

STRIP SEARCHING STUDENTS: THE SUPREME COURT'S LATEST FAILURE TO ARTICULATE A "SUFFICIENTLY CLEAR" STATEMENT OF FOURTH AMENDMENT LAW†

*Martin R. Gardner**

INTRODUCTION

In its recent *Redding* case, which found unconstitutional a strip search of a middle school student,¹ the Supreme Court admitted that its prior case law had failed to articulate a "sufficiently clear" statement of the Fourth Amendment law governing intrusions by school officials beneath the clothing of students.² In an opinion aimed at providing such clarity, Justice

† Funding for this work was underwritten by the National Center for Justice and the Rule of Law at the University of Mississippi School of Law, which is supported by a grant awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position of the United States Department of Justice.

* The author expresses his gratitude to Tiffany Macek for her superb research assistance.

¹ *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2637 (2009). Although the search in *Redding* was deemed unconstitutional, the Court found that the school officials conducting the search enjoyed qualified immunity from liability because "clearly established law [did] not show that the search violated the Fourth Amendment" at the time of the search. *Id.* at 2643 (quoting *Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009)). See Recent Cases: Section 1983—Qualified Immunity—*Ninth Circuit Holds that School's Strip Search of a Student Violated the Fourth Amendment Under Clearly Established Law*—*Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071 (9th Cir. 2008) (en banc), 122 HARV. L. REV. 811, 811 (2008) (criticizing the Ninth Circuit en banc opinion in the *Redding* case for its denial of qualified immunity on the view that the strip search was unconstitutional under "clearly established" law).

² *Redding*, 129 S. Ct. at 2644; see Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve*

Souter and seven other members of the *Redding* Court³ found so-called “strip searches”⁴ sui generis and set about to assess the constitutionality of such intrusions. Given the divergent opinions of the lower courts,⁵ including those considering the *Redding* case itself,⁶ Supreme Court guidance is overdue. School officials have interests in knowing with as much certainty as possible when, in the exercise of their “custodial,” “tutelary,” and “guardian[ship]” responsibilities towards their students,⁷ they can protect educational environments by conducting strip searches without fear of liability. By the same token, students have privacy interests in being protected from intrusive school searches. Unfortunately, however, *Redding* fails to deliver the sufficiently clear guidance promised.

This article assesses *Redding*'s effectiveness as a vehicle for determining the constitutionality of student strip searches, taking into account several troubling questions still unresolved but not raised in that case. The discussion will establish that *Redding* fails to deliver the sufficiently clear guidance promised

the Problem, 70 S. CAL. L. REV. 921, 956 (1996) (“guidance is not available [under Supreme Court case law] leaving millions of students vulnerable to the continuing threat of strip searches”); Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 4 (2004) (explaining that Supreme Court case law provides no “unifying clarity” for educators).

³ Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, Alito, Stevens, and Ginsburg joined in the parts of the Souter opinion finding the search of the student unconstitutional. 129 S. Ct. at 2637.

⁴ The Court characterized the situation in *Redding* as a “strip search” wherein a student was ordered by female school officials to remove her outer clothing, pull her bra out and shake it, and to pull out the elastic on her underpants thus exposing her breasts and pelvic area to some degree. *Id.* at 2641.

⁵ Compare e.g., *Williams v. Ellington*, 936 F.2d 881, 882-83, 887 (6th Cir. 1991) (upholding a strip search of a high school student for drugs without any specific suspicion that drugs were hidden next to her body), with *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006) (requiring a higher level of suspicion to justify a strip search than is necessary for less intrusive searches).

⁶ Initially, a district court and two-judge majority of a Ninth Circuit panel upheld the search in the *Redding* case, *Redding v. Safford Unified Sch. Dist. #1*, 504 F.3d 828, 829 (9th Cir. 2007), only to be reversed by the Ninth Circuit en banc, *Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1089 (9th Cir. 2008) (en banc).

⁷ The Court has so characterized the relationship between educators and their students. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (upholding drug testing of students as precondition for participating in school athletics).

by the Court. Indeed, the case raises more questions than it answers. While requiring a distinct constitutional analysis for student strip searches, the *Redding* Court propounds two inconsistent versions of tests that unwisely invite judicial excursion into matters of education policy. As a result, *Redding* will only spawn confusion, lower court litigation, and ultimately the necessity for additional Supreme Court clarification.

Section I of this article examines the *Redding* case in depth. Section II offers a critique of *Redding* and notes unresolved issues in need of future attention. Section III tests the analytical utility of *Redding* by rethinking three representative lower court strip search cases in its light, concluding that *Redding* is of little use in advancing analysis. Section IV assesses *Redding's* future and argues for a simplified *Redding* standard that finds strip searches constitutional if those conducting the search are motivated by legitimate educational concerns. The Article concludes by urging educational policymakers to adopt provisions that narrowly regulate, if not eliminate altogether, strip searches in the schools.

I. THE *REDDING* CASE

A. *The T.L.O. Framework*

Redding is the Supreme Court's first consideration of a school strip search, but constitutes its second attempt at framing a Fourth Amendment standard for cases where school officials search students with suspicion that a particular student is offending a school rule.⁸ In *New Jersey v. T.L.O.*,⁹ the Court attempted to accommodate the interests of school officials in maintaining a sound educational environment and the privacy interests of students. The Court rejected the traditional proba-

⁸ The Court has decided two other school search cases, both involving situations where school officials conducted searches lacking individualized suspicion. See *Acton*, 515 U.S. 646; *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (upholding drug testing of all students wishing to participate in school extracurricular activities).

⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 328, 343 (1985) (upholding search by a male school official of a fourteen-year-old student's purse after she was observed smoking in the restroom in violation of a school rule).

ble cause standard as the threshold requirement for permissible searches and seizures in favor of a more flexible “reasonable suspicion” test.¹⁰ The *T.L.O.* Court explained that “reasonableness” is dependent on the context in which a search takes place and requires “balancing the need to search against the invasion which the search entails.”¹¹ On one side of the balance are the student’s legitimate expectations of privacy and personal security; on the other, the school’s need for effective methods to assure student safety and discipline within the school. The *T.L.O.* Court specified that determining the reasonableness of any school search involves a two-pronged inquiry: “whether the . . . action was justified at its inception” and “whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”¹² Searches of students will generally be “justified at their inception” so long as there are reasonable grounds to suspect that the search will turn up evidence indicating that the student has violated either the law or a school rule.¹³ As to the second prong, the Court explained that searches “will be permissible in their scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁴ Surprisingly, the Court neither explained the relevance of the age, sex, and nature of infraction factors, nor applied them to the *T.L.O.* facts.¹⁵

¹⁰ *Id.* at 340-41. The *Redding* Court explained the difference in the two tests as follows: probable cause requires a “substantial chance” of discovering incriminating evidence while reasonable suspicion requires only a “moderate chance” of finding evidence of wrongdoing. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

¹¹ 469 U.S. at 337 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967)).

¹² *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

¹³ *Id.* at 341-42.

¹⁴ *Id.* at 342.

¹⁵ I have commented on this aspect of *T.L.O.* elsewhere, addressing the factors in reverse order.

The nature of the infraction consideration . . . seemingly speaks to the necessity of searching based on considerations of educational policy. If drug abuse and violent crime are . . . the “major” problems in the schools, school authorities would seemingly possess broader authority to search students

B. The Redding Decision

With the *T.L.O.* Standard in hand, the *Redding* Court addressed the constitutionality of a search of a 13-year-old student, Savana Redding, by school officials who suspected that

suspected of offenses manifesting those evils than when investigating other kinds of offenses. . . . Yet, in its only discussion of the “nature of the infraction” consideration, the *T.L.O.* majority denied that it had anything of that sort in mind:

The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

It is thus anybody’s guess what the Court had in mind when it included “nature of the infraction” in its list of relevant considerations to be taken into account in the balancing analysis.

Similarly, the Court never explained the relevance of the sex of the student consideration. At least two possible explanations seem plausible. Perhaps the Court is suggesting that some intrusions characteristically affect members of one sex differently from those of the other. If this is the Court’s view, the search of a female student’s purse seems especially intrusive given that purses typically contain items of a highly personal nature such as “notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.” On the other hand, the Court may have focused on the sex of the student as relevant when the search is conducted by a school official of the opposite sex. Such searches are presumably more intrusive than those conducted by a member of the student’s sex. If this is the point, the search of *T.L.O.’s* purse . . . by a male principal in a private office again appears highly intrusive.

Finally, the Court informs us that the “age of the student” is also relevant in weighing the interests involved in school searches. Perhaps the Court is suggesting that privacy interests increase with age. . . . If so, assuming her general competency, as a fourteen-year-old adolescent *T.L.O.* would appear a fit candidate for treatment . . . to full-fledged privacy protection. On the other hand . . . the Court may be suggesting the opposite, that younger children, due to their unique impressionability, are to be afforded greater privacy protection than older ones. Again, because the Court neither applied the age consideration to the *T.L.O.* facts nor explained its relevance, the age factor’s relevance and utility as an analytical tool are unclear.

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, 922-23 (1987) (citations omitted). See *infra* note 49 and accompanying text.

she was concealing contraband prescription and over-the-counter drugs¹⁶ under her clothing while at school. The suspicion was based on an accusation conveyed to an assistant principle by a student, Marissa, who was found in possession of several pills contrary to school rule¹⁷ which she claimed to have received from Redding.¹⁸ Marissa was also found in possession of Redding's day planner which contained non-drug contraband.¹⁹ Earlier that day, the assistant principal had received a visit from another student, Jordan, who surrendered a pill, stating that he had received it from Marissa. The assistant principle was aware that a week earlier Jordan had claimed to have become ill from a pill given to him by a classmate and that some students were bringing drugs and weapons to school. Furthermore, upon presenting the pill to the assistant principal, Jordan informed him that some students were planning to take pills at lunch that day.

Acting on this information, the assistant principal called Redding into his office at which time she admitted being friends with Marissa and owning the day planner, but denied knowledge of the contraband found therein. The assistant principal then showed Redding the pills he had received from Jordan and Marissa but she denied distributing or knowing anything about them. After being informed of the reports implicating her in distributing the pills, Redding consented to a search of her backpack and outer clothing which revealed nothing wrongful. The assistant principal then directed the school nurse and another female administrative assistant to take Redding to the nurse's office to search beneath her clothing for

¹⁶ The school rule at issue proscribed "the nonmedical use, possession, or sale of any drug on school grounds including 'any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.'" *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2639-40 (2009) (citation omitted).

¹⁷ *See supra* note 16.

¹⁸ The pills were discovered when school officials "requested Marissa to turn out her pockets and open her wallet." *Redding*, 129 S. Ct. at 2640. A subsequent search of her bra and underwear by the female school nurse and a female administrative assistant turned up no further evidence. *Id.*

¹⁹ The planner contained several "knives, lights, . . . and a cigarette. *Id.* at 2638.

pills. The two school officials then directed Redding to remove all her clothing except her bra and underwear. After finding no contraband in her clothing, the officials directed Redding to pull her bra out to the side and shake it, and to pull out the elastic on her underpants. The search thus exposed her breast and pelvic area to some degree but turned up no pills or other evidence.

The Court concluded that the school officials had reasonable suspicion that Redding was distributing pills and hence that she may be carrying them on her person or in her backpack, “the carryall that has become an item of student uniform in most places today.”²⁰ Therefore, the search of Redding’s backpack and outer clothing was permissible and not excessively intrusive²¹ because if “reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack[s], it would not justify any search worth making.”²²

As to whether the search was “worth making,” the Court observed that the legitimacy of the school ban on drugs “goes without saying.”²³ Moreover, school officials must be free to determine school standards of conduct without being “second-guess[ed] by courts lacking the experience to appreciate what may be needed.”²⁴

In upholding the constitutionality of the searches of Redding’s outer clothing and her backpack, the Court simply deemed the searches reasonable with no direct application of

²⁰ *Id.* at 2641. While Redding may have consented to the searches of her backpack and outer clothing, the Court analyzed the situation as a non-consensual search finding that the assistant principal had “reasonable suspicion” to conduct those searches without Redding’s consent. *Id.*

²¹ The Court noted that the search of the Redding’s backpack occurred in her presence and in the “relative privacy” of the assistant principal’s office. *Id.*

²² *Id.*

²³ *Id.* at 2640 n.1. The Court observed that except in cases of “patently arbitrary instances,” Fourth Amendment analysis takes the rule as “a given.” *Id.* Thus in the context of the rule applicable in *Redding*, “[t]here is no need here either to explain the imperative of keeping drugs out of schools, or to explain the reasons for the school’s rule banning all drugs, no matter how benign, without advance permission.” *Id.*

²⁴ The Court explained that “[t]eachers are not pharmacologists trained to identify pills and powders, and an effective drug ban has to be enforceable fast.” *Id.*

the *T.L.O.* criteria, nor any analysis. The Court offered no assessment of the balance between the interests of the assistant principal in searching, and Redding's interest in maintaining her privacy. Again, as in *T.L.O.*, the *Redding* Court made no attempt to relate the "age, sex, and nature of the infraction" factors²⁵ to its assessment of the reasonableness of the clothing and backpack searches. Instead the Court simply concluded that they were "not excessively intrusive."²⁶

The Court took a different view regarding the constitutionality of the strip search, finding it a "categorically distinct" search "requiring distinct elements of justification"²⁷ which were not satisfied in *Redding*. The exposure of Redding's breasts and pelvic area constituted a sui generis Fourth Amendment intrusion involving heightened "subjective and reasonable societal expectations of personal privacy."²⁸ Redding experienced embarrassment, fear, and humiliation pursuant to the intrusion, "reasonable" feelings in the eyes of the Court given the "consistent experiences of other young people similarly searched."²⁹ Based on the fact that some jurisdictions have forbidden strip searches altogether, the Court concluded that the accusation of wrongdoing inherent in searches exposing the body conveys a different and more degrading meaning to young people than do other, more ordinary, experiences of nakedness at school such as changing into gym clothes and showering after class.

With these considerations in mind, the Court found that the degree of suspicion failed to match the extent of the intrusion entailed in the strip search of Redding, thus rendering the search violative of the Fourth Amendment. The Court minimized the educational interest in conducting the search in light

²⁵ See *supra* note 14 and accompanying text.

²⁶ 129 S. Ct. at 2641.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* The Court based this conclusion on two sources: Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent, at 6-14, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479); Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998).

of the fact that the assistant principal was looking for drugs posing a “limited threat” to the educational environment, with no reason to suspect that large amounts of drugs were involved or that individual students were receiving great numbers of pills.³⁰ While such assessments may appear to constitute employment of the “nature of the infraction” factor of the *T.L.O.* test,³¹ the Court did not clearly say so nor did it mention *T.L.O.*’s “age and sex of the student” factors.³²

As a further indication of the unreasonableness of the strip search, the Court found that the assistant principal could not have suspected that Redding was hiding contraband in her underwear. While granting that school students have been known to hide forbidden items beneath their clothing, the Court found that the assistant principal had no information that Redding was doing so nor that any other student at his school had ever done so. The Court concluded that a “reasonable search” as extensive as that of Redding “calls for suspicion that it will pay off.”³³

In articulating the test for assessing future strip searches, the court said the following:

[W]hat was missing from the suspected facts that pointed to [Redding] was any indication of danger to the students [hereinafter “the danger factor”] from the power of the drugs or their quantity, and any reason to suppose that [Redding] was carrying pills in her underwear [hereinafter “the in the underwear factor”].³⁴

The Court subsequently added the following:

We [intend] to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably

³⁰ 129 S. Ct. at 2642.

³¹ *See supra* notes 14-15 and *infra* notes 44-48 and accompanying text.

³² *See supra* notes 14-15 and *infra* notes 44-48 and accompanying text.

³³ 129 S. Ct. at 2642.

³⁴ *Id.* at 2642-43 (emphasis added).

make the quantum leap from outer clothes . . . to exposure of intimate parts.³⁵

II. CRITIQUE

A. Redding and T.L.O.

The *Redding* case presented the Supreme Court with the opportunity to clarify the circumstances, if any, under which strip searches of school students are constitutionally permissible. With *T.L.O.* as the sole standard, the lower courts have struggled in relating its two-prong approach to the strip search context.³⁶

Analytical uncertainty has centered on the question of whether searches like those in *Redding* constitute two distinct searches, the first comprising intrusions preceding the strip search with the strip search being a second separate search, or whether only a single progressively more intrusive search is involved.³⁷ The question is significant for, among other things, under *T.L.O.* each “search” must be subjected to the two-prong analysis.³⁸ Each must be justified at its inception and reasonable in its scope. If the search in *Redding* constituted a single search, the issue would be whether the initial search of the

³⁵ *Id.* at 2643 (emphasis added).

³⁶ *See, e.g.,* Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 827-28 (11th Cir. 1997) (characterizing *T.L.O.* as “lack[ing] specificity,” failing to “establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*,” and articulating a “series of [unhelpful] abstractions”).

³⁷ *See* Brief for National School Boards Association and American Association of School Administrator as Amici Curiae Supporting Petitioner, at 8-9, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479). For examples of the two search view, see the discussion of the *Galford* case, *infra* notes 165-92 and accompanying text and *Thomas v. Roberts*, 261 F.3d 1160, 1169 (11th Cir. 2001) which found strip searches of students “not justified at their inception” while searches of clothing preceding the strip searches as reasonable and “justified at their inception.” For examples of the single search view, see *infra* notes 193-226 and accompanying text (discussing the *Fewless* case) and *H.Y. v. Russell County Board of Education*, 490 F. Supp. 2d 1174, 1187 (M.D. Ala. 2007) (seeing *Redding*-type intrusions as a single search with searches of clothing justified at their inception but becoming excessive in their scope when they progress to strip searches).

³⁸ *See supra* notes 10-12 and accompanying text.

clothing and backpack was justified at the inception of the assistant principal's initial encounter with Redding and if so then whether the strip search was permissible under the reasonable-in-scope prong. On the other hand, if multiple searches were involved, the clothing/backpack and the strip search must each satisfy both the justified at its inception and the reasonable-in-scope prong.³⁹

1. *Redding* as One Search

The *Redding* opinion is not clear as to whether it recognizes a single series of intrusions culminating in the strip search or whether the case involves two distinct searches. The case can be read to reflect the one-search view.⁴⁰ In its only application of *T.L.O.*, the *Redding* Court suggested that both its danger and in the underwear factors speak to *T.L.O.*'s concern to limit student searches to a "reasonable scope,"⁴¹ the second prong of the *T.L.O.* standard.⁴² The Court made no mention of the first *T.L.O.* prong, presumably because the search of Redding was "justified at its inception" by the evidence providing reasonable suspicion to search her outer clothing and backpack. On this view, there was one search, justified at its inception, which became unconstitutional as its increasing intrusiveness exceeded reasonable scope.

2. *Redding* as Two Searches

On the other hand, viewing *Redding* as a one search situation is difficult to reconcile with the Court's finding that the

³⁹ See *supra* note 37.

⁴⁰ Three members of the Court understood *Redding* as involving a single, progressively intrusive, search culminating in the strip search. Justices Stevens and Ginsburg saw *Redding* as "chart[ing] no new constitutional path" but simply applying the *T.L.O.* framework in finding the search of *Redding* justifiable at its inception but becoming excessively intrusive in its scope when the principal conducted the strip search. 129 S. Ct. at 2644-45 (Stevens, J., concurring in part and dissenting in part). Justice Thomas took a similar view, finding the search justifiable at its inception and also reasonable in its scope, including the strip search. *Id.* at 2648-49 (Thomas, J., concurring in part and dissenting in part).

⁴¹ *Id.* at 2642 (majority opinion).

⁴² See *supra* notes 10-12 and accompanying text.

strip search constituted a “categorically distinct” search “requiring distinct elements of justification.”⁴³ Such language clearly suggests that the Court embraced the multiple search view. If so, the searches of Redding’s outer clothing/backpack and the strip search would each be required to separately satisfy both prongs of the *T.L.O.* test.

a. The Redding Danger Factor as an Aspect of T.L.O.’s “Nature of the Infraction” Consideration

In analyzing the strip search as a “distinct” search, it could be that *Redding’s* “suspicion of danger factor” is conceptually a function of the “nature of the infraction” consideration under the second prong of the *T.L.O.* standard. If so, the analysis suggests that the more serious the infraction, that is the greater the “danger” it poses to the educational environment, the more latitude school officials will have in conducting intrusive searches, including those beneath student clothing.⁴⁴ If this indeed is the *Redding* Court’s view, however, it is, as pointed out by Justice Thomas in his lone dissent, at odds with the spirit of the *T.L.O.* Court’s instruction that the relative importance of school rules, and presumably school dangers, is a matter for educators to determine and not for courts when conducting nature of the infraction analysis under *T.L.O.’s* scope prong.⁴⁵ In minimizing the strength of the educational interest supporting the strip search in *Redding*,⁴⁶ the Court did not follow *T.L.O.’s* admonition to defer to educators but instead engaged in an assessment of the relative danger posed to the educational environment by the specific drugs prohibited under the school rule.

With no explanation from the *Redding* Court, the significance of this new approach is not clear. If the danger analysis

⁴³ See *supra* note 27 and accompanying text.

⁴⁴ This is the view taken by Justice Thomas, although in the single search context beginning with Redding’s clothing and culminating with the strip search. 129 S. Ct. at 2647-49, 2650-51 (Thomas, J., concurring in part and dissenting in part).

⁴⁵ *Id.*; see *supra* note 15 (discussing the *T.L.O.* nature of the infraction consideration).

⁴⁶ See *supra* notes 30-32 and accompanying text.

indeed falls under *T.L.O.*'s nature of the infraction subset of the scope prong, does this constitute a break from the Court's previous deference to educators to assess relative dangers to their schools in making decisions to search students⁴⁷ signaling a new era where courts are now to make danger assessments in school search cases across the board?⁴⁸ Or, might the Court have carved out an exception permitting judicial assessments of danger, and its relative prevention under school rules, available only when conducting reasonable scope analysis in the unique context of strip searches? Finally, might it be that *Redding*'s danger factor is not a function of the scope of the search inquiry under *T.L.O.* at all, but rather part of a new analysis limited to strip searches distinct and apart from *T.L.O.* altogether?

b. "The Danger" and "The In the Underwear Factors" as Justifying Strip Searches at their Inception

Assuming again that *Redding* recognized the clothing/backpack and nude body searches as two separate Fourth Amendment intrusions and that the *T.L.O.* standard continues to speak to both, it is possible to see both the danger and the in the underwear factors as speaking only to the search at its inception inquiry under the first prong of *T.L.O.* On this view, the Court might simply have concluded that the strip search of

⁴⁷ I have earlier shown that in the context of student search and seizure cases prior to *Redding*, the Court had granted virtually unfettered discretion to school officials to assess the need to search students in their charge. Martin R. Gardner, *The Fourth Amendment and the Public Schools: Observations on an Unsettled State of Search and Seizure Law*, 36 CRIM. L. BULL. 373, 379 (2000). I suggested, in fact, that the Court's deference was so substantial that the actions of school officials in searching their students would be upheld so long as the officials acted in good faith. *Id.* at 379-80, 384-85. Although these views did not take into account the Court's opinion in *Board of Education v. Earls*, 536 U.S. 822 (2002) (upholding drug testing of students as a precondition for participating in school extra-curricular activities) which was handed down subsequent to their publication, there is nothing in *Earls* to call the views into question. Indeed, the *Earls* Court noted that in the school setting "[a] student's privacy interest is limited . . . where the State is responsible for maintaining discipline, health, and safety." 536 U.S. at 830.

⁴⁸ Justice Thomas expressed such fears in his dissent. 129 S. Ct. at 2651-52 (Thomas, J., dissenting).

Redding was not justified at its inception, thus rendering it unnecessary to move to the reasonable-in-scope prong. Thus in cases of reasonable suspicion of danger to the educational environment and/or of reasonable suspicion that a student has hidden evidence under her clothing, a strip search could still be unconstitutionally intrusive by exceeding the permissible scope of acceptable Fourth Amendment searches.⁴⁹

c. Redding as Unrelated to T.L.O.

Thus far, the discussion has assumed that *Redding* constitutes an attempt to expand the *T.L.O.* standard to the context of strip searches. However, given the Court's failure to directly apply the *T.L.O.* standards, it is possible to read *Redding* as replacing altogether the *T.L.O.* rubric with the new two-factor approach fashioned especially for the "categorically distinct" context of strip searches. If so, any search satisfying one or both of the *Redding* factors (depending on whether the Court intends the factors to be in the disjunctive or the conjunctive) could be constitutional without being required to satisfy *T.L.O.*'s requirement that the scope of the search take into account the student's age and sex and the type of the infraction.

d. Summary

Given the uncertainties about whether the Court sees *Redding* as a single or multiple search situation and questions about the extent to which *T.L.O.* governs the strip search context, a single, coherent, analytical framework is not apparent from the *Redding* case and cannot be discerned until the Court answers the following questions: Is *Redding* a single search situation? If so, does satisfaction of the Redding factors necessarily satisfy the scope prong of *T.L.O.*? If not, how do *T.L.O.*'s

⁴⁹ For example, a strip search permissible at its inception under one or the other versions of *Redding*'s two-factor standard might nevertheless be unconstitutional in its scope if a male official conducts the strip search of a female student, if the search was conducted in the presence of numerous school officials or other students, or if while looking for a particular item of evidence school officials search parts of the student's body where the item could not reasonably be concealed.

concerns for the “age and sex of the student and the nature of the infraction” factor into the analysis?⁵⁰ On the other hand, if *Redding* constitutes separate clothing/backpack and strip searches, what is the relationship of *T.L.O.* to the strip search? If *T.L.O.* applies, what is the relationship of the two *Redding* factors—reasonable suspicion of danger and/or reasonable suspicion of evidence of wrongdoing hidden on the body—to the two-prong *T.L.O.* test? Do either of the *Redding* factors suffice to justify a strip search at its inception? Are both necessary? If strip searches are governed solely by the *Redding* factors with *T.L.O.* inapplicable, are searches meeting either or both of the *Redding* factors necessarily constitutional?⁵¹

B. Problems with Redding Itself

1. A Conjunctive or Disjunctive Standard?

Whatever its relationship to *T.L.O.*, *Redding*'s two-factor approach is itself problematic, constituting in Justice Thomas's words a “vague and amorphous” standard⁵² that provides insufficient guidance for school administrators in determining when they can constitutionally conduct strip searches of students.

⁵⁰ As mentioned *supra*, the Court has never explained how the “age, sex, and nature of the infraction” considerations apply in the scope of the search analysis. See *supra* note 15 and accompanying text. An amicus brief in *Redding* urged the Court to clarify the matter. Brief for the National Association of Social Workers, *supra* note 29, at 6, 10, 12. The only member of the *Redding* Court to offer any explanation of any of these considerations was Justice Thomas who offered two viewpoints about what the “nature of the infraction” factor might mean. As discussed above, Thomas accused the majority of interpreting the factor to mean that courts can now take into account the relative danger to the educational environment under a given school rule in deciding whether the “nature of the infraction” justified the intrusiveness of a given search. See *supra* notes 43-47 and accompanying text. Justice Thomas also pointed out that rather than going to the seriousness of the danger posed by violation of the rule, the “nature of the infraction” consideration means instead that searches must be limited to areas where the object of that infraction could be concealed. *Redding*, 129 S. Ct. at 2649 (Thomas, J., concurring in part and dissenting in part). Again, no member of the Court offered any insight into what the “age and sex of the student” factors might mean.

⁵¹ For example, assuming the *Redding* factors are satisfied, would a strip search of a female student by a male school official be permissible? What about a body cavity search if the evidence is not revealed by a mere strip search?

⁵² *Redding*, 129 S. Ct. at 2646 (Thomas, J. concurring in part, dissenting in part).

The most obvious confusion, not noticed, incidentally, by any of the Justices, stems from the Court's very articulation of the standard provided to govern strip searches which states the two factors of the standard in obviously inconsistent conjunctive and disjunctive formulations.⁵³ Does the Court intend that there be both reasonable suspicion of danger and of hiding evidence of wrongdoing beneath student clothing for a strip search to be constitutional or will evidence of either suffice? If the two-factor standard is intended in the conjunctive, is a sliding scale approach also intended so that a deficiency in one factor may be compensated for by a strong showing as to the other?⁵⁴ If, on

⁵³ See *supra* notes 34-35 and accompanying text. Interestingly, in criticizing the majority for espousing a "vague and amorphous standard," Justice Thomas refers to both the disjunctive and the conjunctive versions without noting the difference. 129 S. Ct. 2648-49, 2650-51 (Thomas, J., concurring in part and dissenting in part). See *infra* note 55. It could be argued that the conjunctive formulation of the two-factor standard should be read not as a statement of a proposed test itself, but rather, as a mere identification of the two factors that will constitute the elements of the test stated later by the Court in the disjunctive. The author is grateful to Professor Edwin Butterfoss for pointing out this possibility during an oral conversation. However, it appears more reasonable to understand the conjunctive statement as itself a proposed test given the Court's observation immediately following its articulation of the conjunctive language: "We think that the combination of these deficiencies [danger to the student and reason to believe evidence was hidden in the underwear] was fatal to finding the search reasonable." 129 S. Ct. at 2643 (majority opinion) (emphasis added). Furthermore, Justice Thomas clearly reads the conjunctive statement as a proposed test. See *infra* note 55.

⁵⁴ For example, suppose the "danger" factor is minimally present by evidence that a student possesses a single marijuana cigarette, see *infra* notes 56-65 and accompanying text, but three eyewitnesses testify that the student is hiding the cigarette in her underwear, thus providing strong evidence of the hidden in the underwear factor. Does the strength of the second factor compensate for the weakness of the first? Or, what if Student A informs a school official that the student heard from Student B that Student C "might be carrying a gun in his underwear." Assuming Students A and B are relatively credible people and that Student B is unavailable, can the official strip search Student C on the basis that the serious danger posed by a gun at school compensates for the weak evidence of its being hidden in Student C's underwear? An example of a conjunctive standard interpreted as a sliding scale is reflected in Chief Justice Rehnquist's view of the two-pronged "*Aquilar/Spinelli*" test which required evidence of an informant's veracity or credibility (prong one) and of evidence of the basis of his knowledge in the particular case (prong two) in order to establish probable cause from information he provides. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 131 (2d ed. 1997). Rehnquist said of the relationship of the two prongs: "[These two prongs] are better understood [to mean that] a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other." *Illinois v. Gates*, 462 U.S. 213, 233 (1983).

the other hand, a disjunctive standard is intended, does the Court really mean that a strip search would be justified if school officials have strong evidence that a student is hiding a presumably non-dangerous item of contraband, say a single tobacco cigarette, beneath her clothing? Or could they strip search an entire student body if they have reason to believe that some unidentified student possesses explosives which could possibly be hidden beneath their clothing?

It is simply not possible from the Court's opinion to discern which formulation is intended.⁵⁵ Until the Court identifies which formulation is applicable, *Redding* cannot possibly provide adequate guidance in assessing the constitutionality of student strip searches.

In addition to the conjunctive/disjunctive confusion, *Redding* raises other problems. As will be discussed, the danger factor of the *Redding* standard invites troubling judicial excursions into educational policy matters. Moreover, *Redding* fails to mention certain controversial issues which, while not raised by the facts of the case, might nevertheless have been addressed in *dicta* in order to provide some guidance to courts certain to confront the issues in future cases.

⁵⁵ In promulgating the conjunctive version of the standard, the Court suggested that satisfying its dictates was necessary as the "missing" component required to justify Redding's search. *See supra* note 34 and accompanying text and note 53. On the other hand, in articulating the disjunctive version, the Court specified that it was thereby "[making] clear" the degree of support necessary to satisfy *T.L.O.*'s reasonable scope requirements. *See supra* note 35 and accompanying text. The Court articulated the disjunctive version twice in its opinion, 129 S. Ct. at 2637, 2643, while presenting the conjunctive version only once, *id.* at 2643, perhaps suggesting a preference for the disjunctive version. In his dissent, Justice Thomas refers to both versions without noting the difference, *id.* at 2649 (Thomas, J., concurring in part and dissenting in part) (disjunctive), 2651 (seeing the majority test as permitting strip searches "only if" the item searched for was "sufficiently dangerous," thus assuming the conjunctive formulation). That the Court in fact favors the disjunctive version finds support in its observation that "nondangerous school contraband does not raise the specter of stashes in intimate places." *Id.* at 2643 (majority opinion). By negative implication, if nondangerous contraband did raise such a specter, a search of "intimate places" would apparently be justified thus negating any requirement that "stash" pose a "danger."

2. The Danger Factor

The *Redding* Court found that the threat posed by the pills suspected to be on *Redding's* person did not pose sufficient "danger" to justify the strip search. The Court did not indicate whether the danger factor is meant to address only the risk of harm to the particular student searched, to students other than the one searched, or whether it also entails risk of harm to the broader educational environment.⁵⁶ Apart from suggesting that suspicion of "large amounts" of prescription strength ibuprofen or over-the-counter Advil or Aleve would have sufficed,⁵⁷ the Court offered no further explanation of the "danger" factor. What constitutes a "large amount" of such pills is unclear, particularly in light of the fact that it does not take many of these pills ingested by a single student to constitute a "dangerous" overdose. The only guidance provided by the *Redding* Court on this matter ends up being that under the particular circumstances of the case, the quantity of the suspected pills was insufficient to constitute a danger.

Presumably even small quantities, perhaps even a single dose or hit, of more inherently dangerous drugs than those involved in *Redding* could also justify strip searches.⁵⁸ If so, however, it would appear to place educators in the position of being forced to assess the relative "dangers" of various drugs, imposing upon them the very role of "pharmacologist" expressly rejected as unrealistic by the Court.⁵⁹

As with its impact on controlling the presence of legal drugs in schools, *Redding* raises unanswered questions about whether or under what circumstances possession of illegal drugs pose a sufficient "danger" to justify strip searches. While the Court earlier has recognized the evils posed by such drugs

⁵⁶ Under its initial formulation of the danger factor, the Court specified "danger to students" while subsequently describing it more generally as a "suspicion of danger." See *supra* notes 34-35 and accompanying text; see also *infra* notes 176-78 (discussing the *Galford* case which limited the danger inquiry to protecting students other than the one being searched).

⁵⁷ See *supra* note 30.

⁵⁸ For example, a cyanide tablet would constitute a grave health risk.

⁵⁹ See *supra* note 24.

in school⁶⁰ and has therefore granted educators broad search powers,⁶¹ it is unclear how *Redding's* recognition of the “categorically distinct” nature of strip searches impacts the educational interest in keeping schools drug free. For example, as illustrated by the above discussion of legal drugs,⁶² does the “danger” posed by a given drug depend upon its quantity? Would possession of a single marijuana cigarette pose sufficient danger to justify a strip search? If not, would any number suffice? If so, how many? Would the answers be different for possession of a single dose of methamphetamine or rock of crack cocaine?

Aside from drugs, other contraband may pose “danger” to students. Certainly deadly weapons, loaded guns for example, would appear to be items obtainable through strip searches,⁶³ but what about unloaded guns, water pistols or pea shooters,⁶⁴ darts, brass knuckles, or any other of numerous items that could constitute weapons and be hidden under a student’s clothing? How “dangerous” are small explosive devices? While a stick of dynamite would certainly qualify, what about a single firecracker? It is impossible to tell whether the myriad items usable in one way or another as weapons in the hands of school students could pose sufficient danger to justify a strip search under *Redding*.

⁶⁰ “School years are the time when the physical, psychological, and addictive effects of drugs are most severe” as children are more critically impaired by intoxicants and grow drug dependent more quickly than adults. *Veronia Sch. Dist. 47J v. Acton*, 536 U.S. 646, 661 (1995). These risks to student health and safety “make[s] the war against drugs a pressing concern in every school.” *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002). Even though students possess free speech rights “The First Amendment does not require schools to tolerate . . . student expression that contributes to [the] dangers [of illegal drugs].” *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Acton*, 515 U.S. at 661.

⁶¹ The Court has recognized an “important” perhaps even “compelling” interest in educators in protecting their schools from the influence of drugs. *Acton*, 515 U.S. at 661.

⁶² See *supra* notes 57-59 and accompanying text.

⁶³ The *T.L.O.* Court noted the “major social problems” created by the influx of “drug use and violent crime” in the schools, certainly including those committed with various weapons. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

⁶⁴ “Every adult remembers from his own school days the havoc a water pistol or peashooter can wreak until it is taken away.” *Id.* at 352 (Blackmun, J., concurring).

Apart from drugs and weapons, could other items of contraband qualify as “dangerous” for purposes of the *Redding* standard? For example, assuming that the danger factor extends both to protecting individual students and also to the educational environment in general, what about obscene or pornographic pictures or hate speech literature hidden beneath a student’s clothing?⁶⁵ Is the “danger” entailed in such material the kind that permits a strip search? Would possession of a cell phone banned under a school rule aimed at preventing “sexting” be that kind of danger?⁶⁶ Could property stolen from a teacher or a fellow student and hidden beneath the student-thief’s clothing constitute a *Redding* “danger” to the educational environment unless recovered and returned to its rightful owner?⁶⁷ Does “danger” under *Redding* always involve a future threat to the educational environment or might searches for evidence of past offenses posing no ongoing threat also suffice?⁶⁸

⁶⁵ See *Cuesta v. Sch. Bd.*, 285 F.3d 962, 965-67 (11th Cir. 2002) (allowing a body cavity search of student at jail after she was arrested at school for distributing a pamphlet which depicted the school principal, an African American, with a dart through his head; contained an essay in which the author wondered “what would happen” if he shot the principal, teachers, or fellow students; and discussed the “African disease and immigrants who can’t talk a fucking work of English” in cartoons depicting “violent and sexual activity”).

⁶⁶ Such rules are becoming common. Education authorities in Houston, Texas recently enacted a new rule prohibiting “sexting”—the distribution of nude or semi-nude photographs by videos or text message at school. BRIETBART.COM, *Houston Schools Ban ‘Sexting’* (Aug. 25, 2009), <http://www.breitbart.com/article.php?id=CNG.60b96f71bf4ba4781f8a5d3a49a22a0e.4a1> (last visited Sept. 22, 2010). It is not clear whether the Houston rule prohibits possession of cell phones themselves at school. See also Aldrea Bil-lups, *School Districts Hope Students get the Picture about ‘Sexting’ Dangers*, WASH. TIMES, July 23, 2009, at A1 (describing sexting ban in Bradenton, Florida schools and plans in Miami to develop a comprehensive program to deal with sexting).

⁶⁷ See *Kennedy v. Dexter Consol. Schs.*, 10 P.3d 115, 122 (N.M. 2000) (deeming the theft of a student’s diamond ring at school a “non-dangerous” infraction). But see *Rogers v. Bd. of Educ.*, 749 A.2d 1173, 1176 (deeming the theft of forty dollars during gym class “a serious problem” that if not resolved immediately could lead to violence outside the school given that students in the school came from a variety of neighborhoods with a history of inter-neighborhood fighting). See *infra* notes 176-87 and accompanying text.

⁶⁸ For example, might evidence used in cheating on an exam concealed beneath the cheating student’s clothing constitute sufficient educational “danger” to justify a strip search?

Clearly, *Redding* introduces a new element of vagueness into student search and seizure law, imposing judges as the arbiters of relative “dangers” to the educational environment. It is difficult to see such imposition as anything other than the “second guessing” of school officials by “courts lacking the experience to appreciate [the educational issues involved]” which the *Redding* Court itself supposedly condemned.⁶⁹

3. The In the Underwear Factor

In addition to dangerousness, the *Redding* Court identified a second factor to be considered when assessing the constitutionality of strip searches: whether the searcher reasonably suspected resort to underwear for hiding evidence of wrongdoing. The Court did not elaborate on what might constitute adequate suspicion apart from pointing out that the assistant principal did not have “any reason” to suppose that Redding was carrying pills beneath her clothing.⁷⁰ “Some reason” to so suppose is thus necessary, although the Court offered little hint at the quantity or quality of evidence necessary. The Court did point out that “nondangerous school contraband does not raise the specter of stashes in intimate places,” thus suggesting that “dangerous contraband might raise such a specter.⁷¹ The Court also observed that no evidence existed of a “general practice” among students at *Redding’s* school of hiding contraband of any kind in their underwear,⁷² again suggesting that evidence of such a practice might have justified the strip search.

⁶⁹ Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2640 n.1 (2009); *see supra* note 24 and accompanying text.

⁷⁰ 129 S. Ct. at 2643.

⁷¹ *Id.* at 2642. This does not necessarily mean that the contraband be “dangerous” as a precondition of a valid strip search thus requiring a conjunctive standard requiring both dangerous contraband and reason to believe it is hidden in the student’s underwear. Rather, the point seems to be that dangerous contraband carries evidentiary weight in determining, other things being equal, reason to believe contraband is hidden in underwear. It thus appears that the in the underwear factor could be satisfied if school authorities have particular reason to believe that a student has hidden nondangerous contraband in her underwear.

⁷² *Id.*

While *Redding* is helpful in determining the permissibility of strip searching student offenders who “resort to underwear for hiding evidence of wrongdoing,”⁷³ the case offers little guidance in assessing the constitutionality of strip searches motivated by interests in gathering evidence of wrongdoing from students who have not themselves violated school rules but have instead been victimized by the wrongdoing. For example, is a nonconsensual strip search of a female student permitted if the purpose is to obtain evidence of a sexual assault which school officials suspect has just occurred?⁷⁴ Is such an intrusion a “strip search” within *Redding* or a “physical examination” governed by other considerations?⁷⁵ If a strip search under *Redding*, does the fact that the student being searched is not herself being accused of wrongdoing render the intrusion less “embarrassing, frightening and humiliating” than the search in *Redding*⁷⁶ so as to lessen the burden required to justify the intrusion? Or is the message of *Redding* that strip searches will be permissible only where students “resort to underwear for hiding evidence of wrongdoing”?

Finally, unlike its approach in *T.L.O.*, the *Redding* Court offered no indication of whether strip searches ever could possibly be justified in the absence of prior individualized suspicion of the student subjected to the search.⁷⁷ Such suspicion

⁷³ *Id.* at 2643.

⁷⁴ See *Teague v. Tex. Indep. Sch. Dist.*, 386 F. Supp. 2d 893, 896-97 (S.D. Tex. 2005) (noting that the alleged strip search of a student believed to have been sexually assaulted was not the result of official policy for which the school district might be held liable); Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 32-39 (1992) (describing strip searches of suspected victims of child abuse, some occurring in schools).

⁷⁵ The intrusion would surely be a Fourth Amendment “search” constituting infringements of the student’s actual and reasonable “expectation of privacy.” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁷⁶ See *supra* note 29 and accompanying text.

⁷⁷ Both *T.L.O.* and *Redding* involved cases where the school official conducting the search had suspicion that the particular student searched had violated a school rule. See *supra* note 9. Nevertheless, the *T.L.O.* Court anticipated the possibility that “reasonable suspicion” justifying the kind of search involved in that case might exist in the absence of “individualized suspicion.” *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985). While noting that “some quantum” of such suspicion is “usually a prerequisite to a constitutional search or seizure, the Fourth Amendment imposes no irreducible

was not required in either *Acton* or *Earls*, the two school search decisions handed down by the Court after *T.L.O.* and prior to *Redding*.⁷⁸ It is thus not clear whether the “categorically distinct” context of strip searches requires individualized suspicion as a prerequisite to their constitutionality.⁷⁹

4. Other Unaddressed Matters

In addition to uncertainties centered in the two-factor standard articulated by *Redding*, the Court’s silence on a variety of other matters⁸⁰ lessens the utility of the opinion to resolve the variety of issues presented in strip search cases. Of course, if the Court had anticipated matters not directly raised in *Redding* and addressed them in the opinion, any such views would have constituted obiter dictum leaving the issues still unresolved.⁸¹ Nevertheless, the Court has historically offered *dicta* in a host of important cases as a means of offering some guidance as to how it might proceed in future cases presenting new facts.⁸²

requirement of such suspicion.” *Id.* Of course, the *Acton* and *Earls* cases subsequently made clear that individualized suspicion is not a necessary condition under the “reasonable suspicion” standard applicable to school searches. *See supra* note 8.

⁷⁸ *See supra* note 8.

⁷⁹ The *Redding* Court made no mention of either *Acton* or *Earls*. The individualized suspicion issue is addressed in more detail *infra* notes 98-103 and 136-41 and accompanying text.

⁸⁰ *See infra* notes 87-114 and accompanying text.

⁸¹ Because federal courts are “limited to the case or controversy before them,” they “cannot prospectively set forth a precise code of rules regulating student searches in general because, in doing so, they would step outside the bounds of the judiciary and usurp the role of the legislative . . . branch.” Gartner, *supra* note 2, at 956.

⁸² Sometimes the Court offers “dictum” which is nevertheless understood as part of the Court’s holding in a given case. For example, in *United States v. Place*, 462 U.S. 696, 707 (1983), the Court held that seizure of luggage at an airport constituted a violation of the Fourth Amendment but went on to add that a subsequent dog sniff of the luggage was not a “search” for Fourth Amendment purposes. The dog sniff discussion was clearly unnecessary to the outcome in the case and thus dictum, yet numerous cases have since assumed the fact that dog sniffs of property are not Fourth Amendment searches. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). Sometimes the Court offers *dicta* in the body of its opinion in apparent attempts to limit the scope of its opinion. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that homosexual sodomy between consenting adults in private could not be criminalized, Court noting specifically that case did not involve: minors, individuals “who might be injured

The *T.L.O.* case itself presents a clear example. In a series of footnotes, the *T.L.O.* Court alluded to several issues not presented in the case.⁸³ Particularly significant was the Court's discussion of the question of whether the reasonable suspicion standard articulated in *T.L.O.* required individualized suspi-

or coerced or who are situated in relationships where consent might not easily be refused," public conduct or prostitution, or whether the government must give "formal recognition to any relationship that homosexual persons seek to enter"); *Payton v. New York*, 445 U.S. 573, 582-83 (1980) (holding that arrest warrants are required to arrest suspects in their home, "put[ting] to one side other related problems that are not presented" such as whether exigent circumstances existed justifying warrantless entries and whether police can enter a third party's home to arrest a suspect); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (holding a Sixth Amendment violation of right to counsel where government deliberately elicits a confession from indicted suspect with lawyer present—"we do not question that in this case . . . it was entirely proper to continue an investigation of the suspected criminal activities of the defendant . . . even though [he] had already been indicted"). The Court routinely offers *dicta* in footnotes. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 394 n.3 (1985) (holding automobile exception to warrant requirement applicable to a motor home but "not pass[ing]" on situations where motor homes are used in ways "objectively indicat[ing] [their] being used as a residence" based on factors such as "circumstances of . . . location," ready mobility as opposed to being "elevated on blocks" and "connected to utilities"); *New York v. Belton*, 453 U.S. 454, 461 n.4 (1981) (warrantless search of automobile's passenger compartment permissible incident to arrest of driver, "holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk"); *Arkansas v. Sanders*, 442 U.S. 753, 765 n.13 (1979) (luggage taken from taxi by police afforded protection under the warrant requirement but "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment," e.g., burglar tools or a gun case); *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977) (Cruel and Unusual Punishments Clause limited to "criminal" punishments and thus not to school corporal punishment but "We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment").

For a discussion of the virtues of broad Supreme Court decisions including helpful *dicta*, see generally Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1 (2009).

⁸³ *See New Jersey v. T.L.O.*, 469 U.S. 325, 333 n.3 (1985) (legality of search "implies no particular resolution of the question of the applicability of the exclusionary rule" in school cases); *id.* at 337 n.5 (opinion does "not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies"); *id.* at 341 n.7 ("This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with . . . law enforcement agencies, and we express no opinion on that question.").

cion of the student searched.⁸⁴ Such discussion was *dicta* in *T.L.O.* given the fact that individualized suspicion existed in the case.⁸⁵ Nevertheless, the *dicta* proved helpful in anticipating the Court's later holdings in *Acton* and *Earls* which rejected an individualized suspicion requirement.⁸⁶

Thus, in a similar fashion the *Redding* Court could have provided some helpful *dicta* addressing issues that will continue to trouble the lower courts. The following are some such issues.

a. Must School Officials Exhaust "Less Drastic Alternatives"?

Throughout its Fourth Amendment jurisprudence, the Supreme Court has consistently refused to apply a "less drastic alternatives" approach in deciding whether a given search or seizure was constitutional. Thus, if the police could have achieved their law enforcement interests by employing meas-

⁸⁴ See *id.* at 342 n.8.

⁸⁵ See *supra* note 9.

⁸⁶ The Court hinted in its *T.L.O. dicta* that individualized suspicion might not be required as a prerequisite for valid school searches, noting that such suspicion is sometimes dispensed with in situations "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.'" 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)). While the *T.L.O.* Court recognized that students possess legitimate privacy expectations at school, its application of the sliding scale, balancing approach arguably left student privacy in fact minimally protected. See Gardner, *supra* note 15, at 919-25; Gardner, *supra* note 47, at 378-80. These considerations led the author to predict that the Court would not require an individualized suspicion requirement, thus anticipating the outcomes in *Acton* and *Earls*.

While stating that its holding leaves open the individualized suspicion issue, the Court immediately cited cases which dispense with the usual prerequisite of individualized suspicion. The Court then provided a test for determining when unparticularized searches are permissible: when privacy interests are "minimal" and when "other safeguards" are available to check the discretion of the searcher. When applied to school searches, this test may permit searches unsupported by individualized suspicion. Despite its talk to the contrary, student privacy interests do appear 'minimal' after *T.L.O.*, and a variety of 'safeguards'—parent pressure, administrative regulation, public scrutiny—exist to control the discretion of school officials conducting unparticularized searches.

Gardner, *supra* note 15 at 924, n.134 (citations omitted).

ures more respectful of privacy interest than those chosen, the chosen methods are upheld so long as they meet minimal Fourth Amendment standards.⁸⁷ Similarly, in the school search context, the Court has granted broad deference to school officials in holding that they need not conduct their searches of students in the least intrusive manner so long as the searches are otherwise reasonable.⁸⁸

Yet with the *Redding* Court's recognition that student strip searches are "categorically distinct" from other intrusions, it is plausible to suppose that the Court might be inclined to join several lower courts in embracing a less drastic alternative requirement in the context of strip searches.⁸⁹ Assuming that a strip search is permitted under *Redding's* two-factor standard, a less drastic alternative requirement may still be relevant. For example, may school officials having reasonable suspicion that a student is hiding dangerous contraband in their underwear require the student to *totally* strip or must the officials first conduct the "less drastic" partial strip process evidenced in

⁸⁷ The Court has repeatedly held that "the reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 350 (2001); *Colorado v. Bertine*, 479 U.S. 367, 373-74 (1987). In explaining its reluctance to embrace a less drastic alternative requirement, the Court has said: "The logic of such [a requirement] could raise insuperable barriers to the exercise of virtually all search and seizure powers," *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976), "because judges engaged in *post hoc* evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.'" *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 629 n.9 (1989) (quoting *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985)).

⁸⁸ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (refusing to require the "less intrusive" means of drug testing students on the basis of individualized suspicion of drug use in lieu of the school's choice to test all student athletes without individualized suspicion); *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002) ("Reasonableness under the Fourth Amendment does not require employing the least intrusive means.").

⁸⁹ *See, e.g., Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 889 n.6 (N.D. Ill. 2001) (criticizing police officer who strip searched students for "not . . . using the least intrusive means of finding the [evidence of wrongdoing]"); *Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1203 (D.S.D. 1998) (finding fault with strip searches made before "less intrusive" searches of lockers or motor vehicles); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 833 (11th Cir. 1997) (teachers who launched strip searches did so foregoing several reasonable "less intrusive means" available to achieve the ends of the search) (Kravitch, J., dissenting).

Redding which allowed the student to continue to wear her underwear?⁹⁰ Should school officials be required to conduct a “*Terry* frisk,”⁹¹ an arguably less drastic alternative to a strip search,⁹² as a prerequisite to a strip search?⁹³ Or, as argued by *amicus* in *Redding*, must a hand held metal detector be utilized as a prerequisite to a strip search in situations where school

⁹⁰ See *Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 820 (W.D. Mich. 2002) (assuming an otherwise constitutionally-justified search, requiring a student to shake his underwear, while not exposing himself, is less intrusive than a total strip search and thus presumably constitutionally required under a “least intrusive” analysis). Such a requirement would raise further questions. If the partial strip process is employed initially and no contraband is discovered, would school authorities necessarily lose their reasonable suspicion to conduct a more intrusive “total strip” search? See *infra* notes 193-226 and accompanying test (discussing *Fewless* in detail).

⁹¹ *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting police officer to patdown, “frisk,” the outer clothing of a suspect whom the officer has “reasonable suspicion” to believe might be armed with a weapon).

⁹² On the one hand, *Terry* frisks are generally viewed as less intrusive than full-fledged searches of the person, WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE 660 (4th ed. 2004) (*Terry*-frisk is less extensive than a search of the person incident to arrest); *Brousseau ex rel. Brousseau v. Town of Westerly*, 11 F. Supp. 2d 177, 181-82 (D.R.I. 1998) (“pat down” search of areas around student’s pockets and ankles deemed “limited” and “least intrusive” under the circumstances). On the other hand, however, in the context of school searches because it involves physically touching the person of the student, a *Terry*-frisk is sometimes viewed as *more* intrusive than a strip search. See *Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (holding that since school officials’ suspicion that student was “crotching” drugs, a strip search was less intrusive than “physically touching” him). See also *Singleton ex rel. Smith v. Bd. of Educ.*, 894 F. Supp. 386, 389 (D. Kan. 1995) (school official “patted the [student] plaintiff down in the crotch area”).

⁹³ *Redding*, of course, leaves unanswered whether a more drastic alternative to a strip search, a body cavity search, would ever be justified assuming school officials have reasonable suspicion that a student is hiding dangerous contraband in a body cavity. See *Cuesta v. Sch. Bd.*, 285 F.3d 962, 969-70 (11th Cir. 2002) (body cavity search at jail constitutionally permissible after student was arrested at school for distributing “hate crime” pamphlet). Are such intrusions themselves “categorically distinct” from strip searches so as to require more stringent justification if permitted at all? See *Tarter v. Raybuck*, 742 F.2d 977, 982 (6th Cir. 1984) (“The authority of the school official would not justify a degrading body cavity search of a youth in order to determine whether a student was in possession of contraband.”). In some circumstances a body cavity search has actually been deemed more “reasonable” than a partial strip search along the lines of that conducted in *Redding*. See *Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 810, 820 (W.D. Mich. 2002) (pulling back the waistband of student’s boxer shorts and looking at his buttocks is less reasonable than a body cavity search where suspicion exists that student has hidden marijuana in his “buttrack”).

officials reasonably suspect that weapons are hidden beneath a student's clothing?⁹⁴

b. Require Parental Notification?

Similar to a requirement to exhaust less drastic alternatives, parental notification is suggested by some courts as a prerequisite to valid strip searches.⁹⁵ Parental notice prior to the search allows the parent the opportunity to be present when the search occurs,⁹⁶ thus perhaps ameliorating the student's anxiety.⁹⁷

c. Is Individualized Suspicion a Prerequisite for Permissible Strip Searches?

As mentioned above, the *T.L.O.* Court offered enlightening *dicta* on individualized suspicion as it relates to findings of rea-

⁹⁴ See Brief for the National Association of Social Workers and its Arizona Chapter et al. as Amici Curiae Supporting Respondent April Redding, 24, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479).

⁹⁵ See, e.g., *Fewless* ex rel. *Fewless*, 208 F. Supp. 2d at 814 (finding that a student had been subjected to an unconstitutional strip search, court noted that "his parents were not called" prior to the search). In some contexts involving infringements of young peoples' liberty interests, the Supreme Court has required parental notification, see, e.g., *In re Gault*, 387 U.S. 1, 33 (1967) (child and his parents must be notified of charges in delinquency proceedings against the child), while in others the Court has not required parental notification, see, e.g., *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (student entitled to notice of charges against him in school suspensions of ten days or less, no mention of requirement to notify parents). Moreover, while never holding that parental consent is necessary for searches of school children, the Court has recognized that parental acquiescence is relevant determining the constitutionality of a given school search policy. In upholding the urinalysis searches in *Acton*, the Court observed: "[T]he primary guardians of [the] schoolchildren appear to agree [with the school search policy]. The record shows no objection to this districtwide program by any parents other than [respondents]." *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

⁹⁶ See *Farmer v. State*, 275 S.E.2d 774, 775-76 (Ga. Ct. App. 1980) (school officials calling student's mother as well as police as a consequence of suspicion that student possessed marijuana at school; mother present at subsequent strip search).

⁹⁷ Whether presence of a parent at a strip search would decrease the student's anxiety is of course dependent on a variety of circumstances. Parental presence in some cases may in fact increase the student's anxiety. In some circumstances, parental presence might eliminate the need for a strip search altogether if the parents induce a guilty student himself to turn over contraband he had hidden in his underwear.

sonable suspicion.⁹⁸ Thus far, in the only cases raising the issue, the Court has held that individualized suspicion is not a necessary condition for the presence of reasonable suspicion.⁹⁹

In the “categorically distinct” context of strip searches, however, there is reason to believe that individualized suspicion might play a more important role, particularly in light of numerous lower court cases invalidating strip searches for want of individualized suspicion.¹⁰⁰ Given the fact that school authorities historically have with some regularity conducted mass strip searches of students without individualized suspicion,¹⁰¹ it is probably only a matter of time before the Supreme Court will be required to address the issue. Some indication in *Redding* by way of *dicta* as to whether strip searches are sufficiently distinct from the searches approved in *Acton* and *Earls* so as to require individualized suspicion would no doubt be helpful to school officials in gauging the constitutionality of non-particularized strip searches.¹⁰² *Redding’s* silence on the matter in light of the *T.L.O. dicta* and the *Acton* and *Earls* holdings may create in school officials the impression that individualized suspicion is not a prerequisite for valid strip searches, notwithstanding lower court case law to the contrary. If such an impression is in fact ultimately false, much student

⁹⁸ See *supra* notes 84-86 and accompanying text.

⁹⁹ See *supra* notes 84-86 and accompanying text.

¹⁰⁰ See, e.g., *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 605-06 (6th Cir. 2005); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1177 (11th Cir. 2001); *H.Y. ex rel. K.Y. v. Russell Cnty. Bd. of Educ.*, 490 F. Supp. 2d 1174, 1184-85 (M.D. Ala. 2007); *Carlson ex rel. Stuczynski v. Bremen High Sch. Dist.* 228, 423 F. Supp. 2d 823, 826-27 (N.D. Ill. 2006); *Rudolph ex rel. Williams v. Lowndes Cnty. Bd. of Educ.*, 242 F. Supp. 2d 1107, 1115-16, (M.D. Ala. 2003); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 887-88 (N.D. Ill. 2001); *Konop ex rel. Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1206-07 (D.S.D. 1998); *Kennedy v. Dexter Consol. Schs.*, 10 P.3d 115, 120-22 (N.M. 2000).

¹⁰¹ See *supra* note 100; see also *Oliver ex rel. Hines v. McClung*, 919 F. Supp. 1206 (N.D. Ind. 1995) (strip search of entire gym class in search of stolen money without individualized suspicion); *Rogers v. Bd. of Educ.*, 749 A.2d 1173 (Conn. 2000) (same); *Lamb v. Holmes ex rel. A.L.*, 162 S.W.3d 902 (Ky. 2005) (alleged strip search of entire gym class in search of stolen shorts without individualized suspicion).

¹⁰² The reported lower court cases suggest that absence of individual suspicion renders subsequent strip searches unconstitutional. See *supra* note 100.

privacy might have been protected by cautionary *dicta* in *Redding*.¹⁰³

d. The Meaning of T.L.O.'s "Age and Sex of the Student" and "Nature of the Infraction" Factors: Continued Uncertainty

As noted, the *T.L.O.* Court identified the "age and sex of the student" and the "nature of the infraction" as relevant factors in assessing whether student searches are reasonable in their scope.¹⁰⁴ While *Redding* offered possible elucidation of the nature of the infraction consideration,¹⁰⁵ the Supreme Court has offered no guidance as to the meaning of the age and sex of the student factors. Assuming that the *T.L.O.* rubric applies to constitutional assessments of strip searches,¹⁰⁶ courts are presently required to guess at the relative importance and meaning of the age and sex factors.¹⁰⁷

¹⁰³ To the extent that individualized suspicion is not "clearly" a prerequisite for valid strip searches, school officials enjoy qualified immunity for non-individualized, otherwise reasonable, strip searches should such eventually be found unconstitutional for want of individualized suspicion. *See supra* note 1.

¹⁰⁴ *See supra* notes 12-15 and accompanying text.

¹⁰⁵ *See supra* notes 43-48 and accompanying text. This interpretation suggests that courts are now free to assess the relative dangers under school rules in determining whether searches for evidence of their violation are reasonable in their scope. Despite the questionable basis for this interpretation offered by the *T.L.O.* Court itself (*see supra* notes 15, 44-45 and accompanying text), some lower courts have embraced it. *See, e.g., Thomas ex rel. Thomas*, 261 F.3d at 1168-69 (theft by a student does not constitute "an extreme threat to school discipline or safety" so as to justify strip searching suspected grade school students); *Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993) ("a highly intrusive search in response to a minor infraction would . . . not comport with [the *T.L.O.* standard].") Justice Thomas has suggested a more modest understanding of the "nature of the infraction" factor interpreting it to mean only that searchers must confine their searches to areas where the object of the infraction could be concealed. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2649 (2009) (Thomas, J. concurring in part and dissenting in part). Thus, if school officials have reason to believe a student possesses a rifle, they can search only places where rifles might be. *Id.*

¹⁰⁶ *See supra* notes 31-32, 40-51 and accompanying text.

¹⁰⁷ One court expressed its frustration as follows: "[*T.L.O.* offers] a series of abstractions" couched in language "lack[ing] specificity" seemingly rendered by the Court "[on] purpose []." *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 827-28 (11th Cir. 1997). The court added:

In the absence of detailed guidance, no reasonable school official could glean from these broadly-worded phrases whether the search of a younger or

Attempts to give meaning to the age and sex factors present a variety of interpretations. Regarding the age factor, one view holds that, other things being equal, younger students should receive greater protection from invasive searches than older ones,¹⁰⁸ while another embraces exactly the opposite position that older students, particularly adolescents, are more traumatized by such searches than younger students¹⁰⁹ and thus should receive greater protection from strip searches than their younger counterparts.

As for the sex of the student factor, again several views have been forwarded as to how it should impact analysis. The most common understanding focuses not simply on the sex of the student but also on the sex of the person conducting the search, making the assumption that searches by persons of the opposite sex of the student are more intrusive than those by

older student might be deemed more or less intrusive; whether the search of a boy or girl is more or less reasonable, and at what age or grade level; and what constitutes an infraction great enough to warrant a constitutionally reasonable search or, conversely, minor enough such that a search of property or person would be characterized as unreasonable.

Id. at 825-26. Another court expressed a similar view: "A diligent but unsuccessful search for . . . guidance . . . leads us to a troubling conclusion: the . . . standard articulated in . . . *T.L.O.*, has left courts . . . reluctant or unable to define what type of official conduct would be subject to a . . . cause of action [for violation of students' Fourth Amendment rights]." *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 886 (6th Cir. 1991).

¹⁰⁸ See Brief for the National School Boards Association et al. as Amici Curiae in Support of Petitioners, at 17, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479) ("As for the age factor, it is reasonable to require educators to restrict themselves to less invasive searches for younger students."). Support for this interpretation of the age factor may come from the fact that younger students, unlike their older counterparts who undress at school for gym classes, have a greater expectation of bodily privacy than older students. See *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (student athletes have reduced expectation of privacy because they experience "suiting up" and situations of communal undress).

¹⁰⁹ One court expressed the point this way:

The impact of the search will also vary with the age of the child. Perhaps counterintuitively, a very young child would suffer a lesser degree of trauma from a nude search than an older child. As children go through puberty, they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older.

Cornfield ex rel. Lewis, 991 F.2d at 1321 n.1.

persons of the same sex.¹¹⁰ The sex of the student factor may be relevant in other ways, however. Searches of female students, for example may potentially be deemed more intrusive than those of males given the possibility that female students might be menstruating and might thus be especially self-conscious about their bodies.¹¹¹ Moreover, the sex of the student factor may be relevant in that students of one sex may be more likely than those of the other to possess a particular type of contraband at school,¹¹² thus perhaps justifying a lower threshold for searches of students of the sex deemed more likely to possess the given contraband.¹¹³

¹¹⁰ This assumption is borne out by the case law which evidences that strip searches are most often conducted by school officials of the same sex as the student being searched. *See, e.g., Redding*, 129 S. Ct. at 2638 (female officials searching female student); *Rudolph ex rel. Williams v. Lowndes Cnty. Bd. of Educ.*, 242 F. Supp. 2d 1107, 1116 (M.D. Ala. 2003) (males searching male); *West Virginia ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 42-43 (W.V. 1993) (male searching male). *But see H.Y. ex rel. K.Y. v. Russell Cnty. Bd. of Educ.*, 490 F. Supp. 2d 1174, 1179, 1186 (M.D. Ala. 2007) (female officials putting hands into male student's pockets).

¹¹¹ Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 CRITICAL CRIMINOLOGY 117, 128 (2006). For a case where a student was menstruating at the time of a strip search, see *Konop ex rel. Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1203 (D.S.D. 1998). While not directly relevant to assessments of the sex of the student factor in the context of strip searches, searches of student property unique to one sex are sometimes deemed especially intrusive. As Justice Brennan observed in his dissenting opinion in *T.L.O.*, searching a female student's purse poses a substantial invasion of privacy:

A purse typically contains items of highly personal nature. Especially for shy or sensitive adolescents, it could prove extremely embarrassing for a teacher or principal to rummage through its contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.

469 U.S. 325, 355 n.1 (Brennan, J., concurring in part and dissenting in part).

¹¹² For example, teenage girls tend to abuse prescription drugs more readily than do boys. Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (Apr. 30, 2007). Male students, on the other hand, may be more likely to bring weapons to school. *Cf. Thompson ex rel. Lea v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996) (school officials search all male students on suspicion that *some* student might possess a knife or gun at school; no explanation of why it was reasonable to limit the search to male students).

¹¹³ Such a view smacks of "sexual profiling" and might raise serious equal protection questions. No equal protection issues were raised, however, in the *Thompson* case, *supra* note 112, where all of the male, and none of the female, student body was

Given the controversial nature of student strip searches, clarification from the Supreme Court of the considerations relevant to assessing their constitutionality is obviously desirable. A clear understanding of the age and sex of the student factors articulated in *T.L.O.* appears at least helpful, if not essential, in making such assessments. One would have hoped that the *Redding* Court would have taken the opportunity to offer some guidance as to the meaning of these factors by utilizing them in its analysis.¹¹⁴

searched in a situation where the evidence did not necessarily implicate only male suspects. The search in *Thompson* was premised on a suspicion that someone in the school might possess a sharp object thought to have cut the seats of a school bus on the morning of the search.

¹¹⁴ An additional matter in need of clarification is the issue of whether students are legally capable of consenting to school searches, and if so under what circumstances. While the Supreme Court has never addressed the problem, it perhaps offered some guidance in its decision in *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979) which held that a juvenile, a sixteen year old in that case, could constitutionally waive his *Miranda* rights if he did so “knowingly and intelligently” under the “totality of the circumstances,” the same standard applicable to adults. The *Fare* Court rejected arguments that juveniles are entitled to special protections such as presence of an attorney or a parent as prerequisites to valid waivers. *Id.* The Court found that the validity of waivers depends on a consideration of all the circumstances, including an evaluation of the juvenile’s “age, experience, education, background, . . . intelligence, and . . . whether he has the capacity to understand the [*Miranda*] warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights.” *Id.* at 725. *Fare* might thus suggest that students, at least adolescents, are capable of consenting to searches by themselves, particularly in light of the Court’s Fourth Amendment case law holding that consent to searches is valid so long as it is “voluntary” under the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). Yet, in the context of student consent some lower courts have intimated that, unlike the *Miranda* waiver in *Fare*, students might have a right to “an opportunity to speak to someone who [is] an advocate for [them] like a parent, counselor, or attorney” as a prerequisite to valid consent to a school strip search. *Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 815 (W.D. Mich. 2002). Whether the Supreme Court would follow the *Fare* approach or require protections such as those suggested in *Fewless* as preconditions for valid consent to the “categorically distinct” intrusions entailed in strip searches is unclear. *Redding* presented an opportunity to address the consent issue in light of the fact that *Redding* consented to the searches of her clothing and backpack. *See supra* note 20 and accompanying text.

III. RETHINKING EXISTING CASE LAW UNDER *REDDING*

The above discussion establishes that *Redding* does not meet the goal of providing clear guidance¹¹⁵ for those charged with assessing the constitutionality of school strip searches. As will be shown in this section, additional evidence of these deficiencies is revealed when representative samples of existing case law are rethought in terms of the *Redding* rubric and other Supreme Court case law. Such a process tests *Redding* as a vehicle for resolving troublesome strip search cases that have already come before the courts. *Redding's* inadequacies will be revealed by discovering that the case neither confirms the courts' decisions in those cases nor clearly renders them incorrect. Rather, *Redding* simply calls the decisions into question without offering a firm basis for their resolution.

A. Doe v. Renfrow¹¹⁶ *Dog Sniffs for Marijuana*

The *Doe* case arose as follows: concerned about alcohol, marijuana, and PCP use by students in the community's junior and senior high schools, school officials, in conjunction with law enforcement officers, devised a plan to conduct unannounced entries into the schools' classrooms with dogs trained to detect the odor of marijuana. All agreed that any evidence recovered during the investigation would not be used in juvenile or criminal court proceedings but only in school disciplinary actions against students found in possession of contraband.

The dogs sniffed each student in the schools and "alerted" to approximately fifty students. Of the fifty, eleven students were also subjected to strip searches when the dogs continued to alert to them after the students had emptied their pockets and purses. The searches revealed no drugs or other contraband. Junior high student Diane Doe subsequently brought an

¹¹⁵ See *supra* note 2.

¹¹⁶ 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd per curiam*, 631 F.2d 91 (7th Cir. 1981), *cert. denied* 451 U.S. 1022 (1981).

action for violation of the Fourth Amendment against the school officials who subjected her to a strip search.¹¹⁷

The *Doe* court found no Fourth Amendment violation entailed in the dog sniff of Doe¹¹⁸ nor in the search of her pockets, given that the school officials had “reasonable cause to believe” that some students were violating school rules prohibiting drug activity at school¹¹⁹ and particular suspicion of Doe because the dog had alerted to her. The strip search was another matter, however. The *Doe* court found that intrusion “unreasonable” in light of its infringement of the “individual’s basic justifiable expectation of privacy.”¹²⁰ Such infringement would be permissible only if supported by “some facts that provide a reasonable cause to believe the student possesses the contraband sought.”¹²¹ The continued dog alert was deemed insufficient reasonable cause for the strip search because in the court’s eyes dogs react only to the “odor” of the prohibited substance not necessarily to the substance itself,¹²² creating the possibility that the dog alerted to the odor of marijuana on Doe’s clothing after she had inadvertently and innocently been exposed to its odor through another’s use.¹²³

¹¹⁷ The search was conducted in the school nurse’s station by two female school officials who ordered Doe to remove her clothing. The officials allowed Doe to turn her back to them while she disrobed. The officials briefly examined her clothing and immediately permitted Doe to dress, presumably with her never turning around to face the officials. 475 F. Supp. at 1017.

¹¹⁸ The issue of whether the dog sniff itself constituted a Fourth Amendment “search” is examined in detail by the author at Martin R. Gardner, *Sniffing for Drugs in the Classroom - Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803 (1980). While the *Doe* court found that the dog sniff was not a search, other courts have found to the contrary. See, e.g., *Horton ex rel. Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982), B.C. *ex rel. Powers v. Plumas Unified Sch. Dist.*, 192 F.3d 1260 (9th Cir. 1999).

¹¹⁹ 475 F. Supp. at 1024. *Doe* was decided prior to *T.L.O.*, thus the “reasonable cause” standard utilized did not have specific Supreme Court recognition at the time.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Without elaboration, the court alluded to the possibility that the dog alert to Doe might have been triggered by an odor not associated with illegal drugs. “No marijuana or other drugs were found in [Doe’s] possession, although it was later discovered that [she] had been playing with one of her dogs that morning of the search and that dog was in heat.” *Id.* at 1017.

The *Doe* decision predated *T.L.O.* and, as in that case, rejected a probable cause requirement in lieu of the more lenient “reasonable suspicion” standard. While the court found insufficient “reasonable cause” to believe that Doe possessed contraband hidden beneath her clothing, the evidence could easily have yielded the opposite conclusion. If, as the court indicated, dogs are reliable detectors of contraband odor,¹²⁴ why was it not “reasonable” to believe that Doe had hidden contraband beneath her clothing, given the well-known fact that such hiding is common.¹²⁵ In a *post hoc* assessment of reasonableness, the court concluded that since no drugs were found through the strip search, the dog had to have alerted to the odor of Doe’s clothing¹²⁶ thus supposedly making it unreasonable to believe that she might be carrying contraband beneath her clothing. While it may seem clear after the fact that the dog alerted to odors on Doe’s clothing, how could the school officials have known this, or have had reason to know this, without conducting the strip search? It thus appears that the *Doe* court reached a questionable conclusion under its articulated standard.

In any event, our question is whether the *Redding* opinion provides a useful analytical tool to address the issues raised in *Doe*. Unfortunately, the exercise of rethinking *Doe* in light of *Redding* and the Court’s other student search case law only reaffirms the points made earlier that a host of questions regarding the constitutionality of school strip searches remain unanswered.¹²⁷

1. *Redding* and the Court’s Prior School Search Cases

In assessing the constitutionality of the strip search in *Doe*, initial questions surround whether *Redding* alone provides the proper analytical standard or whether it should be

¹²⁴ In fact, the *Doe* court noted that it is well established that well trained dogs may not merely provide “reasonable suspicion” to believe that contraband is present when they alert, but also “probable cause” to so believe. *Id.* at 1025-26.

¹²⁵ “[U]nderclothing [is] a prime hiding place for controlled substances,” *Rone ex rel. Payne v. Daviess Cnty. Bd. of Educ.*, 655 S.W.2d 28, 30 (Ky. Ct. App. 1983).

¹²⁶ See *supra* notes 122-23 and accompanying text.

¹²⁷ See *supra* notes 52-114 and accompanying text.

supplemented by *T.L.O.*'s two-prong test.¹²⁸ Assuming that *T.L.O.* is intended to be used in conjunction with *Redding* in strip search cases,¹²⁹ the reasonableness of the "search" must be assessed both at its inception and in its scope.¹³⁰ This inquiry confronts the problem addressed earlier: in cases like *Doe* and *Redding*, is the strip search a Fourth Amendment event distinct from the earlier searches preceding it, thus requiring a justification "at its inception" separate from that of the earlier searches, or is it the culmination of a single increasingly intrusive search?¹³¹ Under either interpretation, however, the constitutionality of the strip search cannot be assessed isolated from the earlier intrusions. If any of them constitute a search in violation of the Fourth Amendment, the strip search would be analogous to the "fruit of the poisoned tree" in exclusionary rule cases and thus also unconstitutional because of its causal linkage to the prior unconstitutional searches.¹³² Thus an analysis of the constitutionality of the strip search in *Doe* must begin with an assessment of the reasonableness "at its inception" of the first intrusion arguably constituting a Fourth Amendment "search."

The first such intrusion is the dog sniff of *Doe*. If, as the *Doe* court held, the sniff was not a "search," it carried no Fourth Amendment consequences. However, the courts of two

¹²⁸ See *supra* notes 36-51 and accompanying text.

¹²⁹ As discussed above, the *Redding* Court cited the "reasonable scope" prong of *T.L.O.*'s two-prong test and arguably applied the "nature of the infraction" consideration under that prong in assessing the reasonableness of the strip search. See *supra* notes 41-46 and accompanying text. On the other hand, the *Redding* Court made no mention of the first prong of the *T.L.O.* test, the "justified at its inception" factor, nor did it apply the "age and sex of the student" considerations under the reasonable scope prong. Thus *T.L.O.* received only fleeting attention from the *Redding* Court, leaving uncertain its relevance as an analytical complement to *Redding* in resolving strip search issues.

¹³⁰ See *supra* notes 36-39 and accompanying text.

¹³¹ See *supra* notes 36-39 and accompanying text.

¹³² "[I]f it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of . . . evidence" directly related to the prior violation. WAYNE R. LAFAVE, 6 SEARCH AND SEIZURE 255 (4th ed. 2004); see, e.g., *Parkhurst v. Trapp*, 77 F.3d 707 (3d Cir. 1996) (search of private papers conducted as a consequence of an illegal entry into home where papers were kept held to also be illegal).

federal circuits have disagreed and held dog sniffs in similar circumstances to *Doe* to be Fourth Amendment searches.¹³³ Although the Supreme Court has found that dog sniffs of property are not searches under the Fourth Amendment,¹³⁴ it has not addressed the issue in the context of sniffs of people.¹³⁵ Thus the federal circuits are split on the issue and await Supreme Court clarification.

If the dog sniff was a search, it must be supported by “reasonable suspicion. The school authorities in *Doe* had understandable concerns about the drug problem in their school, but it is not clear whether the wholesale search of the entire student body was reasonable. While the Supreme Court has found “reasonable suspicion” for the unparticularized searches for drugs including marijuana in *Acton* and *Earls*,¹³⁶ neither of those cases involved searching an entire student body for marijuana alone¹³⁷ as was the case in *Doe*. The indiscriminate nature of dog sniffs of entire groups of students has been identified as a primary basis for finding such searches unreasonable by some courts disagreeing with *Doe* in situations not involving eventual strip searches.¹³⁸ For such courts, conclusions of unreasonableness would likely be reached even more readily in cases like *Doe* where the dog sniff leads to an eventual strip search.

On the other hand, there is little reason to read *Acton* and *Earls* as necessarily forbidding indiscriminate dog sniffs of en-

¹³³ See *supra* note 118.

¹³⁴ See *supra* note 82 (discussing the *Place* and *Caballes* cases).

¹³⁵ The Court denied cert. in the *Doe* case. *Doe v. Renfrow*, 451 U.S. 1022 (1981).

¹³⁶ See *supra* notes 7-8.

¹³⁷ *Acton* involved searches of athletes only while *Earls* involved searches limited to students participating in extra-curricular school activities. See *supra* notes 7-8. Both *Acton* and *Earls* involved searches for amphetamines and cocaine in addition to marijuana while *Earls* also included searches for opiates and barbiturates. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822, 826 (2002).

¹³⁸ See, e.g., *Horton ex rel. Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 481-82 (5th Cir. 1982) (“[C]anine inspection of the student’s person . . . cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion . . .”).

tire student bodies.¹³⁹ Even if such intrusions constitute searches, they may well be deemed reasonable in light of the recognized evils of drugs in schools, the effectiveness of dogs in detecting their presence, and the perceived minimal intrusiveness of dog sniffs.¹⁴⁰ If so, utilizing the dog to detect Doe's possible possession of marijuana appears to be "reasonable at its inception."¹⁴¹

Assuming the reasonableness of the dog sniff, the alert to Doe provided reasonable suspicion, indeed perhaps even probable cause, to believe that she possessed or had recently smoked marijuana.¹⁴² The subsequent search of her pockets was therefore reasonable.¹⁴³

2. *Redding's* Two Factor Standard

Regarding the strip search, its constitutionality depends essentially on how it fares under *Redding's* two-factor stan-

¹³⁹ Commentators have stated the matter this way: "[D]og sniffs as part of a random, suspicionless search policy enjoy a presumption of validity after [*Acton* and] *Earls*." James & Larson, *supra* note 2, at 51.

¹⁴⁰ *Id.* Of course if dog sniffs are deemed not to constitute Fourth Amendment searches as held by the *Doe* Court, they would be without the scope of the Fourth Amendment altogether.

¹⁴¹ It could be argued, however, that the search was unreasonable in its scope in that it was more intrusive than necessary to achieve its purposes. The students in Doe's school were each searched in the presence of their classmates. Thus the possible false alert to Doe was witnessed by her whole class, subjecting her to the humiliation of her fellow students suddenly assuming that she was a drug user. The dog sniffs could have been conducted in a manner more respectful to student privacy by having the dogs sniff the students privately rather than in the more public context of the classroom. As noted by dissenters favoring an individualized suspicion requirement in *Acton*: "[A]ny distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential." *Acton*, 515 U.S. at 677 (O'Connor, J., dissenting). Whether this "less drastic alternative" to the classroom search would be required by the Supreme Court is doubtful, however, given the Court's reluctance to impose such alternatives. *See supra* notes 87-94 and accompanying text.

¹⁴² *See supra* note 124. The *Doe* Court's finding of reasonable suspicion through the alert of the dog is enhanced by the Supreme Court's later views in *United States v. Place*, 462 U.S. 696, 707 (1983), in which it found sniffs of property by a well-trained canine to be "*sui generis*" in the sense that the "sniff discloses only the presence or absence of narcotics" and thus constitutes an effective and minimally intrusive investigative technique.

¹⁴³ The search of Doe's pockets is similar to the search of T.L.O.'s purse which the Court upheld as supported by "reasonable suspicion." *See supra* note 9.

dard.¹⁴⁴ As discussed above, that standard is rife with uncertainty.¹⁴⁵

As an initial ambiguity, whether *Redding's* two factors constitute a conjunctive or disjunctive standard¹⁴⁶ raises obvious difficulties. Is it necessary to show *both* that the school officials had reason to believe that Doe's possible possession of marijuana constituted a "danger" to the educational environment *and* that they had reason to believe she had hidden the marijuana under her clothing, or will a showing of *either* suffice? As will be shown, the facts of *Doe* provide evidence of both prongs but whether such is sufficient "reason" to search under either is simply not clear. Thus, whether the *Redding* factors are conjunctive or disjunctive they offer little assistance in determining the constitutionality of the strip search of Doe.

a. The Danger Factor

As for the first, the "danger" factor, the school officials strip searched Doe because they believed she possessed marijuana. While the *Acton* and *Earls* Courts found the substance's possible presence along with other illegal drugs at school sufficiently serious to justify unparticularized urinalysis of significant segments of the school population,¹⁴⁷ does the presence of

¹⁴⁴ Thus *T.L.O.* takes on secondary importance. This is true regardless of whether strip searches in contexts like *Redding* and *Doe* are deemed the culmination of one progressively more intrusive search or are viewed as a search separate from any prior intrusion. See *supra* notes 40-48. If the strip search is the culmination of one search process, it was "justified at its inception" by the likelihood that some student possessed marijuana at school. See *supra* notes 138-41 and accompanying text. The reasonableness of the strip search would thus be conceptualized in terms of whether the scope of the search became unduly intrusive under *T.L.O.'s* scope principles and *Redding's* two factors. See *supra* notes 39-43 and accompanying text. If, one on the other hand, the strip search constitutes a separate search, its "justification at its inception" as well as its constitutionality in general would appear to be determined entirely in terms of the *Redding* factors.

¹⁴⁵ See *supra* notes 52-79 and accompanying text.

¹⁴⁶ See *supra* notes 53-55 and accompanying text.

¹⁴⁷ See *supra* notes 7-8, 137. The *Acton* Court described the "deleterious effects of drugs [including marijuana] on motivation, memory, judgment, reaction, coordination, and performance." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995). The Court saw deterring drug use in schools as an "important" if not "compelling" educational interest in part because school years are the time when the physical, psychologi-

marijuana alone constitute sufficient “danger” to justify the “categorically distinct intrusion” entailed in strip searches?

Although the *Redding* Court found that the threat posed by the pills suspected in that case did not pose sufficient danger to justify the strip search, the Court did suggest that “large amounts” of prescription strength ibuprofen or over-the-counter Advil or Aleve would have sufficed.¹⁴⁸ The quantity of suspected drugs appears relevant for two reasons: overdosing can cause physical harm to the one using the drug and possession of it in large quantities is evidence of intent to distribute it to other students.¹⁴⁹

On the overdosing issue, large quantities of marijuana may appear to pose less danger than large quantities of Advil or Aleve.¹⁵⁰ On the other hand, the dangers entailed in distribution of marijuana within the school may be greater than those involved with Advil or Aleve.¹⁵¹ Thus perhaps only the

cal, and addictive effects of drugs are more severe. *Id.* at 661. Moreover, the effects of “drug-infested” schools “are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted” by students in a “state of rebellion” against rules imposed by the school and, in the case of marijuana, by the criminal law. *Id.* at 662-63. However, Justice Breyer appears to view marijuana use in schools as a less substantial problem than the use of other illegal drugs. In discussing the problem of drugs in school he notes that “about 30% of all students [have used] drugs *other than marijuana* prior to completing high school.” *Bd. of Educ. v. Earls*, 536 U.S. 822, 839 (2002) (Breyer, J., concurring) (emphasis in original).

¹⁴⁸ See *supra* note 30 and accompanying text.

¹⁴⁹ See *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2642 (2009).

¹⁵⁰ While poisoning from an overdose of either Advil or Aleve is a distinct possibility, UNIVERSITY OF MARYLAND MEDICAL CENTER, Medical Reference, *Ibuprofen Overdose - Symptoms* <http://www.umm.edu/ency/article/002655sym.htm> (last visited Dec. 11, 2009), there has apparently never been a documented case of marijuana overdose. WIKI ANSWERS, *Answers - Can you overdose on marijuana if so how* http://wikianswers.com/Q/Can_you_overdose_on_marijuana_if_so_how (last visited Dec. 11, 2009).

¹⁵¹ Long term health risks of marijuana use are controversial. Some studies claim “that regular heavy use of cannabis carries significant risks for the individual user” ranging from increased likelihood of cancer and schizophrenia to behavioral and physical dependence in seven to ten percent of regular users. Harold Kalant, *Adverse Effects of Cannabis on Health: An Update of the Literature Since 1996*, available at <http://www.sciencedirect.com> (last visited Dec. 11, 2009). Other researchers claim, on the other hand, that evidence of a causal relationship between marijuana use and harmful health effects is lacking, thus rendering cannabis “a relatively safe drug.” Leslie Iversen, *Long-term Effects of Exposure to Cannabis*, available at

presence of marijuana in significant quantities will pose a danger under *Redding*. If so, how can it be determined whether a danger was present in *Doe*? The dog alert established the possible presence of marijuana but could not indicate its quantity. Thus the school officials in *Doe* had no way of knowing whether the dog was alerting to a baggy full of the substance or to an amount insufficiently copious to roll a single joint.

On the other hand, might the presence of marijuana in school, regardless of its quantity, constitute a *Redding* danger,¹⁵² indeed a more substantial one than the Court's suggested risks posed by significant quantities of Advil and Aleve in the schools? Unlike those over-the-counter drugs, possession of even a small quantity of marijuana is generally a crime exposing youthful possessors to the juvenile, and perhaps the criminal, justice system.¹⁵³ As a consequence, school authorities have an interest in protecting their students from the possible negative effects of being labeled a "delinquent" or even worse a "criminal."¹⁵⁴ Such interests exist even where, as in *Doe*, only

<http://www.sciencedirect.com> (last visited Dec. 11, 2009). Short-term effects of marijuana use are not in doubt. Consumption of the drug results in increased heart rate, lowered blood pressure, impairment of short-term episodic memory, working memory, psychomotor coordination, and concentration. WIKIPEDIA, *Cannabis*, available at <http://www.wikipedia.com/wiki/cannabis> (last visited Dec. 11, 2009). Such effects could pose health risks to individual students with existing conditions exacerbated by increased heart rate or lowered blood pressure, while causing obvious damage to the educational environment as students are rendered less able to remember what they have learned and to concentrate on their studies. Thus significant numbers of students each with access to marijuana would pose a serious threat to the educational enterprise.

¹⁵² The *Earls* Court recognized an "epidemic" of illegal drug use among students. 536 U.S. at 834. It also rejected a "threshold level" of drug use as a precondition for a drug testing program for school students. *Id.* at 836. In rejecting the idea that only evidence of large quantities of drugs justify school searches, the Court noted: "[W]e refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'" *Id.*

¹⁵³ See National Organization to Reform Marijuana Laws, available at <http://norml.org/> (last visited Dec. 14, 2009). For a discussion of delinquency jurisdiction in juvenile courts and possible "waiver" to criminal court for minors committing criminal acts, see MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 186-91 (3d ed. 2009).

¹⁵⁴ The Court has recognized that the term "delinquent" has come to involve "only slightly less stigma than the term "criminal." *In re Gault*, 387 U.S. 1, 23-24 (1967). Justice Breyer saw it as a virtue that the school officials in the *Earls* case, like those in

school disciplinary measures flow from discovery of marijuana possession at school. After all, students who possess marijuana at school likely also possess it outside school, thus subjecting themselves to all the possible law enforcement consequences of their criminal acts. Removing marijuana from students' possession at school thus might prevent such out of school consequences.

Because marijuana is criminal contraband, school authorities have additional interests in ridding their schools of its presence. As the Court has recognized, schools "prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."¹⁵⁵ Teaching students to obey society's laws is surely a fundamental aspect of their learning the meaning of good citizenship.

Moreover, the allure of illegal drugs might be especially attractive to students, especially adolescents, as a symptom of their common tendency to rebel against established rules.¹⁵⁶ Given this tendency and the influence of peer pressure, "the single most important factor leading schoolchildren to take drugs,"¹⁵⁷ it is easy to see how even small quantities of marijuana in schools could be deemed a "danger" under *Redding*.

A final factor should be taken into account in assessing the dangerousness of marijuana possession in school. If the substance is deemed non-dangerous under *Redding* that would mean that strip searches for its discovery would be unconstitutional under the conjunctive version of the *Redding* standard and more likely to be forbidden under the disjunctive version. Such consequences may provide incentives to students to bring

Doe, chose to deal with their drug problem in a manner that avoided criminal or juvenile court sanctions. *Earls*, 536 U.S. at 838 (Breyer, J., concurring).

¹⁵⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

¹⁵⁶ *See supra* note 147. As a group, adolescents are generally more likely to engage in risky behavior, including criminal conduct, than adults. *See* Elizabeth S. Scott et al., *Adolescent Decisionmaking in Legal Contexts*, 19 *LAW & HUM. BEHAV.* 221 (1995).

¹⁵⁷ *Earls*, 536 U.S. at 840 (Breyer, J., concurring).

marijuana to school and hide it in their underwear thus avoiding its possible discovery.¹⁵⁸

All of this illustrates the uncertainty of whether the threat of marijuana in *Doe* posed a danger under the available standards provided by the Court. Even if the Court offers further guidance, the danger assessment, except in a few obvious situations, is a normative matter, a straightforward policy judgment, not subject to objective determination.¹⁵⁹

b. The In the Underwear Factor

The second factor of the *Redding* standard, the concern that school officials have reason to believe that a student is carrying evidence of wrongdoing in her underwear, is irrelevant if *Redding* embraces a disjunctive standard and the danger factor is satisfied through the reasonable belief of school officials that a student possesses dangerous contraband with no particular understanding that it might be hidden under their clothing. In such a situation, and assuming that the Court continues its reluctance to require exhaustion of less drastic alternatives,¹⁶⁰ it would apparently be constitutional to directly strip search the student even with no particular reason to believe he had anything hidden in his underwear just in case the dangerous item was so hidden.

Because it is uncertain whether the *Redding* standard is disjunctive or conjunctive and equally uncertain whether the threat of marijuana in *Doe* constituted a *Redding* danger, it is necessary to assess the second, the in the underwear factor, in order to determine the constitutionality of the strip search in *Doe*. As with the danger factor, however, the *Redding* Court

¹⁵⁸ See *infra* notes 182-84 (discussing similar considerations in the context of possession of stolen money).

¹⁵⁹ This is not to say that the notion of “danger” is impossible to define more narrowly. For example, the Court could limit the term to the risk of serious physical harm or bodily injury as opposed to the open-ended dictionary definition of “exposure to possible evil, injury, or harm.” WEBSTER’S II: NEW COLLEGE DICTIONARY (2001). Moreover, the Court could clarify whether its danger inquiry is limited to risk of harm to students or also extends to protecting the general educational environment. See *supra* note 56 and accompanying text.

¹⁶⁰ See *supra* notes 87-94 and accompanying text.

offers virtually no guidance as to how this assessment should proceed.

In *Doe*, the school officials suspected that the student was hiding marijuana under her clothing as evidenced by the dog's alert and the failure to discover contraband through the prior search of Doe's clothing. Would this evidence provide sufficient reason to believe Doe had hidden marijuana under her clothing under *Redding's* second factor or would the Court require more specific evidence along the lines of a witness informing school officials that she saw Doe put marijuana under her clothing? Even if the dog sniff evidence is considered indirect, as a general Fourth Amendment matter direct evidence is not required to establish reasonable suspicion or even probable cause to conduct non-strip searches.¹⁶¹ Given the Court's recognition that strip searches are often experienced as particularly humiliating to young people,¹⁶² it is possible that a more rigorous evidentiary standard might be in order as justification for student strip searches.

Assuming that ordinary Fourth Amendment evidentiary standards are in place, it would appear that the dog sniff provided the school officials good reason to believe Doe had hidden marijuana beneath her clothing, thus seemingly satisfying the second prong of the *Redding* standard. If so, and assuming that even if marijuana does not constitute a danger under a disjunctive standard, it would appear that the strip search of Doe was constitutional contrary to the *Doe* court's finding.

This conclusion might be further supported by the fact that even though the police were involved, the search in *Doe* was not conducted for law enforcement purposes but only to rid the schools of drugs and visit school discipline upon offending students. *Dicta* in *T.L.O.* suggests that Fourth Amendment ri-

¹⁶¹ "[T]he probable cause standard does not require the police to have direct, physical evidence . . ." *Gibson v. State*, 758 So. 2d 782, 790 (La. 2000). Thus, for example, hearsay evidence is sometimes sufficient to establish probable cause, *Jones v. United States*, 362 U.S. 257, 271 (1960), even hearsay-upon-hearsay, *see, e.g., United States v. Mathis*, 357 F.3d 1200, 1204 (10th Cir. 2004) ("[M]ultiple layers of hearsay may support a finding of probable cause for a search warrant.").

¹⁶² *See supra* note 29 and accompanying text.

gor might be further relaxed for school administrative searches but more rigorously imposed when school searches are conducted by the police or perhaps by school officials with law enforcement consequences in mind.¹⁶³ This consideration may translate to the strip search context by allowing school authorities greater leeway, giving them more “reason,” to conduct strip searches where the consequences of such to the student are merely school discipline rather than juvenile or criminal court sanction.

3. Summary

All of this illustrates that the Supreme Court case law post-*Doe* provides little analytical assistance in resolving the questions posed by the case.¹⁶⁴ We are thus left with the following: assuming that the dog sniff was not itself a “search,” or if it was, not an “unreasonable” one (a good assumption); if *Redding* espouses a disjunctive standard (maybe it does, maybe it doesn’t), the search was constitutional if marijuana constitutes a *Redding* danger (unclear) or if the dog sniff provided reason

¹⁶³ Citing lower court case law requiring probable cause rather than reasonable suspicion as required for school searches involving the police, the *T.L.O.* Court stated:

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.

New Jersey v. T.L.O., 469 U.S. 325, 342 n.7 (1985). Two concerns seem to be in play here. Searches conducted by the police rather than by school officials may be thought to be inherently more intrusive to the student thus perhaps necessitating a higher level of justification for the search. The other consideration appears to be that in light of the fact that searches conducted for law enforcement purposes often result in more severe consequences to the student than those conducted for school administrative purposes, a higher level of justification again might be required. At least one court upholding a strip search of a student on suspicion of marijuana possession found it relevant that the search was “conducted by school officials with no law enforcement officials present.” *Rone ex rel. Payne v. Daviess Cnty. Bd. of Educ.*, 655 S.W.2d 28, 30 (Ky. Ct. App. 1983) (suggesting that the search might be less constitutionally acceptable had it been for law enforcement purposes).

¹⁶⁴ Whether the above analysis of *Doe* is complete without relating *T.L.O.*’s age and sex of the student considerations is unclear. See *supra* note 129. *Doe* was a female of junior high age. See *supra* notes 106-13 and accompanying text.

to believe Doe had hidden contraband under her clothing (probably good reason). If *Redding* espouses a conjunctive standard (maybe it does, maybe it doesn't), marijuana must pose a *Redding* danger and the dog must have provided sufficient reason to believe Doe had hidden contraband under her clothing. In light of such uncertainty, the most that can be said is that the *Doe* court's conclusion that the strip search was unconstitutional may be erroneous.

*B. Galford v. Anthony*¹⁶⁵: *Stealing Your Teacher's Money*

Galford is a post *T.L.O.* case which involved a strip search of a student suspected of stealing money from a teacher's purse during school hours. After the teacher reported that \$100 was missing from her purse which she had placed under her desk during a period when her classroom was empty, school officials focused their suspicion upon a fourteen-year-old student, Mark, who was known both to be on probation for attempted burglary and likely to have been alone in the classroom during the time it was empty. Acting on this evidence, the school social worker confronted Mark who admitted being alone in the classroom but denied taking the money. After examining Mark's pockets and looking in his socks, the social worker informed the school principle that he had found nothing and that if Mark possessed the money it must be hidden in his underwear. The principal then took Mark into the boy's bathroom, looked in his pockets and socks and, again finding nothing, asked Mark to lower his pants and pull his underwear open in the front and back. Mark's compliance with these requests revealed the missing \$100 hidden in the back of his underwear. Mark confessed to stealing the money which was returned to the teacher who initiated criminal proceedings against Mark, resulting eventually in his adjudication as a delinquent.

Mark moved to suppress the evidence as the product of a violation of his Fourth Amendment rights. The court agreed, finding that while the searches of Mark's pockets and socks were reasonable under *T.L.O.*'s "justified at its inception"

¹⁶⁵ 433 S.E.2d 41 (1993).

prong, the subsequent strip search exceeded the second, “reasonable in its scope,” prong and was thus unconstitutional.¹⁶⁶ The court presumed the strip search to be “excessively intrusive” and per se unconstitutional in the absence of “exigent circumstances” posing “immediate danger” to the “safety of other students.”¹⁶⁷ Mark’s suspected theft of the money did “not begin to approach” the level of threat to other students necessary to sustain the strip search.¹⁶⁸

A colorful dissenting opinion allowed that it would be unreasonable to strip search a student suspected of “stealing an elephant” but totally reasonable to do so for one suspected of stealing money, given that “nine out of ten experienced thieves believe that the best place to *hide* something is where it is unlikely to be discovered.”¹⁶⁹ Thus “where else would a guilty child hide \$100 [but in his underwear]?”¹⁷⁰ In the dissenter’s view “[i]f any search is justified, then a search reasonably calculated to discover *hidden* contraband is justified.”¹⁷¹ Failure to permit the search risked the school’s ability to protect the “morals” of the student and “to maintain the proper functioning of the school.”¹⁷² Such a failure led the dissenter to conclude “[i]f we wonder why our schools are going to hell in a handbasket, it’s probably because of decisions like [the majority’s].”¹⁷³

¹⁶⁶ *Id.* at 45, 49. The court focused on the unique intrusiveness of strip searches:

At 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. Looking inside of a student’s underwear is an invasion of personal privacy that should not be equated with searching a student’s locker or other personal possessions.

Id. at 48.

¹⁶⁷ *Id.* at 49.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (Neely, J., dissenting).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

1. *Redding* and *T.L.O.*

The *Galford* court treats the multiple searches conducted by the principal as essentially a single search process beginning with the search of Mark's pockets and socks and culminating in the strip search. The court then assesses the search in terms of the two-prong *T.L.O.* standard finding it justified at its inception but excessive in its scope as it progressed to the strip search. This view of the search as a single process with attention directed to its reasonableness at its inception and to its intrusiveness in its eventual scope may well be the approach taken by the *Redding* Court¹⁷⁴ with the addition of its two-factor standard as an aid in determining the search's constitutionality under the scope issue.¹⁷⁵ In any event, as with the *Doe* case, *Redding* provides little guidance in determining the legality of the strip search in *Galford*.

2. *Redding's* Two Factor Standard

As in the analysis of the *Doe* strip search, the same problems with the conjunctive/disjunctive ambiguity of the *Redding* standard are obviously present in rethinking *Galford*. The facts of *Galford* provide evidence supporting both prongs of the *Redding* standard without clearly establishing either, again rendering *Redding* of little utility under either the conjunctive or disjunctive standard.

a. *The Danger Factor*

Without access to the *Redding* opinion, the *Galford* court nevertheless focused on danger considerations in finding that the constitutionality of a student strip search hinged on a showing that such search was necessary to protect "the safety of [students] other" than the one being searched.¹⁷⁶ Under this view, the *Galford* court was correct in concluding that no danger was present in the case.

¹⁷⁴ See *supra* notes 40-43 and accompanying text.

¹⁷⁵ See *supra* notes 40-43 and accompanying text.

¹⁷⁶ See *supra* note 167 and accompanying text.

However, it is not clear that a post-*Redding* analysis would necessarily yield the same conclusion. Arguably the *Galford* court's conceptualization of danger is narrower than that articulated under *Redding*'s concern with avoiding "danger to students."¹⁷⁷ This language suggests a broader interest in protecting all students, including the one being searched, from danger. If, for example, a particular student was thought to possess a substance deadly only to himself because of his unique allergies, it is difficult to see how this could not constitute a danger under *Redding* if there existed reason to believe the student was about to ingest the substance.

Moreover, it is unclear whether *Redding*'s concern with avoiding "danger to students" is limited to risks of physical harm or whether it is broad enough also to cover "dangers" to their emotional well-being or to general educational interests of students and the school at large.¹⁷⁸ *Acton* and *Earls* permitted wholesale drug searches in part to protect against the danger of disruption of the educational process.¹⁷⁹ Even though strip searches are "categorically distinct invasions," there is no reason to distinguish the educational interest in *Acton* and *Earls* from those in *Redding* by necessarily ruling out protection of the educational environment as a "danger to students."

Therefore, the question in *Galford* may be recharacterized in terms of whether the stolen money thought to be possessed by Mark constituted a "danger" to him or to the educational environment of the school in general. If so, the situation in *Galford* may well have been considerably more dangerous than that identified by the court.

Whether there existed a *Redding* danger to Mark himself by his possession of the stolen money depends on how one looks at the situation. While certainly risking no physical harm to himself, the facts of *Galford* make clear that possession of the contraband clearly endangered his ability to continue his education at his school as well as to put him at risk of significant legal consequences. So viewed, the money in his pocket consti-

¹⁷⁷ See *supra* text accompanying note 4.

¹⁷⁸ See *supra* note 56.

¹⁷⁹ See *supra* note 147.

tuted a danger to his individual interests in receiving an education and remaining free from the restraints of liberty entailed in legal sanctions for theft. Of course, in *Galford* the search itself *resulted* in those dangers being visited upon Mark. In other contexts, however, a strip search revealing money stolen from a teacher might have the effect of protecting the student from such dangers if the student “is given another chance,” and as a consequence of the search is deterred from committing additional offenses which would have resulted in his being suspended from school and subjected to legal sanctions. This manifestation of “specific deterrence”¹⁸⁰ is consistent with the school’s interest in protecting its students from engaging in criminal conduct¹⁸¹ as well as its interest in teaching its students civility.¹⁸²

Possession of stolen money by a student thief can be viewed as a “danger” not only to the particular student but also to the school at large. If hiding contraband under one’s clothing insulates student thieves from strip searches, thefts at school might increase as students succumb to temptations to steal with the knowledge that they need only hide their ill-gotten gains in their underwear thus avoiding possible detection.¹⁸³ If, on the other hand, strip searches to recover stolen property are permitted to address the “danger” of school theft, the effect may be to “generally deter”¹⁸⁴ theft-prone students.

¹⁸⁰ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (4th ed. 2006) (specific deterrence occurs when one is dissuaded from future misconduct by having unpleasantness visited upon him for his past misconduct).

¹⁸¹ See *supra* note 154 and accompanying text.

¹⁸² See *supra* note 155 and accompanying text. Certainly a student stealing money from a teacher raises a serious moral and legal problem going to the heart of the school’s mission in teaching civility to its students.

¹⁸³ Under the conjunctive version of the *Redding* two-factor standard, hiding non-dangerous contraband in one’s underwear would absolutely insulate the offending student from a strip search. Under the disjunctive version, the student might still be stripped searched if sufficient reason existed to believe he had hidden the non-dangerous contraband in his underwear.

¹⁸⁴ See DRESSLER, *supra* note 180 (general deterrence occurs when the general community is dissuaded from engaging in misconduct because of fear of having the same unpleasantness visited upon them that they see visited upon those engaging in the misconduct).

Finally, the *Galford* court was probably correct in concluding that the situation in the case posed no “exigent circumstances” posing “immediate danger” to the students in Mark’s school. *Redding* however, makes no mention of a requirement that the danger be “immediate.” The “dangers” justifying the searches in *T.L.O.*, and *Earls* posed no “immediate” threats to educational interests.¹⁸⁵ As far as “exigent circumstances” are concerned, they were arguably present in *Galford* in any event. The principal knew that the money had been stolen on the day he searched Mark and that Mark had been in school the entire day. If the principal had delayed his search until a time that allowed Mark to leave school premises, he would likely have removed the money from his underwear and not have continued to carry it on his person. If possession of the money constituted a danger, exigent circumstances justified an immediate search.

As with the marijuana issue in *Doe*, it is clear that a host of educational policy issues are at stake in determining whether possession of stolen money constitutes a danger under *Redding*. As such, reasonable minds will surely differ on the issue. Without further guidance from the Supreme Court, we are left with the situation reflected by the *Galford* court with the majority seeing the theft by Mark as “not even beginning to approach” a danger sufficient to justify a strip search¹⁸⁶ and the dissent accusing the majority of contributing to the educational

Outside the strip search context the Court has allowed school officials to search students in order to deter a potential school problem which might occur in the future. In *Earls*, some evidence of occasional drug use existed but there was no evidence of a massive problem. Nevertheless the Court permitted urinalysis tests of a large portion of the student body. See the *Earls* quote, *infra* note 185.

¹⁸⁵ *T.L.O.* involved a student smoking in the school restroom and *Earls* involved a potential threat of a future drug problem. See *supra* notes 8-9. The *Earls* Court specifically rejected a requirement that the drug threat be immediate.

[T]he need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Bd. of Educ. v. *Earls*, 536 U.S. 822, 836 (2002).

¹⁸⁶ See *supra* text accompanying note 168.

system's "going to hell in a handbasket" through its blindness to the obvious danger posed by Mark's possession of the stolen money.¹⁸⁷

b. The In the Underwear Factor

Unlike the situation in *Doe*, school authorities had individualized suspicion of Mark from the inception of the search process. The evidence supporting the strip search was less direct than that in *Doe*, however, being inferred from the belief that Mark may have stolen the money and hidden it in his underwear when the search of his pockets and socks yielded nothing, rather than based on a dog or a witness directly identifying him as possessing contraband. Again, the fact that no direct evidence suggested that Mark had hidden the money in his underwear does not necessarily render unreasonable the suspicion that he had so hidden it.¹⁸⁸ That the strip search in *Galford*, unlike the one in *Doe*, in fact revealed the suspected contraband is, of course, irrelevant in determining whether the search was founded on reasonable belief that the money was hidden in Mark's underwear.¹⁸⁹

The principal conducted the strip search based on his knowledge that Mark had been alone in the classroom and thus had the opportunity to steal the money. Apparently the principal did not engage in an extensive investigation to discover whether any other person might also have had a similar opportunity.¹⁹⁰ Surely it would have been more reasonable to believe Mark had stolen the money if it were known that he had been the only student with the opportunity to steal the money.

Such failure to investigate the possibility that someone else might have stolen the money is perhaps excused because of the principal's knowledge of Mark's past troubles with the law.

¹⁸⁷ See *supra* text accompanying note 173.

¹⁸⁸ See *supra* note 161 and accompanying text.

¹⁸⁹ "It is axiomatic that hindsight may not be employed in determining whether a prior . . . search was [constitutional]." WAYNE R. LAFAYE, 2 SEARCH AND SEIZURE 47 (4th ed. 2004).

¹⁹⁰ It is not clear from the facts whether such an investigation would have been practical under the circumstances.

Courts routinely take into account character assessments of particular students searched by school officials in determining whether such searches are reasonable.¹⁹¹

Finally, of possible relevance to the reasonableness of the strip search of Mark is the fact that the fruits of the search were used in evidence against him in juvenile court proceedings. As noted in the discussion of *Doe*, there is reason to believe that the Supreme Court might more rigorously scrutinize strip searches conducted for law enforcement purposes rather than those engaged in solely as matters of educational administration.¹⁹² While the police were not involved in Mark's strip search, the purpose of the search was to discover the fruits of a crime which provided the basis for the teacher's initiation of delinquency proceedings. The search thus could easily be viewed as one initiated by school officials but conducted to a significant extent for law enforcement purposes.

3. Summary

As with the *Doe* case, existing case law is inadequate to assist with any degree of assurance a determination of the constitutionality of the strip search in *Galford*. Uncertainties about whether possession of stolen money constitutes a *Redding* danger and whether sufficient evidence existed to afford reason to believe Mark had hidden the money in his underwear make it impossible to confidently reach a conclusion under a disjunctive *Redding* standard much less a conjunctive one. Again, as with *Doe*, the most that can be said is that the *Galford* court's conclusion that the strip search was unconstitutional appears questionable.

¹⁹¹ See, e.g., the Ninth Circuit en banc opinion in *Redding* where the court noted that Redding was an "honor student" deeming the factor relevant in concluding that the school officials lacked sufficient reason to strip search her. *Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1074 (9th Cir. 2008) (en banc).

¹⁹² See *supra* note 163 and accompanying text. It must be noted, however, that the evidence obtained in the search of the student in *T.L.O.* was utilized in proceedings adjudicating her a delinquent resulting in her being placed on probation for one year. *New Jersey v. T.L.O.*, 469 U.S. 325, 329-30 (1985). The *T.L.O.* Court made no mention of the consequences of the search in reaching its conclusion.

*C. Fewless v. Board of Education of Wayland Union Schools*¹⁹³:
Uterior Motives and Accusations of Pot in "Butt Cracks"

Fewless involved the strip search of a fourteen-year-old student, Joseph, who had a history of lying and being the subject of school disciplinary procedures.¹⁹⁴ The search was precipitated by information provided to the assistant principal, Mr. Cutler, by two students, Terpstra and Letting, who had bullied Joseph in the past. The students informed Cutler, who was aware of the students' animosity towards Joseph, that he had told them that he was at that moment hiding marijuana in his "butt crack."¹⁹⁵ A shop teacher made a similar report¹⁹⁶ to Cutler pursuant to the teacher's receipt of information from some other students, probably the same ones informing Cutler earlier. After sharing the information with the school security officer, Cutler brought Joseph to Cutler's office where Joseph denied that he was hiding anything under his clothing. Cutler and the security officer then informed Joseph that any search beneath his clothing must be with his consent and Joseph stated that he had nothing to hide. Joseph then lowered his pants pursuant to Cutler's order and the security guard pulled back the waistband of Joseph's boxer shorts and observed his bare buttocks. Finding nothing, the two officials then allowed Joseph to go back to class.

The strip search was the culmination of a series of events beginning earlier in the day. Prior to the report of Terpstra and Letting to Cutler, Terpstra and three others, again all with a history of animosity towards Joseph, had informed Cutler that Joseph had told them that he possessed marijuana.¹⁹⁷ Cutler then confronted Joseph and searched his gym bag and pock-

¹⁹³ 208 F. Supp. 2d 806 (W.D. Mich. 2002).

¹⁹⁴ *Id.* at 812. Joseph was diagnosed with ADHD which contributed to impulsive behavior such as leaving his seat during class and talking out of turn. However, Joseph had no history of being disciplined at school for drug violations. *Id.*

¹⁹⁵ *Id.* at 810.

¹⁹⁶ The teacher reported that students had told him that Joseph had drugs down "the crack of his ass." *Id.*

¹⁹⁷ The students claimed Joseph had told them that he possessed marijuana in a dime roll which several of the students claimed to have seen. *Id.* at 809.

ets.¹⁹⁸ Finding no marijuana, Cutler sent Joseph back to class and informed Terpstra and another student that no marijuana had been found on Joseph. Subsequently, Terpstra and Letting made their report to Cutler informing him that Joseph had told them that the fruitless searches of his gym bag and pockets did not mean that he did not possess marijuana, but rather that he had evaded detection by hiding the substance in his “butt crack.”¹⁹⁹

Joseph subsequently brought an action claiming that the strip search violated his Fourth Amendment rights.²⁰⁰ The court agreed, finding that Joseph had not consented to the search²⁰¹ and that the strip search failed both prongs of the *T.L.O.* standard, being neither justified at its inception nor reasonable in its scope.²⁰²

The court clearly identified the strip search as a separate Fourth Amendment intrusion from the searches of Joseph’s gym bag and pockets,²⁰³ intrusions apparently justified both at their inception and reasonable in their scope.²⁰⁴ While the adequacy of the tips from students harboring animus towards Joseph were not questioned as providing an inadequate basis for supplying reasonable suspicion for the search of the gym bag and pockets, such tips were found wanting as grounds for the strip search. The court concluded that even though Terpstra and Letting were known informants, the situation was analogous to one involving an anonymous tip because their long standing animosity towards Joseph supplied them with “clearly

¹⁹⁸ Cutler also searched a dime roll in Joseph’s possession and found no contraband. *See supra* note 197.

¹⁹⁹ 208 F. Supp. 2d at 810.

²⁰⁰ Joseph made no claim that the search of his gym bag and pockets was illegal. *Id.*

²⁰¹ In an extensive discussion, the court found that Joseph had merely “acquiesc[ed]” in the search but had not freely and voluntarily “consented.” *Id.* at 813-15.

²⁰² *Id.* at 815-16.

²⁰³ “[T]wo searches of Joseph . . . occurred . . .” *Id.* at 809.

²⁰⁴ Because the search of the gym bag and pockets was not contested, *see supra* note 200, Joseph may well have conceded its constitutionality. Without addressing its constitutionality, the *Fewless* court simply stated that “the legality of this search is not at issue.” 208 F. Supp. 2d at 810.

possible ulterior motives” for informing on Joseph.²⁰⁵ These motives were known to Cutler and should have given him pause in relying on the truthfulness of the tip without further corroboration. The court faulted Cutler for not conducting “an investigation” to determine whether other students harboring no ill will towards Joseph might have corroborated the statements of Terpstra and Letting, or have otherwise provided statements or information helpful to determining whether reasonable suspicion existed to support a strip search.²⁰⁶ Furthermore, the court was critical of Cutler for failing to call Joseph’s parents who might have provided additional information regarding whether further investigation was warranted,²⁰⁷ for failing to question Joseph beyond confronting him with the “butt crack” accusation, and for failing to exhaust less drastic alternatives such as searching his locker or “other locations . . . which may have led a reasonable person to believe the accusations” before resorting to the strip search.²⁰⁸ While such failures spoke to the lack of justification for the strip search at its inception, the court also found the search unreasonably intrusive in its scope, given the fact that rather than pulling out the waistband of the student’s underwear and peering inside as was done to Joseph, there existed the less drastic alternative of asking the student “to shake his . . . underwear, while not exposing [himself], to see if any contraband were to come loose and become visible beneath the underwear.”²⁰⁹ Moreover, the court suggested that the strip search was further unreasonable because the search as conducted was unlikely to discover marijuana “placed deeply between the buttocks” and was thus pointless.²¹⁰ Therefore, the combination of questionable credibility of the informants because of their potential ill motives, the lack of other corroborating evidence, and failure to exhaust less drastic alternatives

²⁰⁵ 208 F. Supp. 2d at 816. The court saw the accusation by the students as “exactly an accusation of the type which might be expected to potentially result in a highly invasive and humiliating search” of Joseph. *Id.* at 819.

²⁰⁶ *Id.* at 817.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 820.

²¹⁰ *Id.*

rendered the “highly invasive and humiliating search”²¹¹ unconstitutional.

1. *Redding* and *T.L.O.*

Assuming that *T.L.O.* supplements *Redding* in informing constitutional analysis of strip searches,²¹² the two-factor inception and scope standard must be satisfied for searches to be constitutional. The *Fewless* court saw two analytically distinct searches in that case, the permissible search of Joseph’s gym bag and pockets and the unjustified at its inception and unreasonable in its scope strip search. While *Fewless* saw two searches, the situation could just as easily be viewed as a single search beginning with the gym bag/pockets and, after a brief interlude, progressing to the strip search.²¹³ As a practical matter it makes little difference whether *Fewless* is a one or two search situation because in either case if search activity fails either prong of *T.L.O.* any subsequent search causally connected to the tainted activity would necessarily be unconstitutional.²¹⁴

The *Fewless* court provided no explanation for why tips from informants with ulterior motives were inherently suspicious so as to render the strip search unjustified at its inception but were apparently sufficiently reliable to justify the search of the gym bag and pockets at its inception.²¹⁵ The court did describe strip searches as “highly invasive and humiliating,” thus seemingly embracing something like the *Redding* view that such searches are “categorically distinct” requiring heightened justification.²¹⁶ In finding no such justification, the *Fewless* court focused entirely on the inadequacy of suspicion to believe that Joseph had marijuana hidden beneath his clothing (the

²¹¹ *Id.* at 819.

²¹² *See supra* notes 129-30 and accompanying text.

²¹³ *See supra* notes 173-75 and accompanying text (discussing *Galford’s* single search conceptualization).

²¹⁴ *See supra* notes 130-32 and accompanying text.

²¹⁵ Again, the constitutionality of the first search was not at issue in *Fewless*. I am presuming that the court may have found it constitutional had the issue been decided. *See supra* notes 200, 204 and accompanying text.

²¹⁶ *See supra* note 27 and accompanying text.

second *Redding* factor) and made no mention of the possible danger posed by marijuana (the first *Redding* factor). Analyzing *Fewless* in light of *Redding* requires, of course, attention to both *Redding* factors.

2. The Danger Factor

The contraband at issue in *Fewless* was marijuana. The earlier discussion of the *Doe* case argues that the threat of marijuana in schools may constitute a *Redding* danger,²¹⁷ and if it does, the strip search in *Fewless* would be constitutional under the disjunctive version of the *Redding* standard²¹⁸ regardless of whether Cutler had sufficient reason to search beneath Joseph's clothing. Of course even if a danger existed in *Fewless*, the strip search would still be unconstitutional under *Redding's* conjunctive standard²¹⁹ if Cutler lacked sufficient reason to search beneath Joseph's clothing.

3. The In the Underwear Factor

As in *Galford*, but unlike the initial intrusion in *Doe*, school officials in *Fewless* possessed individualized suspicion of Joseph as a violator of a school rule. Moreover, unlike the other two cases where suspicion of evidence hidden beneath clothing was inferred through a process of fruitless less intrusive searches, the suspicion triggering the strip search of Joseph was grounded on evidence specifically indicating that he had hidden contraband beneath his clothing. Such evidence does not, of course, necessarily mean that the strip search in *Fewless* was inherently more reasonable than the ones in *Doe* and *Galford* where the suspicion of evidence hidden beneath the clothing was arrived at through an inferential process. The reasonableness of the searches in all three cases must be determined in terms of the reliability of the evidence, whether it be inferred or specific.

²¹⁷ See *supra* notes 147-58 and accompanying text.

²¹⁸ See *supra* note 35 and accompanying text.

²¹⁹ See *supra* notes 34-35 and accompanying text.

The reliability of the evidence in *Fewless* depends on whether the evidence provided by the two student informants constituted credible, believable, information. The *Fewless* court recognized that an informant's tip could create reasonable suspicion in some cases if considering the "totality-of-the-circumstances" the tip's "quantity and quality" is sufficiently credible.²²⁰ Such a standard appears at home with *Redding's* concern that there be reason to believe that a student has hidden evidence in his underwear as a factor in determining the legality of the actions of school officials who conduct strip searches. As noted, *Redding* offers no guidance in determining what reasonable belief would look like, thus leaving courts with broad discretion to make *ad hoc* judgments. That such judgments are often controversial is illustrated by a close examination of whether the evidence in *Fewless* provided a reliable basis to believe that Joseph had hidden marijuana beneath his clothing.

While the conclusion of the judge in *Fewless* is understandable, it is hardly the only one permitted under the facts. In fact, an argument can be made that under existing law at the time of *Fewless* the tip from the student informants not only provided reasonable suspicion that Joseph had marijuana hidden under his clothing but probable cause to believe that he did.²²¹

²²⁰ *Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 818 (W.D. Mich. 2002).

²²¹ While the law defining probable cause, like that of reasonable suspicion, is notoriously vague, the Supreme Court has provided a modicum of guidance in deciding whether information from informants constitutes probable cause. To begin with, it is helpful to distinguish between "citizen-informers," average citizens who by happenstance find themselves in the position of a witness to illegal activity, and "informant[s]," persons who routinely supply the police with information. See WAYNE R. LAFAVE, 2 SEARCH AND SEIZURE 98 (4th ed. 2004). Information from citizen-informers is deemed inherently more reliable than that of informers. *Id.* In the *Fewless* context, Terpstra and Letting would appear to be "citizen-informers" notwithstanding their animosity towards Joseph, thus entitling their information to a presumption of reliability perhaps approaching probable cause. *Id.*

But even if Terpstra and Letting are characterized as non-citizen informants, their information may well have constituted probable cause under Supreme Court case law. In *Aguilar v. Texas*, 378 U.S. 108 (1964), the Court fashioned a two-prong test in determining whether information provided by informants known to the police but ano-

Whatever the probable cause determination in *Fewless*,²²² reasonable suspicion to strip search appears to have existed. The court's conclusion that the students' tip was inherently suspect because of their animosity towards Joseph is surely questionable. It is often the case that an informant's animosity towards an alleged offender provides *more*, not less, reason to believe in the reliability of the information.²²³ Terpstra and Letting could easily be viewed not as "anonymous" informants as the court chose to designate them,²²⁴ but students who

nymous to the magistrate constituted probable cause to issue a warrant. The first prong requires that facts exist showing that the informant has a basis for knowing the truthfulness of his allegation, while the second prong requires that facts exist showing either the inherent credibility of the informant or the reliability of his information on the particular instance at issue. LAFAVE, *supra* this note. The "basis of knowledge" prong is satisfied if the informant himself has perceived the fact asserted. *Spinelli v. United States*, 393 U.S. 410, 425 (1969) (White, J., concurring). The second prong of the test is established either by showing the credibility of the informant in providing truthful information in the past or by showing that the informant is making a declaration against his interest. LAFAVE, *supra* this note, at 100-01. Terpstra and Letting's information clearly appears to satisfy the first prong since they both claim to have heard the fact asserted, namely that Joseph stated that he had marijuana hidden beneath his clothing. The second prong of the test is arguably satisfied because their statement is against their interests in that, if false, it could subject them to disciplinary action for falsely accusing a fellow student. The second prong could also be satisfied if, not knowable from the facts of *Fewless*, the students had provided truthful information in the past.

Finally, the fact that Terpstra and Letting's statement is hearsay insofar as the truth of the matter asserted (whether Joseph had marijuana hidden beneath his clothing) does not negate the possibility of probable cause. The *Aguilar* Court specifically noted that affidavits meeting its two-prong test are routinely based on hearsay. 378 U.S. at 114.

²²² In criticizing the need for a relaxed reasonable suspicion standard for school searches, Professor LaFave has argued the standard is unnecessary because the school cases reaching the courts "strongly suggest that in most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test. In the great majority of cases, the searches were conducted on the basis of information received from other students." WAYNE R. LAFAVE, 5 SEARCH AND SEIZURE 495 (4th ed. 2004).

²²³ See, e.g., *Massachusetts v. Upton* 466 U.S. 727, 733-34 (1984) (viewing the informant's desire "to burn" her former boyfriend as a motive lending credibility to her accusations against him); *State v. Martinez*, 432 So. 2d 1201, 1203 (La. Ct. App. 1983) ("The suggestion of the informant's vengeful motives does not defeat her credibility . . .").

²²⁴ This assessment by the court appears to be an after the fact judgment much like the one made by the *Doe* court. See *supra* notes 124-27 and accompanying text. When

risked sanction for providing false information in a face to face meeting with a school official. Moreover, the reliability of their information need not be called into serious question by Joseph's subsequent denial of drug possession given his reputation for lying. Of course his reputation for lying might also call into question his alleged statement to Terpstra and Letting. In any event, it was far from clear that Cutler was obligated to spend time, if any was in fact available, seeking corroboration of the tip before strip searching Joseph.²²⁵

Finally, the requirement that Cutler should have exhausted less drastic alternatives prior to strip searching Joseph is at odds with the Court's general reluctance to impose such a requirement.²²⁶ Given the silence of the *Redding* Court on the issue, there is no reason to believe that such requirement exists as a precondition to valid strip searches.

3. Summary

None of this is to say that the *Fewless* court was clearly wrong in finding an absence of reasonable suspicion to support the strip search. The point of the discussion is simply to illustrate that, as in *Doe* and *Galford*, clear answers are unavailable even after *Redding*. Uncertainties about whether marijuana possession constitutes a *Redding* danger and whether the student informants provided sufficient evidence to believe Joseph had hidden marijuana under his clothing make it impossible to reach a clear conclusion under either a disjunctive or conjunctive *Redding* standard. Again, as with *Doe* and *Galford*, the most that can be said is that the *Fewless* court might have reached an erroneous conclusion.

no marijuana was found on Joseph, it is much easier to attribute motives to Terpstra and Letting to harass an innocent Joseph rather than to cause a guilty one to experience the unpleasantness entailed in being caught possessing marijuana.

²²⁵ It is not clear from the facts of *Fewless* whether Cutler would have had time to corroborate the tip on the day it was received. Corroboration on any subsequent day would risk removal of the marijuana, had it been present on Joseph's person.

²²⁶ See *supra* notes 87-94 and accompanying text.

IV. REDDING'S FUTURE

In separate opinions, two *Redding* Justices offered strikingly different appraisals of the significance of the case. Justice Stevens downplayed the case suggesting that it “leaves the boundaries of the law undisturbed,” charts “no new constitutional path,” and does little more than decide whether the strip search at issue in the case was constitutional “on these facts.”²²⁷ On the other hand, Justice Thomas saw *Redding*, with its invitation to courts to make danger assessments in determining the constitutionality of strip searches, as a case empowering judges to be the arbiters of delicate matters of educational policy.²²⁸ If one of these views ultimately prevails, *Redding* will either be a decision so narrow as to be of little utility in deciding future cases or one so broad as to require judges to replace educational policymakers as the determiners of what constitutes a danger to the educational process. Either way, *Redding* is unlikely to provide an acceptable objective framework to assist courts in deciding the types of cases they will be called upon to consider in the future.

Justice Stevens' view is surely too narrow. *Redding* will certainly prove to be more than a case merely deciding the constitutional consequences of those particular facts. The Court provided its two-factor standard as the means for determining the constitutionality of student strip searches. The standard does entail a new approach, with the two factors involving significantly different kinds of inquiries. Requiring courts to assure that sufficient reason to believe that a student has contraband hidden under her clothing before school officials strip search her is, to a large degree, a factual matter examining whether sufficient evidence supports the belief. It is the kind of inquiry familiar to the judiciary, well within its competency to decide,²²⁹ and relatively free from value assessments involving

²²⁷ Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2645 (Stevens, J., concurring in part and dissenting in part.).

²²⁸ *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part).

²²⁹ The inquiry is in many ways similar to the probable cause to search decisions routinely made by courts in which they decide whether the “facts and circumstances in a given situation are sufficient to warrant a person of reasonable caution to believe

educational policy. On the other hand, inviting independent judicial assessments of the reasonableness of school officials' fear of danger to their students, or to the educational environment at large, introduces a much broader inquiry into matters of educational policy than was permitted under the Court's previous student search cases.²³⁰ Thus Justice Thomas's concern with *Redding's* blessing to judicial danger assessments appears well-founded.²³¹

Determining "danger" in the educational context is often a value laden, educational policy, inquiry as the discussion of *Doe* and *Galford* makes clear.²³² Courts are ill-suited, indeed incapable, arbiters of educational policy as the Court itself has explicitly indicated and indirectly acknowledged through its refusal in recent cases to interfere with the discretion of educators when challenged by constitutional claims of students.²³³

that seizable objects are located at the place to be searched." CHARLES H. WHITEHEAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 162 (5th ed. 2008). The inquiry is thus "objective" and "not dependent upon the subjective view of the . . . authorizing magistrate." *Id.*

²³⁰ See *supra* notes 15, 43-48 (discussing the "nature of the infraction" consideration under *T.L.O.'s* reasonable scope prong). See generally, James and Larson, *supra* note 2, at 23 (arguing that the Court had allowed in its pre-*Redding* cases such broad deference to educators in conducting school searches that their actions are constitutional so long as they are performed in the "good faith" attempt to further their educational mission).

²³¹ See *supra* notes 56-69 and accompanying text. It should be noted, however, that such assessments may not be necessary in all post-*Redding* strip search cases. If the conjunctive version of the *Redding* standard is eventually settled on, some cases might be decided by finding searches unconstitutional for want of adequate reason to search beneath students' underwear without ever reaching the danger factor. On the other hand, if the disjunctive version ultimately emerges, cases manifesting adequate reason to search beneath the underwear will be constitutionally permissible without necessitating a danger assessment.

²³² See *supra* notes 147-59, 176-87 and accompanying text. It has been argued schools are "mediating institutions" between individuals and the state which instill constitutional values to students thus entitling schools to certain forms of constitutional protections. This in turn means that "many issues that appear to raise constitutional questions will be understood as issues that primarily raise questions of educational policy." See generally Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 670 (1987).

²³³ "[C]ourts are not school boards . . . and are ill-equipped to determine the necessity of discrete aspects of a State's program of compulsory education." *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972). See generally James & Larson, *supra* note 2, at 4; Hafen,

How then are courts to understand and apply the danger factor in future strip search cases?

Rather than embrace *Redding's* invitation to judicial policymaking, Justice Thomas opts for a "return to the 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.'"²³⁴ Such a view advocates total removal of the Fourth Amendment from the school search context.²³⁵ For Thomas, the alternatives appear to be either Fourth Amendment applicability with wholesale judicial oversight of educational policy decisions or no Fourth Amendment applicability at all.

Whatever the merits of Thomas's plea to remove Fourth Amendment applicability from schools, there is no indication that anyone else on the Court is inclined to find it attractive any time soon.²³⁶ While Thomas's proposal is unrealistic, he is

supra note 232, at 681 ("[T]he Supreme Court has been very reluctant actually to interfere with the discretion needed by authorized providers of child supervision."). One commentator summarized *T.L.O.'s* deference to educators as follows: "In essence the *T.L.O.* Court signaled that . . . in the school search context, it trusted those who worked in schools every day to better discern the importance of school rules than judges in far-off courtrooms." Ann Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 83 (1996).

²³⁴ 129 S. Ct. at 2646 (Thomas, J., concurring in part and dissenting in part) (quoting *Morse v. Frederick*, 551 U.S. 393, 414 (2007) (Thomas, J., concurring)).

²³⁵ While Thomas espouses judicial "reluctance" to intervene in school matters, his position clearly amounts to a rejection of Fourth Amendment applicability to school searches altogether. He distinguishes his position from *T.L.O.'s* "prevailing Fourth Amendment test," 129 S. Ct. at 2646, thus seemingly embracing the pre-*T.L.O.* view taken by some courts that the *in loco parentis* doctrine rendered the Fourth Amendment inapplicable to school searches because school officials stood literally in the place of the parent and thus acted in a private, non-governmental, capacity. *See, e.g., Mercer v. State*, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970). This view is expressly accepted by Thomas, who advocates viewing school searches as delegations of parental authority, thus without the scope of Fourth Amendment protection. 129 S. Ct. at 2655-56.

²³⁶ Justice Thomas's view is at odds with a variety of Supreme Court cases rejecting his view of the *in loco parentis* doctrine as a basis for denying constitutional protection for school students:

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the consti-

nevertheless justified in his concern that *Redding* plants the seed for wholesale judicial second-guessing of the decisions of educators made in the exercise of their charge to maintain discipline and safety within their schools. This prospect is surely a recipe for chaos²³⁷ and perhaps serious harm should educational officials become unduly hesitant to conduct searches necessary to protect their students out of fear of subsequent judicial sanction for their actions.²³⁸ A clear need thus exists to find an approach which guides the courts in honoring Fourth Amendment values without, at the same time, transforming them into overseers of educational policy.

A. Suggestions

1. Eliminate the Danger Factor?

One way to prevent judicial overreaching would be to eliminate danger considerations from constitutional assessments of strip searches, and limit such inquiries to a requirement that *Redding's* in the underwear factor be satisfied. Requiring that

tutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985) (citations omitted).

²³⁷ One commentator observed that "entry into school discipline of so formidable a force as the courts and the judicial process may simply discourage some school officials from taking firm disciplinary action." J. Harvie Wilkinson, III, *Goss v. Lopez: The Supreme Court As School Superintendent*, 1975 SUP. CT. REV. 25, 68.

²³⁸ A teacher who hopes to avoid trouble will not always respond right away to problems in the classroom. Rather than dealing with a problem immediately, careful teachers will either spend time trying to ascertain whether a court would find their suspicion reasonable or, more likely, will avoid the problem altogether to avoid any controversy. Dupre, *supra* note 233, at 95.

school officials have specific reason to believe that a student to be searched has hidden evidence of wrongdoing in her underwear is a sensible necessary threshold for valid strip searches, the permissible scope of which could be determined in light of the *T.L.O.* age and sex of the student considerations.²³⁹

At first glance, such an approach might appear appealing. While not an entirely “objective” matter, decisions about whether sufficient “reason” to believe contraband might be hidden in a student’s underwear do not on their face invite the incursions into educational policy risked under the danger factor of the *Redding* standard.

Situations may arise, however, that counsel against the elimination of danger considerations from assessments of strip search constitutionality. Suppose, for example, school officials are informed on very good authority that some unknown student is carrying powerful explosives on his person and is intent on detonating them at school on the day the officials receive the information. The officials suspect no particular student nor have information leading them necessarily to believe that the student possessing the explosives has hidden them in his underwear. Thus, absent a standard that factored in considerations of danger, it would appear that the officials could not strip search any student. Yet, surely a strong argument can be made that under the circumstances the school officials should be able to search, even strip search, the entire student body until the explosives were confiscated without incurring Fourth Amendment liability.²⁴⁰ A Fourth Amendment standard without danger considerations, but requiring reason to believe that evidence of wrongdoing is hidden in a student’s underwear,

²³⁹ See *supra* notes 14-15 and accompanying text (discussing *T.L.O.*’s “nature of the infraction” consideration). It might also be relevant not to invite danger assessments but to limit searches to areas where the object of that infraction might be hidden, see *supra* notes 44-50 and accompanying text, although such a view appears entailed within the requirement that school officials have specific reason to believe contraband is hidden in the student’s underwear before embarking on a strip search.

²⁴⁰ Assuming, of course, that the search process does not itself create the risk of the student igniting the explosives in response to the searches. Such a risk could be reduced if school officials monitor the actions of each student until each is searched and exonerated.

may thus inhibit the officials from taking the very actions necessary to save the lives of their students.²⁴¹

It thus appears desirable to retain danger considerations in assessments of strip searches in schools. At the same time, it is desirable to do so in a manner that does not routinely involve the courts in deciding matters of educational policy.

2. Limited Judicial Danger Assessments: An Analogy to the Court's Eighth Amendment Proportionality Case law

The Court has confronted an analogous problem in its Eighth Amendment proportionality of punishment cases in which it engages in assessments of whether particular terms of imprisonment are proportional to the gravity of the offenses for which they are imposed.²⁴² Similar to assessments of “danger” under *Redding*, determining the danger posed by a given offense is essentially a policy question incapable of judgment under an objective standard.²⁴³

²⁴¹ “The prospect of a lawsuit, with its resulting publicity, expense, and unpleasantness is hardly one that will be relished by either teacher or school administrator, even if the school and teacher are ultimately vindicated.” Dupre, *supra* note 233, at 94. Of course, some school officials would risk Fourth Amendment liability and conduct wholesale strip searches until the danger to the school was alleviated. Others may take other actions such as immediately sending all the students home thus avoiding any student searches but risking an explosion that could physically damage the school and cause student injury and loss of life.

²⁴² See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980) (holding life imprisonment with possibility of parole not disproportionate punishment under recidivism statute); *Solem v. Helm*, 463 U.S. 277, 303 (1982) (holding life imprisonment without possibility of parole disproportionate punishment under recidivism statute); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding mandatory life imprisonment for possessing more than 650 grams of cocaine not disproportionate punishment); *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (holding twenty-five years to life imprisonment not disproportionate punishment under recidivism statute).

²⁴³ In its proportionality of punishment cases, the Court begins its analysis by addressing “the gravity of the offense compared to the harshness of the penalty” in light of the underlying purposes of punishment. See, e.g., *Ewing*, 538 U.S. at 28. In reality this inquiry involves “not applying law but evaluating policy.” *Id.* at 32 (Scalia, J., concurring). Indeed, proportionality of punishment analysis in general does not lend itself to objective analysis:

The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world

In this light, some members of the Court, including Justice Thomas, have argued that assessments of offense gravity are inherently subjective and thus should be left entirely to policymakers.²⁴⁴ In the same spirit as Justice Thomas's rejection of Fourth Amendment applicability to school searches, these Justices have argued that outside the context of capital punishment, the Eighth Amendment should not apply to questions of proportioning punishments to the gravity of the offenses for which they are imposed.

While a majority of the Court has recognized the unwisdom of involving courts in appropriate policy assessments when engaging in proportionality of punishment analysis,²⁴⁵ it has nevertheless rejected the argument that such analysis should therefore be entirely outside judicial review.²⁴⁶ Instead, the Court has adopted a very strong presumption in favor of legislative deference in determining appropriate punishments for given offenses.²⁴⁷

A similar approach should be adopted by courts making danger assessments under *Redding*. What follows is a suggested approach to assessing danger under *Redding* which allows for such within a framework affording proper deference to educators.

In making danger assessments under *Redding*, the views of Justice John Marshall Harlan provide a helpful way forward.

enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

Harmelin, 501 U.S. at 986. Similarly, permitting judges to assess "danger" within the educational context "becomes an invitation to imposition of subjective values," thus allowing judges to evaluate the danger assessments of "the assemblage of men and women" educators charged with protecting schools from danger.

²⁴⁴ See *Ewing*, 538 U.S. at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

²⁴⁵ In expressing its "tradition of deferring to state legislatures in making . . . [the] important policy decisions" involved in enacting crimes and their respective punishments, the Court has recognized that such decisions involve "difficult policy choices" which should not, except in rare circumstances, be "second-guess[ed]" by the courts. *Ewing*, 538 U.S. at 24-25, 28 (Breyer, J., dissenting).

²⁴⁶ See *supra* note 243.

²⁴⁷ It will be a "rare occurrence" for a contested punishment to be found by a court as "gross[ly] disproportion[ate]" to the offense for which it is imposed. 538 U.S. at 36 (Breyer, J., dissenting). See *supra* note 243.

In reaching the proper balance between protecting the constitutional rights of students without impinging upon the expertise of educators, Justice Harlan argued:

I am reluctant to believe that there is any disagreement . . . on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases [where students allege violations of their constitutional rights] . . . cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns . . .²⁴⁸

Inquiry into “legitimate school concerns” should not invite judicial evaluations of whether particular school rules themselves adequately protect against dangers to the educational environment. As the *T.L.O.* Court stated:

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. . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in schools and rules that are not.²⁴⁹

This adoption of the Harlan test would constitutionally entitle educators to decide whether strip searches are necessary to alleviate dangers to their students or to their educational mission except in rare cases where they act with indifference to

²⁴⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

²⁴⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 343 n.9 (1985). The *Redding* Court reiterated this point. *See supra* note 23 and accompanying text.

school concerns and thus in bad faith.²⁵⁰ There is no reason to believe that school officials would abuse such broad discretion by routinely conducting strip searches of their students.²⁵¹ The overwhelming majority of educators have their students' interests at heart, including their privacy concerns. They are likely aware of the possible traumatic effects of strip searches.²⁵² Indeed, when left to decide on their own, some educational policymakers have chosen to forbid strip searches altogether.²⁵³ But, for those who see strip searches as a rare necessity in some circumstances, the Harlan standard would allow such searches when educators in good faith decide they are necessary to alleviate dangers to their schools.

While this standard allows broad discretion without fear of judicial oversight, it is not toothless. Searches conducted maliciously, to harass, or with indifference to legitimate school concerns would violate the Fourth Amendment.

3. Rejecting a Conjunctive Standard

The reasons that counsel for retaining the danger factor in assessing strip search constitutionality also lead to rejecting a

²⁵⁰ Thus, if school officials conduct searches out of a desire to harass or humiliate a student rather than for legitimate school concerns, they act for an inappropriate reason and thus act in bad faith. Similarly, they act in bad faith if they conduct searches with indifference to legitimate school concerns, thus acting for no good reason. A subjective "good faith" test may appear at odds with the seemingly objective "reasonable suspicion" standard recognized by the *T.L.O.* Court as the governing test for Fourth Amendment assessments of school searches and seizures. *See supra* note 10 and accompanying text. I have argued, however, that the *T.L.O.* Court itself effectively embraced a good faith test in the name of "reasonable suspicion." *See Gardner, supra* note 47, at 378-80. *See also supra* note 230. Some lower courts have similarly embraced a good faith test in non-strip search cases. *See Gardner, supra* note 47, at 388-92.

²⁵¹ "[T]eachers . . . who function in custodial and teaching roles make paternalistic decisions constantly, weighing the merits of the conflicting principles in each situation: order and liberty, inquiry and inculcation, love and discipline." Hafen, *supra* note 232, at 669.

²⁵² School officials regularly conduct in-service training with principals and school counselors updating them on search and seizure developments. *See, e.g.*, Interview with Jennifer C. Drahota, Principal, Westside Elementary, Norfolk Pub. Sch. in Lincoln, Neb. (Mar. 2, 2010).

²⁵³ At least seven states have prohibited strip searches and a variety of individual school boards promulgated similar prohibitions. *See Brief, supra* note 29, at 14-15.

conjunctive version of the *Redding* standard. As illustrated by the case posed above where school officials have very good reason to believe that some unknown student possesses and intends to detonate powerful explosives,²⁵⁴ situations may arise justifying strip searches where the danger factor is clearly satisfied but no reason necessarily exists to believe that any student has hidden contraband in his underwear. A conjunctive version of the *Redding* standard would preclude strip searches in such a case thus endangering the lives of both students and teachers.

Having rejected the *conjunctive* version of *Redding*, the question then becomes whether the second, the in the underwear factor, remains relevant as part of a *disjunctive* standard given the interpretation of the danger factor argued for above. Under that interpretation, school officials will be presumed to search to alleviate a legitimate danger to their schools unless it is shown that they act in bad faith.²⁵⁵ Under such a test, most strip searches will satisfy the danger consideration. For those that do not, the official will necessarily be acting for no good reason (indifference to school concerns) or for a malicious and patently bad reason. Under such circumstances, it appears that the second factor of the *Redding* standard (the in the underwear factor) has no work to do. School officials should not be permitted to strip search a student in bad faith simply because they have reason to believe the student has hidden some evidence of wrongdoing in his underwear. Thus, if a search is aimed at alleviating a school danger, it is permitted. If no danger exists, the search is not permitted. Applying Occam's Razor, the two-factor *Redding* standard should thus be reduced to a single consideration: danger to the educational environment.

The consequences of rejecting the conjunctive standard and granting educators broad discretion under the danger factor could lead to controversial results. Suppose, for example, that a school has adopted a rule against possessing chewing gum at school and that school officials possess good reason to

²⁵⁴ See *supra* notes 239-41 and accompanying text.

²⁵⁵ See *supra* notes 248-50 and accompanying text.

believe that Student X possesses a stick of chewing gum somewhere on his person. Assuming that school officials are not in bad faith in enforcing the chewing gum rule, they would be justified in searching, indeed strip searching, Student X. It is, of course, likely that few, if any school officials, would actually strip search Student X in these circumstances given the apparent absence of significant danger.²⁵⁶ However, as Justice White stated in an analogous context, “[t]his is cold comfort indeed” for absent a Fourth Amendment guarantee, “there would be no basis for deciding such cases should they arise.”²⁵⁷

While the Constitution may not protect Student X, parents and local government officials may challenge unwise educational practices and effectuate changes in policy through the democratic process.²⁵⁸ Moreover, educational policymakers should themselves provide protection by, as argued below, fashioning regulations to guide educators in the exercise of their discretion.

The proposed test offers broad discretion to school officials virtually free from judicial oversight. At the same time, the test notifies educators that they may not strip search unless an educational danger is at stake. While admittedly vague, such a standard is not meaningless but functions as a “decision rule”²⁵⁹ in defining broad, but not unlimited, governmental power to intervene in order to protect interests of vital impor-

²⁵⁶ It is likely that school officials would see a minimal degree of danger posed by chewing gum and choose not to strip search the student in this situation.

²⁵⁷ *Harmelin v. Michigan*, 501 U.S. 957, 1018 (1991) (White, J., dissenting) (arguing why an Eighth Amendment proportionality principle is necessary to avoid the possibility of a legislature making overtime parking a felony punishable by life imprisonment, even though such a situation is almost certain never to occur). *See supra* notes 242-44 and accompanying text (discussing the analogy between danger considerations in assessing the constitutionality of strip searches and assessments of “gravity of offenses” in Eighth Amendment proportionality of punishment inquires).

²⁵⁸ *See Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2656-57 (2009) (Thomas, J., concurring in part and dissenting in part).

²⁵⁹ For a discussion of the role played by “decision rules,” as distinguished from “conduct rules,” in allowing discretion for decision makers to exercise *parens patriae* power on behalf of young people, see generally Martin R. Gardner, “*Decision Rules and Kids: Clarifying the Vagueness Problems With Status Offense Statutes and School Disciplinary Rules*,” 89 NEB. L. REV. 1 (2010).

tance to young people.²⁶⁰ By mandating substantial judicial deference to school officials, the standard is thus perhaps as meaningfully addressed to educational policymakers as to courts. It grants educators the ability to adopt practices they deem necessary to protect their schools with minimal fear of judicial interference, while at the same time allowing for a modicum of constitutional student privacy protection. Moreover, as will be shown immediately below, the suggested standard provides a much clearer vehicle for assessments of the constitutionality of strip searches in schools than does *Redding's* nebulous two-factor rubric.

4. Applying the Suggested Standard

The usefulness of the proposed standard is manifested by its application to the facts of the cases considered above, *Doe*, *Galford*, *Fewless*, and indeed to *Redding* itself. Such examination yields easy conclusions in each case establishing that each was wrongly decided.

In *Doe* and *Fewless*, school authorities had reason to believe that the students in the respective cases possessed marijuana in violation of both school and criminal rules. In both cases, the officials were clearly “motivated by legitimate school concerns” in conducting the searches and were thus seeking to alleviate an educational “danger.” The searches were thus clearly constitutional.²⁶¹

²⁶⁰ *Id.*

²⁶¹ Incidentally, in both *Doe* and *Fewless* the school officials also had reason to believe that the dangerous contraband was hidden in the respective student's underwear. In *Doe* the school officials had evidence, perhaps direct, that Doe was hiding contraband in her underwear when the dog continued to alert to her after the prior search of her clothing yielded no evidence. *See supra* notes 159-63 and accompanying text. Similarly, in *Fewless*, school officials possessed statements from arguably reliable informants specifically claiming that the student had hidden marijuana beneath his underwear. *See supra* notes 219-26 and accompanying text. But because an educational danger, marijuana in school, existed in both cases, inquiry into whether or not reason to search in the underwear is unnecessary as it would be in every case. *See supra* text accompanying note 256-57. Had the searches been motivated by something other than “legitimate school concerns,” to harass or humiliate the students for example, they would have been unconstitutional regardless of the specific reason to believe Doe and Fewless, respectively, had hidden evidence of wrongdoing in their underwear.

Galford is perhaps a bit more difficult case. Even though the motivations for the search for the stolen money may have been partly grounded in “law enforcement” interests,²⁶² the search would also appear to have been conducted as a “school concern”²⁶³ thus rendering the stolen money a “danger” to the educational environment²⁶⁴ and therefore justifying the search.²⁶⁵

As for *Redding*, it is again clear that the search was conducted in a good faith attempt to protect students from the harm posed by the misuse of prescription drugs. There is no evidence that the search was motivated by anything other than “a legitimate school concern.” The strip search was therefore constitutional.²⁶⁶

5. Suggested Educational Policy Regulations

The suggested standard grants broad discretion to educators to make decisions to strip search students. Such is obviously subject to potential abuse. For example, school officials who strip search students in a good faith attempt to enforce school rules thereby act legally but might nevertheless act unwisely.²⁶⁷ Others might misuse their authority by hiding actual bad

²⁶² The money recovered by the school officials in *Galford* was turned over to the police who subsequently initiated delinquency proceedings against him. If such is a “law enforcement” matter, it might be treated under different standards than those governing school searches. *See supra* notes 83, 163-64, 191-92 and accompanying text.

²⁶³ *See supra* note 248 and accompanying text.

²⁶⁴ For a discussion of the “danger” presented by the stolen money in *Galford*, see *supra* notes 176-85 and accompanying text.

²⁶⁵ Such a conclusion would, again, be reached without any inquiry into whether or not those searching *Galford* had specific reason to believe that he had hidden evidence of wrongdoing in his underwear.

²⁶⁶ Such a conclusion was also reached by two of the lower courts deciding *Redding* prior to its consideration by the Supreme Court. The District Court for the District of Arizona found no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed. *Redding v. Safford Unified Sch. Dist. #1*, 504 F.3d 828, 831 (9th Cir. 2007) (no reported opinion by the District Court).

²⁶⁷ *See, e.g., supra* note 256 and accompanying text. A strip search conducted in good faith in those circumstances would be legal but almost certainly unwise.

faith while conducting unnecessary strip searches by feigning good faith enforcement of a school rule.²⁶⁸

Much of this potential evil can be avoided if educational policymakers adopt regulations circumscribing their power consistent with their need to maintain discipline in their schools. As mentioned above, they might choose to forbid strip searches altogether. But if they see strip searches as sometimes necessary, a protocol for its employment should be in place.

Given the potential traumatic effects on students subjected to strip searches,²⁶⁹ those making decisions whether or not to conduct such searches should be required to be familiar with the social science literature documenting the risks of trauma. Moreover, regulations might require exhaustion of all less drastic search alternatives, thus forbidding strip searches unless necessary²⁷⁰ to avoid dangers to the educational environment. Such dangers could be defined, if possible, based on educational priorities of particular schools or districts.²⁷¹ Where searches are conducted for offenses prohibited by the criminal law, a preference for calling in law enforcement officers to conduct the searches might also be embodied in the regu-

²⁶⁸ A school official might, for example, harbor intense animus towards a particular student and look for an excuse to harass and humiliate him by conducting a strip search.

²⁶⁹ See *supra* note 29 and accompanying text.

²⁷⁰ For an example of such a provision, see CHARLOTTESVILLE CITY PUBLIC SCHOOLS: SEARCH AND SEIZURE, 11-12 (Issued Aug. 17, 2009) [hereinafter CHARLOTTESVILLE REGULATION], which permits strip searches when “necessary” to address an imminent threat of death or great bodily injury to a person or persons.” Policymakers who choose to require exhaustion of less drastic alternatives must realize, however, that such a requirement might create the possibility of judicial second-guessing of their decisions should students claim that less drastic alternatives were not exhausted. See *supra* note 87 and accompanying text.

²⁷¹ See *supra* note 270; see also MO. REV. STAT. § 167.166 (2009) (permitting strip searches where school officials “reasonably believe” a student possesses “a weapon, explosive, or substance that poses an imminent threat of physical harm to himself or herself or another person”). Note, however, that such terms as “weapon,” “explosive,” and “physical harm” are themselves relatively vague and subject to interpretation. Rather than limiting themselves to an ill-defined list of school “dangers,” policymakers may instead prefer to rely entirely on the vague concept of “danger” itself as an “informal standard . . . permitting ad hoc situation sensitive decisions in particular cases.” See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15 (1987).

lations.²⁷² Regulations should require that searches should be conducted by persons of the same sex as the student being searched, that searches be conducted in private places, and that a second person of the same sex as the searcher be present to reduce the possibility of abuse of the student or claims of such. Finally, those fashioning the regulations should require notifying parents or guardians when a student in their charge is strip searched either as a prerequisite prior to the search²⁷³ or after the fact depending on the policy judgment deemed appropriate.²⁷⁴ By adopting regulations, even if minimal, educational policymakers will be forced to think carefully about when, if ever, strip searching students is justified and thereby make wiser decisions regarding its employment should that be their choice.

V. CONCLUSION

The *Redding* case was anticipated with great interest as the vehicle through which the Supreme Court would provide meaningful direction in the weighty matter of determining the constitutionality of strip searches of school students in the context of an unsettled and confusing body of legal doctrine and delicate policy considerations. The *Redding* Court recognized

²⁷² See, e.g., CHARLOTTESVILLE REGULATION, *supra* note 270, and the Missouri statute, *supra* note 271, both of which require that strip searches be conducted by law enforcement officers unless the “seriousness of the situation” justifies searches by school officials, CHARLOTTESVILLE REGULATION, *supra* note 270, at subsection (12 & 13), or a “law enforcement officer is not immediately available,” MO. REV. STAT. § 167.166(2). Note, however, that school searches by law enforcement personnel might ultimately be subject to a more rigorous Fourth Amendment threshold than those by school officials governed by the reasonable suspicion standard. See *supra* notes 83, 163-64 and accompanying text. The preference for strip searches by law enforcement, rather than school, officials may reflect a policy judgment that student/teacher trust is better perpetuated by not having an educator strip search her student. On the other hand, a strip search by a law enforcement officer—a total stranger to the student—might be more intimidating to the student than if the search were conducted by a school official familiar to the student.

²⁷³ See *supra* note 97 and accompanying text.

²⁷⁴ See, e.g., CHARLOTTESVILLE REGULATION, *supra* note 270, at 14 (providing “parents or guardians shall be notified as soon as possible when any student has been the subject of a personal search”); MO. REV. STAT. § 167.166(4) (requiring that the district “attempt to notify the student’s parent or guardian as soon as possible.”).

and accepted the challenge, promising this time to provide a “sufficiently clear statement” of guiding principles to determine the legality of strip searches. Unfortunately, the Court failed to deliver, making an early lament of then Justice Rehnquist all too relevant: “Certainty and repose . . . may not be the destiny of man, but one might have hoped for a higher degree of certainty in this one narrow but important area of the law than is offered by today’s decision.”²⁷⁵

The *Redding* Court is not even certain about the appropriate Fourth Amendment standard, articulating its newly identified two-factor test in two inconsistent conjunctive and disjunctive formulations. Assuming that the Court continues to embrace its two-factor standard in the future, it is imperative that it clarify whether it intends the conjunctive or disjunctive version.

This Article has shown that *Redding’s* uncertainties render it an inadequate vehicle for advancing analysis of the kinds of cases likely to face the courts in the future. Moreover, its invitation to judicial policymaking constitutes a new and highly unwise dimension to the Court’s school search and seizure law.

With the safety and security of educational institutions and the dignity and psychological wellbeing of students at stake, a clear and effective standard is needed to guide decision makers in making hard judgments about the wisdom and the legality of strip searches of students. I have suggested such a standard, couched in terms of broad discretion to educators with recommended regulations that limit, or even ban altogether, the activity of strip searching students.

In the end, the question comes down to whether or not we can generally trust educators to have the best interests of all of their students at heart. A leading commentator put the matter this way:

[I]f we are unwilling to defer to teachers when they are motivated by “legitimate school concerns,” if we are unconcerned about the lack of respect that students show toward both public school teachers and the process of learning in

²⁷⁵ Steagald v. United States, 451 U.S. 204, 231 (1981) (Rehnquist, J., dissenting).

that institution; if we are unwilling to trust public school educators to implement necessary disciplinary measures so that serious learning can and will take place, we should disband our nation's public schools and declare them a failed experiment.²⁷⁶

²⁷⁶ Dupre, *supra* note 233, at 105 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting)).