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***209 METAL DETECTORS IN THE PUBLIC SCHOOLS: FOURTH AMENDMENT
CONCERNS**

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Abstract

This article looks at the increasing use of metal detectors in the public schools, and asks whether the use of metal detectors is an effective or desirable means of addressing violence in the schools. The article also addresses whether the justifications put forth by the proponents of their use are compelling enough to override students' privacy interests, ultimately concluding that there are serious constitutional concerns raised by their use, and the rationale for upholding school searches in other contexts does not apply to metal detector searches.

Introduction

Imagine this: A student walks up to the school's principal and states "Johnny's got a gun, and he said he's going to kill somebody today." Hearing this, the principal calls "Johnny" out of class, and subjects him to a hand-held metal detector test. The detector goes off. The principal tells Johnny to empty his pockets. Johnny empties his pockets, revealing not a gun, but a set of keys, which had set off the metal detector. But something else is also in Johnny's pocket -- marijuana. The principal calls the police. They arrest Johnny, suspend him from school, and subject him to criminal prosecution. Imagine also that the student that gave the principal this "tip" knew that Johnny did not have a gun. Why then, would she tell the principal that he did have a gun? Because she doesn't like Johnny. Imagine further that at Johnny's criminal trial, his attorney moves to have evidence of the marijuana suppressed, only to find that the exclusionary rule somehow doesn't apply. Nor does it apply in the subsequent school disciplinary hearing. Sound farfetched? Well, it's not. Not only have such scenarios taken place, the entire sequence of events -- *210 from the tip, to the search, to the admission of tainted evidence -- is in most cases considered constitutionally permissible.

This article addresses the constitutional issues raised by the use of metal detectors in the public school system, particularly whether the use of metal detectors violates a student's right to be free from unreasonable search and seizure. Part I will briefly discuss relevant Fourth Amendment cases; Part II will discuss Fourth Amendment rights in the school setting; Part III will address specific metal detector cases, and Part IV will argue that the courts should not eliminate the individualized suspicion, or reasonable suspicion standards from metal detector searches in a public school.

I. Overview of the Fourth Amendment

The Fourth Amendment to the United States Constitution provides in part that "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...." [FN1] The framer's intent behind this amendment is said to have been twofold: to protect an individual's reasonable expectations of privacy, [FN2] and to protect against arbitrary invasions by government officials. [FN3] The amendment does not apply to acts by private actors, but is enforceable against the states through the due process clause of the Fourteenth Amendment. [FN4]

The amendment is composed of three clauses: the "reasonableness" clause, the "warrant" clause, and the "particularity" clause. It is only the first two which concern us here. Whether or not these two clauses operate independently of one another or must be read together is not entirely clear. The conventional theory holds that the warrant clause serves to elucidate the reasonableness clause. That is to say that all searches not conducted pursuant to a warrant are per se unreasonable, unless the search falls within one of the judicially defined warrant clause exceptions. [FN5] A search falling outside of these exceptions is therefore only reasonable if probable cause to issue a warrant exists, and even searches falling within a recognized exception to the warrant clause have traditionally *211 retained some degree of probable cause as a measure of the reasonableness of a search. [FN6]

However, the Court has recently come to recognize that situations exist where a search might still be reasonable even absent a warrant or probable cause to issue a warrant. But to say that a search may still be "reasonable" absent a warrant or probable cause is not to say much, for the Court has never defined or offered much in the way of a guideline as to what is meant by reasonable; the standard is amorphous. Additionally, under this standard, the factors establishing "reasonableness" are subject to change from case to case. Thus, according to the Court, reasonableness could range from being equated with common sense, [FN7] to some purely standardless analysis not based on any formula whatsoever. [FN8]

But to the extent that the Court has defined "reasonable," the following factors are significant to the analysis: the state's interest in conducting the search, as weighed against the intrusion upon the individual's privacy, [FN9] the need for the search, and the risk that the search might be conducted arbitrarily. [FN10]

The Court first correlated the intrusiveness of a search with the state's interest in conducting the search in *Camara v. Municipal Court*. [FN11] *Camara* involved a building owner charged with violating a San Francisco housing code. In refusing to allow building inspectors on the premises, the owner alleged the inspection ordinance was unconstitutional for failing to require a search warrant pursuant to the inspections. The *Camara* appellant argued that search warrants should be issued only where probable cause existed to believe that a particular building contained housing code violations. The Court rejected this argument, stating that the search of a general area is reasonable where the intrusion of the search is outweighed by the need to search, where there is probable cause to believe that violations exist within the area, [FN12] and where the legislature had defined the types of violations that would give rise to penalties (i.e., when the state legislature has set the standards that would give rise to an inspection for code violations, if a house or building meets such standards, there is probable cause to search).

*212 One year later, in *Terry v. Ohio*, [FN13] the Court further extended the balancing test when it considered whether a search could be constitutionally permissible if conducted under a standard lower than probable cause. In *Terry*, the Court found that the type of search at issue, a stop and frisk, was not so intrusive as to amount to a full scale search. From this premise came the idea that the need for individualized suspicion amounting to probable cause was also not necessary. Instead, the Court adopted a standard of "reasonable suspicion" as sufficient to conduct the limited type of search conducted in *Terry*. Other cases extended the "intrusiveness" versus "probable cause" analysis to searches at vehicle checkpoints, [FN14] motor vehicle stops at border patrols, [FN15] the use of roving patrols to stop vehicles at the border, search for illegal immigrants, [FN16] and, most importantly in the context of school search cases, further extensions of regulatory or administrative inspections. [FN17]

Although the "government interest" factor is a key and often stated principle in Fourth Amendment issues, the question of what constitutes a sufficient government interest is not easily answered. Generally, the government interest is adequate when the interest is "compelling"; if the

interest meets this standard, the requirements of individual suspicion or probable cause may be reduced, and the government's intrusion will be constitutionally permissible. Whether an interest is so compelling as to allow such a reduction depends on the policy behind the intrusion (though often it seems that the Court has summarily decided that nearly all government interests are "compelling"). However, as a general proposition, if the state's interest in conducting a search is to further a law enforcement effort, the Court has required that there be at least individualized suspicion. If, on the other hand, the search is conducted pursuant to the merely regulatory protections of public safety and health, there is less of a need for individualized suspicion. [FN18] Thus, how the state's interest is classified is extremely important to the analysis.

Closely related to the idea of "compelling" interest, beyond law enforcement, is the idea of necessity, for where there is a "need" for a search, the *213 interest will be compelling. In *Camara* [FN19] the Court recognized that requiring individual suspicion prior to searching for housing or health code violations would not allow for effective enforcement of such codes -- creating the necessity to proceed without probable cause. In *Terry*, [FN20] necessity existed to protect the safety of police officers, who because of the impracticality of trying to obtain a warrant prior to searching a detained individual, may conduct a limited search of the individual when there is reasonable suspicion to believe that the officer is dealing with an armed and dangerous individual. Likewise, in *Skinner* [FN21] the Court reasoned that to require investigators to base drug tests of train crew members (following an accident) on individual suspicion would be impracticable, given the chaotic and confused scene following an accident. Thus, necessity was found in *Skinner* because the policy behind the drug testing program -- that of insuring public safety -- could not be effectuated by any other means.

Lastly, to protect against the possibility of arbitrary searches, in cases where individualized suspicion is absent, the Court will examine the procedures used in conducting the search, and in selecting the target of the search. The Court first looks to see whether the search was "justified at its inception," [FN22] and then to whether the search was "reasonably related in scope to the circumstances which justified the search in the first place." [FN23]

II. The Fourth Amendment in a School Setting

It is well settled that students' constitutional rights are not lost in a school setting. The Supreme Court has stated that "it can hardly be argued that either students or teachers shed their constitutional rights ... at the schoolhouse gate," [FN24] and that "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." [FN25] Further, it would be ironic to, on the one hand, educate students in the virtues of citizenship, while on the other hand disregarding their constitutional rights. Thus, the generally accepted view is that school officials are subject to constitutional search and seizure provisions. [FN26]

*214 Yet given the perceived crisis concerning violence and drug use in the schools, there are still those that would argue that teaching must take place in a violence-free environment, and if it does not, both the entire educational system and society at large suffer. When society compels students to attend school, it assumes a duty to protect them while in school. Therefore, school officials may be remiss if they do not find and seize objects which might pose a threat to the well being of other students or school officials. The problem, then, is how to balance the state's interest in maintaining a safe learning environment with the student's interest in privacy.

Some courts have suggested that the proper balance can be achieved by recognizing that students do not retain the same expectations of privacy while in school that they would have outside of school. [FN27] The Fourth Amendment does not protect all expectations of privacy, but rather, only those

which are reasonable or legitimate. [FN28] Therefore, Fourth Amendment challenges to the actions of school officials must be assessed on the basis of whether the particular search in question implicated a legitimate expectation of privacy.

In numerous areas the courts are split as to when a legitimate expectation of privacy is present. For example, one court has held that although students do have a legitimate expectation of privacy in the airspace around their persons, and canine sniffs violate this expectation, they do not have a reasonable expectation of privacy in the airspace surrounding their lockers or automobiles. [FN29] Another court, however, has found that students do not have a legitimate expectation of privacy in the airspace around their person, and found that a sniff of a student's hand by a school official did not violate the Fourth Amendment. [FN30] Several courts have held that students have a reasonable expectation of privacy in their lockers, [FN31] while others have held the opposite. [FN32] On the question of students' personal effects, such as handbags or purses, the courts are again split, holding both that there is a reasonable expectation of privacy in such effects, [FN33] and that there is no such expectation. [FN34]

There is also the question of what standard should be used to determine "reasonableness" in a school setting: the general rule (that if a search implicates *215 a person's legitimate expectation of privacy, it is only constitutional if based upon probable cause) or a lesser standard, along the lines of a Terry-like exception, i.e., "reasonable suspicion?"

Again, there is some split amongst the courts, although the majority hold that a search based upon reasonable suspicion is constitutional. [FN35] At least one court has gone even further and held that a search is constitutional even absent reasonable suspicion, if the student's expectation of privacy is minimal and the state's interest outweighs that of the student. [FN36] Several courts have held that the presence of probable cause is constitutionally sufficient to enable school officials to conduct a search, but have not addressed whether a lower standard would also be sufficient. [FN37] On the other side are those courts that have imposed higher standards than "reasonable suspicion," such as holding that probable cause is required for school searches conducted by law enforcement officers, [FN38] and that a warrant is required for constitutional searches by school officials. [FN39]

Lastly, there is the question of what role, if any, individualized suspicion plays in a court's analysis. Does the presence or absence of individualized suspicion factor into whether a particular search is reasonable or not? Generally, unless individualized suspicion is not present in the case being considered, [FN40] the court will not discuss this factor. Courts that have discussed this factor, though, have reached different results. In *New Jersey v. T.L.O.*, [FN41] the Supreme Court, though not explicitly addressing the issue, seemed to indicate that generally some level of individualized suspicion is necessary for a search to be reasonable under the Fourth Amendment. [FN42] The Court further noted that exceptions to the individualized suspicion requirement are appropriate only where there is a minimal privacy interest involved, and where there are safeguards in place to insure that a search is not conducted arbitrarily. [FN43] The corollary is that where individualized suspicion is not present, a search will generally be unreasonable, as several courts have found. [FN44] However, there are exceptions *216 to this premise. In *Vernonia School District v. Acton*, [FN45] the Court addressed the issue it had left unanswered in *T.L.O.*: Under what circumstances can a search be reasonable, absent individualized suspicion? [FN46]

In *Vernonia*, the Court held that random urinalysis drug testing of student athletes was constitutional for Fourth Amendment purposes, even absent individualized suspicion. [FN47] The Court noted that public school students, in general, are often subject to various physical exams and vaccinations, and should therefore have a lower expectation of privacy regarding the taking of bodily samples and bodily testing. Further, student-athletes possess even less of an expectation of privacy, because they are accustomed to changing clothes and showering in common areas (the so called

"locker room" syndrome), and voluntarily subject themselves to a higher level of regulation by choosing to participate in sports. [FN48] The student-athletes' minimal privacy interests were found to therefore be outweighed by the compelling state interest in eliminating student drug use, and the need for immediacy in solving what the Court termed a "crisis." [FN49] However, the Court did caution that random, suspicionless drug testing in contexts outside of the public school setting could pose constitutional difficulties. [FN50]

III. Metal Detector Searches in Public Schools

One should first note that a relatively small number of jurisdictions have even addressed the issue of the constitutionality of metal detector (magnetometer) searches of public school children. This is probably because the use of metal *217 detectors in schools is a fairly recent development. The Supreme Court has never ruled on the issue, but the lower courts that have addressed the question have overwhelmingly ruled that the use of metal detectors in public schools does not violate students' Fourth Amendment rights.

In *People v. Dukes*, [FN51] a New York court held that the search of a public high school student did not violate the Fourth Amendment, even though individualized suspicion was absent. Special police officers from the school safety task force set up metal detector scanning posts one morning in the lobby of the school. The students had been told at the beginning of the year that searches would take place. The Board of Education had adopted guidelines for the searches, with the stated purpose being to prevent weapons from being brought into the school.

The procedure called for hand-held devices to be used, and all students entering the school were to be searched. If, however, the lines became too long, the officers were permitted to limit the search, as long as some random formula (such as searching every third or fourth student) was used. The officers were prohibited from singling out individual students, unless they had reasonable suspicion that a particular student had a weapon. The student and any bags or containers in the student's possession were to be searched. If a bag activated the scanning device, the officer was to request that the student open the bag for a weapon search. If the student's body activated the device, the officer was to request that the student remove any metal objects, and conduct another scan. If the device was set off a second time, the officer was to conduct a pat-down search in a private area. (This pat down could only be done by an officer of the same sex as the student). Once an object was found which appeared to have activated the device, the search was to end.

Dukes was subjected to the procedure and found to possess a five-inch switchblade. At the student's trial for possession of the weapon, the student moved to have the evidence suppressed, pursuant to the exclusionary rule. The court denied the motion, and held the search to be constitutionally permissible, even though individualized suspicion was lacking.

The court's decision stated that the type of search conducted was an administrative search, and thus individualized suspicion was not a component of the reasonableness factor. An administrative search, absent individualized suspicion, is reasonable where the intrusion involved is minimal compared to the government interest underlying the search. By way of analogy to airport and public building magnetometer searches, the court found the type of search in question to be minimally intrusive, given the obvious state interest in preventing *218 acts of violence, and the compelling need for security in the schools. "Weapons in schools, like terrorist bombings at airports and courthouses, are dangers which demand an appropriate response.... In my opinion the government interest underlying this type of search is equal to if not greater than the interest justifying the airport and courthouse searches." [FN52] Surprisingly, the court did not directly address any of the factors identified in *T.L.O.*, nor was *T.L.O.* cited.

The issue then appears to have gone several more years without being litigated, until revisited in the Pennsylvania case of *In re F.B.* [FN53] In *F.B.*, the court also upheld the constitutionality of school metal detector searches, largely by relying on the rationale of *T.L.O.*, as well as *Dukes*. *F.B.* involved a Philadelphia city high school which allowed city police officers to conduct metal detector scans and bag searches. Upon entering the building, the officers led the students to the gymnasium, where they formed lines. One by one, the students were to step up to a table and empty the contents of their pockets onto the table. Their jackets and bags were to be handed over to the officers. While one officer searched the student's belongings, a second officer would scan the student with a hand-held metal detector. The searches were to be conducted in this manner until such time as the gymnasium became too crowded, at which point school administrators were to randomly select students to be searched. As a result of such a search, a student was found to be in possession of a Swiss-army type of knife, and was placed under arrest for possession of a weapon on school property. [FN54]

On appeal from a court order denying his motion to suppress the evidence seized, the student argued that the search was unreasonable in light of the *T.L.O.* factors, specifically that the search was not "justified at its inception," [FN55] because there were no reasonable grounds to suspect that the student was carrying a weapon. The student also asserted that the *T.L.O.* factors could not be waived by merely searching the entire student body. Individualized suspicion, according to the student, must be required when school officials subject students to such highly intrusive searches. [FN56]

The court stated that the *T.L.O.* Court did not decide whether individualized suspicion was an essential element of the reasonableness standard for searches by school officials. But it also noted that in *T.L.O.* the Court had said that "the *219 Fourth Amendment imposes no irreducible requirement of individualized suspicion," [FN57] and that there are exceptions to the requirement of individualized suspicion "where the privacy interests implicated by a search are minimal, and where other safeguards are available to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" [FN58]

Finding that "the school's interest in ensuring security for its students far outweighs the juvenile's privacy interest," [FN59] and that "if schools cannot operate in a violence-free atmosphere, then education will suffer, a result which ultimately threatens the well being of everyone," [FN60] the court rejected the student's argument that his privacy interest was not outweighed because the search in question was a search of his body.

Further, the court rejected the student's argument that his expectation of privacy had not been protected from the discretion of the official in the field, as *T.L.O.* seems to require. "[A]lthough we believe written guidelines would be prudent, we find that there are other safeguards present in this case. Specifically, the officers who conducted the student searches followed a uniform procedure as they searched each student; after each student's personal belongings were searched, the student was scanned by a metal detector. This uniformity served to safeguard the students from the discretion of those conducting the search." [FN61]

The first federal court to address the issue was the United States Court of Appeals for the Eighth Circuit, in *Thompson v. Carthage School District*. [FN62] *Thompson* involved a search for weapons based on a school bus driver's report that there were fresh cuts on the seats of the school bus. Reasoning that a knife or other cutting weapon must therefore be on the school grounds, the principal decided that all students in grades six through twelve should be searched. [FN63] The searches were conducted by bringing each class of students into a classroom, and having them remove their jackets, shoes and socks, and empty their pockets. Then, school officials checked each student with a hand-held metal detector. If the metal detector sounded (as it often did because of the

metal buttons and studs on the students' blue jeans), the student would be patted down. The officials also patted the students' coats and removed any objects they could feel in the coat pockets. [FN64] Thus, the search was not carried *220 out pursuant to an official school or Board of Education policy, but rather, in direct response to the bus driver's report. During the course of the search in question, crack cocaine was discovered in the pocket of one of the students. The student was expelled for the rest of the year.

The student filed a civil rights action in federal district court, alleging that the search and expulsion violated the Fourth Amendment. The district court ruled in favor of the student, finding that the search did, in fact, violate the Fourth Amendment because school officials did not have individualized, particularized suspicion that the student was carrying a weapon or other contraband, and there was no adequate justification for the search at its inception. The Court of Appeals, however, reversed.

The Eighth Circuit panel confronted an issue ignored by both parties and the district court: whether the exclusionary rule applies in a school disciplinary hearing. The court stated that the Supreme Court has never applied the exclusionary rule to exclude evidence from a civil proceeding. Second, the rule would likely serve no deterrent purpose because school officials are not law enforcement officers and do not have an adversarial relationship with students. Moreover, children's legitimate expectations of privacy are limited while at school. Most important to the panel was the thought that application of the rule would seriously deter educators from undertaking disciplinary proceedings that are needed to keep schools safe, and would "frustrate the critical governmental function of educating and protecting children. We doubt that any parent would [want to] compromise school safety in this fashion." [FN65] Thus, ruled the court, the exclusionary rule did not apply in school disciplinary hearings.

As for the search itself, the Eighth Circuit had the benefit of the Supreme Court having decided *Vernonia* [FN66] just several months prior, which addressed the role of individualized suspicion that was left open in *T.L.O.* [FN67] Because *Vernonia* eliminated the need for always having individualized suspicion in school searches, the Eighth Circuit found that the district court had erred in finding that the school officials did not have individualized suspicion in this case.

For the Eighth Circuit, the relevant question in a school setting is "whether the search is one that a reasonable guardian and tutor might undertake." [FN68] The court also rejected, as being inconsistent with *Vernonia*, the district court's finding that the search was not justified at its inception because the school district was not facing a serious ongoing problem with dangerous weapons. "In our view [school officials] had two independent reasons to suspect...weapons had been brought to school.... Though [the principal] had no basis *221 for suspecting any particular student, this was a risk to student safety and school discipline that no 'reasonable guardian or tutor' could ignore." [FN69] The court characterized the search as minimally intrusive, amounting to nothing more than the command "children, take off your shoes and socks and empty your pockets." [FN70] Lastly, the court also rejected the district court's finding that the scope of the search was not related to its original purpose because the student was searched after the metal detector had revealed that the student did not have a knife or gun. "In a school setting, Fourth Amendment reasonableness does not turn on 'hairsplitting argumentation.' If [the student] had emptied his own pocket, [the contraband] would have come into plain view. It is not constitutionally significant that [the teacher] emptied the pocket [rather than the student]." [FN71]

The bulk of reported cases that have considered searches for weapons (or drugs) have uniformly upheld the searches because of the special needs present; that is, to protect the safety of students. According to these decisions, the need to protect students from weapons overrides the individual student's right to privacy, and searches under such justifications do not constitutionally require that

there be individualized suspicion. [FN72] Thus, very few courts have held that school officials must have individualized suspicion, as to the student searched, for the search to comport with the Fourth Amendment, and those that have so held involved cases where the search was for something other than weapons or drugs.

In *Desroches v. Caprio*, the Eastern District of Virginia federal court held that the search of a student suspected of stealing a pair of shoes was unconstitutional absent individualized suspicion. [FN73] *Desroches* involved a student who reported that her shoes had been stolen. Upon receiving the report, the school security officer decided to search all of the students that had been in *222 the particular classroom from which the alleged theft occurred -- nineteen students in all. When one of the students refused to consent to the search, he was informed that his failure to consent would be punished with a ten day suspension. Despite the suspension penalty, the student continued to object to the search, and true to their word, the school suspended him for ten days. [FN74] He then filed a civil rights action, claiming violations of his right to be free from unreasonable searches and seizures. Although barred from receiving damages because of the qualified immunity of the defendants, the court did find that his Fourth Amendment rights had been violated.

The court posed the question in *Desroches* as being whether school officials may search a large group of students for stolen property when the officials suspect that one student in the group is guilty of larceny, but lack individualized suspicion as to any particular student. The court noted that the *Vernonia* Court declined to require individualized suspicion because of the nature of the infraction; that is, the nature of the infraction was relevant because the school's need to search must be balanced against the intrusiveness of the search. [FN75] The testing of student athletes was a special needs case because of the history of rampant drug use at the school, the history of rampant drug use by student athletes, and that student athletes would be particularly endangered if they used drugs. The court also found that cases upholding student metal detector searches in the absence of individualized suspicion could likewise be justified, given the compelling state interest in school safety. However, the court declined to hold that individualized suspicion is never required in the school setting, though they recognized that they apparently could have, depending on one's reading of *Vernonia*. [FN76]

Believing that such a ruling would sweep too broadly, and that students' Fourth Amendment rights were already severely limited, the court concluded that the proper balance would be "struck by retaining the individualized suspicion requirement as a baseline rule from which school may deviate only in special circumstances within schools. This case does not present such circumstances." [FN77] Thus, the court drew a distinction between acts endangering other students, and lesser offenses such as larceny, which present no exigencies requiring swift and immediate attention and do not endanger student safety.

The Court of Appeals for the Fourth Circuit reversed, stating that the search was reasonable because the school officials had individualized suspicion to search the student in question based on the failure to find the shoes in consensual *223 searches of the other eighteen students. [FN78] Looking at the situation from the time of the student's refusal after the other searches -- rather than from the time officials first announced they sought to search the students in the class -- the court found the search to be constitutional, even though it might not have been "justified at its inception." [FN79]

If *Desroches* suggests that the passage of time and events may generate the necessary "individualized suspicion," one court's decision shows that individualized suspicion may dissipate with time. In *People v. Pruitt*, an Illinois Appellate court sustained a student's motion to suppress evidence of a gun seized during a pat down search, on the ground that individualized suspicion of the student was lacking. [FN80]

A school official was notified of a report of a "stranger" in the hall, and that the stranger looked suspicious, unnatural, and appeared to be nervous about something. It was also reported that the person had been observed doing something with his hand, "like it was a movement and a reaching inside of the jacket that he had on, something of that nature." [FN81] The official located the "stranger" and asked if he was a student. The "stranger" replied that he was a student that had just been reinstated. However, the official for some reason did not believe him, and asked the student to accompany him to the school office to verify his identity.

While in the office, a second school official came in and stated that the "stranger" was indeed a student. Prior to this, the official had told one of the two City of Chicago police officers, assigned to the school on a full time basis, about the report and asked the officer to be present with him in the office while he interviewed the boy. Though one school official had already verified his identity, and though the student was totally cooperative, he was kept in the office and asked questions for close to an hour. Finally, the school official asked the student to empty his pockets, later stating that his reason for this request was because he suspected that the student "had something on him." When told to empty his pockets, the student began to comply. At that point, the officer conducted a pat down search of the student, later stating he did so because of what the official had told him about his "suspicious" movements in the hallway, and because he noticed a "bulge" in the student's inside jacket pocket. During the pat-down the officer felt a metal object in the jacket pocket, and immediately arrested the student. The officer then reached into the pocket *224 and retrieved a handgun. [FN82] The student moved to suppress evidence of the handgun at his criminal trial. The motion was denied.

The court of appeals reversed the trial court, finding that although the student was "asked" to empty his pockets, such a request in the presence of a police officer amounts to an order. After sixty minutes of questioning, the official had apparently been satisfied with the truth of the student's answers: he was a reinstated student on his way to class. He had been cooperative and responsive, and the official had no fear of the student. The official could have ordered the student to empty his pockets when they first encountered one another, for at that time there would be reasonable suspicion that the student was either violating school rules, or a trespasser. However, after one hour the situation had changed. There was no longer any specific set of circumstances that would have led a reasonable person to believe that the student posed a danger to anyone, or had breached school rules. Thus, held the court, the search was not justified at its inception, and was unconstitutional. "[The school official] was acting on an 'inchoate and unparticularized suspicion or hunch' when he ordered [the student] to empty his pockets. Public school student or not, [he] possessed a Fourth Amendment expectation of privacy as he sat in that administrative office. The expectation was not realized.... That some Fourth Amendment protection remains is a point we make [in this case]." [FN83]

IV. Analysis

The Supreme Court has yet to address the issue of metal detectors in the schools. However, if they do, they should be hesitant to follow the lower courts' decisions, because they are based on a dubious reading of prior Supreme Court decisions regarding reasonableness, individualized suspicion, and necessity, as applied to a public school setting.

First, *Vernonia* was a narrow ruling which applied to a fairly specific fact pattern: random drug testing, of student athletes, at a school with a documented history of a major drug problem. How do these facts pertain to metal detector searches? Granted, the government interest in eliminating school violence is compelling, but much more than a compelling interest is needed to justify random searches.

Critical to the Court's holding in *Vernonia* was the idea that student-athletes have an even lower expectation of privacy than the typical non-student athlete. As a select group of individuals who freely elect to participate in school athletics, they should be expected, or could be required, to submit to such testing as a condition of their participation. But what of the non-student athlete? *225 He or she does not elect to attend school, they are compelled to attend school, and as a result, can be said to be compelled to lower their expectation of privacy as well. Thus, there is a critical difference between one who, as a condition of a freely elected choice, consents to be searched, and one who is forced to be searched as a condition to something not freely chosen.

The student athlete can choose not to participate in athletics if he or she does not want to be searched. The airline passenger can choose not to travel, or travel by another means, or turn around and walk out of the airport, if they do not want to be searched. The courthouse visitor, if he or she sets off a metal detector, can likewise turn around and walk out -- without consequences or further searching. Not so with the student. Choosing not to attend school to avoid a search subjects the student to discipline. Electing not to consent to a search subjects the student to discipline, for exercising a constitutional right. [FN84] In fact, turning around and walking out of school to avoid a metal detector has been held by some courts to constitute a ground in itself for casting reasonable suspicion upon a student. [FN85] The implication is that only those that have something to hide would object to being searched. Such an implication is unfounded. The exercise of a constitutional right should not subject one to a heightened level of suspicion, and there are certainly a great number of people who would defend their right to be free from unreasonable searches and seizures, even if they had nothing to hide.

The *Vernonia* decision also gave great weight to what the majority perceived as being the "minimal intrusiveness of the search." [FN86] Arguably, metal detector searches are even less intrusive than urinalysis tests. However, the measure of the intrusiveness of a search is not based solely on the disruptiveness of the procedure used. More important than the method of the search is the nature of the information revealed by the search; the intrusiveness of a search is also measured by asking "what did the search reveal?" [FN87] Otherwise, minimally disruptive searches by electronic devices, wiretaps, etc., would routinely be upheld, if the state interest in conducting such a search was compelling. This is not the case. All such means of searching require a warrant and court authorization.

Metal detector searches are often highly intrusive because of what is revealed by the search, even if the procedure itself does not involve bodily touching. *226 The machines are indiscriminate about what metal objects will set them off. If a student triggers the device, an intrusion and revelation of the contents of pockets or bags follows. Often what turns up in such cases are items far beyond the scope of the justifications for the initial search, i.e., something other than weapons. Nonetheless, neither the schools or the police are likely to ignore non-weapon contraband turned up as a result. A metal detector triggered by car keys could give officials carte blanche authority to conduct a further and more intrusive search than can be justified by the purpose of the initial search.

The *Vernonia* majority also considered the voluntary nature of athletics to be a factor minimizing the intrusiveness of the search. Justice O'Connor's dissenting opinion took exception to this idea, and pointed out that the record indicated that the only reason that student-athletes were chosen as the subjects of the search was to increase the chance of the policy surviving constitutional review. According to O'Connor, the district knew that such a policy would not pass muster if applied to all students, so student-athletes were chosen to introduce the elements of voluntary participation, and diminished expectations of privacy. [FN88] By analogy to the majority view then, all extracurricular activities, such as band or the chess club, should be subject to random drug testing as well, and in fact, several schools have proposed to do just that, [FN89] and one circuit court has approved. [FN90]

Vernonia also relied upon the fact that drug use at the high school had reached a state of crisis and had led to an atmosphere of insubordination, thus requiring an immediate response. [FN91] Do the necessity and immediacy justifications therefore extend to schools that have not had a history of violence, and have no reason to anticipate that they ever will have a problem with violence or weapons?

Absent a history of past incidents involving weapons, schools should not be allowed to install metal detectors as a preventive measure. First, there is no indication that metal detectors are an effective means of preventing violence. There is reason to believe that the recent spate of school killings would not, and could not, have been prevented by metal detectors. If a student has his or her mind set to kill someone in school, they will find a way to do so. The student can shoot his target as it walks in or out of the school. They can shoot their target as it is outside of the school, but still on school grounds, engaging in some outside of the classroom activity. They can arrive to school late, *227 when there is no longer anyone manning the metal detectors. They can find ways to get weapons inside the school without having to pass them through the metal detector. Who would be prevented from killing a classmate or a teacher, if they were intent on doing so? The "casual" or uninspired killer?

Perceptions of school violence as a nationwide problem do not justify the use of metal detectors in local districts which have never had, and may never have, a problem with violence. Should a school district be allowed to install metal detectors, as a response to violence occurring outside of their district, as a means of reassuring parents and children that violence will not occur in their district, because "we won't let it"? Necessity, as applied in Vernonia, was based on the immediacy of the problem, as demonstrated by the situation existing at the time. Absent a present and critical problem within the particular school or district, a school or school district should not be allowed to rely upon the "immediacy" factor as a justification for blanket metal detector searches.

Proponents of metal detectors too often rely on unfounded fears and perceptions of widespread violence as a means of justifying their use. This is not to be naive about the situation; there are those districts which have serious problems with violence. But even in those districts, the use of metal detectors offers nothing more than a short sighted, "band-aid" approach to the problem. The problem is with the proliferation of guns. The problem is with violence in our society as a whole. Schools do not create violence; to the extent violence in the schools exists, it is brought into the schools from a student's home, or neighborhood, or parents.

If the state owes children an obligation to protect them from violence, does that obligation begin and end with the school day? Concentrating on that one segment of the day is like saying "we will try to protect you for the seven or eight hours a day that you are here, but after that, you're on your own." Our energies and resources would be better spent focusing on alleviating the sources of violence outside of the school, if we are truly concerned about the safety of our children. Placating parents and taxpayers by installing metal detectors only provides one more excuse to avoid solving the underlying problems.

There is also the issue of the effect that metal detectors have on a student's perception of their school and their education. The installation of metal detectors can likely lead a student to believe that the school is a dangerous place, and that fellow students are dangerous persons -- which, of course, in some instances might be the case. But what if the school had not previously experienced a high level of violence? Is the installation of metal detectors more likely to alleviate fear, or foster fear? Does it suggest that administrators are expecting an increase in violence, or that the administrators consider the students to be dangerous? Will students have a greater respect for authority by being subjected to searches, or more of a reason to rebel against authority? *228 Most important, what sort of learning can go on in schools that are more and more beginning to resemble

armed fortresses?

It is unlikely that once a metal detector program is initiated, a school would reconsider whether it is necessary. Equally unlikely is the notion that the use of metal detectors in schools will decline, given the widespread popular perception that school related violence is increasing (though the reality is that violent crime is down as a whole, as well as in the schools). [FN92] This being the case, it is unrealistic to argue that metal detectors should be eliminated from schools, or that schools do not have the right to initiate metal detector programs. [FN93]

The proposal, then, is to retain the "individualized suspicion" standard as the measure of whether a metal detector search is reasonable. Such a standard is a workable accommodation between the concededly lowered privacy expectations of students, and the schools' interest in maintaining a safe learning environment. Whether or not the Vernonia Court was correct in eliminating the individualized suspicion requirement, the holding there is not so broad as to be applied to all school search issues.

Until recently, students could be assured that regardless of how compelling the state's interest was, and regardless of a diminished expectation of privacy, a school could not conduct the blanket types of searches authorized today, without first suspecting that the student being searched had done something wrong. The likelihood that subjecting the entire student body to a search will turn up contraband, or reveal school violations, is probably great. But so too would it be with a blanket search of any large segment of the population, and this the Constitution does not allow. Constitutionality does not turn on such probabilities or likelihoods.

Further, the removal of individualized suspicion tends to further lower one's expectation of privacy, so that as metal detector searches become more and more commonplace, the next generation of students will become even less sensitive to what should constitute a legitimate expectation of privacy, perhaps setting the precedent for even more intrusive searches, and less reasonable searches, than exist now.

One of the justifications in Vernonia for eliminating suspicion based searches was that suspicion based searches are more subject to arbitrary application than are blanket searches. As uncomfortable as one might be with placing discretion in the hands of school officials, it is certainly preferable to eliminating such discretion, just to insure uniformity. Well developed guidelines as to what does or does not constitute reasonable suspicion could easily be applied by *229 school officials, without expecting them to become constitutional experts, or law enforcement officers. And of course in those cases where the searches are being conducted by law enforcement officers, they are already charged with knowledge of what is or is not a reasonable suspicion. Though such a standard might foster some inconsistency where a district's guidelines were vague or non-existent, one would expect that in return for the constitutional protection it would afford, most students would prefer the occasional inconsistency to the everyday intrusion.

Violence in the schools exists. Guns in the schools exist. But so, it is said, do constitutional rights. Students should not have to compromise those rights to the extent that Vernonia might seem to allow, and one would hope that if the issue ever does reach the Supreme Court, they would carefully consider the effect of extending Vernonia beyond its narrow holding.

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FN1. U. S. CONST. amend. IV.

FN2. *Katz v. United States*, 389 U.S. 347, 351 (1957).

FN3. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

FN4. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961).

FN5. Often, exceptions to the warrant requirement exist in the interest of police safety. These exceptions include searches incident to a lawful arrest, *Chimel v. California*, 395 U.S. 752 (1969); searches made in "hot pursuit" of a suspect, *Warden v. Hayden*, 387 U.S. 294 (1967); stop and frisk searches, *Terry v. Ohio*, 392 U.S. 1 (1968); and voluntary consent searches, *Bumper v. North Carolina*, 391 U.S. 543 (1968).

FN6. See, e.g. *Carroll v. United States*, 267 U.S. 132 (1925).

FN7. *Coolidge v. New Hampshire*, 403 U.S. 433, 527 (1971).

FN8. *United States v. Rabinowitz*, 339 U.S. 56 (1950), *rev'd*, *Chimel v. California*, 395 U.S. 752 (1969); "[reasonableness] is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test." Although *Rabinowitz* has been overruled by the Court, the ad hoc approach to determining reasonableness rejected by the *Chimel* Court seems to be the very approach the Court has come close to restoring in school search cases.

FN9. *Terry v. Ohio*, 392 U.S. 1 (1968).

FN10. *Delaware v. Prouse*, 440 U.S. 648 (1979).

FN11. 387 U.S. 523 (1967).

FN12. *Id.*, at 537.

FN13. 392 U.S.1 (1968).

FN14. *United States v. Ortiz*, 422 U.S. 891 (1975) (searches at permanent checkpoints are not permissible absent probable cause).

FN15. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (inquiries at border patrols concerning one's residence require reasonable suspicion at least); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (individualized suspicion not required for general and brief questioning of vehicle occupants at vehicle checkpoints).

FN16. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (limited nature of the intrusion, which amounted to peering through the windows of the vehicle, justified stops of this sort on facts that did not amount to probable cause).

FN17. *New York v. Burger*, 482 U.S. 691 (1987).

FN18. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

FN19. 387 U.S. 583 (1967).

FN20. 392 U.S. 1 (1968).

FN21. 489 U.S. 602 (1989).

FN22. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, at 20 (1968)).

FN23. *Id.*

FN24. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

FN25. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

FN26. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In *T.L.O.*, the Court rejected the state's argument that the Fourth Amendment was only intended to prohibit searches and seizures carried out by law enforcement officers. The Court noted the large number of cases in which it had held the Fourth Amendment applicable to non-law enforcement officers, such as building inspectors and OSHA inspectors. Also rejected was the idea that school officials were immune from the commands of the Fourth Amendment because they act in loco parentis. The Court concluded that school officials are agents of the state, and not merely surrogate parents.

FN27. E.g., the pervasive supervision which school children are subject to is often cited as being one factor that would diminish a student's privacy expectations. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

FN28. *Katz v. United States*, 389 U.S. 347 (1957).

FN29. *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982).

FN30. *Burnham v. West*, 681 F. Supp. 1160 (E.D. Va. 1987).

FN31. See, e.g., *Commonwealth v. Snyder*, 597 N.E.2d 1363 (Mass. 1992).

FN32. See, e.g., *In Interest of Isiah B.*, 500 N.W.2d 637 (Wis. 1993).

FN33. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

FN34. *State v. Moore*, 603 A.2d 513 (N.J. Sup. Ct. 1992).

FN35. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

FN36. *In re Gregory M.*, 627 N.E.2d 500 (N.Y. Ct. App. 1993).

FN37. *Bilbrey v. Brown*, 481 F. Supp. 26 (D.C. Ore. 1979).

FN38. *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976).

FN39. *In re J.B.*, 343 N.W. 2d 830 (Wis. 1983).

FN40. E.g., in cases involving random urinalysis tests, or random canine sniffs.

FN41. 469 U.S. 325 (1985).

FN42. The Court did not reach the issue because in *T.L.O.*, individualized suspicion was present, and therefore, the search was reasonable.

FN43. See also *In the Interest of Doe*, 887 P.2d 645 (Haw. 1994). Here, the court found that individualized suspicion is constitutionally required for Fourth Amendment purposes, but on the facts of the case, individualized suspicion was present, and the search was therefore reasonable.

FN44. See *Bellnier v. Lund*, 438 F. Supp. 47, (N.D.N.Y. 1977). (Searches of public elementary school students by

school officials are unconstitutional under the Fourth Amendment where individualized suspicion is lacking). As a side note, I point out that I was one of the students searched in this case. It occurred while I was in the fifth grade at Lincoln Elementary School, Auburn, N.Y. The search was conducted after a fifth grade student reported three dollars missing from his coat pocket. School officials first searched our pants, coats, socks, etc. When nothing was found, we were brought into the bathroom and strip searched. When nothing was turned up during the strip search, we were brought back into the classroom, where our desks and books, and our coats (again) were searched. The money was never found. In *Bellnier*, the court found that although there was reasonable suspicion that someone in the class had stolen the money, individualized suspicion was lacking, and the search was therefore unconstitutional. See also *Burnham v. West*, 681 F. Supp. 1160 (E.D.Va. 1987); *Jones v. Latexo Independent School District*, (E.D.Tex. 1980); *Kuehn v. Renton School District*, 694 P.2d 1078 (Wash. 1985).

FN45. 115 S. Ct. 2386 (1995).

FN46. For the facts of *Vernonia*, see 115 S. Ct. at 2388-90.

FN47. See also *Desilets v. Clearview Regional Board of Education*, 627 A.2d 667 (N.J. Sup. Ct. 1993) (individualized suspicion not constitutionally required for search of middle school students going on field trip); In re *Gregory M.*, 627 N.E.2d 500 (N.Y. Ct. App. 1993) (individualized suspicion not constitutionally required for searches conducted outside the context of a criminal investigation) In re *L.J.*, 1991 Wisc. App. LEXIS 96 (Wis. Ct. App. 1991) (individualized suspicion not constitutionally required for search of student coatroom).

FN48. *Vernonia*, at 2392-93.

FN49. *Id.* at 2395-96. The Court found that a pervasive attitude of rebellion existed in the school, fueled largely by what they perceived to be rampant drug use.

FN50. *Id.*

FN51. 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992). In *Dukes*, Judge Allen stated that "to my knowledge, this is the first time this issue has been litigated."

FN52. *Dukes*, at 853.

FN53. 658 A.2d 1378 (Pa. Super. 1995).

FN54. *Id.* at 1379.

FN55. 469 U.S. 325 at 341 (the constitutionality of a school search turns on "'whether the...action was justified at its inception' [and] whether the search...was reasonably related in scope to the circumstances which justified the interference'" with the student's privacy) (quoting *Terry v. Ohio*, 392 U.S. at 20).

FN56. 658 A.2d 1378 at 1379.

FN57. 469 U.S. 325 at 342.

FN58. *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

FN59. 658 A.2d 1378 at 1380.

FN60. *Id.* (quoting *People v. Dukes*, 580 N.Y.S.2d 850, 853 (1992)).

FN61. 658 A.2d at 1380.

FN62. 87 F.3d 979 (8th Cir. 1996).

FN63. *Id.* at 980.

FN64. *Id.*

FN65. *Id.* at 981.

FN66. 115 S. Ct. 2386 (1995).

FN67. 469 U.S. 325 (1985).

FN68. 87 F.3d 979, 981, quoting *Vernonia*, at 2397.

FN69. *Id.*

FN70. 87 F.3d at 981.

FN71. 87 F.3d at 981, quoting *T.L.O.*, 469 U.S. at 346.

FN72. See e.g., *Florida v. J.A.*, 679 So. 2d 316 (Fla. Dist. Ct. App. 1996) (Reversing a lower court's order to suppress evidence, and ruling that random metal detector searches of students (determined by a roll of the dice) is constitutionally permissible because of students' lowered expectations of privacy, metal detector searches are increasingly commonplace, (e.g., courthouses and airports), and the incidents of violence in schools have reached such alarming proportions as to require the type of action taken; *In re S.S.*, 680 A.2d 1172 (Pa. Super. Ct. 1996) (hand-held wand search of student permissible under Fourth Amendment, even where search was conducted without guidelines, and where the need for the search had not been established because there was no history of violence in the school in question); *People v. Pruitt*, 662 N.E.2d 540 at 546 (Ill. App. Ct. 1996) (magnetometer search of student by police officer permissible, because of the "special needs" of the school system, the minimal intrusiveness of the search, and the nature and immediacy of the state interest; "judges cannot ignore what everybody else knows ... the threat of violence [is] present in the public schools ... [and] schoolchildren are harming each other with regularity.")

FN73. 974 F. Supp. 542 (E.D.Va. 1997), rev'd 156 F.3d 571 (4th Cir. 1998).

FN74. The Norfolk School Board policy required that all students who miss more than ten days in a semester fail that semester, unless good cause for the absences was established.

FN75. 115 S. Ct. 2386 (1995).

FN76. 974 F. Supp. at 549.

FN77. *Id.*

FN78. 156 F.3d 571 (4th Cir. 1998).

FN79. *Id.*

FN80. 662 N.E.2d 540 (Ill. App. Ct. 1996). *Pruitt* involved three separate defendants. The court denied the motion to suppress as to the first two defendants, but granted the motion as to one other.

FN81. *Id.* at 550.

FN82. Id. at 551.

FN83. Id.

FN84. As was the case in *Desroches*, 156 F.3d 571 (4th Cir. 1998).

FN85. See *People v. Parker*, 672 N.E.2d 813 (Ill. App. Ct. 1996). Reversing the district court, which had found that a student turning around to walk out of school, rather than pass through a metal detector, gave a police officer reasonable suspicion to suspect that the student was armed, and to order him to walk through the metal detector.

FN86. *Vernonia*, 115 S. Ct. at 2393.

FN87. *Katz v. United States*, 389 U.S. 347 (1957).

FN88. 115 S. Ct. at 2406.

FN89. See e.g., Rick Karlin, *School Districts Consider Widening Drug Tests*, *Times Union* (Albany N.Y.), Aug. 29, 1996, at B1.

FN90. *Todd v. Rush Co. Schools*, 133 F.3d 984, reh (en banc) denied, 139 F.3d 571 (7th Cir. 1998).

FN91. 115 S. Ct. at 2395.

FN92. U.S. Department of Justice, FBI Crime Bureau Statistics, Annual Report, 1997.

FN93. Interestingly, only ten states currently confer this right by statute. They are: California, Delaware, Georgia, Illinois, Louisiana, Massachusetts, New York, South Carolina, and Tennessee. The District of Columbia also confers this right by statute.

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***573 VIOLENCE AND THE PUBLIC SCHOOLS: STUDENT RIGHTS HAVE BEEN
WEIGHED IN
THE BALANCE AND FOUND WANTING [FN1]**

Philip T.K. Daniel [FNa1]

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Abstract

We are told that the Nation's public schools are experiencing problems with violence caused by students and no area of the country is immune from this activity. Responses to the violence have come in the form of stronger school discipline policies as well as federal and state statutes authorizing criminal penalties for acts involving dangerous weapons. In today's "get-tough-on-children" climate the emphasis is on the strong authority of school officials to deal with the criminal element without addressing the fact that the vast majority of episodes labeled "violent" are part of the normal disciplinary activity. This approach has resulted in a narrowing of constitutional and statutory rights for students whether they are perpetrators or victims of violence. This article argues that no matter if students express themselves with lewd remarks, engage in fisticuffs on the schoolyard, or suffer sexual harassment from peers, their rights have been "weighed in the balance and found wanting."

Introduction

We are being told that violence in America's schools is a new phenomenon reaching epidemic proportions. [FN2] The school setting, once thought to be a safe haven, is evolving into a resting place for criminals. Public concern over the Nation's "educational crisis" and rising crime rates has prompted states and *574 local school districts to spend millions of dollars to stem the rising tide of school-based violence. The litany of episodes regarding violence in the schools has prompted at least one commentator to state that, "[w]e are in danger of becoming a nation of thugs." [FN3]

It would be difficult for most educators not to know that there is the perception of a great deal of student violence in America's schools. [FN4] No area of the country is immune from the activity or the statistics. [FN5] With the reports of increased school violence, there has been an explosion of media coverage. An examination of five of the nation's leading newspapers (the Los Angeles Times, New York Times, Wall Street Journal, Washington Post, and Christian Science Monitor) demonstrates that hundreds of articles under the rubric of school violence have been published in the 1990's. [FN6] In addition, new publications have been developed so as to keep the issue on the "front burner" of school-based issues. [FN7]

Although the reality of this phenomenon may be immaterial in today's "get tough on children" climate, there are other surveys mentioned in this article that claim such violence is on the wane. [FN8] Moreover, at least one study indicates that when school violence is categorized, the kind of violence typically reported by the news media represents only a fraction of the experiences actually occurring in or near the schools. Richard Van Acker, in a seminal report, writes that school violence can be divided into four sub-strata: Situational Violence, Relationship Violence, Predatory Violence, and Psychopathological Violence. [FN9] Situational Violence results from circumstances or environmental conditions such as crowded schools and low teacher expectations that students are forced to confront on a daily basis. Here, students engage in disagreements that perhaps warrant

punishments no greater than a suspension; such "vio- *575 that perhaps warrant punishments no greater than a suspension; such "violence" accounts for over forty percent of the reported school cases. [FN10] Relationship violence arises from interpersonal disputes between persons with ongoing relationships. Within the school setting disagreements between friends and acquaintances constitute over twenty-five percent of the disputes and fights reported in schools. [FN11]

Predatory violence is the type most frequently studied. It is violence perpetrated intentionally as part of a pattern of criminal activity and generally results in some personal gain. This type of violence, focusing on gang assaults, coercion, or muggings in and around the school, accounts for only five to eight percent of violent acts reported under the aegis of America's schools. [FN12] Finally, Psychopathological Violence is the rarest type and yet the most observed. This type of violence results from the use of deadly weapons, generates a great deal of media coverage, and, yet, accounts for less than one half of one percent of the reported school violence cases. [FN13]

This article focuses on the judicial reception of the schools' attempts to curb violence, particularly the latter two types. School responses have been to create violence prevention policies typically based on punitive measures or to punish offending behavior after it has occurred. Schools, for example, have introduced dress codes, searches or seizures of students and their property, installation of metal detectors, and stricter discipline to address these problems of violence. Such reactions, or in some instances, the absence of a reaction, may result in a finding that schools have abridged student federal constitutional rights protected under the First, Fourth, and Fourteenth Amendments as well as statutory rights within Title IX of the Education Amendments of 1972 and Section 1983 of the 1871 Civil Rights Act. For the most part, however, student perpetrators or victims of violence face significant obstacles to a finding of school district liability, especially where school officials rely on their authority to protect the health, safety, and welfare of students and staff.

***576 Student Violence and School Prevention**

First Amendment Claims

Analysis of an individual's constitutional rights always involves balancing those rights against the government's interest in supporting and protecting an ordered society. This is no less true when discussing the First Amendment rights of students in the context of school violence. [FN14]

Since much of school violence by students is associated with gang membership and what students wear, schools have attempted to deal with such violence by implementing dress codes. Dress codes represent definitive rules and regulations on what students may wear or display under the imprimatur of the school.

While students may claim First Amendment protection from dress codes associated with student violence, a student's expression cannot be limitless. This rule was first articulated in *Spence v. Washington* [FN15] where a college student draped the American Flag out of his apartment window with peace symbols superimposed on either side. He was convicted under his state's "improper use" statute prohibiting other symbols on the flag or exposing the flag with these inappropriate symbols. The student appealed, claiming a breach of his First Amendment rights. He testified that his expression was protected in that he was engaging in the political protest of the war in Cambodia and the killings of four students at Kent State University. In overturning his conviction, the United States Supreme Court articulated a two-part test for constitutional, free speech protection. First, the person must demonstrate that his conduct was intended "to convey a particularized message ... [second the] likelihood [must be] great that the message would be understood by those who viewed it." [FN16]

The Court concentrated on the context of the expression triggered by the war and the university tragedy. In this case the Court stated that a large majority of citizens would have understood the message being conveyed at the time the flag was displayed. Moreover, the message was specific; it pointed to the political concern of violence surrounding both domestic and foreign government policy. [FN17]

By contrast, it is debatable whether gang attire or symbols associated with school violence sends a particularized message which a large majority of citizens will understand. The perception of the message may be very different depending on whether it is received by gang members of the same group, gang *577 members of a different group, non-gang related students, or school personnel. Some may see such expression as group co-membership; others may see it as a message of fear and intimidation. Still others may view such expression as a challenge to engage in violent activity.

Gang participants may also claim that the wearing of gang attire is "pure speech" or personal expression protected because school officials must not employ an "orthodoxy" or prefer certain ideas or subject matter over others. The argument would be that the dress of supposed gang members is denigrated over that of other students.

The United States Supreme Court entertained a student-based "pure speech" issue in *Tinker v. Des Moines Independent School District* [FN18] where students were suspended for wearing black arm bands in protest of the Vietnam War. School officials had warning of the protest and promulgated a school policy disallowing the wearing of arm bands. However, the policy did not cover the wearing of other symbols. On appeal, the Court held that the wearing of arm bands was an exercise of pure speech and entitled to First Amendment protection. The Court went on to say that the school was punishing students for expression they simply disagreed with. [FN19] The Court did not leave school personnel unarmed. Speech or conduct, under the aegis of the school, "which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts class work or involves substantial disorder or invasion of the rights of others is ... not immunized by the constitutional guaranty of freedom of speech." [FN20]

To the extent that the "material and substantial test" [FN21] of *Tinker* retains vitality [FN22] the dress codes of schools will be able to withstand constitutional muster by demonstrating that gang expression associated with student violence inhibits the smooth running of the school and significantly interferes with the rights of other students. The *Tinker* Court observed no evidence of such disruption or student interference by the protesting students. If gang members can establish the same, they too might be protected by the dictates of *Tinker*. This would be a difficult argument, however, because at least one strong message *578 of gang affiliation is, as noted, the fomenting of division, attended by conflict and violence. This is a major tenet for school districts seeking to protect existing or to create new dress codes to prevent gang or other violent activity. The decision in *Tinker* would justify school codes that restrict gang attire or other expression where there is some proof of disruption or possible disruption rather than conjecture or supposition.

The regulation of student expression by school authorities has been strengthened in more recent years as courts have given even greater deference to administrative decisions. In *Bethel School District No. 403 v. Fraser* [FN23] a high school student delivered a speech filled with sexual metaphor before a school assembly. Two teachers strongly suggested that he not give the speech; disregarding the advice, he gave it anyway and was promptly suspended. His objection to the punishment came before the United States Supreme Court which expressed the inherent conflict between a student's "undoubted freedom to advocate unpopular and controversial views in schools and classrooms ... balanced against ... society's countervailing interest in teaching students the boundaries of socially appropriate behavior." [FN24] The Court, however, distinguished the political message of the arm bands in *Tinker* and the sexual metaphor speech in the instant case. Inasmuch as

the expression in Tinker was not disruptive of the school and did not affect the rights of other students, the same could not be said for the speech of the student in Fraser. More importantly, the Court expressed a desire to extend broad deference to school officials as regards the education enterprise. The parameters of student expression in a school context "properly [rest] with the school board." [FN25]

Dress code supporters will be buttressed by the decision in Bethel if it can be shown that gang attire is unduly disruptive and denigrates the rights of other students. More importantly, it is within the province of the school board to determine what speech is appropriate in the school context. This would include speech both in and out of class. Therefore, the messages of harm and fear engendered by gang symbols and dress can be regulated unless substantial evidence is produced by gang members that a school board's code is unreasonable as to its definition of unduly disruptive and inappropriate student behavior.

School district hegemony over the free speech rights of students was further enhanced by the Supreme Court's decision in Hazelwood v. Kuhlmeier. [FN26] Two articles were eliminated from a school-funded newspaper by the principal. The paper was an arm of the school's journalism class. The Supreme *579 Court recognized the school's broad powers in censoring student speech in a nonpublic forum and declared that school supported newspapers fell within that context. In fact, the Court gave wide latitude as to school censorship in all school sponsored activities. The Court reiterated the Tinker holding that school employees must tolerate the personal free expression of students that just happens to take place at the school. Nonetheless, schools are not obligated to support or promote student speech that might be viewed by the community as representing the school or is inconsistent with school purposes. The Court ruled that speech that appears to carry the school's imprimatur can be prohibited if a legitimate educational concern exists.

Dress codes reviewed under a Hazelwood analysis would likely pass constitutional scrutiny as they would articulate the legitimate pedagogical concern of protecting students and staff from inappropriate speech, dress, symbols or conduct. Thus, anti-gang codes should be designed to foster the protection of the health, safety, and welfare of the school population.

The tenets of the line of cases from Spence to Hazelwood are included in a student-expression, gang-affiliation case. [FN27] A high school student in Midlothian, Illinois was suspended under a school dress code forbidding gang activities related to the wearing of gang symbols, clothes, or jewelry. The student continually wore an earring that designated membership in the Simon City Royals, a gang well known in the community. The student argued that this was mere coincidence and that his reason for wearing such paraphernalia was to express his individuality and to make himself attractive to girls. He challenged his suspension claiming that the dress code violated his right to free expression under the First Amendment.

The facts demonstrated that the school district had suffered continuously with a gang problem for over four years. As evidence, the court noted the intimidation of students, the recruitment in the schools for gang members, gang violence in school buildings, and truancy on the part of students afraid to come to school. [FN28]

To combat this the school board adopted a policy that applied to boys only. The board determined that the bulk of their problem was with males who wanted *580 to display membership in the gangs. [FN29] School officials testified as to the success of the policy as the four year threat had now been brought under control. [FN30]

Citing Spence, the district court stated that in order to find First Amendment protection against the school dress code the student must demonstrate that his conduct conveyed a particular message

and this was clearly understood by those who viewed it. The court reasoned that the student's message of "individuality" was not particularized as several people displayed different interpretations of gang-affiliation. [FN31] His message was said not to fall under the ambit of the First Amendment.

The court also related that the student had to show the absence of a reasonable nexus between the school's rule and a genuine education concern. This he failed to do as the dress code was designed to remedy an issue directly related to the authority of the school -- the protection of the general welfare of the school populous. Further, the school rule was narrowly tailored based on time, place, and manner restrictions in that the student was only restricted from wearing his gang symbol during school hours on school property.

Finally, the court communicated that the duty of the school is not only academic in nature as to subject matter, but extends to inculcating community *581 values and requiring that students exhibit behaviors that are consistent with living in a civilized society. Thus, school personnel could regulate the activities of students away from the school if it could be shown that there was some effect upon the school or its educational mission. [FN32]

Dress codes [FN33] regulating gang activity affecting the school may be supported, then, for at least two reasons. First, school officials have a direct and legitimate interest in supporting the uninterrupted education of students. If gangs are removed as a threat, students will feel less intimidated; they can return to school and feel more relaxed in the educational environment. Second, the authority of the school will be restored and teachers will be in a better position to teach not only the academic subject matter, but the necessity of values in a democratic society.

Limits on School Authority and Students' Expression Rights

School officials should observe that some courts have emphasized a distinction between the decisions in Hazelwood and Tinker relative to student expression. *582 Many view Hazelwood as applying only to expression that might be seen as representing the school. When the daily dress of students is seen as purely personal, the Tinker standard is applied to dress codes. Under a Tinker analysis, to justify the implementation and enforcement of a school dress code that infringes upon student free speech rights, a school district must show facts that might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities. In *Jeglin v. San Jacinto Unified School District*, [FN34] a defendant school and school officials failed to carry the burden of proof of justification for the curtailment of elementary and middle school students contained in that portion of a school dress code that forbade the wearing of clothing free of writing, pictures, or any insignia that identifies any professional sports or college team. The defendants did carry such a burden with regards to high school students.

Under a Tinker analysis state law may also moderate school board authority to control student expression through dress codes. In *Pyle v. School Committee of South Hadley*, [FN35] two students claimed that a school dress code policy prohibiting "clothing that was obscene, profane, lewd, or vulgar" violated First Amendment rights to free expression. In making its decision the court found that a state statute governing this issue required that, to prohibit student expression, school officials must show it is disruptive: The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions. [FN36]

The court declined to accept an argument by the school district that the Bethel or Hazelwood decisions narrowed the holding in Tinker, thus granting broader authority to administrators in regulating student expression. According to the court, the state legislature had ample opportunity over the years to change the statute to reflect new trends. This change did not occur; moreover, since the legislation was not ambiguous, the court saw no need for a judicial reinterpretation.

A school's authority to promulgate school dress codes to address student violence may also lose strength when weighed against the free exercise of *583 religion. In *Alabama and Coushatta Tribes of Texas v. Big Sandy Independent School District*, [FN37] American Indian students were entitled to a preliminary injunction against the enforcement of a dress code restricting hair length of male students. Wearing long hair was seen by the district court as a sincerely held religious belief entitled to First Amendment free speech protection. The school district's dress code was not a valid means of achieving objectives of maintaining discipline, fostering respect for authority, and projecting good public image when weighed against sincerely held beliefs of Indian students.

In another case involving freedom of religion, *Cheema v. Thompson*, [FN38] a school district had a ban on all weapons, including knives, based on two state statutes: 1) making it a crime to carry a knife with a blade longer than 2 1/2 inches to school and 2) authorizing expulsion for possession of "any knife ... of no reasonable use to the pupil." Three student members of the Khalsa Sikh religion filed suit under the Religious Freedom Restoration Act (RFRA) indicating a denial of freedom of religion as they were required to wear a ceremonial knife of 3 1/2 inches at all times. The RFRA created a statutory cause of action for violation of the free exercise of religion where government has "substantially burdened a person's exercise of religion even if the burden results from a rule of general applicability." The school district relied on its interest in school safety to justify the ban. The court upheld a preliminary injunction against the school ban because the school had failed to consider, under the RFRA, whether another less restrictive alternative existed where the students' religious beliefs could be adopted.

School officials should recognize that future cases such as *Cheema* are uncertain because in 1997 the United States Supreme Court declared the RFRA unconstitutional. [FN39]

The vitality of the Tinker standard and student freedom of religion rights notwithstanding, most states have adopted the decision in either Bethel or Hazelwood in making decisions about student expression. The state of Ohio, for example, has determined that schools must be able to set high standards and, following the decision in Hazelwood, need not support any student expression that does not "reasonably" relate to legitimate pedagogical concerns. The state also has announced that public schools are not traditional public forums and there is no intent to create any sort of forum under school aegis that fosters *584 unfettered expressive activity. [FN40] A public forum is one where school authorities have "by policy or practice opened [school] facilities for indiscriminate use by the general public." [FN41] The Court in Hazelwood adopted a "reasonableness" standard or the most minimal of judicial scrutiny when examining constitutional issues. The Hazelwood decision also figures most prominently in recent case law.

In *Phoenix Elementary District No. 1 v. Green*, [FN42] for example, two students deliberately defied a school's dress code of color-coordinated shirts and trousers; one wore a shirt emblazoned with the American flag and the other a shirt with the Bible on it. A state appeals court, in following the Hazelwood standard, determined that the school was not a public forum and school officials could impose reasonable time, place, and manner restrictions on student speech based on pedagogical concerns. The court held in favor of the school noting that the implemented dress code, among other things, promoted learning and increased school security.

More importantly, dress codes attempting to prevent school violence may be supported for at least

two reasons. First, school officials have a direct and legitimate interest in supporting the uninterrupted education of students. If violence is removed as a threat, students will feel less intimidated, they can come into the school and feel more relaxed in the educational environment. Second, the authority of school administrators will be restored and teachers will be in a better position to teach not only the academic subject matter, but the necessity of values in a democratic society. Hence, the "police power" of school officials or the authority of school boards to protect the health, safety, and welfare of students and staff may be sustained, a students's First Amendment rights notwithstanding.

In fact, under certain circumstances a court may decide to not even address a student's free expression defense. For example, in *Green v. Albuquerque Public Schools*, [FN43] a student brought an action under Section 1983 of Title 42 of the United States Code based on a claim that a school dress code prohibiting saggy pants violated his rights under the First Amendment and that the procedures used in imposing a long-term suspension violated the student's right to procedural due process. The student contended that wearing sagging pants was a part of a style known as "hip hop," the roots of which are African-American and that the style was, in large part, a matter of group identity. The court held that there was no First Amendment violation as engaging in the *585 practice of "sagging" was not speech or expressive conduct protected by the First Amendment of the United States Constitution.

Fourth Amendment Claims [FN44]

Reasonable Suspicion

School authority to search students for evidence of weapons, drugs, or other contraband is also an important means of stopping or preventing school violence. When disputes among students and school officials arise, the central issue is whether school based searches or seizures violate the Fourth Amendment of the United States Constitution. That Amendment reads as follows: 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. [FN45]

Beginning in 1985 the United States Supreme Court announced for the first time that the Fourth Amendment protected the rights of public school students against searches (or seizures) by school officials, that even a limited search constitutes an invasion of privacy, but that a warrantless search of a student by school authorities would be constitutional if reasonably justified at its inception within an examination of the totality of circumstances. In *New Jersey v. T.L.O.*, [FN46] a teacher discovered two students smoking in a school restroom -- breaking a school rule -- and reported the incident to an assistant principal. One student admitted smoking; the other denied it. The assistant principal searched the second student's purse and found both cigarettes and cigarette rolling paper. A further search produced marijuana and evidence of drug trafficking. In court, the student claimed that the search was a violation of her Fourth Amendment rights, as the school administrator had neither probable cause nor a warrant as prescribed in the Constitution.

Ultimately, the Supreme Court of the United States ruled that the Fourth Amendment applies in the school setting, but with a less stringent test than applicable to searches by law enforcement officials. The police search is governed *586 by the "probable cause" standard, while a search by school officials is controlled by the lesser "reasonable suspicion" standard. If a school official reasonably suspects, through articulated facts, that the rules of the school or laws of a jurisdiction have been violated, then a reasonable search can be made to determine whether proof of such a violation is present. The search must be reasonable, in light of the age and experience of the

student, and the nature of the alleged infraction. Specifically, reasonable grounds must exist at the time of the search and the scope of the search must be limited to its objectives. In this case the comment by the teacher to the assistant principal represented the reasonable suspicion for searching the student's purse for cigarettes. Then, the sight of the rolling papers raised more reasonable suspicion which then supported the search for drugs. The evidence acquired from the search, looking at the totality of related circumstances, was deemed by the Court to have been properly obtained.

The reasonableness standard applies no less in a school environment when violent activity is suspected by school officials. In *United States v. White* [FN47] school officials suspected gang membership when four non-students entered school grounds. Police, who were called, conducted a search based on an informant's tip. The United States Court of Appeals for the Seventh Circuit ruled that the reasonableness of a search must be reviewed within the totality of circumstances, including the officer's experience and knowledge, the characteristics of persons engaged in illegal activities, and the behavior of the suspects. The court noted that the tip, gang clothing, the officer's knowledge of gang association among the suspects, and relevant criminal conduct involving the suspects were all components of reasonable suspicion justifying a search. The court also held that while gang membership alone carries some weight among the totality of circumstances, courts will more often rely on gang involvement when the gang has been connected to some suspected criminal or school rule-breaking activity.

The reasonableness standard articulated in T.L.O. applies not only to searches, but to seizures as well. In *Edwards v. Rees* [FN48] school officials interrogated a student based on a tip about a bomb threat. The student claimed he was illegally seized and taken to the school office. The United States Court of Appeals for the Tenth Circuit ruled that the seizure was justified at its inception as two students implicated the subject and he never refuted those allegations. This led the principal to believe that questioning the suspect would turn up evidence that either the law or a school rule had been broken. In fact, the magnitude of the suspected offense justified the detention and questioning of the student to *587 uncover information regarding the bomb threat. Hence, while the student was seized by school personnel, this was reasonable in light of the threat to the health, safety, and welfare of students and staff.

Searches under a T.L.O. standard place discretion in the hands of school personnel. Teachers and administrators need not become experts in understanding probable cause. All that is required is that their actions be reasonably related to legitimate pedagogical concerns or the minimum scrutiny standard. Despite this lower threshold, T.L.O. gives school officials no more power to invade the rights and interests of students than is necessary to preserve order in the schools. [FN49] Most of the school Fourth Amendment cases following T.L.O. have applied the two-pronged test.

The reasonableness standard may have its limits, though. One court interpreted the first prong -- "justified at its inception" -- narrowly. In *Cales v. Howell Public Schools*, the burden was placed on school officials to establish that a searched student's conduct created a reasonable suspicion that a specific rule or law had been violated. It must be reasonable to expect a search to produce evidence of that violation. In *Cales*, a student was found by a security guard ducking behind cars in the school parking lot. The school officials assumed drugs and searched her purse. Because the student's presence in that location could indicate any number of rule violations, searching her purse was not justified at its inception. [FN50]

What does the existence of student informants do to the application of the T.L.O. test? Generally, the involvement of other students in the incident leading to the questioned search does not make the search unreasonable. [FN51] Basically, the school official conducting the search must have personal knowledge of the searched student's conduct or have reliable reports that such conduct would give rise to reasonable suspicion of a rule violation or violation of law. [FN52] If the student informant is

known to the official as being likely to render reliable information, no independent corroborating evidence is needed before conducting the search. But if the informant is anonymous to school personnel or unreliable, then more investigation may be required before a search is authorized. Moreover, if the report is made out of malice, it should be considered unreliable and further investigation is required before a search can be conducted. [FN53]

***588 Individualized Suspicion**

Students accused of violent acts may raise concerns about "individualized" or "particularized" suspicion, an issue that the T.L.O. Court expressly declined to address. Individualized suspicion exists when the school official conducting the search has specific evidence of a student's violation of law or a school rule.

Individualized suspicion issues often arise in cases involving "group" searches. "Group" searches involve particularized suspicion of an identifiable group of persons (such as students in a classroom) based on their cohesiveness and proximity. Group luggage searches, for example, have yielded split results. A 1985 case, *Kuehn v. Renton School District No. 403* [FN54] held that the search of students' luggage during a school band tour was unconstitutional, without particularized suspicion with respect to each student's property. School officials must reasonably believe that they will find contraband in violation of law or school rules. In this case, the court found that generalized probability is not enough. But perhaps increased seriousness of drug and weapon use in school situations has altered decisions like *Kuehn*. In the more recent case of *DeSilets v. Clearview Regional Board of Education*, [FN55] a state court upheld a group search of all students' hand luggage. On balance, the interest of school personnel in preventing contraband and rule violations outweighed the privacy interests of the students. Despite no individualized suspicion, the search was justified at its inception.

The trips in both *Kuehn* and *DeSilets* were voluntary and the parents had been informed in advance that luggage was subject to search. This may mean that it is a good idea for school officials to notify parents and students prior to a trip that school personnel reserve the right to check luggage. But anyone conducting searches of student property may assume the role of a "state actor" for purposes of Fourth Amendment analysis. In *Kuehn*, some parents were authorized to conduct searches and, therefore, were subject to constitutional requirements. Schools may not avoid the constitution by assigning its duties to non-school personnel.

Although not likely dispositive of the case, statements in *DeSilets* provide some insight into the necessity of a student search: Our memories are not so short that we cannot recall the rich opportunity for mischief which the field trip provides for some students. The need for close supervision in the schoolhouse is intensified on field trips.... Administrators *589 and teachers have a duty to protect students from the misbehavior of other students. [FN56]

Differences among decisions regarding students' luggage notwithstanding, courts will customarily defer to school district group searches when the situation is dangerous. This was the case in *In re Alexander B.* [FN57] While a school administrator was involved in the separation of two student gangs, he overheard one of the students say, "[d]on't pick on us: one of those guys has a gun." A police officer had arrived and the administrator requested that he carry on a search of the students for weapons. One of the students attempted to leave. In the course of apprehension, the officer found a machete in the student's pant leg. In upholding the constitutionality of the search, the court noted that school officials have a heightened responsibility to provide a safe and secure school environment compared to the responsibility of the police for the general public. The court refused to find the search unreasonable simply because no individual student was alleged to be in possession of a weapon.

Increased concern for the safety of students and staff may also legitimate group searches of broader student populations. In *Thompson v. Carthage School District*, [FN58] the court upheld a group search of all male students in grades six through twelve conducted because of a report that a student had concealed a knife. Although no weapon was uncovered, school officials found one student in possession of crack cocaine. The court noted that individualized suspicion is not always required for school searches and reasoned that the search for dangerous weapons conducted here was "minimally intrusive" and, therefore, not unconstitutional. This is an important consideration for school officials conducting group searches, i.e., searches of a group of students lacking individualized suspicion as to any of them. Hence, schools should not deviate from particularized evidence of some breach of a school rule or a law except in very special circumstances such as the search for weapons or drugs.

In *DeRoches v. Caprio* [FN59] someone in an art class was suspected of stealing a pair of sneakers. The class members were asked if they objected to a search of their backpacks; those who refused were threatened with a ten-day suspension. The search of the entire class was carried out except for one objecting student who was summarily suspended. The student filed an action under 42 U.S.C. § 1983 alleging that his right against an unreasonable search had been violated. The district court ruled in the student's favor noting that: *590 [T]his case does not present an extraordinary situation in which the school's interest was sufficiently substantial or compelling; a stolen pair of tennis shoes simply does not present exigent circumstances or a future danger to other students. [FN60]

The court found that the school lacked the requisite individualized suspicion to carry out a search and that the student was justified in refusing to cooperate with school authorities. [FN61] Recognize, however, that the court did not sustain the student's money damages claim under 42 U.S.C. § 1983 as an ordinary, reasonable, prudent, principal in the same situation would not have realized that the search was a violation of Fourth Amendment rights. [FN62]

Strip Searches

Of all of the searches confronted within a Fourth Amendment analysis, strip searches are arguably the most intrusive. Courts have used either prong of the two-part test found in *T.L.O.*, i.e., "justified at its inception" or "permissible in scope" in light of all of the surrounding circumstances. In strip searches some courts have been careful to consider the age and sex of students and the need of school officials to preserve authority over the school environment. The Court in *T.L.O.* did not rule on this kind of intrusion for students; nonetheless, school officials, depending on the federal circuit in which the search takes place, must be careful in how strip searches are undertaken. Lower courts have *591 applied the reasonable suspicion standard of *T.L.O.* for initiating strip searches and upheld searches entailing limited removal of shoes, socks, and other nonsensitive, non-private clothing as permissible in scope. For example, in *Wynn v. Bd. of Ed. of Vestavia Hills*, a teacher called a fifth grade student to the front of the classroom, instructed her to remove her shoes, and searched her socks for six dollars missing from the class fund. The court held the search, although embarrassing for the student, was not so excessively intrusive as to render it unconstitutional. [FN63]

In *Williams v. Ellington*, the Sixth Circuit upheld a much more intrusive search conducted in accordance with a constitutionally valid strip search policy. [FN64] The search was conducted following a confidential tip from a fellow student. One of the two suspected female students was accused of possessing a vial of a drug (of which inhalation was illegal). The student was then led to the principal's office where, in the company of two female school officials, she was compelled to remove her outer clothing. The appeals court upheld the search under *T.L.O.* stating that it was justified at its inception given the particularized suspicion of the student. The scope of the search was reasonable because of the size of the object sought (a clear glass vial), the suspected nature of the object (white powdery substance), and the previous searches of the student's locker and purse. It was reasonable to suspect the student could be concealing contraband on her person.

The United States Court of Appeals for the Seventh Circuit also decided a strip search case involving high school students. In *Cornfield by Bewis v. Consolidated High Sch. Dist. No. 230*, [FN65] a male high school special education student was observed by male school officials exiting school with a bulge in his trousers. He was escorted to a locker room where he was compelled to strip naked while being visually inspected by the officials and while his clothes were searched for drugs or other contraband. Nothing was found. Suit was filed alleging a violation of Fourth Amendment rights against an illegal search; the student claimed that the information on which the search was conducted was not true. On appeal, the Seventh Circuit observed that the standard to be followed was whether school officials could reasonably believe the information was true. Based on the decision in *T.L.O.*, the evidence needed to satisfy a reasonable suspicion that would lead a reasonable educator to believe the *592 student was in fact breaking a school rule or a law. This does not stretch to the truth or falsehood of the evidence fostering the suspicion.

Of note in this case was the fact that the student was diagnosed with behavioral disorders, a condition that required the intervention of special education services. There was no consideration by the court as to whether such a condition would influence the level of intrusion that this search entailed.

While most strip search decisions examine the "seriousness" or "dangerousness" of the materials to be searched or seized these are not essential ingredients in every federal circuit. This was determined in *Carboni v. Meldrum* [FN66] where the strip search of a veterinary student by school officials at Virginia Polytechnic Institute and State University was upheld. Unlike most strip search cases involving dangerous weapons or drugs, the student was accused of cheating on an exam, a violation of university rules, but not any penal code. Although the student voluntarily participated in the search, she claimed a violation of her Fourth Amendment rights against illegal searches and seizures. The student argued that, while university officials may make discretionary decisions about student discipline, higher education students have a higher expectation of privacy than their public school counterparts as to searches. Specifically, university searches should be undertaken pursuant to a probable cause standard, with the benefit of a warrant, and with a police presence. The court disagreed indicating that "the proper yardstick ... to apply [in a case like this] is what ... [university] administrators could have reasonably concluded they were entitled to do under the circumstances." [FN67] While acknowledging this was an issue of first impression, the court compared the instant search with searches of public school students, namely those in *Cornfield* and *Ellington*, and declared that higher education personnel were justified in their belief that the student was cheating and the strip search was reasonable under the circumstances. The court upheld the intrusive strip search indicating that the issue of whether university students possess a higher degree of privacy than similarly situated minors when accused of cheating was not clearly established. [FN68] Of special note in this case was the determination of broad authority to conduct the most intrusive of searches even absent the slightest hint of danger to other students or staff.

At the time of the completion of this article the United States Supreme Court has declined to review, without comment, a federal appeals court decision that strip searching two eight-year-old girls for allegedly stealing \$7.00 was not a violation of their Fourth Amendment rights to illegal search and *593 seizure. In *Jenkins v. Talladega City Board of Education*, [FN69] school officials strip searched the students on the word of a classmate who claimed money was missing from her purse. The children were first taken into a hallway and questioned. When this turned up no evidence, school officials asked the students to remove their socks and shoes. When these efforts failed to reveal any contraband the students were directed into a restroom and asked to move their underwear down to their ankles. The searches turned up no evidence to implicate the two girls. The case is of particular importance because it seems to supplant the *T.L.O.* standard for reasonable searches by school officials. *T.L.O.* only authorizes further searching each time new evidence is discovered. [FN70] In *Talladega*, the students were subjected to several levels of a search, and unlike

the facts of T.L.O., the more intrusive kind of exploration by school officials was predicated upon prior unrevealing searches. While the court in dicta related that school officials "likely exercised questionable judgment given the circumstances," [FN71] the ultimate judgment found that school officials were entitled to qualified immunity as the students' Fourth Amendment rights had not been been clearly defined. [FN72]

The court noted that no tribunal with binding precedent (i.e., the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, or any Alabama court) had ruled on the appropriateness of a "search in the context of facts materially similar to those of this school search." [FN73] Specifically, the question raised was whether school officials should have known that the continued searching of a student, after an initial search turned up no evidence, was a constitutional violation. This meant that school officials "were left to interpret, balance, and evaluate" [FN74] the two-pronged test of T.L.O., i.e., whether there was reasonable suspicion to conduct the search in the first place, and whether the measures used in searching the students were reasonably related to stated school objectives and "not excessively intrusive in light of the age and sex of the students." [FN75] The court indicted that it was reasonable for school officials to believe that money had been stolen and, based on the comments of the student-victim, the two girls were likely suspects. The court then *594 announced that the searches were not excessively intrusive in light of the nature of the infraction, i.e. the theft of \$7.00, which in an "elementary classroom reasonably could be considered by the school officials to be a matter of serious concern." [FN76] The court indicated that the means used for the search were also not excessive because the female students were searched by female teachers, and eight-year-old students are often assisted in the bathroom by adult teachers. [FN77] Hence, according to the court's reasoning, school officials obtained qualified immunity on the basis of the two-pronged test in T.L.O., since no other articulated standard in binding court opinions had been announced relative to the permissiveness or intrusiveness of student searches.

Metal Detectors

School districts may conduct random searches of students with the help of metal detectors. The use of such machines represents another form of search where the majority of students searched may have engaged in no activity warranting suspicion on the part of school personnel. Such protective searches have as their overriding objective the prevention of violence or crime and may be used where a school district can show rising crime or high crime rates in or around the school.

Use by schools of metal detectors to conduct suspicionless searches of students may be upheld on grounds similar to those adopted in airports and other places of travel accommodation; specifically, the health, safety, and welfare of persons outweighs the privacy interests of those surveilled. In *People v. Dukes*, [FN78] a New York state court upheld the use of a hand-held detector on the grounds that security interests outweighed privacy interests in a high school known for high crime. Students had been informed as the school year began that such searches would be undertaken. One random search found a student with a knife hidden in a book bag; the court held the search reasonable under the circumstances.

In another case, similar to the search in *Dukes*, a Pennsylvania court found no violation of a student's rights when a school official found a knife. [FN79] As in *Dukes*, the court found that the search was unintrusive, that individualized suspicion was unnecessary because of dangerous conditions, and that the use of metal detectors was part of the school's regulatory policies for upholding school safety.

If school officials use metal detectors in schools they should expect to justify such searches with evidence of "a weapons problem and the need for *595 school security." [FN80] Moreover, the few cases decided to date feature a comparison to safety measures in courts or places of public travel.

Hence, if schools are to avoid liability, students should be made aware of the use of metal detectors before they are subjected to them, and all policies associated with such devices should be posted in the schools and in student handbooks.

This procedure may withstand a charge by students of not only an illegal search, but a denial of property rights or liberty interests in education in the event a weapon is found and suspension or expulsion from school ensues. [FN81] Certainly students may not be able to exercise an interest in education in a school filled with violence. Any student interest in education must be balanced against "the school's interest in providing an environment which is safe and conducive to learning." [FN82] And as noted in *People v. Dukes* "if schools cannot operate in a violence-free atmosphere, then education will suffer, a result which ultimately threatens the well being of everyone." [FN83]

Fourteenth Amendment Concerns

Fourteenth Amendment claims of students accused of violent activity involve alleged deprivations of property rights or liberty interests without due process of law. [FN84] Students sanctioned for violent acts based on some violation of a school rule or policy often assert that the rule is vague or overbroad. Students actually punished for such acts typically declare that imposition of the discipline occurred without proper notification and a hearing.

Claims of Vagueness and Overbreadth

Clearly, school rules, including those designed to prevent or punish violent behavior by students, must withstand protests against vagueness and overbreadth. In *Weimerslage v. Maine Township High School District 207*, four high school students were suspended for loitering in an "off-limits area" immediately adjacent to school premises. [FN85] The students alleged that the anti-loitering rule was void for vagueness. The court disagreed, holding that simple dictionary definitions of "loitering" are sufficiently clear to warn people of common intelligence what the prohibited conduct is. In addition, the court held the rule constitutional within the context in which it was written. That is, students and parents knew that the restricted area was to be used only for entrance *596 and exit from school. Furthermore, the use of a common term to refer to the area (the "Hamlin Gate Area") did not render the rule unconstitutionally vague. It cannot be gainsaid that a school's authority, however, is absolute in this area. Recently, the United States Court of Appeals for the Eighth Circuit decided that a school district in Iowa, with a surge in violence, had promulgated a school policy prohibiting gang activity that did not pass constitutional muster. [FN86] The case involved a high school student with a tattoo school officials decided should be removed in light of the new policy. The student was warned that, absent surgical removal, she would suffer suspension and possible expulsion from school. After paying \$500 to have the tattoo removed (which left a permanent scar) the student sued the school district alleging a lack of requisite clarity in the policy. Although the court found that the wearing of tattoos by students was not protected First Amendment expression, it ruled in the student's favor on this vagueness issue: ... the District regulation violates the central purposes of the vagueness doctrine because it fails to provide adequate notice regarding unacceptable conduct and fails to offer clear guidance for those who apply it. A person of common intelligence must necessarily guess at the undefined meaning of "gang related activities." [FN87]

The "overbreadth" doctrine relates to legislation or school rules that may be too sweeping in coverage. Overly broad policies may have a deterrent or "chilling" effect on protected First Amendment expression. To counter an allegation of overbreadth, schools must show that policies restricting student free speech rights further a compelling state interest and are no greater than necessary to further that interest. This means that the school policy is narrowly aimed at meeting school objectives and would not reach expressive conduct that would otherwise be constitutionally protected. The United States Supreme Court has recognized the school's interest in *Grayned v. City*

of Rockford. [FN88] In that case, a student was convicted of violating a local anti-picketing ordinance that prohibited such activity within 150 feet of a public school. The student, along with others, marched around on a sidewalk, less than 100 feet from the school, carrying a placard that was visible from inside classrooms. He challenged the city ordinance, arguing that it sought to regulate constitutionally protected *597 activity and it was overbroad and vague. [FN89] The Court upheld his conviction on the grounds that school officials have a legitimate government interest in preventing activity that materially disrupts classwork and involves substantial disorder or invasion of the rights of others. The Court found no overbreadth as the ordinance was narrowly tailored to the school's compelling interest in having an interrupted school session conducive to student learning. [FN90]

At least one court has held that the "school has inherent authority to maintain order and to discipline students." [FN91] In *Estaban v. Central Missouri State College*, students took part in a demonstration that caused damage to college property. Two students contested their punishment, challenging the school rule prohibiting "participation in mass gatherings which might be considered unruly or unlawful." [FN92] The students complained that the rule was vague and overbroad. The court of appeals ruled that universities have inherent authority to maintain order and discipline; university conduct rules do not need to be drawn with the same specificity as criminal codes. No constitutional infraction exists when university rules are created with flexibility and reasonable breadth; punishment here is part of the educational process and, as such, should be expressed in general terms.

Another court decision stands for the proposition that public education authority must have rules, if students are to comport with them, and the rules must provide standards to guide student conduct. [FN93] Moreover, vague or overbroad rules may allow too much discretion on the part of administrations and this may cause discrimination against some students. [FN94] By and large, however, courts considering issues of vagueness and overbreadth have determined that school disciplinary regulations do not have to be developed with a great deal of specificity and are best left to the discretion of school personnel: Some degree of discretion must, of necessity, be left to ... school officials to determine what forms of misbehavior should be sanctioned. Absent evidence that the broad wording of [school rules] is, in fact, being used to infringe on [constitutional] rights ... we must assume that school officials are acting responsibly in applying the broad statutory command. [FN95]

*598 This is a determination by-and-large followed by contemporary courts, especially where a student is accused of engaging in violent acts or otherwise causing disruption of the education enterprise. In a recent Florida case a state appeals court sustained the arrest of a school student for school disruption and interference with school administration. [FN96] A middle school student charged into a school office, followed by other students, to protest the arrest of her brother by a school police officer. The student herself was arrested for her conduct and charged with violating a state law which, among other things, prohibited a student from "[k]nowingly disrupt[ing] or interfer[ing] with the lawful administration or functions of any educational institution, school board, or activity on school board property ..." [FN97] The student argued that the law was unconstitutionally vague because the terms "disrupt" and "interfere" were not clearly defined and the state statute did not indicate whether any such "disruption" or "interference" was to be measured objectively or subjectively. The court concluded that the statute was designed to preclude conduct that was designed to impede the progress of school administration or related activity. The court resorted to a simple dictionary definition to ascertain whether the student's actions were, in fact, disruptive. The word "disrupt" was seen as synonymous with "interfer[ing]" or throwing into disorder. Uncontested facts indicated that the student's tirade caused such a commotion that school secretaries could not perform essential clerical duties and the school police officer had to forego other important responsibilities to address this student. This kind of disruption was, according to the court, clearly proscribed by the statute.

Punishments for Violent Activity or Threats to Student Safety

Many of the challenges to anti-violence regulations turn on a test of whether there is a rational relationship between a school policy and a legitimate educational concern. In this context, the type of punishment inflicted on students by school authorities may significantly affect a court's determination of reasonableness.

Suspension and expulsion are likely the most common of all disciplinary tactics for violent activity. Suspension represents a temporary stop out of school of ten days or less; expulsion, by implication, represents time out of school of greater than ten days. Although school districts possess broad authority in controlling student speech and conduct, compulsory attendance laws create both a property right and a liberty interest in public education that cannot be taken away without safeguards provided under the Due Process Clause of the Fourteenth Amendment. This was first determined by the United States Supreme *599 Court in *Goss v. Lopez* [FN98] where a state law empowered school officials to suspend students for up to ten days without notice and a hearing before the instituted punishment. Students punished under such a rule challenged the constitutionality of the law. The Court held that suspension for up to ten days implicated the property rights and liberty interests of students. Hence, prior to the imposition of sanctions, schools were required to provide students with oral or written notice of the charges, an opportunity to hear the evidence against them, and to present their side of the story.

Goss pertained only to short-term suspensions not exceeding ten days. Longer times out of school or expulsions, according to the Court, "may require more formal procedures." [FN99] This was addressed in subsequent court cases. In *Draper v. Columbus Public Schools* [FN100] the court allowed that due process is a flexible standard calling for procedural protections that are demanded by the particular circumstances. Protections should be looked at on a case by case basis based on the formula of measuring the individual's interest against that of the state (or the school district). [FN101] In *Draper* a student had been expelled for possessing a dangerous weapon in school. At trial, the court defined the appropriate due process in such cases as written notice of the charges to be sent to the student as well as his parents, an informal hearing before the principal, a formal hearing before the superintendent, a formal hearing before the school board, the right to a formal written record of the hearing and right to have legal counsel present. [FN102] In other decisions courts have also permitted students facing expulsion to obtain the names of witnesses against them and to cross-examine those witnesses. [FN103] This is consistent with the "informant's privilege" in criminal procedure. Unless the informant will be called to testify, the prosecution does not have to reveal the informant's identity. There is no unanimity on this point, however, as a federal appeals court has determined no right to cross-examine student informants or to even know their identity. *600 The court observed that the necessity of protecting such students outweighed the value of such a "truth-determining-process." [FN104]

Students engaged in violent activity in or around the school would not normally receive the constitutional protections found in criminal proceedings as these do not apply to school discipline. The Fifth Amendment right against "double jeopardy," for example, would not be appropriate in a student disciplinary hearing. In the *Matter of C.M.J.* [FN105] a high school student was found by school officials in possession of a loaded firearm in the school parking lot. He was immediately suspended pending a hearing to consider expulsion. The school board affirmed an administrative decision to suspend for two semesters. A few weeks later, a juvenile court proceeding was filed on the basis of the same offense. The student claimed double jeopardy since the school expulsion hearing as well as the juvenile proceeding grew from the same set of circumstances. A state supreme court ruled that a school sanction such as expulsion for a disciplinary infraction rarely, if ever, qualifies as punishment for double jeopardy purposes. Where the school punishment has a remedial purpose such as protecting the health, safety, and welfare of other students, and is not grossly disproportionate to

legitimate state goals, it does not create double jeopardy problems.

Students involved in violent activity may also receive no immediate due process protection if the student's presence in or around the school poses a continuing danger to staff or other students; in other words, the notice and hearing ordinarily required can be temporarily delayed. The student can be removed immediately from any school function or activity with due process procedures to be followed as soon thereafter as feasible. [FN106] Courts have customarily followed this "dangerousness" exception where students are suspected of trafficking drugs or possessing dangerous weapons. [FN107]

Finally, schools that use only minor punishments to deal with gang activity are unlikely to run into conflict. For example, the withholding of participation in extracurricular activities may not rise to a constitutional violation of student rights. The United States Supreme Court has ruled that student participation in extracurricular activities is voluntary, and unlike compulsory attendance, carries little in the way of constitutional protection. [FN108] Because the punishment of non-participation is mild and often reversible if the student later complies *601 with the violated rule, any balancing of rights among the parties usually weighs in favor of the school and other students.

Antiviolence Legislation

The states and the federal government have enacted statutes to prevent violence in the schools and violence associated with gang activity. The State of California, for example, has one of the more comprehensive acts with respect to street gangs -- The Street Terrorism Enforcement and Prevention Act (STEP) [FN109] which provides: Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison for one, two or three years. [emphasis added]. [FN110] A "criminal street gang" is any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts [including assault with a deadly weapon, robbery, homicide, drug sale/possession/transportation, drive-by shootings, arson] ... which has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal activity. [FN111]

The perception [FN112] of student violence with the use of dangerous weapons has become so great that the United States Congress was moved to enact its *602 own federal statute. The Gun-Free Schools Act of 1994 [FN113] prohibits states from receiving federal funds unless they enact a law requiring students who bring weapons to school to be expelled for not less than one year. [FN114] The word weapon was originally defined as a "firearm" in the Act. [FN115] Recently, the Congress has revised the term to "dangerous weapon" or "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such a term does not include a pocket knife with a blade of less than 2 1/2 inches in length." [FN116] Exceptions to the expulsion requirement may be made by the school superintendent on a case-by-case basis. In addition, local school districts must have a policy requiring referral of a student who brings a weapon to school to the state's criminal justice or juvenile delinquency system. [FN117]

The Gun-Free Schools Act should be distinguished from the Gun-Free School Zones Act of 1990 [FN118] which was declared unconstitutional in a ruling by the United States Supreme Court. [FN119] The Gun-Free School Zones Act mandated criminal penalties for possessing a firearm on the grounds of or within close proximity of a school. A high school student was charged with violating

the Act after bringing a loaded gun to school. The United States Supreme Court confirmed a lower court opinion overturning the student's conviction on the grounds that the statute exceeded Congressional authority as its enactment did not fall under any of the enumerated powers of the federal government. Specifically, possession of a gun in or around the school was not a violation of *603 the Commerce Clause as such activity was not economic in nature and did not inhibit interstate commerce.

There is some concern that anti-gang, anti-violence regulations may impact negatively on the whole learning environment and slow the educational process. Students who believe they are being treated unfairly often engage in worse behavior. For the most part, however, the punishments to student violence and gang activity have been designed to protect the health, safety and, welfare of students and staff so as to promote the learning enterprise. In addition, the courts and the Congress have been very careful to leave the administration of punishment to the discretion of school officials.

State courts have held students accountable for the use of dangerous weapons in schools typically based on interpretations of state codes against such activity. In Kansas, for example, a state court upheld a student's suspension for possession of a look-alike gun. [FN120] The student had a pellet pistol in a car near school grounds which he pointed at some friends. A resident near the school saw the incident and reported it to school officials. After an investigation, the student was suspended in violation of the state's anti-violence school code. The student appealed the suspension arguing that the state statute was unconstitutionally vague because it did not state a prohibition against look-alike guns. The Kansas appeals court found that such a specific regulation was not necessary given the possible threat to the safety and security of other school students.

The discipline of students who carry knives to school now has as much vitality as those who carry guns in anti-violence state codes. In Indiana a student was expelled for four months for carrying a Swiss army knife to school. [FN121] The student brought the matter to a state trial court which overturned the expulsion by the local board of education stating the the board had acted arbitrarily. The board appealed to an intermediate court arguing that the trial court had exceeded its scope of judicial review for school matters involving student discipline. At the appellate level the court stated that the matter was moot since the time for the punishment had already passed. The court agreed to review the case, however, because "questions of significant public importance [were] likely to recur." [FN122] The court responded that the student's punishment was not arbitrary since the student had brought a weapon to school capable of causing harm to other students. This was a violation of school rules which specifically spelled out expulsion as a sanction for such activity.

States promulgating rules to comply with the Gun-Free Schools Act, and subsequent amendments, must ensure that policies are encompassing language *604 States promulgating rules to comply with the Gun-Free Schools Act, and subsequent amendments, must ensure that policies are encompassing language featuring "dangerous weapons or actions." A court of appeals in the state of Washington overturned a student's punishment for possessing a firearm as the weapon was incapable of firing. The student had brought a pistol to school with a missing firing pin. The student was charged by the state with possession of a firearm on school grounds. At the trial court level the state statute was interpreted to mean any firearm capable of firing or not. The conviction was overturned at the appeals level since the language of the state statute defined a firearm as a weapon from which a projectile may be fired by an explosive. The court found that the parties to the dispute had all stipulated that the weapon was incapable of being fired at the time it was in the student's possession; in addition, the lower court did not find that the gun contained an explosive capable of propelling a projectile. Hence, there was no evidence that the pistol was a firearm as defined in the state statute. Readers should observe that the school district did not bring an argument at trial that featured the promotion of school authority in expelling the student so as to protect the safety and security of school students.

Student Victims of School Violence

Violence by students in school may result in injury to persons or damage to property. Many victims are other students who often claim that schools are liable for deprivation of federal or state-based rights. Specifically, student victims bring causes of action against educational agencies under Title IX of the Education Amendments of 1972 [FN123] because of alleged peer sexual harassment, and under Section 1983 of the Civil Rights Act [FN124] for complicity in violating their liberty interest in bodily security.

Title IX

Regulations under Title IX state that the statute "is designed to eliminate discrimination on the basis of sex in any education program or activity receiving Federal financial assistance." [FN125] The United States Supreme Court has also held that money damages may serve as a remedy where school officials had knowledge of sexual harassment by an employee against a student and failed to take action to prohibit the conduct. In *Franklin v. Gwinnett County Public Schools* [FN126] a high school student alleged she was subjected to continued *605 sexual harassment, including coerced sexual intercourse, by a coach and teacher. The student claimed that although school officials became aware of and investigated the harassment they took no action to stop the conduct and discouraged the student from pressing charges. On appeal, the Supreme Court changed the enforcement of Title IX, allowing money damages for intentional violations. Hence, it could be argued that school officials face liability when they know of sexual harassment against students by employees and take no immediate remedial action to address the deleterious conduct.

Cases brought by students have alleged that the school district created a hostile environment [FN127] by a failure to act to complaints or deliberately acting with indifference when faced with such complaints. While there are a number of such cases, there is some question as to whether Title IX authorizes a remedy against school districts for the violence of peer sexual harassment among students. The United States Court of Appeals for the Ninth Circuit has found that Title IX does not provide a damage remedy in such circumstances. [FN128] A student alleged that her school counselor failed to take action against student peers that were sexually harassing her and neglected to inform her whether the school had a Title IX policy. The court of appeals refused to find that, at the time of the counselor's sin of omission, the law was clearly established as to a staff member's duty to stop peer sexual harassment. Moreover, the court determined that the plaintiff had not satisfied the intent standard under Title IX since failure to stop peer harassment does not equate to a school's knowingly condoning it. The Ninth Circuit explained its judgment by declaring that Title VII analogies for Title IX remedies had not been sufficiently settled at the time of the case.

At least one court has determined that Title VII principles do not even apply in Title IX cases of peer sexual harassment. The case had two rulings; one in 1996 before a three-judge panel of the United States Court of Appeals for the Eleventh Circuit and a second en banc decision overturning the first ruling. In *Davis v. Monroe County Board of Education* [FN129] a fifth-grade female student complained to teachers and the principal of being sexually harassed by a fifth-grade boy. The alleged harassment included sexual language, and offensive touching of the girl's breasts and vagina. Various requests were made to school officials by the girl's mother to address the problem but nothing was done. The student's grades took a downturn and she wrote a suicide note. In the first appeal, the court ruled against the school district analogizing to Title VII for *606 hostile environment principles. Specifically, failing to respond to student-to-student harassment of which school personnel knew or should have known violates Title IX. The court reasoned that "the ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace ... [since] students look to their teachers for guidance as well as protection ... [and] it is virtually impossible for students to leave their assigned school." [FN130] At least four school officials, including the principal, had factual and repetitive knowledge of the harassment and chose

to do nothing.

In 1997 the full Eleventh Circuit refused to apply Title VII principles to the case. [FN131] The court traced the legislative history of the statute and ultimately ruled that Congress did not intend that Title VII principles be applied to student to student sexual harassment. The court refused to adopt the student's argument that a school official intentionally discriminates on the basis of sex by failing to prevent peer sexual harassment. The court cited to previous rationales in the finding of liability under Title IX. Specifically, the exposition of liability depends upon agency principles such as when a supervisor, representing an employer, discriminates against an employee on the basis of sex. In the instant case, student perpetrators of violence could not be agents and, hence, schools could owe no comparable duty to student victims. [FN132] Moreover, according to the court, Title IX represents Congressional legislation under the Spending Clause. [FN133] Recipients who accept federal monies also accept the conditions Congress has attached to its offer. To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding. The court ruled no such notice was given to the school board "when it accepted federal funding that it could be held liable in this [kind of] situation." [FN134]

School officials are not immune in all cases of alleged sexual harassment under Title IX, but such cases have only succeeded to date when agency principles have been shown through a violation by a school employee. Recently, for example, the Court of Appeals for the Ninth Circuit determined that school officials were not entitled to qualified immunity in a student's sexual harassment suit. [FN135] The female student alleged that male peers in a sixth grade class referred to female body parts in a sexually derogatory manner, and called *607 female students "whores"; there was even an allegation that the plaintiff was struck by a male student and told to "get over it." [FN136] On appeal, the court denied a claim of qualified immunity finding that the school district failed to take reasonable steps to prevent such harassment against students. Critical to this finding was evidence that school officials established a climate for the sexual harassment in the classroom. The male student teacher alleged fondled, kissed, and inappropriately touched female students. [FN137] When the parents complained about the overall harassment the cooperating teacher in the class lowered the student's grade. Using the decision in *Franklin v. Gwinnet County Public Schools* [FN138] as backdrop, the court ruled that the student's rights under Title IX were firmly established at the time of the harassment. School officials were in a supervisory position to the student teacher and all involved knew or had reason to know of the inappropriate conduct. Hence, they could not claim immunity for failure to respond under the circumstances.

Section 1983

Section 1983 imposes liability on government officials who subject individuals to tortious deprivation of constitutional or federal statutory rights. [FN139] The set of rights most at issue in cases of student to student violence fall under the Due Process Clause of the Fourteenth Amendment in that students should be free from harm caused by the actions of school officials. [FN140] Two elements that must be proven to recover under the statute include deprivation of a constitutional or statutory right and evidence that the defendant acted under "color of law." [FN141] In order to succeed, a plaintiff must establish a causal connection between the wrongful government conduct and the alleged deprivation of right. The defendant's conduct must exhibit a "deliberate indifference" to the rights *608 of the plaintiff. While a reckless failure to act may be enough to establish liability, negligence, even gross negligence, alone, is insufficient. [FN142] Readers should recognize that government officials, for the most part, have no duty to protect individuals from violence caused by private actors. However, courts have entertained two theories where there might be a finding of constitutional liability against state actors: 1) a "special relationship" such as custody by the state; and 2) "state-created danger" or where a state actor acted affirmatively to create a danger

perpetrated by a private actor.

Special Relationship

In *DeShaney v. Winnebago City Department of Social Services* the United States Supreme Court considered "when, if ever, the failure of a state or local government entity or its agents to provide an individual with adequate protection constitutes a violation of that individual's due process rights ..." [FN143] The case involved a minor child who was severely beaten by his father while in the father's custody and while the Department of Social Services had knowledge of prior abuse and had failed to act. The Court held that the Fourteenth Amendment's Due Process Clause does not impose a duty on state actors to protect a child against the actions of third parties unless the state or local government entity has restrained the child's freedom to act. [FN144] The opinion considered the limited circumstances in which such a duty would ensue; these included the incarceration of prisoners or institutionalizing of mental patients. The *DeShaney* decision, therefore suggests that the establishment of a "special relationship" with a student would be hard to accomplish even under compulsory education laws.

The decision in *DeShaney* has led lower courts to decide against student plaintiffs who claim that school officials should be liable for the harm caused by other students. In *D.R. and L.R. v. Middle Bucks Area Vocational Technical School* [FN145] two female students alleged that school personnel violated their liberty interest in personal bodily integrity by not preventing their sexual molestation by male students in a public school facility. The girls, who were both special education students, claimed that school officials increased their risk of harm by having knowledge of the activity and doing nothing to prevent it. Relying on the Supreme Court decision in *DeShaney*, the court declared that liability under section 1983 can only accrue when "the State by its affirmative exercise of its power so restrains an individual's liberty that it renders him *609 unable to care for himself, and at the same time fails to provide for his basic needs ... [such as] ... reasonable safety." [FN146] Such liability, according to the court, is restricted to instances of incarceration or the complete institutionalization of persons with mental disabilities. Hence, the requisite custodial control to incite a 1983 action did not exist, given the facts presented for these students. The court reasoned that parents determine whether students attend public school and retain the discretion to remove students from classes. Parents have even greater control over the education of disabled students, as in this case, since federal law mandates parental involvement in placement decisions. The court declined to find liability where there was no proof of some officially sanctioned limitation of freedom. [FN147]

Central to any claim under section 1983 is the proof of some constitutional deprivation established because school officials engaged in some practice that caused harm or acted with deliberate indifference that resulted in some harm to a student. This is difficult to substantiate where students are the ones causing the violence. In *B.M.H. v. School Board* [FN148] an eighth-grade student claimed that she was threatened by a male student with sexual assault, that she duly reported this to school officials, and that they failed to take appropriate action. When the student was later raped by the male, she sued school officials claiming that they were deliberately indifferent to her pleas for help. The court held for the school officials indicating no constitutional deprivation because no special relationship was present.

Students victims of peer violence may not have redress against school officials for constitutional violations of a liberty interest even when housed in a twenty-four hour a day residential program. A student with a hearing disability was raped on two occasions by a fellow student in a residential facility for disabled pupils. [FN149] After the first incident, the students were separated, but owing to budget constraints, both were eventually housed again in the same dormitory. A second incident occurred whereupon the student filed suit alleging that the school superintendent, as a state actor,

violated his substantive due process right to bodily integrity by failing to take appropriate steps to prevent the assaults. The United States Court of Appeals for the Fifth Circuit ruled that the "special relationship" required for protection from such harm arises only when "a person is involuntarily confined or otherwise restrained against his will pursuant to a governmental order or by the affirmative exercise of state power." [FN150] Hence, harm to a student in a residential placement, without *610 more, could not solely substantiate a denial of constitutional rights by school officials. Based on the test of "special relationship" enunciated in *DeShaney*, the student must also have been involuntarily confined.

State Created Danger

Students assaulted or injured by third parties may also claim that school officials are liable under the state-created danger exception. Here, a plaintiff would claim that school authorities acted affirmatively so as to create a danger for the student, were recklessly or deliberately indifferent in their failure to protect the student from the danger they created, or the danger or threat created a direct nexus to the harm imposed on the student. [FN151]

In *D.R.*, the court rejected the allegation of a state-created danger as an alternative basis for liability under section 1983. The students claimed that by failing to report the incidents to parents or other authorities and placing an untrained teacher in a supervisory role, school personnel "created a climate that facilitated sexual and physical abuse of students." [FN152] To effectuate the state-created danger theory, students had to prove that school officials either acted to create the danger or encouraged the alleged violations by bestowing on the male perpetrators some authority under color of law. The court agreed that there were possibilities for this cause of action, but ultimately decided that school authorities neither created the peril nor authorized the male students to act. While acknowledging the "indefensible passivity" of some school defendants, the Third Circuit determined that ignoring the complaints of students did not rise to the level of a constitutional violation. [FN153]

The state-created danger theory often arises in cases involving violent behavior by students and other private individuals such as shootings or stabbings in or near the school. The Court of Appeals for the Eleventh Circuit addressed an allegation that school officials created a dangerous situation by not permitting a student to use a phone in the administration office. [FN154] Instead, the student went to a pay phone and waited at an area near the school. A short while later he was shot and killed during an attempted robbery by a group of nonstudents. The student's father filed suit claiming that the school policy preventing phone use by the school created an inherently dangerous situation. The court disagreed indicating that the pay telephone itself was not in a dangerous location, the school policy did not require that the student wait in a dangerous location, and indeed, he could have waited inside the school building or in the *611 school's courtyard. Instead, the student made the decision to wait some "considerable" distance from the school. According to the court, it was the student who made the decision relative to a dangerous location and this was not deliberately affected by school policy or the actions of school officials.

Courts have also addressed and rejected allegations that school personnel have been deliberately or recklessly indifferent in their failure to protect students in dangerous circumstances. In *Leffal v. Dallas Independent School District* [FN155] a high school student was shot and killed by other students randomly firing guns after a school dance. The parents of the student claimed that the student was placed in danger by school officials who knew that students customarily had such weapons and that the Dallas Police Department had continuously warned the school of the possible risk of harm. The parents argued that school actions were deliberately indifferent to the rights of their son because the dance had only two unarmed security guards present. The court ruled that an allegation of deliberate indifference under the state-created danger theory must show that school

officials must have knowingly brought the victim into close proximity with individuals known to commit violence, abandoned the student in a highly dangerous situation, or actually conspired with the perpetrator of violence to inflict injury. [FN156] According to the court, such indifference was not present because school officials did have security present, albeit unarmed. While these facts would be enough to demonstrate negligence or even gross negligence under the circumstances, the actions of school personnel could not be said to be deliberately indifferent to the deceased student.

A state-created danger to public school students does not arise when education officials fail to install metal detectors, even in schools known for instances of violent crime. In *Johnson v. Dallas Independent School District* [FN157] the Court of Appeals for the Fifth Circuit considered whether the state-created danger theory applied when a student was shot and killed by an outsider on school property. The court found no basis for liability on the part of the school district as school officials had no knowledge of the assailant at school and, therefore, could not have "affirmatively plac[ed] [the victim] in a position of danger, effectively stripping [him of his] ability to defend [himself]" [FN158] The parent claimed that the school authorities had the required knowledge in that there had been previous violent disturbances in school and, in response, the school district had ordered metal detectors installed and the wearing of badges by all students. The court commented that no inference of dangerousness springs from the mere presence of badges or metal detectors; indeed, such *612 devices could have been "installed prophylactically, [even] in the absence of ... criminal violence." [FN159] Moreover, according to the court, "to infer the existence of a dangerous environment (to buttress a section 1983 allegation) ... from the presence of measures designed to avert violence would erect a serious disincentive to their use." [FN160] While school personnel may have been negligent in not actually instituting these safety measures, their conduct was not deliberately indifferent to the safety of the student, the requisite standard for successfully bringing section 1983 claims.

The direct nexus argument was confronted in *Graham v. Independent School District* [FN161] where school officials were accused of having direct knowledge of a threat to a student and doing nothing to prevent his being shot in school by an assailant who was also a student. The Court of Appeals for the Tenth Circuit ruled that school officials had no responsibility of protecting students from violence of third parties, that school officials engaged in no affirmative acts that caused the danger, and even though the administrators had knowledge of the "propensities of the aggressors, any danger to the victims was too remote a consequence of [school officials'] action to hold them responsible under the federal civil rights law." [FN162] The court noted that the enrollment of the assailant had well preceded his actions as a killer. Neither the knowledge nor actions of school personnel, therefore, could have been the immediate or direct cause of the danger or the harm to the shooting victim.

The state-created-danger theory represents a difficult obstacle for students who claim that schools have a constitutional duty to protect them from injuries by private actors. Specifically, students must prove that: (1) The school must have affirmatively acted to create the danger or render the student more vulnerable. [FN163] (2) The danger to the student that is created or enhanced by the school must encompass an immediate threat of harm. [FN164] (3) The School defendants must have been deliberately indifferent in failing to adequately protect the [student] from the danger they created. [FN165]

The student must prove all of these elements with special emphasis on the fact that school personnel took some affirmative step in placing the student in *613 immediate danger of limited range or duration with no possibility of self-defense or help from an outside source. If the student can match this with deliberate indifference by school employees as to the probability of danger, only then is there a possibility of school district liability.

Conclusion

No school district should tolerate violence even if perpetrated by a very few individuals and a relative nominal amount of incidents. Every school must be a haven of reasonableness and order so that learning can take place. Clearly, schools have the authority to address problems of violence whether the approaches are legal, punitive, or educational. In 1969, Justice Black wrote that "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens -- to be better citizens." [FN166] Accordingly, school boards and administrators have been empowered with the authority and duty to regulate pupil behavior in order to protect the interests of the student body and the school. Reasonable sanctions can be imposed if the students do not adhere to legitimate conduct regulations. It should be observed, however, that although the authority to discipline and protect students carries some possible liability to school administrators, by and large, student perpetrators or victims of school violence face almost insurmountable obstacles to constitutional or statutory redress in the courts. Scant few of the cases reported herein favor the student complainant. Over time, courts have been highly deferential to school personnel relative to the disciplining or the care of students and such a phenomenon appears to be in sharp focus within the current education climate. This symbiotic relationship of legislators, jurists, and educators, may have created a curious and unintended integration of rights and activities among both the student perpetrators and victims of school violence. The legislatures of all 50 states have enacted compulsory education laws, the violation of which may bring criminal penalties to students' parents or guardians. [FN167] Given such statutes, victims may find it difficult to escape school violence for any significant period of time. Even if students are removed from violent situations, budgetary constraints or the authority of school personnel may cause a return to the original school site. Based on case law, if students are injured by peers, school personnel may be without liability. If students retaliate or seek to protect themselves from the harm of peers, their role will surely change from that of victim to that of perpetrator. This vicious and unforgiving cycle has caused one commentator to announce that children in war-torn Croatia are less psychologically *614 damaged than those American students who are perpetually exposed to a climate of school violence. [FN168] Clearly, then, whether there has been a surge or a decline in the area of school violence, the rights of students "have been weighed in the balance and found wanting."

FN1. Daniel 5:27 (King James). The title of this article is obviously inspired by the cited Biblical passage; there is no attempt here to imply that the research has its source in divine inspiration, and as far as can be known at the time, there is no familial relationship between the two authors.

FN1. Philip T.K. Daniel, J.D., Ed.D., Professor of Law and Education, University of Minnesota:

FN2. A recent study found that 73% of the school children surveyed indicated that violence was increasing in their schools. This same survey found that 17% of male students in inner-city schools had carried a gun in the past year. See M. Furlong, G. Morrison, & J. Dear, Addressing School Violence as Part of Schools' Educational Mission, 38 PREVENTING SCH. FAILURE 10, 11 (1994).

FN3. J. Kauffman, Violence and Aggression of Children and Youth: A Call for Action, 38 PREVENTING SCH. FAILURE 8 (1994).

FN4. This author has argued that school violence is by no means new, especially to big city schools or school districts undergoing desegregation. For an historical analysis of school violence see P.T.K. Daniel, A History of Discrimination Against Students in Chicago Secondary Schools, 20 HIST. EDUC. Q. 147 (1980).

FN5. See, e.g., P.T.K. Daniel and Patrick Pauken, Right Now It's Just The Markings: Gangs in the Public Schools: Preparation on How to Cope, presented before the Third Annual Education Law Institute, Franklin Pierce Law Center, July 30-August 1, 1996. [On file with the author].

FN6. M. Furlong, G. Morrison, & J. Dear, Addressing School Violence as Part of Schools' Educational Mission, 38

PREVENTING SCH. FAILURE 10 (1994).

FN7. See, e.g., SCHOOL VIOLENCE ALERT AND MAINTAINING SAFE SCHOOLS, of LRP Publications, printed exclusively for information about school violence.

FN8. See studies by the United States Department of Justice and the National Center for Educational Statistics, *infra* note 88.

FN9. R. Van Acker, *Dealing with Aggression and Violence in the Schools: Implications of Research for the Development of Prevention and Treatment Programs*, presentation before the "Stand and Deliver ..." conference sponsored by the Wisconsin Council of Administrators of Special Services, May 1-3, 1995, Madison, Wisconsin. [on file with the author].

FN10. *Id.* at 2-3.

FN11. *Id.* at 4-5.

FN12. *Id.* at 6-7.

FN13. *Id.* at 7-8.

FN14. The First Amendment of the United States Constitution reads in part that, "Congress shall make no law ... abridging the freedom of speech ..." U.S. CONST. amend I.

FN15. 418 U.S. 405 (1974).

FN16. *Id.* at 410-11. This test was reiterated in the flag-burning case of *Texas v. Johnson*, 491 U.S. 397 (1989).

FN17. *Id.* at 411.

FN18. 393 U.S. 503 (1969).

FN19. The Court declared that in order to control a student's expression of opinion, the school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

FN20. *Id.* at 513.

FN21. The reference to a "material and substantial" test relative to the decision in *Tinker* can be found in *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 166 (D. Mass. 1994), vacated, question certified, 55 F.3d 20 (1st Cir. 1996).

FN22. In fact *Tinker* is alive and well in state courts. See, e.g., *M.C. v. State of Fla.*, 695 So.2d 477 (Fla. Dist. Ct. App. 1997); *Pyle v. School Comm. of South Hadley*, 667 N.E.2d 869 (Mass. 1996); and *Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trustees*, 40 Cal. Rptr.2d 762 (Cal. Ct. App. 1995).

FN23. 478 U.S. 675 (1986).

FN24. *Id.* at 681.

FN25. *Id.* at 563.

FN26. 484 U.S. 260 (1988).

FN27. *Olesen v. Board of Educ. Sch. Dist. No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987).

FN28. *Id.* at 821.

FN29. The equal protection concern brought in *Olesen* is a legitimate one. Many anti-gang regulations adopted by school systems are geared toward the people and places most often associated with juvenile violence: males and people of color. (The perception of a symbiotic relationship between violence in the schools and minorities, right or wrong, is replete throughout the society according to a survey whose results stated, "there is no crime wave in America -- except among blacks" -- See S. Elam, L. Rose, and A. Gallup, *The 26th Annual Phi Delta Kappa/Gallup Annual Poll of the Public's Attitudes Toward The Public Schools* 76 PHI DELTA KAPPA 41, 42 (September 1994). Most of the historical dress code litigation was initiated by male students. See, e.g., *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970); *New Rider v. Board of Educ.*, 480 F.2d. 693 (10th Cir. 1973), cert. denied, 414 U.S. 1097 (1973). *Olesen* claimed an equal protection violation under the Fourteenth Amendment in that the policy impacted the wearing of earrings by boys, but not girls. The court easily dispensed with this indicating that the student had to overcome the gender-based substantial relationship test. The court found that while the wearing of earrings by boys generally resulted in gang affiliation, girls symbolized their membership in other ways which were also prevented by school board policy. *Id.* at 823. Similarly, courts and schools find that students in gangs composed of predominantly Hispanic or African-American youths display their membership through distinctive dress. In order to combat the gang problems in some schools it will be difficult not to discriminate against race or national origin. To withstand a constitutional challenge, the schools must demonstrate a compelling interest served by their anti-gang regulations as well as actual effectiveness. For cases with racially based regulations see *Fullilove v. Klutznick*, 448 U.S. 2758 (1980), *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Hopwood v. State of Tex.*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2580 (1996). In addition, the way schools define gangs may dictate how the regulations are enforced and whether they are non-discriminatory. For example, the word "gang" is most often associated with non-white groups, but not necessarily with Skinheads or Neo-Nazis, and with boys, but not with groups of girls. A school code which creates such differences, even if not explicitly written as such, may lead to discrimination and a charge of arbitrary and capricious enforcement.

FN30. *Id.* at 822.

FN31. *Id.*

FN32. Here the court referenced the holding in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). See *Olesen*, 676 F. Supp. at 822.

FN33. Gang members may also claim a First Amendment violation of a "Right of Free Association." This in fact would permit the purveyors of anti-gang regulations to avoid dress code issues and confront gang membership at its core. Historical support exists to justify regulations designed to curb membership in gangs. During the 1920's, rules prohibiting public school membership in fraternities and sororities were upheld with near unanimity. See J. Maloney, *Constitutional Problems Surrounding the Implementation of "Anti-Gang" Regulations in the Public Schools*, 75 MARQ. L. REV. 179 (1991). Other early cases held that local schools and school boards had authority to prohibit organizations which had a negative impact on the school environment and were contrary to the best interests of the school. See, e.g., *Holroyd v. Eibling*, 188 N.E.2d 797 (Ohio Ct. App. 1962); *Burkitt v. Sch. Dist. No. 1*, 246 P.2d 566 (Or. 1952); *Coggins v. Bd. of Ed.*, 28 S.E.2d 527 (N.C. 1944); *Steele v. Sexton*, 234 N.W. 436 (Mich. 1931). Many constitutional claims were lodged against the school districts that had adopted the anti-hellenic regulations. These include due process, equal protection and violation of the right to freely assemble. More often than not, the courts rejected the claims. See, e.g., *Satan Fraternity v. Board. of Educ. Instruction*, 22 So.2d 892 (Fla. 1945). Certainly, students have a protectable right to assemble. The right of assembly is "a right cognate to those of free speech and free press and is equally fundamental." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-78 (1980). Furthermore, "effective advocacy of both public and private points of view, particularly controversial ones, is

undeniably enhanced by group association, as this Court has ... recognized ... the close nexus between the freedoms of speech and assembly." NAACP v. Alabama, 357 U.S. 449, 460 (1957). Groups formed for legal, political, social, cultural or religious reasons all have the right to free association. See Molina, California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?, 22 SW. U.L. REV. 457 (1993). An understanding of the reasons students join "gangs" may yield clues as to the extent of their rights to free association. For some, there is the sheer need to belong, to share in neighborhood social activities, or to simply show off in school. While such activities can be regulated, they may also be protected by the First Amendment. Moreover, the advantage of marginalizing the groups or prohibiting membership in them must be weighed against the possibility of a claim of denial of an equal opportunity to education. On the other hand, if the reason for such groups is to engage in acts of intimidation and violence, the right of association will likely be denied by the courts. See United States v. Choate, 576 F.2d 165, 181 (9th Cir. 1978).

FN34. 827 F. Supp. 1449 (C.D. Calif. 1993).

FN35. 667 N.E.2d 869 (Mass. 1996).

FN36. *Id.* at 871.

FN37. 817 F. Supp. 1319 (E.D. Tex. 1993) *aff'd*, 20 F.3d 469 (5th Cir. 1994). For another Texas case where a federal district court found that a school district's gang-prevention policy was a violation of students' free exercise of religion because it prohibited the wearing of rosary beads see *Chalifoux v. New Caney Indep. Sch. Dist.*, 1997 WL 545641 (S.D. Tex).

FN38. 67 F.3d 883 (9th Cir. 1995).

FN39. *City of Boerne v. Flores*, 117 S. CT. 2157 (1997).

FN40. See, e.g., *Quappe v. Endry*, 772 F. Supp. 1004, (S.D. Ohio), *aff'd*, 979 F.2d 851 (6th Cir. 1991).

FN41. *Hazelwood*, 484 U.S. at 267.

FN42. 943 P.2d 836 (Ariz. Ct. App. 1997).

FN43. *Id.*

FN44. Fourth Amendment concerns regarding student violence are limited in the current article. Other methods not addressed include sniff searches, random drug tests, use of surveillance cameras, employment of security personnel, locker searches, and automobile searches. For an exhaustive rendering of these other Fourth Amendment issues see D. SPERRY, P.T.K. DANIEL, D. HUEFNER, & E.G. GEE, *EDUCATION LAW IN THE PUBLIC SCHOOLS: A COMPENDIUM*, 2d ed. (1998) [hereinafter SPERRY & DANIEL].

FN45. U.S. CONST. amend IV.

FN46. 469 U.S. 325 (1985).

FN47. 47 F.3d 1174, 1995 WL 62887 (7th Cir. (Ind.) (unreported case).

FN48. 883 F.2d 882 (10th Cir. 1989).

FN49. *Id.* at 343.

FN50. 635 F. Supp. 454 (E.D. Mich. 1985).

FN51. *Berry v. State*, 561 N.E.2d 832 (Ind. Ct. App. 1990) (A teacher overheard an argument among students, one accusing the other of drug-dealing, and proceeded to search one student's jacket. The search was held to be reasonable).

FN52. Appeal in Pima County Juvenile Action No. 80484-1, 733 P.2d 316 (Ariz. 1987).

FN53. See *Alabama v. White*, 496 U.S. 325 (1990); *State v. Slattery*, 787 P.2d 932 (Wash. Ct. App. 1990), reh denied, 114 Wash.2d 1015, (1990); *Bahr v. Jenkins*, 539 F. Supp. 483 (E.D. Ky. 1982); *People v. Singletary*, 37 N.Y.2d 310, 333 N.E.2d 39 (1975).

FN54. 694 P.2d 1078 (1985).

FN55. 627 A.2d 667 (N.J. Super. 1993).

FN56. *Id.* at 672.

FN57. 270 Cal. Rptr. 342 (Cal. 1990).

FN58. 87 F.3d 979 (8th Cir. 1996).

FN59. 1997 WL 432056 (E.D.Va.).

FN60. *Id.* at *7.

FN61. Exigent circumstances for school officials may be presented because students congregate in places that imply suspicion. In *Smith v. McGlothlin*, 119 F.3d 786 (9th Cir. 1997), a large group of students congregated in a neighborhood near the school to smoke cigarettes. Because of complaints by neighbors, an assistant principal, accompanied by a school security guard, approached the students and took them all to a detention room. A search ensued and one student was found with knives. The student was turned over to the police, but a juvenile court judge suppressed the evidence. The student sued for damages under 42 U.S.C. § 1983 claiming an unreasonable search since the school official did not have individualized suspicion. The United States Court of Appeals for the Ninth Circuit held that individualized suspicion is not a prerequisite to a reasonable search; further, the search was reasonable in light of the fact that the school official faced the dangerous situation caused by a large number of male students caught smoking in the neighborhood when they should have been in school.

FN62. The United States Supreme Court in *New Jersey v. T.L.O.*, expressly did not decide whether individualized suspicion is an essential element of the "reasonableness standard." Instead the Court found that although some individualized suspicion is usually a prerequisite to a constitutional search or seizure, the Fourth Amendment does not impose an absolute requirement for such suspicion. The Court further noted that exceptions to a requirement of individualized suspicion exist when the privacy interests implicated by a search are minimal or can be protected through other safeguards. 469 U.S. 325, 342, n.8 (1985). Following the *T.L.O.* decision the *DeRoches* court also found this search, although, unconstitutional, was not egregious enough to level damages against the principal. Although the court did not recite a test of "egregiousness," it pointed to the case of *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997), cert. denied, 1997 WL 561964 (U.S.) which upheld qualified immunity from suit for school officials who strip-searched two eight-year old girls accused of stealing money.

FN63. 508 So.2d 1170 (Ala. 1987). But see *State v. Mark Anthony B.*, 433 S.E.2d 41 (W.Va. 1993) where a similar strip search for money was declared unreasonable in scope. See also *Jenkins v. Talladega City Bd. of Educ.* 115 F.3d 821, *supra*, note 51.

FN64. 936 F.2d 881 (1991). The school policy reiterated the *T.L.O.* standard and balanced the interests of the searched student with the rights of other students.

FN65. 991 F.2d 1316 (7th Cir. 1993).

FN66. 949 F. Supp. 427, *aff'd*, 103 F.3d 116, 1996 WL 698069 (4th Cir. (Va.).

FN67. *Id.* at 435.

FN68. *Id.* at 436.

FN69. 115 F.3d 821 (11th Cir. 1997), *cert. denied*, 1997 WL 561964 (U.S.).

FN70. *T.L.O.*, 469 U.S. at 347.

FN71. *Talladega*, 115 F.3d at 828.

FN72. The *Talladega* case may also have some importance because the two girls were represented by the NAACP legal defense fund. The plaintiffs in the case were black; their accuser was white as were all the educators involved in the searches. *COLUMBUS DISPATCH*, November 11, 1997, at 3A. The girls had alleged a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d based on racial discrimination, a claim dismissed in the lower federal district court. 115 F.3d at 822.

FN73. *Id.* at 825.

FN74. *Id.*

FN75. *T.L.O.*, 469 U.S. at 342.

FN76. *Talladega*, 115 F.3d at 827 n.5.

FN77. *Id.*

FN78. 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992).

FN79. *In re F.B.*, 658 A.2d 1378 (Pa. Super. 1995).

FN80. *SPERRY & DANIEL*, *supra* note 32, at 1013.

FN81. For an analysis of student property rights or liberty interests in education based on compulsory attendance laws see *Goss v. Lopez*, 419 U.S. 565 (1975).

FN82. *In re F.B.*, 580 A.2d at 1381.

FN83. 580 N.Y.S.2d 853.

FN84. U.S. CONST. amend. XIV.

FN85. 824 F. Supp. 136 (N.D. Ill. 1993).

FN86. *Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997).

FN87. *Id.* at 1311. See also *Chalifoux v. New Caney Indep. Sch. Dist.*, 1997 WL 545641 (S.D. Tex.) where a Texas district court ruled that a school district policy prohibiting, among other things, the wearing of rosary beads (in an effort to regulate gang paraphernalia) was void for vagueness since it failed to specifically define the prohibited student

attire.

FN88. 408 U.S. 104 (1971).

FN89. *Id.* at 107.

FN90. *Id.* at 118.

FN91. *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1088 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970).

FN92. *Id.*

FN93. *Soglin v. Kaufman*, 418 F.2d 163 (7th Cir. 1969).

FN94. See, e.g., *Sherpell v. Humnoke Sch. Dist. No. 5*, 619 F. Supp. 670 (E.D. Ark), appeal dismissed, 814 F.2d 538 (8th Cir. 1985) where a court found that the combination of vagueness and discretion meant that African-American students were being disciplined for behaviors white students were not being disciplined for.

FN95. *Jenkins v. Louisiana Bd. of Educ.*, 506 F.2d 992, 1004 (5th Cir. 1975).

FN96. *M.C. v. State of Fla.*, 695 So.2d 477 (Dist. Ct. App. 1997).

FN97. *Id.* at 479.

FN98. 419 U.S. 565 (1975).

FN99. *Id.* at 584.

FN100. 760 F. Supp. 131 (S.D. Ohio 1991). For a thorough analysis of *Draper* see P.T.K. Daniel and K. Coriell, *Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?* 13 *HAMLIN J. PUB. L. & POLICY* 1 (1992).

FN101. This formula derives from the case of *Morrissey v. Brewer*, 408 U.S. 471 (1972).

FN102. *Id.* at 134. See also *Gonzales v. McEuen*, 434 F. Supp. 460, 467 (C.D. Cal. 1977), where the court stated: In an expulsion hearing, the notice given to the student must include a statement not only of the specific charge, but also the basic rights to be afforded the student: to be represented by counsel to present evidence, and to confront and cross-examine adverse witnesses.

FN103. *M. v. Board of Educ.*, 429 F. Supp. 299 (S.D. Ill. 1977).

FN104. *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1988).

FN105. 915 P.2d 62 (Kan. 1996).

FN106. *Goss*, 419 U.S. at 582.

FN107. See, e.g., *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1988); *Brewer by Dreyfus v. Austin Indep. School Dist.*, 779 F.2d 260 (5th Cir. 1985).

FN108. See *Veronia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995).

FN109. CAL. PENAL CODE, §§ 186.20-186.27 (West Supp. 1996).

FN110. Id. at § 186.22(a).

FN111. Id. at § 186.22(f).

FN112. While there is a pervasive perception of increased violence in schools, actual self-reported complaints of harm or victimizing actually decreased in schools from 1973 to 1992 according to a U.S. Department of Justice study. U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, N.J.-139563, (1992). A more recent report of the National Center for Educational Statistics states that high school students feel safer in school now than in the 1980's. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, AMERICA'S HIGH SCHOOL SOPHOMORES: A TEN YEAR COMPARISON, NC 93087, (1993). In 1993 the California Commission on Teacher Credentialing found that less than four percent of school board members, school administrators, teachers, and pupil support service staff felt that school violence was a "very big" problem in schools. The California Commission found that "head-line" capturing violence is reported to occur far less frequently than other, more subtle forms of violence. When asked about incidents of violence, 80% of the teachers in the survey reported that students cursing at each other, making fun of other students, grabbing, pushing, and stealing without force were far more common forms of violence occurring at schools. CALIFORNIA COMMISSION ON TEACHER CREDENTIALING, PRELIMINARY REPORT OF THE SCHOOL VIOLENCE ADVISORY PANEL, (1993). See also M. Edelman, Legislating for Other People's Children: Failing to Protect America's Youth, 7 STAN. L. & POLICY REV. 11 (1996), also questioning the magnitude of youth violence.

FN113. 20 U.S.C. § 8921 (West 1997).

FN114. A similar provision is in effect under the Goals 200: Educate America Act, 20 U.S.C.A. § 3351 (West 1997).

FN115. "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm." 18 U.S.C.A. § 921(a)(3) (West 1996).

FN116. 18 U.S.C.A. § 930 (West 1997).

FN117. Although not featured in this article, the United States Congress has also approved disciplinary sanctions against students with disabilities who are involved in dangerous acts. The Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400-1484 (1994), contains the Jeffords Amendment, 20 U.S.C. § 1415(E)(3)(B) which provides that a student who brings a gun to school "may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days." Id. In fact, the Jeffords Amendment has been expanded with the reauthorization of IDEA signed into law by President William Clinton in June, 1997. The new provision permits a student to be removed to an alternative placement for forty-five days if a student brings a "weapon" to school characterized as any device capable of causing death or bodily injury. Prior to the Jeffords Amendment such students could only be punished with a maximum of 10 days suspension. See Honig v. Doe, 484 U.S. 305 (1988). For an in-depth analysis of the discipline of students with disabilities see D. Sperry, P.T.K. Daniel, et al., EDUCATION LAW AND THE PUBLIC SCHOOLS: A COMPENDIUM (1998).

FN118. 18 U.S.C. § 921(A)(25) (1994).

FN119. United States v. Lopez, 115 S. Ct. 1624 (1995).

FN120. Spencer v. Unified Sch. Dist. No. 501, 935 P.2d 242 (Kan. Ct. App. 1997).

FN121. Board of Trustees v. Barnell, 678 N.E.2d 799 (Ind. Ct. App. 1997).

FN122. *Id.* at 802.

FN123. 20 U.S.C.A. § 1681 (1994).

FN124. 42 U.S.C.A. § 1983 (West 1997).

FN125. 34 C.F.R. § 106.1 (West 1996).

FN126. 503 U.S. 60 (1992).

FN127. Many of the Title IX cases brought by students have imported Title VII's principle of "hostile environment" cause by an employer's knowledge of and failure to arrest a supervisor's sexual harassment of an employee. See *Meritor Savings v. Vinson*, 477 U.S. 57 (1986).

FN128. *Doe v. Petaluma City Sch. Dist.* 54 F.3d 1447 (9th Cir. 1995).

FN129. 74 F.3d 1186 (11th Cir. 1996).

FN130. *Id.* at 1196.

FN131. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997). See also *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996).

FN132. *Davis*, 120 F.3d at 1400.

FN133. U.S. CONST. art. I, § 8, cl. 1.

FN134. *Id.* at 1401.

FN135. *Oona R.-S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997).

FN136. *Id.* at 1208.

FN137. *Id.* at 1210.

FN138. See *supra*, note 92.

FN139. 42 U.S.C. § 1983 (1994). Section 1983 actually is a provision of the Ku Klux Klan Act of 1871, a post-Civil-War statute intended to provide remedies for federal civil rights violations against African-Americans. In recent decades the application of Section 1983 has expanded far beyond its initial purposes. Section 1983 provides that: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FN140. See *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989), cert. denied sub nom, *Smith v. Stoneking*, 493 U.S. 1044 (1990) where the United States Court of Appeals for the Third Circuit ruled that school administrators were liable for their actions of negligent supervision and reckless indifference to known or suspected sexual abuse of a student by a band director.

FN141. See *Monell v. Dep't of Social Serv.*, 436 U.S. 658 (1978).

FN142. SPERRY & DANIEL, *supra* note 32, at 1090.

FN143. 489 U.S. 189, 194 (1989).

FN144. *Id.* at 200.

FN145. 972 F.2d 1364 (3rd Cir. 1993).

FN146. *Id.* at 1370.

FN147. *Id.* at 1375.

FN148. 830 F. Supp. 1560 (E.D.Va. 1993).

FN149. *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995).

FN150. *Id.* at 1299.

FN151. SPERRY & DANIEL, *supra* note 32, at 117. See also, *Mitchell v Duval County Sch. Bd.*, 107 F.3d 837, 839 (11th Cir. 1997).

FN152. *D.R. v. Middle Bucks Area Voc. Tech.*, 972 F.2d at 1373.

FN153. *Id.* at 1375.

FN154. *Mitchell v. Duval Cnty. Sch. Bd.*, 107 F.3d 837 (11th Cir. 1997).

FN155. 28 F.3d 521 (5th Cir. 1994).

FN156. *Id.* at 531.

FN157. 38 F.3d 198 (5th Cir. 1994).

FN158. *Id.* at 201.

FN159. *Id.*

FN160. *Id.*

FN161. 22 F.3d 991 (10th Cir. 1994).

FN162. *Id.* at 995.

FN163. E. Schulze and T. Martinez, *Into the Snakepit: Section 1983 Liability under the State-Created Danger Theory for Acts of Private Violence at School*, 104 EDUC. L. REP. 539, 545 (1995).

FN164. *Id.* at 547.

FN165. *Id.*

FN166. *Tinker*, 393 U.S. at 524 (Black, J. dissenting).

(Cite as: 27 J.L. & Educ. 573, *614)

FN167. See, e.g., Ohio Rev. Code §§ 3321.38, 3321.99 (1997) imposing both fines and imprisonment for parents or guardians who fail to send their children to school.

FN168. M.W. Edelman, Legislating for Other People's Children: Failing to Protect America's Youth, 7 STAN. L. & POLICY REV. 11, 12 (Winter 1995-96).

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