FOREWORD

2010 FOURTH AMENDMENT SYMPOSIUM

THE FOURTH AMENDMENT RIGHTS OF CHILDREN AND JUVENILES

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The National Center for Justice and the Rule of Law,[1] which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the Fourth Amendment Initiative is its annual symposium on important search and seizure topics.

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Two-thousand-and-ten was the twenty-fifth anniversary of *New Jersey v. T.L.O.*,[2] which broadly set out the framework for evaluating searches of students by school authorities. In *Safford School District #1 v. Redding*,[3] the Court revisited this issue in the context of a strip search of a student by school authorities looking for nonprescription drugs. Beyond the school setting, there are many unique aspects of the application of the Fourth Amendment to juveniles and younger children. The authors in this volume of the *Mississippi Law Journal* offer an extensive treatment of the subject.

The symposium was held on the second day of an appellate judge conference. In the audience were approximately fifty appellate judges from across the country, as well as academics, members of the law school community, and others. It was webcast and the presentations may be viewed at www.ncjrl.org. I thank the authors for contributing to the symposium and to furthering our knowledge of Fourth Amendment jurisprudence.

Samuel Marion Davis, then Dean and now Professor at the University of Mississippi School of Law, was the keynote speaker at the symposium and contributes an article entitled *School Searches Writ Large: Broadening the Perspective in Which We View School Searches*.[4] He challenges us to view Supreme Court decisions involving juveniles in the larger context of the high court's jurisprudence, including Sixth Amendment jury trial cases, First Amendment decisions, and general Fourth Amendment jurisprudence. Viewed from that perspective, Professor Davis explains how the school search cases fit into the overall constitutional jurisprudence of the Supreme Court.

Professor Edwin J. Butterfoss of Hamline University School of Law brings his in-depth perspectives on the Fourth Amendment to the article entitled *School Children and Parolees: Not so Special Anymore*.[5] He addresses the quarter-

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[2] 469 U.S. 325 (1985).

[3] 129 S. Ct. 2633 (2009).

[4] Samuel Marion Davis, *School Searches Writ Large: Broadening the Perspective in Which We View School Searches*, 80 MISS. L.J. 789 (2011).

[5] Edwin J. Butterfoss, *School Children and Parolees: Not So Special Anymore*, 80 MISS. L.J. 805 (2011).

century old "special needs" doctrine as the measure of "reasonableness," which has had significant importance for school searches. He examines the origins and development of the doctrine and concludes that the doctrine may have been eliminated entirely from the Court's suspicionless search jurisprudence in favor a "general Fourth Amendment approach."[6] Professor Butterfoss addresses the implications of those trends in the school search setting and more broadly to society at large. He concludes that the special needs doctrine, flawed though it may be, offers more constraint on government actions than the Court's more recent approach to reasonableness.

Professor Barry C. Feld, from the University of Minnesota Law, writes T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies.*[7] He reminds the reader of the many challenges present in schools, including drug use and violence, and examines how the Supreme Court, lower courts, legislatures, and schools have addressed—or avoided addressing—those challenges. He deconstructs and criticizes the Court's opinion in *T.L.O.* for departing from traditional Fourth Amendment reasonableness analysis, "instead adopting a formless reasonableness standard that provides minimal guidance."[8] *Redding*, in his view, is no better when it "announced a fact-specific limited right without any practical remedy."[9]

Professor Feld demonstrates the consequences of that lack of guidance in the responses of courts, legislatures, and school districts, to the various issues that arise in the school context. He catalogues a wide range of issues, including: the role of the exclusionary rule in juvenile and disciplinary proceedings; school searches conducted in conjunction with law enforcement; and intrusions by school resource officers, metal detectors, and canines; drug testing of students; searches of lockers, desks, and vehicles; and strip searches. He also addresses

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[6] *Id.* at 806.

[7] Barry C. Feld, T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847 (2011).

[8] *Id.* at 850.

[9] *Id.* at 870.

impediments to remedies when rights have been violated. He concludes that the Court erred in creating "a school search exception . . . where none was necessary."[10] Instead, in Professor Feld's view, traditional standards—reasonable suspicion and probable cause—provide a workable standard that should have been utilized in the school context. Feld believes that the lack of Fourth Amendment rights is compounded by the lack of a real remedy, leading him to conclude: "students have few rights and even fewer remedies."[11]

Professor Martin R. Gardner, of the University of Nebraska College of Law, contributes *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law.*[12] As indicated by the title, Professor Gardner examines *Redding* in detail and finds that the opinion "fails to deliver the sufficiently clear guidance promised"[13] or needed. He believes that *Redding* raises more questions than it answers, pointing to vague and internally inconsistent language in the opinion that will "unwisely invite judicial excursion into matters of education policy,"[14] "spawn confusion,"[15] and generate additional litigation. Garner proposes a modified standard, based in part on *Redding*, to measure the propriety of strip searches. He urges "policymakers to adopt provisions that narrowly regulate, if not eliminate altogether, strip searches at schools."[16]

Mary Graw Leary, Associate Professor at the Catholic University of America Columbus School of Law, takes on the challenge of examining the *Reasonable Expectation of Privacy for Youth in a Digital Age*.[17] The Court has told us that a

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[10] *Id.* at 952.

[11] *Id.* at 953.

[12] Martin R. Gardner, *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law*, 80 MISS. L.J. 955 (2011).

[13] *Id.* at 956.

[14] *Id.* at 957.

[15] *Id.*

[16] *Id.*

[17] Mary Graw Leary, *Reasonable Expectation of Privacy for Youth in a Digital Age*, 80 MISS. L.J. 1035 (2011).

person's reasonable expectation of privacy is the sole interest protected by the Fourth Amendment when the government searches.[18] In her article, Professor Leary examines the many ways that young people use Internet-related technology and how that use has shaped their views of privacy. Those social trends are placed in the prism of the Supreme Court's approach to measuring privacy expectations. Leary highlights the distinct challenges of searches of digital devices by modifying the search in *Redding* to be that of a cell phone. Leary believes that that scenario demonstrates the inadequacy of the Court's current approach to measuring the reasonableness of an expectation of privacy. She maintains that the "value-laden analysis"[19] advocated by Justice Harlan offers a better approach.

Professor Victor Streib, of the Ohio Northern University College of Law, focuses on younger members of our society in *Protecting Preteens: A Child's Portion of the Fourth Amendment*.[20] Professor Streib examines the "almost barren landscape"[21] of jurisprudence regarding the privacy rights of preteen children, specifically those between the ages of seven and twelve. He begins by summarizing the importance of attaining specific ages for the purpose of assigning criminal or juvenile responsibility to the actor, with particular emphasis on homicides by young children. Streib surveys Fourth Amendment cases involving children. (He also helpfully provides an appendix that lists major cases by state courts involving children's Fourth Amendment rights.) Complicating the analysis, according to Professor Streib, is the "fact that children are always assumed to be in the custody of someone, whether it be their parents or the state."[22] Further complications arise based on the broad range of roles that police are expected to engage in—from law enforcement to community caretaking. Streib contends that, when the police

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[18] *E.g.*, Soldal v. Cook County, 506 U.S. 56 (1992).

[19] Leary, *supra* note 17, at 1036.

[20] Victor Strieb, *Protecting Preteens: A Child's Portion of the Fourth Amendment*, 80 MISS. L.J. 1095 (2011).

[21] *Id.* at 1096.

[22] *Id.* at 1119.

come in contact with juveniles for the purpose of law enforcement, the juveniles should be afforded the same protection under the Fourth Amendment as adults receive. He observes: "Greater protections should be afforded to children if police officers reasonably doubt that the child is capable of making adult-like decisions."[23] Moreover, he asserts, when the police are acting out of concern for the child's welfare, they should exercise even "greater caution in protecting the child's right to privacy, because it is more likely that the police power will conflict with what is in the best interests of the child."[24]

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[23] *Id.* at 1121.

[24] *Id.* at 1123.