New Jersey,

Petitioner,

—v.— No. 83–712

T.L.O., a Juvenile

Respondent.

Washington, D.C.
Monday, March 28, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:45 a.m.

BEFORE:

WARREN E. BURGER, *Chief Justice of the United States*
WILLIAM J. BRENNAN, JR., *Associate Justice*
BYRON R. WHITE, *Associate Justice*
THURGOOD MARSHALL, *Associate Justice*
HARRY A. BLACKMUN, *Associate Justice*
LEWIS F. POWELL, JR., *Associate Justice*
WILLIAM H. REHNQUIST, *Associate Justice*
JOHN PAUL STEVENS, *Associate Justice*
SANDRA DAY O'CONNOR, *Associate Justice*

APPEARANCES:

ALLAN J. NODES, ESQ., *Deputy Attorney General of New Jersey, Trenton, New Jersey; on behalf of the Petitioner.*

LOIS De JULIO, ESQ., *First Assistant Deputy Public Defender, East Orange, New Jersey; on behalf of the Respondent.*

QUESTION: Well, the exclusionary rule rests on—at least a lot of people think so, not everybody—on its deterrent effect, and you must exclude the evidence to deter police conduct that is violative of the—it isn't enough for them to know what the Fourth Amendment means. You must also exclude the evidence.

MR. NODES: Yes, or provide another deterrent, so you have to teach people—yes, people have to know what the Fourth Amendment says, and then there has to be a deterrent to their violating and doing what they know is wrong.

QUESTION: Well, actually, in New Jersey is it not just the Fourth Amendment, since the protections of the counterpart of the Fourth Amendment in the state constitution apparently are broader than we have said they were under the Fourth Amendment?

MR. NODES: In many cases—

QUESTION: I guess your teachers have to know what the state constitution guarantees are, don't they?

MR. NODES: I believe under this case that—although in some cases the New Jersey Supreme Court has given broader protections—

QUESTION: In the consent area.

MR. NODES: I beg your pardon?

QUESTION: In the consent area.

MR. NODES: Yes, in the consent area. In general, the opinions of the United States Supreme Court are followed in New Jersey.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[Whereupon, at 1:45 p.m., the case in the above-entitled matter was submitted.]

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in *New Jersey* against *TLO*. Mr. Nodes, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ALLAN J. NODES ON BEHALF OF THE PETITIONER

MR. NODES: Mr. Chief Justice, and may it please the Court, this Court granted *certiorari* to the New Jersey Supreme Court in this case on the issue of the applicability of the Fourth Amendment exclusionary rule to school searches conducted by schoolteachers and school officials.

In this case, the respondent was observed smoking a cigarette in a school restroom by a teacher. The teacher took the student to the vice principal's office and reported the incident to the vice principal. After the vice principal left, the student not only denied having smoked in the restroom, but also stated that it couldn't have been her because she didn't even smoke.

After—following this statement, the vice principal asked for the student's purse and opened the student's purse, finding a pack of cigarettes lying on the top. He picked up the cigarettes and said something to the effect of, "You lied to me about smoking cigarettes," looked back in the purse, and saw rolling papers for cigarettes. He believed these were indicative of the presence of drug paraphernalia in the purse and continued to look through the purse. He found marijuana and other indications that the marijuana was in the purse for purposes of distribution.

QUESTION: Mr. Nodes, under New Jersey law, can a minor consent to a search?

MR. NODES: I don't think there would be any distinction under New Jersey law between a minor consenting to a search

and an adult consenting. New Jersey has a slightly stricter standard than the federal standard concerning consent, and it would have been absolutely necessary that the juvenile be aware of her rights prior to the search taking place in order for it to be a consent search. Because of this, the state has always conceded that it was not a consent search.

The trial court and the appellate division in New Jersey—

QUESTION: You left out one item in the pocketbook, the $40.

MR. NODES: I beg your pardon?

QUESTION: You left out one item in the pocketbook—

MR. NODES: Yes.

QUESTION: —which was $40 in $1 bills, which signified that she was selling it.

MR. NODES: Yes, Your Honor.

QUESTION: You left that out.

MR. NODES: There were also pieces of paper indicating that various other people, Johnny, people like that, owed her $1, $1.25, things like that, and all these items were entered into evidence at the juvenile delinquency proceeding against TLO, and they were all evidence of an intention to distribute the marijuana which was found in the purse.

TLO was adjudicated a delinquent as a result of the evidence which was found, and the trial court and the New Jersey Appellate Division found that the search was totally proper. However, the New Jersey Supreme Court found that the search exceeded reasonable grounds and therefore found that it was required to exclude the evidence which had been found in the search.

Now, in reaching this decision, the New Jersey Supreme Court found that, due to the amount of state action involved, that the Fourth Amendment to the United States Constitution would apply to this situation, and we have not protested this ruling. In addition, the New Jersey Supreme Court found that in order for a search to be reasonable under the United States Constitution in the school search context the person conducting

the search must have reasonable grounds to believe that the search will uncover evidence of a crime or evidence of a violation of school discipline or school regulations.

QUESTION: Mr. Nodes, in your question presented for *certiorari,* you say whether the Fourth Amendment exclusionary rule applies to searches made by public school officials and teachers in school. Now, the unwary might think that you were talking perhaps about an administrative proceeding where someone has been kicked out of school, wondering whether the exclusionary rule would apply in that, but here the exclusionary rule is applied by the Supreme Court of New Jersey in connection with a criminal prosecution of this person, was it not?

MR. NODES: Yes, it was applied in connection with a juvenile delinquency prosecution. The rules in New Jersey would be the same whether it was a juvenile delinquency prosecution or a criminal prosecution.

QUESTION: So what we are really talking about here is the standard supporting a search, aren't we, in a school, rather than whether the exclusionary rule applies in this proceeding?

MR. NODES: Well, the primary motion that was made by the defendant was for exclusion of the evidence, and the first question that had to be reached by the New Jersey court was whether or not under any circumstances there could be exclusion of evidence illegally taken in the school situation. If the answer to that question was no, under no circumstances would this type of evidence be excluded, then setting a standard wouldn't be absolutely necessary. That would no longer really be in controversy.

In the case, the New Jersey Supreme Court did do both. It did set the standard and it also ruled that exclusion was warranted.

QUESTION: And so your argument I take it is primarily addressed to the standard?

MR. NODES: No, our argument here is primarily addressed to the exclusionary rule issue. We basically agree—

QUESTION: Well, do you think it is open to us to deal with the reasonableness of the search?

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MR. NODES: I believe that could be considered a question subsumed within the—

QUESTION: But it wasn't your intention to raise it?

MR. NODES: It wasn't our intention to raise it because we agree with the standard that was set forth by the New Jersey Supreme Court. We feel that that is a workable standard.

QUESTION: Courts around the country have differed somewhat on that standard, have they not?

MR. NODES: Yes, they have. In this whole area there has been a great deal of difference. There have been courts which have held that the Fourth Amendment—they have gone all the way from saying the Fourth Amendment doesn't even apply to saying that the Fourth Amendment always applies and exclusion is always needed.

The reason we didn't specifically address the issue, though, of the standard—we believe both counsel have addressed that issue in their briefs, in footnotes, and we have set forth arguments, and the arguments were made before the New Jersey Supreme Court—the reason we didn't address it is because we think the New Jersey Supreme Court set forth a good standard and a workable standard.

QUESTION: What exactly is your quarrel with the Supreme Court of New Jersey?

MR. NODES: Our quarrel with the Supreme Court of New Jersey is that we do not feel that the exclusionary rule works as a deterrent in the school search situation, and because of that we don't feel that exclusion of evidence from a later criminal proceeding should ever occur when the search was instituted by schoolteachers and school officials.

QUESTION: So teachers and school administrators should not be treated the same way as policemen and law enforcement—

MR. NODES: That is our primary contention. Yes, Your Honor.

QUESTION: Has the exclusionary rule been applied in other administrative search contexts?

MR. NODES: Yes, it has been applied in other—in exclusionary—in other administrative search contexts, such as OSHA searches—

QUESTION: Or fire protection people, and so forth?

MR. NODES: Well, yes. I am not certain that those are actually administrative searches. The people involved in them were searching for evidence of arson, which is definitely a crime, and it often wasn't a firefighter per se.

QUESTION: In the other context, do you think it was based on a deterrence rationale?

MR. NODES: I believe that certainly with the firefighters—

QUESTION: In administrative contexts?

MR. NODES: Yes, I believe it was. The persons who—

QUESTION: But you somehow think that school officials can't be deterred?

MR. NODES: I think it is much less likely that a school official will be deterred. The firefighter, and I believe in both *Clifford* and *Tyler,* the real persons who were doing most of the searching were either fire inspectors or police who were called in by fire inspectors, and they were very definitely searching for evidence of a very serious crime. It wasn't an administrative search, and the other searches that are closer to pure administrative searches, such as *Cameron* and *Barlows,* cases like that, the persons who were doing the searches on a regular basis conducted searches for violations of civil regulations and administrative regulations. That was their primary duty, and the purpose of the search was to find violations, and it was clear that that evidence would be presented in the trial. That was their primary function. I think—

QUESTION: Well, is it your view that school officials, regardless of the exclusionary rule's application, would continue to do what they always have done?

MR. NODES: It is our contention that the exclusionary rule has very little effect on a schoolteacher. We feel that there are other means of teaching schoolteachers compliance with the Constitution and ensuring that there is compliance with the Constitution.

QUESTION: Well, if that is so, then how can you square that with your argument that the application of the rule will create havoc in the schools? It just seems inconsistent.

MR. NODES: Well, I think that what it is is that if the exclusionary rule is to be applied, and if it is to have any effect, it can work only under very limited circumstances. I think that one of the journals pointed out in the respondent's brief, the *Journal of Law and Education*, set forth the way the exclusionary rule could work, and basically the journal suggested that in the school situation administrators and teachers could identify people in schools who were likely to cause trouble. They could watch where these students went and make notes of where they went. They could watch who these students associated with and make notes of that.

They could make notes of whether the people—the students seemed to sometimes be intoxicated, seemed to be acting belligerent, seemed to be cutting classes, seemed to be late a great deal of time. And, basically, what it sounds like is that in order for the rule to work, schoolteachers are going to have to turn into policemen, and they have to turn into policemen who will develop a dossier on a student before conducting a search.

QUESTION: Mr. Attorney General, in this particular case, if the girl involved had a locked briefcase, would it have been all right to break it open?

MR. NODES: I think this case presents a difficult question, and it was a question obviously in the New Jersey Supreme Court, in the New Jersey courts, and that is why there was a split. A locked briefcase would show an added indication that the person had an expectation of privacy. Under the standard set up by the New Jersey Supreme Court—

QUESTION: But a closed pocketbook wouldn't be?

MR. NODES: Well, I think that the—

QUESTION: Have you ever seen a woman that didn't take her pocketbook without a purse?

MR. NODES: Possibly not, Your Honor, but I think that it was a standard set up by the New Jersey Supreme Court. The court indicated that the greater the intrusion, the more significant the intrusion, the higher the standard would have to be in any event. So I think before we went into something that was locked—

QUESTION: That could be classified as freewheeling.

MR. NODES: I think it would better be classified as a common sense approach which schoolteachers can actually use.

QUESTION: But sometimes—anyway.

QUESTION: General Nodes, let me just ask you this question, if I may, following up on what Justice O'Connor was asking you, on the effect of what you are asking for. You are not challenging the standard or the application of the standard in this case. You are taking a broad position, as I understand you, that the exclusionary rule simply doesn't apply in the criminal context when the search is made by a school official.

MR. NODES: Absolutely.

QUESTION: But as I understand the New Jersey court, it would permit these searches to go ahead and let the results of the search be used for school disciplinary purposes and management of the school without any deterrent whatsoever.

MR. NODES: Okay. The New Jersey Supreme Court has not specifically addressed that issue and has not said that.

QUESTION: But this case doesn't preclude that.

MR. NODES: No.

QUESTION: All this case deals with is whether after the material is obtained it can be used for criminal purposes.

MR. NODES: That is correct. I would note that a chancery judge in New Jersey did rule in this case that evidence would be excluded from the disciplinary proceeding.

QUESTION: But that is not before us.

MR. NODES: That is not before us and that is a single opinion that wasn't contested. Our only contention is really that the exclusionary rule shouldn't apply in a criminal trial when the search was conducted by school officials.

QUESTION: And that is no matter how flagrant the violation might be.

MR. NODES: Yes, we think that regardless of how flagrant it would be, the standard would be the same, the application of the exclusionary rule would have very little effect, and that is the problem. We just don't believe the effect is there.

This Court has often noted that there is a balancing test that must be used in determining whether or not the exclusionary rule would be applied in any context. For instance, in *United State* v. *Havens,* the Court allowed excludable evidence to be used for purposes of impeachment. In *United States* v. *Calandra,* possibly excludable evidence was allowed to be presented before a grand jury. In *U.S.* v. *Janis,* the Court allowed evidence which had actually been suppressed, quashed in a state criminal proceeding, to be introduced in a federal civil proceeding. In *Stone* v. *Powell,* this Court found that the additional benefits of allowing certain seizure points to be raised in the federal habeas corpus context would be slight in relation to the costs.

I think that all these cases have centered very squarely on the idea that a balancing test must be used, that the exclusionary rule has as its purpose the deterrent effect, and that we must be sure that that deterrent effect outweighs any detriments of the exclusionary rule before we will automatically apply the rule.

I believe that the benefits of applying the exclusionary rule to the school search situation are really very limited and very questionable. The rule in effect punishes law enforcement officers for transgressions which are committed by law enforcement officers and transgressions themselves and other law enforcement officers.

MR. CHIEF JUSTICE BURGER: We will resume there at one o'clock, counsel.

MR. NODES: Thank you.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m. of the same day.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Nodes.

ORAL ARGUMENT OF ALLAN J. NODES
ON BEHALF OF THE PETITIONER—RESUMED

MR. NODES: Mr. Chief Justice, and may it please the Court, at the recess I was trying to explain that our position is that the benefits of applying the exclusionary rule to the school search situation would be very questionable.

The idea of the rule is to punish law enforcement officers for offenses committed by themselves or constitutional transgressions committed by themselves and by other law enforcement officers. It is thought that those who are in charge of formulating policies for law enforcement will be the persons most greatly affected, since they will be the prosecutors who will lose cases if there is not compliance with the Constitution.

Because of this, the rule is thought to have the effect of causing education of the police officers and detectives and investigators who actually conduct searches, and by this means the entire law enforcement community will be given an incentive to comply with the Constitution.

This simply will not work with schoolteachers, because they are not a part of this law enforcement community, and their interests are different than law enforcement officers. They do obviously have an interest in ensuring that there is discipline in the schools. This interest, however, is secondary to the primary interest, which is to educate the students.

The primary function of a police officer is law enforcement. A policeman becomes a policeman because of an interest in enforcing laws. A schoolteacher becomes a schoolteacher because of an interest in education. Because the interest in law enforcement is so secondary, the benefits of the exclusionary rule

in the school search situation would be even less than they are in the general criminal law situation. This Court has noted often that there is clearly very little empirical data of the effectiveness of the exclusionary rule, and there is some question as to how well it works for law enforcement.

When we remove the person who is doing the search one step further from the law enforcement and one step further from the trial at which exclusion will occur, there is much more question about the effectiveness of the exclusionary rule and much more question as to whether or not it will actually be a deterrent.

As far as the real detriments of the exclusionary rule, the major detriment has, of course, been noted on many occasions by this Court, that the guilty may go free because of the rule. This is tolerated because the rule is felt to foster respect for criminal laws and respect for our system of criminal justice in general.

But as Justice Powell writing for the Court in *Stone* v. *Powell* noted, the indiscriminate use of the exclusionary rule could actually have the opposite of the intended effect. It could actually nurture disrespect for our criminal laws and could actually nurture disrespect for our system of criminal justice.

This is obviously a detriment any time the exclusionary rule is possibly extended. This detriment may be even greater in the school search situation because disrespect of our criminal laws and disrespect of the system of justice is not a lesson which we should teach our students.

Therefore, before the exclusionary rule is applied to school searches by schoolteachers and officials, it should be very clear that the benefits of the rule outweigh the detriments and that there are no other means of exacting compliance with the Constitution. We believe that the detriments have been set forth very clearly and that the benefits are very limited, and the only way that we could really get a beneficial effect from the exclusionary rule in a school search situation so that it would foster compliance with the Constitution is to have teachers act as policemen, to have teachers follow the same rules as policemen, for teachers to actually investigate as policemen.

I suggest that this would totally change the educational system in this country.

QUESTION: May I ask one question on this? As Justice O'Connor pointed out before lunch, there is apparently some diversity among the states as to what the right standard is, but we don't reach that question. I was wondering, have any of the states that have addressed this question, has any court held that the exclusionary rule does not apply?

MR. NODES: The district court—the Supreme Court of Alaska found that the Fourth Amendment in a DRC case didn't apply.

QUESTION: But any court that has held the Fourth Amendment has been violated, but you don't apply the exclusionary rule to schoolteachers?

MR. NODES: I don't remember the name of the case offhand, but I know there have been district courts that have held that. I could supply the Court with the name of the case.

QUESTION: Federal district courts?

MR. NODES: Yes, sir.

But in addition to this detriment that would occur by either—by changing the school system, by using the exclusionary rule, and by forcing schoolteachers to act as policemen, we believe that the exclusionary rule is unnecessary because there are other deterrents in the school situation which will really work.

As this Court noted in *Ingraham* v. *Wright,* the school situation is different than many other situations. In the school situation, there is a great deal of community interest and a great deal of parental interest. Now, in that case, of course, this Court found that if corporal punishment in a public school went too far, the community pressures in addition to possible criminal proceedings and possible civil proceedings would have the effect of stopping further transgressions.

We suggest that this would be at least as true in a school search situation and we suggest that the more egregious a search, the more chances the deterrence would occur. If a student goes home and complains to his parent that he has just been the subject of an unreasonable search, there is a high likelihood

that the parent will complain to the principal or to the board of education, and there is a great likelihood that the principal or the board of education will take action on the basis of that complaint.

In New Jersey, as in many other states, there are systems for bringing community complaints to boards of education. If a complaint were filed against a schoolteacher or an administrator, the local board of education would consider the complaint, and if there was merit, they would report the complaint to the state board of education. That board has the power to remove tenure from the schoolteacher, cause the schoolteacher to be fired, or to revoke the license of a schoolteacher.

We believe that this is the type of a real deterrent against unlawful actions which will actually work and which will actually have an effect on schoolteachers and on school administrators, and I think that the final analysis is, we will find that if unreasonable searches continue, the community pressure will stop them. So there is an automatic safeguard in place to unreasonable searches in the school situation.

In addition, there is the possibility of criminal action being brought against a student or teacher who conducts an unreasonable search, and this would be particularly true in the situation of a possible strip search or a search of that type. There are obvious criminal possibilities, and the teacher who is involved in a search like that or the official would have to consider those possibilities.

QUESTION: But that is not this case.

MR. NODES: I beg your pardon?

QUESTION: What criminal action would there be in this case?

MR. NODES: I think there would be—

QUESTION: Visual, charged with looking?

MR. NODES: Admittedly, there would be very little chance of criminal action in a case like this. We believe that this is a less intrusive search than many others that have been referred to in the defendant's brief, and I believe that this is a much closer call

than in many of the other situations which defendant has referred to.

And because it is such a close call, there would be less of a chance of deterrence obviously. The Supreme Court of New Jersey, while finding that the search in this case was not within constitutional bounds, did not say that the general actions of the school vice principal were totally unreasonable, but just that they were unreasonable under the Constitution. In that situation, it is obviously much harder to deter.

I think, though, that this case, at least in New Jersey, has taught educators what the framework is within which they must work. I think because of this case they have learned something, regardless of whether there is actually exclusion or not.

There is also the chance of bringing a tort action or a 1983 action either in the state court or in the federal court against a teacher or a school official who unreasonably searches a student. These types of things have been known not to be effective deterrents in the law enforcement situation where law enforcement officers are dealing primarily with criminals and people who on the most part are found to have contraband.

However, in the situation of an unreasonable search of a school student, I suggest that there would be a much greater chance that a 1983 action could be successful because the school student is simply going to provide a much more sympathetic figure to put before a jury when requesting damages. And even if damages aren't actually returned in each case, the schoolteachers' and school officials' awareness of the possibility of damages can have a detrimental—a deterrent effect.

Defendant or respondent has pointed out that in *Wood* v. *Strickland* this Court limited the liability of school officials from 1983 actions and said that they would not be liable for good faith violations, and the respondent points out that this would limit the detrimental—the deterrent effect which these type of actions can have.

We believe that these cases teach another lesson. The Court has determined that because of the realities of a school situation, because of the necessities for making sure that there is discipline in schools, that schools shall be treated somewhat

differently, that schoolteachers and administrators shall not be treated precisely as law enforcement officers.

Now, having limited the first party deterrent effect that a 1983 action may have, we believe that it would not be appropriate to try to enforce compliance with the Constitution by means of a third party deterrent, and in the school search situation, that is what the exclusionary rule would really amount to, because the schoolteacher is clearly one step removed from the police officer to whom they turn over the evidence, and that person is one step removed from the prosecutor from whom the evidence will be suppressed.

We believe that in an ideal situation a means would clearly be developed to ensure that the Constitution was complied with while enforcement of criminal laws went on. This Court has noted that in the criminal situation this wasn't possible, and therefore a choice must be made and a compromise must be reached, and the exclusionary rule was set up as a choice, as a compromise between ensuring full criminal prosecution and ensuring the constitutional rights are highly regarded by law enforcement officers and other state officials.

We now are facing a situation where we don't have to make a choice, where we don't have to accept a compromise. We have a situation where the benefits of the rule would be slight, but we do have other deterrents. We can teach the schoolchildren that they must comply with the criminal laws while also teaching them that there are deterrents in place which will ensure that their constitutional rights won't be violated. We suggest this is the rule we should be teaching these students.

I would reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Ms. De Julio?

ORAL ARGUMENT OF LOIS DE JULIO ON BEHALF OF THE RESPONDENT

MS. DE JULIO: Mr. Chief Justice, and may it please the Court.

This case arises in the factual setting of the public school system, but I would urge the Court not to let the context obscure the fact that the issues presented here are not ones of education-

al policy, but are rather ones of criminal law. The question is not whether or under what circumstances schools may regulate the conduct of their students. It is not whether this school may use certain types of evidence in its own internal disciplinary proceedings to form the basis for imposing school sanctions. Rather, the question is whether a court of law may permit an individual to be convicted of a crime based upon evidence illegally seized from him by a government official.

QUESTION: Suppose, Ms. De Julio, that all of these events that took place here took place not in the principal's office, but after the young lady got home, and it was her mother, not the schoolteacher.

MS. DE JULIO: Well, Your Honor—

QUESTION: And lay aside for a minute how the police get the evidence, but do you think the Fourth Amendment enters that setting?

MS. DE JULIO: Your Honor, the Fourth Amendment has never been applied to actions by purely private citizens, and certainly a parent would be acting in a purely private capacity. However, courts have distinguished between the teacher acting as a state official and the parent acting in a parental role. At one time, courts held that the teacher acted *in loco parentis,* that is to say, instead of the parent, and that doctrine may well have accorded with facts of the educational system as it stood 200 years ago, when the parent would hire a tutor or select a private school that would carry out the parents' own educational philosophy and disciplinary standards. But in today's modern compulsory system of education, the teacher serves a very different role.

QUESTION: Let me follow that now. The mother is called to the school by the principal, and the whole episode occurs just as it did here, except that the mother orders the girl to open her purse. The same answer?

MS. DE JULIO: I would submit, yes, that that might very well be perfectly proper under the Constitution, and if the parent gave the evidence to the police, that may well also be proper.

QUESTION: Well, I just said that the parent didn't give it to the police here. The principal of the school then takes the evidence after the mother directs the daughter to disclose it.

MS. DE JULIO: That may very well be a perfectly proper course of events. In this case, it did not occur in that way, and the issue of whether the juvenile herself consented to the search by the principal under New Jersey law was decided against the state because it was not shown that she was aware she had a right to refuse, which would be the test under New Jersey state law for a consent search.

QUESTION: May I ask another hypothetical question? Let's assume you have a patient in a state hospital, and the hospital has a patient who has been forbidden to smoke, and the nurse has reason to believe that the particular patient is smoking and searched his or her purse. You would have the same situation? Would you or would you not?

MS. DE JULIO: I think that conduct would most likely be permissible.

QUESTION: Why?

MS. DE JULIO: Well, the test the New Jersey Supreme Court set forth did not prevent teachers or educators from conducting searches. It merely required that they have some reasonable basis to do so.

QUESTION: Yes. Well, I am thinking about the application of the exclusionary rule.

MS. DE JULIO: With regard to the application of the exclusionary rule, we would submit that if an improper search were conducted by a governmental employee, and I would—

QUESTION: Well, let's assume that the nurse had probable cause to believe that there were cigarettes there and when the purse was opened found marijuana.

MS. DE JULIO: Well, if that were found to be correct, if there were probable cause, then that would be a constitutionally permissible search. However, if not, it might be that the exclu-

sionary rule would apply in that circumstance, depending on whether the actions of the nurse were considered—

QUESTION: If the court found the search was not reasonable, the exclusionary rule would apply?

MS. DE JULIO: If the court found as a matter of fact—and I don't know, because I am not aware of the circumstances in state hospitals, whether the actions of a state hospital employee would constitute governmental action for Fourth Amendment purposes.

QUESTION: A state hospital would be similar in that respect, wouldn't it, to a public school?

MS. DE JULIO: I could certainly see some very definite similarities, and I would, without knowing more, conclude that that may be the case.

QUESTION: So the hospital would be in the same situation generally that the school is?

MS. DE JULIO: In that circumstance, it may very well. Again, the circumstances that I am not aware of might lead a court to conclude that it would not be state action, but with regard to schools and educational officials, the vast majority of state courts and lower federal courts which have considered the question have found that school authorities, at least in our modern system of compulsory education—

QUESTION: Could you help me? What do you think the predicate is for a legal search by a school officer of a young lady's purse? Under New Jersey law, I take it it is probable cause.

MS. DE JULIO: No, Your Honor. With the—

QUESTION: What do you think the Fourth Amendment would be satisfied with?

MS. DE JULIO: Well, the standard that the New Jersey court set forth was a reasonable ground standard, which, by reading the context of the decision, they viewed to be a significantly less stringent standard than probable cause.

QUESTION: So you think the Fourth Amendment doesn't apply in full force in the school context?

MS. DE JULIO: Well, certainly the New Jersey Supreme Court did not think so.

QUESTION: I am asking you what you think.

MS. DE JULIO: We argued below that the standard of probable cause should be applied.

QUESTION: And you still are submitting that?

MS. DE JULIO: Well, Your Honor, that issue was not before the court because the—

QUESTION: I am asking you what you think the standard is.

MS. DE JULIO: Well, certainly when the search at issue is a personal search, and by that I mean a search of a—

QUESTION: Well, a search of what is involved here, search of a purse.

MS. DE JULIO: Of a purse, of a pocket. I would submit, and the New Jersey Supreme Court did indicate that its own standard, as the search became more intrusive, the level of reasonableness would closely approach probable cause, that certainly that—

QUESTION: Why would you dispense with the warrant requirement?

MS. DE JULIO: Well, the requirement of a warrant presents certain difficulties for the school authorities.

QUESTION: So the Fourth Amendment rules really don't apply in their full force in the school context?

MS. DE JULIO: That has been the prevailing decisions by most courts which have considered it.

QUESTION: And you are comfortable with that?

MS. DE JULIO: I would certainly be comfortable with a probable cause standard even in the absence of a warrant.

QUESTION: Without a warrant. Search without a warrant.

MS. DE JULIO: But I think that the circumstances may well devolve into the exigent circumstances exception in most cases

because of the nature of the school environment. The ability of the administrator—

QUESTION: Well, if there are exigent circumstances, there is no violation of the Fourth Amendment.

MS. DE JULIO: That is correct, Your Honor.

QUESTION: And no ground for excluding the evidence.

MS. DE JULIO: And I think that is why the New Jersey court and many other state courts found that the warrant requirement would be particularly difficult for schools to comply with because, as my adversary noted, schools are not primarily involved in investigating criminal conduct.

QUESTION: Well, they could hardly get a warrant anyway, could they?

MS. DE JULIO: It would be difficult. They would have to go—

QUESTION: Difficult? I don't know how they could even get a warrant. They aren't law enforcement officials, are they?

MS. DE JULIO: It might present very difficult procedural problems.

QUESTION: Ms. De Julio, are you suggesting that the presence of exigent circumstances dispenses with the need for probable cause as well as the need for a warrant?

MS. DE JULIO: No, Your Honor. In our position before the New Jersey Supreme Court, we argued that probable cause should be the required test when a full search was being conducted. We obviously distinguish between the less intrusive search, such as the frisk for a weapon, which might arise in the school setting because obviously the police would only have to meet a reasonable suspicion test in that circumstance, and we conceded that if a school authority had reasonable suspicion to believe that a student was armed and dangerous, that the lesser standard would be justified in that circumstance as well.

QUESTION: Do you think a *Terry* standard would be enough then?

MS. DE JULIO: Well, certainly in a weapons situation if we hold the police to that standard I think it would be difficult to argue that we should not allow educators to act in that circumstance on the basis of reasonable suspicion or reasonable grounds. But again, the New Jersey Supreme Court determined that the reasonable grounds was the standard that they would adopt for all school searches, regardless of the purpose or the nature of the substance being searched for, with the caveat that as the search became more intrusive, the reasonable grounds would more closely approach probable cause.

QUESTION: Do you agree that issue isn't before us?

MS. DE JULIO: Your Honor, it is not before this Court as I understand it because the New Jersey Supreme Court found the search of the juvenile to be unreasonable. Therefore we were not in a position to petition, and the state did not take issue, as I understand it, with the nature of the standard which the New Jersey Supreme Court adopted.

QUESTION: So you think as it comes to us we must accept the notion that there was no—not even reasonable suspicion or reasonable grounds.

MS. DE JULIO: I think the facts of the case do support the conclusion that there was no reasonable basis for the search at the outset. Moreover, the New Jersey Supreme Court made the further finding that even if the initial opening of the purse had been reasonable, the scope of the search enlarged far beyond the reasonableness that would have justified the opening of the purse.

The principal testified that he opened the purse looking for tobacco cigarettes and that he saw a package of Marlboro cigarettes sitting right on top. At that point, he had done all that one could argue would be reasonable by any stretch of the imagination, but he then proceeded to remove the cigarettes, observe the rolling papers, which he then felt gave him a basis to go further, to open up zippered compartments, to read personal papers which the student had.

QUESTION: Well, when he found the Marlboro cigarettes, he had more evidence towards probable cause than he did before he found them, because she had said, I don't smoke, and that shows that she lied as to saying that she didn't smoke and therefore supports an inference that she lied in her other denials.

MS. DE JULIO: Well, Your Honor, I think it is a close case, but I think that we have to keep in mind that in this school, unlike many others, smoking was not per se forbidden. The school permitted students to smoke in certain designated areas, so that many students would be lawfully carrying cigarettes in their purses or pockets. So that the search for cigarettes really was not proof positive either that the juvenile had been smoking in the girls' room, which was not a specially designated area.

QUESTION: No, but it was proof positive that she had lied, or a very strong inference that she had lied when she said she didn't smoke.

MS. DE JULIO: Your Honor, I think it may have been some evidence, but I don't think it was conclusive in that the fact that she was carrying cigarettes did not prove that she herself smoked.

QUESTION: No, but I mean, you don't need a whole lot more than that, I don't think.

MS. DE JULIO: Well, as I would be happy to concede, I think that it is a close case, and that the facts would support, however, the conclusion that the New Jersey Supreme Court made.

QUESTION: Well, the only—as you have suggested yourself, there is only one question here, the application of the exclusionary rule.

MS. DE JULIO: Of the exclusionary rule.

QUESTION: Which I suppose assumes that there has been a violation.

MS. DE JULIO: Yes, Your Honor, and certainly the state—

QUESTION: And that even so, the evidence should not be excluded.

MS. DE JULIO: And we would submit that that—the past decisions of this Court, without exception, when the state is attempting to utilize the fruits of its illegal conduct on its direct case in chief in a criminal matter, that the exclusionary rule must be applied. While, as my adversary notes, the more recent decisions of this Court have indicated that the exclusionary rule is not constitutionally mandated in every circumstance where Fourth Amendment violation occurs, those cases have not in any way affected the core deterrent function of the rule, which is to prevent the government from profiting from the fruits of its own illegal conduct, to impose a criminal sanction upon the victim of the search.

This case arises from a criminal prosecution in which the state was attempting to use the evidence to prove guilt the result of which would be the imposition of the criminal sanction upon the victim of the search.

QUESTION: When you use the term "criminal, unlawful conduct" you are speaking of the teacher's conduct in opening the purse, are you?

MS. DE JULIO: Yes, Your Honor. I would suggest that is the government's action in opening the purse, and that in that capacity the teacher acted as the government.

QUESTION: But you said that that is perfectly valid for the teacher to do that in terms of dealing with school discipline.

MS. DE JULIO: It would be perfectly valid if the schoolteacher had some reasonable grounds to believe that the student was violating a school regulation or—

QUESTION: Well, I thought you had conceded that before.

MS. DE JULIO: No, Your Honor, we did not concede that in the facts of this case. The student had violated a school rule. There is no question about that. She was observed by a teacher smoking in a restricted area, an area where it was not permissible to be smoking, but that fact would be, I think, analogous to a situation where a teacher may have found two students fighting in a hallway. Certainly that is a breach of school rules as well as a criminal violation.

QUESTION: So you don't say at all or concede at all that a school official may search a purse just as a routine matter without reasonable grounds and use that as a matter of school discipline?

MS. DE JULIO: Whether the evidence that was found—

QUESTION: Without ever—and with no intention of every presenting it in a criminal prosecution.

MS. DE JULIO: I don't believe that the intention of the searcher should govern the outcome. The Fourth Amendment protects against intrusions into personal privacy. The intrusion is equally invasive regardless of the intent of the individual searching, whether it be for some innocuous substance such as bubble gum in a school context or whether it be for a dangerous object, such as a weapon. We permit the intrusion—

QUESTION: Well, I would think then on the facts of this case if you are right that there was no reasonable grounds to search the purse that you would object to the use of the fruits of that search to impose any kind of discipline on this person.

MS. DE JULIO: Your Honor, that argument could be made, and in fact—

QUESTION: Well, how about—what is your position on that?

MS. DE JULIO: This case came out of a criminal proceeding.

QUESTION: I know it did. I know it did.

MS. DE JULIO: The decision would be with regard to a school disciplinary proceeding. The law is unclear. There is no law—

QUESTION: Well, why wouldn't the answer be the same? If the school officer has violated the constitutional rights of the student, why would the evidence be usable against him?

MS. DE JULIO: The more recent decisions of this Court have distinguished between the types of proceedings in which the exclusionary rule would be applied. I could certainly make very substantial argument that a school disciplinary proceeding might well be the type of proceeding to which we would want to apply the exclusionary rule.

However, I think that we recognize that while people may suffer substantial detriments in civil cases in other settings, we have certain very strict rules that we apply to criminal prosecutions because we recognize that the consequences there are even more serious than might be the case in a comparable civil law setting.

Certainly if this matter had come up on the appeal from the ruling of the chancery court in this matter that the evidence could not have been utilized to impose a disciplinary sanction, it would be a very different case, and I think the arguments that would be made on both sides would be very different. That was not the case here, and I did not nor can I at this point definitely make the arguments that should be made on both sides of that question.

I do feel that perhaps the briefs filed by the *amicus curiae* in this case, the school boards, associations, really address arguments that ought to be made at some point in an appropriate appeal where the issue was whether the illegally seized evidence could be utilized in a school disciplinary proceeding, but I would state without exception that when we are dealing with a criminal law proceeding, the exclusionary rule must be applied when a state seeks to introduce fruits of an illegal search into its direct case in chief.

QUESTION: Ms. De Julio, may I ask you a somewhat different type question? I am sure you know that many states conduct rather intensive educational programs for police officers to make sure that they know their duty and the basic legal principles applicable to the performance of those duties. Has New Jersey instituted any such programs for the education of its teachers?

MS. DE JULIO: Your Honor, I was called by the New Jersey Department of Education subsequent to the decision in the state court and they indicated to me that they were interested in making that kind of training available, but then the petition for *certiorari* was filed, and I believe the matter has been held in abeyance pending the outcome of the matter in this Court.

QUESTION: How many public schoolteachers are there in New Jersey?

MS. DE JULIO: I would not have any estimate. I couldn't begin to tell you.

QUESTION: Do you have any idea how much instruction New Jersey gives its police officers?

MS. DE JULIO: Your Honor, I don't know. I would suggest, however, that the test which was involved in this case is a very simple one. Reasonable ground is a very flexible, very easy concept to understand, and I think that in dealing with teachers and school authorities, we are by definition dealing with a very educated, highly motivated group of people.

QUESTION: But we have exclusionary rule cases at every term of this Court, and I am told by law enforcement officers that every time we hand down a new decision, that requires a new briefing of the police.

MS. DE JULIO: Well, certainly, Your Honor—

QUESTION: Is it your idea that this should be done in the public school system?

MS. DE JULIO: I think that public schoolteachers are already on a continuing basis being made aware of a variety of legal concepts that do impact upon education. We live in a modern society, with many, many laws, and certainly schools are the subject of much litigation and many statutes and many regulations.

QUESTION: And this also would have to be done in the hospitals?

MS. DE JULIO: Well, Your Honor, as I indicated, I think that might be the case if it were found that the action of a state hospital or a state institution rose to the level of government action for Fourth Amendment purposes. Also, I think that it is fair to say that when you are dealing with a complicated educational system, the continuing education of teachers in all aspects is something that is rather routine. This could be very easily

incorporated into that kind of ongoing training that teachers are getting in their academic fields and other related areas.

Perhaps ironically, many teachers themselves are responsible for teaching their students constitutional principles. As a history teacher, I was required to teach constitutional law to my students. So I think we are dealing with a core of people and a core of expertise that is more than adequate to deal with whatever demands the legal standard may require.

QUESTION: Ms. De Julio, when the principal saw the pocketbook and knew the facts around it, what then could he do legally in your mind? How much?

MS. DE JULIO: I believe that when he—he should not have opened the pocketbook. I believe that the search of the pocketbook was independent of—

QUESTION: What could he have done?

MS. DE JULIO: I think he could have imposed a sanction upon the student based upon the testimony of the teacher who observed her smoking a cigarette in a nonpermitted area.

QUESTION: And that is it?

MS. DE JULIO: And that would have been the extent of it. I think we are not dealing with a possessory offense, and the search of her purse would have been a fishing expedition.

QUESTION: Ms. De Julio, you have private secondary schools in New Jersey, don't you?

MS. DE JULIO: Yes, Your Honor.

QUESTION: Suppose the same facts here took place in a private school, and instead of being a public school principal it was a headmaster or headmistress. Different case?

MS. DE JULIO: That may very well present a different case, because the Fourth Amendment has been held not to apply to private citizens such as cases involving employers searching employees' desk drawers, and it may be that a private schoolteacher, since private schools are different and are perhaps not subject to the same regulations and standards, and are not an arm of the government.

QUESTION: So if a youngster wants to get into drugs, he had better stay in the public school side?

[General laughter.]

MS. DE JULIO: Well, Your Honor, I think that that is very much oversimplifying, and I think it is ignoring the fact that the rule imposed by the New Jersey Supreme Court would not prevent a teacher from conducting a search if he had reasonable grounds to believe that a student had drugs in a purse or a pocket, and I think that the cases are—the reported cases are legion where searches were conducted under a reasonable grounds or reasonable suspicion test in various states, and the teachers were upheld because they did have some reason to believe that the student either possessed drugs or some other substance which was dangerous to him.

The test that the New Jersey Supreme Court developed was one which took into consideration the special problems of educators while at the same time recognizing that we do have to protect the rights of students and their rights to personal privacy. The state counts many costs of applying the exclusionary rule to this type of circumstance, but it does not consider the costs that society will suffer if we fail to deter unreasonable searches of students.

For every search of a student that uncovers evidence of wrongdoing, countless other students, innocent students, will have had their privacy violated, and some of those intrusions may not be minimal, but as some of the reported cases show, may extend to such extremes as strip searches. The emotional trauma which this type of indignity will inflict upon impressionable adolescents is a cost which society would have to pay and which should not be ignored in any cost-benefit analysis.

QUESTION: What about the costs to the children of other parents to whom this young lady is selling drugs?

MS. DE JULIO: Your Honor, the—

QUESTION: That is a social cost of some importance, isn't it?

MS. DE JULIO: It certainly is, and certainly the question of dealing with drugs and other criminal conduct in the schools

has been the subject of many studies which have suggested many remedial measures that could be implemented to attack the problem. I think that the use of searches is at best a Band-Aid approach to a problem which I don't think any educator would view as a remedial measure of first choice. Certainly the drug problem has to be dealt with and should be dealt with.

The question is whether we have to throw out students' Fourth Amendment rights in order to do it. The drug problem in society at large is certainly a serious one, but we have not permitted the police to throw away the Fourth Amendment. We have not completely neutralized the Fourth Amendment protections through the exclusionary rule in order to attack the problem of drugs or weapons in our society.

The standard which was imposed below was a compromise that recognized that when you are dealing with children you perhaps have more responsibility than when you are dealing with adults, and that may justify the lesser standard that was imposed.

Also, the court specifically stated that there were many factors which could be taken into consideration, such as the age of the child, the child's prior involvement in criminal activity or disruptive behavior, the nature of the school's own problems, all of which would be considered by a court in determining whether a reasonable grounds existed for the search to be conducted.

It is also important to recognize particularly in the school context that the exclusionary rule does deter conduct on the part of teachers, that while teachers are not, like the police, directly involved in the criminal justice process, they do have some interest, substantial interest, in seeing criminal prosecutions against their students brought to a successful conclusion, because they are responsible for maintaining order in the school.

And the fact of a juvenile or criminal conviction would certainly assist the school in dealing with a dangerous or disruptive student. It might remove the student entirely from the school by means of a custodial disposition, or through some lesser sanction might persuade the student to conform his conduct to school norms.

So, I think that teachers would be deterred, and do have some incentive to follow Fourth Amendment guidelines that would ensure that no evidence would be suppressed in a later court proceeding.

I think it is also important to recognize in the school context that the exclusionary rule serves an educative as well as a deterrent function. Suppression of evidence is a demonstration to society as a whole and to those who govern us that we value highly our constitutional rights and we attach serious consequences to those who violate them. If we expect schools to teach students to respect—

QUESTION: You said serious consequences on those who violate them. The teacher, in your view, violated the rights. Now, what is the serious consequence on the teacher?

MS. DE JULIO: Your Honor, the serious consequence will be the fact that the subsequent court proceeding stemming from the illegal evidence that was discovered will be dismissed.

QUESTION: Well, in the abstract, the teacher perhaps couldn't care less.

MS. DE JULIO: Your Honor, I think in many ways the teacher has more reason, because it is not in the abstract. The teacher—the student will be back in the classroom.

QUESTION: But the teacher, unlike the policeman, is not involved in a criminal justice project or law enforcement.

MS. DE JULIO: But the teacher does have the responsibility of maintaining order and discipline in the school, and if a destructive student or a dangerous student is not dealt with in the criminal justice process, then the school may have to deal with him under much more difficult circumstances.

I think that it is important that we show students that the constitutional system of government is more than a collection of empty promises, and that by applying the exclusionary rule in these circumstances, we protect the students' Fourth Amendment rights and give an effective deterrent for their violation.

QUESTION: Do you think that the teacher having suffered this penalty that you describe is thereafter not going to be concerned about whether students are using marijuana or other drugs?

MS. DE JULIO: I think that the teacher—

QUESTION: What is going to be the impact on the teacher?

MS. DE JULIO: I think that the impact will be that the teacher or school authority will learn to conform their behavior to the reasonable grounds standard which was adopted and which was the basis for determining whether conduct is proper or improper under the unreasonable search and seizure guarantees.

QUESTION: Then as Justice Powell, I think, suggested, teachers had better take a course on the Fourth Amendment.

MS. DE JULIO: I think that teachers will have to learn something about the Fourth Amendment. I think that they already have to learn a great deal about law and how law impacts upon them and their role as educators. I think this will be a relatively easy lesson to teach, and certainly we are dealing with professionals in the area of teaching and learning.

In conclusion, I would merely remind the Court that we opposed the granting of *certiorari* and continue to oppose it on the grounds that the decision below was based upon independent and adequate state grounds. The New Jersey Supreme Court, we would argue, based its decision upon independent grounds which would not be affected by any modification of the federal law which was cited in the—

QUESTION: May I ask in that connection whether, apart from the federal cases, does New Jersey have its own exclusionary rule?

MS. DE JULIO: Your Honor, we have a provision in our state constitution which, though worded very similarly to the federal provision, has been construed by the New Jersey Supreme Court on many occasions to provide broader protections.

QUESTION: That is not my question. My question is whether New Jersey has an exclusionary rule. I know you have argued

they have a broader protection of Fourth Amendment. Do they have an independent exclusionary rule?

MS. DE JULIO: I do not believe that they do, but I do believe that in this case they determined that the exclusionary rule should be applied based on their state law proceedings and on provisions of the state constitution.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Nodes?

REBUTTAL ARGUMENT BY ALLAN J. NODES ON BEHALF OF THE PETITIONER

MR. NODES: Yes, Mr. Chief Justice. Very briefly, in regards to the question that was asked by Justice Powell concerning police training, I believe that the general rule in New Jersey is that an attempt is made to train police officers at least twice a year, and they are given updated training each time a major new constitutional decision comes down which impacts on the Fourth or Fifth Amendment.

QUESTION: How long has that been going on, if you know, this kind of police training?

MR. NODES: I am aware of it for about the last five or six years. I am just not aware of it earlier than that, Your Honor.

QUESTION: Is that for municipal as well as state police?

MR. NODES: Yes, there is a program. I do not—cannot speak to the frequency for each municipality, but the municipal police are included in that program.

After this decision in *State in the Interest of TLO* came down from the New Jersey Supreme Court, there were inquiries from school boards concerning what they were allowed to do, and these inquiries have continued. I don't believe that many of these inquiries have related to what can we do in order to ensure that you, the attorney general's office, can get prosecutions. They simply want to know what they are legally entitled to do. Questions have always been asked in those terms. Legally, what can we do to keep the schools safe? I believe the interest is much

more: what can we do to actually follow the law and to ensure that we won't be subject to civil liability later on?

QUESTION: Do you think if there were no exclusionary rule they would lose interest in knowing what the law was?

MR. NODES: I don't believe so, no.

QUESTION: So they wouldn't have this problem of trying to find out what the Fourth Amendment means anyway, I guess.

MR. NODES: Well, I think it would come up in other contexts. I think it would come up in the context such as the *Wood* v. *Strickland* context. It would later have to be determined in a case like that.

QUESTION: So the outcome of this case really won't affect the teachers' need for or desire for education about the Fourth Amendment.

MR. NODES: That's correct. We don't believe the exclusionary rule will do that.

QUESTION: If you wanted—if you only raised the single question about the exclusionary rule, and if you wanted to argue about the Fourth Amendment, you should have come up here with another question. You seem to—you come here on the assumption that there has been a violation of the Fourth Amendment.

MR. NODES: We didn't contest the constitutional violation. That is correct. We didn't contest it because we believe that the Court never needed to reach that, because the exclusionary rule did not automatically have to be applied in any event.

QUESTION: Well, part of your argument is that the teachers would like to know what the Fourth Amendment means, because you would expect that they would obey it then.

MR. NODES: Yes, Your Honor.

QUESTION: And there wouldn't be the same temptation to disobey it that there is in law enforcement?

MR. NODES: I don't know if I understand the question, Your Honor.