No. 83-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

State of New Jersey,

Petitioner,

v.

T.L.O., a Juvenile,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

SUPPLEMENTAL BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?

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SUPPLEMENTAL BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

The Fourth Amendment protects against unreasonable searches conducted by any governmental agent. Because public school personnel are employed by the State, act with State authority, and are responsible for enforcing State laws and regulations, their conduct constitutes governmental, rather than private, action. Thus, the New Jersey Supreme Court properly ruled that the search of T.L.O. by the assistant principal came within the ambit of the Fourth Amendment.

The Fourth Amendment proscribes all unreasonable governmental searches; however, the procedures and circumstances which would render a search unreasonable are not identical in all situations. To determine whether a given category of official search is constitutionally reasonable, this Court has, historically, utilized a balancing test weighing the governmental interest which motivates the search against the constitutionally protected interests of the citizen. Once a determination is made that the governmental interest justifies the intrusion into the individual's protected area of privacy, then the nature and extent of the search must be appropriately defined in light of the purpose it serves. In defining Fourth Amendment standards in particular contexts, this Court has consistently limited the scope of the intrusion in those circumstances where it has found a lesser standard than probable cause to be constitutionally permissible.

In applying this balancing test to the school setting, the New Jersey Supreme Court considered such governmental concerns as the duty of educators to maintain order, discipline, and safety in the schools, the fact that school officials are not primarily concerned with law enforcement, and the necessity for immediate action when threats to the school environment arise. In view of these educational duties, the New Jersey Supreme Court correctly ruled that a student's Fourth Amendment rights do not preclude school officials from conducting searches when necessary to carry out their educational responsibilities, and that neither a warrant nor the strict probable cause standard was required in the school setting. On the

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other hand, the court properly concluded students' right to privacy required that no search be conducted unless the teacher has reasonable grounds to believe that the student possesses evidence of illegal activity or activity that would interfere with school discipline and order. Furthermore, as the nature of the intrusion intensifies, the definition of "reasonable grounds" approaches that of probable cause.

Petitioner's contention to the contrary notwithstanding, students retain a substantial expectation of privacy in their persons while in school. To be deemed legitimate an expectation of privacy cannot merely be subjective, but must also be one that society is prepared to recognize as reasonable. However, the mere fact that a place is defined to be "public" for Fourth Amendment purposes does not mean that an individual renounces all reasonable expectation of privacy upon entry.

Applying the analysis of *Hudson* v. *Palmer*, ___ U.S. ___, 52 U.S.L.W. 552 (July 3, 1984) to the school setting, it is clear that the goals and purposes of the public school system are not in conflict with a scrupulous observance of students' rights to personal privacy; indeed conscientious protection of students' constitutional rights affirmatively assists schools in their goals of fostering social responsibility, and preventing deliquency. The majority of lower courts have concluded that the responsibilities and operational concerns of the public school system are not incompatible with respect for the personal integrity of the students, and can be adequately accommodated by eliminating the warrant requirement and allowing school personnel to conduct searches on the basis of the lesser, reasonable grounds standard. No further reduction in the students' right to personal privacy has been deemed necessary.

Similarly, empirical evidence supports the conclusion that schools can be safely operated and an effective educational environment can be maintained without stripping students of all but the minimal right to privacy which petitioner suggests. Moreover, this evidence suggests that arbitrarily exposing students to the traumatic experience of a personal search will affect their emotional well-being. Failure to set standards to

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prevent unnecessary searches is contrary to the duty of educators to safeguard the emotional health of the children in their care.

Since observance of individual rights is not incompatible with the goals of the educational system, and will not interfere with the safe and effective operation of the schools, it is clear that a student's substantial expectation of privacy is reasonable. Construing the reasonable grounds standard in light of the students' legitimate expectation of privacy, and applying it to the facts of the instant case compels the conclusion that the search of T.L.O.'s purse was unconstitutional. The assistant principal had no reasonable grounds to believe that the student's purse contained evidence of criminal activity or activity that would disrupt school order. Possession of tobacco cigarettes was not in violation of school rules, and would not have constituted evidence that T.L.O. had been smoking in the girls' restroom. Moreover, the infraction itself did not pose a threat to school safety and order sufficient to warrant the extreme measure of a personal search.

Assuming, *arguendo*, that the assistant principal had some reasonable grounds to open the student's pocketbook, the resulting search exceeded the constitutionally permissible scope. The package of tobacco cigarettes was at the top of the purse. The vice-principal's immediate observation fulfilled whatever evidential purpose it might be supposed that the package would serve. He had no valid reason to seize the packet, and had he not done so, he would not have seen the cigarette rolling papers.

Even assuming that the principal's actions to this point were legal, his seizure of the student's personal papers cannot be justified under the plain view exception. The relationship of the papers to the drug offense was not immediately apparent and could not be readily determined from mere inspection.

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LEGAL ARGUMENT

POINT I

IN THE FACTS[1] AND CIRCUMSTANCES OF THIS CASE, THE ASSISTANT PRINCIPAL VIOLATED THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY SEARCHING RESPONDENT'S PURSE.

This case arises from a criminal prosecution in which the State of New Jersey attempted to utilize on its case-in-chief evidence seized from the juvenile-respondent, T.L.O., by the Assistant Principal of her high school. When the Supreme Court of New Jersey ruled that the evidence seized from the juvenile could not be used against her, petitioner chose to apply for *certiorari* on the basis of only one aspect of that decision, *i.e.*, whether the exclusionary rule should be applied to the fruits of an illegal search conducted by a public school official.

At oral argument, petitioner affirmed that "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. . ." (Tr. of Oral Arg. 8-7 to 9) Petitioner noted that "we agree with the standard that was set forth by the New Jersey Supreme Court," describing it as "a good standard and a workable standard." (Tr. of Oral Arg. 11-3 to 4) Indeed, in its most recent brief, petitioner apparently continues to endorse the "reasonable grounds" standard enunciated by the New Jersey Supreme Court, taking issue only with the lower court's application of this standard to the facts of the case. Supplemental Brief of Petitioner at 7-8. It is therefore somewhat puzzling that petitioner at this belated stage of the proceedings now asserts that the Fourth Amendment does not apply at all to a search conducted by a school official. *See* Supplemental Brief of Petitioner at 9.

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[1] A full summary of the facts adduced at trial is contained in the Statement of the Case set forth in respondent's initial brief, previously filed with this Court.

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Respondent nevertheless submits that the actions of Assistant Principal Choplik constituted governmental action within the ambit of the Fourth Amendment, and that the search of T.L.O.'s purse violated the constitutional proscription against unreasonable searches.

A. Searches Conducted By School Personnel Constitute Governmental Rather Than Private Action And Are Therefore Subject To The Fourth Amendment.

The Supreme Court of New Jersey held that searches of students by school employees constitute governmental action subject to the regulation of the Fourth Amendment. *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934, 939 (1983). This ruling is in accordance with the decisions of the great majority of lower federal and state courts which have considered this question.

The argument and authority in support of this conclusion have been set forth at length in respondent's initial brief. In the interest of brevity, those materials will not be reprinted here; instead, respondent would respectfully refer the Court to Point II A of her original brief at 16-23.[2]

B. A School Official Cannot Search A Student Unless He Has Reasonable Grounds To Believe That The Student Possesses Evidence Of Illegal Activity Or Activity That Would Interfere With School Order.

Having held that the Fourth Amendment does apply to the conduct of the public school personnel, the New Jersey Su-

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[2] Respondent would, in addition, call the Court's attention to *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). In *Ambach*, this Court, in context of a challenge to a state law which required teachers to be American citizens, determined that "teaching in the public schools constitutes a governmental function" [*Id.*], such that a state could properly impose a requirement of citizenship. Respondent submits that this decision supports her position that public school personnel are governmental agents, and must be considered as such for Fourth Amendment purposes as well.

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preme Court nevertheless declined to impose upon school officials the warrant/probable cause requirements traditionally applied to the police. Instead it ruled that "when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence. "*State in the Interest of T.L.O.*, *supra*, 463 A.2d at 941-42. Further, to determine whether the school official had reasonable grounds, a reviewing court should take into consideration the following factors: The probative value and reliability of the information used as justification for the search; the exigency to make the search without delay; the child's age, history and school record; the prevalence and seriousness of the problem in the school to which the search was directed. *Id.* at 942.

In so ruling, the New Jersey Supreme Court specifically excluded from the ambit of its decision school searches conducted by or at the instigation of the police for the purpose of gathering evidence for a criminal prosecution. *Id.* at 941. The decision creates "a narrow band of administrative searches *to achieve educational purposes.*" (emphasis supplied). *Id.* at 940. The state court also warned that as the intrusiveness of the search increases, the reasonableness standard approaches probable cause. *Id.* at 942. Respondent submits that under these circumstances, the standard delineated by the New Jersey Supreme Court is constitutionally required and urges that it be upheld.[3]

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[3] Respondent asserted below that the standard of probable cause was constitutionally required in the circumstances of this case. The reasons supporting the position taken by respondent in the state court have been set forth in the original brief filed on her behalf at 31, n. 18. They still have validity.

However, respondent reconizes that only one court has applied the probable cause/warrant standard to a student search conducted by school personnel in the performance of their educational responsiblity to maintain an orderly and safe school environment. See *State* v.

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It is axiomatic that the Fourth Amendment proscribes all unreasonable governmental searches. *Katz* v. *United States*, 389 U.S. 347, 357 (1967). The procedures and circumstances which would render a search reasonable for Fourth Amendment purposes are not, however, identical in all situations; the "specific content and incidents of this right must be shaped by the context in which it is asserted." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968). For example, to pass constitutional muster, a search by a police officer for contraband or evidence of crime must be shown to have been undertaken on the basis of probable cause, and to have been conducted pursuant to a warrant unless exigent circumstances rendered the obtaining of a warrant impossible. *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5

Mora, 307 So.2d 317 (La. 1975), vac. 423 U.S. 309 (1975), remand 330 So.2d 900 (La. 1976). *Compare e.g. Picha* v. *Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976); *Piazzola* v. *Watkins*, 316 F. Supp. 624 (M.D. Ala. 1970), aff'd 442 F.2d 284 (5th Cir. 1971); *Waters* v. *United States*, 311 A.2d 385 (D.C. App. 1973); *M.J.* v. *State*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981); *People* v. *Bowers*, 72 Misc. 2d 800, 339 N.Y.S.2d 783 (N.Y. Crim. Ct. 1973); (all imposing the traditional probable cause test when the search was conducted or instigated by the police). *See also Horton* v. *Goose Creek Ind. School Dist.*, 690 F.2d 470, 481 (5th Cir. 1982) *cert.* den. ___ U.S. ___, 103 S.Ct. 3536 (1983), and *Doe* v. *Renfrew*, 475 F. Supp. 1012, 1021 (N.D. Ind. 1979), mod. 631 F.2d 91 (7th Cir. 1980), reh. den. 635 F.2d 582 (7th Cir. 1980), *cert.* den. 451 U.S. 1022 (1980), (distinguishing between searches conducted by school authorities in furtherance of the duty to maintain a safe environment conducive to education, and searches by school personnel in which there is some component of law enforcement activity in the searcher's actions.)

Furthermore, the reasonable grounds test as formulated by the New Jersey Supreme Court — excluding searches with police involvement and recognizing that the more intrusive the nature of the search the more nearly the reasonable grounds asserted will have to approach probable cause — addresses many of the concerns which prompted respondent to suggest adoption of the probable cause standard below. Thus respondent now urges this Court to affirm the decision of the New Jersey Supreme Court in this matter.

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(1976). However, certain classes of administrative search, *i.e.*, where the primary purpose of the search is something other than the apprehension of criminals or the investigation of crimes, have been authorized on the basis of standards less than probable cause, although the requirement of a warrant has been retained. *See Michigan* v. *Tyler*, 436 U.S. 499, 507, n.5 (1978). A "frisk" for weapons, on the other hand, can be constitutionally conducted without the necessity of demonstrating probable cause or of obtaining a warrant, if the police officer can show that he had a reasonable suspicion that a suspect was armed and dangerous. *Terry* v. *Ohio*, *supra* at 27.

To determine whether and under what circumstances a given category of official search is constitutionally reasonable, this Court has, historically, utilized a balancing test, weighing the governmental interest which motivates the search against the constitutionally protected interests of the citizen. *See e.g.*, *Camara* v. *Municipal Court*, 387 U.S. 523, 534 (1967); *Terry* v. *Ohio*, *supra* at 21-22. Once a determination is made that the governmental interest justifies the intrusion into the individual's constitutionally protected area of privacy, then the nature and extent of the intrusion must be appropriately limited in light of the purpose it serves. *Id.* at 19-20.

This balancing test was the identical approach taken by the Supreme Court of New Jersey in the opinion below. *State in the Interest of T.L.O.*, *supra* at 941-42. After considering such governmental concerns as the duty of educators to maintain order, safety and discipline in the schools, the necessity of creating a proper educational atmosphere, the fact that educators are not primarily concerned with law enforcement, and the necessity for immediate action when threats to the educational environment arise, the New Jersey Supreme Court ruled that a student's Fourth Amendment rights do not, in the school context, preclude school officials from conducting searches when necessary to carry out these responsibilities. Moreover, in light of these educational concerns, neither a warrant nor the strict probable cause standard was constitutionally required in the school setting. However, the students' right to

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privacy required that no search be conducted unless the teacher has reasonable grounds to believe that the student possesses evidence of illegal activity or activity that would interfere with school discipline and order. *Id.* at 941-42.

The majority of lower federal and state courts, which have considered the school search issue have taken the same approach and have come to the same conclusion, dispensing with the warrant requirement and permitting searches upon a lesser standard the same as, or akin to that formulated by the New Jersey Supreme Court.[4] In concluding that this standard

[4] *See e.g.*, *Bilbrey* v. *Brown*, No. 81-3008 (9th Cir. Aug. 2, 1984); *Horton* v. *Goose Creek Ind. School Dist.*, 690 F.2d 470, 481 (5th Cir. 1982), *cert.* den. ___ U.S. ___, 103 S.Ct. 3536 (1983) (the school official must have "reasonable cause for his action"); *M.M.* v. *Anker*, 477 F. Supp. 837 (E.D. N.Y. 1979), aff'd 607 F.2d 588 (2nd Cir. 1979) ("reasonable suspicion"); *Jones* v. *Latexo Ind. School Dist.*, 499 F. Supp. 223-236 (E.D. Tex. 1980) ("reasonable cause to believe contraband would be found"); *Bellnier* v. *Lund*, 438 F. Supp. 47, 53 (N.D.N.Y. 1975) ("some articulable facts which together provided reasonable grounds to search the student"); *Doe* v. *Renfrew*, 475 F.Supp. 1012, 1021 (N.D. Ind. 1979), mod. 631 F.2d 91 (7th Cir. 1980), reh. den. 635 F.2d 582 (7th Cir. 1980), *cert.* den. 451 U.S. 1022 (1980) ("reasonable cause to believe"); *M.* v. *Bd. of Education Ball-Chatham, etc. Dist. No. 5*, 529 F. Supp. 288 (S.D. Ill. 1977) ("reasonable cause to believe); *In re W.*, 29 Cal. App. 3d 777, 782, 105 Cal. Rptr. 775 (D.Ct. App. 1973) (the search "must be reasonable under the facts and circumstances of the case"); *State* v. *Baccino*, 282 A.2d 869, 872 (Det. Super. Ct. 1971) ("reasonable suspicion"); *State* v. *D.T.W.*, 425 So.2d 1383, 1386 (Fla. D. Ct. App. 1983) ("reasonable subjective suspicion supported by objective, articulable facts [which] would lead a reasonably prudent person to suspect" the presence of contraband); *People* v. *Ward*, 62 Mich. App. 46, 233 N.W.2d 180, 183 (Mich. Ct. App. 1975) ("reasonable suspicion"); *Doe* v. *State*, 88 N.M. 347, 540 P.2d 827, 832 (Sup. Ct. 1975) ("reasonable suspicion that a crime is being committed . . . or . . .reasonable cause to believe that the search is necessary in the aid of maintaining school discipline"); *State in the Interest of G.C.*, 121 N.J. Super. 108, 296 A.2d 102

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was adequate to protect both the legitimate interests of the state and the privacy rights of the students, these courts considered many of the same factors that were noted by the court in *State in the Interest of T.L.O.*, *supra*, as well as others which arise in the school search context. *See e.g.*, *State* v. *McKinnon*, *supra* at 784, and *Doe* v. *State*, *supra* (duty of educators to investigate unlawful acts on school premises), *In the Interest of J.A.*, 85 Ill. App.3d 567, 406 N.W. 2d 958, 962 (App. Ct. 1980) (the health and welfare of the students in the school's charge); *Jones* v. *Latexo Ind. School Dist.*, *supra* at 236 ("the unique role of education in our society"); *State* v. *Baccino*, *supra* at 871, *Interest of L.L.*, *supra* at 349, *People* v. *Scott D.*, *supra* at 406-08, and *People* v. *Jackson*, *supra*, 319 N.Y.S. 2d at 734-35 (the modified *in loco parentis* relationship between teacher and student); *Doe* v. *State*, *supra*, 540 P.2d at 830 (the "epidemic" of crime in the schools); *People* v. *Scott D.*, *supra* (the "lethal" threat of drug abuse on the increase in schools; the immaturity of students).

(J.D.R.C. 1972) ("reasonable suspicion"); *People* v. *Jackson*, 65 Misc.2d 909; 319 N.Y.S.2d 731 (App. Term 1971), aff'd 30 N.Y.2d 734, 333 N.Y.S.2d 167 (Ct. App. 1972) ("reasonable grounds for suspecting something unlawful was being committed, or about to be committed"); *People* v. *Scott D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 408 (Ct. App. 1979) ("sufficient cause to search"); *State* v. *McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (1977) ("reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order"); *Interest of L.L.*, 90 Wis. App.2d 585, 280 N.W.2d 343, 351 (Ct. of App. 1979) ("a reasonable suspicion that a student has a dangerous or illegal item or substance in his possession"). *See also* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L.Rev. 739 (1974); Comment, *Students and the Fourth Amendment: Myth or Reality?*, 46 U.M.K.C. L. Rev. 282 (1977); Comment, *Students and the Fourth Amendment?* 46 U.M.K.C. L.Rev. 282 (1977); Comment, *Students and the Fourth Amendment: "The Torturable Class,"* 16 U.C.D. L.Rev. 709 (1983) (hereinafter, "*The Torturable Class*").

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Thus the considerations unique to searches in the school context have been recognized and accomodated by the elimination of the warrant requirement and the use of a standard less than probable cause. On the other hand, it was determined that the students' Fourth Amendment rights to privacy need not be compromised any further in order to implement the government's interest in providing appropriate educational environment.

Similarly, in deciding that as the nature of the intrusion intensifies, the definition of "reasonable grounds" approaches that of probable cause, the New Jersey Supreme Court followed the same approach used by this Court in defining Fourth Amendment standards in particular contexts. In those circumstances where a lesser standard has been found to be constitutionally permissible, the scope of the resulting intrusion has been limited. Thus, a police officer who has a reasonable suspicion that a suspect is armed and dangerous may only conduct a "pat-down" strictly limited to locating weapons; a full search of the suspect would still require probable cause, and a warrant or exigent circumstances. *Terry* v. *Ohio*, *supra* at 26.

In the area of border searches, a full search of an automobile to determine if it is carying illegal aliens requires probable cause and a warrant, [*Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973)]; however the Border Patrol may, on the basis of reasonable suspicion, stop a vehicle and question its occupants to determine if illegal aliens are present. *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). Mere questioning of persons seeking to enter the country at a permanent border checkpoint has been approved even in the absence of particularized suspicion that the vehicle contains illegal aliens. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976).

Similarly, with regard to fire-fighters, searches conducted pursuant to the lesser standard are limited in intensity and scope. *See Michigan* v. *Clifford*, ___ U.S. ___, 104 S.Ct. 641 (1984). If the fire-fighters want to conduct a full search for evidence of arson, they must obtain a warrant based upon probable cause. *Id.*, 104 S.Ct. at 647. However, if the search is

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intended merely to ascertain the cause of a blaze, the firefighters need only show that a fire of unknown origin has occurred to obtain an administrative warrant; however, they must also show that "the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy." *Id.*

Thus, in ruling that as the intensity of the intrusion increases, the definition of "reasonableness" in the schoolhouse setting approaches that of probable cause, the New Jersey Supreme Court followed long accepted principles of Fourth Amendment law.

C. A Student's Legitimate Expectation Of Privacy In The School Context Is Substantial.

Petitioner at the outset appears to endorse the standard adopted below as a "workable" one, taking issue only with the state court's assessment of the facts surrounding the search of T.L.O. *See* Supplemental Brief of Petitioner at 7-8. Later, however, petitioner asserts that because of the nature of the school environment, a student has at most a "minimal" expectation of privacy in school, [Supplemental Brief of Petitioner at 21]; thus virtually any search of a student would be *per se* reasonable. This construction would completely undermine the constitutionally mandated protections incorporated into the reasonable ground test. It would leave students with only slightly more protection of their Fourth Amendment rights than is now accorded to prison inmates whom this Court recently ruled had no expectation of privacy in their cells.[5] See *Hudson* v. *Palmer*, ____ U.S. ____, 52 U.S.L.W. 5052 (July 3,

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[5] The salient factual differences between a public school and a prison are, or ought to be, too obvious to petitioner to need distinguishing here. *See Ingraham* v. *Wright*, 430 U.S. 651, 670-71 (1977). Moreover, respondent agrees with the Solicitor General's conclusion that any analogy drawn between the teacher/student relationship and the parole officer/parolee relationship is, at best, "imperfect." *See Amicus Curiae* Brief of Solicitor General at 24.

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1984). Such an interpretation finds no support in either fact or law.

Application of the Fourth Amendment depends upon whether the person invoking its protection can claim that a reasonable or legitimate expectation of privacy has been invaded by government action. *Smith* v. *Maryland*, 422 U.S. 735, 741 (1979); *Katz* v. *United States*, *supra* at 353. To be deemed "legitimate," the expectation must not merely be subjective, but must also be one that society is prepared to recognize as reasonable. *Id.*

Last term, this Court, albeit in a very different context, detailed the analysis to be followed in determining whether an individual's expectation of privacy is reasonable. *Hudson* v. *Palmer*, *supra*, presented the issue of whether a prison inmate has any legitimate expectation of privacy in his cell. This Court noted that resolution of the question "necessarily entails a balancing of interests." *Id.* at 5054. The interests identified as pertinent were that of society in the security of its penal institutions and that of the prisoner in privacy within his cell. *Id.*

Weighed heavily in this balance was the recognition that a right to privacy is incompatible with the purposes and operations of penal institutions. *Id.* at 5055. It was noted that imprisonment has historically carried with it the circumscription or loss of many significant rights, and that, indeed, these restrictions serve the purposes of deterrence and retribution in our system of justice. *Id.* at 5054. It was also emphasized that the task of involuntarily confining persons who have already demonstrated a proclivity for anti-social or violent conduct, and of protecting the safety of the inmates, the correctional staff, visitors, and the community at large cannot be carried out if the prisoner is accorded any expectation of privacy in his cell. *Id.* at 5054-55.

Applying this analytical framework to the public school context, it is clear that students legitimately retain a substantial expectation of privacy in their persons and their effects. The

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Fourth Amendment "reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference." *Oliver* v. *United States*, ___ U.S. ___, 52 U.S.L.W. 4425 (April 17, 1984). However, a person who enters a place defined to be "public" for Fourth Amendment analysis "does not lose all claims to privacy or personal security." *Id.* at 4428, n.10, citing to *Arkansas* v. *Sanders*, 442 U.S. 753, 766-67 (1979) (Burger, C.J., concurring). *See also Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 311 (1978). Consequently, the mere fact that schools are by their very nature public places does not support the proposition that a student's expectation of privacy in the school context is minimal.

Certainly, a substantial expectation of privacy is not incompatible with the educational goals and purposes of the public school system. As this Court has itself stated,

> That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia Board of Education v. *Barnette*, 319 U.S. 624, 637 (1943).

See also Ambach v. *Norwick*, *supra* at 76-77; *Horton* v. *Goose Creek Ind. School Dist.*, *supra* at 481.

This view has been echoed by educators. Law-Related Education[6] is a curriculum reform that has been adopted by many school districts, and "has demonstrated promise in preventing delinquency by fostering social responsibility . . ." National

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[6] The National Office of Education in 1979 defined Law-Related Education as "organized learning experiences that provide students and educators with opportunities to develop the knowledge and understanding . . . to respond effectively to the law and legal issues in our complex and changing society." National School Boards Association, *Toward Better and Safer Schools*, 32 (1984).

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School Boards Association, *Toward Better and Safer Schools*, 32 (1984) (hereinafter, *Toward Better and Safer Schools*). It has been endorsed by the National School Boards Association as an effective strategy in creating safer and better schools. *Id.* at 93-94. Significantly, schools implementing such programs have been advised that:

> An important consideration, however, is that schools must practice what they teach. It would be difficult, and could cause more harm than good, to teach constitutional principles of due process and freedom of expression in schools with rigid, authoritarian, and repressive rule-making and enforcement structures. By integrating Law-Related Education into the educational process, schools can enable youth to become contributing members of their schools and their communities.

Id. at 33.

Thus, rather than conflicting with the educational goals of the public school system, conscientious protection of the Fourth Amendment rights and expectations of students affirmatively assists in attaining those goals.

Petitioner has cited to no case, nor has respondent's research disclosed any in which a lower court has held that a student's expectation of privacy in this person or effects is either minimal or non-existent in the school setting. Indeed, as previously discussed, [*See* Note 4, *infra*], the majority of courts, after conducting a balancing analysis akin to that in *Hudson* v. *Palmer, supra,* have concluded as did the Supreme Court of New Jersey, that the goals and operational concerns of our public educational facilities are not incompatible with respect for the personal integrity of the students, and can be accommodated by eliminating the requirement of a warrant and permitting the search to be conducted on the basis of the lesser, reasonable grounds standard. No further reduction in the student's expectation of privacy in his person has been deemed necessary.[7] *See e.g. Horton* v. *Goose Creek Ind. School*

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[7] Petitioner seeks to even further diminish the minimal expectation of privacy it accords to a student's person, by stating that when a

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Dist., *supra* at 478; *Doe* v. *Renfrew*, *supra* at 1023; *People* v. *Scott D.*, *supra* at 407.

Furthermore, petitioner cites no empirical evidence to support its position that an appropriate educational environment cannot be maintained and schools cannot be safely operated by school authorities unless students are stripped of virtually all expectation of privacy. Statistics have been cited in various of the *amicus curiae* briefs submitted in this matter to establish that problems with crime and discipline exist in the schools.

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student brings "unnecessary" objects into school he/she has waived all expectation of privacy in them. Supplemental Brief of Petitioner at 23. While conceding that clothes are necessary items, petitioner concludes that a purse is not. *Id.* How petitioner arrives at this conclusion is puzzling to say the least. A purse is typically used to carry such things as money, eyeglasses, handkerchiefs, pens and pencils, keys, items for personal hygiene — all universally recognized as indispensible for day to day life, not to mention school. In any event, petitioner has supplied no precedential support for the proposition that an expectation of privacy is reasonable only when the article at issue is necessary to the activity engaged in.

Without a doubt, in view of the personal nature of the items typically carried in a purse, a subjective expectation of privacy exists. Moreover, this expectation is clearly one society is prepared to recognize as reasonable. Courts have held that a purse when carried by its owner, as compared with a situation where it is left unattended, is the functional equivalent of a pocket and is, in fact, "worn" just as pockets which are part of other items of clothing. *See e.g.*, *United States* v. *Teller*, 397 F.2d 494 (7th cir. 1968); *United States* v. *Johnson*, 475 F.2d 977 (D.C. Cir. 1973); *United States* v. *Riccitelli*, 259 F.Supp. 665 (D. Conn. 1966). A purse is "an extention of the person, its form being only a matter of expediency, custom and style development over the centuries." *United States* v. *Teller*, *supra* at 496. Thus, under these circumstances, a search of a purse has been considered to be a personal search rather than the search of an object, and accorded the high degree of protection traditionally accorded to the human body in Fourth Amendment law. *Id.*; *United States* v. *Johnson, supra; United States* v. *Riccitelli*, *supra*. Surely a student's expectation of privacy in a purse is a legitimate one.

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These statistics do not, however, support petitioner's conclusions.[8]

At the outset, it must be emphasized that while studies done at the local and national levels have revealed that problems with school crime exist and must be addressed, the findings suggest that the school system is "not the hotbed of crime and violence" that petitioner, implies.[9] *See* ERIC Clearinghouse on Educational Management/National School Boards Association, *Research Action Brief*, 2-3 (1982), ERIC # Ed-208-453 (hereinafter, *Research Action Brief*). A number of surveys have concluded that the incidence of crimes committed in schools by students has been declining since the mid-1970's. National Institute of Education (D.H.E.W.), *Violent Schools — Safe Schools: The Safe School Study Report to the Congress*, 2 (1978), ERIC #ED-175-112 (hereinafter *The Safe School Report)*; L.E.A.A. National Institute of Law Enforcement and Criminal Justice, *School Crime: The Problem and Some Attempted Solutions*, 3-4 (1980), ERIC #Ed-180-103

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[8] Significantly, while the Solicitor General suggests that the public school system is, in general, experiencing serious crime problems, he does not suggest a diminution of student's rights beyond the elimination of the warrant requirement and a substitution of the lesser standard of reasonableness for probable cause. See *Amicus Curiae* Brief of Solicitor General, generally and at 24-25.

[9] Petitioner cites to *Gallup Education Surveys* which report that over the past fifteen years, the public has ranked discipline as the most serious problem faced by schools. Supplemental Brief of Petitioner at 19, n. 10. Such "public opinion" polls must, however, be viewed with extreme caution and cannot be relied upon as evidence of the present state of affairs in most schools. A recent, two-year study conducted by the Ford Foundation of 300 high schools in fifty-seven cities found significant improvements in learning climates, discipline, and in academic achievement. *Toward Better and Safer Schools* at 7. According to the National School Boards Association, this "study affirms the view of many educators that public perceptions sometimes lag significantly behind new realities." *Id.*

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(hereinafter, *School Crime*); New Jersey Department of Education, *Final Report on the Statewide Assessment of Incidents of Violence, Vandalism and Drug Abuse in the Public School*, 57 (1982) (hereinafter, *New Jersey Final Report*); *Research Action Brief*, at 2-3.[10] With regard to drug abuse, a recent study prepared for the National Institute on Drug Abuse by the University of Michigan's Institute for Social Research concluded that "the 1980's represent a period of leveling and decline in drug use" among high school students. *New York Times*, Feb. 7, 1984 at C9, col. 2 (city ed.).

The Safe School Study concluded that only 8% of the nation's school were experiencing a serious crime problem. *The Safe School Report* at 2. Some researchers feel that 4% is a more accurate estimate. *Research Action Brief* at 3. It would indeed be irrational to strip the vast majority of students of all but a minimal expectation of privacy, in order to attempt to solve the problems of a relative few.

In addition, there does not appear to be any reason to believe that the rate of crime is related to the ability of school personnel to conduct searches. For example, the Safe School Study identified a number of factors consistently found in schools with a high incidence of violence: High crime rate in the school's attendance area; higher proportion of male than female students attending; junior high school age level; large school population; lack of firmness in enforcing school rules; large class

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[10] In evaluating the findings of the reports cited herein it should be noted that they also include statistics on categories of crimes, such as vandalism, fighting, assault and arson, with which the use of a search is not normally associated. For example, the *New Jersey Final Report* indicates that between July of 1979 and June of 1981, the state's school districts reported 15,036 incidents of vandalism, 3,975 incidents of violence, and 2,212 incidents of drug abuse. *Id.* at 4. It would appear obvious that the most serious problem faced by the New Jersey schools over this period was vandalism, by an overwhelming margin. The utility of student searches to cope with this type of crime is doubtful.

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size; lack of relevance of academic courses to students; students' feelings that they have little control over what happens to them. *The Safe School Report* at 8. As to property crimes, the study isolated these factors: High crime rate in the attendance area; high residential concentration near school premises; presence of non-student youth around school premises; unstable family conditions; large school size; lax rule enforcement; lack of coordination between faculty and administration; hostile and authoritarian attitudes on the part of teachers toward students; low student identification with teachers as role models; manipulation of grades as a disciplinary measure; intense competition for grades; intense competition for student leadership positions. *Id.* Many of these same problem areas have been identified by other studies. *See e.g.* Governor's (Mich.) Task Force, *School Violence and Vandalism Report* (1979), ERIC #Ed-191-946 (hereinafter *Michigan Report*); *New Jersey Final Report* at 57; California State Department of Education, *Preliminary Report on Crime and Violence in the Public Schools* (1981), ERIC #ED-208-567; New Jersey School Boards Association, *School Violence Survey* (1977), cited in *Research Action Brief* at 3; *Toward Better and Safer Schools* at 3-13.

None of these studies found the infrequency of student searches to be a significant factor in schools with a serious crime problem. Moreover, of the many remedial measures proposed by these studies to reduce the existing crime rate, none involved increasing the intensity of student searches. On the contrary, the findings would seem to suggest that several of the conditions which are associated with a high crime rate could actually be exacerbated by an increase in the number of searches conducted, and by the failure to prevent unreasonable searches of students.

The Safe School Study concluded that the incidence of crime is high in schools where "students feel they have little control over what happens to them," and where there are "authoritarian attitudes on the part of teachers toward students." *The Safe School Report* at 8. *See also The Michigan Report* at 10. It

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was found that "fairness in the administration of discipline and respect for students is a key element in the effective governance of schools," and that "close personal ties between teachers and students" lower the risks of criminal conduct. *The Safe School Report* at 9. *See also* Clark, *Violence in Public Schools: The Problem and Its Solutions*, 8 (1978), ERIC #ED-151-990; *Toward Better and Safer Schools* at 4-5, 33. Frequent searches of students, pariticularly where no reasonable basis exists jusify the search, will not engender respect[11] between educators and students, and will only increase the students' perception that they have no control over what happens to them.[12]

Furthermore, while petitioner repeatedly emphasizes the duty of educators to protect the childern in their charge from the dangers of criminal conduct on the part of their fellow students, petitioner nowhere addresses the responsibility of school personnel to prevent the harm to students attendant

[11] The Solicitor General recognizes that "educators must strive to create an atmosphere of trust and friendship between students and school officials," but suggests that the imposition of the "formalities of the criminal law process" can only be disruptive of this ideal. Brief of *Amicus Curiae* at 24. Respondent would suggest that the emotional relationship between student and teacher is far more likely to be destroyed by the specter of teachers invading the personal belongings and/or the bodily integrity of their students. The "formalities" of the Fourth Amendment may, in fact, promote a relationship of teacher-pupil trust by reassuring the students that no search will be conducted unless there is a reasonable ground to believe that it is necessary, and that the scope of the intrusion will be appropriately circumscribed.

[12] In the context of juvenile court proceedings, this Court long ago accepted the psychological evidence that "the appearance as well as the actuality of fairness, impartiality and orderliness . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." *In re Gault,* 387 U.S. 1, 26 (1967). the absence of established procedures may give the child a sense that he is being arbitrarily dealt with by all-powerful adults and he may, as a result, resist the rehabilitative efforts that follow. *Id.*

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upon arbitrary and unreasonable searches. With regard to adults, this Court has described the relatively limited measure of a "pat-down" search as "an annoying, frightening and perhaps humiliating experience," [*Terry* v. *Ohio*, *supra* at 24], and "a serious intrusion upon the sanctity of the person which may inflict great indignity and arouse strong resentment." *Id.* at 17, n.15. The embarrassment suffered by shy adolescents whose personal possessions have been exposed to public view or whose clothing has been rifled, the humiliation experienced by students required to disrobe or to submit to the indignity of a school administrator touching intimate parts of their bodies, this harm, too, must be considered in any balancing of interests.[13]

Some courts have recognized that because of their tender age and emotional immaturity, children are more likely than adults to suffer psychological damage when subjected to involuntary searches. *See Horton* v. *Goose Creek Ind. School Dist.*, *supra* at 478-79; *People* v. *Scott D.*, *supra*, 34 N.Y.2d at 490; *Bellnier* v. *Lund*, *supra* at 53. As one commentator warned:

> This possibility of harm is even more ominous since the innocent as well as the guilty suffer from unreasonable searches. One example of this is the case in which an entire fifth grade class was strip searched after one student told the teacher three dollars were missing from a coat pocket [See *Bellnier* v. *Lund*, *supra*]. The indignity and trauma created by the search was fruitless; no money was found.

The Torturable Class at 731.

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[13] These are not merely hypothetical concerns. Reported decisions have revealed school searches which have constituted extreme invasions of personal privacy. See *e.g. Bellnier* v. *Lund*, *supra*, (in which an entire class of fifth graders was strip-searched); *M.M.* v. *Anker*, *supra*, 477 F. Supp. at 837, and *Doe* v. *Renfrew*, *supra*, 631 F.2d at 91 (both involving the strip searches of individual students); *Stern* v. *New Haven Conn. Schools*, 529 F. Supp. 31 (E.D. Conn. 1981) (in which a "two-way" mirror was installed in a boys' rest room).

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The physical safety of students is, of course, of great concern to school personnel, but educators have a parallel responsibility to safeguard the emotional well-being of the children in their charge. For some time, educators have been aware that a closed authoritarian environment in the classroom is destructive to the emotional health of students. The destructive effects which this type of atmosphere can have upon students is so devastating that educators have referred to the phenomena as "soul murder." *Toward Better and Safer Schools* at 27.

In light of these considerations respondent would urge this Court not only to affirm the reasonable grounds standard endorsed by the court below, but to recognize that students have a substantial expectation of privacy in the school context.

D. The Supreme Court Of New Jersey Correctly Held That The Search Of T.L.O. Violated Her Fourth Amendment Rights.

1. The Assistant Principal Had No Reasonable Grounds To Open The Juvenile's Purse.

Applying the reasonable grounds standard to the incident at issue, the Supreme Court of New Jersey found that the Assistant Principal did not have reasonable grounds to open the juvenile's purse, and that the search was, therefore, unconstitutional. *State in the Interest of T.L.O.*, *supra* at 942. A review of the facts below compels this conclusion.

Ms. Chen, a member of the faculty, testified that when she entered the girls' restroom, she observed T.L.O. and another juvenile smoking tobacco cigarettes. (TS 20-7 to 5) Since the restroom was not one of the school's specially designated smoking areas, the girls' conduct constituted a violation of school rules. Ms. Chen escorted the juveniles to the office of Assistant Principal Choplik, and advised him of the infraction. (TS 22-21 to 23) When Mr. Choplik confronted T.L.O. with the charge, she denied that she smoked at all. (TS 27-1 to 21)

Although Mr. Choplik acknowledged that no further evidence was necessary to impose a sanction for violating the

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smoking rules, he nevertheless proceeded to open T.L.O.'s purse.[14] (TS 47-9 to 13) He did so ostensibly in an effort to be fair to the juvenile and to investigate the situation before imposing punishment. (TS 30-24 to TS 31-3).

Utilizing the criteria set forth below, it is clear that under these circumstances, the principal's opening of the purse was unreasonable. Certainly no evidence was presented that "the prevalance and seriousness of the problem in the school to which the search was directed" [*State in the Interest of T.L.O.*, *supra* at 942] warranted the search. In a school in which smoking was allowed in designated areas, the possession of cigarettes not only presented no problem, but was completely in accordance with school regulations. As to the infraction of smoking in a rest room, no testimony was adduced to show that such occurences had presented a serious problem to the school authorities in maintaining an environment conducive to education.

Surely not every violation of school rules, in itself, justifies the search of a student.[15] It would be ludicrous to suggest that a

[14] The Solicitor General asserts that in the face of the juvenile's denial, if the vice principal had proceeded to impose punishment without any further investigation, T.L.O. would have learned the unfortunate lesson "that students are always to be disbelieved." Brief of Solicitor General at 27. The seizure and search of her purse, however, could hardly have been understood by T.L.O. as a sign of the principal's faith in her honesty. Respondent did not intend, at oral argument to imply that the immediate imposition of punishment was the best course of action for the principal to pursue, only that it was preferrable to subjecting a student to a search. Respondent would suggest that if Mr. Choplik genuinely believed that Ms. Chen could have been mistaken, and wanted to pursue the matter further in an attempt to support the student's credibility, he could have easily questioned the other girls who were present in the rest room with T.L.O. One of those girls was already in the vice principal's office and could have simply been asked whether T.L.O. had been smoking.

[15] The National School Boards Association recommends "sensitivity and balance" in dealing with disciplinary problems. *Towards*

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teacher could reasonably search a student to ascertain if he possessed a packet of bubble gum, even though possession of this innocuous item might be proscribed by school rules. The "threat" to school safety and order presented by this infraction would hardly warrant the extreme measure of a personal search. Similarly, in the instant matter, the infraction was not one which involved weapons, drugs, or other dangerous substances; therefore the level of seriousness was not such that a search was reasonably required. *Compare State* v. *McKinnon*, *supra* (upholding as reasonable the search of a student where principal received information that student possessed narcotics in particular pockets of specifically described clothing and was selling it to other students); *Bahr* v. *Jenkins*, 539 F. Supp. 483 (D.C. Ky. 1982) (search of student's purse found to be reasonable when principal informed that she possessed and was distributing firecrackers that were being set-off in the school building); *Interest of L.L.*, *supra* (reasonable for teacher to search student's pocket when his conduct and information from other students indicated that he possessed a knife or razor blade).

As to "the exigency to make the search without delay," [*Id.*], for similar reasons, this criteria has no application to the facts at issue here. The principal had no information that the student was in possession of weapons, narcotics, or other items which presented an immediate threat to the safety of other students or to the orderly school environment.

The trial court assumed that smoking in a prohibited area would constitute a threat to the fire safety of the building. *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980). However, no evidence was presented to this

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Better and Safer Schools at 3. It also warns against treating minor infractions with the same methods as would be appropriate when dealing with violence or serious crime: "[E]quating disciplinary issues solely with the incidence of crime and violence will do little to solve the problem. It may actually foster policies that further alienate students." *Id.*

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effect. If this incident had occurred in an elementary school, a threat to fire safety might be deduced from the age of the students and their inexperience with, or inability to handle matches. At the high school level, the ability of students of that age to safely manage matches or lighters is scarcely open to question. The school authorities involved in this case had, themselves, recognized this fact by permitting students to smoke in the school. Thus the criteria of "the child's age" [*State in the Interest of T.L.O.*, 463 A. 2d at 942] lends no support to the actions of the vice principal.

No testimony was adduced as to the student's "history, and school record" [*Id.*] from which it could be concluded that she presented a threat to the safety of the school. She had no record of prior smoking violations or disciplinary infractions of any kind. *Compare, e.g. Interest of L.L., supra,* (in which one factor upon which the court upheld a teacher's search of a student for a weapon was the fact that the student had a past history of carrying weapons and was in a special class for emotionally disturbed students).

Finally, "the probative value of and the reliability of the information used as a justification," [*State in the Interest of T.L.O., supra]* was correctly assessed by the New Jersey Court as having no relationship to the search carried out. *Id.* Since the school allowed smoking in designated areas, carrying cigarettes did not violate school regulations. Thus, the package of Marlboros did not amount to contraband subject to confiscation. Concededly, the eyewitness report of Ms. Chen gave the vice principal a reasonable basis to believe that T.L.O. was smoking in the girl's rest room. It supplied no grounds to believe that the student's purse contained cigarettes, even if some valid reason could be hypothesized for their seizure:

> No one furnished information to that effect to the school official. He had, at best, a good hunch. No doubt good hunches would unearth much more evidence of crime on the part of students and citizens as a whole. But more is required to sustain a search.

Id. at 942-43.

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Even under a lesser, reasonable grounds test, the agent conducting the search cannot rely upon inchoate suspicions, but "must be able to point to specific and articulable facts" and the "rational inferences" which may be drawn from those facts. *Terry* v. *Ohio, supra* at 21, 27. *See Bellnier* v. *Lund, supra* at 53; *Interest of L.L., supra* at 351; *People* v. *Scott D, supra* at 408-09.

Petitioner suggests that the principal's conduct was reasonable because the juvenile denied that she smoked, the possession of cigarettes would show that she lied in this regard, and the fact that she lied about being a smoker would demonstrate that she was lying when she said she was not smoking in the rest room. Certainly the Fourth Amendment does not limit government action to searches for contraband; a search can be lawfully made for evidential items which would aid in apprehending and convicting law-breakers. *Warden* v. *Hayden,* 387 U.S. 294, 307 (1967). However, in this type of search there must be a nexus between the item to be seized and the criminal behavior:

> Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particualr apprehension or conviction. *Id.*

In the instant matter, there is no such nexus.

The presence or absence of cigarettes in the juvenile's purse would have provided no proof of either innocence or guilt as to the infraction of smoking in the rest room. Failure to find them would not have cleared T.L.O. of the charge of smoking in a prohibited area; she could have been smoking a cigarette borrowed from or shared with another student. Indeed, the principal was aware that T.L.O. had been in the girls' room with another student who candidly admitted that she had been smoking and was therefore as likely a source of the cigarettes as T.L.O.'s purse.

Conversely, the presence of the cigarettes would not have been probative of guilt. Since the school rules allowed students

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to smoke in designated zones, there were undoubtedly many students in school that day who possessed cigarettes, but did not violate the rules by smoking in prohibited areas. Mere possession would not have even showed that T. L. O. lied when she said she did not smoke at all; she could have been carrying a packet belonging to a friend. Thus, the objective of the principal's search, the package of cigarettes, lacked the requisite evidential nexus with the infraction committed by the student.

Moreover, as previously noted, even if Mr. Choplik had had some valid evidential objective in mind when he initiated the search, he had no information whatsoever upon which to conclude that such evidence was contained in her purse. *State in the Interest of T.L.O., supra* at 942-43. Ms. Chen told Mr. Choplik that she had observed the juvenile smoking; she did not tell him that she had seen T. L. O. taking cigarettes from or putting them into her purse.

Under these circumstances and after consideration of the relevant criteria, it is clear that the New Jersey Supreme Court correctly concluded that the vice principal did not have reasonable grounds to conduct a search. Moreover, as the court below held, as the intrusiveness of the search intensifies, the standard of "reasonableness" approaches probable cause. *State in the Interest of T.L.O., supra* at 942. Opening a closed purse carried by a student is a significant intrusion into an area in which, as was previously stated, individuals are recognized to have a high expectation of privacy. In view of the nature of the intrusion, the facts upon which the school official based his actions did not amount to reasonable grounds.

2. Assuming *Arguendo* That The Vice-Principal Had Reasonable Grounds To Open T.L.O.'s Purse, The Resulting Search Exceeded The Constitutionally Permissible Scope.

Once Mr. Choplik opened T.L.O.'s purse, he observed "a package of Marlboros sitting right on top there." (TS 28-3 to 11) He removed the package of Marlboros, and as he did so, he observed cigarette rolling papers in the purse. He then pro-

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ceeded to search the entire purse finding a metal pipe; some empty plastic bags; one plastic bag containing tobacco or some similar substance[16]; a wallet containing "a lot of singles and change"; and inside a separate compartment, two letters and an index card. (TS 29-10 to 16; TS 3-7 to 10; TS 38-6 to 12; TS 40-20 to 22; TS 39-4 to TS 40-11)

Assuming, *arguendo*, that the assistant principal had some valid basis for opening the juvenile's purse to see if she possessed cigarettes, the subsequent search far exceeded the scope constitutionally permissible under the circumstances. It is well-settled that "a search which is reasonable in its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry* v. *Ohio*, *supra* at 17-18. *Kremen* v. *United States*, 353 U.S. 346, 347 (1957). The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Terry* v. *Ohio*, *supra* at 19; *Warden* v. *Hayden*, *supra*. Once he opened the purse and saw the package of Marlboros, which he acknowledged were "right on the top," (TS 28-3 to 11), Mr. Choplik had no basis to search any further. Since the cigarettes were not contraband, *i.e.*, possession of them did not violate any law or any school rule, he had no right to seize them. Whatever evidential purposes it could be said that that possession of the packet may have had were fully served by Mr. Choplik's immediate observation.

Petitioner nevertheless maintains once the vice-principal removed the Marlboro packet, the cigarette rolling papers came into plain view, and thereby supplied him with a valid basis to suspect the presence of drugs and to search for them. Application of the plain view doctrine presupposes that the initial intrusion as a result of which the incriminating evidence was inadvertently discovered was in itself lawful. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466-67 (1971). Since the vice-

[16] At trial, it was stipulated that the bag contained 5.40 grams of marijuana. (T 12-17 to 25)

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principal had no valid basis to seize the Marlboro packet, the subsequent exposure of the rolling papers did not come within the plain view exception.

Even if the plain view doctrine could, on the basis of the principal's observation of the rolling papers, be said to have validated the search for and seizure of the 5.40 grams of marijuana, the pipe, and the rolling papers which were found in the purse, it clearly could not have justified the seizure of the student's letters which were taken from a separately zippered compartment. Information that a student possesses narcotics paraphernalia may furnish a reasonable basis under the Fourth Amendment to search for drugs. However, the Fourth Amendment forbids "a general exploratory rummaging in a person's belongings" in the unparticularized hope of uncovering evidence of crime. *Coolidge* v. *New Hampshire, supra* at 468; *Stanley* v. *Georgia,* 394 U.S. 557, 572 (1969) (concurring opinion of Stewart, J.).

The principal had no information upon which to conclude that these letters had any evidential value with regard to the intial cigarette smoking violation or the subsequent finding of grams of marijuana. Moreover, since their relationship to the drug offense was not "immediately apparent" to the searcher [*Coolidge* v. *New Hampshire, supra* at 466-67], and "could not be determined by mere inspection" [*Stanley* v. *Georgia, supra*], they were not within the ambit of the plain view doctrine, and could not be lawfully seized. *Compare United States* v. *Ochs,* 595 F.2d 1247 (2nd Cir. 1979) (plain view found when officers conducting inventory search of impounded car found a number of ledger sheets marked "Studio I," which the officers from other investigations knew to be a brothel); *United States* v. *Pugh,* 566 F.2d 626 (8th Cir. 1977) (plain view found when an officer arresting a man for possession of cocaine, observed in a half-opened brief case, a book entitled "Cocaine Consumer's Handbook"); *Mapp* v. *Warden,* 531 F.2d 1167 (2nd Cir. 1976), *cert.* den. 429 U.S. 98 (1976) (finding plain view where the police had probable cause to believe that two apartments rented under false names were being utilized to manufacture

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narcotics, and during the search of one apartment for drugs found rent receipts for the other); *United States* v. *Berenguer*, 562 F.2d 206 (2nd Cir. 1977) (finding that the plain view exception did not apply to a wallet containing bills of large denomination when police, while arresting a man for drug distribution, seized the wallet from his nightstand). Thus, the plain view doctrine cannot be validly used to justify the portion of the search which extended into the juvenile's personal papers.

It is true that children cannot be equated with adults for all constitutional purposes.

> At the same time, in a civilized society it is also recognized that the obligations and powers of those charged with the care of children should be limited by standards shaped by the conditions which require them. Thus, the imposition of authority over children may not exceed the causes which give rise to that authority.

People v. *Scott D.*, *supra* at 407. While it is clear that under certain circumstances, searches of students by school officials are constitutionally permissible, it is equally clear that unless the scope of those searches is carefully circumscribed, the Fourth Amendment protections accorded to students will be rendered meaningless. In the instant matter, the search of T.L.O. extended far beyond the substantiation of the smoking infraction which petitioner claims gave the assistant principal sufficient grounds to look inside the purse. For this reason, respondent submits that even if the initial opening of her pocketbook was reasonable, the resulting search exceeded constitutionally permissible limits and the evidence obtained thereby was properly suppressed.

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CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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