

Children and Parolees: Not So Special Anymore

Professor Ed Butterfoss



- Briefly review the Court's suspicionless search jurisprudence
- Explain where TLO and the school search cases fit into that jurisprudence



- Examine what putting two recent Supreme Court parolee/probationer search cases and *Redding* into the mix means for the Court's suspicionless search jurisprudence and for school searches.



- “A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”

City of Indianapolis v. Edmond, 531 U.S. 32 (2000), citing Chandler v. Miller, 520 U.S. 305, 308 (1997).



- “[Individualized] suspicion is not an “irreducible” component of reasonableness.”
 - Martinez-Fuerte, 428 U.S. 543 (1976)
- “Closely guarded category of permissible suspicionless searches”



Camara v. Municipal Court of San Francisco (1967)

- Reasonableness determined by a “balancing test”
- Individualized suspicion not required



- **The warrant approach:**
- all searches without a warrant are per se unreasonable unless within narrowly drawn exception
- Exigency may excuse warrant; PC still required



- **The reasonableness approach:**
- Whether a search is reasonable is determined through the balancing test
- Individualized suspicion not necessarily required



- “The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures.”



• “The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine **administrative** caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.”



T.L.O. And The Expansion of the “Constitutionally Permissible Suspicionless Search” Category



• “**only** in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable is the Court entitled to use the balancing test.”



• “[A] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.”



• “as in other cases of ‘special need’ . . . a warrantless inspection of a commercial premises may well be reasonable within the meaning of the Fourth Amendment.”

• New York v. Burger, 482 U.S. at 702.



–Skinner: “we have recognized exceptions to this rule, however, ‘when “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.””



– Von Rabb: “our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”



– Acton: “a search unsupported by probable cause can be constitutional, we have said, ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.’”



– “[In Skinner and Von Raab] the Court further widened the ‘administrative search’ exception to normal Fourth Amendment requirements . . . ,”

- Steven J. Schulhofer, On The Fourth Amendment Rights Of The Law-Abiding Public, 1989 Sup. Ct. Rev. 87, 87 (1989);



–“The Court has struggled to find the proper fulcrum between the two clauses, but currently asks whether a “special governmental need” exists that justifies departure from the Warrant Clause.”

- Scott E. Sundby, “Everyman”s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum. L. Rev. 1751, 1796 (1994)



- Th[e] special needs exception . . . can plausibly subsume the [administrative search and traffic checkpoint] categories of cases . . .

–Dressler, Understanding Criminal Procedure, § 19.01(3d ed. 2002).



- “But it is perfectly plain from a reading of Von Raab, . . . that it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. Martinez-Fuerte, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and Brown v. Texas are the relevant authority here.”



- Suspicionless searches are only permissible in **limited circumstances**



- “[W]e have recognized only **limited circumstances in which the usual rule does not apply.**”



- special needs (drug testing, school searches, probation searches);
- appropriately limited administrative searches; and
- brief traffic checkpoints with a primary purpose other than ordinary crime control.



- Suspicionless searches are only permissible in **limited circumstances**



NOT SO SPECIAL ANYMORE?

- United States v. Knights (2001)



- “In Knights' view, apparently shared by the Court of Appeals, a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in Griffin- i.e., a “special needs” search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions.”



- “This dubious logic—that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary to *Griffin*’s express statement that its “special needs” holding made it “unnecessary to consider whether” warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.”



- “because we conclude the search of *Knights* was reasonable under our general Fourth Amendment approach of “examining the totality of the circumstances,” with the probation search condition being a salient circumstance.”



- Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose.



- With the limited exception of some special needs and administrative search cases, . . . “we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.”



Samson v. California (2006)

- “[U]nder our general Fourth Amendment approach’ we ‘examin[e] the totality of the circumstances’ to determine whether a search is reasonable within the meaning of the Fourth Amendment.”



- “Whether a search is reasonable “is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.””



- “Examining the totality of the circumstances pertaining to petitioner’s status as a parolee, “an established variation on imprisonment,” . . . including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.”



- “[O]ur Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a search supported by neither individualized suspicion nor ‘special needs’ is nonetheless ‘reasonable.’”



- “[While individualized suspicion “is not an ‘irreducible’ component of reasonableness” under the Fourth Amendment, . . . the requirement has been dispensed with only when programmatic searches were required to meet a “ ‘special need’ ... divorced from the State’s general interest in law enforcement”



- Never before have we plunged below the floor [of reasonable suspicion] absent a demonstration of 'special needs.'”



- “In special needs cases we have at least insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion.”



- “Here, by contrast, there are no policies in place--no “standards, guidelines, or procedures,” . . . --to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness.”



• “Not surprisingly, the majority does not seek to justify the search of petitioner on “special needs” grounds. . . . *Griffin*, after all, involved a search by a probation officer that was supported by reasonable suspicion. The special role of probation officers was critical to the analysis”



• “It is no accident, then, that when we later [in *Knights*] upheld the search of a probationer by a law enforcement officer (again, based on reasonable suspicion), we forwent any reliance on the special needs doctrine.”



• “That simply is not the case. . . . [W]hile this Court’s jurisprudence has often recognized that ‘to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,’ . . . we have also recognized that the ‘Fourth Amendment imposes no irreducible requirement of such suspicion,’”



- “Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, **we have never held that these are the only limited circumstances** in which searches absent individualized suspicion could be ‘reasonable’ under the Fourth Amendment.”



- “Under California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee.”



- “In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. . . .”



- “Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”



- “The Court's interference in these matters of great concern to teachers, parents, and students illustrates why the most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of in loco parentis.”



- “[I]n the early years of public schooling, courts applied the doctrine of in loco parentis to transfer to teachers the authority of a parent to ‘command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.’ . . .”



▪ “So empowered, schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms.”



▪ “If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand.”



▪ “There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have ‘immunity from the strictures of the Fourth Amendment’ when it comes to searches of a child or that child's belongings.”



▪ “Restoring the common-law doctrine of in loco parentis would not, however, leave public schools entirely free to impose any rule they choose. ‘If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move.’”



▪ “Moreover, the Acton Court’s recognition that ‘schoolmasters stand in loco parentis’ to their students at least for ‘many purposes’ signals that the Court is “struggling to empower school officials to effectively address rising threats to children” perhaps leading “down a path that promises to end the Fourth Amendment rights of students in public schools.”



• **Lopera v. Town of Coventry, 652 F. Supp. 2d 203 (D. Rhode Island 2009)**

• “In T.L.O., the Supreme Court appeared to soundly reject the doctrine of in loco parentis as a rationale to justify a search of a student”



- “Later, however, the Supreme Court added confusion when it referred to the powers school officials have over students as “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”



- “Recently, the Supreme Court passed up an opportunity to clarify whether the in loco parentis doctrine has any significance in school search cases. See *Safford Unified Sch. Dist. No. 1 v. Redding*”



- “Justice Thomas's partial dissent urged the Court to adopt an in loco parentis standard to govern all school search cases, a point the majority declined to address.”



- “In light of the Supreme Court's silence on the issue and the rather clear language of T.L.O., a persuasive argument could be made that the in loco parentis doctrine serves no purpose in cases involving the Fourth Amendment rights of public school students.”



- “However, based on the full record of commentary on the issue, this Court cannot conclude that this was a clearly established principle of constitutional law in 2006. See *Morse v. Frederick*, (J. Thomas, concurring) (stating that at least nominally the Supreme Court continues to recognize the applicability of the in loco parentis doctrine to public schools).”



- “Courts have banded about the phrase to such an extent that it is far from clear exactly what role the in loco parentis doctrine plays in a Fourth Amendment analysis, particularly in the specific factual context presented here.”



- Spencer v. City of Bay City, 292 F. Supp. 2d 932 (E.D. Mich. 2003)
- Freidman v. Boucher, 580 F.3d 847 (9th Cir. 2009)


