

***T.L.O* AND *REDDINGS*'S UNANSWERED (MISANSWERED)
FOURTH AMENDMENT QUESTIONS: FEW RIGHTS AND
FEWER REMEDIES**

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Compulsory attendance laws concentrate large groups of young people in schools. Crime rates increase sharply during adolescence and pose unique problems of social control in schools. In addition to their educational mission, school officials have to maintain order, provide a safe environment in which to learn, and control guns, drugs, and violence on campus and nearby. To do so, they impose extensive rules and regulations, physically monitor students, and generate more opportunities to infringe on Fourth Amendment interests than adults or youths encounter in other public places. School officials search students, their purses, jackets, backpacks, lockers, urine, and cars with great regularity. School resource officers (SROs), police, and their canine partners sometimes accompany school personnel who conduct searches. When courts define students' Fourth Amendment expectations of privacy, should they subject students to a different regime than adults or youths on the street enjoy? And what remedies may students invoke when school officials violate their rights?

Prior to the Supreme Court's ruling in *New Jersey v. T.L.O.*, school officials advocated and courts developed several rationales to uphold virtually all searches of students and their personal effects. Using inconsistent logic, school administrators sometimes argued that they acted as private citizens, hence

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their searches entailed no state action. In the alternative, they claimed to act *in loco parentis* under delegated authority from students' parents, argued students impliedly consented, or asserted their authority to provide third-party consent to search. More fundamentally, administrators insisted that public schools' security needs required more relaxed rules to search students.¹

The Supreme Court in *New Jersey v. T.L.O.* applied a Fourth Amendment standard of reasonableness, balanced the government's special need to intervene against intrusions on students' legitimate expectations of privacy, and held that the search in question was reasonable.² By finding that no Fourth Amendment violation occurred, the Court avoided answering the question for which it originally agreed to hear the case: "whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers."³

T.L.O. departed from ordinary Fourth Amendment principles and instead used a reasonableness balancing approach to analyze searches conducted by school officials. Moreover, the Court left unanswered many more questions than it answered. Because *T.L.O.* upheld the search under an amorphous reason-

¹ See *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2646 (2009) (Thomas, J., dissenting) (advocating return to "common-law doctrine of *in loco parentis* under which 'the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order'" (quoting *Morse v. Frederick*, 551 U.S. 393, 414 (2007) (Thomas, J., concurring in part and dissenting in part))); *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n.2 (1985) (describing alternative search rationale); Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W. ST. U. L. REV. 105 (2003) (providing a comprehensive analysis of pre-*T.L.O.* lower court decisions); Dale Edward F.T. Zane, Note, *School Searches Under the Fourth Amendment: New Jersey v. T.L.O.*, 72 CORNELL L. REV. 368, 376-80 (1987) (analyzing alternative theories under which courts upheld student searches prior to *T.L.O.*). See generally William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974), for analyses of pre-*T.L.O.* cases.

² 469 U.S. at 333-48.

³ *Id.* at 331.

ableness standard,⁴ the Court provided no guidance for schools or courts to define valid searches in other circumstances. The Court did not decide whether the exclusionary rule applied to evidence obtained from unconstitutional searches conducted by school authorities. Because the procedural rights of delinquents and criminal defendants differ substantially,⁵ the Court has never directly required an exclusionary remedy in delinquency prosecutions. In addition, *T.L.O.* avoided deciding what remedy, if any, students enjoyed in school disciplinary proceedings when school personnel obtain evidence unlawfully.⁶

T.L.O. went out of its way to identify other issues that the Court did not decide. Because *T.L.O.* involved the search of a student's purse in her possession, the Court specifically did not decide students' expectations of privacy in desks and lockers,⁷ or in their cars parked on school property. The principal who searched T.L.O.'s purse acted alone and the Court did not decide which search standard—reasonable suspicion or probable cause—applied when police act in conjunction with school officials.⁸ *T.L.O.* concluded that the principal who searched her had reasonable suspicion, and it declined to speculate whether staff could conduct reasonable searches without individualized

⁴ *Id.* at 381 (Stevens, J., concurring in part and dissenting in part) (“The Court’s effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults’ privacy only creates uncertainty in the extent of its resolve to prohibit the latter.”).

⁵ Compare *Duncan v. Louisiana*, 391 U.S. 145, 147-59 (1968) (holding that in all criminal prosecutions for serious offenses the Sixth Amendment right to a jury trial is made obligatory on the States by the Fourteenth Amendment), and *Gideon v. Wainwright*, 372 U.S. 335, 339-46 (1963) (holding that in all criminal prosecutions the Sixth Amendment right to counsel is made obligatory on the States by the Fourteenth Amendment), with *McKeiver v. Pennsylvania*, 403 U.S. 528, 543-52 (1971) (denying delinquents a constitutional right to jury trial), and *In re Gault*, 387 U.S. 1, 34-43 (1967) (basing juveniles’ right to counsel on the Fourteenth Amendment due process clause rather than the Sixth Amendment). See generally Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111 (2003) (arguing that the procedural deficiencies of juvenile court cannot sustain the use of delinquency convictions to enhance adult criminal sentences).

⁶ *T.L.O.*, 469 U.S. at 333 n.3.

⁷ *Id.* at 337 n.5.

⁸ *Id.* at 341 n.7.

suspicion.⁹ Finding answers to these and related questions became more urgent with the increase in drug use and youth violence in the first decade after *T.L.O.* and the spate of school shootings and heightened police security in the subsequent decade.¹⁰

This article examines how the Supreme Court, federal and state courts, legislatures, and schools have answered these questions over the ensuing quarter-century. Part I A. analyzes *T.L.O.* and the Fourth Amendment questions that the Court *did* answer. *T.L.O.* applied Fourth Amendment strictures to school officials and balanced governmental and privacy interests. For a search to be reasonable, it must be justified at its inception—ordinarily individualized suspicion—and related in scope to that justification—degree of intrusiveness. I criticize *T.L.O.* for abandoning elementary Fourth Amendment principles—probable cause as a prerequisite to intrusive searches—and instead adopting a formless reasonableness standard that provides minimal guidance to school officials or lower courts confronted with the myriad factual variations of searches. Part I B. examines *Safford Unified School District #1 v. Redding*¹¹ which applied *T.L.O.*'s reasonableness balancing approach to a student's strip search, found the administrators acted unconstitutionally, and still denied relief. Part I C. identifies the questions *T.L.O.* declined to answer and to which *Redding* provides no additional guidance.

Part II analyzes how courts, legislatures, and school districts have responded to *T.L.O.*'s undecided questions. Part II A. examines juveniles' right to an exclusionary remedy in delinquency prosecutions and in internal school disciplinary proceedings. It identifies for later analyses the problematic issue of remedies when school officials violate students' constitutional rights. Part II B. examines how the increased presence of

⁹ *Id.* at 342 n.8.

¹⁰ See generally BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999) (analyzing factors contributing to escalation in drug use, gun violence, and youth homicide between mid-1980s and mid-1990s); KATHERINE S. NEWMAN ET AL., *RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS* (2004) (analyzing social context of school shootings in the 1990s).

¹¹ 129 S. Ct. 2633 (2009).

police officers in schools—police liaison officers or school resource officers—greatly complicates the question of “assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement.”¹² It suggests that a weakened search standard and a heightened police presence fuels the school-to-prison pipeline and contributes to disproportionate minority over-representation in the juvenile justice system.

Part III examines *T.L.O.*'s first prong that requires searches to be justified at their inception. Individualized suspicion, probable cause or reasonable suspicion, typically provides the bases to conduct searches reasonably. Part III A. examines applications of *T.L.O.*'s reasonable suspicion standard in schools. What quanta of facts provide a minimum basis for reasonable suspicion? Part III B. analyzes how school officials obtain information. *Redding* and other cases pose questions of how courts should evaluate tips provided by student informants. It examines the uses of metal detectors and dogs to provide bases to conduct intrusive searches. Part III C. analyzes post-*T.L.O.* drug-testing cases—*Acton*¹³ and *Earls*¹⁴—in which the Court entirely abandoned Fourth Amendment jurisprudence, eschewed particularized facts, and upheld suspicionless searches.

Part IV examines *T.L.O.*'s second prong that limits the scope of searches to their threshold justification. It considers the scope of searches in different contexts. Part IV A. examines searches of lockers, desks, and personal effects. Part IV B. considers searches of students' automobiles on campus. Part IV C. focuses on strip searches and the Court's application of *T.L.O.*'s reasonableness standard in *Redding*.¹⁵ Even though *Redding* found that school officials violated the Constitution, it provided no remedy.

Part V considers remedies available to students when school officials violate their Fourth Amendment rights. Cases

¹² *T.L.O.*, 469 U.S. at 341 n.7.

¹³ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁴ *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001).

¹⁵ *Redding*, 129 S. Ct. 2633.

present themselves in two procedural postures: a motion to suppress evidence in a delinquency prosecution or a § 1983 action for violations of constitutional rights. Neither of these remedies adequately protects students' rights or impels school officials to respect them. The Court's amorphous reasonableness balancing approach, the minimal threshold of suspicion to justify a search, the breadth of good-faith qualified immunity, judges' highly deferential stance toward school officials, and practical procedural impediments to litigation have created "enclaves of totalitarianism" that the Court has long decried.¹⁶ The article concludes that students have few Fourth Amendment rights and fewer remedies for their violations.

PART I. *T.L.O.*'S REASONABLENESS BALANCING FRAMEWORK:
FOURTH AMENDMENT FORM WITHOUT SUBSTANCE

The Supreme Court in *New Jersey v. T.L.O.* originally granted certiorari to consider whether juveniles could invoke the exclusionary rule in delinquency trials as a remedy for unconstitutional searches conducted by public school officials.¹⁷ On reconsideration, the Court instead announced a Fourth Amendment reasonableness standard to govern school searches, concluded that the principal's search did not violate the Fourth Amendment, and did not reach the question of remedy. This section analyzes *T.L.O.*'s reasonableness standard, the Court's application of it in *Redding* to a strip search, and the many questions *T.L.O.* declined to answer.

A. *New Jersey v. T.L.O.: The Wrong Answer to a Question Not Asked*

A teacher discovered T.L.O., a 14-year-old high school freshman, and another girl smoking in a bathroom in violation of a school rule that prohibited them from smoking except in

¹⁶ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (upholding students' First Amendment rights in school); see also *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (prohibiting school officials from compelling Jehovah's Witness students to salute the flag).

¹⁷ 469 U.S. at 327.

designated areas.¹⁸ Reflecting an earlier attitude toward teen smoking, the school rules did not prohibit students from possessing or smoking cigarettes, but regulated only the places in which they could smoke.¹⁹ The teacher who observed the violation brought the two girls to Vice Principal Theodore Choplick's office.²⁰ Although T.L.O.'s companion admitted her transgression, T.L.O. denied the charge and claimed that she did not smoke.²¹ Choplick directed T.L.O. to his private office and demanded to see her purse.²² He opened the purse, removed a pack of cigarettes, and confronted her with it for lying to him.²³ As he removed the cigarettes, he saw a pack of cigarette rolling papers which he associated with marijuana use.²⁴ Based on that suspicion, he conducted a thorough search of the purse which yielded a small amount of marijuana, a pipe, empty plastic bags, a quantity of money in one-dollar bills, a list of students who owed T.L.O. money, and two incriminating letters.²⁵ Choplick gave the evidence to the police.²⁶ When police interrogated T.L.O. and confronted her with the evidence, she confessed to selling marijuana at school.²⁷ In addition to sanctions imposed by the school, the State charged her with delinquency based on the evidence seized from her purse.²⁸ T.L.O. moved to suppress the evidence and her confession which she claimed the unlawful search tainted.²⁹ The juvenile court denied T.L.O.'s motion to suppress, adjudicated her delinquent, and placed her on probation for one year.³⁰ T.L.O. appealed the trial

¹⁸ *Id.* at 328.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 329.

²⁸ *Id.* at 329 n.1 (noting that T.L.O. received a 3-day suspension from school for smoking in a non-smoking area and a 7-day suspension for possession of marijuana). The trial court ruled that Choplick's search violated the Fourth Amendment, set aside the 7-day suspension, and the school did not appeal the decision. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 333.

court's evidentiary ruling and the New Jersey Supreme Court reversed the judgment and ordered suppression of the evidence.³¹

The New Jersey Supreme Court in *In re T.L.O.* considered two issues: "(1) whether the Fourth Amendment exclusionary rule applies to student searches made by public school administrators; and (2) what standard determines the reasonableness of the search if the exclusionary rule does apply."³² The court concluded that the Fourth Amendment applied to searches conducted by public school officials.³³ It rejected the state's objection to an exclusionary remedy and held that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."³⁴ Although the New Jersey Supreme Court dispensed with a warrant requirement, it insisted that school officials must have "reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order."³⁵ It did not specify whether "reasonable grounds" meant probable cause or only reasonable suspicion. The court reviewed the factual predicate for Choplick's search and concluded that he acted without adequate justification under either standard.³⁶ The contents of T.L.O.'s purse had no relevance to the teacher's accusation that she smoked in the bathroom—a violation only because it was a prohibited place to smoke—and Choplick lacked specific facts to believe it contained any contraband.³⁷ Therefore, his intrusive search that yielded evidence of drug crimes was invalid.

The United States Supreme Court initially granted New Jersey's petition for certiorari to consider "only the question

³¹ *Id.*

³² *T.L.O. v. Engerud (In re Interest of T.L.O.)*, 463 A.2d 934, 936 (N.J. 1983).

³³ *Id.* at 942.

³⁴ *Id.* at 939.

³⁵ *Id.* at 941.

³⁶ *Id.* at 942.

³⁷ *Id.* ("[Choplick] did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order. . . . Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.").

whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers.”³⁸ The Court set the case for re-argument to consider the applicability and scope of the Fourth Amendment to searches conducted by school officials.³⁹ Because a majority of the Court concluded that Choplick’s search of T.L.O.’s purse did not violate the Fourth Amendment, it did *not* answer the question whether juveniles could invoke the exclusionary rule in delinquency proceedings for unlawful searches by school officials.⁴⁰

All of the *T.L.O.* Justices agreed that public school officials are state actors bound by the Fourth Amendment’s prohibition against unreasonable searches and seizures.⁴¹ But that conclusion required the Court to define the scope of searches conducted by school officials:

Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires “balancing the need to search against the invasion which the search entails.” On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.⁴²

³⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 331 (1985).

³⁹ *Id.* at 332.

⁴⁰ *Id.* at 333 n.3 (“[W]e do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. 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. Thus, *our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.*” (emphasis added)).

⁴¹ *Id.* at 335-38.

⁴² *Id.* at 337 (citation omitted).

The Court used the reasonableness analysis developed in *Terry v. Ohio*⁴³ and balanced the intrusion on a person's expectation of privacy against the government's need to intervene.

The Court rejected the state's argument that because of schools' pervasive regulation of students, young people had no reasonable expectation of privacy in personal items, such as purses, brought to school.⁴⁴ It repudiated the state's analogy of schools to prisons and the claim that officials' need to maintain order and discipline vitiated students' legitimate expectations of privacy.⁴⁵ The Court observed that students necessarily bring personal property—supplies, wallets, purses, backpacks, musical instruments, and other articles to participate in recreational and extracurricular activities—to school and concluded that they have not “waived all rights to privacy in such items merely by bringing them onto school grounds.”⁴⁶ Respecting students' privacy interests fosters their maturation and sense of autonomy and socializes them into the values of a democratic society, whereas arbitrary governmental invasions may impede development and cause psychological harms.⁴⁷

Although the majority grudgingly acknowledged T.L.O.'s privacy interests in her purse, it balanced those abstract concerns against school officials' imperative to maintain discipline

⁴³ 392 U.S. 1 (1967) (upholding police “stop and frisk” practices as less intrusive than full-blown searches and therefore requiring only “reasonable suspicion” rather than probable cause).

⁴⁴ The state's argument found a more sympathetic audience in the concurring opinion of Justices Powell and O'Connor. “In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.” *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). They also distinguished the relationship between teachers and students from those of law enforcement officers and citizens. *Id.* at 349. “Law enforcement officers function as adversaries of criminal suspects. . . . Rarely does this type of adversarial relationship exist between school authorities and pupils.” *Id.* at 349-50.

⁴⁵ *Id.* at 338-39 (majority opinion) (noting that because of the need to maintain order in prison, inmates retain no legitimate expectations of privacy: “We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.”).

⁴⁶ *Id.* at 339.

⁴⁷ See generally Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 902-04 (1988) (describing injuries associated with unjustified invasions of young people's privacy).

and order and to promote an appropriate educational environment.⁴⁸ The Court noted that the increased prevalence of drugs and violence posed great challenges for some school administrators. Thus, schools had “special needs” beyond those associated with traditional law enforcement.⁴⁹ To address those evils and to provide a suitable academic milieu required school officials to closely supervise students and allowed them to impose rules and regulations which would not apply to adults or to youths in other settings.⁵⁰ Moreover, the Court emphasized that school officials require flexibility to achieve these goals.⁵¹

The majority, concurring, and dissenting Justices agreed that the Fourth Amendment applied to searches conducted by school officials and that exigent circumstances justified dispensing with a warrant as a prerequisite to a valid search.⁵² However, the majority and dissent disagreed about the level of suspicion required to justify an intrusive search. The majority conceded that even a warrantless search ordinarily required probable cause, but it insisted that probable cause was not “an irreducible requirement of a valid search.”⁵³ Instead of adhering to the language of the Fourth Amendment, the Court en-

⁴⁸ *T.L.O.*, 469 U.S. at 339-40.

⁴⁹ Although the *T.L.O.* majority emphasized officials' obligation to maintain order, Justice Blackmun's concurring opinion focused on schools' “special needs” beyond those associated with ordinary law enforcement to justify dispensing with the probable cause requirement. *Id.* at 352-53 (Blackmun, J., concurring).

The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers. . . . [B]ecause drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.

Id.

⁵⁰ *Id.* at 339 (majority opinion).

⁵¹ *Id.* at 340 (“[M]aintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.”).

⁵² *Id.* (“[S]chool officials need not obtain a warrant before searching a student who is under their authority”); *id.* at 355-56 (Brennan, J., concurring in part and dissenting in part) (agreeing that school officials “generally may conduct a search of their students' belongings without first obtaining a warrant”); *id.* at 370-71 (Stevens, J., concurring in part and dissenting in part).

⁵³ *Id.* at 340 (majority opinion).

gaged in “a careful balancing of governmental and private interests” and concluded that “the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.”⁵⁴

The Court used a balancing approach similar to that used in *Terry v. Ohio*⁵⁵ to justify stop-and-frisk intrusions to govern the reasonableness of school searches. “Determining the reasonableness of any search involves a twofold inquiry: first, one must consider ‘whether the . . . action was *justified at its inception*’; second, one must determine whether the search as actually conducted ‘was *reasonably related in scope* to the circumstances which justified the interference in the first place.’”⁵⁶ A search would be justified at its inception if school officials had reasonable grounds to believe that it would uncover evidence of a crime or a violation of a school rule.⁵⁷ A search would be reasonably related in scope as long as officials confined it to the objectives of the search and did not use excessively intrusive methods “in light of the *age and sex* of the student and the *nature of the infraction*.”⁵⁸ However, the Court did not explain the practical meaning of those limitations—age, sex, or the nature of the infraction. Nor did it explain why a male principal conducting a full-blown search of a young female’s purse for a violation—smoking in the wrong venue—that did not require additional evidence did not exceed the scope limitation it purported to announce.⁵⁹

T.L.O. used the same standard as that employed by the New Jersey Supreme Court,⁶⁰ but criticized the lower court for

⁵⁴ *Id.* at 341. *But see* Zane, *supra* note 1, at 390 (criticizing the majority for failing to weigh the comparative costs of requiring probable cause rather than reasonable suspicion and the negative effects of denying students full Fourth Amendment protections).

⁵⁵ 392 U.S. 1 (1967).

⁵⁶ *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967)) (emphasis added).

⁵⁷ *Id.* at 341-42.

⁵⁸ *Id.* at 342 (emphasis added).

⁵⁹ *See infra* note 88 and accompanying text.

⁶⁰ *T.L.O.* emphasized that most lower courts did not require a probable cause standard, *T.L.O.*, 469 U.S. at 341, and reasoned that

using “a somewhat crabbed notion of reasonableness” to invalidate the search.⁶¹ The majority reanalyzed the facts and assumed that whether T.L.O. possessed cigarettes was relevant to the credibility of her denial of smoking, inferred that if she possessed cigarettes they likely would be in her purse, and concluded that therefore Choplick had reasonable suspicion to search her purse.⁶² The Court used a plain-view rationale to justify his more intrusive search of her purse thereafter to uncover evidence of drug-related activities.⁶³ The Court found his actions justified at the inception, reasonably related in scope to the original justification, and upheld the search as reasonable. New Jersey used the evidence in both a school disciplinary proceeding and a delinquency prosecution.⁶⁴ *T.L.O.* did not distinguish the standard for admissibility—reasonable suspicion and probable cause—in those differing settings and endorsed the lower one for both.⁶⁵ By endorsing a lower Fourth Amendment standard, *T.L.O.* enables the state to convict juveniles with evidence found in school that would be inadmissible if offered against a similarly-situated adult.⁶⁶

[T]he special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause. These courts have, by and large, upheld warrantless searches by school authorities provided that they are supported by a reasonable suspicion that the search will uncover evidence of an infraction of school disciplinary rules or a violation of the law.

Id. at 332 n.2.

⁶¹ *Id.* at 343.

⁶² *Id.* at 343-46.

⁶³ *Id.* at 347.

⁶⁴ *Id.* at 329 n.1.

⁶⁵ Prior to *T.L.O.*, several lower courts had suggested that public school officials could search on less than probable cause for internal school disciplinary proceedings, but required probable cause if the state introduced the evidence at a delinquency trial. See *Bahr v. Jenkins*, 539 F. Supp. 483, 485-86 (E.D. Ky. 1982); *Stern v. New Haven Cmty. Sch.*, 529 F. Supp. 31, 35-36 (E.D. Mich. 1981); *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd*, 631 F.2d 91 (7th Cir. 1980); Erica Tina Helfer, Comment, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U. L.J. 119, 129-30 (1979).

⁶⁶ See Feld, *supra* note 5 (analyzing direct and collateral consequences of delinquency convictions for sentencing, transfer to criminal court, and sentence enhancement of adults); Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S.

Justice Brennan's dissent questioned the majority's adoption of a reasonableness standard to conduct full-scale searches "whose only definite content is that it is *not* the same test as the 'probable cause' standard found in the text of the Fourth Amendment."⁶⁷ He characterized the Court's resort to a balancing test as a departure from Fourth Amendment precedents that require probable cause and criticized it for unreasonably applying the standard to the facts of the case.⁶⁸ He predicted that *T.L.O.* effectively would immunize teachers and administrators from any obligation to respect constitutional limits.⁶⁹ Justice Stevens's dissent argued that the majority's balancing approach would allow officials to conduct highly intrusive searches to enforce trivial school rules.⁷⁰ Both dissents criticized the Court's reasonableness standard because it provided no guidance to school officials or to lower courts attempting to apply it.⁷¹

Justice Brennan questioned *T.L.O.*'s reasonableness balancing approach to govern full-scale searches. He argued that a full-scale search such as opening a closed purse and scrutinizing its contents required probable cause.⁷² He distinguished between full-scale searches that require probable cause and less-intrusive police practices, such as stop-and-frisks, that use

CAL. L. REV. 921, 934-35 (1997) (noting that delinquency adjudications can lead to students' suspension or expulsion and difficulty obtaining admission to college or jobs).

⁶⁷ *T.L.O.*, 469 U.S. at 354 (Brennan, J., concurring in part and dissenting in part).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 371 (Stevens, J., concurring in part and dissenting in part).

⁷¹ *Id.* at 354 (Brennan, J. concurring in part and dissenting in part).

⁷² *Id.* at 358. Brennan states:

I emphatically disagree with the Court's decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search. The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of its Rohrschach-like "balancing test." Use of such a "balancing test" to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis.

Id. at 357-58.

a lower threshold of reasonable suspicion.⁷³ Under circumstances that constitute a full-scale search, no justification exists to employ a balancing test.⁷⁴ Brennan charged that the majority resorted to a reasonableness balance because it calculated that a lower standard than probable cause would enable school officials to search without meaningful constraints.⁷⁵

Justice Brennan found *T.L.O.*'s adoption of a less-demanding search standard especially ironic in light of the Court's earlier decision in *Illinois v. Gates* to use a less-structured and more flexible approach to determinations of probable cause.⁷⁶ "Among the adjectives used to describe the [probable cause] standard were 'practical,' 'fluid,' 'flexible,' 'easily applied,' and 'nontechnical.' The probable-cause standard was to be seen as a 'commonsense' test whose application depended on an evaluation of the 'totality of the circumstances.'" ⁷⁷ He questioned why administrators and teachers would find it too difficult to apply *Gates*'s common-sense, non-technical probable cause standard in the school setting.⁷⁸ Finally, he noted the *Terry* reasonable suspicion standard provided school officials with flexibility for less intrusive actions than full-scale searches.⁷⁹

⁷³ Compare *Terry v. Ohio*, 392 U.S. 1, 16-28 (1968) (adopting reasonableness balancing and upholding stop and frisk of outer garment based on reasonable suspicion), with *Sibron v. New York*, 392 U.S. 40, 62-67 (1968) (excluding evidence obtained by an intrusive search of pocket based on reasonable suspicion).

⁷⁴ *T.L.O.*, 469 U.S. at 362 (Brennan, J., concurring in part and dissenting in part).

⁷⁵ *Id.* at 362-63.

⁷⁶ *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (adopting "totality of the circumstances" approach to evaluations of probable cause). Prior to *Gates*, courts analyzed probable cause provided by informants using a two-prong rule announced in *Spinelli v. United States*, 393 U.S. 410 (1969), *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Draper v. United States*, 358 U.S. 307 (1959). *Gates* emphasized judicial discretion rather than rules or standards to govern probable cause determinations. *Gates*, 462 U.S. at 231-42.

⁷⁷ *T.L.O.*, 469 U.S. at 364 (citation omitted) (Brennan, J., concurring in part and dissenting in part).

⁷⁸ *Id.* Moreover, reliance on an amorphous "reasonableness" standard could "leave teachers and administrators uncertain as to their authority and will encourage excessive fact-based litigation." *Id.* at 367; see also Zane, *supra* note 1, at 388 ("[T]he state could either educate teachers about probable cause or assign [sic] law enforcement officials to conduct school searches.").

⁷⁹ *T.L.O.*, 469 U.S. at 367 (Brennan, J., concurring in part and dissenting in part).

The majority did not respond directly to Justice Brennan's questions or justify its adoption of a reasonable suspicion standard to conduct full-blown searches. Even as *T.L.O.* acknowledged the relevance of a probable cause requirement, the majority simply asserted a preference for the lower, less-restrictive threshold.⁸⁰ Although the majority purported to use *Terry's* balancing analysis, it ignored the significant differences in the intrusion on privacy—a protective frisk of outer clothing versus opening a closed purse—and the justification for intervention—a potentially armed suspect versus a disingenuous student.⁸¹ *Terry* emphasized that both the justification for and scope of a frisk were less intrusive than a search.⁸² Justice Brennan properly criticized the majority for failing to cite any cases which approved a full-scale search without probable cause.⁸³

Justice Stevens objected to the majority's grant of unrestricted authority to school officials to conduct a full-blown search whenever they claimed a valid governmental interest.⁸⁴

⁸⁰ *Id.* at 340 (majority opinion). "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.* at 341; see Rosemary Spellman, Comment, *Strip Search of Juveniles and the Fourth Amendment: A Delicate Balance of Protection and Privacy*, 22 J. JUV. L. 159, 170 (2001-02) (criticizing *T.L.O.* majority for failing "to explain why a search of a person's intimate possessions, which would be unreasonable if done to a free citizen in any other context, was reasonable in school").

⁸¹ *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (emphasizing that the officer "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons").

⁸² *Id.* at 26 ("[I]t must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.").

⁸³ *T.L.O.*, 469 U.S. at 360 (Brennan, J., concurring in part and dissenting in part) (distinguishing the Court's reliance on stop-and-frisk, border search, and administrative searches as "minimally intrusive searches that served crucial law enforcement interests" and not full-scale searches).

⁸⁴ *Id.* at 377 (Stevens, J., concurring in part and dissenting in part). Stevens states:

The Court's standard for deciding whether a search is justified "at its inception" treats all violations of the rules of the school as though they were fungible. For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.

If officials could search whenever they reasonably believed “*that the student has violated or is violating either the law or the rules of the school,*” then they could conduct intrusive searches to enforce trivial regulations.⁸⁵ All rules are not equally important, and a reasonable balance requires a proportional relationship between the governmental interests asserted and the privacy interests intruded upon.⁸⁶ A substantial difference exists between the lethal danger confronted in *Terry* and *T.L.O.*'s compromised veracity.⁸⁷ Although the majority asserted that a search should not be “excessively intrusive in light of the age and sex of the student *and the nature of the infraction,*” Stevens questioned what practical limits that imposed if a male disciplinarian could rummage through a young woman's purse—“a serious invasion of her legitimate expectations of privacy”—to find impeachment evidence marginally related to a minor smoking violation.⁸⁸

The Court rejected any requirement of proportionality between the importance of a rule and the privacy intrusion its enforcement occasioned and simply deferred to school administrators' expertise.⁸⁹ “We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules.”⁹⁰ The majority declined to second guess school officials' judgments about what rules they required to maintain discipline,

Id.

⁸⁵ *Id.* (citing examples of trivial rules and regulations for which teachers could search).

⁸⁶ *Id.* at 378-79 (“[A] standard that varies the extent of the permissible intrusion with the gravity of the suspected offense is also more consistent with common-law experience and this Court's precedent.”).

⁸⁷ *Id.* at 380 (“The logic of distinguishing between minor and serious offenses in evaluating the reasonableness of school searches is almost too clear for argument.”).

⁸⁸ *Id.* at 376, 381-82. Stevens characterized Choplick's search as an overreaction to “a minor infraction—a rule prohibiting smoking in the bathroom of the freshmen's and sophomores' building . . . [T]he search for cigarettes merely tended to corroborate a teacher's eyewitness account of T.L.O.'s violation of a minor regulation designed to channel student smoking behavior into designated locations.” *Id.* at 384.

⁸⁹ *Id.* at 342 n.9 (majority opinion).

⁹⁰ *Id.*

prevent harm, and promote a learning environment and gave them *carte blanche* to enforce all.

Analysts have criticized *T.L.O.* for abandoning Fourth Amendment jurisprudence and adopting a reasonableness balancing approach that provides no workable bases to analyze and answer different factual situations.⁹¹ Commentators agree that the Court failed to justify its decision to use a lower search threshold for students in schools.⁹² A common-sense, non-technical probable cause standard is no more difficult for school officials to administer than a reasonable suspicion standard, except that it provides greater protection for students' privacy interests prior to governmental intrusion.⁹³ Reasonableness, by contrast, provides minimal guidance in advance, lends itself to abuse by school officials whom judges are loathe to characterize as acting "unreasonably," and discourages challenges to real constitutional violations because of its uncertainty.⁹⁴ *T.L.O.*'s application of the reasonable suspicion standard to the facts of the case effectively denied students any meaningful Fourth Amendment protections.⁹⁵ The Court's paternalistic stance to-

⁹¹ See, e.g., Zane, *supra* note 1, at 386-90 (criticizing *T.L.O.* for abandoning a probable cause standard and announcing a reasonableness standard that "does not provide a workable general framework for fourth amendment analysis; in most situations application of the reasonableness view is both illogical and unwieldy").

⁹² See Irene Merker Rosenberg, *New Jersey v. T.L.O.: Of Children and Smoke-screens*, 19 FAM. L.Q. 311 (1985); Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 N.Y.U. L. REV. 1077 (1991) (arguing that the balance of student and school interests varies with the context and that different interests apply to searches in school, to searches of vehicle in the school parking lot, and to searches conducted off-campus during extracurricular activities); Mary-Ellen Zalewski, Note, *New Jersey v. T.L.O.: Qualified Fourth Amendment Rights for Public School Students*, 64 OR. L. REV. 727 (1986); Zane, *supra* note 1.

⁹³ Zane, *supra* note 1, at 388 (arguing that "probable cause is at least as easy a standard to apply as reasonable suspicion").

⁹⁴ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) ("If there are no fairly clear rules telling the policemen [or school officials] what he may and may not do, courts are seldom going to say that what he did was unreasonable.").

⁹⁵ See, e.g., Missy Kelly Bankhead, Note, *New Jersey v. T.L.O.: The Supreme Court Severely Limits Schoolchildrens' Fourth Amendment Rights When Being Searched by Public School Officials*, 13 PEPP. L. REV. 87, 88 (1985) (arguing that the Court's "strict application of the reasonable suspicion standard severely limit, and possibly overwhelm, any fourth amendment rights held by students").

ward students' privacy interests and its deferential posture to school officials presage further erosion of students' rights.⁹⁶

*B. Safford Unified School District #1 v. Redding—
Proportionality, Reason, and No Remedy*

A quarter-century later, the Court in *Safford Unified School District #1 v. Redding*⁹⁷ applied *T.L.O.*'s principles to a strip search of a thirteen-year-old girl to find prescription-strength ibuprofen and found that school officials acted unreasonably.⁹⁸ *T.L.O.* and *Redding* presented the constitutional issue to the Court in different procedural postures: *T.L.O.* moved to suppress evidence of drug dealing in a delinquency prosecution, whereas Savana Redding sought § 1983 civil relief for her constitutional violation. While Redding's innocence may have made it easier for the Court to find that school officials violated her rights, the majority still gave her no remedy for that infringement.⁹⁹ Ultimately, *Redding* provided no additional guidance for school administrators confronting somewhat different factual situations and thereby provided no clarification of *T.L.O.*'s ambiguous reasonableness standard.

A student-informant, Jordan Romero, told assistant principal Kerry Wilson that students were bringing drugs to school and that he had become ill after taking a pill obtained from a classmate.¹⁰⁰ A week later, Jordan gave Wilson a white pill he received from Marissa Glines and told him that students would take pills at lunch.¹⁰¹ Wilson called Marissa out of class, and her teacher gave Wilson a day-planner found within Marissa's

⁹⁶ Gardner, *supra* note 47, at 923-24; Zane, *supra* note 1, at 392 (concluding that *T.L.O.*'s reasonableness approach "may ultimately destroy those [students'] rights. Searches based on reasonable suspicion of the violation of the most trivial school rules may now pass constitutional muster.").

⁹⁷ 129 S. Ct. 2633 (2009).

⁹⁸ *Id.* at 2638.

⁹⁹ *Id.* at 2643-44 (finding that diversity of lower court decisions on validity of strip searches precluded finding that school officials violated a "clearly established" constitutional right and granting qualified immunity).

¹⁰⁰ *Id.* at 2640.

¹⁰¹ *Id.* The pill was Ibuprofen 400 mg, a prescription-strength dose of the over-the-counter remedy. *Id.*

reach that contained contraband items.¹⁰² A search of Marissa in Wilson's office produced a blue pill, white ones, and a razor blade.¹⁰³ Marissa told Wilson that she received the blue pill from Savana Redding and denied any knowledge of the day-planner.¹⁰⁴ Wilson did not ask Marissa when she received the pill from Savana, whether Savana presently had pills, or where on her they might be hidden.¹⁰⁵ Wilson called Savana to her office and showed her the planner.¹⁰⁶ Savana admitted it was hers, said that she had loaned it to Marissa several days earlier, and denied knowledge of its contents.¹⁰⁷ Wilson knew that Savana and Marissa were friends and members of a rowdy group of students who attended the school's opening dance at which staff found cigarettes and alcohol in the girls' bathroom.¹⁰⁸ Jordan had identified Savana as hosting a pre-dance party at which alcohol was served.¹⁰⁹

The Court found these circumstances provided reasonable suspicion for Wilson to search Savana's backpack and outer clothes.¹¹⁰ After that search proved fruitless, Wilson subjected Savana to a strip search which also produced no evidence of wrong-doing.¹¹¹ Redding sought § 1983 relief for violation of her

¹⁰² *Id.* at 2640. The zippered day-planner contained several knives, lighters, and a cigarette. *Id.* at 2638.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2640.

¹⁰⁶ *Id.* at 2640-41.

¹⁰⁷ *Id.* at 2641.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ("If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than [female assistant's] subsequent search of her outer clothing.")

¹¹¹ *Id.*

The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. [Officials] directed Savana to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants . . . The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree . . .

Id.

constitutional rights.¹¹² Both the trial court and a panel of the Ninth Circuit concluded that Wilson's search did *not* violate her rights.¹¹³ After *en banc* reconsideration, the sharply divided Ninth Circuit bench concluded that the strip search violated the Fourth Amendment so egregiously that it denied the school officials qualified immunity.¹¹⁴

The Supreme Court affirmed in part and reversed in part. It agreed with the Ninth Circuit's conclusion that the strip search was unreasonable and violated the Fourth Amendment, but it denied any relief.¹¹⁵ It found that the humiliating and intrusive strip search violated

both subjective and reasonable societal expectations of personal privacy [and] support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.¹¹⁶

The Court distinguished between routine exposure when students change for gym and an accusatory and degrading body-search for evidence of wrong-doing.¹¹⁷

The Court invoked *T.L.O.*'s strictures that a search must be "reasonably related in scope to the circumstances which justified the interference in the first place . . . [and] not excessively intrusive in light of the age and sex of the student and the nature of the infraction."¹¹⁸ However, *Redding* did not discuss why Savana's age (thirteen years old) or her gender (female) rendered the strip search excessively intrusive nor did the Court indicate whether a similar search of an older youth or a

¹¹² *Id.* at 2639.

¹¹³ *Redding v. Safford Unified Sch. Dist. #1*, 504 F.3d 828, 831, 835 (9th Cir. 2007).

¹¹⁴ *Redding*, 129 S. Ct. at 2638. The Supreme Court requires a two-step process to evaluate officials' claims of qualified immunity. See *Saucier v. Katz*, 533 U.S. 194 (2001). First, a court must determine whether a constitutional violation occurred. *Id.* at 201. If so, then it must determine whether the state actors violated constitutional rights that were clearly established at the time of the search. *Id.* at 202.

¹¹⁵ *Redding*, 129 S. Ct. at 2643-44.

¹¹⁶ *Id.* at 2641.

¹¹⁷ *Id.* at 2642.

¹¹⁸ *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985)).

boy would have produced a different result.¹¹⁹ Although the Court did not prohibit strip searches, it characterized them as a uniquely intrusive type of search that required individualized suspicion to be justified. “The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.”¹²⁰ Despite the school’s legitimate zero tolerance policy for drugs, *Redding* found that ibuprofen posed a limited threat and that without any reason to believe that Savana was hiding pills in her underwear, the search was unreasonable.¹²¹

Notwithstanding the constitutional violation, the Court granted Redding no relief in her § 1983 lawsuit. It relied on the doctrine of qualified immunity that insulates public officials acting in good faith from liability unless their actions violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹²² Although *Redding*

¹¹⁹ Laura Jarrett, *Excessively Intrusive in Light of Age or Sex?: An Analysis of Safford Unified School District #1 v. Redding and Its Implications for Strip Searches in Schools*, 33 HARV. J.L. & GENDER 403, 409 (2010) (“[A]lthough the majority may have correctly found Savana’s strip search excessively intrusive in this case, its failure to explain its reasoning sends an ambiguous message to school officials about which factors are most relevant in determining the permissible scope of a search.”).

¹²⁰ *Redding*, 129 S. Ct. at 2643.

¹²¹ *Id.* at 2642.

[A] reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence . . . [of] students . . . hiding that sort of thing in underwear . . .

. . . [W]hat was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.

Id. at 2642-43.

¹²² *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity enables courts to summarily dismiss most challenges to constitutional violations.

[T]he recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.”

Id. at 807 (citations omitted).

noted that an explicit holding on the challenged action was not necessary to clearly establish a constitutional right, the Court emphasized the diversity among lower courts applying *T.L.O.*'s standard to strip searches.¹²³ The difference of opinions about justifications for and intrusiveness of strip searches warranted a grant of qualified immunity for the offending officials.¹²⁴

Justices Stevens and Ginsburg concurred with *Redding's* conclusion that her strip search violated the Constitution but dissented from the Court's decision to grant the school officials qualified immunity. The dissent objected that the majority made the question whether Wilson's actions violated a "clearly established constitutional right" seem closer than it was.¹²⁵ Stevens emphasized that "[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude."¹²⁶ He insisted that *Redding* did not create a new constitutional right but simply applied *T.L.O.*'s principle that a search may not be

¹²³ *Redding*, 129 S. Ct. at 2643 ("A school official searching a student is 'entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.'). The Court cited several cases in which lower courts had upheld strip searches of students or denied recovery for such actions. See *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997) (en banc) (noting that the ambiguity of *T.L.O.*'s reasonableness balance made it impossible to apply to cases that presented different facts); *Williams v. Ellington*, 936 F.2d 881 (6th Cir.1991) (upholding strip search of high school student based on student's tip that did not include information that the drugs were hidden on her body); Colleen J. Berry, Note, *Students "Stripped" of Their Constitutional Rights: Jenkins v. Talladega City Board of Educ.*, 115 F.3d 821 (11th Cir. 1997), 23 S. ILL. U. L.J. 223, 231 (1998) (criticizing *Jenkins's* grant of qualified immunity and arguing that *T.L.O.* was sufficiently clear to establish that "teachers that strip search[] eight-year-olds in pursuit of a few dollars violates the Fourth Amendment"); Patsy Thimmig, *Not Your Average School Day—Reading, Writing, and Strip Searching: The Eleventh Circuit's Decision in Jenkins v. Talladega City Board of Education*, 42 ST. LOUIS U. L.J. 1389, 1412-13 (1998) (criticizing the *Jenkins* ruling because by "refusing to hold teachers accountable for using judgment that lacks any traces of common sense, the Eleventh Circuit is giving school officials absolute authority over their students.').

¹²⁴ *Redding*, 129 S. Ct. at 2644 ("[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law.').

¹²⁵ *Id.* at 2644-45 (Stevens, J., concurring in part and dissenting in part).

¹²⁶ *Id.* at 2644 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 382 n.25 (1985); see also *infra* note 486 and accompanying text.

“excessively intrusive in light of the age and sex of the student and the nature of the infraction” to her strip search.¹²⁷ Long before *Redding*, several states’ statutes prohibited school officials from conducting warrantless strip searches.¹²⁸ Although the court in *Doe v. Renfrow* upheld a dog sniff of a student, it condemned her strip search based on the canine’s alert.¹²⁹ *Tarter v. Raybuck* condemned a student’s body cavity search and held that “privacy interests of the youth would clearly outweigh *any* interest in school discipline or order which might be served by such a search.”¹³⁰ Several other lower courts condemned students’ strip searches as excessively intrusive.¹³¹ The strip search cases in which lower courts upheld the practice involved stronger individualized suspicion, multiple sources of information, “unusual bulges,” and other indicia to justify the intrusion.¹³² As I discuss later, *Redding* announced a fact-specific limited right without any practical remedy.

¹²⁷ *Id.* at 2644-45 (“In this case, by contrast, we chart no new constitutional path. We merely decide whether the decision to strip search Savana Redding, on these facts, was prohibited under *T.L.O.*”). Justice Stevens also noted that *T.L.O.* had cited with approval *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984), which held unconstitutional a strip search conducted under circumstances similar to *Redding*. *Id.* at 2645.

¹²⁸ See, e.g., CAL. EDUC. CODE § 49050 (West 1993) (prohibiting school officials from conducting a search that involves “removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil.”); OKLA. STAT. ANN. tit. 70, § 24-102 (West 2005) (providing that “No student’s clothing, except cold weather outerwear, shall be removed prior to or during the conduct of any warrantless search.”); IOWA CODE ANN. § 808A.2 (West 1994); WASH. REV. CODE ANN. § 28A.600.230(3) (West 1995); WIS. STAT. § 948.50 (2007).

¹²⁹ 631 F.2d 91 (7th Cir. 1980), *reh’g denied*, 635 F.2d 582 (7th Cir. 1980), *and cert. denied*, 451 U.S. 1022 (1981). See also *infra* notes 303-08 and accompanying text analyzing *Doe*’s approval of canine sniffs.

¹³⁰ 742 F.2d 977, 982-83 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (emphasis added).

¹³¹ See *Allen v. Koon*, 720 F. Supp. 570 (E.D. La. 1989); *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454 (E.D. Mich. 1985); *State v. Mark Anthony B.*, 433 S.E.2d 41 (W. Va. 1993).

¹³² See *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1319 (7th Cir. 1993) (multiple reports by students and school bus driver of youth’s drug use, “unusual bulge,” knowledge that youth had “croched” drugs during a police raid, and failed urinalysis for cocaine); *Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991) (facts supporting strip search included student tip, teacher report of unusual behavior, incriminating letter, and father’s expressed concerns about daughter’s drug use); *Spellman*, *supra* note 80, at 172 (analyzing decisions prior to *Redding* in which lower courts

C. Questions T.L.O. Asked, Declined to Answer, and Which Redding Does Not Clarify

The Court in *T.L.O.* found her search reasonable and declined to answer the original question for which it granted certiorari.¹³³ The Court uses a flexible due process approach to determine juveniles' procedural rights, provides delinquents with less rigorous protections than those required for criminal defendants,¹³⁴ and has not directly ruled whether delinquency prosecutions must provide an exclusionary remedy. In the context of school disciplinary proceedings, the Court in *Goss v. Lopez*¹³⁵ held that students have minimal due process protections—a right to notice and an opportunity for “some kind of hearing”—but explicitly denied them a right to counsel or proof beyond a reasonable doubt.¹³⁶ Despite Justice Stevens' urging that *T.L.O.* rule on the exclusionary rule question in delinquency prosecutions,¹³⁷ the Court has not decided whether school officials may consider illegally obtained evidence in internal disciplinary hearings.

In addition to the questions of remedies, or lack thereof, the majority in *T.L.O.* identified a number of other questions it did not answer. Although *T.L.O.* recognized the reasonableness of her expectations of privacy in her person and purse, the Court noted the possibility of a different result with respect to students' lockers or desks:

We do not address the question, *not presented by this case*, whether a schoolchild has a legitimate expectation of

generally found strip searches unconstitutional); Thimmig, *supra* note 123, at 1400-03 (analyzing facts in lower court cases which provided stronger basis for upholding strip searches).

¹³³ *New Jersey v. T.L.O.*, 469 U.S. 325, 327 (1985) (declining to decide “the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities”).

¹³⁴ See generally Feld, *supra* note 5; Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Courts*, 69 MINN. L. REV. 141 (1984).

¹³⁵ 419 U.S. 565 (1975).

¹³⁶ *Id.* at 579, 583.

¹³⁷ *T.L.O.*, 469 U.S. at 372-73 (Stevens, J., concurring in part and dissenting in part) (distinguishing the applicability of the exclusionary rule in delinquency prosecutions and school disciplinary proceedings).

privacy in lockers, desks, or other school property provided for the storage of school supplies. Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials.¹³⁸

Do students have a reasonable expectation of privacy in desks and lockers that schools provide? Do they have a legitimate expectation of privacy in their jackets and backpacks stored in those lockers—i.e., private containers within containers? In addition, many students drive cars, and schools often provide and regulate the places in which they park their vehicles on campus. Despite the inherent mobility of automobiles, the Court requires probable cause to search cars.¹³⁹ After *T.L.O.*, which standard—probable cause or reasonable suspicion—governs searches of students' cars parked on school property?

The vice principal who searched T.L.O.'s purse did so without any police involvement. The Court justified its use of a reasonable suspicion, rather than probable cause, standard because he acted alone. It declined to speculate whether participation of police officers might require adherence to the real Fourth Amendment probable cause standard.

We here consider only searches carried out by school authorities acting alone and on their own authority. *This case does not present* the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.¹⁴⁰

¹³⁸ *Id.* at 337 n.5 (emphasis added).

¹³⁹ See *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (noting that “the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution”); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (dispensing with warrant requirement but insisting on probable cause to seize and search vehicles).

¹⁴⁰ *T.L.O.*, 469 U.S. at 341 n.7 (emphasis added); see, e.g., Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1074

In the decades since *T.L.O.*, school resource officers and police liaison officers have become a ubiquitous presence in schools. They provide law enforcement services, investigate and interrogate youths, and arrest and refer law violators to juvenile courts. With uniformed police officers as regular fixtures in public schools, lower courts confront the question of which standard to apply—reasonable suspicion or probable cause—when they search students.

T.L.O. concluded that Choplick had reasonable grounds to search her purse based on the teacher's observation of smoke in the bathroom and his own inferences.¹⁴¹ The teacher's reliability enabled the Court to avoid deciding how judges should evaluate allegations of wrong-doing provided by student-informants.¹⁴² *T.L.O.* did not present issues of suspicion based on technological enhancements—metal detectors or canine partners—which could provide individualized suspicion.¹⁴³ Finally, *T.L.O.* did not decide whether school officials could conduct a reasonable search without specific information that they would find evidence of wrong-doing.

We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.” Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where “other safeguards” are available “to

(2003) (noting that the Court “expressed no opinion” regarding role of law enforcement acting with school officials).

¹⁴¹ *T.L.O.*, 469 U.S. at 345-46.

¹⁴² Compare *Spinelli v. United States*, 393 U.S. 410 (1969), with *Illinois v. Gates*, 462 U.S. 213 (1983).

¹⁴³ See *Illinois v. Caballes*, 543 U.S. 405 (2005) (characterizing canine sniff of exterior of vehicle as minimally intrusive and not affecting reasonable expectation of privacy in car's interior); *Kyllo v. United States*, 533 U.S. 27 (2001) (characterizing thermal imaging technological enhancements as a search—intrusion on reasonable expectation of privacy—when it enabled police to perceive activities within the home).

assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"¹⁴⁴

Subsequently, the Court in *Vernonia School District 47J v. Acton*¹⁴⁵ and in *Board of Education v. Earls*¹⁴⁶ eroded *T.L.O.*'s minimal threshold of individualized suspicion and upheld suspicionless drug testing of athletes and students who participate in extracurricular activities.

In light of *T.L.O.*'s failure to address the many questions it posed and *Redding*'s lack of clarification, Parts II–IV of this article analyze the answers that lower courts have reached. Part II examines the availability of exclusionary remedies in delinquency prosecutions and school disciplinary hearings. It also assays the standard used when law enforcement agents, rather than school officials, conduct searches. Part III focuses on when school officials may search—justified at its inception. How may school authorities obtain information to search—informants, dogs, and technology—and when may they search without any individualized suspicion of wrong-doing? Part IV examines where school authorities search—desks, lockers, and cars—and how intrusively they search—*Redding* and strip searches—without probable cause—reasonably related in scope to the original justification. Part V considers the remedies available to students when school officials search unreasonably.

PART II. *T.L.O.*'S UNANSWERED QUESTIONS – EXCLUSIONARY REMEDY AND SEARCHES BY POLICE

When police encounter juveniles and adults in non-school public places, courts apply the same Fourth and Fifth Amendment principles to their interactions.¹⁴⁷ Even in these contexts,

¹⁴⁴ *T.L.O.*, 469 U.S. at 342 n.8 (emphasis added) (internal citations omitted).

¹⁴⁵ 515 U.S. 646 (1995).

¹⁴⁶ 536 U.S. 822 (2002).

¹⁴⁷ See generally *Lanes v. State*, 767 S.W.2d 789 (Tex. Crim. App. 1989) (emphasizing centrality of Fourth Amendment probable cause standard in juvenile justice administration); Gardner, *supra* note 47, at 907; Lourdes M. Rosado, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and*

youths may stand on a different footing than adults. The Court in *Roper v. Simmons* recognized youths' diminished responsibility and prohibited executions of offenders who committed crimes when younger than eighteen years of age.¹⁴⁸ *Roper's* recognition of youths' immature judgment and limited capacity has implications for their waivers of Fourth, Fifth, and Sixth Amendment rights. The Court long has cautioned trial judges to be sensitive to the effects of youthfulness and immaturity on the voluntariness of juveniles' confessions.¹⁴⁹ Despite these concerns, the Court in *Fare v. Michael C.* and *Yarborough v. Alvarado* denied the need for special procedural protections when immature suspects exercise *Miranda* rights and endorsed the adult waiver standard: "knowing, intelligent, and voluntary" under the "totality of the circumstances."¹⁵⁰ By contrast, developmental psychologists who have studied adolescents' adjudicative competence and ability to exercise *Miranda* rights strongly question whether they possess the ability, maturity, and judgment necessary to exercise legal rights.¹⁵¹ As a result of youths' diminished capacity, formal legal equality may produce practical inequality when judges apply adult standards to

Seizures on the Street, 71 N.Y.U. L. REV. 762 (1996) (discussing applicable Fourth Amendment standards in ordinary street encounters).

¹⁴⁸ 543 U.S. 551 (2005) (abolishing death penalty for juveniles based in part on youths' lack of maturity and judgment, impulsivity and recklessness, susceptibility to negative peer influences, and transitory personality development). See generally, Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9 (2008) (analyzing developmental psychological research and neuroscience evidence to support *Roper's* finding of diminished responsibility).

¹⁴⁹ See *Gallegos v. Colorado*, 370 U.S. 49 (1962) (emphasizing role of youthfulness and isolation on involuntariness of confession); *Haley v. Ohio*, 332 U.S. 596 (1948) (emphasizing role of youthfulness and immaturity on involuntariness of confession).

¹⁵⁰ See *Fare v. Michael C.*, 442 U.S. 707 (1979) (rejecting youthfulness as requiring special safeguards and applying adult waiver standard); see also *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (rejecting special consideration of youthfulness and inexperience on suspect's feelings of custody).

¹⁵¹ See Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

juveniles' waiver decisions.¹⁵² Analysts have noted *Roper's* diminished responsibility rationale for juveniles' exercises of legal rights and police interrogation.¹⁵³ Similarly, both courts and analysts recognize that developmental limitations adversely affect youths' ability to voluntarily consent to a search.¹⁵⁴ While the impact of youths' developmental limitations on their exercise of procedural rights poses important questions, this article focuses on *T.L.O.'s* unanswered Fourth Amendment questions.

A. Exclusionary Remedy in Delinquency and School Disciplinary Proceedings

Justice Stevens' *T.L.O.* dissent urged the Court to decide whether the exclusionary rule applied to unconstitutional searches conducted by school officials.¹⁵⁵ The Court has not ex-

¹⁵² See Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006); Feld, *Criminalizing Juvenile Justice*, *supra* note 134 (arguing that formal equality produces practical inequality and places juveniles at a comparative disadvantage in the justice process); Feld, *supra* note 5 (arguing that quality of justice in juvenile courts produces less reliable results than do criminal courts that afford right to jury trial).

¹⁵³ See Tamar R. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385 (2008); Donna M. Bishop and Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In re Gault*, 60 RUTGERS L. REV. 125 (2007).

¹⁵⁴ See *In re J.M.* 619 A.2d 497, 503 (D.C. 1992) (emphasizing "the effect of age and relative immaturity on the voluntariness of the [fourteen-year-old] defendant's consent"); Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009).

¹⁵⁵ *New Jersey v. T.L.O.*, 469 U.S. 325, 371-72 (Stevens J., concurring in part and dissenting in part). Justice Stevens emphasized that the case did not address the evidentiary use in school disciplinary hearings, but rather the use of evidence in delinquency "proceedings brought against T.L.O. [which] involved a charge that would have been a criminal offense if committed by an adult." *Id.* For those purposes, Justice Stevens invoked the dual rationales of *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary remedy to unlawfully obtained evidence in state criminal prosecutions). Both the deterrence and symbolic or judicial integrity rationales of *Mapp* require application of an exclusionary remedy to evidence obtained in violation of the Constitution.

The practical basis for this principle is, in part, its deterrent effect and as a general matter it is tolerably clear to me, as it has been to the Court, that the existence of an exclusionary remedy does deter the authorities from violating

PLICITLY held that delinquency trials must provide an exclusionary remedy, and some pre-*T.L.O.* state courts had decided to the contrary.¹⁵⁶ The Court used a different incorporation strategy than it used in criminal prosecutions to decide which procedural rights delinquents received and denied them some fundamental rights such as a jury trial.¹⁵⁷ The Court repeatedly insists that it does not simply equate delinquency and criminal proceedings.¹⁵⁸

the Fourth Amendment by sharply reducing their incentive to do so. In the case of evidence obtained in school searches, the "overall educative effect" of the exclusionary rule adds important symbolic force to this utilitarian judgment.

....

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.

T.L.O., 469 U.S. at 372-74 (citations omitted).

¹⁵⁶ In *State v. Young*, 216 S.E.2d 586 (Ga. 1975), the Georgia Supreme Court reviewed a school search conducted without reasonable suspicion and declined to apply the exclusionary rule to a search of a student conducted in a public school. *Id.* at 588. Although the vice-principal acted as a state agent, the court distinguished between the applicability of the Fourth Amendment and availability of the exclusionary rule. *Id.* at 589. "The Fourth Amendment requires only state action; the latter requires state law enforcement action." *Id.* "In the Fourth Amendment area, in determining the reasonableness of a search, the social utility of the search must be balanced against the individual's reasonable expectation of privacy." *Id.* *Young* distinguished between the actions by school officials and those of law enforcement. It reasoned that the exclusionary rule does not apply in non-law enforcement circumstances and if school officials violated a student's Fourth Amendment rights, their remedy would be "based upon a claimed violation of their civil rights by state officers." *Id.* at 591.

¹⁵⁷ Feld, *Criminalizing Juvenile Justice*, *supra* note 134; Feld *supra* note 5. *Compare* *Duncan v. Louisiana*, 391 U.S. 145 (1968) (finding a jury right fundamental and required in state criminal prosecutions), *with* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (denying juveniles a constitutional right to jury trial).

¹⁵⁸ *McKeiver*, 403 U.S. at 545 ("The Court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding."). *In re Gault* granted delinquents the Fifth Amendment privilege against self-incrimination. 387 U.S. 1, 49 (1967). The Supreme Court has never explicitly held that *Miranda* applies to delinquency proceedings, but the Court in *Fare v. Michael C.* "assume[d] without deciding that the *Miranda* principles were fully applicable to the present [juvenile] proceedings." 442 U.S. 707, 717 n.4 (1979).

1. Exclusionary Remedy in Delinquency Trials

T.L.O. did not decide whether juveniles may invoke an exclusionary remedy in delinquency prosecutions for violations of their constitutional rights. The Court has granted delinquents some procedural safeguards but has used a different incorporation strategy to determine juveniles' constitutional rights, declined to grant them all rights of adult criminal defendants, and insisted that it will not simply equate delinquency and criminal prosecutions.¹⁵⁹

Notwithstanding the Court's reluctance to equate the two systems,¹⁶⁰ the vast majority of states have decided implicitly or explicitly that delinquents enjoy an exclusionary remedy for constitutional violations.¹⁶¹ The unanimous Court in *Florida v. J.L.*¹⁶² held that a general, anonymous tip did not justify the stop-and-frisk of a juvenile that led to seizure of a gun. Because the information lacked sufficient indicia of reliability to provide reasonable suspicion, the Court's holding reinstated the trial and Florida Supreme Court decisions to suppress the evidence against the juvenile. Professor Irene Rosenberg argues that *J.L.* implicitly held that outside of the school context, juveniles are entitled to the same Fourth Amendment protections as adults, including an exclusionary remedy:

¹⁵⁹ See *Schall v. Martin*, 467 U.S. 253 (1984) (authorizing preventive detention of juveniles); *Breed v. Jones*, 421 U.S. 519 (1975) (holding that double jeopardy precludes criminal re prosecution after delinquency conviction); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (denying juveniles constitutional right to jury trial); *In re Winship*, 397 U.S. 358 (1970) (holding state must prove delinquency beyond a reasonable doubt); *In re Gault*, 387 U.S. 1 (1967) (granting procedural rights under Fourteenth Amendment Due Process clause rather than Sixth Amendment). See generally Feld, *Criminalizing Juvenile Justice*, *supra* note 134; Feld, *supra* note 5.

¹⁶⁰ See, e.g., *Fare v. Michael C.*, 442 U.S. 707, 717 n.4 (1979) ("assum[ing] without deciding that the Miranda principles were fully applicable to the present [juvenile] proceedings.").

¹⁶¹ See Irene Merker Rosenberg, *A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29, 58 n.180 (1996) (listing statutes and court rules that explicitly provide an exclusionary remedy and decisions in which state courts implicitly accept exclusionary rule).

¹⁶² 529 U.S. 266 (2000) (holding insufficient a tip alleging that a young black man wearing a plaid shirt would be found in a particular location and would be carrying a gun).

The issue before the Court was, in effect if not form, whether to suppress the evidence obtained by the police during a frisk that is unlawful. The Court nonetheless framed the question as one of substance rather than remedy. . . .

. . . .

. . . [I]t was unnecessary for the Court to decide whether the exclusionary rule applies to juveniles as a matter of federal law since in Florida that right is granted by statute. Indeed, all states seem to have either explicitly or implicitly determined that the exclusionary rule applies at least to non-school searches of minors by police officers. That would mean that the *J.L.* Court is finding a substantive violation of the Federal Constitution that will be remedied by state law. . . .

. . . [The *T.L.O.* Court] may well have been assuming without stating that police searches of minors, at least out of school, would be governed by the usual Fourth Amendment standard. . . .

. . . .

. . . The Court clearly understood that *J.L.* was a juvenile and that, by making its ruling in such a context, it was holding that the federal constitutional standard for frisks is the same for adults and children, at least with respect to police frisks outside of the public schools.¹⁶³

Even without an explicit federal constitutional ruling, state courts consistently have applied the exclusionary rule in juvenile delinquency prosecutions.¹⁶⁴ When the state offers evidence illegally seized by school officials, courts readily conclude that “the exclusionary rule is fully available in criminal prose-

¹⁶³ Irene Merker Rosenberg, *Florida v. J.L. and the Fourth Amendment Rights of Juvenile Delinquents: Peekaboo!*, 69 U. CIN. L. REV. 289, 291-95 (2000).

¹⁶⁴ See *In re William G.*, 709 P.2d 1287, 1298 (Cal. 1985); *In re Marsh*, 237 N.E.2d 529, 531 (Ill. 1968) (“[T]he exclusionary rules required by the Fourth Amendment’s prohibition against illegal search and seizures are applicable to proceedings under the Juvenile Court Act.”); *State v. Doe*, 597 P.2d 1183, 1186 (N.M. 1979); *In re L.L.*, 280 N.W.2d 343, 347 (Wis. 1979). See generally, Rosenberg, *supra* note 161 at 58 (“A substantial majority of states has decided, explicitly or implicitly, that the exclusionary rule applies to delinquency proceedings.”).

cutions and juvenile proceedings with respect to evidence illegally obtained by high school officials.”¹⁶⁵ State courts recognize the Fourth Amendment’s “twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior” apply equally to delinquency and criminal prosecutions.¹⁶⁶

2. Exclusionary Rule in School Disciplinary Proceedings

The Court has evinced a general hostility toward the exclusionary rules and expressed a disinclination to extend it to civil proceedings.¹⁶⁷ Unlike delinquency trials, courts decline to apply the exclusionary rule in school disciplinary proceedings when officials illegally seize evidence.¹⁶⁸ State courts’ reluctance to require an exclusionary remedy in disciplinary proceedings stems from perceived differences in roles of school officials and police, uncertainty about the deterrent impact of the exclusionary rule on school personnel, and the Court’s strong inclination to give them broad latitude to deal with student misconduct.¹⁶⁹ The court in *Thompson v. Carthage School District*¹⁷⁰ confronted an illegal, suspicionless mass-search that led to evidence upon which school officials relied to expel a student.¹⁷¹ Despite the clear constitutional violation, the court

¹⁶⁵ *Gordon J. v. Santa Ana Unified Sch. Dist.*, 208 Cal. Rptr. 657, 665 (Cal. Ct. App. 1985).

¹⁶⁶ *In re Montrail M.*, 589 A.2d 1318, 1325 (Md. Ct. Spec. App. 1991).

¹⁶⁷ *See Hudson v. Michigan*, 547 U.S. 586 (2006) (holding exclusionary rule inapplicable in a criminal prosecution for violation of Fourth Amendment “knock and announce” requirement); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable in civil deportation proceeding); *United States v. Leon*, 468 U.S. 897 (1984) (creating a “good faith” exception to exclusionary rule); *United States v. Janis*, 428 U.S. 433 (1976) (declining to apply the exclusionary rule to illegal seized evidence in civil tax proceeding).

¹⁶⁸ *See In re Lance W.*, 694 P.2d 744 (Cal. 1985); *Gordon J. v. Santa Ana Unified Sch. Dist.*, 208 Cal. Rptr. 657, 665-66 (Cal. Ct. App. 1985) (holding that exclusionary rule did not apply in high school disciplinary proceedings because of risk of harm to other students). *See generally* Rosenberg, *supra* note 161, at 42-43.

¹⁶⁹ Rosenberg, *supra* note 161, at 42-43.

¹⁷⁰ 87 F.3d 979 (8th Cir. 1996).

¹⁷¹ *Id.* at 980. After a school bus driver informed the principal of fresh cuts on the seat of the bus, the principal decided to search all male students in grades six to

conducted a cost-benefit analysis and declined to apply the exclusionary rule in school disciplinary hearings.¹⁷² It weighed among the costs of providing an exclusionary remedy the fear that illegally searched youths could not be expelled or could pose a danger to their classmates.¹⁷³ It asserted that maintaining order required some flexibility in school disciplinary proceedings.¹⁷⁴ The court feared that an exclusionary rule could have an excessive chilling effect on school officials who typically do not have an adversarial relationship with students¹⁷⁵ and concluded that:

twelve. *Id.* During the search, a student told the principal that there was a gun at school. *Id.* The principal and teacher ordered each class of students to remove their jackets, shoes, and socks, empty their pockets, and place the items on a table. *Id.* They checked students for concealed weapons with a metal detector and conducted pat-down searches if it sounded. *Id.* The principal and teacher had no reason to believe that Ramone Lea, a ninth grade student, had cut the school bus seats, possessed a weapon or any other contraband. *Id.* A search of his coat revealed a match box that contained crack cocaine. *Id.* After school officials expelled him from school, Lea sought § 1983 relief for “wrongful expulsion” because the search violated the Fourth Amendment. *Id.* The district court awarded Lea \$10,000 in damages, attorney’s fees, and a declaratory judgment that the search violated his Fourth Amendment rights. *Id.* The district court assumed that the school could not expel a student on the basis of illegally obtained evidence. *See* D. Shayne Jones, *Application of the “Exclusionary Rule” to Bar Use of Illegally Seized Evidence in Civil School Disciplinary Proceedings*, 52 WASH. U. J. URB. & CONTEMP. L. 375, 387 (1997).

¹⁷² *Thompson*, 87 F.3d at 981-82.

¹⁷³ *Id.* at 981.

The societal costs of applying the rule in school disciplinary proceedings are very high. For example, the exclusionary rule might bar a high school from expelling a student who confessed to killing a classmate on campus if his confession was not preceded by *Miranda* warnings To the extent the exclusionary rule prevents the disciplining of students who disrupt education or endanger other students, it frustrates the critical governmental function of educating and protecting children.

Id.

¹⁷⁴ *Id.* “Moreover, ‘maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures.’ Application of the exclusionary rule would require suppression hearing-like inquiries inconsistent with the demands of school discipline.” *Id.* (citation omitted).

¹⁷⁵ *Id.*

Knowing that evidence they illegally seize will be excluded at any subsequent disciplinary proceeding would likely have a strong deterrent effect.

. . . .

[W]e see some risk that application of the rule would deter educators from undertaking disciplinary proceedings that are needed to keep the schools safe and to control student misbehavior. In any event, any deterrence benefit would not begin to outweigh the high societal costs of imposing the rule.¹⁷⁶

Using a cost-benefit analysis in which the costs of exclusion inevitably outweigh the benefits of constitutional conformity,¹⁷⁷ *Thompson* did not explain what incentive school officials would have to learn of or to respect students' rights or identify any practical remedy to induce constitutional compliance.¹⁷⁸ Because school personnel are less well-versed in Fourth Amendment doctrine than police officers and also enjoy qualified immunity for reasonable, good-faith mistakes, they have scant motivation to learn or respect limits without some systemic impetus for constitutional conformity.

By contrast, the court in *Jones v. Latexo Independent School District*¹⁷⁹ applied the exclusionary rule and barred use of unconstitutionally obtained evidence in school disciplinary proceedings. *Jones* followed the rationale of *Mapp v. Ohio* and concluded that exclusion provided the only available remedy for students whose rights school administrators violated.

The primary vehicle for enforcing the strictures of the fourth amendment in our legal system is the "exclusionary rule," which prevents the use of unconstitutionally obtained evidence by the government in subsequent proceedings. While

. . . School officials, on the other hand, are not law enforcement officers. They do not have an adversarial relationship with students. "Instead, there 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."

Id. (citation omitted).

¹⁷⁶ *Id.* at 981-82.

¹⁷⁷ See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (conducting cost-benefit analysis and concluding that officers acting in "good faith" could not be deterred from violating the Constitution).

¹⁷⁸ *Jones*, *supra* note 171, at 397 (criticizing *Thompson* because it allows school officials to "trample on the substantive rights of students under the Fourth Amendment, knowing that even evidence which is seized illegally can be admitted to suspend or expel a student").

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

the exclusionary rule is most often employed in criminal cases, it has been resorted to on numerous occasions to redress fourth amendment violations in a variety of civil contexts as well.

....

. . . “If there were no exclusionary rule in this case . . . [school] authorities would have no incentive to respect the privacy of its students.”¹⁸⁰

Jones reasoned that students’ lack of resources with which to pursue civil remedies and school officials’ good faith qualified immunity would insulate them from liability in almost every instance of constitutional wrong-doing.¹⁸¹ Absent an exclusionary remedy within the school, officials would have no incentive to learn about or to observe constitutional limits.¹⁸² Despite *Thompson’s* assertion to the contrary, other lower courts also had provided students with an exclusionary remedy in school disciplinary proceedings.¹⁸³ *Jones* is correct that an exclusionary remedy in disciplinary proceedings is the only practical mechanism to educate school officials and protect students. However, it ignored practical administrative questions such as who would rule on motions to suppress—the principal who conducted the search and presides at the disciplinary hearing or the school district’s counsel? Would students then have to litigate their adverse rulings in court as did *Jones*?

¹⁸⁰ *Id.* at 238 (alteration in original) (internal citations omitted).

¹⁸¹ *Id.*

¹⁸² See, e.g., Caven S. McLoughlin, Lynn Sametz, & Victor L. Streib, *Prospective Educators’ Knowledge of Children’s Legal Rights*, 20 AM. EDUC. RES. J. 591 (1983) (surveying prospective teachers’ knowledge about students’ legal rights and concluding that “prospective educators have limited legal knowledge, and in specific cases have misconceptions about the law”).

¹⁸³ See, e.g., *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975); see also Charles W. Hardin, Jr., *Searching Public Schools: T.L.O. and the Exclusionary Rule*, 47 OHIO ST. L.J. 1099, 1108 (1986) (“[A] minority of courts appear to have adopted the view that the exclusionary rule does not require the suppression of evidence unconstitutionally seized [from students] by teachers and other school authorities.”). See generally Kathleen K. Bach, *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 (1986).

B. School Searches in Conjunction with or at the Behest of Law Enforcement—Police Presence Fuels a School-to-Prison Pipeline

T.L.O. emphasized that Choplick conducted the search without involvement of law enforcement officials.¹⁸⁴ In the 1980s, police departments began to assign sworn police officers—SROs—to schools to combat the scourge of drugs and in the 1990s to provide heightened security after high-profile school shootings.¹⁸⁵ Local law enforcement agencies typically assign school resource officers (armed and uniformed police officers) to schools where they perform traditional law enforcement duties—patrolling campus, investigating criminal allegations, and dealing with students who violate school rules or the law.¹⁸⁶ Expanded use of metal detectors and canine

¹⁸⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.7 (1985).

¹⁸⁵ See Richard E. Redding & Sarah M. Shalf, *The Legal Context of School Violence: The Effectiveness of Federal, State, and Local Law Enforcement Efforts to Reduce Gun Violence in Schools*, 23 LAW & POL'Y 297, 298-302 (2001) (describing role of high-profile school shootings on enhanced security measures); Pinard, *supra* note 140, at 1068-69 (describing expanded role and presence of police in schools); ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7 (2005) (noting that school districts have adopted the easiest and most visible response to school safety by “increasing the number of police patrolling hallways and giving them a greater role in disciplinary matters. In a growing number of schools, police are hired on a full-time basis. These officers are often assigned from local police departments to augment the school security staff.”). They describe the multiple levels of police and security presence in schools:

In some districts, local police departments assign officers to schools to perform specific duties. . . . In other places, . . . school districts have their own police departments, with all the powers of local police but with jurisdiction limited to school grounds. In addition to police officers, schools often employ their own security officers or subcontract with a security firm.

Id. at 17. See also, Randall R. Beger, *Expansion of Police Power in Public Schools and the Vanishing Rights of Students*, 29 SOC. JUST. 119 (2002) [hereinafter Beger, *Expansion of Police Powers in Public Schools*]; Randall R. Beger, *The “Worst of Both Worlds”: School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336 (2003) [hereinafter Beger, *The “Worst of Both Worlds”*].

¹⁸⁶ Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009); RICHARD LAWRENCE, SCHOOL CRIME AND JUVENILE JUSTICE (2d ed. 2007); Aaron Kupchik & Nicole L. Bracy, *To Protect, Serve, and Mentor? Police Officers in Public Schools*, in TORIN MONAHAN & RODOLFO D. TORRES, SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC

partners to detect weapons and drugs accompanied the heightened police presence and fostered a “prison-like” environment.¹⁸⁷ In addition to ordinary law enforcement responsibilities, SROs collaborate with schools to increase trust, prevent crime, and provide training and education in conflict resolution, drug abuse prevention (DARE) and the like.¹⁸⁸ The increased presence of police in schools heightens surveillance and increases opportunities for Fourth Amendment issues to arise.¹⁸⁹ Simply by virtue of their presence, police observe violations, and school personnel report incidents that previously would not have come to law enforcement’s attention.¹⁹⁰ The increased presence of police has led to a dramatic escalation in school referrals to juvenile courts—a police-induced school

EDUCATION 21, 24-28 (2010) (describing multiple roles of SROs including patrolling halls, investigating incidents, and participating in school discipline).

¹⁸⁷ Pinard, *supra* note 140, at 1075-76 (2003) (describing changing landscape of law enforcement presence in schools); Redding & Shalf, *supra* note 185, at 319-20 (suggesting that “[i]t is hard to find anything better than anecdotal evidence” to indicate that heightened security such as guards, metal detectors, and surveillance cameras reduce school gun violence); Theriot, *supra* note 186, at 283 (“American schools have been transformed into ‘prisonlike’ facilities, replete with locked doors, metal detectors, camera surveillance, and greater police presence.”); Bernardine Dohrn, *The School, the Child, and the Court, in A CENTURY OF JUVENILE JUSTICE* 267, 283 (Margaret K. Rosenheim et al. eds., 2002) (observing that as a result of “get tough” policies, “[m]any schools became more prisonlike: locked doors, closed campuses, metal detectors, classroom lock-downs and simultaneous locker searches, heavily armed tactical police patrols, dogs, camera surveillance, uniforms, expansive disciplinary codes, interrogations, and informers—these are some elements that contributed to the criminalization of school life”).

¹⁸⁸ CATHY GIROUARD, U.S. DEPT’ OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP FACT SHEET: SCHOOL RESOURCE OFFICER TRAINING PROGRAM (Mar. 2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200105.pdf>; Andrea G. Bough, *Searches and Seizures in Schools: Should Reasonable Suspicion or Probable Cause Apply to School Resource/Liaison Officers?*, 67 UMKC L. REV. 543, 545 (1999) (describing functions of SROs as a law enforcement figure on campus, classroom resource for instruction in violence diffusion, alcohol and drug prevention, and as a member of school community to solve problems).

¹⁸⁹ Pinard, *supra* note 140, at 1079 (arguing that increased collaboration between police and school officials increases the latter’s likelihood to report misconduct).

¹⁹⁰ Theriot, *supra* note 186, at 281 (“[M]ost crime occurring at schools historically has not been reported to police, yet having a police officer available and accessible at school facilitates reporting.”) (internal citation omitted).

crime wave.¹⁹¹ Assigning an SRO to a school increases the number of referrals to juvenile courts for minor offenses such as simple assaults and disorderly conduct.¹⁹²

Schools that adopt zero tolerance policies toward trivial infractions adopt a “broken windows” theory that failure to sanction minor violations can lead to more serious crime and disorder.¹⁹³ As a result, school officials increasingly refer minor offenses—simple assaults, cursing as disorderly conduct, nail-clippers as knives—for delinquency proceedings that they previously handled internally and informally.¹⁹⁴ The combination of police presence and zero tolerance policies reduces schools’ informal discretion, increases police power to refer youths to

¹⁹¹ See BLUE RIBBON COMM’N ON SCH. DISCIPLINE, A WRITTEN REPORT PRESENTED TO THE SUPERINTENDENT AND BOARD OF EDUCATION, CLAYTON COUNTY PUBLIC SCHOOLS (2007), available at <http://www.clayton.k12.ga.us/departments/student-services/handbooks/BlueRibbonExecutiveReport.pdf>; Pinard, *supra* note 140, at 1106 (“[L]aw enforcement presence in public schools, particularly when combined with zero tolerance policies, creates an acute risk of utilizing the criminal justice system to handle incidents and behaviors that had been previously dealt with through school disciplinary processes.”).

¹⁹² Theriot, *supra* note 186, at 285 (“SROs contribute to criminalizing student behavior. Having an SRO at school significantly increased the rate of arrests for this charge [disorderly conduct] by over 100 percent even when controlling for school poverty.”); Beger, *The “Worst of Both Worlds,” supra* note 185, at 339 (describing criminal charges filed for “such minor infractions as pouring soapy water into a teacher’s cup, threatening students in a lunch line not to ‘eat all the potatoes,’ and allegedly stealing two dollars from a classmate.”) (internal citation omitted).

¹⁹³ George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1932, at 31 (positing that broken windows, left unattended, transmitted a societal message of indifference to disorder that contributes to further vandalism, serious crime, and urban deterioration); Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 79-81 (2003) (contending that “broken windows” theory contributes to zero tolerance policies in schools and suggesting that adherents believe that “by drawing a clear line, giving no quarter to disruption or disrespect, and setting high expectations, schools will instill the obedient and cooperative values of a former era”).

¹⁹⁴ See Dohrn, *supra* note 187, at 283 (“Fighting, vandalism, and theft, traditionally handled within school disciplinary systems, were transformed into delinquency offenses.”); Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852 (2008); NYCLU & ACLU, ELORA MUKHERJEE, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS (Phyllis Eckhaus et al. eds., 2007).

juvenile courts, and fosters a school-to-prison pipeline with a disparate impact on urban minority youths.¹⁹⁵ In light of expanded criminal consequences, which standard should courts apply when police search students in school: *Gates's* probable cause or *T.L.O.'s* reasonable suspicion?¹⁹⁶

In *People v. Dilworth*, the local police department employed the SRO, a sworn police officer, whose duties at the school included preventing and detecting criminal activity, arresting offenders, and transporting them to the police station.¹⁹⁷ In deciding whether to apply “the less stringent reasonable suspicion standard for searches of students by school officials or the general standard of probable cause,”¹⁹⁸ the Illinois Supreme Court identified three categories of cases:

- (1) those where school officials initiate a search or where police involvement is minimal, (2) those involving school police or liaison officers acting on their own authority, and (3) those where outside police officers initiate a search. Where school officials initiate the search or police involvement is minimal, most courts have held that the reasonable suspicion test obtains. The same is true in cases involving school police or liaison officers acting on their own authority. However, where outside police officers initiate a search, or where school offi-

¹⁹⁵ See Blumenson & Nilsen, *supra* note 193, at 66 (arguing that zero tolerance policies emphasize expulsion and suspension for “misconduct that previously would have been dealt with through lesser sanctions such as detention, or through remedial efforts such as counseling”); see also Dohrn, *supra* note 187, at 283 (criticizing school administrators because “[c]orporal punishment, humiliation, isolation, and referrals to the vice principal historically, and suspensions or expulsions today, are imposed disproportionately on African American youth, providing evidence of pervasive and systemic bias in school discipline”); Pinard, *supra* note 140, at 1108-19 (arguing that increased interdependence between police and school officials, expanded definitions of criminal misconduct, and racial differences in administration of zero tolerance policies foster school to pipeline flow).

¹⁹⁶ See Pinard, *supra* note 140, at 1070 (arguing that “the more protective probable cause standard [should] govern whenever law enforcement authorities are involved in student searches”); Bough, *supra* note 188, at 563 (“[SROs] are regular police officers who have training and authority that schools officials do not have. Thus, they are not the traditional school official. As such, they should operate under the constitutional standards that are applicable to police officers in general.”).

¹⁹⁷ 661 N.E.2d 310, 313 (Ill. 1996).

¹⁹⁸ *Id.* at 316 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)) (internal citations omitted).

cials act at the behest of law enforcement agencies, the probable cause standard has been applied.¹⁹⁹

The court characterized the liaison officer's search as an effort to maintain a proper educational environment and applied the reasonable suspicion rather than the probable cause standard.²⁰⁰

Dilworth rationalized its classification of SROs—category 2—with school officials—category 1—by using the three-prong analysis employed in *Vernonia School District 47J v. Acton*.²⁰¹ It weighed whether schools' special needs beyond those normally associated with law enforcement warranted a departure from the ordinary probable cause standard:

The competing interests of the individual and the State were balanced by an examination of the following: (1) the nature of the privacy interest upon which the search intrudes, (2) the character of the search, and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means for meeting it.²⁰²

The court balanced these factors—students' diminished expectation of privacy, the officer's individualized suspicion, and the school's need for immediate and effective intervention—and held that “reasonable suspicion, not probable cause, is the proper fourth amendment standard.”²⁰³ In so doing, the

¹⁹⁹ *Id.* at 317 (internal citations omitted).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 318 (citing *Vernonia Sch. Dist. 47 J v. Acton*, 515 U.S. 646 (1995)).

²⁰² *Id.* at 318.

²⁰³ *Id.* In its balance, *Dilworth* gave primary emphasis to schools' need to maintain social control:

There is no doubt that the State has a compelling interest in providing a proper educational environment for students, which includes maintaining its schools free from the ravages of drugs. As to the efficacy of the means for meeting this interest, it is relevant that the search at issue took place at an alternate school for students with behavioral disorders. In order to maintain a proper educational environment at this particular school, school officials found it necessary to have a full-time police liaison as a member of its staff. The liaison officer assisted teachers and school officials with the difficult job of preserving order in this school.

Id. (citations omitted).

court appeared to focus more on where the search occurred than on who conducted it.²⁰⁴

The dissent in *Dilworth* emphasized that the liaison officer's role in the school was to prevent and investigate crime and described him as a "police officer . . . permanently assigned to the school."²⁰⁵ Because he acted in a law enforcement capacity, the ordinary probable cause standard, rather than the lower school reasonable suspicion standard, should govern his actions.²⁰⁶ The principal disputes arise not among the first or third categories of the *Dilworth's* tripartite classification—purely school or outside law enforcement—but in the intermediate category—searches initiated by SROs acting on their own authority.

Courts' assessments of the proper standard—reasonable suspicion or probable cause—to search often hinge on whether a school official or a police officer initiated it.²⁰⁷ Where school officials possess reasonable suspicion and then enlist the assistance of better-trained SROs to conduct the search, courts typically apply the lower school standard.²⁰⁸ They emphasize that

²⁰⁴ See Bough, *supra* note 188, at 555-56 (criticizing majority for ignoring that SRO's "duties appeared to be more in line with a regular law enforcement officer than a school official" and for focusing primarily on "where the search occurred (the school setting) than who conducted the search (school officials or police officers)").

²⁰⁵ *Dilworth*, 661 N.E.2d at 321 (Nickels, J., dissenting).

²⁰⁶ See *id.*

Ruettiger was a police officer, and acted as one in seizing and searching defendant's flashlight After observing and questioning defendant in the hallway, Ruettiger seized and searched defendant's flashlight because he suspected it contained drugs. After finding cocaine, Ruettiger chased and captured defendant, arrested him, placed him in custody, handcuffed him, placed him in the squad car, and took him down to the investigative division of the Joliet police station. There, Ruettiger handcuffed defendant to a wall, read him his *Miranda* rights, and interrogated him. These were the acts of a police officer, not a school official

Id. at 322.

²⁰⁷ Jason E. Yearout, Note, *Individualized School Searches and the Fourth Amendment: What's a School District to Do?*, 10 WM. & MARY BILL RTS. J. 489, 521 (2002) ("If a consensus exists in this area, it might be that the . . . question turns on who gets the proverbial ball rolling.").

²⁰⁸ See *F.S.E. v. State*, 993 P.2d 771, 773 (Okla. Crim. App. 1999) (noting that "a school official may utilize law enforcement to assist with an investigation or search of a student while on school premises so long as the public school official has a reasonable

student searches with SRO participation involve minimal searches and occur at the behest of school officials.²⁰⁹ Courts opt for the lower standard when SROs search in “the interest of preserving swift and informal disciplinary procedures in schools.”²¹⁰ By contrast, when outside police officers provide security at a high school dance, courts apply the ordinary probable cause standard.²¹¹ When outside police search to uncover evidence of criminal activity, courts are more likely to require probable cause.²¹² Because of the difference in search standards, courts confront a “silver platter” problem when police provide information to school officials to conduct a search under the lower standard because they lack probable cause.²¹³

suspicion as to the student under investigation or search”); *State v. Angelia D.B.*, 564 N.W.2d 682 (Wis. 1997) (upholding “reasonable suspicion” search of student for a knife by school liaison officer whose assistant principal enlisted after receiving tip). The court in *Angelia D.B.* reasoned that

where a law enforcement official has an office in the school, one of the official’s responsibilities as a school liaison officer is to assist school officials in maintaining a safe and proper educational environment. Because the report of a knife on school premises posed an imminent threat of danger to students and teachers, it is reasonable to conclude that [the school liaison officer] conducted the search . . . in conjunction with school officials and in furtherance of the school’s objective to maintain a safe and proper educational environment.

Id. at 690.

²⁰⁹ See, e.g., *State v. N.G.B.*, 806 So. 2d 567, 568-69 (Fla. Dist. Ct. App. 2002) (noting search was initiated by a teacher who sought SRO assistance).

²¹⁰ See *Cason v. Cook*, 810 F.2d 188, 192 (8th Cir. 1987).

²¹¹ See *State v. Tywayne H.*, 933 P.2d 251, 253-54 (N.M. Ct. App. 1997) (rejecting *T.L.O.* and requiring probable cause when uniformed police officers initiated pat-down searches of students while providing security at high school prom); Michael Doyle, Note, *Search and Seizure—Police Searches on Public School Campuses in New Mexico—State v. Tywayne H.*, 30 N.M. L. REV. 141, 149, 152-53 (2000) (distinguishing between *T.L.O.*’s rationale of lower standard to maintain school order and discipline and outside police’s objective of search to secure criminal evidence).

²¹² See *F.P. v. State*, 528 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1988); *In re Josue T.*, 989 P.2d 431, 433 (N.M. Ct. App. 1999); *In re D.D.*, 554 S.E.2d 346, 352 (N.C. Ct. App. 2001); *Angelia D.B.*, 564 N.W.2d at 687.

²¹³ *Elkins v. United States*, 364 U.S. 206, 208 (1960) (abolishing “silver platter” doctrine and prohibiting use in federal courts of evidence unconstitutionally seized by state officers); *In re P.E.A.*, 754 P.2d 382 (Colo. 1988) (en banc) (upholding search based on reasonable suspicion after police officer provided school officials with information about contraband in student’s car); *State v. Heirtzler*, 789 A.2d 634 (N.H. 2001) (applying probable cause standard when school and police had formal agreement that

As the majority and dissenting opinions in *Dilworth* indicate, “no clear case law exists as to whether SROs should be held to a probable cause standard, as are regular police officers, or whether they should be allowed to operate under the lesser reasonableness standard, as are school administrators.”²¹⁴ Some courts justify a reasonable suspicion standard because law enforcement agencies assign SROs to schools to assist in maintaining a safe educational environment. If reasonable suspicion exists that a student has brought a weapon to school, then it is better for a professional police officer to conduct the search than an untrained teacher or school official.²¹⁵

Analysts argue that courts should hold SROs to traditional probable cause requirements because of the increased presence of police officers in public schools and the convergence between school disciplinary emphases and law enforcement tactics.

[T]he increased interdependency between school officials and law enforcement authorities . . . has greatly altered the methodologies and philosophies of school discipline processes. Most significantly, it has led to increased use of the juvenile and criminal justice systems to monitor and punish a broadened array of student conduct. As a result, there is a widening gulf between the more expansive use of law enforcement personnel in school discipline, along with the broadened categories of behaviors that could potentially introduce students to the criminal justice system, and the narrow (and narrow-

school officials would conduct searches); Pinard, *supra* note 140, at 1090-1104 (analyzing cases involving police and school officials co-operation to manipulate applicable search standard).

²¹⁴ Bough, *supra* note 188, at 544; Beger, *The “Worst of Both Worlds,” supra* note 185, at 345-48 (reviewing state appellate court decisions approving police searches in public schools without probable cause).

²¹⁵ See *J.A.R. v. State*, 689 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 1997) (“It would be foolhardy and dangerous to hold that a teacher or school administrator, who often is untrained in firearms, can search a child reasonably suspected of carrying a gun or other dangerous weapon at school only if the teacher or administrator does not involve the school’s trained resource officer or some other police officer.”); *In re Josue T.*, 989 P.2d 431 (N.M. Ct. App. 1999); *Angelia D.B.*, 564 N.W.2d at 690; Pinard, *supra* note 140, at 1088-89 (reasoning that applying higher search standard to police “might cause school officials, who lack the expertise to pat-search for or neutralize dangerous weapons, to search students suspected of possessing dangerous weapons without the aid of a liaison officer”) (citing *Angelia D.B.*, 564 N.W.2d at 690; *J.A.R.*, 689 So. 2d at 1243).

ing) protections afforded students under the Fourth Amendment.²¹⁶

Equating the search standard of school officials with SROs conflates the two despite the substantial difference in roles, disregards the greatly expanded police presence in school, and ignores the increased referrals of youths to juvenile courts from cases originating in schools.²¹⁷

Schools' zero tolerance policies and the increased presence of police have fostered a school-to-prison pipeline of delinquency referrals for school misconduct.²¹⁸ In response to escalating youth violence in the late 1980s, Congress passed the Gun-Free Schools Act of 1994,²¹⁹ which required schools to expel students found on school property with firearms. States and schools re-

²¹⁶ Pinard, *supra* note 140, at 1070 (footnote omitted); see Beger, *The "Worst of Both Worlds," supra* note 185.

²¹⁷ Pinard, *supra* note 140, at 1069-70; see also Bough, *supra* note 188, at 561 (suggesting that courts should focus on: "(1) To whom are the police officers ultimately responsible, the school or the local law enforcement agency? (2) To what extent were the officers involved in the search? and (3) To what extent does the object of the search interfere with order in the school environment (i.e., drugs versus weapons)?").

²¹⁸ *E.g.*, Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Autumn (Fall) 2003, at 9. The authors argue that

many school districts have adopted a zero-tolerance approach to school code violations. The result is a near doubling of the number of students suspended annually from school since 1974 (from 1.7 million to 3.1 million), an increase in the presence of police in schools, and the enactment of new laws mandating referral of children to law enforcement authorities for a variety of school code violations.

Id. at 10 (endnote omitted); see also Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URB. EDUC. 536, 544 (2007) (arguing that school discipline codes furnish few options other than suspension or expulsion for dealing with student misconduct). They contend that "[o]nce removed from the classroom because of fear of control and being labeled in this manner, there are relatively limited responses in the schoolwide discipline policy other than suspension or expulsion." *Id.* at 548.

²¹⁹ 20 U.S.C. § 7151 (2006); Pinard, *supra* note 140, at 1109 (attributing proliferation of zero tolerance policies in schools to Gun Free Schools Act). See generally Kupchik & Bracy, *supra* note 186, at 22 (attributing heightened police presence to Safe Schools Act of 1994 allocating federal funds to schools with serious crime problems to hire police; a 1998 amendment to the Omnibus Crime Control and Safe Streets Act that encouraged schools to participate in SRO model; and federal funding for Community Oriented Police Services (COPS) which enabled schools to hire SROs).

sponded by adopting laws and policies requiring suspension or expulsion of students who were found with any weapons or drugs or who committed violations on or near school grounds.²²⁰ Three decades of research demonstrates that these policies disproportionately contribute to over-representation of black youths in disciplinary suspensions and expulsions.²²¹ Racial disparities in school suspensions and expulsions mirror racial disparities in juvenile justice administration following adoption of “get tough” policies.²²² Analyses of school disciplinary practices indicate that exclusionary practices cannot be attributed to socioeconomic class rather than race differences or to differences in types of behavior by race.²²³ Rather, school personnel

²²⁰ ADVANCEMENT PROJECT, *supra* note 185, at 15; ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000) (reporting schools’ treatment of paper clips, nail files and scissors as weapons); Blumenson & Nilsen, *supra* note 193, at 69 (characterizing expansive use of mandatory suspensions and expulsions as one element of zero tolerance policies); Dohrn, *supra* note 187, at 283 (“Within a year [of Congressional passage of the Gun-Free Schools Act], the federal prohibition was revised to ‘dangerous weapon’ rather than firearm, and the school exclusion stampede was launched. As states added drug possession, drug paraphernalia, or assaults on school personnel as a basis for suspension or expulsion, school exclusion skyrocketed.”); Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1051 (2001) (describing expansive and irrational application of zero tolerance policies to trivial school violations); Joseph R. McKinney, *The Fourth Amendment and the Public Schools: Reasonable Suspicion in the 1990s*, 91 EDUC. L. REP. 455, 458 (1994) (reporting that nineteen states out of a sample of thirty-six states had special school-related drug trafficking laws and provisions for mandatory adult prosecution of juvenile violators).

²²¹ See Fenning & Rose, *supra* note 218, at 539-42 (reviewing literature documenting scope of and factors contributing to disproportionate minority discipline in schools); Chauncey D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1013 (2009) (noting impact of zero tolerance policies on school referrals to juvenile and criminal justice agencies).

²²² See generally FELD, *supra* note 10, at 264-66 (describing disproportionate increase in racial minority overrepresentation in juvenile courts and correctional facilities); PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, & CONTROL ET AL., JUVENILE CRIME, JUVENILE JUSTICE (Joan McCord et al. eds., 2001) (reporting disproportionate confinement of minority youth after controlling for differences in rates of offending by race); Smith, *supra* note 221, at 1016-18 (describing racial disparities in school disciplinary referrals).

²²³ Fenning & Rose, *supra* note 218, at 539-40 (reviewing literature and disputing claims that racial differences in exclusionary practices can be attributed to “socioeconomic differences among African American and White students, rather than race it-

perceive poor black males as “troublemakers” or “dangerous” and a threat to teachers’ control in the classroom.²²⁴ Perceived threat of loss of control in the classroom leads to punitive responses that disproportionately affect black youths.²²⁵ Once schools identify youths as troublemakers, school staff and police subject them to exclusionary practices, monitor them more closely, and increase their likelihood of future academic failure.²²⁶ Disproportionately sanctioning minority youths who attend underperforming schools in weak and disorganized communities and who already experience higher school drop-out rates and impediments to work opportunities serves only to perpetuate their underclass status.²²⁷

self,” and that “African American youth engage in more severe behaviors to warrant such severe discipline”).

²²⁴ *Id.* at 537. Analysts of disproportionate minority confinement in the juvenile justice system attribute punitive responses to structural or perceived threats posed by minority youth. See George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998) (attributing differential processing of juveniles by race to attribution of sources of white youths’ problems to external factors and black youths’ misconduct to internal characteristics); Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW & SOC’Y REV. 285 (1993) (attributing disproportionate minority confinement to structural inequality and perceived threat posed by youth).

²²⁵ Blumenson & Nilsen, *supra* note 193, at 71-72 (“[Z]ero tolerance sanctions [apply] equally against weapons and alcohol offenses, drug sale and possession offenses, and assault and disorderly offenses. They also may apply against such infractions as tardiness, disrespect, and defiance, which, in addition to increasing the numbers, allow bias to creep into the decision to discipline.”); Fenning & Rose, *supra* note 218, at 537 (“We would argue that a fear of losing control in the classroom on the part of educators, rather than an actual threat of dangerousness, sheds light on why our most vulnerable students fall into the web of exclusionary discipline consequences.” (citation omitted)).

²²⁶ See, e.g., ADVANCEMENT PROJECT, *supra* note 185, at 12 (arguing that zero tolerance and criminalization policies adversely affect students who “face the emotional trauma, embarrassment, and stigma of being handcuffed and taken away from school—often shackled with an ankle-monitoring device. They must then serve time on probation with no slip-ups Once many of these youths are in ‘the system,’ they never get back on the academic track. Sometimes, schools refuse to readmit them; and even if these students do return to school, they are often labeled and targeted for close monitoring by school staff and police.” (footnote omitted)).

²²⁷ FELD, *supra* note 10, at 191-200 (describing structural origins of underclass isolation from societal mainstream); Blumenson & Nilsen, *supra* note 193, at 83-85 (arguing that zero tolerance policies contribute to and perpetuate racial underclass exclusion); Theriot, *supra* note 186, at 280-81 (“Students removed from school miss educational opportunities. These students also face humiliation and stigma from

The differences in police and school search standards comprise one element of the school-to-prison pipeline. Accordingly, analysts contend that courts should more closely evaluate searches in which police officers initiate or direct school officials.

Such “involvement” should not be relegated to situations where officers play *proactive and directive* roles vis-à-vis school officials *in particular searches*. Rather, their “involvement” should be construed more expansively to include situations such as where the officers search students at the request of school officials, or are present during searches for purposes of ensuring compliance and providing the necessary “backup.” . . . “[I]nvolvement” should include situations where school officials—through policies that simultaneously constrain their discretion while broadening the discretion of law enforcement authorities—in effect, collect evidence for law enforcement purposes.²²⁸

When police search for evidence to use in a delinquency or criminal prosecution, rather than internal school discipline, then courts should hold them to the traditional probable cause standard.

III. *T.L.O.*'S INDIVIDUALIZED SUSPICION—JUSTIFIED AT THE INCEPTION

Over the decades and in dozens of cases, the Supreme Court repeatedly has struggled to define probable cause and reasonable suspicion,²²⁹ and only distinguished between the

classmates and teachers after being led from school in handcuffs. Being stigmatized and labeled as an offender also might result in greater scrutiny, surveillance, and questioning from school staff and security. This type of regular suspicion and harassment could lead some students to drop out of school . . .”).

²²⁸ Pinard, *supra* note 140, at 1119-20.

²²⁹ See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, *CRIMINAL PROCEDURE* 165-81(5th ed. 2009) (discussing meaning and sources of probable cause). The Supreme Court has stated that the probable cause standard is “incapable” of a precise, exacting definition. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citing *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

two concepts in *Terry v. Ohio*.²³⁰ The differing standards reflect both the quantity and quality of information police must possess before they may act. Probable cause demands “a fair probability that contraband or evidence of a crime will be found in a particular place.”²³¹ Reasonable suspicion requires “indicia of reliability” that an informant’s tip justifies credence.²³² Ultimately, the verbal formulae do not lend themselves to easy quantification, clear classification, or easily administered criteria.²³³ According to the Court, attempts to quantify probable cause or reasonable suspicion may be an exercise in futility. “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”²³⁴ As *Gates* emphasized, probable cause is a “fluid,” “common-sense,” and “practical” standard.²³⁵ Assessments of probable cause under the “totality of the circumstances” hinge on whether the particular facts indicate a “substantial chance” of criminal activity.²³⁶

The Court’s discussions of reasonable suspicion have been equally unilluminating and simply require “some objective manifestation that the [individual] . . . is, or is about to be, engaged in criminal activity.”²³⁷ As with probable cause, the Court opines that reasonable suspicion is a fact-specific concept

²³⁰ *Terry v. Ohio*, 392 U.S. 1 (1968). As some commentators have recognized, “[p]rior to the Court’s [1968] decision in *Terry v. Ohio*, probable cause, reasonable suspicion, reasonable cause, and reasonable belief had roughly the same connotation and were used interchangeably.” Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 653 (2009) (citing Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 479-95 (1984); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 979-80 (2003)).

²³¹ *Gates*, 462 U.S. at 238.

²³² *Adams v. Williams*, 407 U.S. 143, 147 (1972).

²³³ The Supreme Court has recognized the multiplicity of definitions of probable cause, and has tried to clarify its understanding by synthesizing the discussion: “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and . . . the belief of guilt must be particularized with respect to the person to be searched or seized.” *Pringle*, 540 U.S. at 371 (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *Brinegar*, 338 U.S. at 175).

²³⁴ *Gates*, 462 U.S. at 232.

²³⁵ *Id.* at 232, 238.

²³⁶ *Id.* at 243 n.13.

²³⁷ *United States v. Cortez*, 449 U.S. 411, 417 (1981).

that demands a level of flexibility.²³⁸ Reasonable suspicion is a “commonsense, nontechnical conception[] that deal[s] with the ‘factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’”²³⁹ In *United States v. Sokolow*, the Court held that to establish reasonable suspicion:

The officer, of course, must be able to articulate something more than an “inchoate and unparticularized suspicion or hunch.” The Fourth Amendment requires “some minimal level of objective justification” for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means “a fair probability that contraband or evidence of a crime will be found,” and [reasonable suspicion] . . . is obviously less demanding than that for probable cause.²⁴⁰

Simply put, the amount and reliability of information necessary to establish reasonable suspicion are less than that required to establish probable cause by some unquantifiable degree.²⁴¹ In *Redding*, Justice Souter distinguished the two standards with the cryptic observation:

²³⁸ The Court later stated that, along with probable cause, reasonable suspicion is also not “readily, or even usefully, reduced to a neat set of legal rules.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Gates*, 462 U.S. at 232). In fact, the Supreme Court has said that other courts’ attempts to “refine and elaborate” upon the understandings and requirements of reasonable suspicion unnecessarily muddles the evaluation. *Id.* at 7-8; see also *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (“[T]he reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against ‘an objective standard,’ whether this be probable cause or a less stringent test.” (footnotes omitted)).

²³⁹ *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (quoting *Gates*, 462 U.S. at 231; citing *Sokolow*, 490 U.S. at 7-8).

²⁴⁰ *Sokolow*, 490 U.S. at 7 (internal citations omitted).

²⁴¹ *Alabama v. White*, 496 U.S. 325, 330 (1990) (“Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required [for] probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.”); see, e.g., Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U. L. REV. 1, 5 (2002) (“The difference between a probable cause standard and one of an articulated reasonable suspicion is substantial. Although it should not be applied too technically,

Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raises a "fair probability" or a "substantial chance" of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.²⁴²

My criticism of *T.L.O.* and *Redding* is not that probable cause provides a clearer, more precise standard to search than does reasonable suspicion—a "substantial chance" versus a "moderate chance" that a search will uncover evidence. Rather, it is that the Court opted for the less stringent standard, increased the number of searches that school officials conduct, and allowed the state to introduce evidence against juveniles that would be inadmissible if seized from an adult under similar circumstances.

The reliability of information often hinges on its source. The Court has decided several cases in which an informant's tip provides the basis to establish probable cause or reasonable suspicion.²⁴³ Earlier, the Court used a two-pronged test and evaluated both the informant's basis of knowledge and veracity to determine probable cause.²⁴⁴ *Gates* rejected the two-pronged analysis in favor of a "totality of the circumstances" assessment, although it acknowledged that an informant's credibility

probable cause is a much more formal, objective test To support reasonable suspicion, all that is needed is a particularized and articulated basis, that is rational or reasonable, to believe that the particular person may be guilty of an offense or that evidence of a crime may be present." (footnote omitted).

²⁴² *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2639 (2009) (internal citations omitted).

²⁴³ See *White*, 496 U.S. at 326-27 (holding that an anonymous tip "corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion" to make a stop); *United States v. Harris*, 403 U.S. 573 (1971); see also Orrin S. Shifrin, *Fourth Amendment—Protection Against Unreasonable Search and Seizure: The Inadequacies of Using an Anonymous Tip to Provide Reasonable Suspicion for an Investigatory Stop*; *Alabama v. White*, 81 J. CRIM. L. & CRIMINOLOGY 760, 761 (1991) (describing use of anonymous tips when police receive information from unknown informant).

²⁴⁴ See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

and factual basis remain relevant considerations.²⁴⁵ Despite the undefined and inherent imprecision of the two concepts, the clear difference between the majority and dissenting justices in *T.L.O.* was whether to use the lower, watered-down standard. Justice Brennan criticized the *T.L.O.* majority's adoption of a reasonableness standard "whose only definite content is that it is *not* the same test as the 'probable cause' standard found in the text of the Fourth Amendment."²⁴⁶

*A. Reasonable Suspicion to Justify School Searches:
Informants, Metal Detectors, and Canine Partners*

T.L.O. rejected the New Jersey Supreme Court's "crabbed notions of reasonableness" and concluded that Choplick possessed reasonable suspicion to search T.L.O.'s purse. Similarly, *Redding* concluded that Marissa's self-serving statements implicating Savana provided a reasonable basis to search her clothes and backpack. Courts have applied *T.L.O.*'s reasonable suspicion standard broadly to uphold virtually all types of school searches.²⁴⁷ When courts assess the reasonableness of administrators' actions, they focus on the location and objects sought and give greater deference to searches for drugs or wea-

²⁴⁵ *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In the area of information provided by known or anonymous informants, the *Gates* Court concluded that "it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations." *Id.* (footnote omitted). Fourth Amendment scholar Wayne LaFave has argued the *Gates* Court misunderstood the flexibility of the two-pronged test, and consequently, it unnecessarily and "unwisely rejected the *Aguilar-Spinelli* two-pronged test, reasoning that it improperly gave the veracity and basis of knowledge elements 'independent status' when actually 'a deficiency in one may be compensated for . . . by a strong showing as to the other.'" 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.3(b), at 130 (4th ed. 2004) (alteration in original) (footnote omitted).

²⁴⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part and dissenting in part).

²⁴⁷ *Id.* at 343 (majority opinion); see *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991); *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987); *James ex rel. James v. Unified Sch. Dist. No. 512*, 899 F. Supp. 530 (D. Kan. 1995). See generally McKinney, *supra* note 220, at 457 (analyzing all searches based on reasonable suspicion between 1985 and 1993).

pons than for missing money or property.²⁴⁸ Although reasonable suspicion is the school-search standard,²⁴⁹ it is not self-defining or self-evident. The chameleon-like drug-courier profile consists of numerous, contradictory factors which support

²⁴⁸ See *Burnham v. West*, 681 F. Supp. 1160 (E.D. Va. 1987); *People v. Alexander B.*, 270 Cal. Rptr. 342 (Cal. Ct. App. 1990); McKinney, *supra* note 220. McKinney identifies four constellations of factors that courts consider to determine reasonable suspicion:

1. The student's age and history of disciplinary problems both within and without the school context (i.e., known criminal record);
2. The extent and seriousness of the problem in the school and in the community to which the search was directed;
3. The existence of exigent circumstances necessitating an immediate search (to prevent violence or destruction of evidence);
4. A "totality of the circumstances" approach in determining the reliability and probative value of the information school officials use to justify the search.

Id. at 459.

²⁴⁹ See *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) (per curiam) (requiring individualized suspicion under reasonable belief standard); *Kuehn v. Renton Sch. Dist.* No. 403, 694 P.2d 1078 (Wash. 1985). In *Kuehn*, teachers on previous extracurricular band trips found that students brought liquor in their luggage. *Kuehn*, 694 P.2d at 1079. The court concluded that experience alone did not justify a search of students' luggage as a prerequisite to boarding the bus for a concert. *Id.* at 1081 ("To meet the reasonable belief standard, it was necessary for the school officials to have some basis for believing that drugs or alcohol would be found in the luggage of each individual student searched."). By contrast, the court in *Desilets ex rel. Desilets v. Clearview Regional Board of Education*, 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993), upheld a nondiscretionary search of the hand luggage of all students participating in a field trip. The court recalled

the rich opportunity for mischief which the field trip provides to some students. The need for close supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eyes of chaperones. Administrators and teachers have a duty to protect students from the misbehavior of other students. In the context of a field trip, we add to that burden the duty to protect the general population from student mischief.

. . . .

The deterrent effect of the board's search policy advances the legitimate interest of the school administrators in preventing students from taking contraband, in the broadest sense of the word, on field trips.

Id. at 672-73 (internal citations omitted); see also *Yearout*, *supra* note 207, at 490 (describing tension between protecting school safety and respecting constitutional rights).

reasonable suspicion.²⁵⁰ Similarly, school personnel can construct almost any particularized justification after-the-fact to create a reasonable suspicion to search a student.²⁵¹ For example, a student suspected of alcohol or drug use may be sullen or boisterous,²⁵² lethargic or active,²⁵³ arrive tardy or early for an activity,²⁵⁴ and her eyes may be glazed or focused, direct or averted.²⁵⁵

In addition to school staff or teachers' personal observations, they may receive tips from other school personnel, known students, anonymous informants, dogs, and technology to provide reasonable suspicion to search.²⁵⁶ Fourth Amendment decisions rendered in other contexts provide courts with guidance to evaluate the quantity and quality of information required to justify intrusions on privacy.

1. Informants

The strip search in *Redding* rested on Marissa's guilt-evading assertion that she received pills from Savana.²⁵⁷ The Court found that Jordan and Marissa's allegations provided reasonable suspicion to search her clothes and backpack.²⁵⁸ However, it ruled narrowly that the strip search was too intru-

²⁵⁰ See *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992) (finding that a sloppily dressed deplaning passenger provides reasonable suspicion).

²⁵¹ McKinney, *supra* note 220, at 457 (surveying all post-*T.L.O.* cases between 1985 and 1993 and reporting that courts upheld searches based on reasonable suspicion in thirty-one of thirty-six cases). Between 1990 and 1993, courts found school administrators lacked reasonable suspicion in two of twenty cases. *Id.* One-third of cases in the 1990s involved searches for guns, all of which courts upheld. *Id.* at 457-58.

²⁵² Compare *Cornfield v. Consol. High Sch. Dist.* 230, 1992 WL 59106 (N.D. Ill. 1992) (finding sullenness provides reasonable suspicion), with *Hedges v. Musco*, 33 F. Supp. 2d 369 (D.N.J. 1999) (gregariousness provides reasonable suspicion).

²⁵³ See, e.g., *Kraslawsky v. Upper Deck. Co.*, 65 Cal. Rptr. 2d 297 (Cal. Ct. App. 1997) (suggesting that lethargic responses may provide reasonable suspicion).

²⁵⁴ See *Bartram v. Pennsbury Sch. Dist.*, 1999 WL 391480 (E.D. Pa. 1999) (lateness provides basis for reasonable suspicion).

²⁵⁵ See *United States v. McRae*, 81 F.3d 1528, 1531 (10th Cir. 1996) (focused or fixed stare provides reasonable suspicion).

²⁵⁶ See generally Gardner, *supra* note 47; Myron Schreck, *The Fourth Amendment in the Public Schools: Issues in the 1990s and Beyond*, 25 URB. LAW. 117 (1993).

²⁵⁷ *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2638 (2009).

²⁵⁸ *Id.* at 2641.

sive without individualized suspicion that Savana might have drugs hidden in her underwear.²⁵⁹ Unfortunately, *Redding* missed an opportunity to clarify for lower courts and school officials why those facts justified a search of her outer clothes and backpack but not a strip search. If Wilson lacked a reasonable basis to believe that Savana had pills in her underwear, then what reason did he have to believe they would be found anywhere else on her person?²⁶⁰ Similarly, in *T.L.O.*, what more than an “unparticularized suspicion or hunch” did Chopllick possess that she had cigarettes in her purse?

Lower courts have struggled with tips provided to school officials by student-informants. Even when courts evaluate informant tips under *Gates*’s “totality of circumstances”²⁶¹ approach, factors like informants’ veracity,²⁶² declarations against penal interests,²⁶³ and other “indicia of reliability”²⁶⁴ remain relevant to determinations of probable cause and reasonable suspicion. The critical question is whether the information only provides a basis for further investigation or justifies immediate action. Courts apply a deferential standard when school officials act based on student-informants’ tips. “Absent information that a particular student informant may be untrustworthy, school officials may ordinarily accept at face value the information they supply.”²⁶⁵ Similarly, school officials may rely

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 2642-43 (“[W]hat was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.”).

²⁶¹ *Illinois v. Gates*, 462 U.S. 213 (1983) (noting relevance of credibility and factual-basis to evaluations of probable cause).

²⁶² *See id.*; *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

²⁶³ *United States v. Harris*, 403 U.S. 573 (1971) (finding declaration against penal interest by a known informant sufficient to establish credibility).

²⁶⁴ *Adams v. Williams*, 407 U.S. 143 (1972).

²⁶⁵ *S.C. v. State*, 583 So. 2d 188, 192 (Miss. 1991); *see also Florida v. J.L.*, 529 U.S. 266, 274 (2000) (holding that uncorroborated tip was insufficient to conduct frisk and search). Even though the Court in *J.L.* held the particular search invalid, it cautioned that it did not hold that “officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as . . . schools, cannot conduct protec-

on anonymous tips that provide specific details if the allegation is plausible because of conditions at the school.²⁶⁶ The Court in *Williams ex rel. Williams v. Ellington*,²⁶⁷ evaluated a tip under the “totality of the circumstances” which included the reliability of the informant. However, school settings provide unique opportunities for students to unfairly implicate others in wrong-doing and, unlike declarations against penal interests, false allegations to school officials carry no criminal consequences to assure their veracity.²⁶⁸

2. Metal Detectors in Public Schools

The threats of violence and weapons are facts of life in many schools. Magnetometers (metal detectors) have become standard features in airports and public buildings, such as courthouses. However, people may choose whether or not to enter those spaces, and if they do so, then they have consented to expose themselves to those devices. By contrast, compulsory attendance laws require students to attend school and to sub-

tive searches on the basis of information insufficient to justify searches elsewhere.” *Id.* at 274.

²⁶⁶ See *Martens ex rel. Martens v. Dist. No. 220*, 620 F. Supp. 29 (N.D. Ill. 1985); Leigh Taylor Hanson, Note, *Psst! Janie’s Got a Gun: Anonymous Tips and Fourth Amendment Search and Seizure Rights in Schools*, 37 GA. L. REV. 267, 270 (2002) (“[A]nonymous tips should automatically satisfy the reasonable suspicion standard in schools, particularly in cases where the tip involves firearms or drugs.”); see also McKinney, *supra* note 220, at 460 (“In the vast majority of . . . cases . . . school officials relied on information supplied by student informants to justify, at least in part, the search of another student.”).

²⁶⁷ 936 F.2d 881 (6th Cir. 1991).

²⁶⁸ See *id.* at 888-89 (“While there is a concern that students will be motivated by malice and falsely implicate other students in wrongdoing, that type of situation would be analogous to the anonymous tip. Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted.”); *Phaneuf v. Fraikin*, 448 F.3d 591, 598-99 (2d Cir. 2006) (“While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search.”); see also Hanson, *supra* note 266, at 283 (“Anonymous tips occur frequently in the school context. Students do not want to ‘rat’ on each other and fear loss of reputation or even a loss of safety for telling on another student. Instead, students want to take the burden off themselves and anonymously warn of the potential threat.” (footnote omitted)).

mit to such technology.²⁶⁹ The Court has considered the uses of technologies to search in several contexts. *Kyllo v. United States* characterized the use of thermal-imaging technology that revealed information about the interior of the home as a search that required probable cause.²⁷⁰ By contrast, *Illinois v. Caballes* concluded that the use of a dog to sniff the exterior of a car did not intrude on any reasonable expectation of privacy and therefore did not require any prior factual justification.²⁷¹

May schools install metal detectors to limit the introduction of weapons at schools?²⁷² Does requiring students to walk through a metal detector constitute a search that requires reasonable suspicion?²⁷³ If a student sets off an alarm, then how intrusively may school personnel search her? In *In re F.B.*, the court did not require individualized suspicion to install and use a metal detector at an urban high school because of high rates of violence and the minimal intrusion caused by screening.²⁷⁴ In *People v. Pruitt*, the court used *T.L.O.*'s balancing approach

²⁶⁹ LAWRENCE F. ROSSOW & JACQUELINE A. STEFKOVICH, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 34 (2d ed. 1995) ("A distinction should be made between the use of a detector at locations where members of the public can prevent the search by choosing not to enter Unlike a passenger at an airport the student is not free to terminate the search."); Crystal A. Garcia & Sheila Suess Kennedy, *Back to School: Technology, School Safety and the Disappearing Fourth Amendment*, 12 KAN. J.L. & PUB. POL'Y 273, 274 (2003) (describing five most commonly used school security technologies as security cameras, recording systems, hand-held or walk through metal detector systems, duress alarms, and entry control devices); Gardner, *supra* note 47, at 943 ("[B]ecause students are compelled to attend school, unparticularized school searches are inherently more coercive, and therefore more intrusive, than those experienced at checkpoints and airports by persons free to avoid those intrusions by simply going elsewhere.").

²⁷⁰ 533 U.S. 27 (2001).

²⁷¹ 543 U.S. 405 (2005).

²⁷² ADVANCEMENT PROJECT, *supra* note 185, at 11 (describing the array of security measures schools employ). "Visible measures to prevent serious crime in schools include: school security officers, police officers, metal detectors, tasers, canine dogs, drug sweeps, SWAT teams, biometric hand readers, and surveillance cameras." *Id.*

²⁷³ See Robert S. Johnson, *Metal Detector Searches: An Effective Means to Help Keep Weapons Out of Schools*, 29 J.L. & EDUC. 197, 202-03 (2000) (arguing that metal detector screening of students is constitutional); Michael Ferraraccio, Note, *Metal Detectors in the Public Schools: Fourth Amendment Concerns*, 28 J.L. & EDUC. 209, 224-29 (1999) (arguing that use of metal detectors constitutes a suspicionless search that violates Fourth Amendment Rights).

²⁷⁴ 658 A.2d 1378 (Pa. Super. Ct. 1995).

and found that reality of school violence and the minimal intrusiveness justified metal detector screening.²⁷⁵ Courts routinely approve the use of hand-held metal detectors to randomly check students for weapons and do not characterize such practices as searches.²⁷⁶ They rationalize that the overriding need to protect students from weapons outweighs individual privacy interests.²⁷⁷ The sounding of an alarm then provides the reasonable suspicion to conduct a frisk or more intrusive search.

3. Canine Partners in Schools

The use of dogs to sniff students, lockers, or cars may either provide reasonable suspicion to justify a search or may itself constitute a search that requires pre-existing individualized suspicion.²⁷⁸ In *Illinois v. Caballes*,²⁷⁹ the Court found that the use of a dog during a reasonable traffic stop did not prolong the encounter and the sniff of the air around the car for contraband did not intrude on any reasonable expectation of privacy.²⁸⁰ *Caballes* relied on the Court's earlier dicta in *United States v. Place* that "treated a canine sniff by a well-trained narcotics-detection dog as 'sui generis' because it 'discloses only

²⁷⁵ 662 N.E.2d 540 (Ill. App. Ct. 1996); see Eugene C. Bjorklund, *Using Metal Detectors in the Public Schools: Some Legal Issues*, 111 EDUC. L. REP. 1 (1996); Ferraraccio, *supra* note 273, at 224-29 (arguing that schools' use of metal detectors to conduct suspicionless searches violates students' Fourth Amendment rights).

²⁷⁶ See *People v. Latasha W.*, 70 Cal. Rptr. 2d 886 (Cal. Ct. App. 1998) (approving use of hand-held metal detectors to randomly wand students for weapons); *State v. J.A.*, 679 So. 2d 316 (Fla. Ct. App. 1996); *People v. Dukes*, 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992); *In re S.S.*, 680 A.2d 1172 (Pa. Super. Ct. 1996) (approving use of hand-held wands even without school history of violence).

²⁷⁷ See Robert S. Johnson, *Metal Detectors in Public Schools: A Policy Perspective*, 80 EDUC. L. REP. 1 (1993); Johnson, *supra* note 273; Ferraraccio, *supra* note 273.

²⁷⁸ See generally ROSSOW & STEFKOVICH, *supra* note 269, at 17.

²⁷⁹ 543 U.S. 405 (2005).

²⁸⁰ *Id.* at 409.

[T]he use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view,"—during a lawful traffic stop, generally does not implicate legitimate privacy interests. . . . Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Id. (citation omitted) (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

the presence or absence of narcotics, a contraband item.”²⁸¹ *Caballes* distinguished the use of dogs from more intrusive technologies, such as the thermal-imaging invalidated in *Kyllo v. United States*.²⁸² A dog sniff during a traffic stop detects nothing but contraband, whereas thermal imaging intrudes on the privacy of the home *and* reveals lawful, intimate and personal details, as well as possible illegal activity.²⁸³ If a sniff is not a search, then police do not need individualized suspicion before they deploy canine partners.²⁸⁴

Justice Souter’s *Caballes* dissent objected that the majority’s ruling that a sniff is not a search placed the use of dogs outside the scope of Fourth Amendment review.²⁸⁵ He disputed the majority’s assumption about the infallibility of dogs and warned that canines’ false-positive error rate could lead to excessive intrusions on privacy.²⁸⁶ Justice Ginsburg’s dissent argued that the use of dogs qualitatively changes the nature of an otherwise lawful encounter and should require reasonable suspicion for that heightened intrusion.²⁸⁷ She warned that the

²⁸¹ *Id.* (quoting *Place*, 462 U.S. at 707).

²⁸² 533 U.S. 27 (2001).

²⁸³ *Caballes*, 543 U.S. at 410 (“The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent’s hopes or expectations concerning the nondetection of contraband in the trunk of his car.”).

²⁸⁴ State courts often require reasonable suspicion before use of dogs. *See, e.g.*, *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. 1987).

²⁸⁵ *Caballes*, 543 U.S. at 410 (Souter, J., dissenting).

²⁸⁶ *Id.* at 412-13. Justice Souter argued that dogs’ fallibility undermines *Place*’s justification to treat sniffs as *sui generis* and warned that:

[T]he sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime Thus in practice the government’s use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area.

Id.

²⁸⁷ *Id.* at 421-22 (Ginsburg, J., dissenting).

A drug-detection dog is an intimidating animal. Injecting such an animal into a routine traffic stop changes the character of the encounter [It] becomes broader, more adversarial

. . . .

Court's holding would allow police to use dogs in parking lots and public places without any factual justification.²⁸⁸

If a dog sniff does not intrude on any reasonable expectations of privacy, then police may deploy them routinely in airports, courthouses and other public buildings without any particularized suspicion. The availability of canine resources and anticipated cost-benefits of their use provide the only constraints on their deployment. May school officials assert a similar special need and enlist the assistance of canine partners to sniff students, their lockers, or their cars parked in school lots? Justice Ginsburg cautioned that the presence of a dog changed the character of the intrusion on privacy and expanded the scope of searches. Should school officials have reasonable suspicion before police walk dogs around students' cars or lockers? Should police have individualized suspicion before dogs sniff students?

a. Canine Sniffs of Students

Significantly, *Caballes* involved a sniff of a car rather than a person. Does a sniff of a person involve a different intrusion on privacy than a sniff of luggage or cars? Fourth Amendment analysts argue that a sniff of a person is qualitatively different and that constitutional prerequisites—reasonable suspicion or probable cause—should apply.²⁸⁹ If a dog alerts to a particular student, then does that signal provide school officials and/or police with reasonable suspicion or probable cause to conduct a

. . . Today's decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.

Id. (alteration in original) (citations omitted).

²⁸⁸ *Id.*

²⁸⁹ 1 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(g) at 537 (4th ed. 2004) (arguing that a canine sniff of a person “is embarrassing, overbearing and harassing, and thus should be subject to Fourth Amendment constraints”); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246-47 (1982) (“[T]he very act of being subject to a body sniff by a German shepherd may be offensive at best or harrowing at worst.”).

more thorough search of the person? Does a dog's alert coupled with an unsuccessful search of a student's outer clothing provide the individualized suspicion that *Redding* required to conduct a strip search? Heightened security in schools to combat drugs provides fertile ground to litigate these questions.

The Supreme Court has not decided whether sniffs of people require greater justification than sniffs of cars. Lower courts are divided whether school administrators and police must possess reasonable suspicion when handlers direct the dog at students rather than their property.²⁹⁰ In *Doe v. Renfrow*,²⁹¹ school officials enlisted local police and canine partners to combat the school's drug problem.²⁹² School officials and police agreed that any drugs uncovered by dog sniffs only would be used for internal discipline but would not lead to criminal prosecutions.²⁹³ During a schoolwide drug inspection, teachers confined students in their classrooms for two and one-half hours while an administrator or teacher, a dog and its handler, and a uniformed officer inspected each classroom.²⁹⁴ Students sat at their desks with their hands, purses and bags on the desk top while the handler led the dog up and down the

²⁹⁰ See, e.g., *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999).

In *Horton*, the Fifth Circuit noted that "the intensive smelling of people, even if done by dogs, [is] indecent and demeaning" and held that the sniffing by dogs of students was a search. The Fifth Circuit in *Horton* considered and expressly rejected the approach taken by the Seventh Circuit in *Doe v. Renfrow* . . . [on] facts nearly identical to those of *Horton*.

Id. (alteration in original) (internal citations omitted); see also *Jennings v. Joshua Indep. Sch. Dist.*, 877 F.2d 313 (5th Cir. 1989) (upholding dog sniff of a car); *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (upholding canine sniff of student lockers).

²⁹¹ 475 F. Supp. 1012 (N.D. Ind. 1979). See generally *Gardner*, *supra* note 47 (analyzing Fourth Amendment implications of *Doe*).

²⁹² *Doe*, 475 F. Supp. at 1015-16. Beginning in fall 1978, school officials recorded nearly two-dozen instances in which students possessed drugs, paraphernalia, or alcohol. *Id.* at 1015. Thirteen of those twenty-one incidents occurred within four weeks prior to the search. *Id.* School officials and teachers became concerned that drug use in the school had a negative impact on the educational environment. *Id.* at 1016. Students under the influence of drugs disrupted classrooms, and faculty and student morale suffered. *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

aisles.²⁹⁵ The dog alerted to students on about fifty occasions, and after each alert, the student emptied her pockets or purse.²⁹⁶ School officials subjected eleven students, including Doe, to a body search because the dog continued to alert after they emptied their pockets.²⁹⁷ A school nurse conducted a strip search of Doe.²⁹⁸ Doe did not possess any contraband; earlier that morning, she had played with her dog that was in heat²⁹⁹—one source of the false-positive alerts of which Justice Souter warned in *Caballes*.³⁰⁰ As a result of a two and one-half hour detention and canine sniffs of 2,780 students, school officials disciplined seventeen students – a hit-rate of 0.006%.³⁰¹

Doe sought § 1983 relief for violation of her constitutional rights.³⁰² *Doe* considered three substantive Fourth Amendment issues: 1) whether the use of dogs to find drugs constituted a search; 2) whether a dog's alert alone provided reasonable suspicion to search her person; and 3) whether the dog's alert provided reasonable grounds to conduct a nude search.³⁰³ The Court in *Doe* first noted that schools extensively regulate students' movements and prolonged detention in classrooms did not constitute a search or seizure.³⁰⁴ It characterized the use of canine teams in classrooms as a minimal intrusion—a brief interruption applied even-handedly to all students until a dog

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 1017.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (Souter, J., dissenting).

³⁰¹ *Doe*, 475 F. Supp. at 1017 (noting that seventeen students possessed drugs—twelve voluntarily withdrew from school, three were expelled, and two were suspended).

³⁰² *See id.* at 1019.

³⁰³ *Id.* at 1018.

³⁰⁴ *Id.* at 1022 (“Any expectation of privacy necessarily diminishes in light of a student’s constant supervision while in school. Because of the constant interaction among students, faculty and school administrators, a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting.”); *accord Florida v. Bostick*, 501 U.S. 429 (1991) (arguing the plaintiff’s presence on a bus, and not the police presence, constrained the plaintiff’s freedom of movement); *I.N.S. v. Delgado*, 466 U.S. 210 (1984) (holding that conditions of employment, not immigration officers, restricted mobility).

alerted. *Doe* emphasized the school's drug problem and concluded that "[u]se of the dogs to detect where those drugs were located was not unreasonable under the circumstances."³⁰⁵ The dog alert, in turn, provided reasonable suspicion to search students' pockets and purses.³⁰⁶ After school officials searched *Doe* unsuccessfully, they strip searched her, which the Court in *Doe* found unreasonable.³⁰⁷ School officials had no facts—other than the dog's alert—to believe she had any drugs, but *Doe* held that only the nude search violated the Fourth Amendment. Despite the unreasonable search, the Court found that school officials acted in good faith, granted them qualified immunity, and summary judgment—the same result *Redding* reached three decades later.³⁰⁸

Doe minimized the intrusiveness of dog sniffs of students and anticipated *Place* and *Caballes's* rationale that contraband-specific canine detection is a "non-search." The paucity of people-sniffing cases and the abundance of cases challenging sniffs of luggage and cars suggest that dog sniffs of people rarely occur outside of schools.³⁰⁹ Other courts on facts similar to *Doe* have concluded that a dog sniff of a person is more intrusive than sniffing inanimate objects and that school officials

³⁰⁵ *Doe*, 475 F. Supp. at 1021. Using language similar to *T.L.O.'s*, *Doe* focused on "(1) the student's age; (2) the student's history and record in school; (3) the seriousness and prevalence of the problem to which the search is directed; and (4) the exigency requiring an immediate warrantless search." *Id.* at 1024-25.

³⁰⁶ *Id.* at 1024 ("[T]he alert of the dog constituted reasonable cause to believe that the plaintiff was concealing narcotics. Having that requisite reasonable cause to believe that the plaintiff was concealing narcotics, the defendants did not violate the plaintiff's Fourth Amendment rights by ordering her to empty her pockets onto the desk.").

³⁰⁷ *Id.* The court reasoned that a strip search is

[A]n intrusion into an individual's basic justifiable expectation of privacy. Before such a search can be performed, the school administrators must articulate some facts that provide a reasonable cause to believe the student possesses the contraband sought. The continued alert by the trained canine alone is insufficient to justify such a search because the animal reacts only to the scent or odor of the marijuana plant, not the substance itself.

Id.

³⁰⁸ *Id.* at 1025-28.

³⁰⁹ Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980); Martin R. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803 (1980).

and police must have reasonable suspicion before deploying dogs against students.³¹⁰ The court in *Horton v. Goose Creek Independent School District* observed that:

“[T]he intensive smelling of people, even if done by dogs, [is] indecent and demeaning.” Most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell. . . . Intentional close proximity sniffing of the person is offensive whether the sniffer be canine or human. One can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person.³¹¹

Horton analogized a dog’s sniff, close proximity, and occasional touching to a *Terry* frisk that required reasonable suspicion.³¹² Although *Horton* found the sniff of students to be a search that required reasonable suspicion, it held that the use of dogs to sniff lockers and cars parked in public lots was not a search that required any factual predicate.³¹³

³¹⁰ *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 478-79 (5th Cir. 1982) (distinguishing sniffing inanimate objects such as bags, *United States v. Place*, 462 U.S. 696 (1983), from the greater intrusion on the person).

We need only look at the record in this case to see how a dog’s sniffing technique—*i.e.*, sniffing around each child, putting his nose *on* the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive. . . . [T]he dogs put their noses “up against” the persons they are investigating.

. . . [W]e hold that sniffing by dogs of the students’ persons in the manner involved in this case is a search within the purview of the fourth amendment.

Id. at 479 (internal citations omitted).

³¹¹ *Id.* at 478-79 (alteration in original) (citations omitted) (quoting Note, *supra* note 309).

³¹² *Id.* at 479.

³¹³ *Id.* at 477 (concluding that “the use of the dogs’ nose to ferret out the scent from inanimate objects in public places” is not a search and that “the sniffs of the lockers and cars did not constitute a search and therefore we need make no inquiry into the reasonableness of the sniffing of the lockers and automobiles”).

In *B.C. v. Plumas Unified School District*, school officials required students to walk past a deputy sheriff and drug-sniffing dog stationed outside the classroom door.³¹⁴ School officials then ordered students to wait outside the classroom while the dog sniffed backpacks and jackets they left in the room.³¹⁵ *B.C.* concluded that close proximity sniffing of a person is offensive and infringes on a reasonable expectation of privacy.³¹⁶ Because the school did not face a serious drug problem and the search was more than minimally intrusive, the court required individualized suspicion, which officials lacked.³¹⁷ Notwithstanding the suspicionless search, *B.C.* denied relief in the student's § 1983 action because school officials acted in good faith and did not violate a "clearly established" constitutional right.³¹⁸

Commonwealth v. Martin held that the greater intrusiveness of dog sniffs of students than cars and lockers required probable cause rather than reasonable suspicion.³¹⁹ Earlier, the Pennsylvania Supreme Court in *Commonwealth v. Johnston* interpreted the state constitution to find that a dog sniff of a storage locker or bag was a search and required reasonable suspicion.³²⁰ *Johnston* balanced the intrusion of dogs on privacy in containers against the state interest in combating drugs and only required reasonable suspicion, rather than probable cause. *Johnston* justified the lower standard as a middle ground between federal law, which exempted dog sniffs from any Fourth

³¹⁴ 192 F.3d 1260, 1263 (9th Cir. 1999).

³¹⁵ *Id.*

³¹⁶ *Id.* at 1266-67. The *Plumas* court noted that dog sniffs are "highly intrusive" for several reasons. *Id.* at 1267. "First, 'the body and its odors are highly personal.' Noting that dogs 'often engender irrational fear,' the district court further explained that the fact '[t]hat search was sudden and unannounced add[ed] to its potentially distressing, and thus invasive, character.' In addition, the 'search was completely involuntary.'" *Id.* (alterations in original) (internal citations omitted).

³¹⁷ *Id.* at 1268.

³¹⁸ *Id.* (granting school officials' qualified immunity defense because "[w]hen the dog sniff in this case occurred, it was not clearly established that the use of dogs to sniff students in a school setting constituted a search. As such, the unlawfulness of defendants' conduct 'in light of preexisting law,' was not 'apparent.'" (citation omitted).

³¹⁹ 626 A.2d 556 (Pa. 1993).

³²⁰ 530 A.2d 74 (Pa. 1987).

Amendment scrutiny per *Caballes*, and a rigorous probable cause standard. *Martin* calibrated the greater intrusiveness of a sniff of a person than containers and required probable cause to use a dog.³²¹ Once police have probable cause to conduct a sniff, they may then detain a person for a reasonable time within which to obtain a warrant.³²² *Martin*'s rationale is consistent with Supreme Court decisions requiring probable cause to seize an object and to briefly hold it until police obtain a warrant to search it.³²³ In contrast with the procedures adopted in *Martin*, *Doe*'s approval of unrestricted use of canines and *Horton* and *B.C.*'s minimal regulations do not adequately protect students' expectations of privacy in their persons.

b. Canine sniffs of students' cars in school parking lot.

Justice Ginsburg's dissent in *Caballes* warned that the Court "clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots."³²⁴ In *Myers v. State*, police conducted a narcotics dog sniff of students' cars in the school parking lot.³²⁵ Following the dog's alert to Myers's car, a school official searched it for drugs and recovered a gun. Charged with possessing a firearm on school property, Myers filed a motion to suppress evidence. The trial judge denied his motion to suppress and a sharply divided Indiana Supreme Court affirmed.³²⁶

³²¹ *Martin*, 626 A.2d at 560. The court emphasized that:

[A]n invasion of one's person is, in the usual case, [a] more severe intrusion on one's privacy interest than an invasion of one's property.

. . . [P]olice must have probable cause to believe that a canine search of a person will produce contraband or evidence of a crime. Reasonable suspicion of criminal activity will not suffice.

Id. at 560.

³²² *Id.* *Martin* distinguished between an allowable self-protective stop and frisk authorized by *Terry* and a search of the person.

³²³ See *Illinois v. McArthur*, 531 U.S. 326 (2001) (allowing detention of resident while police obtain a warrant to search premises); *United States v. Chadwick*, 433 U.S. 1 (1977) (allowing seizure of footlocker based on probable cause but requiring search warrant to open it).

³²⁴ *Illinois v. Caballes*, 543 U.S. 405, 422 (2005) (Ginsburg, J., dissenting).

³²⁵ 839 N.E.2d 1154, 1159 (Ind. 2005).

³²⁶ *Id.* at 1161.

The *Myers* majority emphasized that school officials enlisted the assistance of police and conducted the search.³²⁷ Because Myers's car was parked in the school lot and unoccupied, the court relied on *Caballes* to uphold a canine sniff without individualized suspicion.³²⁸ Although a search of a car ordinarily requires probable cause, the court relied on *Dilworth's* tripartite framework, found that school officials did not formally act as agents of the police, and endorsed *T.L.O.'s* lower standard of reasonableness.³²⁹ The majority concluded that:

[S]chool officials, not the police, conducted the searches and that the police only assisted the school officials. The decision to conduct the sweep was made by the school and, although the time and date of the sweep was determined by the police, it was within a range of dates determined by the school; the areas to be searched were determined by the school; and the actual search was conducted by school officials. Because . . . the school initiated and conducted the search and sought only supporting police resources such as trained narcotics dogs that were not available to the school, we find that the propriety of the vehicle search under the Fourth Amendment is governed by the reasonableness test, not the warrant requirement.³³⁰

Myers reasoned that *Caballes* allowed a dog sniff of a car without any reason, found the dog's reaction provided reasona-

³²⁷ *Id.* at 1157.

[I]t was the School who determined that the sweep would take place, where the sweep was to be conducted, and the range of time in which the sweep was to be conducted, further it was the School who did any search after the dog had alerted to a locker or vehicle.

Id. According to *Myers*, school officials were not acting as agents of the police. *Id.*

³²⁸ *Id.* at 1159 (rejecting Myers's claim that "reasonable individualized suspicion was required by the federal constitution before officials could use a trained narcotics-detection dog to sniff the outside of the defendant's unoccupied motor vehicle").

³²⁹ See *supra* notes 42-65 and accompanying text; *Myers*, 839 N.E.2d at 1160 ("[W]here a search is initiated and conducted by school officials alone, or where school officials initiate a search and police involvement is minimal, the reasonableness standard is applicable.").

³³⁰ *Myers*, 839 N.E.2d at 1160.

ble suspicion for school officials to search the areas to which it alerted, and held that the search was reasonable.³³¹

In two separate dissents, justices would have excluded the evidence seized from Myers' car. Justice Sullivan objected to the majority's characterization of the search as one initiated by school officials when it involved officers descending "from four separate police departments without any advance notice and their vehicle-by-vehicle search of the cars in the parking lot."³³² Sullivan also objected to the majority's extension of *Caballes* from a contraband-specific dog sniff during a lawful traffic stop to a weapon search without any valid detention.³³³ In a separate dissent, Justice Rucker urged the court to apply *Caballes*' rationale narrowly because no logical limitation existed to the majority's expansive reading.³³⁴ Because police used the dogs to discover evidence for criminal prosecutions and not for school discipline, he would have required them to have reasonable suspicion, if not probable cause, to conduct a search with dogs, which they clearly lacked.³³⁵

³³¹ *Id.* at 1160-61.

³³² *Id.* at 1162 (Sullivan, J., dissenting).

³³³ *Id.*

³³⁴ *Id.* at 1164 (Rucker, J., dissenting). Justice Rucker expressed concern that the majority's approval of the suspicionless dog-sniff in the parking lot expands the practice

to a variety of contexts not specifically sanctioned by the *Caballes* court. Indeed, in a dissenting opinion Justice Souter made a similar point. Although complaining that the Court's stated reasoning "provides no apparent stopping point," Justice Souter pointed out that he did not believe the Court's [sic] was "actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car . . . or on the person of any pedestrian minding his own business on a sidewalk."

Id. (quoting *Illinois v. Caballes*, 543 U.S. 405, 417 (2005) (Souter, J., dissenting)).

³³⁵ *Id.* at 1164-66. Justice Rucker argued that:

[B]efore an officer may subject a vehicle, lawfully parked in a parking lot, to a canine sniff, the officer must first have at least a reasonable articulable suspicion that a crime is being committed.

....

... [B]ecause the school's drug prevention and detection policy was intended to (and did in fact) result in the seizure of evidence for law enforcement purposes, the traditional probable cause requirement was not waived. . . . "[W]here a law enforcement officer directs, participates or acquiesces in a

B. Drug testing Students without Individualized Suspicion

The majority in *T.L.O.* concluded that Choplick had reasonable suspicion to search the student's purse but suggested that other searches might be reasonable without any individualized suspicion.³³⁶ Are there other types of *sui generis*, non-intrusive searches that school officials can perform without a warrant, probable cause, or even reasonable suspicion? May school officials invoke the epidemic of drug abuse—e.g., drugs' adverse impact on concentration, memory, academic performance, and associated problems of discipline and disruption—to create programs to detect and reduce drug use by students without any suspicion? When confronted with these questions, *Vernonia School District 47J v. Acton*³³⁷ and *Board of Education v. Earls*³³⁸ further watered down *T.L.O.*'s minimal threshold of individualized suspicion and upheld suspicionless drug testing of athletes and students who participate in extracurricular activities.³³⁹

In the late-1980s, Vernonia School District perceived a sharp increase in drug use, discipline problems, and classroom

search conducted by school officials, the officer must have probable cause for that search, even though the school officials acting alone are treated . . . to a lesser constitutional standard."

Id. (quoting *A.J.M. v. State*, 617 So. 2d 1137, 1138 (Fla. Dist. Ct. App. 1993).

³³⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985).

We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

Id. (internal citation omitted) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)); *see supra* note 141; Gardner, *supra* note 47, at 925-46 (criticizing *T.L.O.* for opening the door to suspicionless searches and posing hypotheticals realized in subsequent cases involving use of dogs, random urinalysis, and other departures from Fourth Amendment standards).

³³⁷ 515 U.S. 646 (1995).

³³⁸ 536 U.S. 822 (2002).

³³⁹ *See, e.g.*, Irene Merker Rosenberg, *Public School Drug Testing: The Impact of Acton*, 33 AM. CRIM. L. REV. 349, 350 (1996) (characterizing *T.L.O.* as narrowing students' privacy rights and *Acton* as eliminating them).

disruptions and asserted that student-athletes were leaders of the school's drug culture.³⁴⁰ After other efforts to deter drug use proved unsuccessful, it adopted a policy to require all students who participated in interscholastic athletics to consent to drug tests at the start of their sport's season and to submit to random testing thereafter.³⁴¹ The policy required students to provide a urine sample while monitored by same-sex school staff and an independent laboratory tested the sample for drugs.³⁴² The school barred seventh-grader James Acton from playing football because he and his parents refused to sign the consent form.³⁴³ Acton claimed that the testing policy violated the Fourth Amendment and sought § 1983 declaratory and injunctive relief. The Ninth Circuit Court of Appeals agreed and invalidated the policy.³⁴⁴

A six-to-three majority of the Supreme Court reversed that decision and upheld the Vernonia School District's Policy. *Acton* employed a reasonableness balancing test and measured the intrusion on privacy interests against the promotion of legitimate governmental interests.³⁴⁵ The Court noted that *T.L.O.* recognized schools' "special needs" and dispensed with traditional Fourth Amendment strictures.³⁴⁶ It identified other in-

³⁴⁰ *Acton*, 515 U.S. at 649 (claiming that drug use adversely affected athletes' "motivation, memory, judgment, reaction, coordination, and performance" and increased the risk of sports-related injuries); see Michael D. Mosser, *Random Drug-Testing High School Student Athletes in Vernonia School District 47J v. Acton: Is the War on Drugs a Losing Battle for the Fourth Amendment?*, 17 WHITTIER L. REV. 527 (1996) (approving majority's balance in light of magnitude of school drug problem); Samantha Elizabeth Shutler, *Random, Suspicionless Drug Testing of High School Athletes*, 86 J. CRIM. L. & CRIMINOLOGY 1265, 1273-75 (1996) (analyzing context of Vernonia's drug problem and failures of alternative efforts to combat it).

³⁴¹ *Acton*, 515 U.S. at 649-50.

³⁴² *Id.* at 650.

³⁴³ *Id.* at 651.

³⁴⁴ *Id.* at 652.

³⁴⁵ *Id.* at 652-53.

³⁴⁶ *Id.* at 653. The Court noted that:

A search unsupported by probable cause can be constitutional . . . "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

We have found such "special needs" to exist in the public school context. There, the warrant requirement "would unduly interfere with the mainten-

stances in which it had found that government's "special needs" required suspicionless drug testing.³⁴⁷ *Acton* balanced the individual's privacy interests, the nature and degree of the intrusion on them, and the governmental interests and efficacy of the strategy to meet them.

In balancing these factors, the Court further minimized *T.L.O.*'s already meager recognition of students' privacy interests and emphasized their custodial relationship with school officials.³⁴⁸ Even though *T.L.O.* recognized that school officials are state actors who do not simply act *in loco parentis*, *Acton* found that their "power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."³⁴⁹ To further diminish students' expectation of privacy, the Court emphasized school authorities' role to "inculcate the habits and manners of civility," emphasized their "custodial and tutelary responsibility for children," and noted that schools already subject students to physical examinations and vaccination requirements.³⁵⁰ The majority insisted that student athletes "volunteer" for greater regulation and supervision than do ordinary students³⁵¹ and asserted that school

ance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools."

Id. (citation omitted) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)).

³⁴⁷ *Id.* (noting the Court's approval of suspicionless "drug testing of railroad personnel involved in train accidents" and "random drug testing of federal customs officers who carry arms or are involved in drug interdiction . . .") (citations omitted); *see infra* notes 355-56, 358 and accompanying text.

³⁴⁸ *Id.* at 654 (noting that "the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster").

³⁴⁹ *Id.* at 655.

³⁵⁰ *Id.* at 655-56 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

³⁵¹ *Id.* at 657 ("[Student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . [S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.").

locker rooms and showers provide no privacy.³⁵² The Court emphasized the minimal intrusion associated with collecting a urine sample—conditions “nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily.”³⁵³ The Court emphasized that the laboratories only tested the samples for undisclosed drugs, the school restricted personnel’s access to results, and it did not use positive test results for either law enforcement or internal disciplinary purposes.³⁵⁴

On the other side of the balance, the Court found a compelling governmental interest to deter drug use by student-athletes. *Acton* invoked the Court’s earlier decisions in *Skinner v. Railway Labor Executives’ Association*³⁵⁵ and *National Treasury Employees Union v. Von Raab*³⁵⁶ which upheld suspicion-

³⁵² *Id.* (“[Athletic participation] require[s] ‘suing up’ before each practice or event, and showering and changing afterwards. Public school locker rooms . . . are not notable for the privacy they afford.”).

³⁵³ *Id.* at 658 (emphasizing that school staff collected urine samples from fully-clothed students under conditions similar to those in which students ordinarily used bathrooms).

³⁵⁴ *Id.*

³⁵⁵ 489 U.S. 602 (1989). The Court ruled that Federal Railroad Administration regulations requiring drug and alcohol testing of railroad employees involved in accidents without a warrant or reasonable suspicion were reasonable under the Fourth Amendment because of the compelling governmental interest in assuring security in “safety-sensitive tasks” and the balance of public and private interests involved.

The Government’s interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operations of a government office, school, or prison, “likewise presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.”

Id. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). By contrast, railroad employee’s expectations of privacy are substantially diminished by virtue of their “participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.” *Id.* at 627. Finally, the Court found a compelling governmental interest to testing without a showing of individualized suspicion because “[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.” *Id.* at 628.

³⁵⁶ 489 U.S. 656 (1989). The Court upheld the United States Customs Service employee drug-testing program which did not require individualized suspicion when employees applied for promotion to positions involving interdiction of illegal drugs or which required them to carry firearms. *Id.* In addition to the governmental interest in

less drug testing for “closely-regulated” employees. Both *Skinner* and *Von Raab* found a “compelling need” to conduct drug tests without individualized suspicion because of the government’s “special needs” to investigate railroad accidents and to assure unimpaired integrity of armed, drug-interdiction customs agents.³⁵⁷ *Acton* equated the “compelling state interest” to enhance drug enforcement by armed customs agents and to prevent accidents by railroad engineers with a “legitimate need” to deter student drug use.³⁵⁸

School years are the time when the physical, psychological, and addictive effects of drugs are most severe. . . . And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. . . . Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened [for] . . . pose substantial physical risks to athletes.³⁵⁹

detecting drug use among customs employees, the Court emphasized a “compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment.” *Id.* at 670. The Court noted that the military subjects personnel to intrusive inquiries into their physical fitness and conducts routine searches of employees of the U.S. Mint when they leave the workplace. *Id.* at 671. Similarly, customs enforcement officers have a reduced expectation of privacy because:

[E]mployees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.

Id. at 672.

³⁵⁷ See *supra* notes 355-56.

³⁵⁸ See, e.g., Shutler, *supra* note 340, at 192-93 (criticizing Court for conflating “compelling” and “legitimate” state interests to justify search).

³⁵⁹ *Acton*, 515 U.S. at 661-62 (alteration in original).

Acton emphasized the drug problem confronted by the School District and student-athletes' role as leaders of the drug-culture.³⁶⁰ It insisted that a search could be reasonable even if the District did not use the "least restrictive" method available—i.e., searches based on individualized suspicion—to achieve its goals.³⁶¹ It rejected *T.L.O.*'s requirement of reasonable suspicion to search as impractical, accusatory—"a badge of shame"—and counter-productive.³⁶² The Court concluded that "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."³⁶³

Justice O'Connor dissented from *Acton*'s approval of suspicionless drug testing of student-athletes and insisted that "mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth

³⁶⁰ *Id.* at 663 ("[A] drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.").

³⁶¹ *Id.* ("refus[ing] to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment").

³⁶² *Id.* at 663-64. The Court reasoned that suspicion-based drug testing was impractical because

[P]arents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.

Id. (citations omitted).

³⁶³ *Id.* at 665. Justice Ginsburg concurred with the Court's conclusion that the "drug-testing policy applies only to students who voluntarily participate in interscholastic athletics," *id.* at 666 (Ginsburg, J., concurring), but expressed reservations as to whether a school could impose routine drug testing on all students. *See infra* notes 376-83 and accompanying text, in which Justice Ginsburg wrote the dissenting opinion in *Board of Education v. Earls*, 536 U.S. 822 (2002). The majority in *Earls* approved more extensive drug testing. *See infra* notes 375-79 and accompanying text.

Amendment.”³⁶⁴ While the majority assumed that random testing avoided arbitrary or accusatory selection,³⁶⁵ Justice O’Connor argued that requiring individualized suspicion enabled potential targets to avoid a search altogether by not engaging in suspicious behavior.³⁶⁶ She emphasized that previous decisions dispensed with individualized suspicion only when minimally intrusive and conducted in unique contexts such as closely-regulated businesses or prisons.³⁶⁷ She challenged the majority’s conclusion that a requirement of individualized suspicion would be impractical, accusatory, and counterproductive.³⁶⁸ Teachers and coaches constantly monitor students and readily can observe suspicious behavior.³⁶⁹ Most of the incidents on which the Vernonia School District relied to justify random testing would have furnished officials with reasonable suspicion to conduct drug tests under *T.L.O.*³⁷⁰ The *Acton* majority emphasized the impracticality of a suspicion-based regime and asserted that parents who would accept ran-

³⁶⁴ *Acton*, 515 U.S. at 667 (O’Connor, J., dissenting). O’Connor was joined by Justices Stevens and Souter. *Id.* at 666.

³⁶⁵ *Id.* at 667 (criticizing the Court’s rationale to dispense with individualized suspicion on policy grounds). “First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing who to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search.” *Id.* (emphasis in original).

³⁶⁶ *Id.* A requirement of individualized suspicion

afford[s] potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.

Id.

³⁶⁷ *Id.* at 673. Moreover, *T.L.O.* explicitly rejected the analogy between schools and prison. *New Jersey v. T.L.O.*, 469 U.S. 325, 338-39 (1985). “We are not yet ready to hold that the schools and prisons need to be equated for purposes of the Fourth Amendment.” *Id.*

³⁶⁸ *Acton*, 515 U.S. at 669-76 (O’Connor, J., dissenting).

³⁶⁹ *Id.* at 678 (“[N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. 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, or locker rooms.”) (emphasis in original).

³⁷⁰ *Rosenberg*, *supra* note 339, at 358 (criticizing majority for failing to analyze whether an “individualized suspicion requirement would be ineffectual or impractical”).

dom testing of all athletes would reject “accusatory drug testing . . . [that] transforms the process into a badge of shame.”³⁷¹ However, if school officials possess reasonable suspicion under *T.L.O.*, then parental acceptance is irrelevant to their authority to search. As an additional reason to reject individualized suspicion, the majority expressed concern that “teachers will impose testing arbitrarily upon troublesome but not drug-likely students.”³⁷² *T.L.O.* required reasonable suspicion as a prerequisite to a valid search, and if teachers “arbitrarily” test troublesome students, then their conduct should be subject to administrative and judicial review. In short, focusing on disruptive student behavior would provide a better indicator of drug use and substantially reduce the number of young people tested than the undifferentiated blanket policy endorsed by the majority.³⁷³

Although *Acton* focused narrowly on student-athletes who posed a significant risk of drug-impaired physical injury to themselves or others, commentators noted that its rationale could extend more broadly.³⁷⁴ In *Board of Education of Inde-*

³⁷¹ *Acton*, 515 U.S. at 663.

³⁷² *Id.* The majority decried the “expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed.” *Id.* at 663-64.

³⁷³ *Id.* at 685-86 (O’Connor, J., dissenting). Justice O’Connor argued that the more reasonable school policy would

focus on the class of students found to have violated published school rules against severe disruption in class and around campus—disruption that had a strong nexus to drug use Such a choice would share two of the virtues of a suspicion-based regime: testing dramatically fewer students, tens as against hundreds, and giving students control, through their behavior, over the likelihood that they would be tested.

Id. (citation omitted). See Shutler, *supra* note 340, at 1294-95 (questioning scope of drug problems among athletes, whether deterring their drug use would also deter use among non-athletes, whether testing would deter athletes, and asserting a negative impact on the relationship between athletes and coaches).

³⁷⁴ See, e.g., Carla E. Laszewski, *Gone to Pot: Student Athletes’ Fourth Amendment Rights After Vernonia School District 47J v. Acton*, 40 ST. LOUIS U. L.J. 575, 610 (1996):

While the decision directly pertains to student athletes, the possibility of wider application both in and out of the school setting exists. The Court finds all students have a decreased expectation of privacy in school. That fact coupled with the Court’s preference for suspicionless testing because of the

pendent School District No. 92 of Pottawatomie County v. Earls a five-to-four majority of the Court approved a policy to place all students participating in extracurricular activities—e.g., debate, chess club, dramatics, band, choir, Future Farmers and Future Homemakers of America, and the like—in the drug-testing pool.³⁷⁵ The *Earls* majority emphasized schools’ “special needs,” applied *Acton’s* balancing test, and upheld the testing program. Even though the School District conceded it did not confront a significant drug problem, Justice Thomas minimized students’ privacy interests and emphasized the school’s responsibility to maintain discipline, health, and safety.³⁷⁶ Regardless of whether an extracurricular activity required a physical examination or communal undress, Thomas insisted that participating students “volunteered” for more extensive regulation which further diminished expectations of privacy.³⁷⁷ Expanding *Acton’s* safety rationale, *Earls* asserted that illegal drug use

“badge of shame” associated with a suspicion-based testing procedure, suggests other students could be subject to suspicionless testing.

Id.; see also, John J. Bursch, Note, *The 4 R’s of Drug Testing in Public Schools: Random Is Reasonable and Rights Are Reduced*, 80 MINN. L. REV. 1221, 1251 (1996) (arguing for random drug testing of entire student body because “the state’s important interest and the test’s minimal intrusiveness still should outweigh the students’ expectation of privacy” and because it avoids the Court’s concern about discriminatory selection); Mosser, *supra* note 340 (agreeing that random drug testing constitutes appropriate policy as confined to student athletes); Rosenberg, *supra* note 339, at 366-71 (cautioning that only one of *Acton’s* four rationales confined the decision to student athletes); Shutler, *supra* note 340, at 1295 (insisting that *Vernonia* disregarded Fourth Amendment principles by finding the school district’s interests “to be ‘compelling’ given the paucity of the evidence of athletes using drugs; and second, by holding that student athletes have diminished privacy expectations solely due to the structure and requirements of the athletic program”).

³⁷⁵ 536 U.S. 822 (2002); see also *Todd v. Rush Cnty. Sch.*, 133 F.3d 984, 984 (7th Cir. 1998) (relying on *Vernonia* and anticipating *Earls* by approving school district policy of random testing students “participating in any extracurricular activities or driving to and from school”); *Joye v. Hunterdon Cent. Reg’l High Sch. Bd. of Educ.*, 826 A.2d 624 (N.J. 2003) (extending scope of student activities subject to random testing to students’ use of school parking lot for their cars).

³⁷⁶ *Earls*, 536 U.S. at 834 (suggesting that the “nationwide drug epidemic makes the war against drugs a pressing concern in every school,” regardless of the magnitude of the problem in any given school).

³⁷⁷ *Id.* at 831 (“[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.”).

per se posed a threat to students' health and welfare and justified broad application of the testing program.³⁷⁸ The Court concluded that suspicionless testing reasonably furthered the School District's legitimate goal to deter and detect drug use.³⁷⁹

Four justices dissented and objected that *Earls* jettisoned *Acton's* "special needs" rationale which emphasized both the school's acute drug problem and safety concerns for student athletes.³⁸⁰ The only commonality between *Acton* and *Earls* was the latter's conclusion that drug use posed a threat to all students and they voluntarily participated in extracurricular

³⁷⁸ *Id.* at 836-37 ("[T]he safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose."). Commentators objected that the health and safety rationale of *Earls* could support mandatory random testing of all high school students. See Marcus Raymond, *Drug Testing Those Crazy Chess Club Kids: The Supreme Court Turns Away from the One Clear Path in the Maze of "Special Needs" Jurisprudence in Board of Education v. Earls*, 22 ST. LOUIS U. PUB. L. REV. 559, 589 (2003). Raymond argues that instead of emphasizing the specific context as in *Vernonia* to limit drug testing to athletes, *Earls* "changed the context by redefining the relationship between the student and the school, leading to the allowance of drug testing students as a class. By doing so, the Court has laid the framework for a future in which all students may be forced to submit to drug tests." *Id.*; see also Irene Merker Rosenberg, *The Public Schools Have a "Special Need" for Their Students' Urine*, 31 HOFSTRA L. REV. 303, 315 (2002). If the special context of competitive athletics is irrelevant, then:

The health of *all* children seems to be what is important, no matter how un-strenuous the activities in which they engage. Quarterbacks and chess club members are equal in that regard and if so, it is no small leap from that to all students, whether involved in extracurricular activities or not. After all, students could be injured during gym class or while running past each other in the halls.

Id.

³⁷⁹ *Earls*, 536 U.S. at 837 ("[T]he Fourth Amendment does not require a finding of individualized suspicion and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students."); see Christopher A. Gorman, *Public School Students' Fourth Amendment Rights After Vernonia and Earls: Why Limits Must Be Set On Suspicionless Drug Screening in the Public Schools*, 29 VT. L. REV. 147, 162-63 (2004) (criticizing the Court for conflating the privacy interests of student athletes with those who participate in other extracurricular activities).

³⁸⁰ *Earls*, 536 U.S. at 843 (Ginsburg, J., dissenting) (insisting that *Vernonia* "emphasized that drug use 'increase[d] the risk of sports-related injury' and that *Vernonia's* athletes were the 'leaders' of an aggressive local 'drug culture' that had reached 'epidemic proportions.'" (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995))).

activities. The dissent readily distinguished between the risks associated with competitive school sports and those confronted by participants in band, choir, and Future Farmers of America.³⁸¹ Justice Ginsburg also questioned whether students “volunteered” to participate in many extracurricular activities and contended that they simply extended the educational opportunities schools provide.³⁸² The dissent also objected that the testing policy targeted the wrong group of students at risk and discouraged other students from participating in extracurricular activities.³⁸³

Both *Acton* and *Earls* minimized students’ privacy interests, emphasized schools’ “custodial and tutelary responsibili-

³⁸¹ *Id.* at 852 (distinguishing between competitive athletics and contact sports and the activities affected in *Earls*). “Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.” *Id.*

³⁸² *Id.* at 845-46 (“Participation in [extracurricular] activities is . . . essential in reality for students applying to college Students ‘volunteer’ for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.”) *see also* Roseann Kitson, *High School Students, You’re in Trouble: How the Seventh Circuit Has Expanded the Scope of Permissible Suspicionless Searches in Public Schools*, 1999 WIS. L. REV. 851, 881 (arguing that participation in extracurricular activities is not a “privilege” or purely voluntary because of “the ubiquitous nature of extracurricular activities in secondary education and the encouragement of such participation by admissions requirements of many colleges and universities”); Gorman, *supra* note 379, at 164 (“[E]xtracurricular involvement has become indispensable to the overall educational experience of many students. Extracurricular activities provide ‘marginal’ students with an incentive to remain in school. Involvement in extracurricular activities has also become essential for all college-bound students.”).

³⁸³ *Earls*, 536 U.S. at 853. The Court emphasized that students who engage in extracurricular activities develop substance abuse problems significantly less frequently than do those who do not participate:

Even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use. Tecumseh’s policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.

Id.; *see, e.g.*, Raymond, *supra* note 378 (noting that extracurricular activities promote prosocial values and keep youths busy and less likely to engage in risky behaviors).

ties,” and decried the hazards of drug use. The School District in *Doe v. Little Rock School District*³⁸⁴ invoked that logic to conduct random, suspicionless searches of *all* students’ persons and belongings. It regularly ordered students to leave the classroom after emptying their pockets and placing their possessions, backpacks and purses on their desks.³⁸⁵ While students waited outside, personnel searched the items left in the classroom for weapons and contraband.³⁸⁶ School officials found marijuana in Doe’s purse,³⁸⁷ turned it over to police, and she was convicted of a misdemeanor.³⁸⁸ She claimed that the search violated her Fourth Amendment rights and sought declaratory and injunctive relief under § 1983.³⁸⁹ The District Court relied on *Acton* and *Earls* and dismissed her complaint with prejudice finding no violation of her rights and providing no remedies.³⁹⁰ The Eighth Circuit Court of Appeals found that the search violated the Fourth Amendment and reversed that ruling.³⁹¹ *Doe* distinguished between random searches imposed on the entire student body and those in *Acton* and *Earls* in which students volunteered to participate in extracurricular activities and waived their privacy expectations.³⁹² *Doe* emphasized that the school’s goal to discover potential weapons or drugs did not completely obliterate students’ privacy interests in their per-

³⁸⁴ 380 F.3d 349 (8th Cir. 2004).

³⁸⁵ *Id.* at 351.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Doe v. Little Rock Sch. Dist.*, 2003 WL 24054462, at *1 (E.D. Ark. 2003).

³⁸⁹ *Doe*, 380 F.3d at 351.

³⁹⁰ *Doe*, 2003 WL 24054462, at *2-3.

³⁹¹ *Doe*, 380 F.3d at 351-52 (holding the search unconstitutional “[b]ecause subjecting students to full-scale suspicionless searches eliminates virtually all of their privacy in their belongings”).

³⁹² *Id.* at 354. The Court emphasized that:

By consciously choosing to ‘go out for the team’ or other competitive extracurricular endeavor, such students agree to waive certain privacy expectations that they would otherwise have as students in exchange for the privilege of participating in the activity. But the search regime at issue here is imposed upon the entire student body, so the LRSD [Little Rock School District] cannot reasonably claim that those subject to search have made a voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege.

Id.

sonal belongings.³⁹³ It observed that *Acton* and *Earls* only used information gleaned from testing to regulate participation in extracurricular activities and did not use it for internal discipline or disclose it to police.³⁹⁴ Finally, *Doe* characterized the reasonableness balance as a sliding scale—degree of privacy intrusion weighed against compelling governmental interest—and found nothing in the record to indicate that the School District confronted a significant weapon or drug problem.³⁹⁵ In short, *T.L.O.* provides limited protection for students' personal property, but none for bodily fluids.

Despite *Acton* and *Earls*' denigration of students' privacy interests and approval of suspicionless drug testing, some lower courts have shown greater respect for Fourth Amendment values.³⁹⁶ In *Theodore v. Delaware Valley School District*,³⁹⁷ the

³⁹³ *Id.*

³⁹⁴ *Id.* at 355 (“[T]he fruits of the searches at issue here are apparently regularly turned over to law enforcement officials and are used in criminal proceedings against students whose contraband is discovered.”).

³⁹⁵ *Id.* at 356 (distinguishing the court's earlier ruling in *Thompson v. Carthage School District*, in which it upheld “a single ‘generalized but minimally intrusive search’” based on particularized evidence that knives and/or guns were present at school that morning (quoting *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 983 (8th Cir. 1996))).

³⁹⁶ In *Brannum v. Overton County School Board*, the court confronted students' “reasonable expectations of privacy” after school officials installed video surveillance cameras to improve security throughout the school including in the boys' and girls' locker rooms. 516 F.3d 489 (6th Cir. 2008). The cameras transmitted images to a computer in the assistant principal's office where they were displayed and stored. *Id.* at 492. School officials could access those images via remote internet connection. *Id.* Members of a visiting basketball team noticed the camera in the girls' locker room and notified their coach who reported the camera to her school principal. *Id.* The camera recorded images of girls in their bras and panties when they changed clothes. *Id.* at 493. Students sued school officials under 42 U.S.C. § 1983, alleging that they violated their constitutional right to privacy by installing and operating video surveillance equipment in the boys' and girls' locker rooms and by viewing and retaining the recorded images. *Id.* at 494. The court concluded that videotaping “such intimate, personal activity” violated the students' reasonable expectation of privacy. *Id.* The court initially concluded that the installation of the surveillance cameras was justified at its inception by legitimate security concerns. *Id.* at 496. “[T]he policy of setting up video surveillance equipment throughout the school was instituted for the sake of increasing security, which is an appropriate and common sense purpose and not one subject to our judicial veto.” *Id.* The court balanced the *T.L.O.* and *Vernonia* factors—“the students' reasonable expectations of privacy, the nature of the intrusion, and the severity of the school officials' need in enacting such policies, including particularly, any history of injurious

Pennsylvania Supreme Court interpreted the state constitution to require a more particularized showing by the School District of the need to conduct random drug tests.³⁹⁸ The court's state constitutional test balanced four factors: (1) students' privacy interests, (2) the nature of the intrusion created by the search, (3) notice, and (4) the purpose to be achieved by the search and the immediate reasons prompting the decision to search.³⁹⁹ In

behavior that could reasonably suggest the need for the challenged intrusion." *Id.* (citing *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005)). Even though *Vernonia* relied, in part, on students' lower level of privacy in school locker rooms, *Brannum* concluded students could not reasonably expect that school administrators would videotape them while they undressed and changed clothes for an athletic activity. *Id.* "Video surveillance is inherently intrusive. . . . [T]he school officials wholly failed to institute any policies designed to protect the privacy of the students and did not even advise the students or their parents that students were being videotaped." *Id.* at 496-97. The court distinguished between video surveillance and students' expectations of privacy in schools' public spaces—e.g., hallways, cafeterias, and other places in which students mingle—and those specifically set aside to provide privacy—e.g., dressing and undressing in locker rooms. *Id.* at 498. In the absence of evidence demonstrating concerns about safety and security in the locker room—i.e., previous misconduct or a threat of future wrong-doing—the court found the installation of surveillance cameras in a place of heightened privacy to be a disproportionate response that violated students' reasonable expectation of privacy. *Id.* Significantly, the court denied school officials the protection of qualified immunity. *Id.* at 500. Notwithstanding a reluctance to inhibit officials' exercise of broad discretion to carry out their duties without fear of personal liability, the court found the surveillance policy violated a "clearly established" constitutional right, despite a clear prior court decision.

Some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion. Surreptitiously videotaping the plaintiffs in various states of undress is plainly among them. Stated differently, and more specifically, a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room.

Id. at 499.

³⁹⁷ 836 A.2d 76 (Pa. 2003).

³⁹⁸ *Id.* at 88. The court noted that "the unique policy concerns safeguarding the individual right to privacy in Pennsylvania bring a greater degree of scrutiny to all searches where the protection of Article I, Section 8 is invoked" and that it "mandate[s] greater scrutiny in the school environment." *Id.* (quoting *In re F.B.*, 726 A.2d 361, 365 (Pa. 1999)).

³⁹⁹ *Id.* at 88.

contrast with *Acton* and *Earls*, *Theodore* noted that “the students’ privacy rights here—rights which were rather summarily dismissed by *Earls*—have greater meaning under Article I, Section 8, [and] the testing authorized by the District cannot be viewed as a trivial incursion on privacy.”⁴⁰⁰ While *Theodore* acknowledged the need to deter drug use, it analyzed the efficacy and reasonableness of selecting the targeted students for testing.⁴⁰¹ *Theodore* concluded that the School District failed to demonstrate that an actual drug problem existed, that the policy actually targeted students likely to be involved, or that the policy was reasonably tailored to address whatever drug problem existed.⁴⁰²

The Washington Supreme Court in *York v. Wahkiakum School District No. 200*, interpreted a provision of the state constitution to give student athletes greater protection than *Acton* and *Earls* granted under the Fourth Amendment.⁴⁰³ *York’s* analysis considered whether the state’s action to require a urine sample disturbed his privacy and whether that intrusion was justified.⁴⁰⁴ Notwithstanding student athletes’ greater regulation and reduced privacy in the locker room, *York* viewed collecting urine samples as a significant intrusion on privacy.⁴⁰⁵ *York* rejected the state’s claim that schools confronted unique circumstances and declined to adopt *Acton’s* “special needs” exception in its interpretation of the state constitution.⁴⁰⁶ *York* feared that the “special needs” exception provided no basis on which “to draw a principled line permitting drug testing only student athletes. If we were to allow random drug testing here, what prevents school districts from either later drug testing students participating in any extracurricular activities, as fed-

⁴⁰⁰ *Id.* at 88, 90.

⁴⁰¹ *Id.* at 92 (“Although we do not for a moment downplay the seriousness of student use of drugs and alcohol, in this post-Columbine High School era otherwise-undetected alcohol and drug use by some students does not present the same sort of immediate and serious danger that is presented when students introduce weapons into schools.”).

⁴⁰² *Id.* at 93.

⁴⁰³ 178 P.3d 995 (Wash. 2008); WASH. CONST. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

⁴⁰⁴ 178 P.3d at 998-99.

⁴⁰⁵ *Id.* at 1006.

⁴⁰⁶ *Id.* at 1005.

eral courts now allow, or testing the entire student population?"⁴⁰⁷

School administrators and the *Acton* and *Earls* majorities apparently believe that random testing deters drug use. By contrast, Justice Ginsburg's dissent in *Earls* and the Pennsylvania court in *Theodore* question the efficacy of random—as opposed to suspicion-based—drug testing as a strategy to prevent student drug use. Whether an intrusion on privacy is reasonable depends, in part, on whether it is likely to achieve its goal and actually reduce drug use. An empirical study examined which schools used drug tests, how they selected students to test, and the relationship between drug testing and student drug use.⁴⁰⁸ Drug testing is expensive and costs escalate quickly for schools with larger student bodies and which test significant samples of participants in extracurricular activities.⁴⁰⁹ A small minority of schools administered drug tests, and they most often tested students for whom individualized suspicion of use or impairment existed.⁴¹⁰ A survey of school principals in wealthy communities and “troubled” neighborhoods reported that they were less likely to use random drug tests than those in midrange schools were.⁴¹¹ Regardless of

⁴⁰⁷ *Id.* at 1006.

⁴⁰⁸ See Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159 (2003) (collecting data on adolescent drug use from self-administered questionnaires given to nationally representative samples of students in grades 8, 10, and 12 and obtaining information on school characteristics, including drug-testing policies from school administrators and analyzing trends between 1998 and 2001).

⁴⁰⁹ *Id.* at 159 (“A single standard drug test to detect marijuana, tobacco, cocaine, heroin, opiates, amphetamines, barbiturates, and tranquilizers can range from \$14 to \$30 per test, while a test for steroid use costs \$100 per test.”).

⁴¹⁰ *Id.* at 161-62 (noting that less than one-fifth of schools (18%) reported administering drug tests and “students suspected of using drugs were most likely to be tested, with 14.04% of schools testing such students . . . for cause and suspicion”).

⁴¹¹ See Cynthia Kelly Conlon, *Urineschool: A Study of the Impact of the Earls Decision on High School Random Drug Testing Policies*, 32 J.L. & EDUC. 297 (2003) (surveying school principals' reactions to *Earls* and the school characteristics that influenced their decision whether or not to adopt random drug testing of students.) The principals who declined to implement random drug testing emphasized “the difficulty of getting support from all members of the community (especially student support), cost, and the problems with preserving confidentiality and maintaining student trust.” *Id.* at 309. Conlon examined the relationship between “school functioning”—parental involvement,

school size and socioeconomic status (SES), random drug testing did not affect students' drug use. "[S]chool drug testing was not associated with either the prevalence or the frequency of student marijuana use, or of other illicit drug use. Nor was drug testing of athletes associated with lower-than-average marijuana and other illicit drug use by high school male athletes."⁴¹² In addition to apparent ineffectiveness and costs, random testing risks alienating students and parents, and produces collateral consequences with false-positive test results. By eschewing individualized suspicion, *Acton* and *Earls* minimized students' privacy interests, denied them any right to autonomy or bodily integrity, expanded the scope of government power beyond any reasonable bounds, and produced no positive results.⁴¹³

IV. SEARCH RELATED IN SCOPE TO THE JUSTIFICATION: LOCKERS AND DESKS, CARS, AND STRIP SEARCHES

T.L.O. held that a search must be "justified at its inception" by particularized suspicion and "reasonably related in scope to the circumstances which justified the interference in

instructional expenditures per pupil, truancy rate, and average ACT score—principals' decision whether or not to adopt a random drug-testing policy. *Id.* at 316. In wealthy school districts, "parents don't want to subject their children to testing that they perceive could have negative consequences. . . . [T]hese parents have the political clout to control policy in their districts and block efforts to institute random drug testing." *Id.* at 317. By contrast, in "troubled" schools with limited funds, chronic truancy, and academic under-achievement issues, principals have more pressing priorities than instituting random drug testing, even if parents lack the political clout or energy to oppose such a policy. *Id.* "It is in the mid-level districts, where schools have adequate funding but parents are not as involved, that principals who support random drug testing have the political maneuverability to make it happen." *Id.* at 319.

⁴¹² Yamaguchi, *supra* note 408, at 164; *see also* Conlon, *supra* note 411, at 319 (noting that some principals conduct suspicionless testing despite an "absence of data to show that random drug testing actually deters student drug use. Although intuition may suggest that testing will be a deterrent, little research has been conducted to find out if this is so.").

⁴¹³ *See, e.g.,* Rosenberg, *supra* note 339, at 377-78 (arguing that suspicionless drug testing adversely affects "the students' autonomy and sense of bodily integrity, their sense of fairness, and the limits of governmental power. It is not only children's bodies but also their minds and emotions that are affected by programs of this sort.").

the first place.”⁴¹⁴ *T.L.O.* recognized that students bring legitimate non-contraband items to school and do not waive their expectation of privacy in those personal objects—purses, outerwear, backpacks, and the like. Because *T.L.O.* found that Choplick had reasonable suspicion to search the student’s purse, the Court declined to speculate on students’ expectation of privacy in their “lockers, desks, or other school property provided for the storage of school supplies.”⁴¹⁵ Courts have struggled to define students’ legitimate expectation of privacy in lockers and desks provided by the school.⁴¹⁶ Do authorities require reasonable suspicion to open those containers? Even if authorities may open school lockers provided for students’ convenience, may they inspect the contents of those lockers—e.g., squeeze jackets or backpacks, or open them for inspection—without individualized suspicion?⁴¹⁷ When students park their cars in school parking lots, may school officials search those cars under *T.L.O.*’s reasonable suspicion standard or must they possess the probable cause required to search an automobile? Finally, *Redding* confronted an intrusive strip search and required particularized justification. What factual justifications have lower courts required when public officials strip search young people?

A. Searches of Desks and Lockers

A few lower courts have held that students have a reasonable expectation of privacy in their lockers and that school authorities must have reasonable suspicion to open them and search them for contraband.⁴¹⁸ They reason that if students have a reasonable expectation of privacy in their personal

⁴¹⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

⁴¹⁵ *Id.* at 337 n.5.

⁴¹⁶ *See* *S.C. v. State*, 583 So. 2d 188 (Miss. 1991); *In re Dumas*, 515 A.2d 984 (Pa. 1986) (applying *T.L.O.* standards to searches of lockers); *Commonwealth v. Cass*, 666 A.2d 313 (Pa. Super. Ct. 1995) (expectation of privacy in school locker); *State v. Joseph T.*, 336 S.E.2d 728 (W. Va. 1985).

⁴¹⁷ *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (holding that squeezing and manipulating an object to determine its contents constituted a search).

⁴¹⁸ *See supra* note 416 and accompanying text.

items, it should not dissipate if they place them in a school locker.⁴¹⁹

To avoid this problem, some states have adopted statutes that provide that school authorities may inspect students' lockers "for any reason at any time, without notice, without student consent, and without a search warrant."⁴²⁰ If state law provides that lockers remain under the exclusive control of the school and subject to search without any justification, then students can claim no reasonable expectation of privacy in them.⁴²¹ Even without explicit legislation, school authorities may promulgate a locker search policy that renders any expectation of privacy unreasonable.⁴²² In *In re Isiah B.*, the school principal received reports from staff and security personnel that guns were present at school.⁴²³ The principal ordered a search of student lockers; aides searched about seventy-five to one hundred lockers and found a gun and cocaine in Isiah B.'s locker.⁴²⁴ Although Isiah B. challenged the search for lack of individualized suspicion, the Wisconsin Supreme Court relied on a school policy advising students that they had "no expectation of privacy" in their lockers and denied his motion to suppress evidence. The court held that "[s]chool administrators may adopt a locker policy retaining ownership and possessory control of school lockers and give notice of that policy to students. Because Isiah B. had no reasonable expectation of privacy in his locker, there was no Fourth Amendment violation."⁴²⁵

⁴¹⁹ *Cass*, 666 A.2d at 317 ("[A] student's expectation of privacy in a jacket or purse was not lost merely because the student placed the jacket or purse in his or her locker." (citing *In re Dumas*, 515 A.2d at 985)).

⁴²⁰ MINN. STAT. ANN. § 121A.72 subdiv. 1 (West 2008).

⁴²¹ See ALASKA STAT. §§ 14.03.105, 14.45.190 (2008); ARK. CODE ANN. § 6-21-608 (2007); CONN. GEN. STAT. ANN. § 54-33n (West 2009); FLA. STAT. ANN. § 232.256 (West 1998); IOWA CODE ANN. § 808A.2 (West 2003); N.J. STAT. ANN. § 18A:36-19.2 (West 1999); OHIO REV. CODE ANN. § 3313.20 (LexisNexis 2009); VA. CODE ANN. § 22.1-277.01:2 (2006) (repealed 2001).

⁴²² See *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (concluding that school had joint control of locker and enjoyed right to inspect it); *In re Isiah B.*, 500 N.W.2d 637 (Wis. 1993) (holding that random search of student's locker was justified because school had policy allowing for searches of lockers for any reason).

⁴²³ 500 N.W.2d at 638.

⁴²⁴ *Id.* at 639.

⁴²⁵ *Id.* at 641.

Although statutes or school handbooks may allow school officials to open a student's locker, what may they do with a jacket or backpack stored within the locker? Do they need reasonable suspicion to feel coats, squeeze backpacks, or open briefcases or other closed containers within the locker? In *Minnesota v. Dickerson*, the Court held that after an officer conducted a *Terry* frisk and found no weapon, any subsequent "squeezing, sliding and otherwise manipulating the outside of the defendant's pocket" constituted a search in violation of the Fourth Amendment.⁴²⁶ Statutes that authorize suspicionless inspection of school lockers recognize students' residual privacy interests in their personal contents.⁴²⁷ Courts have found that students retain a privacy interest in their personal items even when they store them in lockers. "We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which the student takes to school but would lose that expectation of privacy merely by placing the purse or jacket in school locker provided to the student for storage of personal items."⁴²⁸

In *State v. Jones*, the Iowa Supreme Court analyzed students' expectation of privacy in their lockers and contents.⁴²⁹ Prior to winter break, school staff planned to inspect and clean out lockers to ensure health and safety, to remove trash and food, to retrieve overdue library books, and to find weapons and controlled substances.⁴³⁰ They notified students to report to their locker at assigned times to open them for inspection.⁴³¹ About twenty percent of students, including Jones, did not report to their lockers at the designated time. Two aides opened lockers that had not been inspected and found a blue nylon coat

⁴²⁶ 508 U.S. 366, 378 (1993) (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)).

⁴²⁷ See, e.g., MINN. STAT. ANN. § 121A.72 subdiv. 1 (West 2008) ("The personal possessions of students within a school locker may be searched only when school authorities have a *reasonable suspicion* that the search will uncover evidence of a violation of law or school rules.") (emphasis added).

⁴²⁸ *In re Dumas*, 515 A.2d 984, 985 (Pa. 1986).

⁴²⁹ 666 N.W.2d 142 (Iowa 2003).

⁴³⁰ *Id.* at 144.

⁴³¹ *Id.*

hanging in Jones's locker.⁴³² One aide manipulated the coat and discovered a small bag of marijuana in an outside pocket.⁴³³ The school principal and aides removed Jones from his classroom, escorted him to his locker, and removed the coat.⁴³⁴ Jones grabbed the coat and attempted to run away.⁴³⁵ The principal chased, captured and held Jones until police arrived and retrieved the bag of marijuana from the coat.⁴³⁶ In his subsequent criminal prosecution, the district court suppressed the evidence as the fruit of an unreasonable search.⁴³⁷

Jones reasoned that he had a legitimate expectation of privacy in the contents in the school locker as T.L.O. did in the contents of her purse.⁴³⁸ School rules recognized that expectation of privacy because they contemplated either a student's presence at a locker inspection or a waiver of the opportunity.⁴³⁹ Despite his privacy interests, the court characterized the manipulation and inspection of the jacket in the locker as "not overly intrusive, especially in light of the underlying governmental interest and broader purpose of the search" and concluded that the search was reasonable.⁴⁴⁰ However, the court did not explain why the school officials' "plain feel" search of

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.* at 148 ("[A] student's locker presents a similar island of privacy [to T.L.O.'s purse] in an otherwise public school. Numerous permissible items of a private nature are secreted away within a locker on a daily basis with the expectation that those items will remain private." (citation omitted)).

⁴³⁹ *Id.* (finding "a broad societal recognition of a legitimate expectation of privacy in a school locker"). In support of that conclusion the court noted that:

[T]he school's rules contemplate the presence of the student or at least a "waiver" of the student's opportunity to be present and supervising the search. Moreover, the school rules and state law related to search and seizure in schools are premised on a presumption of privacy; such legislation would likely be unnecessary if no expectation of privacy existed in the first place.

Id.

⁴⁴⁰ *Id.* at 149-50 (balancing private and governmental interests and concluding that "while students maintain a legitimate expectation of privacy in the contents of their school locker, that privacy may be impinged upon for reasonable activities by the school in furtherance of its duty to maintain a proper educational environment").

Jones' jacket was any more reasonable than the police officer's manipulation of the contents of Dickerson's pocket. If school officials are state actors under *T.L.O.* and police cannot conduct "plain feel" searches without probable cause, then why can they search a student's private jacket without any justification?

Courts encounter even greater difficulty when school officials search students' luggage prior to or during a school field trip. In *Kuehn v. Renton School District 403*, decided several days prior to *T.L.O.*, school officials searched students' luggage before embarking on a band trip.⁴⁴¹ Although school officials announced prior to the trip that they would inspect luggage for alcohol and insisted that the trip was voluntary, the court found the search invalid.⁴⁴² By contrast, the court in *Desilets v. Clearview Regional Board of Education* upheld a similar search because of "the unique burdens placed on school personnel in the field trip context" and the limited search of hand luggage only.⁴⁴³

B. Searches of Students' Parked Cars

T.L.O. did not address the search standard for students' cars parked in the school parking lot. Although the Court regularly describes cars as possessing a reduced expectation of privacy, it still requires probable cause before police may seize or search a car.⁴⁴⁴ If students are in class and school rules restrict access to their cars during the school day, then is the car's relationship to the school similar to that of a vehicle parked in any public lot?⁴⁴⁵ If school officials search a students' parked car,

⁴⁴¹ 694 P.2d 1078, 1079 (Wash. 1985).

⁴⁴² *Id.* at 1079, 1083.

⁴⁴³ 627 A2d. 667, 673 (N.J. Super. Ct. App. Div. 1993).

⁴⁴⁴ *See* United States v. Ross, 456 U.S. 798, 825 (1982) (authorizing search of car and containers if probable cause exists to believe the vehicle contains contraband or evidence); *Chambers v. Maroney*, 399 U.S. 42 (1970) (approving warrantless search of vehicle at police station even after impounded and immobilized); *Carroll v. United States*, 267 U.S. 132, 155-56 (1925) (recognizing "automobile exception" to warrant requirement because of "exigent circumstances").

⁴⁴⁵ ROSSOW & SEFKOVICH, *supra* note 269, at 31. Rossow and Stefkovich contend that whether or not students have access to their cars during the school day bears on the reasonableness of a search.

does the traditional automobile search probable standard or *T.L.O.*'s lower reasonable suspicion standard govern their actions?

Although *T.L.O.* balanced a school's need to preserve order and maintain a learning environment, searches of student's cars may require a different balance.⁴⁴⁶ If schools prohibit students' access to their cars, then any threat to the learning environment of contraband stored in their cars is limited. Moreover, an automobile search rests on the likelihood of contraband in the car and not in the student's possession. A vehicle search for weapons or contraband is more likely to produce evidence to be used in a delinquency prosecution, and a probable cause standard should govern admissibility.⁴⁴⁷

Courts confronted with motions to suppress evidence seized from students' cars uniformly adopt *T.L.O.*'s reasonableness balancing approach rather than the traditional Fourth Amendment standard of probable cause.⁴⁴⁸ Most courts just

If students do not have access to their cars, the extent to which the cars become part of the routine in the school environment is minimal to nonexistent. In that case the expectation for privacy in the car is treated more like that of the home than that of the locker. If the school searches a car in what essentially is a closed campus, the school's interest will be minimal and therefore individual reasonable suspicion should be present. If the students have access to cars throughout the day or even just during the lunch break, the car becomes part of the area of activity for the students. In this case the vehicles become more like their lockers than their homes.

Id. Berman, *supra* note 92, at 1107.

⁴⁴⁶ Berman, *supra* note 92, at 1109.

⁴⁴⁷ *Id.* at 1111.

⁴⁴⁸ Courts have opted for *T.L.O.*'s reasonable suspicion standard to search students' vehicle on school grounds and rejected the probable cause standard for automobile searches. *See* *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 245 F. Supp. 2d 1188, 1200 (D.N.M. 2002), *rev'd and remanded on other grounds*, 341 F.3d 1197 (10th Cir. 2003); *Anders v. Fort Wayne Cmty. Schs.*, 124 F. Supp. 2d 618, 622-23 (N.D. Ind. 2000); *Shamberg v. State*, 762 P.2d 488, 492 (Alaska Ct. App. 1988); *In re P.E.A.*, 754 P.2d 382, 389 (Colo. 1988) (finding reasonable suspicion based on tip and "[c]onsidering the limited ways the students could have transported the marijuana to school and concealed it on school grounds and the magnitude of the threat to having the marijuana sold and distributed at the school"); *People v. Williams*, 791 N.E.2d 608, 611-12 (Ill. App. Ct. 2003); *Myers v. State*, 839 N.E.2d 1154, 1159-60 (Ind. 2005), *cert. denied*, 547 U.S. 1148 (2006); *Covington Cnty. v. G.W.*, 767 So. 2d 187, 193 (Miss. 2000) (rejecting probable cause standard and observing that "we can hardly say such a higher expectation of privacy should be had in a car on school property as opposed to a school locker");

assumed that *T.L.O.*'s reasonableness standard governed vehicle searches.⁴⁴⁹ In *State v. Best*, assistant principal Brandt received a tip from a student suspected of being under the influence of drugs who informed him that he had ingested a green pill given to him by Best.⁴⁵⁰ Brandt located Best in class, escorted him to the office, and confronted him with the allegations.⁴⁵¹ After Best denied any wrongdoing, Brandt searched him and found three white capsules in his pants pocket but no green pills.⁴⁵² Brandt searched Best's locker but did not find any pills.⁴⁵³ Brandt previously had given Best permission to drive his car to school to be serviced in the school's auto shop.⁴⁵⁴ Brandt searched the passenger compartment of Best's car and seized drugs and paraphernalia.⁴⁵⁵ The trial court and court of appeals found Brandt's search was reasonable and denied

In re Michael R., 662 N.W.2d 632, 637 (Neb. Ct. App. 2003); *F.S.E. v. State*, 993 P.2d 771, 772 (Okla. Crim. App. 1999); *Coronado v. State*, 835 S.W.2d 636, 641 (Tex. Crim. App. 1992); *State v. Slattery*, 787 P.2d 932, 933-35 (Wash. Ct. App. 1990) ("To limit the school search exception to a search of a student's body or his locker would be anomalous in light of the rationales of *T.L.O.*"); see, e.g., Patrick K. Perrin, *Fourth Amendment Protection in the School Environment: The Colorado Supreme Court's Application of the Reasonable Suspicion Standard in State v. P.E.A.*, 61 U. COLO. L. REV. 153, 174 (1990) (analyzing the Colorado Supreme Court's application of *T.L.O.*'s reasonable suspicion standard to searches of students' cars).

Courts apply the probable cause standard when police officers search students' cars on school grounds or when school officials act in concert with police. See *Marner v. Eufaula City Sch. Bd.*, 204 F. Supp. 2d 1318, 1325 (M.D. Ala. 2002); *James v. Unified Sch. Dist. No. 512*, 959 F. Supp. 1407, 1413-14 (D. Kan. 1997); *State v. Barrett*, 683 So. 2d 331, 339-40 (La. Ct. App. 1996); *In re Dengg*, 724 N.E.2d 1255, 1257-59 (Ohio Ct. App. 1999).

⁴⁴⁹ See *Shamberg v. State*, 762 P.2d 488 (Alaska Ct. App. 1988); *In re P.E.A.*, 754 P.2d 382 (Colo. 1988); *State v. Slattery*, 787 P.2d 932 (Wash. Ct. App. 1990); Berman, *supra* note 92, at 1104-11 (analyzing post-*T.L.O.* car search cases).

⁴⁵⁰ 987 A.2d 605, 607 (N.J. 2010).

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* School policy required students to obtain approval to drive to school. If permission was granted, the student received a limited-duration parking permit. *Id.* at 608. Students permitted to drive to school for auto shop service had to surrender their car keys to the auto shop teacher. *Id.* If school officials suspected a student had weapons, drugs, or items that pose a threat to other students, they would search the student, the student's locker, and any student's car parked on school property. *Id.*

⁴⁵⁵ *Id.* at 607-08. Brandt contacted the school liaison officer who took custody of the drugs and arrested and interrogated Best, who admitted the drugs were his. *Id.* at 608.

Best's motion to suppress the evidence.⁴⁵⁶ The New Jersey Supreme Court held that "a school administrator need only satisfy the lesser reasonable grounds standard rather than the probable cause standard to search a student's vehicle parked on school property."⁴⁵⁷ The court emphasized school officials' responsibility to protect the safety of students, which drugs and other illegal activities clearly hamper, whether inside the school or in the school parking lot.⁴⁵⁸

It is the school environment and the need for safety, order, and discipline that is the underpinning for the school official—who has reasonable grounds to believe that a student possesses contraband—to conduct a reasonable search for such evidence. To be sure, a student may hide contraband in his or her clothing, purse, book bag, locker, or automobile. Consequently, we conclude that the reasonableness standard, and not the traditional warrant and probable cause requirements, applies to the school authorities' search of a student's automobile on school property.⁴⁵⁹

Best reasoned that a student could only transport to school and conceal contraband from school officials in a few places—on his person; in a locker, backpack, or purse; or in a car.⁴⁶⁰ It concluded that Brandt's search was reasonable because the student informant identified a green pill, Brandt's search of Best produced white pills, and a search of his locker revealed no additional drugs. According to the court, Brandt's process of

⁴⁵⁶ *Id.* at 608 (noting that the trial court found Brandt's search of Best's car reasonably related in scope to his reasonable suspicion that he had additional drugs that posed a danger to other students).

⁴⁵⁷ *Id.* at 607.

⁴⁵⁸ *Id.* at 613. "[T]he need for school officials to maintain safety, order, and discipline is necessary whether school officials are addressing concerns inside the school building or outside on the school parking lot." *Id.* (citing *Joye v. Hunterdon Cent. Reg'l Sch. Bd. of Educ.*, 826 A.2d 624 (N.J. 2003) ("[S]tudents wishing to park on school grounds ask school officials to extend their supervisory authority beyond the classroom.")).

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*; see, e.g., *In re P.E.A.*, 754 P.2d 382, 389 (Colo. 1988).

elimination justified extending the search to Best's vehicle as reasonably related in scope to the initial reason to search.⁴⁶¹

C. Strip Searches

Between *T.L.O.* and *Redding*, school officials regularly conducted strip searches of students.⁴⁶² Following *T.L.O.*, courts upheld strip searches of students based on "reasonable suspicion" that the student possessed drugs.⁴⁶³ Courts are less sympathetic when school staff strip search students to find stolen money or missing property but still grant offending officials qualified immunity.⁴⁶⁴ In none of the cases did school officials

⁴⁶¹ *Best*, 987 A.2d at 614 ("[T]he vice principal's search of defendant's car was reasonably related in scope to the various locations on school property that defendant might have placed the contraband—on his person, his locker, and his car.")

⁴⁶² See David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem?*, 99 DICK. L. REV. 1 (1994) (arguing that strip searches require justifications of probable cause, seriousness, and "imminent threat to safety or health"); Gartner, *supra* note 66, at 925-31 (summarizing numerous instances of strip searches of students in public schools and criticizing T.L.O. for allowing "school officials to exercise virtually unbridled discretion in the area of student searches . . . [and] effectively giv[ing] to teachers the same rights of search given to prison guards"); Steven F. Shatz, Molly Donovan & Jeanne Hong, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 39 (1991) (noting that strip searches constitute a substantial intrusion and inflict serious psychological harm and arguing that "[s]chool officials should not be permitted to strip search any child without a warrant or consent, except in the case of a genuine emergency"); Spellman, *supra* note 80, at 172-74 (analyzing strip search cases).

⁴⁶³ See *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (deciding that school officials had strong reason to believe that plaintiff was hiding drugs in the crotch of his pants when they took him to locker room and told him to remove pants but allowed him to put on gym uniform during search); *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991) (deciding that school officials had reason to believe female student was using drugs when they took student into private office where, in the presence of a female secretary, she removed her shirt, shoes, and socks and lowered her jeans to her knees); *Widener v. Frye*, 809 F. Supp. 35 (S.D. Ohio 1992) (school officials detected odor of marijuana, observed student acting in a lethargic manner, and took him into a private office and told him to remove jeans but not undergarments); Spellman, *supra* note 80 (noting that schools conduct strip searches based on concerns about school violence and drug use).

⁴⁶⁴ *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997) (holding that teachers who twice conducted strip search of two eight-year-old girls in attempt to locate alleged missing \$7 were protected by qualified immunity because they should not have known that search was unreasonable); *Oliver v. McClung*, 919 F. Supp. 1206 (N.D. Ind. 1995) (holding that strip search of seventh grade girls in an effort to recover

conduct strip searches to find weapons hidden in students' underwear that might pose an imminent safety threat.⁴⁶⁵ Justice Stevens' separate opinion in *T.L.O.* asserted that "the governmental interest which allegedly justify[ed] official intrusion" should bear heavily on the reasonableness of the search.⁴⁶⁶ Although drugs and money are items most readily hidden in private areas, courts should not treat suspicion of theft and drug offenses as equally "compelling" governmental interests such as safety and security.

The Court in *Redding* stated that school officials must possess individualized suspicion prior to conducting a strip search of a student. By approving strip searches even under limited circumstances, the Court effectively equated the power of school officials over students with that of prison guards over convicted inmates.⁴⁶⁷ *Redding* missed an opportunity to clarify the appropriate search standard and to require more than reasonable suspicion—i.e., probable cause—because of the greater intrusiveness of strip searches on students' privacy interests.⁴⁶⁸

stolen \$4.50 was unreasonable under the circumstances); *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977) (holding that strip search of entire fifth-grade class to find missing \$3 violated Fourth Amendment); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 48-49 (W.Va. 1993) (deciding that strip search of student to find money missing from teacher's purse was excessively intrusive and unreasonable in scope). In *State ex rel. Galford*, the court reasoned that "[a]t some point, a line must be drawn which imposes limits upon how intrusive a student search can be. We certainly cannot imagine ever condoning a search that is any more physically intrusive than the one now before us." *Id.* at 48; see *Berry*, *supra* note 123 (criticizing grant of qualified immunity to protect teachers who conducted clearly unreasonable strip searches).

⁴⁶⁵ *Thimmig*, *supra* note 123, at 1415 (arguing that school officials should only conduct strip searches "for serious violations, particularly drug or weapons possession," and questioning the likelihood that "a student would hide a gun or knife in his/her undergarments").

⁴⁶⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 376 (Stevens, J., concurring in part and dissenting in part) (quoting *Terry v. Ohio*, 392 U.S. 1, 20-21 (1969)).

⁴⁶⁷ See *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding that prison guards' practice of conducting strip and body-cavity searches of inmates after contact visits does not violate Fourth Amendment); *Gartner*, *supra* note 66, at 931 ("By permitting school officials to exercise virtually unbridled discretion in the area of student searches, the Court has effectively given to teachers the same rights of search given to prison guards.").

⁴⁶⁸ See, e.g., *Spellman*, *supra* note 80, at 172-73 (arguing that a search of a "school age child or adolescent has a greater impact than would the same search of an adult because the development of a sense of privacy is critical to a child's maturation" and

T.L.O. and *Redding* purported to balance the degree of intrusion on individual privacy against the governmental interests. *Redding* acknowledged that a strip search is humiliating, degrading, and constitutes the maximum intrusion on a person's reasonable expectation of privacy.⁴⁶⁹ In any reasonableness balancing scheme, if a strip search is that intrusive, then shouldn't the level of suspicion and the governmental interest be equally weighty? All of the reported school strip search cases involved a quest for drugs or stolen money, neither of which poses as imminent a threat to school safety as weapons. In addition to the psychological trauma, a school official's decision to strip search a student conveys a moral message, teaches negative lessons about rights and responsibilities, and strongly affects the student's future relationship with teachers and staff.⁴⁷⁰

It is instructive to contrast *Redding's* nominal solicitude for strip-searched students with that of juveniles admitted to a juvenile detention facility for non-criminal misconduct. In *N.G. v. Connecticut*, police took truant and runaway girls into custody for status offenses under a statute authorizing detention of children in "families with service needs."⁴⁷¹ A female staff member at the detention center followed a standard protocol and strip searched them without any individualized suspi-

contending that court must balance "the danger of the student's alleged conduct *against* the need to protect him or her from the humiliation and other emotional harms such a search produces"). Lower courts previously had held that a strip search requires probable cause. *See also* *M.M. v. Anker*, 477 F. Supp 837 (E.D.N.Y. 1979).

⁴⁶⁹ *Safford Unified Sch. Dist #1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) ("The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.").

⁴⁷⁰ *Spellman*, *supra* note 80, at 173 ("Students learn best about these rights and responsibilities through their observance by knowledgeable teachers and school officials.").

⁴⁷¹ 382 F.3d 225, 226-27 (2d Cir. 2004); *see* CONN. GEN. STAT. ANN. § 46b-120(8) (West 2009) (authorizing secure detention if a judge finds probable cause that a child has run away from home, become beyond the control of parents, engaged in indecent or immoral conduct, been a truant, or engaged in sexual intercourse with another juvenile aged thirteen or older).

cion.⁴⁷² Parents of two girls brought suit under § 1983 for damages and injunctive relief against the state and detention facility administrators and claimed that routine, suspicionless strip searches incident to non-criminal misconduct violated the Fourth Amendment.⁴⁷³ The district court found that the strip searches were reasonable and dismissed the complaint.⁴⁷⁴ The Second Circuit Court of Appeals upheld the suspicionless strip searches prior to admission to the detention facility.⁴⁷⁵ The *N.G.* majority acknowledged that strip searches of adults arrested for minor offenses were invalid without individualized suspicion to believe they possessed contraband or weapons.⁴⁷⁶ However, the court invoked *Earls*' "special needs"⁴⁷⁷ and *in loco parentis*⁴⁷⁸ rationales to justify suspicionless strip searches. Like *Redding*, the *N.G.* majority recognized that strip searches

⁴⁷² *N.G.*, 382 F.3d at 239 (Sotomayor, J., concurring in part and dissenting in part) (describing the strip search protocol followed for all youths admitted to the juvenile detention center).

⁴⁷³ *Id.* at 229 (majority opinion).

⁴⁷⁴ *Id.* at 230.

⁴⁷⁵ *Id.* at 237. In *Smook v. Minnehaha County*, police arrested Jodi Smook and her three companions for violating curfew while walking home after her car broke down. 457 F.3d 806, 808 (8th Cir. 2006). The Eighth Circuit Court of Appeals considered the constitutionality of strip searching all juveniles admitted to the juvenile detention center regardless of the seriousness of charged offense or existence of individualized suspicion and upheld the searches based on *N.G.* *Id.* at 812-14; see also Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67 (2007) (criticizing the courts' reasoning in *N.G.* and *Smook* and proposing litigation strategies to challenge suspicionless strip searches of children).

⁴⁷⁶ *N.G.*, 382 F.3d at 232 (noting that "strip searches may not be performed upon adults confined after arrest for misdemeanors, in the absence of reasonable suspicion concerning possession of contraband" and observing that all of the circuit courts to rule on the issue have reached that conclusion).

⁴⁷⁷ *Id.* at 231 (arguing that *Earls*' "special needs" test to uphold suspicionless drug testing (urinalysis) of middle and high school students participating in extracurricular activities, and students participating in school athletics" justified extension to strip searches of detention center admitees (citation omitted) (citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 828-38 (2002))).

⁴⁷⁸ *Id.* at 232. Echoing *Acton*'s assertion of "custodial and tutelary" authority, the *N.G.* court asserted that "[w]here the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm." *Id.*

were humiliating and very intrusive.⁴⁷⁹ Even though the girls were not charged with or convicted of any criminal offense, *N.G.* relied on *Earls* to justify the practice.

First, although the age of the children renders them especially vulnerable to the distressing effects of a strip search, it also provides the State with an enhanced responsibility to take reasonable action to protect them from hazards resulting from the presence of contraband where the children are confined. The State has temporarily become the *de facto* guardian of children lawfully removed from their home, and “when the government acts as guardian . . . the relevant question is whether the search is one that a reasonable guardian . . . might undertake.” The State has a more pervasive responsibility for children in detention centers twenty-four hours a day than for the children in *Vernonia* and *Earls* who were under State authority for the few hours of the school day. Second, a strip search serves the protective function of locating and removing concealed items that could be used for self-mutilation or even suicide.⁴⁸⁰

N.G. concluded that the State’s goals to protect children from self-inflicted harm, to protect other inmates, and to maintain institutional safety outweighed the psychological risks of strip searches and the risks to youths’ well-being and institutional safety if personnel did not strip search them.

Judge, now United States Supreme Court Justice, Sotomayor dissented from the majority’s cavalier treatment of the “severely intrusive nature of strip searches . . . of emotionally

⁴⁷⁹ *Id.* at 233 (“The Seventh Circuit has described strip searches as ‘demeaning,’ ‘dehumanizing,’ and ‘terrifying.’ The Tenth Circuit has called them ‘terrifying.’ The Eighth Circuit has called them ‘humiliating.’ And since ‘youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage,’ [c]hildren are especially susceptible to possible traumas from strip searches.” (quoting *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983); *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988)).

⁴⁸⁰ *Id.* at 236 (citation omitted) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995)). As an additional justification for strip searches, the court stated that “a strip search will often disclose evidence of abuse that occurred in the home,” and assist juvenile courts to develop an appropriate treatment plan. *Id.*

troubled children.”⁴⁸¹ Although she accepted a reasonableness balancing test, she objected that “the government has failed to demonstrate that its special needs should overcome these concerns and allow for strip searches, in the absence of individualized suspicion, of adolescents who have never been charged with a crime.”⁴⁸² While the Fourth Amendment does not require officials to use the “least intrusive means” to secure the government’s interests, it must demonstrate a “close and substantial relationship” between the asserted need and a substantial intrusion.⁴⁸³ Judge Sotomayor observed that nearly all the contraband discovered through strip searches could have been found through less intrusive searches or through a policy only to strip search in cases of individualized suspicion.⁴⁸⁴ She dismissed the government’s claims that the prospect of a strip search prior to admission to detention would deter youths from carrying contraband.⁴⁸⁵ She concluded that it was unreasonable to conduct highly degrading, intrusive strip searches of vulnerable young adolescents without any individualized suspicion that they possessed contraband or weighty governmental justification.⁴⁸⁶

⁴⁸¹ *Id.* at 238 (Sotomayor, J., dissenting). While the majority dryly recited the detention center’s written policy, *id.* at 228 n.4, Judge Sotomayor described what they meant in practice.

The detention facility officers on numerous occasions ordered appellants—troubled adolescent girls facing no criminal charges—to remove all of their clothes and underwear. The officials inspected the girls’ naked bodies front and back, and had them lift their breasts and spread out folds of fat. . . . The juvenile detention facilities perform similar searches on every girl who enters, notwithstanding the fact that many of them—indeed, most of them—have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age.

Id. at 239 (footnote omitted).

⁴⁸² *Id.* at 238.

⁴⁸³ *Id.* at 238, 242 (objecting that “the government has not demonstrated adequately that the highly invasive suspicionless strip searches bore a ‘close and substantial relationship to the government’s special needs’” (quoting *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004))).

⁴⁸⁴ *Id.* at 242.

⁴⁸⁵ *Id.* at 243 (noting that youth are less likely to make that calculus because “it is common for children to be arrested unexpectedly and confined immediately”).

⁴⁸⁶ *Id.* at 241, 244. Judge Sotomayor criticized the majority’s decision:

V. REMEDIES FROM CONSTITUTIONAL VIOLATORS WHO HOLD STUDENTS HOSTAGE

A. § 1983 and School Officials' Qualified Immunity

In most of the cases discussed, plaintiff-students and their parents brought a § 1983 action against school officials for violating their Fourth Amendment rights.⁴⁸⁷ Government officials may defend their actions based on a reasonable, good faith belief that their conduct was lawful. The Court, in *Harlow v. Fitzgerald*, clarified the standard courts use to assess the liability of public officials, such as school administrators, alleged to have violated constitutional rights.⁴⁸⁸ *Harlow* balanced the need to provide a damages remedy for constitutional violations against “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.”⁴⁸⁹ The Court

[T]o hold that the strip searches of the two girls . . . were reasonable is equivalent to saying that these girls are entitled to the same level of Fourth Amendment protection as prison inmates held on felony charges, and to decidedly less protection than people crossing the border, jail inmates detained on misdemeanor charges, prison corrections officers, or students in public school.

Id. at 241.

⁴⁸⁷ 42 U.S.C. § 1983 (2006) gives citizens a cause of action for damages against public officials who violate their constitutional rights.

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

Id.

⁴⁸⁸ 457 U.S. 800 (1982).

⁴⁸⁹ *Id.* at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). The Court recognized that when public officials violated constitutional rights, an action for damages offered the only realistic remedy and denied absolute immunity. *Id.* at 818-19. On the other hand, the Court stated:

[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the

held that public officials enjoyed a qualified, good faith immunity from liability provided “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴⁹⁰ Although a clearly established constitutional right does not require a direct holding on that issue, it does require that “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁴⁹¹ Moreover, a school district would not be liable for a teacher’s constitutional violations based on traditional tort notions of *respondeat superior* unless she acted pursuant to “a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.”⁴⁹² In short, to extend liability beyond the immediate actors—principal, teachers, or other staff—a student would have to prove that a

diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”

Id. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

⁴⁹⁰ *Id.* at 818. The court in *B.C. v. Plumas Unified School District*, 192 F.3d 1260 (9th Cir. 1999), granted school officials qualified immunity for their use of dogs to sniff students in a classroom because their conduct did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”

A right is clearly established if the contours of [that] right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. To show that the right in question here was clearly established, [plaintiff] need not establish that [defendants’] behavior had been previously declared unconstitutional, only that the unlawfulness was apparent in light of preexisting law. If the only reasonable conclusion from binding authority [was] that the disputed right existed, even if no case had specifically so declared, [defendants] would be on notice of the right and [they] would not be qualifiedly immune if they acted to offend it.

Id. at 1268 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Jensen v. Oxnard*, 145 F.3d 1078, 1085 (9th Cir. 1998); *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997)) (internal quotation marks omitted). The constitutional question whether the use of dogs to sniff students in a school setting constituted a search or violated rights was not clearly established.

⁴⁹¹ *Anderson*, 483 U.S. at 640.

⁴⁹² *Monell v. N.Y. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

school district adopted a “policy or custom” to violate students’ constitutional rights.

In light of the unsettled questions and contradictory answers provided in *T.L.O.*, *Acton*, *Earls*, and *Redding*, would a school principal confronted with a “drug problem”—minor, moderate, severe—who enlisted the assistance of canines to sniff each classroom violate the Fourth Amendment?⁴⁹³ If the dog alerts to a student, how extensively may authorities search? After *Redding*, would a principal violate a “clearly established constitutional right” if she conducted a strip search based on a tip from another student who reported seeing the student inhale a white powdery substance and who offered it to her? Would a strip search be justified if a teacher stated that the student acted “strangely” on the day of the alleged use? Would it be valid if a typing teacher found a letter at the student’s desk that referred to “the rich man’s drug” or a father expressed concerns that his daughter might be using drugs?⁴⁹⁴ In light of the inherent imprecision of *T.L.O.*’s reasonable suspicion standard, *Redding*’s failure to explain why her strip search was invalid, and the additional latitude provided by a “good faith” and “objective reasonableness” inquiry, how often will a school official who conducts an unreasonable search be found liable for violating students’ constitutional rights? After *Redding*, does a student subjected to a strip search based on somewhat different facts have any effective remedy?⁴⁹⁵

⁴⁹³ See, e.g., *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980).

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. . . . Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under “settled indisputable principles of law.”

Id. at 92-93 (quoting *Wood v. Strickland*, 420 U.S. 308, 321 (1975)).

⁴⁹⁴ See *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

⁴⁹⁵ Spellman, *supra* note 80, at 177-78 (“[S]chool teachers and administrators also enjoy a qualified immunity from damages for claims of constitutional violations in actions undertaken in good faith. As a result, because the law on student strip searches is still unsettled, a teacher could successfully defend on the grounds that although the search turned out to be illegal, the teacher acted in good faith at the time.”).

B. Impediments to Litigation

The experience after *Wolf v. Colorado* teaches that civil suits are an ineffective way to protect Fourth Amendment privacy rights.⁴⁹⁶ In addition to substantial legal impediments to a successful § 1983 action, students and parents confront additional disincentives to challenge school officials' violations of constitutional rights. To bring any tort suit, plaintiffs must go through a process of naming, blaming, and claiming.⁴⁹⁷ In some instances, parents may not realize officials have violated their children's constitutional rights.⁴⁹⁸ Power differentials between parents and public officials and the opportunity-costs associated with litigation further deter parents from vindicating their children's rights. Parents require tremendous courage, substantial discretionary income for attorneys' fees, and a strong sense of outrage to sue school officials when doing so is such an exercise in futility. If a student remains in the school, then officials effectively hold her hostage and can retaliate directly and indirectly—finding other violations, writing negative evaluations and letters of recommendations, and taking other forms of retaliation. “Parents may be hesitant to file suit while their children are still students under the control of the offending school personnel. In fact, the fear of intimidation and reprisal would seem even greater in the school context due to the continuing interaction between teacher and student.”⁴⁹⁹ If parents decide to wait until their child graduates, then the statute of limitations may preclude filing suit.

If parents decide to sue and cannot afford a lawyer's hourly rate, then how many attorneys would agree to represent

⁴⁹⁶ 338 U.S. 25, 42-43 (1949) (Murphy, J., dissenting) (describing inadequacy of traditional tort remedies to vindicate privacy rights).

⁴⁹⁷ See, e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

⁴⁹⁸ See, e.g., Spellman, *supra* note 80, at 177 (“[P]arents may not realize that their child's constitutional rights have been violated and that they have any legal recourse, particularly if the child never communicates the incident to the parents.”).

⁴⁹⁹ Spellman, *supra* note 80, at 177.

them on a contingent fee basis?⁵⁰⁰ Constitutional tort actions are notoriously unsuccessful because of qualified immunity, jury hostility toward litigants, and limited liability by municipalities and school districts.⁵⁰¹ How much is a “priceless liberty” worth? For innocent students, what are the actual damages caused by an unfounded locker search or even a strip search that produces no suppressible evidence?⁵⁰² The payout for successfully litigated § 1983 cases are lower than in comparable tort actions.⁵⁰³

Finally, it is instructive to review the outcomes in which the Supreme Court reviewed students’ Fourth Amendment claims. Whether a student presented the constitutional issue via a motion to suppress evidence—e.g., *T.L.O.* or in a § 1983 civil right action—e.g., *Acton*, *Earls*, and *Redding*—the Court consistently snatched defeat from the jaws of victory. *T.L.O.* prevailed on her motion to suppress before the New Jersey Supreme Court, but the United States Supreme Court found the search reasonable and upheld her conviction. The Ninth Circuit found the Vernonia School District policy violated James Acton’s Fourth Amendment rights,⁵⁰⁴ but the Supreme Court reversed and upheld suspicionless random drug testing. Lindsay Earls appealed from an adverse lower court ruling and the

⁵⁰⁰ See, e.g., *Smyth v. Lubbers*, 398 F. Supp. 777, 794 (W.D. Mich. 1975) (“Students do not normally have the means to maintain a protracted damage action.”).

⁵⁰¹ See, e.g., Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 735 (1988) (attributing lack of success of § 1983 actions against police officers to qualified immunity, jury hostility to claimants and limited municipal liability).

⁵⁰² Gartner, *supra* note 66, at 928-31 (describing psychological trauma associated with student strip searches).

⁵⁰³ Lant B. Davis, John H. Small, & David J. Wohlberg, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 789-90 (1979) (attributing low damage awards for Fourth Amendment violations to the absence of physical harm); Gartner, *supra* note 66, at 926-27 (noting that occasionally students and parents receive substantial damages but concluding that “[m]ore often, however, the parties settle out of court, with settlements ranging anywhere from \$3400 to \$7500 or more.”); Schwab & Eisenberg, *supra* note 501, at 737 (studying the difference in damages received and finding the recovery in constitutional tort cases to be less than half of comparable tort cases).

⁵⁰⁴ *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514 (9th Cir. 1994).

Tenth Circuit Court of Appeals reversed,⁵⁰⁵ only to be overruled by the Supreme Court. After adverse rulings in the district and Circuit Court, the *en banc* Ninth Circuit held that Savana Redding's strip search violated the constitution. The Supreme Court affirmed that conclusion *and* still denied her any remedy. The clear lesson is that regardless of the merits of a student's claim, if the Supreme Court decides the case, then they will lose.

CONCLUSION

T.L.O. created a school search exception to the Fourth Amendment where none was necessary. *Terry* provides a perfectly adequate response for teachers to conduct less intrusive investigation of students and *Gates's* probable cause provides a workable standard in every other context in which state agents conduct full-blown searches. *T.L.O.* adopted a reasonableness standard that has no objective meaning and enables school officials to subject students to a regime more suitable to prisons than to educational environments—suspicionless drug testing, video surveillance, canine sniffs, and strip searches.⁵⁰⁶ In reviewing *T.L.O.'s* unanswered questions, the Court and lower courts have further minimized students' privacy interests—e.g., *Acton* and *Earls*—and dramatically increased the power of the State. Public and political panics about drugs and violence have encouraged school boards to adopt heavy-handed and

⁵⁰⁵ See *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001).

⁵⁰⁶ Blumenson & Nilsen, *supra* note 193, at 73. The authors conclude that:

Given the evisceration of any requirement of individualized suspicion and the virtual elimination of any expectation of privacy among public school students, the Court's incantation of Fourth Amendment protections to public schools is more ritual than substance. It is also clear that, whatever minimal doctrinal protections survive, random locker searches, video surveillance, records identifying potential troublemakers, and drug testing are increasingly commonplace in many schools around the country.

Id.; see also Beger, *The "Worst of Both Worlds," supra* note 185, at 337 ("By allowing police to search students without probable cause, courts have placed school children into a position that is the 'worst of both worlds,' reducing Fourth Amendment protections in a setting of security and penalties for even minor misconduct.").

counterproductive strategies—to station police in schools, to enlist dogs to sniff for contraband, to adopt zero tolerance policies that produce patently irrational results, and to deny students any expectation of privacy in their desks, lockers, or cars. Minimal legal protection, increased surveillance, heightened police presence, and school officials' repudiation of common sense and judgment have fostered a school-to-prison pipeline that adversely affects all youths, especially students of color.

The Court defines rights and prescribes remedies.⁵⁰⁷ For students, the absence of any effective remedy accompanies the Court's rejection of substantive Fourth Amendment rights. Lower courts routinely grant qualified immunity and summary judgment to offending school personnel who exercise egregious judgment. Only the most determined litigants—James Acton, Lindsay Earls, Savana Redding—obtain any § 1983 relief and then the Supreme Court takes it away. Non-constitutional tort suits provide no practical remedy because of prohibitive costs of litigation and the minimal financial damages associated with typical Fourth Amendment violations. The absence of an exclusionary rule or other systemic remedy enables school officials to remain ignorant of constitutional obligations and to violate students' rights with impunity. In short, students have few rights and even fewer remedies.

Schools are the incubators of future citizens, and school officials convey moral lessons by their actions.⁵⁰⁸ Providing young people with real Fourth Amendment protection and meaningful enforcement mechanisms will better socialize them to participate effectively in a democratic society as adults.⁵⁰⁹ Although

⁵⁰⁷ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (adopting the exclusionary rule to sanction constitutional violations).

⁵⁰⁸ The Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), emphasized that schools “educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”

⁵⁰⁹ See, e.g., *State v. Joseph T.*, 336 S.E.2d 728, 738-40 (W.Va. 1985) (McGraw, J., dissenting). Justice McGraw dissented from the court's adoption of *T.L.O.*'s reasonable suspicion standard in lieu of probable cause. He concluded that:

[P]erhaps it is fitting that our children learn at a tender age that the struggle of our ancestors against the arbitrary exercise of the will of the Crown has

the Court insists that “students . . . [do not] shed their constitutional rights . . . at the schoolhouse gate,”⁵¹⁰ a quarter of a century of Fourth Amendment decisions have created “enclaves of totalitarianism.”⁵¹¹ The moral lesson of *T.L.O.* and its progeny is that we inculcate in students the values and virtues of citizenship by denying them fundamental constitutional rights.

become our struggle against the arbitrary exercise of the will of those who seek to “balance” away as “mere platitudes” the fundamental constitutional rights for which those ancestors fought and died.

Id. at 740; *see also In re William G.*, 709 P.2d 1287, 1298 (Cal. 1985) (Bird, C.J., concurring in part and dissenting in part) (advocating probable cause rather than reasonable suspicion school search standard).

⁵¹⁰ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (affirming students’ First Amendment rights and invalidating school prohibition of wearing black arm bands to protest war in Vietnam).

⁵¹¹ *Id.* at 511; *see also Barnette*, 319 U.S. 624.