Winter 1980

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Use of Drug Detecting Dogs in Public High Schools

The use of trained dogs to detect marijuana among public high school students and in their lockers raises a threat to a student's fourth amendment guarantee against unreasonable searches and seizures. Doe v. Renfrow and Jones v. Latexo Independent School District are the only cases to have dealt with the use of trained dogs in a high school. Doe held that the use of dogs in a public school was constitutional, finding that the dog inspection was not a search under the fourth amendment but was a justified regulatory action taken in accordance with the school's duty to preserve a disciplined and productive school environment. The court in Jones held, contrary to Doe, that the indiscriminate use of marijuana sniffing dogs was unconstitutional.

In deciding on the constitutionality of dog searches in schools, these courts were faced with the task of aligning two developing issues: the use of trained dogs by police officers and student searches conducted by school administrators. Prior decisions addressing the use of drug detecting dogs have generally held that the use of the canines does not constitute a search for purposes of the fourth amendment. Nevertheless, these courts have required a minimal amount of prior suspicion to be

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1 Dogs of various breeds have been trained to detect odors of certain drugs, primarily marijuana and heroin. In searching for hidden drugs, a dog handler leads his dog around the suspected area. If the dog senses the presence of drugs, it gives a signal. Such an indication of the presence of a marijuana or heroin odor is called an "alert" or a "reaction" and usually consists of snarling, barking, whining or pawing at the area of the scent. For a general explanation of the training a dog receives, see Comment, United States v. Solis: Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?, 13 SAN DIEGO L. REV. 410, 414-18 (1976).


2 475 F. Supp. 1012 (N.D. Ind. 1979). The plaintiffs brought an action pursuant to 42 U.S.C. §§ 1983, 1985 (1976). They sought damages for violation of their constitutional rights as guaranteed by the fourth, fifth, ninth and fourteenth amendments resulting from the dog search. They also sought a permanent injunction against future dog searches.


4 475 F. Supp. at 1019.

5 499 F. Supp. at 237.

shown before the use of dogs can be validated. Decisions dealing with conventional student searches conducted by school officials have upheld the searches on a showing of "reasonable suspicion"—a standard similar to the one required in the dog search cases and much less stringent than the probable cause standard police officers must satisfy before conducting a search.

The court in Doe chose to follow these precedents and applied the lower "reasonable suspicion" standard. It failed to recognize that the use of dogs in a public school resembles neither the prior dog cases nor the prior school cases. This note will propose that a dog inspection in a public school creates a special situation which demands a re-evaluation of the rationale used by courts applying the lesser standard. It will argue that the use of dogs constitutes a search and that students subjected to this search are entitled to the protection of the fourth amendment and will conclude that the utilization of the dogs by school officials should be permitted only upon satisfying the strict probable cause standard.

THE DOG SEARCH

*Doe v. Renfrow* was the first case to deal with the use of dogs in a public school and provides a reasonable example of how dogs are likely to be used in future school searches. Trained marijuana detecting dogs were utilized by school officials in an effort to combat serious drug

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7 See United States v. Venema, 563 F.2d 1003, 1004 (10th Cir. 1977); United States v. Bronstein, 521 F.2d 459, 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); United States v. Painter, 480 F. Supp. 282, 284 (W.D. Mo. 1979). See also People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975) (dog search invalidated in part because the dogs were utilized without any knowledge of possible presence of drugs).


The amount of proof needed to satisfy the reasonable suspicion requirement is unclear. The Supreme Court has stated that the requirement is generally satisfied if the searching party has a reasonable belief "that criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 30 (1968); see notes 70-78 & accompanying text infra.


This note will consider only the dog search in a public junior or senior high school that is conducted primarily by school officials for school administrative and disciplinary purposes. If the use of dogs is only allowed in schools upon a showing by the school officials of probable cause, the use of dogs will be unnecessary in most cases. However, the dogs may be used to a limited extent in some situations. For example, school officials or police officers may have probable cause to believe that the school is being used as a storage place for a large amount of marijuana. In such a situation, the dogs may aid the police in searching nonpersonal areas of the school, just as they could aid the police in searching a warehouse.
abuse problems in the school. The search was intended to rid the junior and senior high schools of illicit drugs and discourage their future use. Although several police officers were involved, the police had previously agreed that no criminal charges would be brought against any of the students found in possession of drugs; nevertheless, school administrators intended to bring school disciplinary proceedings against any student violator.

During the search, a canine team visited each classroom. The students were instructed to sit quietly in their seats with their hands and any purses or other belongings placed upon their desks while the dogs were led up and down the aisles of the classroom. The dogs "alerted" to particular students on approximately fifty occasions. After each alert the student was required to empty his pockets or her purse; if no marijuana was found as a result of this procedure, the student was subjected to a body search. As a result of the inspection seventeen students were found in possession of marijuana and two were found in possession of drug paraphernalia.

\[\text{11} 475 \text{ F. Supp. at 1016.}
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\[\text{12 Id. Although the court often refers to police officers in the Jones opinion, it does not appear that the police department was involved in that search. See 499 F. Supp. at 228-29.}
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\[\text{13 475 F. Supp. at 1016.}
\]
\[\text{14 Each canine team consisted of a school administrator or teacher, a trained dog and its handler and a uniformed police officer. There were six canine teams working at one time. Id.}
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\[\text{15 Id. It does not appear from the opinion that the dogs were used to detect marijuana in student lockers. However, lockers were included in other searches conducted with dogs in the northeastern part of Indiana. See Plaintiffs' Memorandum in Support of Petition for Temporary and Preliminary Injunctive Relief at 6-9, Doe v. Renfrow, 499 F. Supp. 223 (E.D. Tex. 1980) [hereinafter cited as Plaintiffs' Memorandum].}
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\[\text{16 475 F. Supp. at 1016. The search in Doe began during the first period class. Each teacher was instructed, by means of a sealed note, to keep students in class throughout the duration of the search. The inspection lasted two and a half hours. Any student wishing to use the washroom was allowed to leave the classroom with an escort to the washroom door. Id. at 1016-17.}
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\[\text{The plaintiff in Doe alleged that she and her classmates were illegally detained in their classrooms due to the extended first period class. The court rejected this argument, noting that similarly extended periods had been experienced at other times during convocations and school assemblies. Id. at 1019.}
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\[\text{17 See note 1 supra.}
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\[\text{18 475 F. Supp. at 1017.}
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\[\text{19 Id.}
\]
\[\text{20 The court stated that a body search "involved extensive examination of the student's clothing entailing the removal of some of the garments." Id. at 1017 n.6. The dog continued to alert to the plaintiff, Doe, after she was subjected to the body search. Finding nothing on her person, the officials escorted her to the nurse's station where she was required to strip in the presence of two women, one of whom was a friend of the plaintiff's mother. Her hair and clothes were examined and no marijuana or other drugs were found. It was later discovered that the plaintiff played with a dog in heat on the morning of the search and the trained dog was reacting to that scent. Id. at 1017.}
\]
\[\text{21 Of those 17 students found possessing drugs, 12 withdrew from school voluntarily and three were expelled. The two found possessing paraphernalia were both suspended. Id. In Jones, six students were suspended for possession of paraphernalia. 449 F. Supp. at 229.}
THE FOURTH AMENDMENT AND THE USE OF DOGS IN SEARCHES

The validity of a dog search as described in *Doe* is governed by the fourth amendment, which protects "[t]he rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."* The case law interpreting this amendment has held it to mean only that unreasonable searches, rather than all searches, are invalid. Generally two questions must be asked in determining whether an illegal search has been conducted: first, whether a search and seizure has actually taken place; and second, whether the search was reasonable.

*Katz v. United States* is the leading Supreme Court case for determining whether a search has actually been conducted. In *Katz*, FBI agents attached an electronic listening and recording device to the outside of a telephone booth from which incriminating calls were being made by the defendant. The Supreme Court held that the evidence obtained as a result of the electronic device was inadmissible at trial and that the use of such devices was unconstitutional. This holding significantly altered prior search and seizure law because it explicitly rejected the long standing "trespass doctrine" of *Olmstead v. United States*. That doctrine required a physical penetration into a person's property before fourth amendment protections could be applied. In *Katz*, the Supreme

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*p. 325*

2 U.S. Const. amend. IV. Courts have not been consistent in protecting minor students' fourth amendment rights. Compare *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972), and *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969), and *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App. 1970), with *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976), and *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975). The Supreme Court has suggested that fourth amendment rights should be extended to minors as well as adults. See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (students held to be entitled to first amendment rights); *In re Gault*, 387 U.S. 1 (1968) (minor held to be entitled to protections of the due process clause of the fourteenth amendment in delinquency adjudication proceedings). These two cases imply that minor students enjoy the same constitutional status as adults. The Court in *Gault* noted that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13. See also *Buss, The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739, 739-43 (1974).

24 See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).


28 *Id.* at 348.

29 *Id.* at 359.

27 277 U.S. 438 (1926).

30 *Id.* at 457. *Olmstead* also involved the use of wiretaps on the defendant's telephone. *Id.* at 456-57. As in *Katz*, there was no intrusion upon the defendant's premises. In *Olmstead*, the use of the wiretaps had been upheld. *Id.* at 456. See also *Goodman v. United States*, 316 U.S. 129 (1942) (evidence obtained by use of a detectaphone applied to the wall of a room adjoining the office of the defendant held to have been legally obtained).
Court shifted its emphasis from protecting property interests to protecting privacy interests, noting that the “Fourth Amendment protects people, not places.”

The majority opinion in *Katz* did not specify what privacy interests are protected under the fourth amendment, but courts which have decided subsequent search and seizure cases have followed the test formulated by Justice Harlan in his concurring opinion. Justice Harlan believed that the limitations of the fourth amendment apply in those circumstances in which a person harbors a reasonable expectation of privacy.

Justice Harlan’s reasonable expectation of privacy test was invoked in a situation involving the use of trained drug detecting dogs for the first time in *United States v. Bronstein*, a case where narcotic agents used two trained dogs to examine the defendants’ luggage at an airport terminal. The dogs’ reactions were positive and after opening the luggage the agents discovered 240 pounds of marijuana. The Second Cir-

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3 The Supreme Court refrained from equating the fourth amendment rights with a general constitutional “right to privacy.” The Court noted that the amendment’s “protections go further [than the privacy of persons] and often have nothing to do with privacy at all.” 389 U.S. at 350.

2 Id. at 351.


3 The test consists of a two-fold requirement: “[F]irst that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as reasonable.” 389 U.S. at 361 (Harlan, J., concurring). An illustration used by Justice Harlan in *Katz* helps explain his “expectation of privacy” test. He reasoned that one who occupies a telephone booth, shuts the door and pays the toll to make a call has a reasonable expectation that his private conversation is not being intercepted. In contrast, Harlan believed that “conversation in the open would not be protected against being overheard, because any expectation of privacy under these circumstances would be unreasonable.” Id.

The Supreme Court has cautioned that in some situations the first prong of the *Katz* test dealing with subjective expectations “would provide an inadequate index of Fourth Amendment protection.” *Smith v. Maryland*, 442 U.S. 735 (1979). The first prong was eventually refuted by Justice Harlan himself. See *United States v. White*, 401 U.S. 745 (1971). A subjective expectation of privacy does not add to an individual’s claim to fourth amendment protection. If it did, the government could diminish each person’s subjective expectation of privacy “merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.” *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

Therefore, the second prong of *Katz* is the modern basis for deciding whether certain searches require fourth amendment protection. See, e.g., *Gillard v. Schmidt*, 579 F.2d 825 (3d Cir. 1978); *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). Although the expectation of privacy test has not been addressed in detail by the Supreme Court since *Katz*, it has been referred to in several cases. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *Couch v. United States*, 409 U.S. 322, 335 (1973); *United States v. White*, 401 U.S. 745 (1971).

A positive reaction means that the dog has picked up the scent of the substance being sought. See note 1 supra.

2 Id. at 461.
cuit Court of Appeals held that the use of dogs was an intrusion upon the defendants' privacy, but that the fourth amendment did not apply because they did not have a reasonable expectation of privacy in their airplane luggage.  

A different approach was taken by the Tenth Circuit in United States v. Venema. There, trained dogs were used to detect marijuana suspected to have been placed inside lockers at a storage company. The court held that the fourth amendment was not applicable because the defendant did not have "any justifiable expectation of privacy in the areaway [in front of the defendant's locker] in the storage building." The court claimed that since the dog only sniffed the air in the areaway, no search of the defendant's rented locker was conducted.

Expectations of Privacy

These cases illustrate two lines of analysis used in dog search cases. The first involves the expectation of privacy test and is typified by the Bronstein case; it should be limited to airport searches which can be distinguished from school searches on the basis of the special dangers involved in international and domestic travel. Courts have generally held

38 The rationale behind this holding is that passengers do not possess a reasonable expectation of privacy while travelling on commercial airlines. "There can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjack and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impedimenta." 40

39 Although the problem of airplane hijacking has been prevalent since 1930, it reached its apex in the late 1960's. In 1968, 18 American airplanes were hijacked. In 1969, the figure rose to 33. The number has declined every year since then. McGinley & Downs, Airport Searches and Seizures—A Reasonable Approach, 41 FORDHAM L. REV. 293, 294-95 (1972).

40 The airlines are also hampered with severe detection problems. The court in United States v. Moreno, 475 F.2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973), described some of the problems:

Airport security officials have the awesome responsibility of ferreting out hijacking threats from among thousands of passengers while at the same time avoiding any undue disruption...[while] the hijacker prefers the anonymity of the crowd.... His arsenal is not confined to the cumbersome gun or knife; for modern technology has made it possible to miniaturize to such a degree that enough plastic explosives to blow up an airplane can be concealed in a toothpaste tube. A detonator planted in a fountain pen is all that is required to set it off. 475 F.2d at 49.
that persons have a reduced expectation of privacy in their luggage as passengers on an airline, and that passengers consent to a baggage search by accepting passage on the airplane or that an airport search is justified under the stop-and-frisk approach. These holdings imply that searches among airline passengers are not as strictly protected under the fourth amendment as those in other contexts. As a result, the ruling in Bronstein that the use of dogs is not a search should be limited to airport cases and should not be reflected in other kinds of cases involving the use of trained dogs.

The ever present danger of hijackings which reduces a passenger's expectation of privacy in his luggage does not exist in the school environment. Students clearly have a justifiable expectation of privacy in their person. Although it is unclear whether they possess the same expectation in their school lockers, expectations of privacy are not limited by the fact that students do not own or rent their lockers. The applicability of the fourth amendment does not turn on the nature of the property interest in the area searched.

The stop-and-frisk approach stems from Terry v. Ohio, 392 U.S. 1 (1968). For an application of it in the context of airline searches, see, e.g., United States v. Clark, 498 F.2d 535 (2d Cir. 1974); United States v. Moreno, 475 F.2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973); United States v. Bell, 484 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 1085 (1972); cf. United States v. Bell, 335 F. Supp. 797, 803 (E.D.N.Y. 1971), aff'd, 464 F.2d 667 (2d Cir. 1972) (rejecting the consent argument because the defendant's consent was neither voluntary nor intelligently given); People v. Erdman, 69 Misc. 2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972) (defendant's mere presence and silence at airport was too ambiguous to constitute waiver of constitutional right).

4 The implication seems to have been accepted by the Supreme Court. The Court stated: "[L]uggage contents are not open to public view except as a condition to a border entry or common carrier travel." United States v. Chadwick, 433 U.S. 1, 13 (1977) (emphasis added).

4 The court labelled the legal status of the school locker as "somewhat anomalous" and held that "[a]lthough a student may have control of his school locker as against fellow students, his possession is not exclusive against the school and its officials." 203 Kan. at 640, 456 P.2d at 3. See also People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967).
dent does not maintain exclusive control over his locker does not in itself justify the conclusion that the student lacks a justifiable expectation of privacy.\textsuperscript{41} The significant question is whether the student places personal effects inside the locker, manifesting an "expectation that the contents [will] remain free from public examination."\textsuperscript{52} The school locker is a depository for many personal effects of a student,\textsuperscript{53} and when he closes his locker he manifests an expectation that neither school officials nor other students will examine the contents. The student, therefore, possesses a reasonable expectation of privacy. The argument is made stronger by the nature of the school environment, in which the student's personal freedom and privacy are structured and highly regulated.\textsuperscript{54} In such surroundings, placing personal effects in a locker is the only means a student has to protect them from being viewed by others.\textsuperscript{55}


\textsuperscript{51} \textit{See United States v. Speights, 557 F.2d 362 (3d Cir. 1977).} This case held that a police officer had a justifiable expectation of privacy in a locker that he used at department headquarters. The defendant knew that the police chief possessed a master key to all the lockers. He did not own or rent the locker, but was assigned it by the department. This situation seems perfectly analogous to the school locker situation. \textit{See also} Gillard v. Schmidt, 579 F.2d 825 (3d Cir. 1978). That case held that a guidance counselor in a public high school possessed a reasonable expectation of privacy in his desk at school, even though the school board members had access to all the offices with use of the janitor's keys. \textit{Cf. State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), cert. denied, 397 U.S. 947 (1970)} (although student's possession of his locker was exclusive as to other students, it was not exclusive as to school officials).

\textsuperscript{52} \textit{United States v. Chadwick, 433 U.S. 1, 11 (1977)} (warrantless search of footlocker violates fourth amendment).

\textsuperscript{53} Items a student might keep in a high school locker include "letters from a girl friend, applications for a job, poetry he is writing, books that may be ridiculed because they are too simple or too advanced, or dancing shoes he may be embarrassed to own." Buss, \textit{supra} note 22, at 773.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} The opinions holding that students have no privacy interests in their lockers argue that the highly structured and regulated school life reduces the expectations of privacy of students. \textit{See, e.g., People v. Overton, 20 N.Y.2d 360, 362-63, 229 N.E.2d 596, 598, 283 N.Y.S.2d 22, 25 (1967) (students were aware that the principal possessed combinations to all lockers).} Such an argument is based on the assumption that students give up all their privacy rights when they enter the schoolhouse door. The assumption is fallacious, given that students are required by law to attend school. Otherwise, students would be put in a position in which they must choose between either giving up their privacy interests for eight hours or breaking the law by not attending school.

School regulations and a record of past locker inspections that make it clear to the student that the use of his locker is not exclusive and is subject to periodic inspection may alter the student's expectation of privacy in his locker. \textit{See United States v. Bunkers, 521 F.2d 1217 (9th Cir.), cert. denied, 423 U.S. 989 (1975); Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972),} \textit{aff'd,} 484 F.2d 1196 (9th Cir. 1973); \textit{United States v. Donato, 269 F. Supp. 921 (E.D. Pa.),} \textit{aff'd,} 379 F.2d 288 (3d Cir. 1967).
Whether Dog Sniffing Constitutes a Search

The second line of analysis, followed in Venema, is that the use of the dogs' olfactory process is not a physical search. According to the reasoning of the court, the dog was not searching the defendant's rented locker, but was merely examining the air outside the locker. This view cannot be reconciled with previous cases which have held that the use of magnetometers and x-ray machines constitutes a search under the fourth amendment. It is difficult to distinguish between the use of dogs and the use of a magnetometer or x-ray; both are nonhuman means to detect the contents of a closed area without physical entry. Judge Mansfield, in his concurring opinion in Bronstein, offered this comparison:

There is no legally significant difference between the use of an x-ray machine or magnetometer to invade a closed area in order to detect the presence of a metal pistol or knife, and the use of a dog to sniff for marijuana inside a private bag.... The magnetometer ascertains whether there is metal in the hidden space by detecting changes in the magnetic fields surrounding the area of the hidden space. The dog uses its extremely sensitive olfactory nerve to determine whether there are marijuana molecules emanating from the hidden space.

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563 F.2d at 1007-08.

See, e.g., United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972), cert. denied, 406 U.S. 947 (1973). A magnetometer, used primarily at airports, is a device that is activated solely by metal on the person of the passenger. It can be activated by a mass approximating a .25 caliber pistol. See United States v. Albarado, 495 F.2d at 802, 805.

The x-ray devices, now in use at most major airports, are used to detect weapons in carry-on baggage. See, e.g., People v. Fritschler, 81 Misc. 2d 106, 364 N.Y.S.2d 801 (1975). The same rationale behind the magnetometer cases has been used to uphold the use of these devices.

These courts have held that the use of these machines is reasonable in light of the circumstances present in an airport. See, e.g., United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974): "The absolutely minimal invasion in all respects of a passenger's privacy weighed against the great threat to hundreds of persons if a hijacker is able to proceed to the plane undetected is determinative of the reasonableness of the search."

Judge Mansfield disagreed with the majority, holding that no search was conducted. He believed that the agents' actions did constitute a search, but were reasonable considering the circumstances of the case. United States v. Bronstein, 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring), cert. denied, 424 U.S. 918 (1976).

See 521 F.2d at 464 (citations omitted). The majority opinion tried to distinguish the use of magnetometers and dogs by pointing out that the use of drug detecting dogs is more selective in that they are trained to smell only the prohibited item such as marijuana; therefore, only guilty persons are searched further. The majority claimed that the magnetometer may be set off by the presence of such "innocuous objects as lockets, key chains, combs or coins." Id. at 482 (majority opinion). Such an argument has some merit. See Note, Constitutional Limitations on the Use of Canines to Detect Evidence of Crime, 44 FORDHAM L. REV.
The drug detecting dogs can be trained to such a high degree of accuracy in detecting the scent of marijuana that, although they are living creatures, they resemble "finely tuned machines," indistinguishable in substance from magnetometers, x-ray machines or bugging devices. Judge Mansfield realized this and noted that the essence of any search is the intrusion into a closed area otherwise insulated from human view or smell. The use of dogs to detect marijuana comes under this definition, just as does the use of magnetometers to detect metal, and therefore, should be considered a search and be subject to the limitations of the fourth amendment.

Therefore, despite the holdings of several courts, dog sniffing is a search for purposes of fourth amendment analysis. Because students maintain an expectation of privacy both as to their person and their

973, 986 (1976). The argument falls short, however, because it fails to consider the potential for false alerts. A trained dog reacts only to the scent—not the presence—of marijuana. Therefore, it is possible that the dog may alert to a lingering scent in an area from which marijuana has been recently removed. See notes 138-41 & accompanying text infra. Thus, a police officer who, on the basis of a dog's false alert, conducts an extensive search, invades the privacy of a person who, although connected in some remote way to the use of marijuana, is innocent. Trained dogs are very accurate, however, and the frequency of false alerts is minimal. See Savage, Drug Detector Dogs, ALL HANDS, August, 1973, at 47. Yet the degree of accuracy is irrelevant to whether the use of dogs is a search; it is only relevant in determining whether a search is reasonable in light of the surrounding circumstances. See Judge Mansfield's approach to the problem in United States v. Bronstein, 521 F.2d 459, 464 (2d Cir. 1975) (Mansfield, J., concurring), cert. denied, 424 U.S. 918 (1976). See also notes 58-60 & accompanying text supra.

Comment, supra note 1, at 416.


Virtually all the commentators take the view that the use of the dogs should be considered a search under the fourth amendment. See, e.g., 1 W. LAFAVE, SEARCH AND SEIZURE § 2.2(f) (1978) (quoting the opinion of Judge Mansfield and arguing that the use of dogs should be considered a search even though such searches may be allowed upon a showing of less than probable cause); Peebles, The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs, 11 GA. L. REV. 75 (1976); Note, The Detection of Marijuana by Trained Dogs, 2 U. DAYTON L. REV. 149 (1977); Note, supra note 62; Note, Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment, 1977 U. ILL. L.F. 1167.
lockers," an intrusion into those protected areas without a showing of probable cause is unconstitutional. The dogs are indistinguishable in function from magnetometers, x-ray machines or bugging devices. Use of those devices has been repeatedly held to constitute a search for purposes of the fourth amendment. To hold otherwise is contrary to and irreconcilable with those cases, some of which were decided by the Supreme Court. The use of dogs without a showing of probable cause in a public school is an unwarranted intrusion into areas where students maintain expectations of privacy. The use of dogs is therefore subject to constitutional scrutiny and must meet the standard of reasonableness mandated by the fourth amendment.

**COMPETING STANDARDS IN TESTING REASONABleness**

Even if the use of dogs is a search under the fourth amendment, it can still be sustained if it is "reasonable." Under traditional search and seizure doctrine, a search is reasonable if it is based on probable cause. The standard for probable cause is met when known facts and circumstances are sufficient in themselves to lead a reasonably prudent person to believe that an offense has been or is being committed. The probable cause test is an objective one and is approached from the vantage point of a reasonable police officer guided by his experience and training.

Courts do not always require this strict criminal law standard of probable cause to be met. There are several categories of situations in which a lesser standard is applied. Under this standard, the searching party

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67 See notes 48-55 & accompanying text supra.
68 See notes 56-66 & accompanying text supra.
70 See notes 22-25 & accompanying text supra.
74 The less strict standard has recently been used in deciding the validity of school searches. See notes 79-103 & accompanying text infra. It has also been applied in other cases where policy considerations militate against the use of the stricter probable cause standard. For example, in border searches, the vital national interest in preventing illegal entries and narcotic smuggling is considered so important that the probable cause standard should not be required. See, e.g., United States v. Ramsey, 431 U.S. 606 (1977); Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967); Alexander v. United States, 362 F.2d 379 (9th Cir. 1966). In searches involving industries which are closely regulated by the government, the courts reason that businessmen enter the industry with the knowledge that their inventory records will be subject to inspection by the government. See, e.g., United States v. Biswell, 406 U.S. 311 (1972) (retail store selling firearms was searched
would only be required to show that he had a "reasonable suspicion" that an offense has been or is being committed. Although the precise definition of a "reasonable suspicion" has not been formulated, it is generally satisfied if the searching party has a reasonable belief "that criminal activity may be afoot."\(^7\)

Courts have applied the reasonable suspicion standard in deciding cases involving traditional searches conducted by school officials\(^8\) and in cases involving searches conducted with the use of dogs in settings other than schools.\(^9\) However, it is inappropriate to draw together these precedents in determining which standard should be applied when a dog search is conducted in a public school. As previously discussed, the use of dogs in the school constitutes a search under the Fourth Amendment and is subject to the limits of that amendment.\(^{10}\) Furthermore, even if the use of dogs is a search, the rationale offered in other cases which have applied the less strict standard is not relevant when dogs are used in schools because criminal evidence is not sought and because the use of the canines creates a greater potential for the infringement of privacy rights.

**DOE AND OTHER SCHOOL CASES**

In cases involving school searches, the more lenient standard of rea-
sonable suspicion has generally been applied. A balancing approach is used, comparing the invasion of the student's rights with the school administrator's need to protect and preserve a productive school environment. In striking this balance, courts have concentrated on weighing the danger of the suspected conduct against the student's right to privacy and the "need to protect them from the humiliation and psychological harms" associated with the search.

Another factor considered in the balance is the distinction between searches conducted for school administrative purposes and those conducted for law enforcement purposes. If the police conduct the search to further their own criminal investigations, the strict standard of probable cause is applied; but, when school officials conduct the search for school regulatory purpose, only a reasonable suspicion is required. The relationship between a school administrator and a student is different from the relationship between a police officer and a suspected criminal. In Moore v. Student Affairs Committee, the court stressed that the competing interests of both the student and the school administrator must be protected. Therefore, to protect both the student's right of

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79 See, e.g., M. v. Board of Educ. Ball-Chatham C.U.S.D. No. 5, 429 F. Supp. 288, 292 (S.D. Ill. 1977) (the less strict standard should be used because no police were involved); Picha v. Wielgos, 410 F. Supp. 1214, 1220-21 (N.D. Ill. 1976) (distinguishing between searches that do and do not involve the police, noting that the strict standard of probable cause is required when the police are involved); State v. Young, 234 Ga. 488, 495, 216 S.E.2d 586, 593-94 (1975) (reasonable suspicion standard will pass constitutional muster only if school officials are acting in their proper capacities and the search is free of involvement by law enforcement personnel); State v. McKinnon, 88 Wash. 2d 116, 120, 558 P.2d 781, 784 (1977) (noting that high school principal is not a law enforcement officer, and should not be held to meet the probable cause standard in conducting school searches). See also People v. Bowers, 72 Misc. 2d 800, 339 N.Y.S.2d 783 (1973). In that case a search was conducted by a uniformed security guard who was employed by the school board rather than the police department. The court held that the guard was "cloaked with police powers" and therefore the scope of his actions was limited by the fourth amendment. Id. at 802, 339 N.Y.S.2d at 786.


82 Id. at 730.

The [college to student] relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student. A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a "waiver" of that right as a condition precedent to admission. The college, on the other hand, has an "affirmative obligation" to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process.

Id. at 729 (footnotes omitted).
privacy, and the university's interest in maintaining a productive, drug-free atmosphere in the dormitories, the court applied the reasonable suspicion standard.\footnote{Id. at 730.}

The distinction between these searches and those that are conducted for law enforcement purposes was made again in \textit{Piazzola v. Watkins},\footnote{316 F. Supp. 624 (M.D. Ala. 1970), aff'd, 442 F.2d 284 (5th Cir. 1971).} which arose out of the same dormitory search conducted in \textit{Moore}.

However, the dormitory room search in \textit{Piazzola} was held to be unconstitutional. The court in \textit{Piazzola} distinguished the search from \textit{Moore} because it did not pertain to the "special relationship" between the school and the student.\footnote{Both \textit{Piazzola} and \textit{Moore} involved the same general dormitory search conducted by university officials and narcotic agents. Six or seven dormitory rooms were searched during the general inspection. The searches in \textit{Piazzola} and \textit{Moore} involved different rooms. In \textit{Moore}, the student whose room was searched was seeking reinstatement as a student in good standing. 284 F. Supp. at 727. In \textit{Piazzola}, two students whose rooms were searched were seeking habeas corpus relief. 316 F. Supp. at 624-25. Judge Johnson of the Middle District of Alabama wrote both opinions.} The special relationship was tainted because the police initiated the search for the sole purpose of gathering incriminating evidence against the defendants for use at a criminal trial.\footnote{Id. at 626-27.}

The interests behind the \textit{Piazzola} search were not limited to those held by the school and the student, but included those of the police authorities. The court held that when a search furthers the interests of the police, it must be subjected to the traditional strict standard of probable cause.\footnote{Id.}

The court in \textit{Piazzola} recognized a potential infringement of students' rights in allowing too much police participation in a search conducted primarily by school authorities. A search conducted with extensive police involvement furthers the interests of the police to such an extent that it overshadows the stated school regulatory purpose behind the search.\footnote{[A] student . . . must yield [his rights] to the extent that they would interfere with the institution's fundamental duty to operate the school as an educational institution. This distinction is not one of form over substance. The distinction lies in the "special relationship" existing between the college and the student and the purposes for which the search is conducted.} \textit{Piazzola} and similar decisions, therefore, have attempted to distinguish school searches involving regulatory interests from those involving police interests; the latter require the application of the traditional standard of probable cause.\footnote{Id. at 628.} Student searches based on less than...
probable cause are permitted in order for school officials to realize administrative interests, such as the extirpation of marijuana use in the school. Police interests in arresting drug users, however, do not justify the use of the less strict standard, and any investigatory procedures used to achieve those interests must be tested under the traditional standard of probable cause. In making this distinction between police and administrators, these courts have denied the police officers the power to achieve their investigative interests by conducting searches which, if conducted outside the school environment, would be in violation of the fourth amendment.\(^3\) If the distinction were not made, police officers would be able to use the school search as an investigative tool which is not subject to the traditional limitations of the fourth amendment. They would be obtaining evidence upon a "silver platter"—a practice long ago invalidated by the Supreme Court.\(^4\)

Although recognizing the significance of the distinction, courts find it very difficult to differentiate between regulatory and criminal searches in schools.\(^5\) The Moore and Piazzola cases typify the problems of trying to quantify what degree of police participation changes a regulatory school search into a criminal school search. In searches involving dogs, the problems are magnified to such an extent that it cannot be meaningfully determined whether a particular search was conducted for the purpose of furthering the school's interests or those of the police department.

Extensive police involvement is likely to be needed by school officials in conducting a dog search. Police are often involved in school searches when it is unlawful to possess the item sought\(^6\) and the need for extra manpower in dog searches will demand even greater police assistance.\(^7\) It is also probable that the dog handlers and trainers are police officers.\(^8\) Additional police officers may be needed to assist the school

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\(^3\) Outside the school, the police officers would be required to meet the standard of probable cause. See note 71 & accompanying text supra.

\(^4\) The "silver platter" theory was invalidated in Gambino v. United States, 275 U.S. 310 (1927). Prior to Gambino, state officers were not subject to the limitations of the fourth amendment and were, therefore, permitted to give evidence discovered in searches, which would have been unconstitutional if conducted by federal officers, to federal officers to be used in a federal prosecution.


\(^6\) See, e.g., Picha v. Wielgos, 410 F. Supp. 1214, 1219 (N.D. Ill. 1976) (principal called police after he received a tip from a caller concerning two students); Mercer v. State, 450 S.W.2d 715, 721 n.3 (Tex. Civ. App. 1970) (principal of school met with city police department on weekly basis).

\(^7\) Approximately 40 police officers took part in the dog search in Doe. Plaintiffs' Memorandum, supra note 15, at 8. There has not been such a degree of police involvement in previous school cases.

\(^8\) This was not necessarily true in Doe, although the occupations of the dog handlers were not described in detail. The owner and operator of the dog academy which provided the dogs, and coordinator of the search, was a "sworn, non-paid and non-uniformed Deputy
authorities in identifying the various types of contraband discovered. Despite extensive involvement by the police in Doe,99 the court held that the dog search was solely for school administrative purposes.100 The court did not consider the extensive police involvement as significant because the police agreed not to use the dogs to further their own investigative interests, nor prosecute any student found in possession of drugs during the search.101

The existence of an agreement not to prosecute should not be dispositive of whether the search should be considered to serve administrative or criminal investigatory purposes because the mere existence of an agreement not to prosecute does not remove the criminal stigma caused by the search. Even if the police do not prosecute, the implicated students may be vulnerable to future police harassment or put under surveillance outside the school environment.102 Police officers could also make threats of subsequent prosecutions in order to coerce a student to implicate others using drugs. A dog search conducted in the presence of police officers provides the police department with names and descriptions of several likely marijuana users in the community. Access to this

Sheriff of Miami County, Indiana.” 475 F. Supp. at 1017. The occupations of the handlers ranged from “[a] housewife to deputy county sheriffs.” Id. at 1017 n.7. However, the court did not attach any significance to the fact that several dog handlers were police officers. It held that none of those police officers were actively engaging in their occupation while participating in the dog search at the school.

The occupations of the dog handlers in Jones were not described. The dogs were provided by Security Associates, Inc., a private corporation. See 499 F. Supp. at 228. A uniformed police officer accompanied each of the six canine teams, which consisted of a school administrator or teacher, the dog and its handler. Uniformed police officers also were present in the hallways of the school throughout the investigation. About 40 officers took part in the search. 475 F. Supp. at 1016.

Because those [school] administrators now acted with assistance from a uniformed officer does not change their function. The officers were merely aiding in the inspection, at the request of the school administrators. Their presence does not change the actions of the school official[s] from that of supervision ... to that of an unwarranted search.

Id. at 1020.

101 The validity of the actual agreement between the police and school administrators is questionable. Technically, only the county prosecutor can guarantee immunity from prosecution. Mays, Who Says Students Have Rights?, STUDENT LAW., February, 1980, at 17. No prosecutions arose from the search in Doe, but it is possible that in future cases that involve such an agreement, the police officers may feel obligated to bring charges where much more marijuana is discovered than expected, thus implicating the student as a dealer.

102 See Rotenberg & Sayer, Marijuana in Houston High Schools—A First Report, 6 Hous. L. REV. 759, 778 (1969). The Houston police department often stopped an automobile filled with teenagers, using as a pretext some minor traffic violation. “The minor traffic arrest is subject to obvious abuse by the police: a stretching of the facts so as to legitimate a search; and harassment of law abiding citizens.” Id. Such action could be directed at students implicated or found in possession of marijuana at school.

Another practice was the use of parents to “spy” on their own children. Id. at 779. In Doe, therefore, although the police agreed not prosecute, the use of the dogs can be an important starting point in a major drug abuse investigation.
type of information would be much more difficult to acquire if the police were subject to the strict standard of probable cause under which they normally must operate. However, when dogs are used in an indiscriminate manner under the guise of a school regulatory search, the police are able to obtain incriminating evidence easily and efficiently at the expense of the students' fourth amendment rights.\textsuperscript{103}

\textit{Administrative Search Theory and School Searches}

Even if school officials are able to conduct the dog search without the assistance of the police, the increased invasion of students' privacy and the greater potential for unwarranted injury to their reputations are additional factors that distinguish a school dog search from other school searches. Although most lower courts which have dealt with school searches have only treated these factors in a cursory manner, the Supreme Court has addressed similar factors outside the school context. In \textit{Camara v. Municipal Court},\textsuperscript{104} the Supreme Court held that a city housing official must secure a search warrant before making a residential housing inspection for administrative code violations.\textsuperscript{105} However, the Court stated that the warrant may be obtained upon a showing of a quantum of evidence that is less than that required to meet the traditional standard of probable cause.\textsuperscript{106} The rationale behind the Court's application of the more lenient standard is that an administrative inspection of a residence is unlike an indiscriminate search through a citizen's personal belongings looking for incriminating evidence. Therefore, the tests in determining the validity of these searches should be more permissive.\textsuperscript{107} The Supreme Court's justification for using the lesser standard in \textit{Camara} was that the governmental interest in enforcing occupancy violations is more deserving of protection than the minimally affected fourth amendment rights of the homeowner.\textsuperscript{108} This justifies a balancing approach, weighing the "need to search against the invasion which the search entails."\textsuperscript{109} Several courts, noting the similarities between administrative searches and school searches, have followed \textit{Camara} and have utilized a balancing approach in determining the validity of searches conducted in the school environment.\textsuperscript{110}

\textsuperscript{103} It seems intuitively clear that it would be more expensive and involve a greater number of man hours to conduct the major type of investigation needed to acquire the amount and type of information discovered in \textit{Doe}.


\textsuperscript{105} Id. at 534.

\textsuperscript{106} Id. at 534-35, 538.

\textsuperscript{107} Id. at 535.

\textsuperscript{108} Id. at 537-39.

\textsuperscript{109} Id. at 537.

The Degree of Intrusion Factor

A significant factor in the balancing approach used in Camara and in prior school cases has been the degree of intrusion created by the search.\(^{111}\) The Supreme Court in Camara considered the housing inspection to be much less intrusive than the typical search in the criminal procedure context because the former is "neither personal in nature nor aimed at the discovery of evidence of crime."\(^{112}\) Typical housing inspections involve an examination of plumbing, heating or electrical systems and do not require rummaging through a homeowner's personal effects and papers. They are generally conducted during the day and in a non-coercive, business-like manner and are, therefore, less likely to arouse the suspicions of neighbors or friends.

Similarly, the conventional searches conducted by school officials in a public school environment, although personal in nature, are often less intrusive than those conducted by law enforcement officers upon suspected criminals. The school searches are generally conducted in the privacy of the principal's office, and the students are often summoned to the office in a neutral manner, so that the purpose is not apparent to other students.\(^{113}\)

However, the use of dogs in school searches departs from the less coercive atmosphere of Camara and the usual school cases. In Doe v. Renfrow,\(^{114}\) unlike Jones v. Latexo Independent School District,\(^{115}\) uniformed police officers led dogs around the school halls and through each classroom, indiscriminately sniffing each student.\(^{116}\) A positive reaction\(^{117}\) by a dog implicated a student not in the privacy of a prin-

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111 See, e.g., 387 U.S. at 537; note 113 & accompanying text infra.
112 387 U.S. at 537.
116 Id. at 228; 475 F. Supp. at 1016-17.
117 The presence of the dogs may be frightening to some of the more sensitive children. A positive reaction is likely to frighten anyone. Each dog reacts differently, but they generally snarl, bark, whine or paw at the area of the scent. Comment, United States v. Solis: Have Government's Suppersniffers Come down with a Case of Constitutional Nasal Congestion?, 13 SAN DIEGO L. REV. 410, 415 (1976). However, in one case the dog reacted "by growling, barking, biting... and scratching" at the area of the scent. People v. Evans, 65 Cal. App. 3d 924, 929, 134 Cal. Rptr. 436, 442 (1977); cf. Jones, 499 F. Supp. at 233 (evidence indicated that the dog "slobbered" on one child in the course of the search and had previously been trained as an attack dog).
cipal's office, but in front of his peers. The student would then be required to empty his pockets in the presence of his classmates. Thus, the dog search is more "stigmatizing" in that it singles out a particular student as the object of official suspicion.

The dog search not only tends to stigmatize the student violators, but also has the potential to do the same to innocent students. In *Doe*, the dogs alerted to fifty different students, yet only seventeen were found to possess marijuana. Although the other thirty-three students apparently did not possess drugs, they were subjected to an unpleasant experience which was damaging to their reputations in the school and in the community.

The Lack of Alternatives Factor

In addition to the less intrusive nature of an administrative search, the Court in *Camara* noted that housing authorities must be permitted to make residential inspections upon the less strict standard because application of the higher standard would place an unreasonable burden upon the ability of city agencies to maintain minimal standards of health, occupancy and fire prevention. The Court stated that there were no other techniques available which were able to "achieve acceptable results" in enforcing housing regulations. The rationale behind this factor is that in certain exigent circumstances an infringement of a person's rights should be permitted, but only when the least intrusive method is utilized. In light of this consideration set forth in *Camara*, decisions involving school searches have justified an infringement upon students' rights because the infringement is inevitable in order to combat the drug abuse problem.

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118 Doe, 475 F. Supp. at 1022.
119 Cf. 3 W. LAFAVE, supra note 66, § 10.11(b), at 462 (school searches less stigmatizing than criminal searches because usually conducted in principal's office).
120 475 F. Supp. at 1017. In addition two students were found in possession of drug paraphernalia.
121 Although the dogs alerted to some students who did not have marijuana on them, the dogs may have been picking up a "dead scent." See notes 138-41 & accompanying text infra.
122 The potential danger to a student's reputation was addressed in Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973). The court held that a drug control program designed to identify potential drug abusers in a junior high school was unconstitutional in that it invaded the children's right of privacy. One reason was that a reputation as a drug abuser can be very harmful to the child. The court stated: "There are many opportunities for a child to suffer insurmountable harm from a labeling such as 'drug abuser' at an age when the cruelty of other children is at an extreme." Id. at 920.
123 387 U.S. at 523.
124 Id. at 537. "There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures." Id. at 535-36 (footnote omitted).
125 See, e.g., State v. Young, 234 Ga. 498, 218 S.E.2d 556 (1975) (school officials should be allowed to make immediate, effective searches to prevent disturbances); People v. D., 34
It is unlikely that an indiscriminate use of marijuana detecting dogs is the only technique available which would achieve acceptable results in combating the drug problem. It is also unlikely that the use of dogs is as effective as conventional methods to control a school's drug problem. The use of marijuana detecting dogs will not control the overall drug problem if the dogs are unable to detect the presence of other often used drugs, such as alcohol and amphetamines. The use of dogs may deter students from bringing marijuana into the school building, but will do very little to deter student use of the drug in the schoolyard or away from school. Also, the use of dogs may implicate those students who merely are experimenting with the drug while allowing more sophisticated student drug dealers, who do not store the contraband in their lockers, to go unsuspected. The use of dogs to detect marijuana will at best provide a short-term solution; it will not appreciably lessen the underlying problems of student ignorance about drugs, and peer pressure to use drugs, nor will it eliminate sources of drugs in the community.

Despite its approval of the less strict standard in upholding administrative searches, the Camara decision sought to preserve a citizen's rights by allowing a minimal invasion of his privacy only as a last resort. A dog search in a public school cannot be rationalized under Camara because it is more intrusive than the typical principal-student confrontation and because the use of dogs is not essential in conducting an effective school drug abuse program.

The extensive involvement of the police and the intrusive nature of the dog search creates a situation different from those addressed by other courts deciding on the validity of school searches. The rationale

N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974) (held search unconstitutional, suggesting alternative: school should put suspected student under closer surveillance for a couple of days before search); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (1971) (noting that rigid standard of probable cause should not be imposed on school official expected to effectively supervise students); State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977) (maintaining school discipline often requires immediate search without procurement of search warrant based on probable cause).

Professor LaFave argues otherwise that the traditional probable cause standard can be just as successful in achieving acceptable results as the more lenient reasonable suspicion standard. 3 W. LaFave, supra note 66, § 10.11(b).

128 See Camara, 387 U.S. at 523.
129 There was no showing in Doe that the indiscriminate use of marijuana detecting dogs was the only means adequate to combat the drug problem. There were reported instances of drug use and possession prior to the search. Thus, school officials must have used some type of procedure to detect the use of drugs in the school. The court did not state why the current procedure was inadequate nor why other programs were not considered. 475 F. Supp. at 1015-16.
130 Dogs may be trained to detect odors of drugs other than marijuana. See Savage, supra note 62, at 47. There was no indication in Doe that any of the dogs were certified to detect any drug other than marijuana.
131 See notes 113-22 & accompanying text supra.
behind these more conventional school cases is that there is a special relationship between the student and the school administrator because each has valid interests that must be recognized by the courts. Thus, courts have attempted to formulate a standard that protects students from intrusive and unwarranted searches, but which does not place an impossible burden upon the duty of the school administrator to maintain a productive and drug-free high school environment. In contrast, when trained dogs are utilized, the special relationship between the student and the school breaks down because the interests of the student are given only minimal attention. Although the dog search may be conducted primarily by school officials and despite the existence of an agreement not to prosecute, the harmful effects which accompany a criminal search are still present. The dog search is indiscriminate and potentially stigmatizing for both innocent and guilty students. Upholding dog searches based upon only a reasonable suspicion endorses a very intrusive dragnet despite the absence of any proof that the use of dogs is essential in combating the drug problem in high schools.

**DOE AND OTHER DOG SEARCH CASES**

The few courts that have considered the utilization of dogs to be a search, have upheld the utilization upon the less strict standard of reasonable suspicion. Other courts, even though they have refused to label the use of dogs a "search," have required the showing of some evidence of prior suspicion.

The rationale in applying the less strict standard in these cases is that the use of dogs is a reliable yet fairly unintrusive means to search for illegal drugs. Implicit in this rationale is a judicial reluctance to preclude the employment of a highly effective and "useful law enforcement tool." These courts do not want the rigid standard of probable

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See cases cited note 66 supra.

See, e.g., People v. Furman, 30 Cal. App. 3d 454, 457, 106 Cal. Rptr. 366, 367-68 (1973) (dog's positive reactions corroborated an informant's tip); People v. Campbell, 67 Ill. 2d 308, 317, 367 N.E.2d 949, 954 (1977) (use of trained dogs to corroborate information already received acceptable under the fourth amendment).

See, e.g., People v. Campbell, 67 Ill. 2d 308, 317, 367 N.E.2d 949, 953 (1977): "The use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation or even inconvenience to the innocent citizen."

United States v. Solis, 536 F.2d 880, 882 (9th Cir. 1976). In State v. Elkins, 47 Ohio App. 2d 307, 354 N.E.2d 716 (1976), the court considered the options a police officer has to follow up an unspecified tip:

Obviously, merely searching the package or breaking into the trailer is prohibited. Conceivably, had the trained police dog not been available, the police could have staked out the area, or followed the package in transit, utilizing perhaps hundreds of hours of police work in an effort to obtain further evidence necessary to sustain the issuance of a search or arrest warrant. Instead, the police utilized the trained police dog to obtain the further evidence necessary for procurement of a search warrant.

*Id.* at 311-12, 354 N.E.2d at 718.
cause to hamper unduly the use of a law enforcement technique which is less intrusive than a normal search.\textsuperscript{134} The standard used in determining the validity of searches should be flexible; it should be less strict for less intrusive searches. These courts imply that if held to the standard of probable cause, law enforcement officials would be unable to control effectively the smuggling of drugs. Therefore, these officials should be entitled to use a technique which is less intrusive and which is effective in controlling the illegal transportation of drugs.

This argument cannot be made in the school situation, in which administrators are not hampered by the inflexible nature of the probable cause standard and dog searches are more intrusive than conventional school searches. School administrators already exercise wide discretion in conducting student searches.\textsuperscript{135} Therefore, they, unlike law enforcement officials, are not entitled to more power and latitude in enforcing drug regulations.

Past cases involving dogs have often considered the dog's effectiveness and reliability in discovering hidden drugs as a significant factor in allowing their use.\textsuperscript{136} However, the accuracy of the canines in \textit{Doe} was far from perfect.\textsuperscript{137} The discrepancy arises because sometimes the dog

\textsuperscript{134} This view is similar to the position taken by the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), which held that a stop-and-frisk search was constitutional even though the police officer failed to show that he had probable cause to search. The Court noted that the stop-and-frisk search was less intrusive than a normal search and therefore should not be tested under the same standard. \textit{Id.} at 29-30.

\textsuperscript{135} School administrators currently possess more latitude than police officers in conducting school searches. See notes 79-103 & accompanying text \textit{supra}. To allow school administrators the use of trained dogs would give them even wider discretion. In the criminal context it is clear that police officers would not be allowed to "roam the streets at will with trained dogs or sensor instruments, detecting the odor of marijuana and arresting persons at will as a result." \textit{State v. Elkins}, 47 Ohio App. 2d 307, 313, 354 N.E.2d 716, 719 (1976). However, such unchecked power would be a reality in the school context if dogs were permitted to be used in an indiscriminate manner as they were in \textit{Doe} and \textit{Jones}.

\textsuperscript{136} This point was used in United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), \textit{cert. denied}, 424 U.S. 918 (1976), to distinguish the use of dogs from the use of magnetometers. The court said that the magnetometer search was indiscriminate and that the presence of a sufficient amount of metal would lead to a body or baggage search. On the other hand, the court noted that the trained dogs only detect marijuana, possession of which is a criminal offense. 521 F.2d at 462-63.

The ability of dogs to detect the scent of marijuana is generally unquestionable if trained properly; their sense of smell is eight times greater than a human's. Dogs have been trained to sense the presence of heroin, which emits such a faint odor that it is considered by some authorities to have no scent at all. See Savage, \textit{supra} note 62, at 47-48. The reliability of a trained dog should not be tested upon how many times he picks up a scent and how many times he fails, but should depend upon how many times he picks up a scent when the drug is not actually present.

\textsuperscript{137} The dogs alerted to 50 different students, yet only 17 were found to be in possession of marijuana. 475 F. Supp. at 1017. The mistakes did not favor the suspect. This was considered important in upholding a dog search in United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), \textit{cert. denied}, 424 U.S. 918 (1976). In explaining this factor the court in \textit{Bronstein} stated that when the dogs err they do so to the extent that they fail to pick up the scent.
reacts to a "dead scent," which lingers in the air after the marijuana has been removed. The frequency of these "false alerts" is unknown, but several reasons have been given, including ineffective communication between the handler and his dog, the dog's short attention span and the effect upon the dog created by various working conditions.

In the prior dog cases, the canines were utilized for a few minutes. In Doe, they were utilized for two and a half hours. Thus, the strain upon the dog's attention span, which may not have been relevant in other cases, is a factor that should be considered before sustaining extensive dog searches under the reasonable suspicion standard. If courts require school officials to have probable cause before they utilize the dogs, the attention span of the dogs will not be such an important factor because the search necessarily will be limited to a specific area.

A further distinction between the use of dogs in a school environment and the use of dogs outside the school as part of a criminal investigation

When such a mistake occurs, the suspect is not required to open his bags and he is permitted to go on his way unobstructed. 521 F.2d at 463. The court did not address the issue of "false alerts."


Communication is so important that, in the military, the personalities of man and dog are laboriously matched for 13 weeks. The handler must be highly perceptive of the dog's movements because even a slight hesitation of the dog may be an indication of a drug find. It is possible that an unqualified or inexperienced handler may unintentionally or otherwise cue his dog to give an alert. Id. See also Lederer & Lederer, supra note 138, at 15.

The dog handlers in Doe, although certified, were not gainfully employed as dog handlers and their previous experience with the dogs that they led around was not described by the court. Apparently, however, the dogs were owned by their handlers. See 475 F. Supp. at 1017. In Jones, the dog handler had completed a four week training program in drug detection and had approximately one year of experience handling marijuana detecting dogs. 499 F. Supp. at 229 n.3.

Id.

In addition, the dogs were used to detect marijuana in one specific area, such as a package or a piece of luggage. E.g., United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974). In a few cases, the dogs were used in an airline baggage room where the dogs discovered marijuana among numerous pieces of luggage. E.g., People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1973); People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973). The most extensive use of a dog was in an airport warehouse where the dog detected the scent of marijuana in two of 300 crates. See United States v. Race, 529 F.2d 12 (1st Cir. 1976).

For a discussion of how specific police officers or magistrates must be in finding probable cause, see 1 W. LAFAVE, supra note 66, § 3.2(e). In the context of the school, the probable cause requirement may make the use of dogs unnecessary, especially when searches of students and their lockers are involved. There may be some limited situations, however, where the dogs may be useful. See note 10 supra. In these limited situations, the probable cause requirement will force school officials or police officers to limit the search to a particular area as to which probable cause can be articulated. When dogs are used in this more discriminating manner false alerts due to their short attention span are less likely.
is that in the latter situation the amount of marijuana discovered is usually large and concentrated in one area;¹⁴⁶ accordingly, the strength of a dog's alert is likely to be greater.¹⁴⁷ When a dog reacts strongly to a scent, it is probably reacting to the actual presence of marijuana rather than to a dead scent.¹⁴⁸ However, when the amount is small and not concentrated, as in the school environment,¹⁴⁹ the dog handler may be unable to determine whether his dog's weak alert is in response to a dead scent or to the actual presence of a small amount of marijuana.¹⁵⁰

Furthermore, the question of canine reliability is more crucial in situations like Doe and Jones where the trained dogs searched individual students rather than objects or personal belongings. Decisions that have upheld prior dog searches have been justified on the ground that the search was less intrusive because it was not conducted upon individuals.¹⁵¹ False alerts in these prior cases, in addition to being less probable, would also consist only of a search through a person's baggage or some other personal belonging. However, false alerts in the school situation will lead to pat-down or strip searches,¹⁵² which are clearly more in-


¹⁴⁷ Although the relationship does not appear to be documented, there is evidence that dogs react in different degrees according to the strength of the scent. A few cases have mentioned various degrees of dog reactions. See, e.g., United States v. Solis, 536 F.2d 880, 881 (9th Cir. 1976) (dog alerting 25 yards from the source of the scent was a strong indication of the presence of marijuana); United States v. Race, 529 F.2d 12, 14 (1st Cir. 1976) (dog gave strong alert to hidden marijuana).

¹⁴⁸ See notes 138-41 & accompanying text supra.

¹⁴⁹ In the school, the marijuana is likely to be hidden in clothing, books and purses. Therefore, the amount hidden is likely to be very small. See Doe, 475 F. Supp. at 1012.

¹⁵⁰ The handler must be able to read the reactions of the dog to determine whether the dog is reacting to a dead scent or whether marijuana is actually present. See Comment, supra note 117, at 417.

¹⁵¹ See, e.g., United States v. Bronstein, 521 F.2d 459, 462-63 (2d Cir. 1975), cert. denied, 424 U.S, 918 (1976). The court distinguished the use of dogs and the use of a magnetometer, claiming that the use of dogs is less intrusive because it is "aimed not at the person but his baggage which leaked the telltale aroma." 521 F.2d at 463. See also United States v. Solis, 536 F.2d 880, 882-83 (9th Cir. 1976).


Individuals are checked by trained dogs during border searches however. See Comment, supra note 117, at 416 n.31. The validity of border searches is well-established. See note 74 supra.

¹⁵³ See, e.g., Doe, 475 F. Supp. at 1017.
trusive than any search could have been in the other cases involving dogs.

A further distinction between a dog search in a school environment and one that is conducted outside the school environment is that the dog's positive reaction provides the basis of proof for securing a search warrant. The evidence of the dog's alert could be taken to a magistrate who, if assured of the dog's reliability and past training, would issue a search warrant for a more extensive examination of the suspect's luggage or other belonging. The requirement of a search warrant before an extensive search is conducted provides a final check against searches conducted with inadequately trained dogs or handlers and searches conducted in conditions which lead to an increased potential for false alerts. Since students are not afforded the protection of this check mechanism, preservation of their privacy rights depends solely on school administrators' judgment in choosing well trained dogs and competent handlers. However, students could be protected from unwarranted intrusion due to false alerts if the probable cause standard is met before the dogs are used. In order to satisfy the strict standard, school administrators should be required to specify the room, locker or student to be searched. The dogs will be searching for an isolated scent and thus only be required to search for a minimal length of time. The use of dogs, in effect, will be limited to situations in which the dog's working conditions are ideal for detecting the scent of marijuana.

By requiring the strict standard of probable cause to be met, courts may render the use of dogs unnecessary in most situations. When the school official has probable cause to search, he does not need the trained dogs; he can conduct an extensive search by himself. The dogs would only be allowed to serve as a tool for school officials to use in conducting a search they themselves are legally able to conduct. Such a consequence is not crucial in the school situation where school officials already have

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132 See, e.g., United States v. Venema, 563 F.2d 1003, 1007 (10th Cir. 1977) (affidavit that the dog was trained and certified was legally sufficient to justify the issuance of a search warrant on the basis of the dog's alert); United States v. Race, 529 F.2d 12 (1st Cir. 1976) (issuance of warrant held valid on grounds that government laid strong foundation of canine reliability and handler expertise; cf. People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973) (no warrant issued, but the dog's reaction, supported by a foundation of reliability, coupled with an informant's tip provided the probable cause for an immediate warrantless search). See also United States v. Meyer, 535 F.2d 963 (1st Cir. 1976).

133 See notes 136-49 & accompanying text supra.

134 The rationale behind the school cases is that the issuance of a warrant in the high schools would tend to incorporate the full panoply of criminal procedures into the school system, thereby having a disruptive effect upon the educational process or causing the student psychological trauma. See In re G., 11 Cal. App. 3d 1193, 1197, 90 Cal. Rptr. 361, 363 (1970). Most courts have presumed without much explanation that a warrant is not required. Warrants have been required in some college dormitory room searches. See, e.g., Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975). See also Buss, supra note 22, at 773-76.
wide latitude under the fourth amendment in searching students. The crucial aspect behind the application of the strict standard in school dog searches is that the standard lessens the potential for false alerts caused by deficient dogs or unqualified handlers. It protects those students who are not in possession of marijuana yet use it outside of school or associate with those who do.

CONCLUSION

Using dogs to detect marijuana is a search under the fourth amendment and students subjected to the search are entitled to the amendment's protections. In determining whether to apply the reasonable suspicion or the probable cause standard in testing the validity of dog searches in public schools, courts must recognize that other cases involving schools or dogs are not adequate to protect the fourth amendment rights of students. Unlike other school searches, the dog search involves extensive police participation which makes it impossible to distinguish the school's administrative purposes from the police department's law enforcement purposes. The dog search is also more intrusive than school searches not involving dogs because the dog search is more stigmatizing and therefore damaging to the student's reputation. The accuracy of the dogs in detecting the presence of marijuana, although very high in criminal cases, is likely to be low in the school environment where the scent of marijuana is widespread. Therefore the trained drug detecting dogs, despite being useful in the criminal context, should be prohibited from the school grounds except within the strict limitations of the fourth amendment's probable cause requirement.

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156 See notes 136-49 & accompanying text supra.