

The Application of the Fourth Amendment in the School Context May Create a Safe Learning Environment for Some but Creates the School-to-Prison Pipeline for Others: The Challenges of Inner City School Violence

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Introduction

One of the government's most important functions is to provide children with an education. In order to accomplish this task, the school environment should be safe and free from danger. Unfortunately, drugs and violent crime has become an increasing reality in many of our nation's schools.¹ A dangerous school environment can hinder a student's ability to learn and interfere with the educational process. This problem is even more visible in many poor, urban, and predominately minority schools.² Some of these schools have resorted to drastic measures to protect students which created "prison-like atmospheres that make students of color feel like criminals."³ However, Fourth Amendment protections against unreasonable search and seizures are applicable in the school context.⁴ Commentators have argued that "jailhouse procedures" like search and seizures and metal detectors contribute to the school-to-prison pipeline and overrepresentation of minorities in the criminal justice system.⁵ Therefore, schools are faced with the difficult challenge of trying to maintain a safe learning environment while making sure they do not violate student's constitutional right to be free from unreasonable searches in schools. Balancing these interests and rights can be a daunting challenge for administrators, particularly at inner city schools with a high crime rate.

¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

² Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *FORDHAM URB. L. J.* 1009, 1029 (2009).

³ Smith, *supra* note 2 at 1029.

⁴ *T.L.O.*, 469 U.S. at 333.

⁵ Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *PUNISHMENT & SOC'Y* 95 (2001); see also Elora Mukherjee, *NEW YORK CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY PUBLIC SCHOOLS* (2007), http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf.

This paper will begin with a discussion about the development of search and seizure case law in the school context beginning with the seminal *New Jersey v. T.L.O* ruling. This paper then highlights the unique challenges that many inner city schools face in trying to educate students while also keeping them safe. This paper then discusses how current strategies and policies only promote the school-to-prison pipeline and concludes with recommendations to use alternative strategies such as peer mediation to successfully disrupt the school-to-prison pipeline while simultaneously enhancing safety in schools.

Search and Seizure in Schools: New Jersey v. T.L.O.

The Fourth Amendment provides "the right of people to be secure in their persons, houses, papers, and effects, against *unreasonable* search and seizures...."⁶ Prior to 1985, lower courts were divided on the issue of student privacy rights in schools.⁷ It was not until the ruling in *New Jersey v. T.L.O.* did the U.S. Supreme Court for the first time definitively announce the rule governing the Fourth Amendment in schools and the standard for searches.⁸

T.L.O. was one of two girls caught smoking in the lavatory, which was a violation of a school rule.⁹ She was a 14-year-old high school freshman at the time.¹⁰ The teacher took them to meet with Assistant Vice Principal, Mr. Choplick. T.L.O.'s companion admitted smoking but T.L.O. denied that she had been smoking.¹¹ Mr. Choplick asked her to come into his private office and demanded to see her purse.¹² He opened her purse and found a pack of cigarettes. Mr. Choplick reached further into her purse and found rolling papers which, in his experience, was associated

⁶ *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (emphasis added).

⁷ Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 B.Y.U. EDUC. & L.J. 71, 75 (1999).

⁸ *See T.L.O.*, 469 U.S. 325.

⁹ *Id.* at 328.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

with marijuana use.¹³ Upon further inspection into T.L.O.'s purse, Mr. Choplick found marijuana, a pipe, empty plastic bags, a substantial amount of one-dollar bills, and an index card with a list of students who apparently owed T.L.O. money, thus implicating her in drug dealing.¹⁴ The Supreme Court held that the Fourth Amendment applies to searches in the school context and through the Fourteenth Amendment students' Fourth Amendment rights are protected against encroachments by public school officials.¹⁵

The Court further stated that contrary to the State of New Jersey's argument, Fourth Amendment restrictions on unreasonable searches were never limited only to the police.¹⁶ The Fourth Amendment applies to governmental action and the activities of criminal and civil authorities and the goal of this principle is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.¹⁷ The Court in determining the standard of reasonableness of searches requires balancing the need to maintain security and order in the schools against the student's privacy interests.¹⁸ The Court made reference to *Tinker v. Des Moines Independent Community School District* and appeared to rely on some reasoning from this decision that students do not give up their constitutional rights when they enter schools and they should not be assumed to give up their privacy rights regarding their personal items.¹⁹ On other hand, the Court recognizes the unique disciplinary needs in the public school environment. Schools need to have order to ensure a "proper educational environment, which includes rules against conduct that would be perfectly permissible if done by an adult."²⁰ The Court held that a

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 333-334.

¹⁶ *Id.* at 335.

¹⁷ *Id.*

¹⁸ *Id.* at 337.

¹⁹ *Id.* at 336; *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

²⁰ *T.L.O.*, 469 U.S. at 339.

search is reasonable if it is justified at its inception and reasonably related in scope.²¹ The Supreme Court warned that courts should exercise restraint and not unduly interfere with the school's ability to protect the children within its borders.²²

One interesting factor that was missing from the *T.L.O.* decision which granted schools broad discretion in the use of search policies was that *T.L.O.* did not require individualized suspicion. The Court declined to address whether individualized suspicion was an essential element of the reasonableness standard in the school search context. *T.L.O.* left unanswered what steps could be taken when you have a generic school problem that interfered with student learning; thus, whether a school can engage in suspicionless searches. However, cases in the post-*T.L.O.* era have shed light on these issues.

Search and Seizure in Schools: Post T.L.O.

Since *T.L.O.* courts have typically upheld most school search policies. Even broad, sweeping searches of students in schools have been upheld when safety is at issue. In *Thompson v. Carthage*, a student, Ramone Lea, was expelled after crack cocaine was found in his coat pocket while school officials were looking for weapons that were reported to be on school grounds.²³ In *Thompson*, the principal and a science teacher, based on a tip that there was a weapon in the school, began searching students in the office by asking them to remove their outer clothing, footwear, and empty their pockets.²⁴ The science teacher also checked students

²¹ *Id.* at 342 (noting that a search will be “‘justified at inception’ when there are reasonable grounds for suspecting that the student has violated or is violating either the law or the rules of the school...permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”).

²² *Id.*

²³ *Thompson v. Carthage School District*, 87 F.3d 979, 980 (8th Cir. 1996)

²⁴ *Id.*; *cf.* *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 26422643 (2009) (holding that a strip search of a student by a school administrator was not justified using a *T.L.O.* analysis); but see *Cornfield v. Consolidated High School Dist.*, 991 F.2d 1316, 1323 (7th Cir. 1993) (applying *T.L.O.*, the Court held that the strip search of the student was not unreasonable).

using a metal detector.²⁵ An initial search of Thompson revealed matches and a cigarette box and a subsequent search revealed he was in possession of crack cocaine. Thompson was then expelled.²⁶ Thompson alleged the search and his expulsion violated his Fourth Amendment rights.²⁷ In quoting *T.L.O.*, the Eight Circuit said, “maintaining security and order in the schools requires a certain degree of flexibility in disciplinary procedures...the attitude of the typical teacher is one of personal responsibility for the student’s welfare as well as for his education.”²⁸

In applying *T.L.O.*, the Court found that the search was justified at its inception because the school officials were given information regarding a threat to student safety. The search was also justified in scope because the school officials issued a sweeping but minimally intrusive search for dangerous weapons which was constitutionally permissible.²⁹ The Court went on to hold that the exclusionary rule may not be applied to hinder school officials in their performance of disciplinary duties and thus Thompson was not wrongly expelled.³⁰ This decision, like many others, supported the view that individualized suspicion is not required in the school context when it comes to promoting student safety and promoting a safe, comfortable learning environment.³¹

²⁵ *Thompson*, 87 F.3d at 980.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 981 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 340, 350).

²⁹ *Id.* at 983.

³⁰ *Id.* at 982-983.

³¹ *See Veronica Sch. Dist. v. Acton*, 515 U.S. 646, 664-665 (1995) (holding that individualized suspicion is not always required for school searches and upheld random drug testing of athletes in the absence of individualized suspicion); *Rhodes v. Guarricino*, 54 F. Supp.2d 186, 192-193 (S.D.N.Y. 1999) (applying *T.L.O.*, court upheld the search of students’ hotel rooms during a school sponsored trip, where the school principal and chaperone asked hotel security to open the student’s rooms and search them after there was a reported strong odor of marijuana detected); *Desilets v. Clearview Regional Bd. of Education*, 627 A.2d 667, 673 (N.J. Super. 1993) (applying *T.L.O.*, court upheld the search of students’ hand luggage prior to boarding school trip bus in the interest of student safety); *see also Zamora v. Pomeroy*, 639 F.2d 662, 670-671 (1981) (upholding the search of a student’s locker despite there being no specific suspicion of student’s particular locker); *In re Latasha W.*, 70 Cal. Rptr. 2d 886 (ct. App. 1998) (holding that a student, who was found in possession of a knife after a metal detector search, Fourth Amendment right was not violated if the student was subjected to random metal detector searches while at school).

The Inner City School Violence Problem

In *T.L.O.*, Justice White commented, “[T]he difficulty of maintaining discipline in the public schools *today*...is not so dire...[t]he prisoner and the schoolchild stand in wholly different circumstances.”³² However, it seems as though much has changed since Justice White made this statement in *T.L.O.* School violence has become so much of a problem that schools have taken drastic measures to protect their students.³³ Ironically, the measures taken by school administrators have given some schools a striking resemblance to prison. In what appears to be acts of desperation to combat violence and protect students, school officials have instituted metal detectors and broad searches of weapons. These are sometimes referred to as administrative searches in that the search is aimed at a group or class of people rather than a particular person under the theory that a member of that group or class might pose a threat to safety.³⁴ The application of these types of searches (typically used at airports, border patrols, DUI checkpoints, jails) to the school context raises an interesting point of irony and makes Justice White’s comment in *T.L.O.* seemingly a distant memory and a legal fiction.

Despite challenges to the constitutionality of these searches, they have frequently been upheld. Several cases illustrate the courts’ deference to schools in developing policies to protect their students and uphold them on constitutional grounds. In a 1995 case, *In the Interest of F.B.*, the Pennsylvania Superior Court upheld a school-wide search of students for weapons where the

³² *T.L.O.*, 469 U.S. at 338 (emphasis added).

³³ Matt Hishongh, *School Violence is Focus of Teacher Training-Gang Expert Warns that Jonesboro-style Incident Could Happen Here*, NORTH LITTLE ROCK TIMES, Oct. 1, 1998; see also CENTERS FOR DISEASE CONTROL (CDC), UNDERSTANDING SCHOOL VIOLENCE FACT SHEET 1 (2010), www.cdc.gov/violenceprevention/pdf/SchoolViolence_FactSheet-a.pdf. (noting that a 2007 survey showed that almost 6 percent of students in high school carried a weapon within 30 days of the survey and with regard to drugs approximately 22 percent of students said they were offered, sold, or given an illegal drug on school property during the 12 months before the survey).

³⁴ *People v. Dukes*, 580 N.Y.S. 2d 850, 850 (N.Y. Crim. Ct. 1992).

school was faced with a general problem of school violence.³⁵ The Philadelphia school district employed police officers to conduct metal detector scans and bag searches on school grounds at a local school.³⁶ Because signs were posted on the front door and around the school regarding the policy, student's expectation of privacy was greatly reduced.³⁷ Perhaps the most fascinating part of this decision was the court's agreement with the trial court that under a *T.L.O.* analysis, the search was justified at its inception. "Because of the high rate of violence in the Philadelphia public schools...[the search] was reasonable...because there is no way to know which students are carrying weapons."³⁸ Here the Court is acknowledging that when there is a general problem (i.e., violence), which pose a threat to student safety and interferes with student learning, a search may be deemed justified at its inception under *T.L.O.*'s analysis.

A similar decision was passed down in New York in 1992. In *People v. Dukes*, a New York City high school adopted a metal detector search pursuant to guidelines established by the Board of Education in 1989.³⁹ Like the Pennsylvania case *In the Interest of F.B.*, signs were posted outside the building announcing the search.⁴⁰ In balancing the government interest against privacy interest, the Court held that the search was reasonable and the decision was informed in part by the need to maintain security in schools.⁴¹ Judge Allen wrote, "It is unfortunate that we have reached the point where so many of our great public institutions resemble medieval fortresses."⁴²

Addressing the issue of violence in schools can be further complicated and challenging due to systemic barriers outside of the school's control. For instance, ethnic minority students

³⁵ *In the Interest of F.B.*, 442 Pa.Super. 216, 219 (1995).

³⁶ *Id.*

³⁷ *Id.* at 224.

³⁸ *Id.* at 225.

³⁹ *Dukes*, 580 N.Y.S. 2d at 850.

⁴⁰ *Id.*

⁴¹ *Id.* at 853.

⁴² *Id.*

report more fear at school and low income areas have significantly higher incidence rates of violence.⁴³ Under the rationale of the above mentioned cases, many schools, particularly inner city schools that have the harsh reality of violence within its borders can resort to “prison-like” search procedures that will withstand constitutionally scrutiny. Unfortunately while creating an environment that is safe, one might argue that the presence of metal detectors does not create a “comfortable” environment conducive to learning. Moreover, as mentioned earlier, many commentators argue that these prison like atmospheres that currently exists in schools do not foster learning, but rather a pipeline-to-prison.⁴⁴ This has a greater impact on youth who attend such dangerous schools and the burden that must be met to implement these searches are likely always *reasonable* because the need for these searches to enhance safety in these schools is greater.⁴⁵

Some commentators argue that there should be a requirement for individualized suspicion prior to searching a student.⁴⁶ However, requiring individualized suspicion may not provide school officials working in high crime schools with the broad disciplinary powers they need to adequately protect their students. Although I echo the concerns raised by Judge Allen, I applaud Judge Allen’s opinion⁴⁷ and many similar decisions to err on the side of safety in the school context. In the context of schools, children do not have a choice to attend school and there must be a safe learning environment for educational goals to be met. Therefore, courts have and must continue to defer to school officials by considering the prevalence and seriousness of violence in

⁴³ Safe & Responsive Schools, The Facts about School Violence, <http://www.indiana.edu/~safeschl/facts.html> (last visited May 14, 2011).

⁴⁴ See generally Smith, *supra* note 2.

⁴⁵ In the Interest of S.S., 452 Pa.Super 15, 1172, 1176 (1996) (upholding student-wide search of student entering school using metal detectors and pat-downs absent individualized suspicion because of the high violence rate at the school).

⁴⁶ See Robert B. Harper, *School Searches—A Look into the 21st Century*, 13 MISS. C.L. REV. 293 (1993).

⁴⁷ *Dukes*, 580 N.Y.S. 2d at 853.

their respective school and the need for administrative action to further the goal of maintaining school discipline and order.⁴⁸

Re-Thinking the Problem

The real dangers of violence in schools, particularly inner city, predominately minority schools, have caused school officials to use “prison-like” search procedures.⁴⁹ The challenging issue is that students must feel safe in school, but common sense also dictates that it can be psychological distressing for a young child to have to walk through a metal detector to enter school every day. As mentioned earlier, commentators argue that these tactics help facilitate the pipeline to prison. One expert noted that “administering carceral treatment on students, such as subjecting students to search and seizures...and socializing students into acting defiantly through exposure to carceral school environments and treatment.”⁵⁰

Moreover, not every student who brings a weapon to school is looking to engage in predatory violence. Some students may feel compelled to bring weapons to school to “defend” themselves from the potential dangers that lurk in the school hallways.⁵¹ Sometimes the violence that is seen in the school setting may be the result of an escalating conflict between rivals or retaliation.⁵² Although this does not excuse the behavior, it may shed light on how the problem and solution are viewed. In other words, sometimes when a student brings a weapon into school, that student may be crying for help or merely need some sort of guidance.⁵³ Though school

⁴⁸ *Id.* at 317-318; see also Leigh Taylor Hanson, *Psst! Janie’s Got a Gun: Anonymous Tips and Fourth Amendment Search and Seizure Rights in Schools*, 37 GA. L. REV. 267 (2002).

⁴⁹ Smith, *supra* note 2 at 1027.

⁵⁰ *Id.* at 1027-1029.

⁵¹ See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (OJJDP), REDUCING YOUTH GUN VIOLENCE: AN OVERVIEW OF PROGRAMS AND INITIATIVES 6, <http://www.ncjrs.gov/pdffiles/redyouth.pdf> [hereinafter, OJJDP, OVERVIEW].

⁵² *Id.*

⁵³ William DeFoore, Teen Violence Is A Desperate Cry for Help, <http://www.angermanagementresource.com/teen-violence.html> (last visited May 11, 2011).

safety should not be compromised, teachers, school officials, and trained professionals can collaborate to develop strategies to attenuate violence in schools.⁵⁴

Currently zero-tolerance policies have been one popular solution to combat violence and weapons in school. Zero-tolerance policies typically mandate the expulsion of students who fight or are found to be in possession of weapons on school grounds.⁵⁵ These students are often referred to the justice system where there is substantial evidence of existing racial/ethnic disparities in juvenile case processing.⁵⁶ Zero tolerance policies have not proven to be effective, do not improve school safety, and only push students, especially minorities, out of school and into incarceration.⁵⁷

The reality of school violence was in its birth phase when the *T.L.O.* case was decided and there must be a radical shift in thinking of ways to address the school violence problem. Rather than using metal detectors and search and seizure laws to promote safety in schools, with the help of relevant agencies and trained professionals, schools can develop programs which help teachers and school officials in detecting the potential warning signs of violence or students who are in distress and at-risk for engaging in violence.⁵⁸ Also, since students bringing weapons in schools have been shown to be related to retaliation and poor conflict management skills, another strategy that could be used is peer mediation.⁵⁹ Using an alternative solution such as peer mediation to minimize violence can actually prevent students from feeling the need to bring weapons to school. Moreover, merely expelling students not only facilitates the school-to-prison

⁵⁴ The Chicago School Forensic Center, Save Our School Children (S.O.S.), <http://forensiccenter.org/save-our-school-children-s-o-s/> (last visited May 12, 2011) [hereinafter S.O.S.]; see also OJJDP, OVERVIEW, *supra* note at 7.

⁵⁵ Smith, *supra* note 2 at 1028-1029.

⁵⁶ *Id.* at 1029; see also HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 193-194 (1999).

⁵⁷ Smith, *supra* note 2 at 1028-1029; see also Phyllis C. Murray, Reflections on Rosa Parks: We still have a long way to go, <http://www.edwise.org/citywide-council-on-high-schools-we-need-a-moratorium-on-high-school-phase-outs> (last visited May 17, 2011).

⁵⁸ S.O.S., *supra* note 54.

⁵⁹ OJJDP, OVERVIEW *supra* note 51.

pipeline, but it also does nothing to prevent the students from engaging in violence after they are outside the school environment. This is disturbingly common and a significant challenge for many inner city school students.⁶⁰ Many of the students live in similar neighborhood so there is nothing to prevent a conflict that began in school from ending in the street.⁶¹ However, peer mediation helps the student resolve the conflict in the school setting and can prevent the violence from occurring later in the community. Moreover, students would be developing the type of problem solving skills to help them not feel the need to resort to bringing weapons to school or resort to violence.⁶² This strategy not only breaks down the school-to-prison pipeline but also reduces student exposure to carceral school environments thus making the learning environment not just safe, but also “comfortable.”

School districts have and should continue to partner with federal agencies and universities to develop and implement programs which address violence in schools rather than waiting until the violence is so unmanageable that they resort to search and seizure procedures, thus creating a carceral school environment. The aforementioned programs and partnerships also are able to address the community issues (i.e., gang violence) which often times permeate into the school setting.⁶³ Because these alternative programs cost money, school districts should continue to work with agencies such as the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to receive federal funds to implement strategies to combat violence in schools located in high crime areas and thus break the school-to-prison pipeline.⁶⁴

⁶⁰ See RENEE PARKER, MIAMI PARTNERSHIP FOR ACTION IN COMMUNITIES TASK FORCE (PROJECT MPACT) (2006); see also Michael W. Collier, Cultures of Violence in Miami-Dade Public Schools, IEI Working Paper #2 (March 1998), available at <http://www2.fiu.edu/~iei/index/working2.html>.

⁶¹ *Id.*

⁶² See David Polsky, Teaching Conflict Resolution Skills to Students Can Reduce School Violence and Dismantle the School-To-Prison Pipeline by Empowering Students to Resolve Their Own Conflicts In a Cooperative and Constructive Way (2011).

⁶³ See PARKER, *supra* note 60.

⁶⁴ See *Id.*