedent and the uncertainty of the deterring value that the exclusionary rule would have on school officials since they are not law enforcement officers engaged in the business of ferreting out crime.[225] Additional support for this conclusion is found in the Court's apparent disfavor of the "judicial integrity" rationale[226] and the fact that the Court acknowledges that the exclusionary rule does not extend as far as does the Fourth Amendment.[227] The Court has referred to the rule as merely a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[228] Also, there are other remedies that remain available as a deterrent for serious violations.[229] There is also a high societal cost in school safety and discipline from having the rule.[230] Finally, the Court has consistently treated schools as "special" in the context of the Fourth Amendment.[231] In light of these considerations, it seems most reasonable that the exclusionary rule should not and would not apply. In any event, the prospect for the Supreme Court's decision on this issue is uncertain.

IV. CONCLUSION

In the *New Jersey v. T.L.O.* majority opinion, the Supreme Court purposefully left open certain questions and issues. One of the most important questions is the applicability of the exclusionary rule in juvenile delinquency and criminal proceedings when the evidence has been seized in school, by a school official, in violation of the Fourth Amendment standard announced in the opinion itself. By leaving this question open, courts across the country, both before and after *T.L.O.*, have reached varying conclusions on the issue. The various rationales have also differed, and there are valid arguments for both sides. Although it appears that the majority of scholarly

225. *See supra* notes 207–215 and accompanying text.
226. *See supra* notes 216–219 and accompanying text.
227. *See supra* note 179 and accompanying text.
228. United States v. Calandra, 414 U.S. 338, 349 (1974).
229. *See supra* note 188 and accompanying text.
230. *See supra* note 201 and accompanying text.
231. *See supra* Section II.

publications and cases argue for the application of the rule in the school search context, the same stated justifications and rationales have also been used by others to argue against the application of the rule. While not without valid arguments to the contrary, it seems most reasonable that the exclusionary should not apply in juvenile delinquency and criminal proceedings when the evidence is based on a school search conducted by a school official in violation of the Fourth Amendment. In any event, due to the Court's pattern of treating the school environment in unique and sometimes unpredictable ways as it pertains to constitutional rights, the predictions about the Court's possible resolution of this question are not without hesitance and qualification. The future of the exclusionary rule in the school context is, at the very least, unclear.

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