Strip Searching Students:

The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law (Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009))

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Prior Supreme Court Caselaw

- Supreme Court's latest attempt at articulating how Fourth Amendment applies in public school context
- Challenge: Balancing privacy interest (student) vs. public school safety and efficiency (administration)
- First case: *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)

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T.L.O. Standard:

- Court held the Fourth Amendment applicable to school searches, but rejected traditional "probable cause" standard and required "reasonable suspicion"
- Two-pronged inquiry: (1) Whether the search was reasonable at inception and (2) Whether search conducted was reasonably related in scope to circumstances that justified the search

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T.L.O. Two-Pronged Inquiry:

- "Justified at inception" means:
  - reasonable grounds to suspect that the search will turn up evidence indicating that the student has violated either the law or a school rule
- "Reasonably related in scope" means:
  - 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

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Redding Facts

- 13-year-old honor roll student suspected of hiding prescription and over-the-counter drugs on her person
- Accusations made to Assistant Principal:
  - Marissa, a fellow student, who was discovered to have several pills, which she claimed to have received from Redding. Marissa was also in possession of Redding's day-planner, which contained non-prescription contraband.

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- Jordan, a fellow student, turned in a pill he claimed to have received from Marissa.
- A week earlier, Jordan had become ill from taking a pill – and that Jordan claimed students were threatening to bring drugs and weapons to school
- Jordan informed the Assistant Principal that students were planning on taking the pills at lunch

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- Redding admitted to being friends with Marissa and owning the day planner, but denied knowledge of any contraband;
- Redding consented to a search of her backpack and outer clothing, which turned up no evidence of contraband;
- Female nurse and female administrative assistant took Redding to the nurse's office and asked her to remove all of her clothing, except her bra and underwear, and pull out her bra and underwear and shake them.

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- Court concluded that school officials had reasonable suspicion that Redding was distributing pills and search of backpack and outer clothing was not excessively intrusive
  - No *T.L.O.* analysis
  - No attempt to relate the "age, sex, and nature of the infraction" factors
  - No assessment of balancing interests of school officials v. student privacy

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- The Court noted research indicating that strip searches are traumatic, embarrassing, and humiliating to young people.

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- Court viewed the strip search as a "categorically distinct search"
- The Court held that the content of the suspicion failed to match the degree of the intrusion entailed in the strip search of Redding thus rendering the search violative of the Fourth Amendment.

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CONJUNCTIVE

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

DISJUNCTIVE

- "We do mean, though, 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 make the quantum leap from outer clothes and backpacks to exposure of intimate parts."

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Which Test Applies?

- CONJUNCTIVE: Presence of danger factor **and** underwear factor
- DISJUNCTIVE: Presence of danger factor **or** underwear factor

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Two Factors: Danger Factor

- "[W]hat was missing from the suspected facts that pointed to [Redding] was **any indication of danger to the students from the power of the drugs or their quantity,** and any reason to suppose that [Redding] was carrying pills in her underwear."
  - The "danger factor"
  - What constitutes a "danger?"
  - Arguably a vague standard imposed by the Court

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Two Factors: Underwear Factor

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

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Questions Raised in *Redding*:

- One search or two?

One search

(1) Backpack/outer clothing ending in strip-search

Two searches

(1) Backpack/outer clothing; **(2)** Strip-search

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More Questions Raised . . .

- Whether *Redding's* "suspicion of danger factor" is a function of the "nature of the infraction" consideration under the second prong of the *T.L.O.* standard?
  - Is the Court departing from *T.L.O.*'s instruction that we not second-guess the relative importance of school rules?
  - Or, in the context of strip searches, has the Court carved out an exception permitting judicial assessments of danger?

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More Questions Raised . . .

- Given the Court's failure to directly apply the *T.L.O.* standards, it is possible to read *Redding* as altogether replacing the *T.L.O.* rubric with the new two—factor approach fashioned especially for the "categorically distinct" context of strip searches.

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Some Unanswered Questions . . .

- Must school administrators exhaust "less drastic alternatives" before conducting "categorically distinct" strip searches?
- Do strip searches require parental notification prior to the search?
- Do "categorically distinct" strip searches require individualized suspicion prior to the search?
- Do *T.L.O*'s "age and sex of the student" and "nature of the infraction" factors apply?

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Re-Thinking Existing Caselaw Under *Redding*:

- ***Doe v. Renfrow***, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd per curiam*, 631 F. 2d 91 (7th Cir. 1981), *cert. denied* 431 U.S. 1022 (1981).
  - Concerned of alcohol, marijuana, and PCP possession and consumption 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.

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Doe v. Renfrow continued . . .

- The dogs sniffed each student at school
- The dog "alerted" to approximately 50 students
- 11 students were subjected to strip searches when the dogs continued to alert to them after they had emptied their pockets and purses.
- The searches revealed no drugs or other contraband.
- Junior high student Diane Doe subsequently brought an action for violation of the Fourth Amendment.

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Doe Search

- Dog alerted to Doe
- Doe was asked to empty her pockets and purse
- Strip search was conducted in the school nurse's station by two female school officials who ordered Doe to remove her clothing and turn her back to them while she disrobed
- School officials briefly examined her clothing and immediately permitted Doe to dress, presumably never having to face the officials

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Constitutionality of dog sniff & search of Doe's pockets:

- **Dog sniff:** Not a Fourth Amendment search
- **Pocket Inspection:** Fourth Amendment search, but reasonable
  - School officials had "reasonable cause to believe" that some students were violating or had violated school rules prohibiting drug activity at school and particular suspicion of Doe in light of the fact that the dog had alerted to her.

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Constitutionality of strip search:

- The *Doe* court found the strip search "unreasonable" in light of its infringement of the "individual's basic justifiable expectation of privacy."

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Renfrow re-analyzed in light of *Redding*

- Initial analytical questions are posed:
  - Whether *Redding* alone provides the proper analytical standard or whether it should be supplemented by *T.L.O.*'s two—prong test?
  - In cases like *Doe* 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?

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Analysis:

- Under either interpretation, the constitutionality of the strip search cannot be assessed in isolation of 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 unconstitutional because of its causal linkage to the prior unconstitutional searches.

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Analysis continued . . .

- Thus 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."

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- The first such intrusion is the dog sniff of Doe.
  - *Doe* court held the sniff was not a "search," therefore, carrying no Fourth Amendment consequences.
  - Two federal circuits have disagreed and held dog sniffs in similar circumstances to *Doe* to be Fourth Amendment searches.
  - Supreme Court clarification desired.

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- Assuming that the dog sniff was a search, was it supported by "reasonable suspicion?" If so, utilizing the dog to detect Doe's possible possession of marijuana appears to be "reasonable at its inception."
  - Supreme Court has found "reasonable suspicion" for the unparticularized searches for drugs including marijuana in *Acton* (student athletes) and *Earls* (students involved in extra-curricular activities).
  - Neither of those cases involved searching an entire student body for marijuana, as was the case in *Doe*.

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- Whether the second intrusion – search of pockets was reasonable?
  - 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.
  - The subsequent search of her pockets was therefore reasonable.

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The Strip Search

- Whether the strip search was constitutional?
  - Constitutionality of the strip search depends on the *Redding* two-factor standard.
  - Is it necessary to show *both* that the school officials had reason to believe that Doe's possible possession of marijuana constituted a "danger" *and* that they had reason to believe she had hidden the marijuana under her clothing?
  - *Or* will a showing of either suffice?

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The *Redding* Danger Factor:

- Does the presence of marijuana alone consittute a sufficient "danger" to justify the "categorically distinct intrusion?"
  - The *Acton* and *Earls* Courts found the possible presence of marijuana, along with other illegal drugs at school, sufficiently serious to justify unparticularized searches.
  - The *Redding* Court suggested that "large amounts" of prescription strength ibuprofen or over—the—counter Advil or Aleve would have sufficed.
  - The dog alert indicates the possible presence of marijuana but cannot indicate its quantity.

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The *Redding* Underwear Factor:

- In *Doe*, school officials had evidence that the student was hiding marijuana under her clothing based on the dog alert and failure to discover the contraband during search of Doe's clothing. Would this evidence suffice as reason to believe that she was concealing marijuana beneath her clothing?
- Is this sufficient to satisfy underwear factor or would the Court require additional evidence? If so, what?

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Conjunctive/Disjunctive *Redding* Standard

- Under the disjunctive standard only have to satisfy "the danger factor" or "the underwear factor."
- Under the conjunctive standard must satisfy both "the danger factor" and "the underwear factor."

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Conclusion:

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 to believe Doe had hidden contraband under her clothing (probably).

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.

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Conclusion:

- 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.
- The exercise of rethinking *Doe* in light of *Redding* and the Court's other student search caselaw only reaffirms the points made earlier that a host of questions regarding the constitutionality of school strip searches remain unanswered.

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Re-Thinking Existing Caselaw Under *Redding*:

Galford v. Anthony, 433 S.E. 2d 41, 189 W. Va. 538 (1993).

- *Galford* involved a strip search of a student suspected of stealing $100 dollars from a teacher's purse during school hours.
- Teacher reported the money was missing from her purse, which she had placed under her desk during a period when her classroom was empty.

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- 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.
- Mark admitted to being alone in the classroom, but denied stealing the money.

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- School social worker searched Mark's pockets and socks, finding nothing.
- Principal took him to 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.
- Principal found the $100 dollars
- Teacher initiated criminal proceedings against Mark resulting eventually in his adjudication as a delinquent.

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- Mark moved to suppress the evidence as the product of a violation of his Fourth Amendment rights.

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- The Court held that search of his pockets and socks were reasonable under T.L.O. "justified at its inception" prong, but the subsequent strip search exceeded the second, "reasonable in its scope" prong.

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- The Court held the strip search was unconstitutional, presuming it to be "excessively intrusive" and per se unconstitutional in the absence of "exigent circumstances" posing "immediate danger" to the "safety of other students."
- 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.

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Galford re-analyzed in light of *Redding*:

- 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.
- 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* Court.

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Galford in light of *Redding*'s additional two-factor standard:

- The same problems with 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.

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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.
- Under this view, the *Galford* court was surely correct in concluding that no danger was present in the case.

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- Would a post-*Redding* analysis 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."
  - This language suggests a broader interest in protecting all students, including the one being searched, from danger.

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- It is also 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.
  - **Example:** A student possesses a substance deadly to himself due to unique allergies, it is difficult to see how this could not constitute a danger under *Redding*

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- Whether the stolen money thought to be possessed by Mark constituted a "danger" to him (individual interest in receiving an education or remaining free from liberty restraints after being adjudicated a thief) or to the educational environment in general (insulating and enabling thieves in school by permitting them to place contraband under their clothing).
- 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.
  - Specific deterrence achieves school's interest in protecting students from criminal conduct & teaching students civility.

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- *Redding* makes no mention that the danger be "immediate."
- 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*.

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The Underwear Factor:

- The *Galford* authorities had individualized suspicion of Mark from inception.
- However, the evidence supporting the strip search was indirect, inferred from the belief that he may have stolen the money and hidden it in his underwear when the search of his pockets and socks yielded nothing.
- The fruits of the strip search were used in criminal proceedings.

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Conclusion in light of *Redding*:

- 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.

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