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THE CONSTITUTIONALITY OF CANINE SEARCHES IN THE CLASSROOM

In recent years courts have grappled with the problem of accommodating fourth amendment principles to searches of students in public schools. In *Doe v. Renfrow*¹ the United States District Court for the Northern District of Indiana confronted the novel problem of the constitutionality of the use of dogs trained to detect marijuana as an investigative tool in classroom searches. The *Doe* court found no constitutional infirmity in the use of dogs to sniff all students in the junior and senior high schools in Highland, Indiana, nor did it find fault with the pocket searches of students to whom the dogs "alerted."² The court did, however, invalidate a nude search of a student conducted when a dog continued to alert after a search of the student's pockets failed to disclose any unlawful substance.

Principles that can consistently explain these results are notably absent from the court's opinion. The problems posed by the unique factual situation in *Doe* highlight the thorny constitutional issues which have so far been sidestepped by decisions in this area. It is unfortunate that the court did not take the opportunity presented by the facts in *Doe* to clarify these issues and to resolve them in an intellectually coherent fashion.

The facts in *Doe* are important because they distinguish the case from the clear line of precedents in state and lower federal courts throughout the country upholding warrantless searches by school officials of students or their lockers. These earlier decisions have been limited to searches of the person or possessions of individuals already suspected of possessing contraband. None has dealt with an inspection of all students in a school or with the use of dogs to sniff for the presence of illegal substances.³

¹ 475 F. Suppl. 1012 (N.D. Ind. 1979).

² "An alert is an indication of a trained canine that the odor of the drug, in this case marijuana, is present in the air or upon the individual." *Id.* at 1017 n.5.

³ See notes 29-30 & 45-53 & accompanying text *infra*. In the overwhelming majority of cases, the searches at issue have been upheld on findings of less than probable cause. See, e.g., *M. v. Board of Educ.*, 429 F. Supp. 288 (S.D. Ill. 1977) (school official who searched student's pockets on the basis of information provided by a student source had reasonable cause to believe student possessed drugs); *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972) (vice principal, who sought police assistance to conduct search of student's pockets after being informed

In response to increasingly widespread use of drugs in the junior and senior high schools in Highland, Indiana,⁴ members of the local school board suggested the use of drug-detecting canines to deal with the problem. Following a meeting with the school board, school superintendant Renfrow decided to proceed with a plan to use dogs to investigate drug use in the schools. Renfrow secured the cooperation of the Highland Police Department and of Patricia Little, an independent trainer of drug-detecting canines. The police department agreed, on the insistence of school officials, that no criminal proceedings would be brought as a result of evidence discovered during the investigation. School officials, however, did

that student had sold drugs in school and after student emptied pouch which contained \$20, acted on "good cause"); *State v. Baccino*, 282 A.2d 869 (Del. 1971) (vice principal, who searched student's coat because student was out of class without authorization and was known to have experimented with drugs, acted on reasonable suspicion); *Nelson v. State*, 319 So. 2d 154 (Fla. App. 1975) (teacher who observed two boys by a tractor shed and detected odor of marijuana acted reasonably in conducting search of their pockets); *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975) (assistant principal who observed furtive gestures on part of high school student acted reasonably in asking student to empty pockets); *Mercer v. State*, 450 S.W.2d 715 (Tex. Ct. App. 1970) (principal who searched student's pockets after receiving tip that student possessed marijuana acted within the scope of his in loco parentis authority). *But see State v. Mora*, 307 So. 2d 317 (La. 1975), *vacated and remanded*, 423 U.S. 809, *on remand*, 330 So. 2d 900 (La. 1976) (warrantless search of a student's effects by a school official who suspected the presence of marijuana violated fourth amendment). See generally Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974); Gardner, *Sniffing for Drugs in the Classroom*, 74 NW. U.L. REV. 803 (1980); Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57 (1976).

⁴ In the six-month period between September 1978 and March 1979, school officials recorded 21 instances in which students were found under the influence of drugs or in possession of either drugs, drug paraphernalia or alcohol. Thirteen of these instances occurred during a four-week period. School officials, teachers and students expressed concern about the problem because of its disruptive effect on the school, and some students indicated that they felt pressure from their peers to engage in drug use on campus. *Doe v. Renfrow*, 475 F. Supp. at 1015-16.

intend to bring disciplinary action against students found in possession of illegal drugs.

The investigation was conducted on March 23, 1979. Students in both the junior and senior high schools were instructed to remain in their first period classrooms until the investigation, which lasted about two and one-half hours, was completed.⁵ During that time, a canine team consisting of a school administrator or teacher, a dog and handler and a uniformed police officer went into each classroom.⁶ While the team was in the classroom, students were asked to remain seated with their hands and purses on their desk tops. The dog handler introduced the dog and led it up and down the aisles between the desks. The teams spent approximately five minutes in each classroom.

The dogs had been trained to "alert" when the odor of marijuana was present in the air or on an individual.⁷ Alerts occurred on approximately fifty occasions during the investigation of the Highland schools. Upon an alert, the student by whom the alert was triggered⁸ was asked to empty his or her pockets and/or purse. If the dog continued to alert, a "body search" was conducted. The opinion does not indicate where body searches were performed or by whom. They involved, however, "extensive examination of the student's clothing entailing the removal of some of the garments."⁹ Eleven students were subjected to body searches. In addition, at

⁵ Students who wished to use the washroom during the investigation were permitted to do so accompanied by an escort of the same sex to the washroom door. *Id.* at 1017.

⁶ There is some ambiguity as to how many canine teams were used and in which schools. The statement of facts indicates that a total of six teams were used; four in the high school and two in the junior high. *Id.* at 1016. However, in a subsequent section, the court stated that "[f]ourteen handlers and their dogs participated during the inspection." *Id.* at 1018.

⁷ The opinion does not discuss the distance from the odor within which the dogs will alert nor does it provide any data concerning the reliability of these particular dogs. The dogs were all trained and certified at Ms. Little's academy. Ms. Little contacted handlers to ask their assistance in the investigation. Each handler provided his own dog and participated in the investigation as an unpaid volunteer. *Id.* at 1017. Other courts have documented the reliability of trained dogs in detecting drugs. *See, e.g.,* *United States v. Fulero*, 498 F.2d 748, 749 (D.C. Cir. 1974). *See generally* Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 *FORDHAM L. REV.* 973, 986-87 (1976).

⁸ The *Doe* opinion does not indicate whether there is any ambiguity as to the source of the smell which triggers an alert. One must presume that the dog's alerting signals implicate one person and one person only, although there is no evidence discussed in the opinion on this point.

⁹ *Doe v. Renfrow*, 475 F. Supp. at 1017 n.6.

least one student,¹⁰ the plaintiff, was subjected to a nude search. When a dog continued to alert to Doe, she was escorted to the inner office of the nursing station. Two women were present, one of whom was a friend of Doe's mother. Upon inquiry, Doe denied ever using marijuana. She then was asked to undress with her back facing the two women. After her clothing was examined and her hair lifted, she was permitted to dress. No illegal substances were found in her possession. It was later learned that Doe had been playing with one of her own dogs on the morning of the search and that the dog was in heat. The reason for subjecting Doe to a nude search rather than to a body search was not explained.

During the investigation seventeen students were found in possession of drugs and two in possession of drug paraphernalia. Following the investigation several parties brought suit against School Superintendent Renfrow and other school officials under 42 U.S.C. § 1983¹¹ for violation of their constitutional rights. All party plaintiffs were dismissed except Diane Doe and her parents.¹²

I

The court separated the discussion of the constitutional validity of the investigation into four issues: (1) whether an investigatory inspection of all students initiated by school officials for the purpose of eliminating drug use within the school is a search or seizure within the meaning of the fourth amendment; (2) whether the use of drug-detecting dogs to sniff students for the presence of marijuana is a search within the meaning of the fourth amendment; (3) whether the search of a student's clothing upon the alert of a trained dog violates the student's rights under the fourth amendment; and (4) whether a nude search following a similar alert violates the student's rights under the fourth amendment.¹³

¹⁰ The opinion does not indicate whether other nude searches were conducted.

¹¹ 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹² *Doe v. Renfrow*, 475 F. Supp. at 1014-15. Class certification of all persons enrolled in Highland High School and Highland Junior High School was denied. *Id.* at 1028.

¹³ *Id.* at 1018.

In considering the first issue, the court rejected the contention that the action of school officials constituted a "mass detention and deprivation of freedom in violation of the Fourth Amendment,"¹⁴ holding that because school officials have the authority to regulate student schedules, no constitutional claim is raised by the fact that the inspection disrupted the students' ordinary class schedule.¹⁵ More importantly, the court held that "entry by the school officials into each classroom for five minutes was not a search contemplated by the Fourth Amendment but, rather, was a justified action taken in accordance with the *in loco parentis* doctrine."¹⁶ The court noted further that this conclusion was unaffected by the presence of the police officers, emphasizing that the police were present at the request of the school officials and that no police investigations or criminal proceedings resulted.¹⁷

The court treated separately the impact of the presence of the dogs on the constitutionality of the inspection and concluded that the action of the dogs in walking up and down the aisles and sniffing for the odor of marijuana also did not constitute a search within the meaning of the fourth amendment.¹⁸ The court advanced a number of perplexing arguments in support of this conclusion. It argued, first, that in the public school environment the courts have not granted full application of fourth amendment protections.¹⁹ Second, the court argued that because of the nature of public education and "because of the constant interaction among students, faculty and school administrators,"²⁰ a student's expectation of privacy in the public school setting is minimal. In addition, the court relied on precedent to support its conclusion that dog sniffs are not searches within the meaning of the fourth amendment pointing out that all five of the circuits which have considered the issue have suggested that a dog's sniff of a person's possessions is not a search within the meaning of the fourth amendment.²¹ Finally, the court engaged in a bal-

ancing process between the individual student's privacy rights and the school administrators' need to protect all students and the educational process. "Weighing the minimal intrusion [on students] against the school's need to rid itself of the drug problem, [the court concluded that] the actions of the school officials leading up to an alert by one of the dogs was reasonable and not a search for purposes of the Fourth Amendment."²²

Although the court found that the use of drug-detecting dogs to sniff children for the presence of marijuana was not a search within the meaning of the fourth amendment, it did find that a search had occurred when a particular student was asked to empty his or her pockets following a dog "alert."²³ The court concluded, however, that because the dog's alert constituted "reasonable cause to believe that the student was concealing narcotics,"²⁴ the search was reasonable and therefore no fourth amendment violation had occurred. While recognizing that the fourth amendment generally precludes searches absent a warrant signed by a neutral magistrate on a finding of probable cause, the court argued that the requirement can be modified by special circumstances, citing state court decisions that have upheld warrantless searches of students on less than probable cause.²⁵

Applying the same "reasonable cause to believe" standard, the court held that a nude search conducted following a dog alert is an unreasonable search within the meaning of the fourth amendment.²⁶ The court reasoned:

The continued alert by the trained canine alone is insufficient to justify such a search because the animal reacts only to the scent or odor of the marijuana plant, not the substance itself. . . . Therefore, the alert of the dog alone does not provide the necessary reasonable cause to believe the student actually *possesses* the drug.²⁷

trailer); the Tenth: *United States v. Venema*, 563 F.2d 1003 (10th Cir. 1977) (sniff of rented locker in storage company); and the D.C. Circuit: *United States v. Fulero*, 498 F.2d 748 (D.C. Cir. 1974) (sniff search of footlocker at port of entry). However, only *Fulero*, *Bronstein* and *Venema* unequivocally held that dog sniffs are not searches within the meaning of the fourth amendment. In *Race* and *Solis* the courts decided that the dog sniffs were reasonable under the circumstances and therefore did not violate the fourth amendment.

²² 475 F. Supp. at 1022.

²³ *Id.* at 1024.

²⁴ *Id.*

²⁵ *Id.* at 1023.

²⁶ *Id.* at 1024-25.

²⁷ *Id.* at 1024 (emphasis in original).

¹⁴ *Id.* at 1019.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1019-22.

¹⁹ *Id.* at 1020.

²⁰ *Id.* at 1022.

²¹ *Id.* at 1020-21. The circuits which have considered the issue include the First: *United States v. Race*, 529 F.2d 12 (1st Cir. 1976) (dog alert to crate in airport warehouse); the Second: *United States v. Bronstein*, 521 F.2d 459 (2d Cir.), *cert. denied*, 424 U.S. 918 (1975) (sniff search of baggage at airport); the Ninth: *United States v. Solis*, 536 F.2d 880 (9th Cir. 1976) (sniff search of semi-

II

While the analysis in *Doe* is not inconsistent with existing decisions in the area, it is unfortunate that the court did not take the opportunity presented by this novel factual situation to reassess the important constitutional issues raised by the use of dogs to sniff students in the classroom. Instead, the court relied on alternate theories which are sometimes inconsistent and other times ill-suited to the facts before it, leaving the basis of its decision opaque and the law regarding canine searches of public school students in disarray. An additional problem in the court's analysis is its failure to confront the two distinguishing factual circumstances in *Doe*: the fact that the inspection was directed at all students rather than at targeted suspects and the fact that the dog sniffs were directed at persons rather than at property. A critical review of the rationales relied on by the *Doe* court will make these problems apparent.

The court invoked the doctrine of *in loco parentis* to explain its holding that an investigatory inspection of all students is not a fourth amendment search.²⁸ That doctrine allows school officials to stand in the shoes of parents in their interactions with school children. It has been criticized because of its use as a theoretical buttress to justify actions by school officials which abrogate rights traditionally secured by the fourth amendment.²⁹ Nevertheless, many state courts relying on the doctrine have upheld the authority of school officials to search students when they have reasonable cause to believe the students possess illegal substances.³⁰ Indeed, some courts have upheld the use of police assistance to conduct such searches.³¹ But in each of these cases the school official had reasonable cause to suspect the individual student of illegal activity. *Doe* is the first case to present the question of whether the *in loco parentis* doctrine allows school officials to conduct an inspection of *all* students on the basis of a reasonable belief that *some* possess drugs. Yet the court avoided judging the general inspection in *Doe* according to tradi-

tional fourth amendment standards by holding that the entry of school officials into the classrooms to uncover drugs is not a search within the meaning of the amendment. Thus, not only has the court declined to impose greater scrutiny on generalized inspections which might be thought to raise more serious fourth amendment problems than searches based on reasonable cause, it has removed them from the scope of fourth amendment protection altogether.

One of the fundamental principles underlying the fourth amendment is that people will be left alone to conduct their affairs free from state intrusion unless their actions raise suspicions of guilt.³² Should that principle be subverted in the context of school inspections by simple manipulation of the word "search" so that it does not encompass general inspections to uncover contraband? General inspections of adults even when they are limited to a search for housing code violations rather than a search for contraband are not accorded such deference.³³ Is the doctrine of *in loco parentis* sufficiently robust to serve as the theoretical basis for denying to public school students this fundamental protection against government intrusion that is based only on generalized suspicion? The court's discussion offers no reassurance that it is.

Even more problematic is the court's treatment of the issue of whether the use of dogs to sniff students for the presence of marijuana constituted a fourth amendment search. None of the other theories that the court relied on is adequate to support its conclusion that a dog's sniff of a student is not a search. For example, the court's suggestion that courts have not granted full application of fourth amendment protections in the public school³⁴ is irrelevant to the issue of whether a dog's sniff constitutes a search within the meaning of the fourth amendment. The sniff of a person by a dog either is a search or is not, irrespective of whether the person is in or out of school.

The relevant standard for determining whether there has been a fourth amendment search was articulated by the Supreme Court in *Katz v. United States*.³⁵ *Katz* held that a search occurs where there has been an invasion of a person's "justifiable reliance" on privacy. Applying that standard, the *Katz* Court concluded that the use of an electronic

²⁸ *Id.* at 1019.

²⁹ See *Mercer v. State*, 450 S.W.2d 715, 718 (Tex. Ct. App. 1970) (Hughes, J., dissenting); Buss, *supra* note 3, at 765-68; Gardner, *supra* note 3, at 825.

³⁰ See, e.g., *M. v. Board of Educ.*, 429 F. Supp. 288 (S.D. Ill. 1977); *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972); *People v. Jackson*, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

³¹ See, e.g., *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972).

³² See *Ybarra v. Illinois*, 100 S. Ct. 338 (1979). See also Gardner, *supra* note 3, at 845.

³³ See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

³⁴ 475 F. Supp. at 1020.

³⁵ 389 U.S. 347 (1967).

monitoring device on the outside of a public telephone booth was a search within the meaning of the fourth amendment.³⁶

The court in *Doe* suggested that *Katz* was inapplicable to the facts before it because in *Katz* the action in question was undertaken by police officers whereas *Doe* involved action by school officials. One wonders whether the court really meant to suggest that what is a search when conducted by the police might not be a search when conducted by some other government official. This would indeed be a novel position. It is true that a few courts have held that a school official is not a government official sufficient to trigger fourth amendment protections.³⁷ This, however, is apparently not the *Doe* court's position, else there would be no need for its discussion of whether the action of school officials constituted a fourth amendment search.

The court, however, did not end its discussion of the justifiable expectation of privacy test by distinguishing *Katz*. The court also argued that because of the nature of public schools, students' justifiable privacy expectations while in school are minimal.³⁸ This conclusion is too facile. While it may be that students have lower expectations of privacy in school than elsewhere, it is not meaningful to conclude that the privacy interest per se is minimal in school. In balancing privacy interests against those of the school to determine the reasonableness of the search, the nature and strength of the privacy interest is crucial in school as elsewhere.³⁹ The *Doe* court itself recognizes a student's strong privacy interest in his own body, even in school.⁴⁰

The privacy interest at issue in the context of the dog sniffs is in protecting odors emanating from one's person from intentional smelling by another.⁴¹ As one commentator has suggested, this is

³⁶ *Id.* at 353.

³⁷ The fourth amendment is only applicable to searches conducted by government officials. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). For cases holding that a school official is not a government official falling within the ambit of the fourth amendment, see, e.g., *In re Donaldson*, 269 Cal. App. 2d 509, 510, 75 Cal. Rptr. 220, 221 (1969); *Mercei v. State*, 450 S.W.2d 715, 717 (Tex. Ct. App. 1970).

³⁸ 475 F. Supp. at 1022.

³⁹ See *United States v. Crowder*, 543 F.2d 312, 322 (D.C. Cir. 1976) (Leventhal, J., dissenting), cert. denied, 429 U.S. 1062 (1977); *Gardner, supra* note 3, at 848-49.

⁴⁰ 475 F. Supp. at 1024.

⁴¹ It is possible to characterize the privacy interest at issue in *Doe* differently. In fact, the court notes the lack of an expectation of privacy in "the air around the

a strong interest: "[O]ne's smells are tied closely to those bodily functions considered to be particularly intimate."⁴² Moreover, it is not an interest which is in any way diminished by virtue of the fact that one is in school. It is difficult to argue that one assumes the risk of being purposely smelled simply by entering a public school.

The court too was apparently unsatisfied with the force of this analysis, for it adopted yet another approach. It balanced and concluded that the minimal intrusion of the students' privacy was outweighed by the school officials' need to root out drugs from the school environment. Therefore, the court reasoned, there was no fourth amendment search.⁴³ It is this "therefore" that is puzzling. Under *Katz* the process of balancing the degree of intrusion of privacy against the government's legitimate need is relevant only after it has been determined that a search has occurred.⁴⁴ Balancing is directed at the issue of whether the search was reasonable, not at whether a search has occurred.⁴⁵

The court's position that a dog's sniff is not a search within the meaning of the fourth amendment is not without precedential support. In fact the court relied heavily on the circuit court decisions which have concluded that a dog's sniff is not a search.⁴⁶ But again, the court failed to deal satisfactorily with the two unique factual elements in *Doe* which make those precedents dubious authority for the court's holding.

First, in none of the previous cases was the dog's sniff directed at a person. This is a significant

[students'] desks." *Id.* at 1022. This characterization parallels that adopted by the courts which have addressed the issue of dog sniffs of objects. See *United States v. Venema*, 563 F.2d 1003, 1005 (10th Cir. 1977) (air surrounding rented locker in storage building); *United States v. Solis*, 536 F.2d 880, 882 (9th Cir. 1976) (air surrounding semi-trailer parked at rear of gasoline station); *United States v. Fulero*, 498 F.2d 748, 749 (D.C. Cir. 1974) (air surrounding foot lockers at part of entry). However, this characterization fails to capture the element of intentionality involved in the dog's sniff. It is not the air to which the sniff is directed, but the smells emanating from a particular person. Characterization of the privacy interest as an interest in the air surrounding one's person has the effect of minimizing what is likely to be subjectively perceived as intrusive of one's dignity.

⁴² *Gardner, supra* note 3, at 85.

⁴³ 475 F. Supp. at 1022.

⁴⁴ See *Katz v. United States*, 389 U.S. at 353-54.

⁴⁵ See generally *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-56 (1976); *United States v. Lilly*, 576 F.2d 1240, 1245 (5th Cir. 1976).

⁴⁶ See note 21 *supra*.

difference in light of the *Katz* "justifiable expectation of privacy test"⁴⁷ and the differing privacy interests at issue when one seeks to protect one's possessions from public exposure and when one seeks protection for smells emanating from one's person. When one's possessions are smelled, even intentionally, there is no threat to one's sense of personal dignity. This is not so clear when one's person is intentionally smelled.⁴⁸

The court purported to deal with this difference by noting that "[a]lthough each of those cases dealt with the search of objects rather than of persons... the same test of reasonableness applies."⁴⁹ Such cursory treatment serves only to blur the fine lines of distinction on which constitutional differences rest. It may be that the subjective sense that one has been demeaned by the sniff of a dog ultimately ought not to be constitutionally significant. But one might wish for some recognition of the different interests at stake in sniffs of people and of property and for careful consideration of whether those differences merit different constitutional treatment.

Second, in all but one of the existing decisions, police officers relied on prior information to direct the dogs to particular objects.⁵⁰ The *Doe* court recognized this as an important factor but argued that prior information was also present in *Doe* because school officials only decided to use dogs in their investigation after the upsurge of drug use in the schools. Therefore, the court reasoned, school officials had independent evidence that there were drugs within the school.⁵¹

This argument is simply untenable. The independent information in the earlier cases targeted particular persons or objects as suspects. That is very different from information which merely indicates that drugs are being used in the schools.

⁴⁷ See note 35 & accompanying text *supra*.

⁴⁸ See Gardner, *supra* note 3, at 850-51.

⁴⁹ 475 F. Supp. at 1021.

⁵⁰ In *United States v. Race*, 529 F.2d 12 (1st Cir. 1976), the sniff search was conducted of all baggage in an airport warehouse without advance reason to suspect the particular crates to which the dogs alerted. *But see* *People v. Evans*, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977) (Holding that an exploratory "search with canines conducted without some preknowledge or reasonably strong suspicion that contraband is to be found in a particular location is a constitutionally impermissible invasion of the suspects' reasonable expectations of privacy and consequently a violation of the Fourth Amendment." *Id.* at 933, 134 Cal. Rptr. at 441); *accord*, *People v. Williams*, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975).

⁵¹ 475 F. Supp. at 1021.

Moreover, it was precisely the kind of situation in *Doe* which the Second Circuit Court of Appeals in *United States v. Bronstein*⁵² was distinguishing when it noted that, in the case before it, independent reliable evidence of crime was available before dogs were employed. The *Bronstein* court held that no fourth amendment violation had occurred when marijuana was discovered after dogs alerted to two pieces of luggage in a group of about fifty pieces held on the conveyor belt at an airport.⁵³ In reaching this conclusion, the court indicated that its decision might have been different if no particular individual had been suspected, commenting that in the case before it, the dog "was not employed in a dragnet operation directed against all flight passengers but rather [was employed] on the basis of reliable information that reasonably triggered the surveillance employed here."⁵⁴

One is left then with the court's unsettling conclusion that the use of drug-detecting dogs to sniff students for the presence of marijuana is not a search within the meaning of the fourth amendment. But on what basis does this conclusion rest? Is it not a search because the fourth amendment does not protect public school students? Because in school there can be no reasonable expectation of privacy? Because the school's need to investigate outweighs the student's privacy interest? Or because the sniff of a person is no different than the sniff of an object and other circuits have concluded that sniffs of objects are not searches? The court did not indicate on which of these theories its decision rested.

Similar ambiguity is present in the court's holding that no fourth amendment violation occurred when a student's pockets were searched without a warrant following a dog alert. This holding was based on two premises. First, that in the context of public school searches the lesser "reasonable cause

⁵² 521 F.2d 459 (2d Cir.), *cert. denied*, 424 U.S. 918 (1975).

⁵³ 521 F.2d at 463.

⁵⁴ *Id.* Of course it might be argued that the presence of independent evidence of crime does not go to the issue of whether or not a search has occurred but to the reasonableness of an acknowledged search. Such criticism could fairly be leveled against the existing decisions in the area. But even if the inquiry is addressed to the reasonableness of the dog sniffs, assuming that a search has occurred, there is a significant difference between a search directed at persons suspected on the basis of reliable information of illegal activity and a search of a group of people some of whom are suspected of illegal activity. Under traditional fourth amendment analysis, the latter would be clearly prohibited.

to believe" standard may be substituted for the usual "probable cause" standard and second, that the warrant requirement can be modified by special circumstances such as the in loco parentis authority of school officials. Reasoning from these premises, the court found that the reasonable cause to believe standard was satisfied by the dog alert and the search was therefore valid despite the absence of a warrant.⁵⁵

The authority for these premises derives from state court decisions upholding warrantless searches on less than probable cause.⁵⁶ While such precedents indeed exist, they are contrary to the basic constitutional rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."⁵⁷ Courts are not free to balance away the interests promoted by search warrants whenever law enforcement interests are strong.⁵⁸ Unless the court in *Doe* intended to hold that school searches fall within, or are analogous to, one of the "jealously and carefully drawn"⁵⁹ exceptions to the warrant requirement, abrogation of that requirement is unjustified.⁶⁰ But the court in *Doe* did not argue that school searches fall within one of these exceptions. Instead, it argued that the student's fourth amendment privacy interest is modified by the in loco parentis authority of school officials.⁶¹ Is this, then, a holding that fourth amendment protection does not extend to public school students or rather that the school presents an additional exception to add to the catalogue of those now

exempt from the warrant requirement? The court offered no guidance on this point.

An additional puzzle left by the court's analysis is how to reconcile the holding that a warrantless pocket search conducted following a dog alert is valid under the fourth amendment with the holding that a nude search following such an alert is not. No problem would be presented had the court's analysis involved balancing the degree of intrusion into a student's privacy against the school official's legitimate need to remove illegal drugs from the school. It is certainly possible to conclude that the government's interest is sufficient to outweigh a student's interest in protecting the privacy of his pockets whereas it is not sufficient to outweigh the student's interest in protecting the privacy of his body. But this was not the court's approach. Instead the court argued that a dog alert does not constitute reasonable cause to believe that a student actually possesses marijuana because the dog reacts to the scent of the drug rather than to the substance itself.⁶² This analysis undercuts the court's earlier argument that the "alert of the dog constituted reasonable cause to believe that the plaintiff was concealing narcotics"⁶³ in her pocket. How is it possible for the dog alert to provide reasonable cause to believe that marijuana is contained in a student's pocket but not elsewhere on the student's person? In either case the dog's nose is fallible. In either case the dog may react to the lingering odor of marijuana rather than to the substance itself.

III

The use of dogs to sniff students in the classroom for the presence of marijuana raises important constitutional issues which merit serious consideration and careful resolution. With the increasing problem of drug use on public school campuses, it is incumbent upon the courts to delineate the scope of fourth amendment protection in the public schools so that school officials can deal with the problem without infringing students' constitutional rights. Perhaps future decisions will resolve these constitutional issues in a manner that affords clearer guidance to school officials struggling to find solutions which fall within the scope of ill-defined constitutional standards.

⁶² *Id.* at 1024.

⁶³ *Id.*

⁵⁵ 475 F. Supp. at 1022-24.

⁵⁶ *Id.* at 10-24.

⁵⁷ *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). The Supreme Court has yet to rule on whether the fourth amendment prohibition against warrantless searches and seizures applies to students in public schools. *See Phay & Rogister, supra* note 3, at 58.

⁵⁸ *See Mincey v. Arizona*, 437 U.S. 385, 390-96 (1978); *Zweibon v. Mitchell*, 516 F.2d 594, 628-33 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

⁵⁹ *Jones v. United States*, 357 U.S. 493, 499 (1958).

⁶⁰ *See Gardner, supra* note 3, at 823. Gardner discusses the difficulties in trying to fit school searches within the rubric of one of the well-established exceptions to the warrant requirement and concludes that none of them can plausibly support the application of lesser fourth amendment standards to school searches. *Id.* at 823-25.

⁶¹ 475 F. Supp. at 1023.