SUPPRESS OR SUSPEND: NEW YORK'S EXCLUSIONARY RULE IN SCHOOL DISCIPLINARY PROCEEDINGS

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INTRODUCTION

A high school student brings a handgun to school, concealed in his jacket pocket. He does not pass through a metal detector, and the gun is invisible from the outside. A school security guard sees the young man in the hallway, and on an impulse grabs him as he passes. The guard pats the student down and finds the gun. The guard disarms the student and calls for help; the police arrive and arrest the student.[1]

Weapons[2] and violence[3] in public schools have become a national problem. One New York City study found that during the 1992-1993 school year thirty percent of high school students brought a weapon to school.[4] In 1995-1996, 171 New York City schools were rated "unsafe" by the United Federation of Teachers.[5] In response to such statistics, school districts are hiring security guards, installing metal detectors, and implementing other security measures.[6] These meas-

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1 This scenario is based on the facts of Juan C. v. Cortines, 647 N.Y.S.2d 491, 492 (App. Div. 1996), rev'd on other grounds, 679 N.E.2d 1061 (N.Y. 1997).

2 See, e.g., The University of the State of New York et al., A Study of Safety and Security in the Public Schools of New York State 19 (1994) [hereinafter SUNY Study] (reporting that 21% of New York State students brought weapons to school during 1992-1993 school year, 15% of whom brought guns); Centers for Disease Control, 42 Morbidity and Mortality Weekly Rep. 773, 773 (1993) [hereinafter Morbidity Report] (reporting that, during 1991-1992 school year, 21% of New York City students in grades 9-12 carried weapon to school at least once during month preceding survey and 7% carried handguns).

3 See SUNY Study, supra note 2, at x (citing 36,107 violent incidents in New York State schools during 1992-1993); Morbidity Report, supra note 2, at 773 (reporting that homicide is leading cause of death among 15- to 19-year-olds in New York City). But see R. Craig Wood & Mark D. Chestnutt, Violence in U.S. Schools: The Problems and Some Responses, 97 Educ. L. Rep. 619, 620-22 (1995) (asserting that increase in school crime statistics may not reflect actual increase and describing flaws in studies reporting increase).

4 See SUNY Study, supra note 2, at 18 (reporting that 30% of New York City students brought weapons to school during 1992-1993).

5 See United Federation of Teachers, Report of the School Safety Department for the 1995-1996 School Year 1 (1996) (summarizing violence statistics).

6 See SUNY Study, supra note 2, at xi (reporting that school districts are increasing security staff, installing metal detectors, and implementing violence reduction programs in response to violence in schools); Morbidity Report, supra note 2, at 775 (stating that one-

ures have not eliminated the problem, however, and it is generally agreed that they are insufficient.[7] In the face of this perceived safety crisis, school districts, personnel, parents, and students alike may view the above scenario as a success story—an example of a quick-witted employee who saved the school community from possible violence. They may encourage more of these searches in the hope that more weapons will be revealed and removed from schools.

As an unfounded, random search, however, the scenario is also an example of a school employee's unconstitutional conduct. The guard lacked "reasonable suspicion" that the student was carrying contraband—the amount of suspicion necessary to search a student under the Fourth Amendment.[8] Therefore, in patting him down, the guard violated the student's constitutional right to be free from unreasonable search and seizure. The primary tool to deter such illegal searching is the exclusionary rule. The federal exclusionary rule excludes evidence obtained in violation of a person's Fourth Amendment rights from a criminal prosecution against that person. Many states also have state law-based versions of the rule, barring evidence obtained in violation of their constitution's search and seizure counterparts to the Fourth Amendment. The exclusionary rule precludes the gun's use in a juvenile prosecution against the student in the facts above. This Note addresses the question of whether the gun should also be suppressed in a resulting school suspension or expulsion proceeding against that same student. It considers not when a student's constitutional right against search and seizure is violated, but rather what the remedy is for an acknowledged violation. Specifically, it argues that New York courts should apply the state constitution-based exclusionary rule to school disciplinary proceedings and suggests that other states should do the same with their own exclusionary rules.

New York's First Department of the Appellate Division recently considered this question in *Juan C. v. Cortines*.[9] That court found that the exclusionary rule should have been applied to the suspension

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fourth of large urban school districts in United States used metal detectors in 1991). As of 1993, the New York City Board of Education's School Safety Division employed nearly 3000 uniformed officers. See Jeremy Travis et al., Rethinking School Safety: The Report of the Chancellor's Advisory Panel on School Safety 52 (1993).

[7] See SUNY Study, supra note 2, at xi ("[T]he current level of safety and security in the schools is not sufficient to provide an environment in which all children can learn and succeed.").

[8] Reasonable suspicion is the level of suspicion required to search a student in school. See New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (search of student by school official justified where there are reasonable grounds for suspecting that search will provide evidence of violation of laws or school rules); see also infra text accompanying notes 106-10.

[9] 647 N.Y.S.2d 491 (App. Div. 1996), rev'd on other grounds, 679 N.E.2d 1061 (N.Y. 1997).

hearing against a fifteen-year-old student in the Bronx who was illegally searched in school.[10] The court weighed the costs of exclusion against the benefits and cursorily found that, in the school discipline context, the latter outweighed the former.[11] That decision provoked much public criticism. The case was appealed to the New York Court of Appeals, which never reached the exclusionary rule issue but upheld the suspension on other grounds. The issue, however, is certain to arise again. This Note argues that when it does, the Court of Appeals should apply the state constitution-based exclusionary rule to school disciplinary proceedings. Doing so will further advance what is already a robust state constitutionalism by expanding search and seizure rights into a new area. This Note builds on the Appellate Division's ruling and attempts to fill the analytical gaps left by that court. It considers how the decision fits within New York search and seizure jurisprudence and examines more carefully than did the court the costs and benefits of applying the exclusionary rule to school disciplinary proceedings. Additionally, this Note identifies considerations unique to the school setting which should be factored into the balancing calculus and concludes that the benefits of exclusion outweigh the costs.

The Note focuses specifically on the New York Constitution because federal precedent makes clear that the federal exclusionary rule does not apply to school disciplinary proceedings. Further, because children's education is a uniquely local concern, students' rights *should* be defined by the state constitution. Other state courts, which will inevitably face the same question, should look to their state constitutions to determine whether their state exclusionary rule applies to school proceedings. Rather than blindly proceeding in lockstep with federal decisions, state courts should consider the following factors in answering this question: the existence and scope of an independent state exclusionary rule; any state law-based right to education; the background principles to that state's exclusionary rule; and other state law-based precedent that shapes the school setting and young people's rights. Those states with a broad, independent exclusionary rule, and those that have carved out their own search and seizure jurisprudence, will most likely extend the exclusionary rule to school disciplinary proceedings.

Part I of this Note briefly describes state constitutionalism—also called "new federalism,"[12]—the doctrine which encourages states to

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10 See id. at 495.

11 See id.

12 See, e.g., Shirley S. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1153 (1985) ("[Some] commenta-

grant their citizens greater protection of individual rights than the United States Constitution provides. New York is a good example of state constitutionalism, particularly in the search and seizure area. The Court of Appeals has developed a significant body of search and seizure precedent independent of recent federal doctrine, despite identical constitutional language. The New York and federal constitutions both provide that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[13]

One specific area in which the Court of Appeals has diverged from the United States Supreme Court is in cases applying the exclusionary rule to civil proceedings. Part I also compares these two bodies of case law.

Part II describes the legal context of school searches, in particular the lower standard of suspicion required to justify a search of a student in school. It then reviews the Appellate Division's *Juan C.* opinion, which set out the court's view of the relative costs and benefits of applying the exclusionary rule to school disciplinary hearings. In Part III, the Note provides a more thorough evaluation of costs and benefits, drawing on concerns previously articulated by New York courts as well as new factors to be considered. In the school search context, unique reasons support the application of the exclusionary rule to disciplinary actions: (1) school security personnel as well as teachers and administrators will be effectively deterred by exclusion; (2) school proceedings should be as free from the taint of unconstitutionality as criminal proceedings; and (3) the exclusionary rule will have a significant and far-reaching educative effect on the entire student commu-

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tors see a new federalism: the federal constitution establishes the minimum rather than maximum guarantees of individual rights, and the state courts independently determine, according to their own law[,] . . . the nature of the protection of the individual against state government.").

[13] U.S. Const. amend. IV; N.Y. Const. art. I, § 12 (capitalization and punctuation differs from U.S. Constitution in manner unimportant to interpretation). New York's constitution further provides:

> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

Id.

nity. These three reasons outweigh the exclusionary rule's central cost in this context: the risk or perception of reduced school safety. Nevertheless, they do not do so easily, and any court considering this question is under a duty to analyze carefully both costs and benefits with special attention to concerns unique to the school setting.

Underlying the argument that the exclusionary rule should apply to school disciplinary proceedings is a deeper concern. In a climate of decreasing public tolerance for both school conditions and judicial rulings suppressing relevant evidence,[14] as well as continued reduction of Fourth Amendment protections, state courts and state constitutions stand as crucial protectors of individual rights, particularly those of students. In the past, New York's Court of Appeals, like some other state courts, has willingly served as such a guardian, but not always in a principled, consistent manner. In granting greater protection under the state constitution than under the federal constitution, the court should meticulously and explicitly explain its reasoning. Doing so not only will guide lower courts, but also will serve as an example to other state courts facing this question and creating their own state constitutionalism.

I
THE EXCLUSIONARY RULE AND CIVIL PROCEEDINGS

The following Part defines state constitutionalism and briefly describes this phenomenon in the context of New York search and seizure jurisprudence. Just as some state courts have developed their own state law definitions of when a search or seizure is unreasonable, the state courts can define the scope of their own state exclusionary rules independent of the federal rule's scope. Laying the foundation for New York's divergence from federal doctrine will clarify the capacity of other states to grant similar state constitutional protections.

A. State Constitutionalism: New York's Article I, Section 12 as an Example

In his influential 1977 article, Justice William Brennan invited state courts to "step into the breach" left by the Supreme Court's increasingly cramped interpretations of federal constitutional protections.[15] Decrying the Burger Court's retreat from many of the Warren

[14] The front page of a recent *New York Post* read, "[New York City Schools Chancellor] Crew's plan to expel students with guns[:] KICK 'EM OUT OF SCHOOL." N.Y. Post, Feb. 13, 1997, at 1.

[15] William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977) [hereinafter Brennan, State Constitutions]; see also William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitu-

Court's decisions expanding civil rights and civil liberties, Justice Brennan announced that "[w]ith federal scrutiny diminished, state courts must respond by increasing their own."[16] Partly in response to this invitation, state courts revived their state constitutions as sources of protection for many individual rights. For example, after the United States Supreme Court curtailed First Amendment rights in *Lloyd Corp. v. Tanner*,[17] the California Supreme Court ruled that, under California's constitution, shopping centers are public fora in which free speech is protected.[18] And when the United States Supreme Court held that a car impounded for a parking violation may be searched,[19] South Dakota's highest court found on remand that the same search was unconstitutional under its state constitution.[20] This new federalism has developed quickly in the area of search and seizure,[21] where, after decades of handing down opinions which broadened the Fourth Amendment rights of Americans, the Supreme Court began to erode many of its most significant holdings.[22]

The legitimacy of state constitutionalism is a given.[23] The high court of any state is free to find that its state constitution affords

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tions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 548 (1986) ("[T]he [Supreme] Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach.").

16 Brennan, State Constitutions, supra note 15, at 503.

17 407 U.S. 551 (1972) (holding shopping mall to be private space and denying First Amendment right to distribute handbills therein).

18 See Robins v. PruneYard, 592 P.2d 341, 347 (Cal. 1979), aff'd, 447 U.S. 74, 81, 88 (1980) (holding that *Lloyd* does not prevent state from granting more expansive liberties than does federal Constitution).

19 See South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976).

20 See State v. Opperman, 247 N.W.2d 673, 674-75 (S.D. 1976).

21 See, e.g., State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (rejecting Schneckcloth v. Bustamonte, 412 U.S. 218 (1973), and holding that under New Jersey Constitution, for consent to search to be valid, consenting party must know she has right to refuse); State v. Ringer, 674 P.2d 1240, 1242-43 (Wash. 1983) (rejecting New York v. Belton, 453 U.S. 454 (1981), and holding that warrantless full search of car where driver has been arrested violates Washington Constitution).

22 See, e.g., United States v. Leon, 468 U.S. 897, 922-25 (1984) (finding good faith exception to constitutional requirement that valid search warrant be supported by probable cause); United States v. Watson, 423 U.S. 411, 424 (1976) (finding that search based on consent that was not fully informed is not necessarily unconstitutional); United States v. Robinson, 414 U.S. 218, 236 (1973) (allowing full search of driver arrested for traffic violation where no probable cause to suspect that he engaged in any other criminal activity existed).

23 See, e.g., People v. Scott, 593 N.E.2d 1328, 1341-42 (N.Y. 1992) ("[A]s the primary guardian[s] of the liberty of the people . . . [we] have the power to interpret the provisions of our State Constitution as providing greater protections than their Federal counterparts." (second alteration in original) (citing Massachusetts v. Upton, 466 U.S. 727, 739 (1984) (Stevens, J., dissenting))); id. at 1347 (Kaye, J., concurring) (stating that rejecting Supreme Court precedent and opting for greater safeguards as a matter of state law is "perfectly respectable and legitimate").

greater protection than the federal Constitution.[24] This is true because the federal Constitution was designed to set the minimum rights available to all Americans: it is a floor, not a ceiling. Thus, while states cannot take away rights, they may grant additional or greater rights.[25] They may do so directly by enumerating provisions not included in the federal Constitution, for example, an explicit right to privacy[26] or a right to education.[27] But even where language is identical to that of the federal constitution, a state court may find that a state constitutional provision creates rights beyond those recognized in the parallel federal provision. By relying on unique aspects of the document's text or history, as well as state traditions or precedents, a state court may deviate from federal interpretation of the same words.[28]

The Founders predicted that states would supplement the federal Constitution with robust state constitutions that would provide the bulk of protection for individual rights.[29] These predictions were mistaken, however, and for more than a century the major decisions about individual rights were based on the federal Constitution.[30] New York was no exception. For many years, the New York Court of Appeals and lower courts primarily interpreted the federal constitutional provisions; where a party raised a state constitutional issue (which was

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[24] See Michigan v. Long, 463 U.S. 1032, 1041 (1983) (holding that where state court decision "clearly and expressly" indicates that it rests on independent state law grounds, Supreme Court will not review decision).

[25] It is theoretically possible for states to enumerate *fewer* rights in their own constitutions, so that their behavior is controlled only by federal constitutional protections. See Peter J. Galie, Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role, 4 Emerging Issues in State Const. L. 225, 227-28 (1991) (describing "Equivalence Minus" model of state judicial review). Professor Galie points to two ramifications of this model. First, if the federal right is later stripped away, the state constitution provides no fall-back protection. See id. Second, the model encourages the Supreme Court to curtail the right in question. See id.

[26] See, e.g., Alaska Const. art. 1, § 22 ("The right of the people to privacy is recognized and shall not be infringed.").

[27] See, e.g., N.Y. Const. art. XI, § 1.

[28] See Robert M. Pitler, Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decision-Making, 62 Brook. L. Rev. 1, 234 (1996). But see James A. Gardner, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761, 818 (1992) (questioning whether, in modern day, any state is unique).

[29] See Brennan, State Constitutions, supra note 15, at 501-02 (explaining that federal Constitution was modeled on existing state constitutions, not vice versa, and that before Fourteenth Amendment's passage, state bills of rights were primary restraints on government action).

[30] See Peter J. Galie, Ordered Liberty: A Constitutional History of New York 1 (1996) ("For too long Americans have tended to identify their constitutional tradition with the U.S. Constitution and its development. This identification has fostered neglect of state constitutions . . . .").

a rare event[31]), both the party and the court often merged the state constitutional right with the federal right. As a result, during this period, no independent analysis of the state constitution in general, and article I, section 12 in particular, is to be found in Court of Appeals opinions. From its inception until 1981, article I, section 12 was assumed to provide protection coextensive with the Fourth Amendment.

In the 1981 case, *People v. Elwell*,[32] the Court of Appeals first expressly recognized that article I, section 12 provides greater protection than the parallel federal provision. Rejecting a recent Supreme Court case which altered a warrant-issuing magistrate's standard for finding probable cause based on hearsay,[33] the court noted that "to the extent that [federal precedent] may be read as imposing a less stringent test under the Federal Constitution, we decline to construe the parallel provision of our State Constitution similarly and adopt the rule set forth above as a matter of State constitutional law."[34] With this single, unexplained sentence, the Court of Appeals began what can now be called a tradition of interpreting New York's article I, section 12 more broadly than its federal counterpart.

Although the Court of Appeals did not always grant additional protection under article I, section 12, it did so on several notable occasions, sometimes explicitly[35] and sometimes *sub silentio*,[36] occasionally

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31 See Galie, supra note 25, at 237 (stating that failure to raise distinct state constitutional claim "frequently occurs"); see also Abrahamson, supra note 12, at 1158 (remarking that during 1980s, most state courts referred only to federal Constitution in criminal cases); Hans A. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 Balt. L. Rev. 379, 383 (1980) (stating that counsel does not raise state constitutional claim "most of the time").

32 406 N.E.2d 471 (N.Y. 1981).

33 *Elwell* followed the Supreme Court's former "*Aguilar-Spinelli* test." See id. at 472. Arising out of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), the *Aguilar-Spinelli* test required that where an informant provided the information relied on in a magistrate's probable cause determination, two things had to be shown: the informant's veracity and her basis of knowledge. See *Elwell*, 406 N.E.2d at 474-75. If either of these two prongs was not satisfied, probable cause did not exist and any warrant issued on that information alone was invalid. See id. This test was later replaced in Illinois v. Gates, 462 U.S. 213 (1983), where the Supreme Court adopted a "totality of circumstances" test, which allowed the strength of one of the *Aguilar-Spinelli* prongs to make up for a deficiency in the other. See id. at 230-31.

34 *Elwell*, 406 N.E.2d at 473, 477 (holding that basis of knowledge prong of *Aguilar-Spinelli* test can be satisfied only by corroboration of culpable facts or where information provided is so detailed that it must be result of personal knowledge).

35 See, e.g., People v. Johnson, 488 N.E.2d 439, 445 (N.Y. 1985) (rejecting *Gates* totality of circumstances test for warrantless arrests).

36 See, e.g., People v. Martinez, 606 N.E.2d 951, 953 (N.Y. 1992) (rejecting contention that police pursuit is not Fourth Amendment seizure).

with careful analysis,[37] but more often without.[38] Indeed, in 1986, the New York Court of Appeals decided more cases than any other state

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[37] See, e.g., People v. Scott, 593 N.E.2d 1328 (N.Y. 1992). That case consisted of a majority opinion, as well as a long concurrence, defending state constitutionalism and a strong dissent attacking the court's deviation from federal interpretation. *Scott* held that the state constitution requires a warrant for random searches of "chop shops." See id. at 1345. The United States Supreme Court had previously found that a warrant was not required under the Fourth Amendment. See New York v. Burger, 482 U.S. 691, 718 (1987).

In perhaps its clearest analysis, in People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986), the Court of Appeals set out two grounds for relying on state rather than federal constitutional provisions: interpretive and noninterpretive review. Under the former, the court looks to the language, history, and structural placement of the provision's text. See id. Under the latter, the court

> proceeds from a judicial perception of sound policy, justice and fundamental fairness . . . [and] attempts to discover, for example, any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.

Id. (citation omitted). A third ground for deviation may exist: reasoned disagreement with Supreme Court analysis. See Pitler, supra note 28, at 218-19 (describing *Scott* and People v. Keta, 593 N.E.2d 1328 (N.Y. 1992), as cases in which Court of Appeals' decision rested "on the court's belief that the relevant Supreme Court decisions were unpersuasive, and that the arguments rejected by the Court were actually the more persuasive").

[38] See, e.g., People v. Dunn, 564 N.E.2d 1054, 1057-58 (N.Y. 1990) (holding that canine sniff constituted search under New York Constitution without explaining departure from federal interpretation in United States v. Place, 462 U.S. 696 (1983)); People v. Class (Class III), 494 N.E.2d 444, 445 (N.Y. 1986) (per curiam) (holding that after traffic stop, police may not enter car to observe vehicle identification number (VIN) without probable cause or justification). In People v. Class (Class I), 468 N.Y.S.2d 892 (App. Div. 1983), the Appellate Division had ruled that a police officer may enter a lawfully stopped automobile to examine its VIN without probable cause. The Supreme Court, in New York v. Class (Class II), 475 U.S. 106, 118, 119 (1986), reversed *Class I*, finding no Fourth Amendment privacy interest in a vehicle's VIN. On remand in *Class III*, the Court of Appeals reasserted its original *Class I* holding without addressing the Supreme Court's analysis, stating summarily that absent extraordinary circumstances, the court would not change its ruling. This is a good example of the Court of Appeals taking a major jurisprudential step without providing explicit analysis to defend its move. As a result, not only is it difficult to predict the court's holding on future issues, it also makes the holding more vulnerable to attack, if only in commentary.

Professor Pitler argues that between 1985 and 1992, the Court of Appeals would sometimes accord greater protection under section 12, simply announcing that it was using a noninterpretive approach. See Pitler, supra note 28, at 191. More recently, the court has relied on these earlier cases as precedent, despite the "questionable process of their origin." Id. Thus, many recent decisions are based on analytically unsound decisions. See id. at 192-218. While Pitler's point is valid, it does not necessarily affect the analysis here. The point is that such rulings do exist to guide present and future courts, and the rulings are justifiable, even if not explicitly well-justified at the time. Cf. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 506-07 (1984) (stating that neither attorneys nor courts interpreting state constitutional provisions need explain why they choose to reject Supreme Court analysis).

court on the basis of state constitutional rights construed more broadly than their federal counterparts.[39] As a result, New York now has an extensive body of search and seizure caselaw in which the Court of Appeals has interpreted the state constitution independent of—even in opposition to—Supreme Court precedent.

The development of New York constitutionalism has been lauded by some and condemned by others. Among its critics is New York's Governor, George Pataki, who introduced a bill last year to prevent the Court of Appeals from interpreting article I, section 12 of the New York State Constitution to be more protective of individual rights than the Fourth Amendment.[40] This bill would restrict the judiciary's ability to expand individual rights by ensuring that the court proceeds in lockstep with the less protective Supreme Court when deciding search and seizure cases. While an analysis of this proposal—in particular, whether it works an unconstitutional interference with separation of powers[41]—is beyond this Note's scope, it serves as a sharp reminder that state constitutionalism is not always popular.

It is precisely because state constitutional protection of individual rights is so politically unpopular that it is also necessary, especially in the school context. This Note distinguishes between two forms of state constitutional analysis. In the more common form, in deciding a narrow, fact-specific question, the state court employs the same analytic framework as the United States Supreme Court, but reaches a different result. For example, when the Supreme Court held that a police officer may open the door of a lawfully stopped automobile to examine the Vehicle Identification Number without probable cause,[42] the New York Court of Appeals, without distinguishing its approach, summarily reached the opposite conclusion.[43] This Note will refer to this form as the "weak" form of state constitutionalism. By contrast, in the other approach, a state's high court defines a new area of protection, one which either is no longer, or has never been, protected by the federal Constitution. For example, in *Ravin v. Alaska*,[44] the

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39 See Galie, supra note 25, at 230 & n.26 (citing seven cases).

40 See George E. Pataki, Police and Public Protection Act: Closing Loopholes Law Would Crack Down on Criminals, N.Y. L.J., May 1, 1996, at S1 (describing Governor's bill to bring New York standards of admission of evidence in line with standards set by Supreme Court).

41 See, e.g., Raven v. Deukmejian, 801 P.2d 1077, 1089 (Cal. 1990) (striking down constitutional amendment that would require California Supreme Court to interpret state constitution in lockstep with federal Constitution because it would effect impermissible constitutional revision permitted only by special convention).

42 See *Class II*, 475 U.S. at 119.

43 See *Class III*, 494 N.E.2d at 445 (refusing to reach Supreme Court's result without "extraordinary or compelling circumstances").

44 537 P.2d 494 (Alaska 1975).

Alaska Supreme Court found that the state constitution protected a range of private conduct not protected by the United States Constitution, including an adult's possession of marijuana in the home for personal use.[45] This Note will refer to the second approach as the "strong" form of state constitutionalism, to reflect the degree to which that form rests on a sound conception of state constitutional guarantees rather than on a result-oriented approach to a particular issue or case before the court. This strong form of state constitutionalism is jurisprudentially most legitimate when it is supported by consistent state precedent and principles, and when it concerns an area controlled at the state level.

Applying the exclusionary rule to school disciplinary proceedings is an example of the strong form of state constitutionalism. By extending the exclusionary rule to a new class of proceedings, the New York Court of Appeals can enter an area of individual rights entirely outside the scope of federal protection: students' search and seizure rights in disciplinary proceedings. Protection of such rights is supported by precedent extending the New York exclusionary rule beyond the federal rule. Moreover, a strong state constitutionalism is appropriate here because students' rights and the educational environment are areas which are designated for state, not federal, control. States should not rely on the United States Constitution to protect students' rights; the Supreme Court has made clear that the federal role in protecting educational rights is extremely limited. In *San Antonio School District v. Rodriguez*,[46] for example, the Court rejected an equal protection claim that property tax-based school funding violated the Equal Protection Clause.[47] The *Rodriguez* Court articulated its reluctance to involve itself in "persistent and difficult questions of educational policy, an[ ] area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local

[45] See id. at 511. The court found this reading of the constitutional privacy right to be "consonant with the character of life in Alaska. Our . . . state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states." Id. at 504. The court further supported its decision with prior case law recognizing the premium placed on an Alaska citizen's control over her home. See id. at 503 & n.42 (citing to homestead exemption to execution sales, justifiable homicide defense to prevent commission of felony in home, and distinction between burglary in home and burglary elsewhere).

[46] 411 U.S. 1 (1973).

[47] See id. at 55 (finding Texas plan to be neither irrational nor "invidiously discriminatory").

levels."[48] Other decisions also emphasize the importance of federalism and states' rights in this context.[49]

In response to *Rodriguez*, many states turned to their own constitutions, which enumerated a right to education. Some of these states found that this right is violated where property tax-based systems of school funding create inferior educational settings for children in poor, urban districts.[50] These state courts guaranteed students the right not only to education but to an education of the same quality as their peers in wealthier districts.[51] Just as state courts have stepped in to provide a right to education where none exists under the federal Constitution, they can and should guarantee students full protection against unreasonable searches and seizures in school. State, not federal, courts are best equipped to address the "myriad of 'intractable economic, social, and even philosophical problems'"[52] that shape educational policy, including what remedies are available to prevent students' rights from being violated. Like decisions in the wake of *Rodriguez*, decisions excluding unlawfully collected evidence from suspension hearings allow states to shape educational goals within their borders, in accordance with local norms and values. Disciplinary schemes as well as curricula lie within state or district control.[53] Rejecting a national standard set by a remote Supreme Court, decisions that carve out additional rights for students under state constitutions reflect a healthy, vital federalism.

B. A Comparison of New York's Exclusionary Rule and the Federal Exclusionary Rule

The exclusionary rule prevents the government from introducing at trial evidence collected by an illegal search or seizure. It is a judi-

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48 Id. at 42.

49 See, e.g., Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (finding that education is traditional concern of state); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (cautioning against federal judicial interference in operation of public schools).

50 See, e.g., Brigham v. State, 692 A.2d 384, 397 (Vt. 1997) (per curiam) (holding that Vermont education system violates right to equal educational opportunities under Vt. Const. ch. I, § 68); see also Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform, 48 Vand. L. Rev. 101, 102 n.5 (1995) (citing 14 states that by 1995 had found that locally funded education systems violated state constitution).

51 See, e.g., *Brigham*, 692 A.2d at 396 ("It is . . . our paramount duty to place the means for obtaining instruction and information, equally within the reach of all." (citation omitted)).

52 *Rodriguez*, 411 U.S. at 42 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

53 See Kathleen K. Bach, Note, The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After *New Jersey v. T.L.O.*, 37 Hastings L.J. 1133, 1134 (1986) (showing that few offenders released by exclusionary rule's application are dangerous).

cial remedy that safeguards rights against unreasonable searches and seizures.[54] Originating in the Supreme Court decision, *Weeks v. United States,*[55] the federal rule was incorporated to prevent use of illegally obtained evidence at state trials in *Mapp v. Ohio*.[56] In addition, many states have created state versions of the rule.[57]

When New York's search and seizure provision was constitutionalized in 1938,[58] it did not include (implicitly or explicitly) the remedy of the exclusionary rule.[59] Nonetheless, by 1985, the Court of Appeals recognized an exclusionary rule based on the New York state constitution.[60] In *People v. Bigelow*,[61] the court rejected *United States v. Leon*,[62] the Supreme Court case establishing a good faith exception to the federal exclusionary rule. *Bigelow* involved a factual situation similar to *Leon*'s for search and seizure purposes: the police relied in good faith on a warrant later determined to be defective. Nonetheless, the Court of Appeals declined on state constitutional grounds to adopt the *Leon* exception.[63] In only one paragraph, the court asserted that

> the *Leon* rule does not help the People's position. That is so because if the People are permitted to use the seized evidence, the

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[54] See United States v. Calandra, 414 U.S. 338, 348 (1974) (noting that rule is designed to safeguard general Fourth Amendment rights through its general deterrent effect, rather than through protection of personal constitutional right).

[55] 232 U.S. 383, 398 (1914) (concluding that use at trial of papers seized by federal officials in violation of Fourth Amendment was prejudicial error).

[56] 367 U.S. 643, 655 (1961) (holding that illegally obtained evidence must be excluded from state court).

[57] Thirty-six states have state law-based exclusionary rules. See Pitler, supra note 28, at 323 app. A (listing states).

[58] Before 1938, the protection from search and seizure was statutory. New York had no Bill of Rights before 1938; rather, those rights enumerated in the federal Bill of Rights were protected by statute at the state level. See Galie, supra note 30, at 49-51.

[59] See id. at 235-36 (describing New York Constitutional Convention's consideration and rejection of state exclusionary rule).

[60] The status of a separate, constitutionally mandated state exclusionary rule has recently been questioned. Professor Pitler has persuasively argued that, despite the Court of Appeals's holdings in *Bigelow* and *Johnson*, no constitutionally mandated state exclusionary rule exists in New York. See Pitler, supra note 28, at 318-19 (concluding that, given constitutional history, it is "virtually impossible to reach a principled conclusion . . . that Article I, § 12 mandates a state exclusionary rule"). Nonetheless, even if New York's exclusionary rule was created by the Court of Appeals rather than by the state constitution, the rule unquestionably exists and must be reckoned with. Cf. Yale Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 581-85 (1983) (arguing that many constitutional doctrines and rules have been created by courts).

[61] 488 N.E.2d 451 (N.Y. 1985).

[62] 468 U.S. 897 (1984).

[63] See *Bigelow*, 488 N.E.2d at 458 ("We therefore decline, on state constitutional grounds, to apply the good-faith exception the Supreme Court stated in *United States v. Leon*.").

> exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future. We therefore decline, on State constitutional grounds, to apply the good-faith exception . . . .[64]

Many other states also have created their own exclusionary rule independent of the federal rule.[65] As *Bigelow* itself demonstrates, because New York has its own exclusionary rule, its courts are free to apply that state-based rule even in cases and areas in which they would not apply the federal exclusionary rule. This Part describes some of those areas.

1. The Scope of the Federal and New York Exclusionary Rules

Both the federal exclusionary rule and the New York rule apply to criminal prosecutions against a defendant whose rights were violated by an unconstitutional search.[66] Neither rule, however, applies to collateral criminal proceedings, such as grand jury proceedings,[67] or bars collateral use, such as for impeachment purposes.[68] Both the Supreme Court and the New York Court of Appeals determine whether the exclusionary rule applies to civil proceedings by balancing the costs of such application against the benefits.[69] The outcome of this test is not always the same under the two rules, however, because New York recognizes benefits not recognized by the Supreme Court.[70]

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[64] Id. (citation omitted).

[65] See Pitler, supra note 28, at 323 app. A (listing 36 states with state law-based exclusionary rules).

[66] See Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that illegally obtained evidence must be excluded from state court); Weeks v. United States, 232 U.S. 383, 398 (1914) (concluding that use at trial of papers seized by federal officials in violation of Fourth Amendment was prejudicial error).

[67] See United States v. Calandra, 414 U.S. 338, 354 (1974) (concluding that damage from use of exclusionary rule in grand jury proceeding outweighs benefits).

[68] See United States v. Havens, 446 U.S. 620, 627-28 (1980) (holding that defendant's statements made on cross examination reasonably suggested by direct examination is subject to impeachment by illegally obtained evidence); Walder v. United States, 347 U.S. 62, 65 (1954) (concluding that barring use of illegally obtained evidence for impeachment purposes "would be a perversion of the Fourth Amendment").

[69] See United States v. Janis, 428 U.S. 433, 454 (1976) (declining to extend exclusionary rule to federal civil proceedings since costs outweigh benefits); Boyd v. Constantine, 613 N.E.2d 511, 513-14 (N.Y. 1993) (discussing and applying balancing test in administrative disciplinary proceeding); People v. Drain, 535 N.E.2d 630, 631 (N.Y. 1989) ("This court has long recognized, therefore, that the application and scope of the exclusionary rule is ascertained by balancing the foreseeable deterrent effect against the adverse impact of suppression upon the truth-finding process." (citations omitted)).

[70] See infra Part I.B.2.

Using this balancing test, the Supreme Court has found that the federal rule generally does not apply to civil proceedings.[71] In the seminal civil proceeding case, *United States v. Janis*,[72] the Supreme Court chose not to apply the rule to a civil tax assessment proceeding.[73] It reached this result by weighing the benefit of the exclusionary rule, defined as deterrence of future unlawful searches, against the "substantial cost on the societal interest in law enforcement."[74] A major factor in the Court's decision was the ineffectiveness of punishing one sovereign (the Internal Revenue Service) for unconstitutional behavior by another sovereign (the local police who had searched illegally). *INS v. Lopez-Mendoza*,[75] however, modified *Janis*'s approach: it rejected the exclusionary rule even where deterrent effect was highest, because the Fourth Amendment violation was intrasovereign and the perpetrators of the unconstitutional search were interested primarily in the civil, not criminal proceeding.[76] In *Lopez-Mendoza*, the Immigration and Naturalization Service (INS) sought to introduce evidence collected illegally by INS agents in a deportation proceeding. The Court ruled that, despite *Janis*'s apparent reliance on the intersovereign nature of the violation, exclusion was not necessary. These two cases, combined with federal precedent curtailing students' Fourth Amendment rights,[77] make clear that the federal exclusionary rule does not apply to school disciplinary proceedings.

Although New York appears to use the same balancing test as the Supreme Court, the New York Court of Appeals defines the benefits of exclusion more broadly than does the Supreme Court. Certainly, it has reached different results. In *Finn's Liquor Shop v. State Liquor Authority*,[78] the Court of Appeals applied the exclusionary rule to proceedings involving the suspension or revocation of a license. That the New York Court of Appeals considers the state exclusionary rule

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[71] The only case applying the federal exclusionary rule to a civil proceeding is One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965) (applying exclusionary rule to forfeiture proceeding). There, although the Court held that the exclusionary rule applied to forfeiture proceedings, it did so on the reasoning that such proceedings were quasi-criminal because they aimed to penalize the defendant for her offense against the law. See id. at 700 ("[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.").

[72] 428 U.S. 433 (1976).

[73] See id. at 459-60 (holding that exclusionary rule does not apply in civil proceedings).

[74] Id. at 448.

[75] 468 U.S. 1032 (1984).

[76] See id. at 1043 (recognizing that exclusionary rule is most effective where violation is intrasovereign, but citing additional factors detracting from that deterrent value in civil deportation context).

[77] See infra notes 106-10 and accompanying text.

[78] 249 N.E.2d 440 (N.Y. 1969).

to be independent[79] of the federal rule in the area of civil proceedings is made clear in the unanimous decision *People ex rel. Piccarillo v. New York State Board of Parole.*[80] In holding that the exclusionary rule applies to parole revocation hearings, the *Piccarillo* court explicitly acknowledged that it was departing from federal precedent.[81] Whereas "[i]n the complex and turbulent history of the [federal exclusionary] rule, the [Supreme] Court never has applied it to exclude evidence from a civil proceeding,"[82] the Court of Appeals began its analysis from the position that "[i]t can no longer be disputed that the exclusionary rule is applicable to administrative as well as criminal proceedings in New York."[83]

2. *A Comparison of Background Principles*

The Court of Appeals has never set forth clearly its reasoning for reading article I, section 12 to be more protective than the Fourth Amendment. Nonetheless, by examining where New York application has diverged from federal precedent, one can glean background principles unique to the New York rule. These principles reveal factors that the Court of Appeals considers and those factors' relative importance. This Part explains that the Court of Appeals considers the preservation of judicial integrity to be a benefit of excluding un-

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[79] The Court of Appeals rarely cites to federal precedent. For example, the most important federal case, *Janis*, is cited only seven times in Court of Appeals opinions; *Lopez-Mendoza* is cited only three times.

[80] 397 N.E.2d 354 (N.Y. 1979).

[81] See id. at 357 n.6 (listing cases holding that federal exclusionary rule does not apply to parole revocation hearings).

[82] United States v. Janis, 428 U.S. 433, 447 (1976).

[83] *Piccarillo*, 397 N.E.2d at 357; see also People v. McGrath, 385 N.E.2d 541, 544 (N.Y. 1978) ("[A]pplicability of the exclusionary rule to administrative as well as criminal proceedings in New York can no longer be disputed . . . ."). Neither the Supreme Court nor the New York Court of Appeals distinguishes between administrative and civil proceedings, applying the same analysis to both. For simplicity's sake, this Note refers only to "civil" proceedings. In addition to *Piccarillo* and *Finn's*, the Court of Appeals has approved application of the exclusionary rule to a Housing Authority disciplinary proceeding against an employee patrol officer. See *Piccarillo*, 397 N.E.2d at 357 (citing with approval McPherson v. New York City Hous. Auth., 365 N.Y.S.2d 862 (App. Div. 1975)).

The Court of Appeals has declined to apply the exclusionary rule in the following proceedings: civil police disciplinary proceedings, see Boyd v. Constantine, 613 N.E.2d 511, 514 (N.Y. 1993); Mancini v. Codd, 385 N.E.2d 541, 551 (N.Y. 1978); perjury prosecution based on allegedly false grand jury testimony, see People v. Drain, 535 N.E.2d 630, 632 (N.Y. 1989); criminal contempt proceeding arising from allegedly false grand jury testimony, see People v. McGrath, 385 N.E.2d 541, 546-47 (N.Y. 1978). *Mancini* and *McGrath*, however, rely to some extent on attenuation principles. See *McGrath*, 385 N.E.2d at 548; see also *Boyd*, 613 N.E.2d at 515 (N.Y. 1993) (Titone, J., dissenting) ("[*McGrath*] was premised on the ordinary principles of attenuation analysis . . . and not on any special concerns about the civil use of evidence that has been suppressed in related criminal proceedings." (citations omitted)).

lawfully obtained evidence and sees greater deterrent value in exclusion than does the Supreme Court. These values affect the balancing test each court uses to determine whether to apply the exclusionary rule to civil proceedings.

a. The Role of Judicial Integrity. Judicial integrity was first raised as a justification of the exclusionary rule in *Weeks v. United States*[84] and was best articulated in Brandeis's and Holmes's dissents in *Olmstead v. United States*.[85] These opinions warned that judicial use of unconstitutionally obtained evidence would make courts complicit in police misconduct and would breed "contempt for law."[86] Although that concern was part of the original exclusionary rule decisions,[87] judicial integrity has fallen out of favor with the Supreme Court as a legitimate reason to exclude relevant and reliable evidence.[88] In contrast, New York courts have continued to consider "the imperative of judicial integrity"[89] in determining whether to suppress evidence in search and seizure cases.[90]

Bigelow best demonstrates that the Court of Appeals, unlike the Supreme Court, does not see deterrence as the sole purpose of the

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[84] 232 U.S. 383 (1914). *Weeks* was the first decision to mandate application of the exclusionary rule in federal cases. It characterized the rule as a judicially created sanction designed to prevent Fourth Amendment violations. See id. at 391-92.

[85] 277 U.S. 438 (1928). *Olmstead* held that wiretapping was not a Fourth Amendment violation because no physical invasion had occurred. See id. at 466. It was overruled by Katz v. United States, 389 U.S. 347 (1967), which found that a constitutional violation exists where police have infringed on one's reasonable expectation of privacy. See id. at 353.

[86] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

[87] See Mapp v. Ohio, 367 U.S. 643, 659 (1961) (reciting *Elkins*'s concern for judicial integrity); Elkins v. United States, 364 U.S. 206, 222 (1960) (considering "the imperative of judicial integrity"); *Weeks*, 232 U.S. at 392 ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . . .").

[88] See, e.g., United States v. Calandra, 414 U.S. 338 (1974). *Calandra* established that the sole rationale behind the federal exclusionary rule was deterrence. See id. at 348 (stating that exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"). In United States v. Janis, 428 U.S. 433 (1976), the Court revived the term "judicial integrity," but conflated it with deterrence. See id. at 458 n.35 (defining judicial integrity as requirement that courts not encourage constitutional violations); see also United States v. Peltier, 422 U.S. 531, 533 n.13 (Brennan, J., dissenting) (stating that majority "merges the 'imperative of judicial integrity' into its deterrence rationale . . . and then ignores the imperative").

[89] *Elkins*, 364 U.S. at 222.

[90] See People v. Drain, 535 N.E.2d 630, 631 (N.Y. 1989) (referring to deterrence as exclusionary rule's "*primary* function" (emphasis added)). But see People v. McGrath, 385 N.E.2d 541, 550 (N.Y. 1978) (referring to deterrent effect as "single-most, if not sole, justification for [exclusionary rule's] application").

exclusionary rule.[91] If deterrence were the only purpose, then the court would have adopted *Leon*'s good faith exception: where officers act in good faith, subsequent exclusion by definition has no deterrent effect, because there is no way for the officers to know in advance that their conduct is unconstitutional.[92] While judicial integrity alone has never been considered a sufficient reason to exclude evidence from a civil proceeding,[93] it remains a consideration for the Court of Appeals.[94]

b. Deterrent Value. Another difference between the New York rule and the federal rule is the weight that each accords to deterrence when comparing the costs and benefits of exclusion. Here, the term "deterrence" must be broken down to recognize the various forms it can take: individual deterrence and general (or systemic) deterrence. The Supreme Court has tended to look primarily at individual deter-

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[91] See also Governing Bd. v. Metcalf, 111 Cal. Rptr. 724 (Ct. App. 1974). *Metcalf* held that the exclusionary rule does not apply to a teacher disciplinary proceeding, but recognized two policies behind the exclusionary rule in California: "The first and primary one in California is to deter government officials from lawless conduct by denying them a reward for such conduct. The secondary one is to preserve the integrity of the judicial process by keeping it free of the taint of the use therein of improperly obtained evidence." Id. at 726 (citations omitted).

[92] See United States v. Leon, 468 U.S. 897, 916 (1984); see also *Janis*, 428 U.S. at 459 n.35 (noting that officers acted in good faith, which reduces deterrent effect of exclusion). In *Peltier*, the Supreme Court found that the imperative of judicial integrity was not offended where law enforcement officers believed in good faith that their conduct was not unconstitutional. See United States v. Peltier, 422 U.S. 531, 537 (1975). However, rejecting evidence gathered in good faith reliance may create systemic deterrence. See infra text accompanying notes 96-99.

[93] See, e.g., Boyd v. Constantine, 613 N.E.2d 511 (N.Y. 1993) (deciding case based on deterrence concerns alone); People v. Drain, 535 N.E.2d 630 (N.Y. 1989) (same); People v. Adams, 422 N.E.2d 537 (N.Y. 1981) (same); People v. McGrath, 385 N.E.2d 541 (N.Y. 1978) (same).

[94] See, e.g., People v. Young, 434 N.E.2d 1068, 1073 (N.Y. 1982) (Fuchsberg, J., concurring) (discussing "overriding consideration" of judicial integrity); People v. Martinez, 339 N.E.2d 162, 165 (N.Y. 1975) (including judicial integrity as justification for exclusionary rule); cf. Brown v. State, 674 N.E.2d 1129, 1144 (N.Y. 1996):

> The point is that no government can sustain itself, much less flourish, unless it affirms and reinforces the fundamental values that define it by placing the moral and coercive powers of the state behind those values. When the law immunizes official violations of substantive rules because the cost or bother of doing otherwise is too great, thereby leaving the victims without any realistic remedy, the integrity of the rules and their underlying public values are called into serious question.

This concern is not limited to search and seizure cases. In Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984), Judge Jasen, in a concurring opinion, noted that the New York Court of Appeals denies recovery to a plaintiff in tort who was engaged in illegal conduct when the injury occurred, explaining that recovery "is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." See id. at 45 (Jasen, J., concurring).

rent effect when measuring the benefits of exclusion. It asks whether exclusion would prevent an individual law enforcement officer from conducting an illegal search or seizure in that particular situation. If it would not, then exclusion is unnecessary.[95]

New York's Court of Appeals, on the other hand, has demonstrated a more expansive understanding of deterrent value.[96] First, it may weigh the exclusionary rule's effect as a general, rather than individual, deterrent.[97] In other words, the exclusionary rule in some cases fails to deter an individual police officer, but may encourage whole police departments or prosecutors' offices to institute policies that curtail unconstitutional behavior among all members. The Court of Appeals considers such deterrence to be a benefit and, as will be argued in Part III, should include it in any balancing test when considering whether to apply the exclusionary rule to a civil proceeding.[98] Second, New York's high court may focus on deterring parties other than law enforcement. Unlike the Supreme Court, the Court of Appeals has demonstrated a willingness to deter magistrates and legislatures from unconstitutional acts.[99] This difference reveals the Court

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[95] See, e.g., *Leon*, 468 U.S. at 918 (finding that police who act illegally but in good faith are not deterred from such actions by exclusion of evidence).

[96] This Note uses the term "deterrent value" to encompass both deterrent effect and deterrent purpose. See Kamisar, supra note 60, at 661-62 (arguing that exclusionary rule serves deterrent purpose as well as effect by creating disincentive).

[97] See Boyd v. Constantine, 613 N.E.2d 511, 517 (N.Y. 1993) (Titone, J., dissenting) (stating that exclusionary rule is based on general, not specific, deterrence and that purpose is to remove significant incentives to violate suspect's rights); Kamisar, supra note 60, at 660 (claiming that exclusionary rule deters by systemic, not specific, deterrence because police officers are part of larger structure that tracks successful prosecutions and sets guidelines to encourage compliance with Fourth Amendment).

[98] See People v. Young, 434 N.E.2d 1068, 1075 (N.Y. 1982) (Meyer, J., dissenting) (stating that effectuation of Fourth Amendment protection demands deterrence of improper prosecutorial conduct); People v. Scott D., 315 N.E.2d 466, 471 (N.Y. 1975) (applying exclusionary rule to illegal search by teacher because even if teachers are not aware of reasonable suspicion requirement, criminal prosecutors must be held to proper standard).

[99] See Pitler, supra note 28, at 151 n.600 (noting that unlike Supreme Court, Court of Appeals may believe purpose of exclusionary rule is to deter magistrates who issue warrants and legislators who enact statutes). Compare People v. Scott, 593 N.E.2d 1328, 1343 (N.Y. 1992) (rejecting Supreme Court's ruling in same case and holding that administrative search exception to warrant requirement does not apply to statute authorizing searches of chop shops to uncover criminal activity), People v. Payton, 412 N.E.2d 1288, 1290 (N.Y. 1980) (excluding evidence gathered based on defective warrant and explaining that "the exclusionary rule serves to insure that the State itself, and not just its police officers, respect the constitutional rights of the accused"), and People v. Grossman, 229 N.E.2d 589, 590 (N.Y. 1967) (excluding evidence seized in reliance on statute subsequently found unconstitutional), with *Leon*, 468 U.S. at 916 (rejecting exclusion where it would punish magistrate who issued invalid warrant), and Illinois v. Krull, 480 U.S. 340, 351-52 (1987) (holding that exclusionary rule does not apply where police reasonably relied on statute later found to violate Fourth Amendment, because exclusion will not create significant deterrent effect).

of Appeals's broader vision of the exclusionary rule as a deterrent tool.

Third, New York has demonstrated a skeptical attitude toward law enforcement practices. For example, the Court of Appeals has shown less tolerance for pretextual searches than has the Supreme Court.[100] Its rejection of the good faith exception is one example: the New York Court may have been motivated by suspicion that police officers would claim that they relied in good faith on a defective warrant when in fact they had known the warrant was invalid.[101]

Because the New York exclusionary rule is justified by a broader set of principles, it applies to a greater number of proceedings than does the federal rule. Although the Court of Appeals has never explicitly offered a distinct rationale for the state exclusionary rule,[102] the differences outlined in this Part reveal concerns absent from Supreme Court opinions. These concerns support expansion of the state exclusionary rule to cover school disciplinary proceedings. Unfortunately, in *Juan C. v. Cortines,* while it did rule that exclusion was necessary, the Court of Appeals failed to surface and analyze fully these concerns.

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100 Cf. People v. Berrios, 270 N.E.2d 709, 714 (N.Y. 1971) (Fuld, C.J., dissenting) (noting that in many "'dropsy cases [narcotics and gambling prosecutions where police allege that defendants dropped contraband in their presence], the [officer's] testimony . . . is tailored to meet the requirements of search-and-seizure rulings'" (quoting brief of District Attorney of New York County)). Compare, e.g., People v. Spencer, 646 N.E.2d 785, 791 (N.Y. 1995) (holding that police may not stop cars based on right to request information because "a pandora's box of pretextual police stops would be opened"), People v. Diaz, 612 N.E.2d 298, 302 (N.Y. 1993) (rejecting "plain-touch" exception in part because such exception would invite pretextual searches), and People v. Class, 472 N.E.2d 1009, 1015 n.3 (N.Y. 1984) (noting that "pretext search would not be condoned"), with Whren v. United States, 116 S. Ct. 1769, 1774 (1996) (holding that pretextual traffic stop is not violation of driver's Fourth Amendment rights), Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (adopting plain-touch exception), and Pennsylvania v. Mimms, 434 U.S. 106, 123 (1977) (Stevens, J., dissenting) (suggesting that majority's holding that routine traffic stop permits pat down of driver without reasonable suspicion is premised on desire to allow pretextual searches).

101 Cf. United States v. Janis, 428 U.S. 433, 447 n.18 (1975) (noting studies finding that exclusionary rule encourages police to lie on witness stand about circumstances of search).

102 See Pitler, supra note 28, at 212 (asserting that Court of Appeals "has never examined completely the rationale [behind the exclusionary rule] in the context of state constitutionalism").

II
JUAN C. V. CORTINES AND THE PROBLEM OF SCHOOL SEARCHES FOR CONTRABAND

Juan C. v. Cortines[103] is a good example of an illegal school search that resulted in a suspension proceeding, and the Appellate Division's opinion provides a starting point for analyzing whether the exclusionary rule should apply. Part II supplements the Appellate Division's reasoning and sets forth concerns that the Court of Appeals should take into account when it faces this question.

Juan C. was a case of first impression for New York courts. In fact, no other court has considered whether a state constitution bars illegally obtained evidence from use at a school disciplinary proceeding. Three courts have applied the *federal* rule to school disciplinary hearings.[104] In addition, some state courts have applied (or refused to apply) their state exclusionary rule to *criminal* proceedings against juveniles.[105] The New York Appellate Division, however, was the first court to consider the application of a state exclusionary rule to school disciplinary proceedings. Before reviewing that court's reasoning, a few basic premises of the Fourth Amendment must be laid out.

A. The Legal Context: School Searches

As noted above, both the Fourth Amendment and article I, section 12 protect individuals from unreasonable government searches and seizures. A central protection is the prohibition of searches without probable cause. "Probable cause" is the level of suspicion generally required for a search or seizure. With or without a warrant, police can search a person only if they have probable cause to believe that that person has engaged in or is engaged in criminal activity.

School searches, however, are different. In *New Jersey v. T.L.O.*,[106] the Supreme Court ruled that school officials may search a

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[103] 647 N.Y.S.2d 491 (App. Div. 1996), rev'd on other grounds, 679 N.E.2d 1061 (N.Y. 1997).

[104] See infra notes 111-23 and accompanying text (describing cases).

[105] See In re Bobby B., 218 Cal. Rptr. 253 (Ct. App. 1985) (holding that exclusionary rule does not apply to search by school official in violation of California Constitution); State v. Young, 216 S.E.2d 586 (Ga. 1975) (holding exclusionary rule does not apply to search by public school officials in violation of Constitution); State v. Mora, 307 So. 2d 317 (La. 1975) (deciding that exclusionary rule applies to school searches under both Fourth Amendment and La. Const. art. I, § 7), vacated sub nom. Louisiana v. Mora, 423 U.S. 809 (1975) (vacating to consider whether judgment was based on federal or state constitutional grounds); State v. Montgomery, No. 83-948-CR, 1983 WL 161399 (Wis. Ct. App. Dec. 27, 1983) (holding exclusionary rule applicable to illegal school search on both Fourth Amendment grounds and Wis. Const. art. I, § 11).

[106] 469 U.S. 325 (1985).

student on mere "reasonable suspicion" that she has violated a law or school rule, a standard lower than probable cause.[107] This lower standard is primarily the result of the special need to maintain discipline in public schools, and partly the result of remnants of the *in loco parentis* doctrine.[108] The reasonable suspicion standard applies under both the federal Constitution and the New York Constitution. In the recent case *Vernonia School District v. Acton*,[109] the Supreme Court upheld a school search (urinalysis testing for all school athletes) which was based on no individualized suspicion at all.[110] *T.L.O.* and *Acton* make clear that in the face of increasing drug and weapons use by students, the Supreme Court has aided school authorities in coping with these problems by allowing them to ferret out criminal activity through more and more extensive school searches for contraband.

The Appellate Division decided *Juan C. v. Cortines* against this background and in light of the precedent considering the exclusionary

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107 See id. at 341-42; see also People v. Scott D., 315 N.E.2d 466, 469 (N.Y. 1974) ("[T]he basis for finding sufficient cause for a school search will be less than that required outside the school precincts . . . .").

108 The *in loco parentis* doctrine grew out of the belief that a school (including teachers, administrators, and other staff), unlike the wider society, has a parental relationship with its students. In enforcing discipline, a school aims not only to keep its community free from harm, but also to teach the student a lesson. Therefore, the school's interest is not as clearly opposed to the student's interest as society's is to the criminal defendant's, and intrusions by school officials are therefore not as harmful as those by law enforcement officials. *T.L.O.*, in ruling that school authorities are governed by the Fourth Amendment, clarified that the doctrine no longer applies in full force. See *T.L.O.*, 469 U.S. at 336 (finding doctrine to be "in tension with contemporary reality and the teachings of this Court"); see also Bach, supra note 53, at 1138-45 (tracing elimination of *in loco parentis* doctrine and recognition of students' constitutional rights). However, courts continue to rely implicitly on the same assumptions. See, e.g., *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) ("[T]eachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child."); id. at 350 (Powell, J., concurring) ("[T]here is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education."); Thompson v. Carthage Sch. Dist., 87 F.3d 979, 981 (8th Cir. 1996) (finding that commonality of interests between teachers and students results in nonadversarial relationship); D.R.C. v. State, 646 P.2d 252, 260 (Alaska Ct. App. 1982) (finding search constitutional and pointing out that search was conducted by teacher, not security guard); People v. J.A., 406 N.E.2d 958, 962 (Ill. App. Ct. 1980) (finding that school officers are state employees but not law enforcement officers).

One approach distinguishes between two uses of the doctrine. First, the view rejected in *T.L.O.*, the doctrine posits that a school search of a student is not a governmental search at all, because the school is *in loco parentis*. Second, the doctrine describes the relationship between the student and school authorities, thus bearing on the reasonableness of the search. See Wayne R. LaFave, 4 Search and Seizure: A Treatise on the Fourth Amendment 802-06 (1996) (finding that neither use of doctrine has "contributed to effective analysis of what is admittedly a very difficult and comprehensive Fourth Amendment issue").

109 115 S. Ct. 2386 (1995).

110 See id. at 2396.

rule in civil contexts. While the Appellate Division's decision was overruled on other grounds, its rationale remains important, particularly in light of the Court of Appeals's choice not to address whether the exclusionary rule applies to school disciplinary proceedings. In suppressing the illegally discovered gun, the court joined three other courts that have found that any exclusionary rule applies to school disciplinary proceedings.[111]

The three prior decisions, however, were based on the federal exclusionary rule, not a state version of the rule. In *Smyth v. Lubbers*,[112] two college students' suspensions for drug possession were held invalid where they were based on marijuana found during an illegal search of the students' dormitory rooms. Starting from the premise that the Fourth Amendment applies to "'all alike, whether accused of crime or not,'" the court looked to the "hostility of intrusion" to determine whether the exclusionary rule applied.[113] It found that a suspension would substantially disrupt a college student's life,[114] and that exclusion would not only deter unconstitutional conduct but also preserve the integrity and legitimacy of the college.[115] As a result, the court held that the marijuana should be excluded from any disciplinary proceedings.[116]

Similarly, in *Jones v. Latexo Independent School District*,[117] a Texas district court's analytical starting point was that the exclusionary

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111 See Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 237-39 (E.D. Tex. 1980) (holding that alleged drug paraphernalia seized as result of unconstitutional searches could not be used as grounds for disciplinary measures); Smyth v. Lubbers, 398 F. Supp. 777, 794-95 (W.D. Mich. 1975) (holding that marijuana seized in illegal search of dormitory room could not be used against student in college disciplinary proceedings); Caldwell v. Cannady, 340 F. Supp. 835, 839-40 (N.D. Tex. 1972) (holding that product of warrantless search of automobile could not be considered by school board in expulsion proceedings). In the following cases, courts have declined to apply the exclusionary rule to school disciplinary hearings: Thompson v. Carthage Sch. Dist., 87 F.3d 979, 981-82 (8th Cir. 1996) (holding that exclusionary rule does not apply to high school disciplinary proceedings); James v. Unified Sch. Dist. No. 512, 899 F. Supp. 530, 533-34 (D. Kan. 1995) (same), summary judgment granted, 959 F. Supp. 1407 (D. Kan. 1997); Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 666-67 (Ct. App. 1984) (same); see also Morale v. Grigel, 422 F. Supp. 988, 999 (D.N.H. 1976) (exclusionary rule does not apply to college-level disciplinary proceedings); Ekelund v. Secretary of Commerce, 418 F. Supp. 102, 106 (E.D.N.Y. 1976) (exclusionary rule does not apply to United States Merchant Marine Academy disciplinary proceedings).

112 398 F. Supp. 777 (W.D. Mich. 1975).

113 Id. at 786 (quoting Weeks v. United States, 232 U.S. 383, 392 (1914)).

114 See id. at 788.

115 See id. at 794-95.

116 See id. at 795.

117 499 F. Supp. 223 (E.D. Tex. 1980).

rule had been applied "on numerous occasions" in civil contexts.[118] From there, it reasoned that three high school students could not be suspended on the basis of drug paraphernalia found during an illegal "canine sniff" search.[119] The *Latexo* court was motivated in part by its recognition that the deterrent effect of suppression would be great and that suspension from school was a harsh punishment.[120] Additionally, it emphasized that school authorities are role models for students and must therefore be held to strict Fourth Amendment standards.[121] The third case, *Caldwell v. Cannady*,[122] engaged in very little analysis, holding simply that precedent required that a school board not consider evidence obtained unconstitutionally.[123]

While much of the reasoning contained in these three decisions is advocated in Part III below, the decisions themselves are anomalous and largely inconsistent with later Supreme Court rulings. Most importantly, their initial premise, that the federal exclusionary rule applies to most civil proceedings, no longer holds true: all were decided before the Supreme Court decided *INS v. Lopez-Mendoza*.[124] In holding that even where deterrence is greatest, suppression may not be required, *Lopez-Mendoza* made clear that the federal presumption is firmly against application of the exclusionary rule to civil proceedings. Therefore, the three federal cases cannot be considered good law today. Additionally, since they considered only the federal rule, they were of little precedential value to the Appellate Division as it decided *Juan C.*

B. Juan C. v. Cortines: *The Appellate Division Decision*

On December 8, 1992, Juan C., a fifteen-year-old student at William Howard Taft School in the Bronx, brought a loaded handgun to school concealed in the inside pocket of his leather jacket.[125] That

118 Id. at 238 (citing federal cases in which fruits of illegal searches were suppressed in forfeiture proceeding, civil tax proceeding, civil antitrust trial, and federal employee discharge proceeding).

119 See id. at 237.

120 See id. at 238-39.

121 See id. at 239.

122 340 F. Supp. 835 (N.D. Tex. 1972). The unconstitutional search in *Caldwell* was a warrantless, nonexigent automobile search.

123 See id. at 839. The court relied on Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969), which found that students have First Amendment rights, and on Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971), which held that a warrantless search is per se unreasonable.

124 468 U.S. 1032 (1984).

125 See Juan C. v. Cortines, 647 N.Y.S.2d 491, 492 (App. Div. 1996), rev'd on other grounds, 679 N.E.2d 1061 (N.Y. 1997).

morning, a school security aide,[126] Luis Mujica, saw Juan C. in the hallway, and, according to the aide's testimony, recognized the outline of a gun or the handle of the gun pulling down one side of Juan C.'s jacket. Mr. Mujica said nothing to Juan C., but grabbed his arm to pat him down. When Juan C. walked away to avoid the pat-down, the aide chased him, touched the jacket, and discovered the gun. The aide called additional security personnel, and the gun was removed.[127]

Two proceedings resulted from the incident: a criminal juvenile delinquency proceeding and a civil school suspension hearing. As part of the delinquency prosecution, a suppression hearing was held in Family Court. There, Mr. Mujica testified that his basis for stopping Juan C. was his observation of the gun's outline or bulge.[128] Juan C. then demonstrated to the court how he had been carrying the gun in school. The judge found that the gun, placed in the interior pocket of Juan C.'s jacket, "'was not visible, the slight bulge was not in any particular shape or form and was not remotely suspicious.'"[129] Thus, the security aide's testimony that he had observed the gun before stopping Juan C. was discredited, and the judge found that Mr. Mujica had searched Juan C. without the requisite reasonable suspicion.[130] The judge suppressed the gun, and the case was dismissed.[131]

At roughly the same time as the prosecution, the Superintendent of Bronx High Schools began a suspension proceeding against Juan C.[132] At the Board of Education (Board) suspension hearing, Juan C.

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126 School security aides are distinct from school safety officers. They do not wear uniforms or badges, and they are not armed. See id. at 492 (describing security aide who searched student). In the interest of simplicity, this Note uses the term "security guard" to describe any person responsible primarily for maintaining school safety.

127 See id.

128 See id. at 492-93.

129 Id. at 492 (quoting findings of administrative factfinder).

130 See id. A school authority may stop or search a student in public school only if the authority has a reasonable suspicion that the student is committing an infraction. See New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (holding that student may be searched when there are reasonable grounds for suspecting that search will turn up evidence that student has violated or is violating either law or school rules).

131 See *Juan C.*, 647 N.Y.S.2d at 492.

132 A "superintendent's suspension" was initiated against Juan C.—a type of suspension available for non-special education high school students. Such a suspension can result in a suspension greater than five days and must be sought when a student is found to possess a firearm. See New York City School District Chancellor, Reg. No. A-441 (issued Oct. 1, 1993). A principal may effect a "principal's suspension" for up to five days; this shorter suspension proceeding requires less protection of the student's procedural rights. See id.

When a superintendent's suspension is commenced, the school must notify the student's parent immediately, and a formal hearing must be held within five school days. See id. Both the school and the student's parent or representative may subpoena witnesses for the hearing. See id. At the hearing, the student may be represented by counsel or other advisor. See id. The Board of Education Hearing Officer makes findings of fact, but the

objected to the gun's admission into evidence, arguing that the Family Court's decision to suppress it was binding on the school suspension hearing officer. The hearing officer rejected this argument, finding that the Board was not bound by the Family Court decision.[133] The hearing officer then found that Juan C. had possessed a gun and suspended him for one year.[134]

After exhausting his administrative appeals, Juan C. appealed the Board's decision in the state Supreme Court, Bronx County. That court found that the exclusionary rule applied to the suspension hearing but held that the Family Court finding that the pat-down was illegal was not binding on the Board hearing officer.[135] The Supreme Court dismissed the appeal because it found ample evidence supporting the legality of the search.[136]

On appeal, the Appellate Division reversed in a unanimous decision, agreeing that the exclusionary rule should have been applied at the suspension hearing.[137] To reach its decision to suppress the gun,

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superintendent renders the final disposition, determining: whether to sustain the suspension; where to place the student for alternative education; and what information to put in the student's records. See id. Weapons possession allows for suspension for up to one year. See id.

A student may appeal the Superintendent's decision to the School's Chancellor; if affirmed by the Chancellor, the suspension may be appealed to the New York City Board of Education. See id. From that final administrative decision, an Article 78 petition may be filed in a New York Supreme Court. See N.Y. C.P.L.R. § 7801 (McKinney 1995).

133 See *Juan C.*, 647 N.Y.S.2d at 493.

134 See id. at 492.

135 See id. at 493.

136 See id.

137 See id. The groundbreaking *Juan C.* decision was immensely unpopular. See Albert Shanker, Where We Stand, U.S. Newswire, Oct. 4, 1996, available in Lexis NEWS Library, USNWR File (stating that "[t]he general response to [*Juan C.*] was outrage—and rightfully so"); Gary Spencer, School Search Case before Court of Appeals, N.Y. L.J., Feb. 3, 1997, at 1 (reporting that *Juan C.* decision set off criticism from New York Governor Pataki, New York City Mayor Giuliani, school officials, and school employee unions); see also Guns in Schools, Editorial, Wash. Post, Sept. 25, 1996, at A22 ("Is there not room for common sense, at least within the school disciplinary system, in dealing with lawbreaking predators in the student body?").

The Appellate Division's decision even provoked a legislative response. Two bills have been introduced in the New York legislature specifically to overrule the Appellate Division's *Juan C.* decision. See Eliot Spitzer & Dennis Saffran, Ruling Leaves Our Schools at Risk, Times Union (Albany), Feb. 9, 1997, at E2 (describing bills sponsored by Assemblyperson Stephen Kaufman, D-Bronx, and Senator Owen H. Johnson, R-Long Island, which would prevent application of exclusionary rule to school disciplinary proceedings). The constitutionality of these bills is questionable; it may be argued that, by usurping the judiciary's authority to interpret the New York Constitution, they work an impermissible change in the state's separation of powers. Cf. Raven v. Deukmejian, 801 P.2d 1077, 1088-89 (Cal. 1990) (striking down constitutional amendment that would require California Supreme Court to interpret state constitution in lockstep with federal Constitu-

the Appellate Division relied on a balancing test,[138] weighing the benefits of excluding the evidence against the costs.[139] The court found the benefit of exclusion to be its effect as a deterrent to unconstitutional searches by school authorities. It determined that excluding the illegally obtained handgun would be an effective deterrent for two reasons: first, the entity which had committed the illegality (the school) was the same entity which sought to admit the evidence.[140] Second, it observed that security personnel have an eye toward suspension proceedings; suspension or expulsion is within a guard's "'zone of primary interest,'"[141] and eliminating evidence from that proceeding will deter security personnel from illegally searching students. In addition, the court noted that the possibility of the gun's suppression at a criminal or juvenile proceeding alone would be insufficient as a deterrent.[142] Thus, the court concluded that the "deterrence factor is compelling and is as substantial as it is direct."[143]

Balanced against these benefits was the cost: foregoing the student's "removal from the ranks of the student body."[144] The court found this cost to be no greater than the cost overridden in a criminal proceeding[145] and to be outweighed by the benefits of exclusion. Accordingly, the Appellate Division ruled that the illegally acquired gun must be suppressed.[146]

Integral to the Appellate Division's ruling was its holding that the Board, represented by Corporation Counsel, was collaterally estopped from challenging the legality of Mr. Mujica's search. It found that collateral estoppel[147] applied for the following reasons: there was an

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tion because it effects impermissible constitutional revision permitted only by special convention).

138 See supra Part I.B.1. for a more detailed discussion of the balancing test.

139 Although the Appellate Division described the test as balancing deterrent effect against the benefit of admitting the evidence, most courts frame the test as costs of exclusion against benefits of exclusion. To be consistent, this Note uses the common terms, not those of the Appellate Division.

140 See Juan C. v. Cortines, 647 N.Y.S.2d 491, 495 (App. Div. 1996), rev'd on other grounds, 679 N.E.2d 1061 (N.Y. 1997); see also United States v. Janis, 428 U.S. 433, 455-58 (1976) (finding little deterrent effect where sovereign that obtained evidence illegally is not same sovereign that seeks to use evidence in civil proceeding and, therefore, declining to apply exclusionary rule).

141 *Juan C.*, 647 N.Y.S.2d at 495 (quoting *Janis*, 428 U.S. at 458).

142 See id.

143 Id.

144 Id.

145 But see infra notes 236-38 and accompanying text.

146 See *Juan C.*, 647 N.Y.S.2d at 495-96.

147 For a description of the doctrine of collateral estoppel, see 10 Jack B. Weinstein et al., New York Civil Practice: CPLR ¶ 5011.23 (1997) (describing doctrine of collateral estoppel).

identity of parties and issues in the Family Court and the Board proceedings; the first proceeding had resulted in a final and valid judgment; and Corporation Counsel had had a full and fair opportunity to litigate.[148]

Corporation Counsel then appealed to the Court of Appeals. That court found that collateral estoppel did not apply, because Corporation Counsel and the Board were not in privity.[149] Therefore the Family Court findings were not binding on the Board proceeding, and the hearing officer was free to find that the search was legal.[150] Having decided that evidence supported the hearing officer's ruling that the search of Juan C. was legal,[151] the court did not have to decide whether the gun would need to be excluded. The court thus avoided the question of the exclusionary rule's applicability to school disciplinary proceedings. It did, however, caution cryptically in dicta that its decision was not meant to encourage violations of students' rights.[152] Although the Court of Appeals did not reach the issue in *Juan C.*, it will inevitably have to address the question of whether illegally obtained evidence may be used in a school disciplinary proceeding. The following Part offers an analysis to answer that question. It supplements the Appellate Division's analysis, using its balancing test to determine whether the exclusionary rule applies to civil proceedings to argue that such evidence must be excluded.

III

APPLYING THE COST-BENEFIT ANALYSIS TO SCHOOL DISCIPLINARY PROCEEDINGS IN NEW YORK

Although the exclusionary rule does not automatically apply to civil proceedings, important policy reasons support its application to the school suspension setting. These reasons relate to concerns particular to students and the school environment, as well as to the role of public education in society. These unique considerations outweigh the very real costs of excluding relevant evidence from school disciplinary proceedings.

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148 See *Juan C.*, 647 N.Y.S.2d at 493-94.

149 See Juan C. v. Cortines, 679 N.E.2d 1061, 1066 (N.Y. 1997). The court found that identity of parties did not exist, the school officials had not had a full and fair opportunity to litigate, and the two fora had different frameworks and purposes. See id. at 1068. Thus, there was not sufficient privity between the Board and the Corporation Counsel for collateral estoppel to apply. See id.

150 See id.

151 See id. at 1070.

152 See id. (pointing out "inherent tension" in schools' goals of dealing with offending student and respecting all students' constitutional rights; and noting that courts must encourage school officials to comply with constitutional standards and safeguards).

Juan C. provides a useful fact pattern to consider both costs and benefits of exclusion; it is not, however, the only fact pattern. *Juan C.* presented a strong case for *admitting* illegally obtained evidence in school disciplinary proceedings: a student was discovered to be carrying a dangerous weapon by means of a relatively nonintrusive pat-down.[153] The article I, section 12 violation was comparatively small, and the fruits of the search were significant. This Note focuses on the *Juan C.* facts for just that reason: it presents the hard case for application of the exclusionary rule. The other end of the spectrum, however, must be acknowledged. For example, the evidence in question in *Juan C.* could have been a small amount of marijuana found on a young student during a suspicionless strip search by a police officer.[154] These facts would make the exclusionary rule more palatable than *Juan C.*'s facts. Nonetheless, to make the strongest argument, this Part analyzes the costs and benefits of exclusion in the context of weapons possession.

Additionally, an important distinction must be made between right and remedy. The exclusionary rule is not an individual constitutional right belonging to the person whose search and seizure rights were violated.[155] The rule is a judicial remedy necessary to enforce the rights of all; it is not a personal remedy which a single individual may seek in court to benefit herself. Therefore, when this Part refers to protecting students' constitutional rights through use of the exclusionary rule, it should be understood to refer to all students' rights, not just those of the person unlawfully searched.

Finding that New York's exclusionary rule provides greater protection is different from saying that article I, section 12 itself provides more protection in a school setting, which it clearly does not.[156] As

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153 See supra text accompanying notes 125-26.

154 See, e.g., Bellnier v. Lund, 438 F. Supp. 47, 54 (N.D.N.Y. 1977) (finding strip search of entire class triggered by complaints of missing money unreasonable).

155 See United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."). But see State v. Davis, 666 P.2d 802, 806-07 (Or. 1983) (holding that purpose of state exclusionary rule is to protect individual rights and to provide remedy for violation of those rights); State v. White, 640 P.2d 1061, 1070-72 (Wash. 1982) (same).

156 Cf. New Jersey v. T.L.O., 469 U.S. 325, 333 n.3 (1985):

> The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case.

Cf. also People ex rel. Piccarillo v. New York State Bd. of Parole, 397 N.E.2d 354, 357 (N.Y. 1979) (distinguishing between "well settled" concept that parolee status is relevant to reasonableness of search or seizure and question of whether exclusionary rule should be

described in Part II.A., schoolchildren have reduced search and seizure rights.[157] Yet the question of whether a student has reduced Fourth Amendment rights while in school is entirely separate from the question of what remedy[158] exists for violation of those rights. In *Juan C.*, for example, all parties agreed that Juan C.'s rights had been violated by the illegal search; they disagreed only as to whether the violation mandated the gun's exclusion as a remedy. That students have fewer rights to begin with cannot alone justify eliminating the remedy that is afforded when their rights are violated. Courts should eliminate the exclusionary rule as a remedy for a constitutional violation only if they find that its costs outweigh its benefits. Courts should not eliminate the rule simply because the victim of illegality has fewer constitutional rights than adults. To implement the exclusionary rule in school disciplinary proceedings, state courts need not create rights over and above the rights of schoolchildren granted by the federal standard; they simply need to define the remedy differently from federal courts. This Part advocates several rationales for defining the remedy broadly.

A. Benefits of Exclusion

Three benefits are gained by applying the exclusionary rule to school disciplinary proceedings: deterrence of future unlawful conduct, preservation of the school proceeding's integrity, and positive educative effect. Each of these benefits has been recognized in Supreme Court and New York Court of Appeals opinions, but each takes on a special importance in the school setting.

1. Deterrence

The primary benefit of excluding evidence obtained in violation of a student's article I, section 12 rights is the deterrent value of such exclusion. Since students already have limited constitutional rights,[159]

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applied to exclude use of that evidence in parole revocation hearing where evidence was fruit of unreasonable search).

157 See supra notes 106-08 and accompanying text. In re Gregory M., 627 N.E.2d 500 (N.Y. 1993), makes clear that the Court of Appeals uses the same standard under the state constitution as under the federal constitution for school searches. See id. at 502 (stating that Supreme Court's Fourth Amendment reasonable suspicion standard is appropriate under New York Constitution as well). In fact, New York had implemented the lower reasonable suspicion standard as a matter of state law, see People v. Scott D., 315 N.E.2d 466, 469-70 (N.Y. 1974) (applying reasonable suspicion standard), before the Supreme Court applied this standard at the federal level in *T.L.O.*

158 "Remedy" is used here to refer to a judicial—not personal—remedy. See supra note 155 and accompanying text.

159 See supra notes 106-08 and accompanying text.

this value is especially important in the context of school searches. A strong deterrent is needed to prevent random (or, worse, invidiously targeted) searches of schoolchildren and their book bags, lockers, or other belongings. As minors compelled by law to be in school—an environment which calls for almost constant submission to authority—students are unlikely to be able to resist unreasonable searches on their own.[160] This Part argues that deterrence in the school setting is especially effective and important for three reasons. First, school administrators and security personnel have a closer relationship to the searched parties than do the judicial system and police. Second, there are few realistic alternatives to exclusion as a remedy for constitutional violations. Third, students are especially vulnerable to unlawful searches.

To measure the deterrent value of excluding relevant evidence from a school disciplinary proceeding, courts look at the "marginal deterrence."[161] Marginal deterrence is the amount of deterrent value above and beyond the value gained by exclusion of the same evidence at the criminal proceeding. For example, in the New York case, *Boyd v. Constantine*,[162] the searching officers did not know that the person searched was also a police officer, so they could not foresee the resulting disciplinary proceeding instituted against him as a result of the contraband they found.[163] For the same reason, they could not foresee the evidence's suppression at that proceeding. Therefore, because it was unforeseeable, suppression in the civil context could not affect the officers' behavior. No additional deterrence could be gained beyond that resulting from suppression at the (foreseeable and foreseen) criminal trial, and the Court of Appeals therefore declined to apply

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160 See, e.g., People v. Bowers, 339 N.Y.S.2d 783, 787 (Crim. Ct. 1973) (suppressing marijuana found in student's pocket where high school security guard had no reason to suspect student of drug possession yet asked student to empty pockets, and "student, in the face of uniformed authority, acceded to the request"), aff'd, 356 N.Y.S.2d 432 (Sup. Ct. 1974).

161 See INS v. Lopez-Mendoza, 468 U.S. 1032, 1045 (1984) ("Deterrence must be measured at the margin."); United States v. Janis, 428 U.S. 433, 453-54 (1975) (refusing to apply exclusionary rule to federal civil tax proceeding because "additional marginal deterrence . . . surely does not outweigh the cost to society of extending the rule to that situation"); People ex rel. Piccarillo v. New York State Bd. of Parole, 397 N.E.2d 354 (N.Y. 1979); see also In re Finn's Liquor Shop, 249 N.E.2d 440, 442 (N.Y. 1969) (concluding that deterrence function of rule is minimized when evidence is admitted in collateral proceedings). But see Kamisar, supra note 60, at 661-62 (arguing that exclusionary rule discourages violation by removing incentive, therefore every time actor benefits in some way, disincentive is undermined, and thus decisions not to apply exclusionary rule in marginal settings are "ominous").

162 613 N.E.2d 511 (N.Y. 1993).

163 See id. at 514.

the exclusionary rule.[164] In the school context, courts must measure the deterrent value incurred by excluding evidence from the suspension proceeding—value which is beyond that incurred by excluding the evidence from the parallel delinquency prosecution. For several reasons, the deterrent value in this context is greater than in other contexts.

First, the exclusionary rule is likely to be more effective in the school setting than in the criminal setting[165] because the community and administration are smaller. Security personnel who conduct illegal searches are more likely to be timely reprimanded or disciplined for illegal behavior, simply because a school's administration is smaller and swifter than the criminal justice system. Excluding evidence from a school disciplinary hearing is also effective because the same authority (the school district) which conducted the illegal search seeks to use the evidence against the student whose rights were violated.[166] The authority punished by exclusion is likely to control future unconstitutional behavior of its employees.

Exclusion of evidence in a suspension or expulsion hearing also has great deterrent value because the searcher in most cases is primarily interested in seeing the offending student removed from school grounds temporarily or permanently. A school official's "zone of primary interest" is maintaining order and safety in school; she is not necessarily interested in a criminal proceeding against the offending student.[167] This factor distinguishes *Boyd*, a case which appears simi-

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164 See id.; see also People v. Drain, 535 N.E.2d 630, 632 (N.Y. 1989) (finding negligible deterrent effect where collateral perjury prosecution was unforeseeable at time evidence was seized).

165 Disagreement exists regarding the exclusionary rule's effectiveness in the criminal context. See, e.g., Milton A. Loewenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 UMKC L. Rev. 24, 32-35 (1980) (raising and refuting arguments that exclusionary rule is ineffective deterrent).

166 See INS v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984) ("[T]he exclusionary rule is likely to be most effective when applied to . . . 'intrasovereign' violations."); Thompson v. Carthage Sch. Dist., 87 F.3d 979, 981-82 (8th Cir. 1996) (recognizing deterrent benefit where party who acted illegally is same party that seeks to use evidence); Juan C. v. Cortines, 647 N.Y.S.2d 491, 495 (App. Div. 1996) ("Since the party responsible for the illegal search is the same party offering the evidence the deterrence factor is compelling . . . ."), rev'd on other grounds, 679 N.E.2d 1061 (N.Y. 1997). But see Myron Schreck, The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond, 25 Urb. Law. 117, 155 (1993):

> [B]ecause of the pressure to protect other students from the threat of drugs and weapons, school officials are not likely to be deterred by the exclusionary rule and are more likely to engage in a search simply to dispel their fears that students are in possession of such harmful items.

167 See Donald B. Kaufman, Comment, Strip Search in Pennsylvania Public Schools, 90 Dick. L. Rev. 803, 823-24 (1986) (suggesting that, if exclusionary rule's deterrent effect is minimal with respect to criminal prosecutions, then exclusionary rule should be extended

lar to the school disciplinary proceeding context. In *Boyd*, illegally obtained evidence was not excluded from a police disciplinary hearing.[168] However, in that case, when police searched the car, they were primarily—even exclusively—interested in obtaining evidence for criminal prosecution, not in aiding the collateral administrative proceeding against the defendant. Allowing suspensions and expulsions to result from illegal searches would defeat the exclusionary rule's deterrent purpose, because officials would reach the desired goal (elimination of the offender from the student body) by way of their own illegal acts. Whether the evidence was excluded or admitted in the delinquency proceeding would be irrelevant, since the primary goal of the search would already have been achieved. This is exactly the result that the Court of Appeals has eschewed in other civil contexts.[169]

An effective deterrent method is particularly important to limit the conduct of hired school security guards.[170] Security personnel are essentially law enforcement officials operating within the confines of a public school; they are concerned with enforcing laws and school regulations.[171] Yet they receive less training than police officers and are

to school disciplinary proceedings); cf. INS v. Lopez-Mendoza, 468 U.S. 1032, 1053 (1984) (White, J., dissenting) (observing that INS agents are primarily interested in deportation proceeding, not criminal prosecution); D.R.C. v. Alaska, 646 P.2d 252, 258 n.10 (Alaska 1982) (noting that school official faced with choice between tolerating drug use and weapon possession or continuing to search at expense of prosecutions would continue to search illegally).

168 See *Boyd*, 613 N.E.2d at 511 (stating legal question as whether exclusionary rule applies to state administrative proceeding commenced by state police).

169 See In re Finn's Liquor Shop, 249 N.E.2d 440, 443 (N.Y. 1969) (reasoning that not applying exclusionary rule in administrative proceeding would allow state agents to attain their objectives as effectively by way of related civil proceeding as they could through criminal prosecution from which evidence had been excluded); cf. United States v. Janis, 428 U.S. 433, 463-64 (1975) (Stewart, J., dissenting) (lamenting that deterrent purpose is "wholly frustrated" if authorities may crack down on illegal gambling by violating constitutional rights and then turning evidence over to IRS). The concern is magnified here, where the party that violated the student's rights is the same party that seeks to use the evidence against that student.

170 Even though school security personnel are not analytically different for Fourth Amendment purposes, see New Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (holding that Fourth Amendment applies to searches conducted by school officials), one must take into account some of the concerns particular to these state actors because their role affects the deterrent effect of exclusion.

171 School safety officers (SSOs) are part of the New York City Board of Education's Division of School Safety. There are 3000 SSOs in New York City public schools. Telephone Interview with Sidney Yeldell, Director of Division of School Safety (Aug. 7, 1997). SSOs are screened, fingerprinted, and evaluated before they are hired. See id. They undergo eight weeks of training and are deputized by the New York City Police Department. See id. In addition, the Police Department participates in training SSOs. See James Dao, Court Upholds Suspension of Student Carrying Gun, N.Y. Times, Apr. 2, 1997, at B3 (reporting that New York City Mayor Rudolph W. Giuliani and Schools Chancellor Rudy Crew agreed to police recruiting and training of SSOs).

less likely to be familiar with constitutional restrictions.[172] Because guards are therefore less likely to regulate their searches according to these restrictions, it is of graver importance that effective and immediate deterrent methods exist to control their conduct.[173]

When weighing the exclusionary rule's deterrent value, courts consider the alternatives to exclusion.[174] The exclusionary rule was created to make Fourth Amendment rights meaningful, because no other method was available to prevent unreasonable state intrusions on people's privacy rights.[175] Despite some attempts to replace it with more effective measures,[176] courts generally agree that no other measure currently provides sufficient deterrence.

An alternative frequently suggested to replace the exclusionary rule in deterring illegal searches and seizures is lawsuits against the authority which conducted the search or seizure.[177] Last year, in

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Interestingly, the more a school official appears to be a law enforcement official, the less likely her zone of primary interest is to be the disciplinary proceeding (and the more likely it is to be criminal sanctions). Thus, it could be argued that a security guard will be deterred less by the exclusionary rule applied to a suspension hearing than would a teacher (whose zone of primary interest will be the hearing, not the criminal proceeding).

172 See Travis et al., supra note 6, at 66 (describing training program for school security personnel); cf. INS v. Lopez-Mendoza, 468 U.S. 1032, 1044-45 (1984) (relying in part on INS's separate means of deterring unconstitutional conduct). Yet as Justice White's *Lopez-Mendoza* dissent points out, comprehensive departmental regulations may be the result of—not a replacement for—application of the exclusionary rule. See *Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting). This is general deterrence. See supra notes 95-98 and accompanying text.

173 Cf. Joan E. Imbriani, Comment, Metal Detectors in Public Schools: A Subtle Sacrifice of Privacy Interests, 6 Seton Hall Const. L.J. 189, 217 (1995) (warning that increasing cooperation between law enforcement and school officials will lead to more frequent violations of students' constitutional rights and diminish quality of educational life).

174 See, e.g., *Lopez-Mendoza*, 468 U.S. at 1044-45 (ruling that exclusionary rule does not apply to civil deportation hearing in part because INS has own regulations that deter agents from violating suspects' Fourth Amendment rights and because INS practices can be challenged through requests for declaratory relief); see also Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976) (realizing that refusal to apply exclusionary rule to college disciplinary proceeding "may leave [student] basically without a remedy for the wrong that he has suffered").

175 See Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). Unfortunately, it seems impossible to know or agree on the rule's effectiveness as a deterrent. See United States v. Janis, 428 U.S. 433, 449-50 & 450 n.22 (1975) (noting that deterrent effect of exclusion in civil proceedings is unknown, and criticizing all studies of rule's deterrent effect).

176 See, e.g., Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416-29 (1974) (accepting exclusionary rule as "necessary evil," but proposing that emphasis in Fourth Amendment law be on administrative rulemaking by police departments).

177 See, e.g., Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 811-16 (1994) (advocating suits by "innocent" victims to replace exclusionary rule).

Brown v. New York,[178] the Court of Appeals recognized an implied constitutional tort for violations of article I, section 12. *Brown*'s holding allows individuals who have been wrongfully searched to bring claims for money damages against not only individual officers but also the state itself.[179] Such an option is likely to be foreclosed in the school search context, however, because young people generally lack the resources necessary to commence costly affirmative litigation.[180] Not only do many students lack the money and knowledge to hire a lawyer, but they may not even be aware that their rights have been violated and that damage remedies exist. Also, attorneys are probably not enthusiastic about taking such cases, given that they are lengthy, complex, and have little likelihood of success.[181] And, despite *Brown*, school authorities enjoy some immunity under state statute.[182] Finally, since there is minimal public interest in illegal police

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178 674 N.E.2d 1129 (N.Y. 1996). *Brown* involved a police investigation of an assault that took place near the State University of New York's Oneonta campus, in which the victim had described her assailant as a young black man. The state police first obtained a list of all black male students at Oneonta and questioned all 125 of them. Finding no suspects, they began a street sweep, stopping and questioning all dark-skinned Oneonta residents during the following five days. The decision relied in part on the New York Constitutional Convention's rejection in 1938 of a state exclusionary rule, where those at the Convention assumed that a damage remedy existed. See Evan A. Davis, A Cause of Action for Damages Against the State, N.Y. L.J., Dec. 12, 1996, at 3.

179 See *Brown*, 674 N.E.2d at 1137-38.

180 See Smyth v. Lubbers, 398 F. Supp. 777, 794 (W.D. Mich. 1975) (noting that students rarely have means to pursue damage actions in order to protect rights); see also INS v. Lopez-Mendoza, 468 U.S. 1032, 1055 (1984) (White, J., dissenting) (arguing that deported illegal aliens are in no position to bring suit against INS challenging legality of obtained evidence and that "[i]t is doubtful that the threat of civil suits by [legal residents subjected to illegal searches and seizures] will strike fear into the hearts of those who enforce the Nation's immigration laws").

181 See Amsterdam, supra note 176, at 430 ("Where are the lawyers going to come from to handle these cases for the plaintiffs? . . . [W]hat on earth would possess a lawyer to file a claim for damages . . . in an ordinary search-and-seizure case?").

182 See, e.g., People v. Scott D., 315 N.E.2d 466, 468 & n.* (N.Y. 1975) (finding school officials immune under N.Y. Educ. Law §§ 912(a), 3028(a)) (McKinney 1988); cf. Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976):

> A school official is liable, under 42 U.S.C. § 1983, to a wronged student only if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

For a discussion of possible school official immunity, see R. Craig Wood & Mark D. Chestnutt, Violence in U.S. Schools: The Problems and Some Responses, 97 Educ. L. Rep. 619, 631-32 (1995).

behavior affecting people concededly engaged in criminal activity, litigation or other forms of protest are unlikely to be undertaken.[183]

A last group of deterrence concerns focuses on students themselves. Deterrence of illegal intrusions on students' privacy rights is especially important in the secondary school context. Illegal searches probably do not affect the majority of students; school disciplinary action is very likely to focus on a subset of identified "troublemakers" who may be repeatedly harassed by school officials.[184] This risk is exacerbated by *People v. Scott D.*,[185] which offered factors to consider in determining whether sufficient cause exists to search a student. These factors include a child's history and record in school.[186] Thus, by virtue of her prior infractions, a perceived troublemaker may already be halfway to the reasonable suspicion standard necessary to search her. Taking into account past behavior in assessing a child's likelihood of committing a crime is certainly reasonable.[187] However, in the high school or junior high school setting, where children are labeled at an early age and have great difficulty altering or escaping their reputations, repeatedly singling out and searching a particular student will only cement her reputation and signal to her that she is expected to continue causing trouble.

One dimension of this concern is that racial minorities may more often be singled out for search than other children. For example, young African American men are searched at a disproportionately high rate outside the school context.[188] Often, they are searched ille-

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183 See generally Kamisar, supra note 60 (arguing that because communities and media are not outraged by illegal searches and seizures, courts must rely on exclusionary rule to enforce Fourth Amendment).

184 Cf. Mary Ellen Moore, School Security Chiefs Deal with Guns, The Patriot Ledger (Quincy, MA), Apr. 27, 1996, at 34 (quoting Sidney Yeldell, Director of Board of Education's Division of School Safety, as saying "selective expulsion is a problem" and expressing concern that school officials will give students a break instead of arresting them for weapons possession).

185 315 N.E.2d 466 (N.Y. 1974).

186 See id. at 470. That case also states that "the scope of permissible search and . . . the scope of undue risk of psychological harm, will vary significantly with the age and mental development of the child." Id. at 490. To the extent that these factors allow greater intrusions on the rights of "bad" kids, it is especially important that evidence gained in violation of those already limited rights be suppressed.

187 We do this in the criminal setting, where past criminality may support a finding of probable cause to search or arrest. See, e.g., United States v. Harris, 403 U.S. 573, 583 (1971) (concluding that police officer's knowledge of suspect's reputation for criminality contributes to probable cause); People v. David, 652 N.Y.S.2d 324, 326 (App. Div. 1996) (finding probable cause based in part on suspect's 1977 felony conviction).

188 Several studies have documented that police officers are far more likely to stop, search, and arrest an African American or Latino than a white person. See, e.g., The Real War on Crime: The Report of the National Criminal Justice Commission 109 (Steven R. Donziger ed., 1996) ("Most studies reveal what most police officers will casually admit:

gally, without probable cause.[189] It is likely, then, that African American male students are searched in school more often than other students. The risk that searches may consciously or unconsciously be based on race underscores the need to deter illegal conduct. Additionally, as disciplinary proceedings already affect students of color disproportionately,[190] that effect will be magnified by allowing school personnel, who may act on racial bias, to search students with impunity.[191]

Last, although minors are often assumed to have diminished expectations of privacy, in fact school searches are likely to be especially intrusive and painful for young people. The constitutional right to be free of unreasonable searches and seizures protects all students, not

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that race is used as a factor when the police decide to follow, detain, search, or arrest."); Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 Yale L.J. 214, 225-37 (1983) (describing uses of race in police decisions to detain suspects); Andrew D. Leipold, Essay, The Dangers of Race-Based Jury Nullification: A Response to Professor Butler, 44 UCLA L. Rev. 109, 141 n.7 (noting that from 1965 to 1992 arrest rate for African Americans was four to seven times greater than for whites) (citing Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1994, at 378 (1995)); Floyd D. Weatherspoon, The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective, 23 Cap. U. L. Rev. 23, 30-35 (1994) (describing statistically high rate at which African American men are searched and arrested); Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1494-1520 (1988) (discussing police actions based on race). These patterns have been found in police interactions with juvenile suspects as well as adults. See, e.g., Randy Hertz et al., Trial Manual for Defense Attorneys in Juvenile Court § 3.07, at 20 (1991) (describing influence of race on police decisions to charge juvenile suspects); Donald J. Black & Albert Reiss, Jr., Police Control of Juveniles, 35 Am. Soc. Rev. 63, 63 (1970); see also Katheryn K. Russell, The Racial Hoax as Crime: The Law as Affirmation, 71 Ind. L.J. 593, 607-09 (1996) (describing police interactions with young African American men).

189 See, e.g., Weatherspoon, supra note 188, at 33 ("African-American males are routinely stopped and singled out for interrogation, detainment, arrest, searches, and prosecution . . . .").

190 See, e.g., Philip T.K. Daniel & Karen B. Coriell, Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?, 13 Hamline J. Pub. L. & Pol'y 1, 32-34 (1992) (describing racially discriminatory impact of suspension and expulsion on students of color); Weatherspoon, supra note 188, at 58-59 (reporting that in 1992 in Houston, 50% of suspended students were African American, while African Americans made up only 38% of student body; in school district in San Diego during 1990-1991 school year, 91% of African American male students were suspended while only 37% of all students were suspended).

191 This concern is speculative, as data are not available that support or undermine this hypothesis. See, e.g., Daniel & Coriell, supra note 190, at 32-34 (discussing three cases where disciplinary procedures were found to be discriminatory, but not identifying disproportionate searching of minority students as contributing factor); see also Ross v. Saltmarsh, 500 F. Supp. 935, 948 (S.D.N.Y. 1980) (approving settlement of claim that New York school district's disciplinary practices were discriminatory, but not mentioning disproportionate searching).

just those carrying guns or drugs in school.[192] It protects the privacy of students and all their belongings, not just their contraband. Students are especially sensitive to public embarrassment,[193] and adolescents, with few privacy rights in their parents' homes, will often keep personal, potentially shameful items in their pockets, book bags, or purses.[194] A strong deterrent is necessary to prevent school authorities from searching innocent students needlessly and illegally.

The above concerns, unique to a school setting, militate for suppression of unconstitutionally obtained evidence. They do so not only on the basis of the increased effectiveness of exclusion in this context, but also because deterrence is so critical in this context where search and seizure authority is at special risk of being misused.

2. *The Integrity of the Learning Environment and Disciplinary Actions*

In addition to deterrence concerns, the Court of Appeals should take into account the importance of judicial and administrative integrity in the context of school disciplinary proceedings.[195] While the Supreme Court has long since abandoned this justification, New York courts have not.[196] Since schools are the central socializers of American children,[197] this concern for integrity is especially significant. As

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192 Cf. Amsterdam, supra note 176, at 366 (arguing that Fourth Amendment protects society as whole, not isolated individuals); Roger B. Dworkin, 48 Ind. L.J. 329, 331 (1973) ("The innocent and society are the principal beneficiaries of the exclusionary rule.").

193 See People v. Scott D., 315 N.E.2d 466, 471 (1974) (finding that "the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable").

194 See New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (noting that students may bring to school "keys, money, . . . necessaries of personal hygiene and grooming, . . . photographs, letters, . . . diaries . . . [as well as] articles of property needed in connection with extracurricular or recreational activities"); id. at 355 n.1 (Brennan, J., dissenting) ("Especially for shy or sensitive students, it could prove extremely embarrassing for a teacher or principal to rummage through [their purse's] contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.").

195 Judicial integrity as a justification of the exclusionary rule has always been a source of disagreement. Even when the Supreme Court accepted it as a rationale for excluding evidence, other existing doctrines undercut that rationale, most obviously, the doctrine of standing, which allows admission of evidence gathered in the most flagrantly unconstitutional manner as long as the defendant's rights are not violated. See Rakas v. Illinois, 439 U.S. 128, 133 (1978) (finding that persons without reasonable expectation of privacy in searched areas could not challenge search of those areas); see also Pitler, supra note 28, at 178 n.697 (listing circumstances under which tainted evidence is admitted in court, including: standing, attenuation, impeachment, grand jury use, police disciplinary proceedings, and many civil proceedings).

196 See supra text accompanying notes 84-94.

197 See Smyth v. Lubbers, 398 F. Supp. 777, 794-95 (E.D. Mich. 1975) (finding that applying exclusionary rule to college disciplinary hearing will preserve integrity and legitimacy of college as maker and enforcer of regulations). But see Morale v. Grigel, 422 F.

the Supreme Court has remarked, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[198] Keeping the educational environment free from the taint of illegal, unconstitutional behavior is of paramount importance, just as it is in judicial proceedings. Like a criminal proceeding,[199] and unlike a civil dispute between two parties of equal power,[200] a school suspension proceeding represents the legitimate exercise of governmental control over an individual. Because it necessarily involves tremendous coercive power, the proceeding should be scrupulously "clean."

Further, just as it increases the need for effective deterrence, the discriminatory impact of suspensions also compromises the integrity of our educational system. Flexible search and seizure standards may be susceptible to abuse in the school setting, where race and class are highly influential.[201] Ensuring that disciplinary actions are based only on valid searches provides an opportunity to weed out those searches which may have been effected on the basis of racial stereotyping or other bias. Such tainted searches should not further taint resulting disciplinary proceedings.

Judicial integrity also has a public perception component, which may cut both for and against application of the exclusionary rule. On one hand, in its original incarnation, the principle of judicial integrity grew out of courts' express concern that they not be viewed as complicit in police illegality.[202] In the criminal context, those communities concerned with official misconduct and racially discriminatory police practices will be more skeptical and disaffected by a judicial system which does not impose sanctions for unconstitutional behavior. Similarly, those parents and students who see or experience racial discrimination or misconduct on the part of school officials will lose faith in a system that benefits from such misconduct.[203] On the other hand, the people may lose faith in a system that appears to ignore a known

Supp. 988, 999 (D.N.H. 1976) (finding that judicial rationale is irrelevant to question of whether exclusionary rule applies to college disciplinary proceeding).

198 Shelton v. Tucker, 364 U.S. 479, 487 (1960).

199 At least one commentator has argued that illegally obtained evidence should be excluded from school disciplinary proceedings because those proceedings are quasi-criminal. See Bach, supra note 53, at 1157-62.

200 But see Lebel v. Swinicki, 93 N.W.2d 281, 287 (Mich. 1958) (applying exclusionary rule to civil litigation).

201 See supra notes 188-91 and accompanying text.

202 See Olmstead v. United States, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting).

203 See Bach, supra note 53, at 1163-64 (emphasizing importance of maintaining reputation of integrity among parents of schoolchildren, because parents are more aware of school disciplinary measures than general public is of criminal justice system).

wrongdoer.[204] Most likely, public opinion will depend on the community.[205]

A final aspect of the judicial integrity rationale which may be magnified in the school setting is the exclusionary rule's symbolic value.[206] By refusing to use relevant, probative evidence simply because it was obtained by violating a student's rights, the school system would signal both to students and to its own administration that article I, section 12 rights are meaningful and consequential.[207] Clearly, nowhere is this lesson more essential than in an educational environment. The following Part considers this lesson in greater detail.

3. *The Exclusionary Rule's Educative Effect*

A last benefit of excluding tainted evidence from disciplinary proceedings is similar to judicial integrity, but has such a powerful role in the public school context that it deserves separate mention: the exclusionary rule's educative effect. This concern was expressed most explicitly by Justice Stevens in his *T.L.O.* dissent. He explained that:

> The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal

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204 See infra text accompanying note 241.

205 See Bach, supra note 53, at 1150-51 (remarking that judicial integrity principle is somewhat speculative because one does not know how public views criminal justice system and exclusionary rule).

206 See Kamisar, supra note 60, at 604 (finding that exclusionary rule has "important symbolic quality" as underscored by dissenters in *Olmstead*).

207 See Stone v. Powell, 428 U.S. 465, 492-93 (1976) (stating that exclusion demonstrates that society takes constitutional violations seriously and forces police to incorporate Fourth Amendment ideals into their value systems); People v. Young, 434 N.E.2d 1068, 1075 (N.Y. 1982) (Meyer, J., dissenting) ("Effectuation of [the Fourth Amendment's] mandate requires deterrence not only of improper police conduct but of improper, even if not malicious, prosecutorial tactics as well."); Loewenthal, supra note 165, at 30 (warning that eliminating exclusionary rule would signal to police that Fourth Amendment protections were not serious, even if other sanctions were imposed); see also Kamisar, supra note 60, at 591 (noting that Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Weeks v. United States, 232 U.S. 383 (1914), share theme that Constitution must be taken seriously). This view almost runs into deterrence concerns, because one of the purposes of taking constitutional violations seriously is to discourage violations in the first place. Between 1971 and 1974, Loewenthal conducted a study of New York City police officers. He found that without the exclusionary rule, police were unfamiliar with constitutional standards and did not consider the Fourth Amendment to be a legal obligation. See Loewenthal, supra note 165, at 29. He also found that police do not respect courts that fail to enforce constitutional standards by excluding tainted evidence. See id. at 30.

> privacy of its citizens without a warrant or compelling circumstance.[208]

To prosecute a student based on evidence found during an unconstitutional search of her person or her property would be a "curious moral" for that student and all other members of the school community, Justice Stevens concluded.[209]

An important part of educating and socializing children is teaching them to accept responsibility for their own acts. Unfortunately, in a situation such as Juan C.'s, there is no way to send a unified message to that student. If Juan C. avoids suspension by suppressing the gun, he learns that he may bring a weapon to school as long as he hides it well. If, on the other hand, Juan C. is first subjected to an unconstitutional and humiliating search and is then suspended for one year as a result, he learns that people with authority may break even the most solemn rules.[210] Both of these messages are destructive and unfortunate. However, inasmuch as children learn the former lesson (that one may avoid punishment by concealing wrongdoing) well before entering school, schools should prioritize not teaching the latter lesson.[211] Further, the student is not likely to avoid punishment entirely; apart from having his wrongdoing revealed—possibly in public—he may be disciplined in some way that does not involve suspension.[212]

The lesson that rulemakers must themselves obey rules is especially important in the controlled environment of a public school, where students are generally at the mercy of school authorities[213] and struggle to find consistency in the rules, rewards, and punishment sys-

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208 New Jersey v. T.L.O., 469 U.S. 325, 385-86 (1985) (Stevens, J., concurring in part, dissenting in part).

209 Id. at 386 (Stevens, J., concurring in part, dissenting in part).

210 Of course, if the search of Juan C. reveals nothing, or if it results in evidence used in a proceeding against another person, he may learn this same lesson, since the school authority will not be punished for her illegal conduct.

211 Cf. Olmstead v. United States, 277 U.S. 438, 469-70 (1928) (Holmes, J., dissenting) (objecting to use of evidence obtained by wiretap as violation of Fourth Amendment). There, Justice Holmes argued that

> we must consider the two objects of desire both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.

Id. at 470. In addition, one might consider what lessons *other* students may learn from Juan C.'s situation. These indirect lessons would seem to parallel Juan's direct lesson.

212 See infra notes 274-75 and accompanying text.

213 See Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2403 (1995) (O'Connor, J., dissenting) ("In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways,

tems.[214] It is also crucial because young people tend to learn by example, and teachers and other school authorities are expected to be role models.[215] In fact, a New York statute requires public school teachers and administrators to swear to uphold the United States and New York Constitutions.[216]

A last reason to weigh the exclusionary rule's educative effect as a benefit is that public schools are the setting in which young people learn the rights and responsibilities of citizenship.[217] It would certainly be ironic for a young person to begin her school day with the Pledge of Allegiance only to be stopped in the school hall without warning, provocation, or suspicion, and searched in front of her classmates, in violation of her constitutional rights.[218] As Justice Brennan has stated:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the

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or locker rooms."); *T.L.O.*, 469 U.S. at 339 ("[A] proper educational environment requires close supervision of schoolchildren.").

214 Cf. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (discussing conflict inherent in forcing students to salute flag to teach respect for a government which supports and defends freedom of conscience); Loewenthal, supra note 165, at 30 (emphasizing importance of ensuring that legal system makes sense to police officers, so that they do not disregard it).

215 See Bach, supra note 53, at 1162-63 (arguing that judicial integrity is especially important in schools because educators are role models of good citizenship, goal of education is to shape character, children learn by example, and students have relationship of trust with teachers).

216 See N.Y. Educ. Law 61, § 3002 (McKinney 1995).

217 See Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (1995) (defining constitutionally mandated education as "basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury").

218 Justice Stevens explained:

> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights," and that this is a principle of "liberty and justice for all."

T.L.O., 469 U.S. at 373-74 (footnotes omitted) (quoting Stone v. Powell, 428 U.S. 465, 492 (1976), and 36 U.S.C. § 172 (1994) (pledge of allegiance to the flag), respectively). Professor Pitler, no fan of New York's exclusionary rule, see supra note 28, acknowledged the rule's educative value, commenting on the *Juan C.* decision that "you don't want to say to kids in this society, 'While you are in school you can be searched at any time for no reason.' If schools are a place to learn about democracy, I think that would teach the wrong lesson." Ian Fisher, Gun Decision Raises Furor in Schools, N.Y. Times, Sept. 19, 1996, at B1 (quoting Professor Pitler).

> one her teacher had hoped to convey. I would . . . teach petitioner another lesson: that the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" . . . . Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.[219]

As mentioned in Part I.A., schools' and students' rights are an appropriate area for state constitutions to deviate from federal constitutional standards, because they are of uniquely local concern. What and how a state teaches its schoolchildren should not be dictated by a uniform, national rule. Rather, a state is free to, and should, set students' rights in conformance with its educative purposes and priorities. In fact, in its *Juan C.* decision, the Court of Appeals suggested that it was concerned about the educative effect of exclusion. It noted in dicta that "school authorities must simultaneously exemplify, honor and fulfill their constitutional and pedagogical obligations by respecting the rights of the many thousands of law-abiding students, yearning to learn about school subjects and life in society."[220]

The three categories of benefits associated with the exclusionary rule—deterrence, integrity of the disciplinary process, and educative effect—all support exclusion of illegally obtained evidence from school disciplinary proceedings. They do so despite the often very grave cost of exclusion: foregoing the suspension of a student known to have committed an offense.

B. The Costs of Exclusion

Before determining the cost of exclusion in a school disciplinary hearing, one must distinguish between the cost of the exclusionary rule and the costs of article I, section 12 and the Fourth Amendment. It is primarily the Fourth Amendment itself, not the exclusionary rule, that prevents courts from using the vast majority of relevant evidence. It does so by preventing the evidence from being collected in the first place.[221] As Professor Kamisar explains:

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[219] Doe v. Renfrow, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting from denial of cert.).

[220] Juan C. v. Cortines, 679 N.E.2d 1061, 1070 (N.Y. 1997).

[221] See United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting); Potter Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1392-93 (1983) ("Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the Fourth Amendment itself."). But see Amar, supra note 177, at 794 (arguing that "it is far from clear that the illegality of a search is indeed a but-for cause of the later introduction into evidence of an item found in the search" and claiming that

> [O]ne might say the "cost-benefit analysis" had already been worked out when the fourth amendment was written—the amendment embodies the conclusion that the "benefits" of privacy, liberty and personal freedom and security outweigh the "costs" incurred when the government is unable to bring the guilty to punishment either (a) because its agents lack sufficient cause to seek evidence of crime and therefore *never make the search or seizure that might have produced the evidence* or (b) because the government cannot use the evidence its agents obtained when, lacking the requisite grounds, *they carried out a search or seizure they never should have made . . .*.[222]

In other words, the exclusionary rule serves to eliminate only that evidence which should never have been found. Like the Fourth Amendment, the costs of article I, section 12 were determined long ago: the New York Constitution's founders and subsequent New York courts accepted that certain prosecutions and civil penalties would be sacrificed in the interest of protecting all people from unreasonable searches and seizures. In the school context, some searches and suspensions of potentially dangerous students are sacrificed: those that target students as to whom reasonable suspicion of wrongdoing does not exist. What makes the exclusionary rule difficult to accept is that it "flaunts" the wrongdoing in the face of law enforcement and the public, while evidence never collected because officials obey the Constitution remains speculative only.

Nonetheless, because it is not clear whether the Founders intended the exclusionary rule to apply to the civil context, exclusion in that context may have additional, unforeseen costs. One way to distinguish the exclusionary rule's costs from article I, section 12 costs is to measure the *marginal* cost as one measures marginal deterrence.[223] As explained in Part III.A.1., courts generally see the marginal cost as

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where police could obtain search warrant but do not and court later finds warrant necessary so suppresses evidence, since police could have searched with warrant, unconstitutionality does not strictly cause exclusion).

222 Kamisar, supra note 60, at 600; see also id. at 596 (stating that courts must test legality of police conduct at some time and most logical point is during prosecution and that "[c]hallenging the legality of a search or seizure at *some* stage of the criminal process—when it *is* practicable to do so—means the exclusionary rule. That's *all* the exclusionary rule means.").

223 See INS v. Lopez-Mendoza, 468 U.S. 1032, 1048 (1984) ("The costs of applying the exclusionary rule, like the benefits, must be measured at the margin."); Juan C. v. Cortines, 647 N.Y.S.2d 491, 495 (App. Div. 1996) (finding that benefit to be derived from use of excluding tainted evidence at suspension hearing is no greater than it would be at criminal prosecution), rev'd on other grounds, 679 N.E.2d 1061 (N.Y. 1997).

that *additional* cost of exclusion beyond the lost criminal prosecution.[224]

1. *Perceived Costs: Additional Litigation and Chilled Law Enforcement*

In *INS v. Lopez-Mendoza*,[225] the Supreme Court found that the marginal costs of the exclusionary rule were great: because deportation proceedings were simple and swift affairs, litigating Fourth Amendment issues would significantly lengthen and complicate them.[226] Similarly, one definite cost of applying the exclusionary rule to school disciplinary proceedings is the cost of litigating the constitutionality of a school search.[227] In New York, applying the exclusionary rule will require Board of Education Hearing Officers to conduct suppression hearings. Relatively few searches may be found unconstitutional,[228] however, since the requisite level of suspicion, reasonable cause, is both lower and simpler to apply than probable cause.[229] Therefore, it is likely that few students will litigate this issue. Further, the cost of an added suppression hearing may be mitigated or even eliminated by authorities' ability to circumvent the exclusionary rule by charging the student with a lesser violation, proof of which does not require the evidence.[230]

An additional perceived cost is exclusion's chilling effect on effective disciplinary enforcement. On this view, school officials will

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224 Marginal cost also might be defined as the cost of exclusion beyond what would have been excluded had police not acted illegally. Clearly this definition results in a lower cost (often no cost), because in most cases law-abiding police never would have found the evidence at all.

225 468 U.S. 1032 (1984).

226 See id. at 1048-50; see also United States v. Calandra, 414 U.S. 338, 349-50 (1974) (holding that exclusionary rule does not apply to grand jury proceedings in part because costs of application outweigh benefits, and finding that suppression hearings would interfere with investigations and lead to extended litigation of tangential issues).

227 See *Lopez-Mendoza*, 468 U.S. at 1048-49 (weighing as cost delays and complication added to deportation hearings when exclusionary rule applies).

228 But cf. Peter F. Nardulli, The Societal Costs of the Exclusionary Rule: An Empirical Assessment, 1983 Am. B. Found. Res. J. 585, 596 (reporting that less than 5% of warrantless searches are challenged and only 14% of such suppression motions are granted, i.e., 0.7% of total cases involving warrantless searches); Peter F. Nardulli, The Societal Costs of the Exclusionary Rule Revisited, 1987 U. Ill. L. Rev. 223, 238-39 (confirming earlier findings that exclusionary rule has little impact on criminal prosecutions).

229 See New Jersey v. T.L.O., 469 U.S. 325, 346 (1985) (referring to principal's suspicion as "common-sense conclusion about human behavior") (citation omitted); see also Terry v. Ohio, 392 U.S. 1, 27 (1968) (setting out reasonable suspicion standard, stating that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger").

230 See Bach, supra note 53, at 1168.

forego searching students out of a belief that any resulting evidence will be suppressed (and perhaps that they will be revealed to have acted unlawfully). To the extent that this chilling effect prevents *illegal* searching, that is exactly what the exclusionary rule and article I, section 12 seek to achieve.[231] The real question is whether officials will be deterred from making *legal* searches because they are overly cautious. Evidence from criminal law enforcement suggests that this cost would be insignificant.[232] Because the standard of reasonable suspicion is relatively low and easy to apply, few searches will be foregone out of uncertainty whether the requisite level of suspicion exists.[233] As a result, illegal searches should be rare.[234] School officials should not have trouble applying the straightforward reasonable suspicion standard, and once that standard is met, they are not likely to forego a search.

2. *The Real Cost: Student Safety*

In a school setting, the primary concern is typically to remove offenders from the school through disciplinary proceedings, not criminal prosecutions. By applying the exclusionary rule to the school disciplinary hearing itself, the school may be unable to expel or suspend a dangerous student. This lost suspension is the greatest cost of the rule, as it allows the offender to continue attending school and may put other students at risk.[235] This cost may be greater than a lost prosecution.[236] To the extent that the offending student is willing or likely

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231 See supra notes 54-56 and accompanying text.

232 See Loewenthal, supra note 165, at 36 (arguing that in marginal situations, police are not deterred from searching by exclusionary rule).

233 See Bach, supra note 53, at 1167-68 (arguing that cost of lost suspension is mitigated in school context, because reasonable suspicion standard is easier to apply than probable cause, and therefore school personnel will rarely search illegally or refrain from searching where search is constitutionally permissible).

234 See id. (arguing that reasonable suspicion standard is easier to apply than probable cause). But see In re Gregory M., 627 N.E.2d 500, 501 (N.Y. 1993) (allowing very limited search on less than reasonable suspicion); see also id. at 507-08 (Titone, J., dissenting) (noting that it is hard to distinguish between reasonable suspicion and evident suggestion or between premonition and reasonable suspicion).

235 See Thompson v. Carthage Sch. Dist., 87 F.3d 979, 981 (8th Cir. 1996) (finding that exclusionary rule "prevents the disciplining of students who disrupt education or endanger other students"); Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 668 (Ct. App. 1984) (distinguishing between administrative penalties which aim to protect public from offender's practice and criminal penalties whose purpose is to punish offender); In re Ronald B., 401 N.Y.S.2d 544, 546 (App. Div. 1978) (balancing individual student's rights against security of all students). But see Bach, supra note 53, at 1152, 1152 n.119 (showing that few offenders released by exclusionary rule's application are dangerous).

236 But see Gail Paulus Sorenson, The Worst Kind of Discipline, 6 Update on Law-Related Educ. 26, 72 (Fall 1982) ("Determining guilt or innocence may be important to the

to bring a weapon to school again,[237] a smaller population (the school community) bears the cost of that student's dangerous presence than the population (society in general) which bears the cost of a lost prosecution.[238] Of course, the relative seriousness of this cost will depend on the offense for which the student is suspended. Students are suspended for many reasons besides possessing a handgun: they may be suspended for drug or tobacco possession or for possessing a weapon most people would consider much less dangerous than a gun, such as a razor.[239]

Second, even if the student's continued presence in school is not actually a danger to other students, her peers and teachers will certainly perceive her to be dangerous. The school community as a whole will feel less safe and this lack of security may interfere with learning directly or indirectly.[240] This cost is higher than the theoretical insecurity that the public feels when one criminal is set free by the exclusionary rule.

A lost suspension may even have an effect outside the school community. In the previous section, concern for judicial integrity was argued to weigh in favor of exclusion, and public perception was found to be one component of that concern: people will not respect or trust a law enforcement or educational system which condones offi-

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system of criminal justice, but it is much less relevant in an educational system that, as a matter of educational policy, provides some form of education to all students.").

237 It is important to recognize that a child will not likely be released immediately after being illegally stopped or searched. Given that even the commencement of a prosecution and/or disciplinary proceeding is inconvenient, time consuming, and publicly humiliating, a student will hesitate to repeat her offense. Further, since school personnel know of the weapon possession, they will be more likely to suspect that student in the future and will be able to search her more easily in the future. See People v. Scott D., 315 N.E.2d 466, 470 (N.Y. 1974) (allowing school authorities to take into account student's record in determining whether they have reasonable suspicion to search). These factors provide a substantial disincentive to repeat the offense.

238 See Brief of Washington Legal Foundation et al. at 18, Juan C. v. Cortines, 679 N.E.2d 1061 (N.Y. 1997) (No. 94-01007) (arguing that exclusion from criminal proceeding results in entire society being slightly more at risk but that people have safe havens to retreat to, whereas exclusion from suspension proceeding results in subset of population being at risk and destroys safe haven of school). But see Barry Kamins, Time to Reform the Exclusionary Rule? No, N.Y. L.J., Oct. 10, 1996, at 2 (defending Appellate Division's *Juan C.* ruling, stating that allowing guilty student to remain in school is *less* drastic a remedy than letting guilty person go free).

239 See New York City School District Chancellor, Reg. No. A-441 (issued Oct. 1, 1993).

240 One study found that one in 10 New York students has missed school because of fear of violence. See SUNY Study, supra note 2, at 17. This number is higher for New York City students, 16% of whom reported missing school, and for other large cities (12%). See id.; see also Denise Buffa, Crew Pleads for Right to Expel Teen Thugs from City Schools, N.Y. Post, Feb. 13, 1997, at 2 (quoting New York City Mayor Rudolph Giuliani saying that he "firmly believe[s] there's a moral commitment to parents and children that school children have a safe place to learn, and teachers have a safe place to teach").

cial misconduct.[241] As the public becomes more and more disenchanted with the judiciary, however, the real risk to credibility may be in *excluding* tainted evidence, not *admitting* it. Similarly, in the school context, that segment of the public that wants to keep guns and other contraband out of school at all costs will lose faith in a system which allows an acknowledged offender to remain in school.

Before assessing this cost of exclusion as intolerably high, however, one must consider those factors which diminish the cost. Removal of a child from her school also implicates other rights, particularly her right to an education and her liberty interests.[242] The 1975 Supreme Court case *Goss v. Lopez*[243] established that once a state creates a right to education a student has property and liberty interests in that right.[244] In *Pollnow v. Glennon*,[245] the Southern District of New York found that a student has a constitutionally protected right to education under the Fourteenth Amendment, and under New York Education Law section 3214.[246] Similarly, *Orozco v. Sobol*[247] found that under the New York Constitution, article XI, section 1, a child has a property right to a free public education, and that this right is protected by the federal due process clause.[248] Other New York cases demonstrate that a child's right to education may not be lightly eliminated or restricted. For example, a federal court found that New York students have a right to counsel in disciplinary hearings.[249]

On the other hand, education is not a fundamental right under either the United States Constitution[250] or the New York Constitu-

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241 See supra notes 202-05 and accompanying text.

242 See Comment, Constitutional Law—Right to Counsel—Student Held Entitled to Counsel at Public School Disciplinary Hearing, 42 N.Y.U. L. Rev. 961, 966 (1967) (noting that child has strong interest in disciplinary proceeding because both her liberty interest and her right to public education are jeopardized).

243 419 U.S. 565 (1975).

244 See id. at 574-75. The Court held that a student could not be deprived of these interests by way of a 10-day suspension without procedural due process. See id. at 581.

245 594 F. Supp. 220 (S.D.N.Y. 1984), aff'd, 757 F.2d 496 (2d Cir. 1985).

246 See id. at 223-24.

247 674 F. Supp. 125 (S.D.N.Y. 1987).

248 See id. at 128; see also *Goss*, 419 U.S. at 579 (noting that where disciplinary action will result in suspension, student is entitled to procedural due process protections of notice and hearing); 32 Educ. Dep't Rep. 68 (1992) (holding that, since right to education is protected by article XI, section 1, decision to deprive student of such right permanently must meet strict scrutiny).

249 See Madera v. Board of Educ., 267 F. Supp. 356, 372-73 (S.D.N.Y. 1967) (finding constitutionally protected right to hearing in disciplinary proceeding and concomitant right to counsel therein). For commentary on *Madera*, see generally Comment, supra note 242.

250 See Plyler v. Doe, 457 U.S. 202, 223 (1982) (holding that education is not fundamental right for equal protection purposes); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (same).

tion.[251] Other state constitutions grant students greater rights to education[252] than does New York and thus students in those states can make stronger arguments for application of the exclusionary rule in any proceeding where those rights are threatened. For example, a student defending against a suspension or expulsion hearing might argue that because the proceeding threatens such an essential right she is entitled to every protection given to a criminal defendant.[253] Such a due process argument would not likely win the day, since due process does not require exclusion of illegally obtained evidence, and due process must already be complied with under *Goss v. Lopez*.[254] Nonetheless, pointing to the recognized importance of a child's right to education may mitigate the perceived benefit of removing that child from her neighborhood school.[255]

In New York, a student who is suspended may be placed in another school setting, but not removed completely from the school system; unlike some other states, a New York suspension does not work a complete deprivation of state-provided education.[256] Nonetheless, although a suspended student continues to receive some form of free education, her status and schoolwork may be affected. To the extent that a New York suspension results in a child's placement in a different program against her will, her liberty interest is implicated.[257] And

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[251] See Levittown Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 365-66 (N.Y. 1982) (holding that public education is not fundamental constitutional right under state constitution).

[252] See, e.g., Serrano v. Priest, 557 P.2d 929, 957-58 (Cal. 1976) (finding fundamental right to education for equal protection analysis under California Constitution); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (same under Connecticut Constitution); Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (same under Minnesota Constitution).

[253] Cf. Bach, supra note 53, at 1161 (arguing that school disciplinary proceedings are quasi-criminal in nature).

[254] 419 U.S. 565, 581 (1975).

[255] For a comparison of various states' approaches to the constitutional right to education, see generally Roni R. Reed, Note, Education and the State Constitutions: Alternatives for Suspended and Expelled Students, 81 Cornell L. Rev. 582, 591-602 (1996).

[256] See N.Y. Educ. Law § 3214 (McKinney 1995 & Supp. 1997); see also N.Y. Educ. Law §§ 3205(1)(c), 3206(1) (McKinney 1995); New York City School District Chancellor, Reg. No. A-441(II)(c) (issued Oct. 1, 1993) (providing that suspended students will be provided alternative instruction). But see Buffa, supra note 240, at 2 (reporting on New York City Schools Chancellor Crew's proposal to expel automatically students 17 years or older who possess weapons in school and to prevent such students from pursuing high school equivalency degrees for one year following expulsion). States that allow suspended or expelled students to be excluded from all public schools entirely have an even greater reason to apply the exclusionary rule in school disciplinary proceedings, because the stakes are higher: a student risks losing a full year of education.

[257] See Goss v. Lopez, 419 U.S. 565, 574-75 (1975). While *Goss* found that a child granted the right to education under state law cannot be deprived of that right without due process under the *United States* Constitution, the argument is stronger when considering the *state* constitution, because the federal judiciary tries to stay out of operations of schools. See Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (noting that State has "un-

even a short suspension may result in long-term damage. As the Supreme Court stated in *Goss*, recorded suspensions can seriously damage "students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[258] It is worth repeating at this point that such a suspension might be based not on a dangerous weapon, as in *Juan C.*, but on a less serious, nonviolent offense. For example, in *Jones v. Latexo Independent School District*,[259] one of the victims of the illegal search was found with a small amount of a substance thought to be marijuana but never tested.[260] Because suspension entailed a mandatory grade point loss, the student, a high school senior, was unable to graduate that year.[261] The more severe the consequences of suspension, the stronger the policy argument for applying the exclusionary rule to disciplinary proceedings.

While students' property and liberty rights in education do not override the state's interest in removing an acknowledged offender from school, they should enter into the equation, diminishing the cost of a lost suspension. Admission of illegally obtained evidence in a procedure designed to deprive a student of her education may amount to doubling the interference with the student's constitutional rights.

There are additional policy reasons not to see suspension as an unadulterated benefit to school and society. Losing a year of school may have permanent effects on social and intellectual development.[262] Removing students from school will likely hinder, rather than further, overall educational goals.[263] Suspension and expulsion often lead to more serious offenses and involvement in the juvenile justice sys-

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doubted right to prescribe the curriculum for its schools"). State courts, on the other hand, can and should be involved in protecting students' rights from infringement by the State by way of school officials.

258 *Goss*, 419 U.S. at 575.

259 499 F. Supp. 223 (E.D. Tex. 1980). For a discussion of the case, see supra text accompanying notes 117-21.

260 See id. at 228 & n.3.

261 See id. at 229.

262 See *Goss*, 419 U.S. at 575 (describing potential permanent effects of suspension); cf. Comment, supra note 242, at 966 (finding high school student's interest in education greater than that of college student because latter has more alternatives and is at less crucial stage of education).

263 See Study: Expulsion Policy Can Cause Long-Term Costs To Rise, Managing School Business, Mar. 17, 1996, available in LEXIS, NEWS Library, LRP File [hereinafter Expulsion Policy] (reporting that one study found most frequent activities of expelled students were sleeping, watching television, and "hanging out" with friends); cf. Recent Legislation Seeks To Give Teachers More Discipline Power, School Violence Alert, Apr. 1996, available in LEXIS, NEWS Library, LRP File (quoting one New York school administrator as saying that short-term suspensions are "counterproductive," because children are merely sent home).

tem.[264] This is a serious loss for society as well as for the individual student.[265] Approximately 1.5 million American students miss a significant amount of school due to suspension or expulsion each year.[266] Sacrificing that much education, even for good reason, has long-term societal and economic repercussions.[267] Disciplinary sanctions also disproportionately affect students of color, particularly African American students.[268] Thus, suspensions may exacerbate the disparity in education levels between children of color and white children. Again, these factors mitigate, but do not eliminate, the cost of a lost suspension.

Compulsory education laws, which require students to attend school for a prescribed period of time,[269] may also play into the cost-benefit analysis and create a concern not present in other civil proceedings. It is not clear, however, whether these laws cut for or against application of the exclusionary rule to school disciplinary proceedings. On one hand, it is possible that compulsory education laws create a "special relationship" between school and student.[270] Because of this "special relationship," the school has an affirmative responsibility to keep schoolchildren safe, and the exclusionary rule should not hamper officials in performing that task.[271] Children may

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264 See Expulsion Policy, supra note 263 (reporting that Colorado's mandatory expulsion law led to a 165% increase in number of students expelled and increased costs of youth correctional facilities). Of course, a child in the juvenile justice system costs the state more than a child in public school. See id. (comparing cost of child in youth facility ($30,250 per year) with cost of educating same child in public school ($6,477 per year)).

265 See, e.g., United States v. Lopez, 115 S. Ct. 1624, 1660-61 (1995) (Breyer, J., dissenting) (describing link between inadequate secondary education and national economy).

266 See Daniel & Coriell, supra note 190, at 15.

267 See Reed, supra note 255, at 605-06 (arguing that since suspension and expulsion are positively correlated with dropping out, it is probable that problems experienced by dropouts—late criminal activity, need for public assistance, unemployment, and lower earning capacity—will be experienced by expelled and suspended students).

268 See id. at 605-10 (describing higher suspension, expulsion, and dropout rates among students of color than among white students); cf. Anne Lindberg, School Expulsions Increase by 14.8%, St. Petersburg Times, July 10, 1996, at 1 (reporting that 36% of students expelled in one Florida county are African American, while only 18.5% of student population is African American).

269 See N.Y. Educ. Law § 3205(1)(a) (McKinney 1995).

270 The Court of Appeals has held that a "special relationship" must exist between a person and a municipality before liability can be imposed on the municipality for failure to protect the individual. See generally Cuffy v. City of New York, 505 N.E.2d 937 (N.Y. 1987).

271 See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) (Blackmun, J., concurring) ("[G]overnment has a heightened obligation to safeguard students whom it compels to attend school."); Brief of Lawyers' Committee On Violence at 15, Juan C. v. Cortines, 679 N.E.2d 1061 (N.Y. 1997) (No. 94-01007). For a more detailed treatment of this argument, see generally Note, Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. § 1983, 30 Harv. C.R.-C.L. L. Rev. 169 (Winter 1995).

stay home from school if they feel they are not safe from gun violence.[272] On the other hand, the state should not initially *compel* a student to attend school only to *deny* her access to school later by means of a procedure which has violated her constitutional rights.[273]

The above arguments do not advocate ignoring a weapon in school simply because it was found during an illegal search. Rather, they support disciplining an offending student in some manner less punitive and less costly to her education than suspension. A range of disciplinary measures exist to address an offending student.[274] Those disciplinary measures which do not require a hearing—or presentation of evidence—are not affected by the exclusionary rule and remain available where suspension is precluded. For example, counseling sessions or participation in a violence-prevention program can be ordered without a hearing. Such methods are also more appropriate for young people, who are considered to require a rehabilitative rather than punitive approach.[275]

While all of the above considerations do not eliminate the cost of applying the exclusionary rule to suspension hearings, they do complicate that cost. Removing from school premises a student who has brought a gun to school is certainly a worthy goal. However, the effect of removal on that student is to curtail not only her individual liberty rights temporarily, but also her right and obligation to be educated—in some cases permanently.[276] Thus, the collateral benefits of

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272 See supra note 240.

273 See William G. Buss, The Fourth Amendment and Searches of Students in Public Schools, 59 Iowa L. Rev. 739, 743 (1974) (finding that Fourth Amendment protection is "particularly called for by the fact that children are compelled by law to attend school through a substantial portion of their public school lives, and are strongly pressured by economic and social constraints to remain in school even after that" (footnote omitted)); Imbriani, supra note 173, at 214-15 (distinguishing between airport metal detectors which courts find to be constitutional in part because person can choose not to go to airport and school metal detectors which are unavoidable due to compulsory education); cf. *T.L.O.*, 469 U.S. at 336 (rejecting *in loco parentis* doctrine and attendant diminution of students' constitutional rights in part because compulsory education laws are inconsistent with theory that school officials act with authority voluntarily conferred by parents).

274 See, e.g., New York City School District Chancellor, Reg. No. A-441 (issued Oct. 1, 1993) (reciting options available for addressing behavioral problems).

275 See, e.g., N.Y. Fam. Ct. Act § 301.1 (Gould 1962) (stating that purpose of article 3 governing juvenile delinquency proceedings includes considering needs and best interests of juvenile respondent).

276 See Orozco v. Sobol, 674 F. Supp. 125, 128 (S.D.N.Y. 1987) (considering request for injunction to allow homeless child to attend school and finding that child could suffer irreparable harm if denied attendance at public school); see also Ross v. Disare, 500 F. Supp. 928, 934 (S.D.N.Y. 1977) ("[I]nterruption of a child's schooling caus[es] a hiatus not only in the student's education but also in other social and psychological developmental processes that take place during the child's schooling . . . .").

a lost suspension ultimately outweigh the concerns militating against application of the exclusionary rule to school disciplinary proceedings.

CONCLUSION

Applying New York's exclusionary rule to school disciplinary proceedings would be an important example of strong state constitutionalism: relying on local precedent and principles, the Court of Appeals could establish new state law protections in an area reserved for state control. This issue is appropriate for a strong state constitutional decision because educational policy—including how to balance students' privacy rights against the need to maintain a safe environment—is set by state governments, not the federal government. In addition, many of the factors that affect educational policy will vary from locale to locale. For example, existing alternative methods to deter illegal school searches, as well as the range of available disciplinary measures apart from suspension, will determine in part whether exclusion is a necessary remedy.

As school searches increase in number, New York will inevitably have to answer the question it avoided in *Juan C.* In ruling that its exclusionary rule does apply to school suspension and expulsion hearings, the Court of Appeals would set an example for other states with strong constitutional traditions to follow.[277] Other state courts should look to their own traditions and principles as a starting point. The concerns laid out in Part III, the benefits and costs of exclusion in the context of a school search, will apply to any state's public schools. For those states whose constitutions include strong search and seizure provisions and independent exclusionary rules, these concerns will ultimately require exclusion of illegally obtained evidence from school disciplinary proceedings. This Note encourages those states to reach out and protect students' diminishing constitutional rights. Well-justified and principled decisions applying the exclusionary rule to school disciplinary proceedings will remind school administrators, courts, and the public that "students . . . [do not] shed their constitutional rights . . . at the schoolhouse gate."[278]

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[277] As Justice Brandeis commented, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[278] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).