



September-October 2016 NSDA Public Forum Debate:  
Student Rights

Resolved: In United States public K-12 schools, the probable  
cause standard ought to apply to searches of students.

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## META

### NEW JERSEY VS. TLO

#### NEW JERSEY VS. TLO DESCRIBED-Feldman '13

[Amy; Legal Education Consultant to the National Constitution Center; When does a public school have the right to search its students?; Constitution Daily from the National Constitution Center; 31 May 2016; <http://blog.constitutioncenter.org/2013/05/when-does-a-public-school-have-the-right-to-search-its-students/>; retrieved 14 August 2016]

The question of when a public school can search a student or a student's locker, backpack, purse, or other possessions first came before the Supreme Court in 1985.

A few girls at a high school girl in Piscataway, New Jersey, were caught smoking in the bathroom. After they were brought to the principal's office, the principal searched through the purse of one of the girls, known in court documents as T.L.O. (the initials were used to protect her privacy as a minor), and found cigarettes and evidence of drug dealing. The student was suspended and received a year of probation. She sued the school district, claiming that it didn't have a warrant to search for contraband and therefore had conducted an unreasonable search.

#### TLO TWO STEP TEST DEFINED-Torres, Brady and Stefkovich '11

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

In T.L.O., the Court developed a two-step inquiry to determine whether the search of a student was reasonable. First, the search must be justified at its inception by reasonable grounds indicating that it is likely to reveal evidence that the student violated either the laws or school rules. Second, the scope of the search must be reasonable in that "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction" (p. 342). For over 20 years, this notion of reasonableness as articulated in the T.L.O. decision has been the prevailing legal standard for student searches in state and federal courts (Fossey & Roberts, 2009).

#### NEW JERSEY V. TLO CLEARLY GRANTS SCHOOL OFFICIALS THE RIGHT TO SEARCH-Ehlenberger '01-'02

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

The Fourth Amendment to the U.S. Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Before 1985, doubt existed about whether this right applied to students in the public schools. Schools argued that administrators acted in loco parentis—in the place of the parent—while students were at school. In 1985, the U.S. Supreme Court determined that the Fourth Amendment applies to students in the public schools (New Jersey v. T.L.O., 1985). The Court concluded, however, that the school environment requires an easing of the restriction to which searches by public authorities are normally subject. School officials, therefore, do not need probable cause or a warrant to search students.



## REASONABLE SUSPICION DEFINED

### REASONABLE SUSPICION STANDARD DEFINED-Ehlenberger '01-'02

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

The Court articulated a standard for student searches: reasonable suspicion. Reasonable suspicion is satisfied when two conditions exist: (1) the search is justified at its inception, meaning that there are reasonable grounds for suspecting that the search will reveal evidence that the student has violated or is violating the law or school rules, and (2) the search is reasonably related in scope to the circumstances that justified the search, meaning that the measures used to conduct the search are reasonably related to the objectives of the search and that the search is not excessively intrusive in light of the student's age and sex and the nature of the offense.

### REASONABLE SUSPICION STANDARD DEFINED-Beger '04

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

On appeal, the U.S Supreme Court ruled that school children do not waive their Fourth Amendment rights by bringing purses, books, and items necessary for personal grooming and hygiene to school. However, a certain degree of "flexibility" in school searches was deemed necessary, which made the warrant and probable cause requirements "impractical." Ultimately, the Court held that school officials need only have "reasonable suspicion" for student searches. Reasonable suspicion means that school officials "must have some [articulable] facts or knowledge that provide reasonable grounds" before conducting a search [according to Richard Lawrence, author of School Crime and Juvenile Justice]. Under T.L.O., a search is reasonable if, first, the search decision is supported by reasonable suspicion and, second, the scope of the search is not "excessively intrusive" in light of the age and sex of the student and the nature of the infraction.

## PROBABLE CAUSE STANDARD DEFINED

### PROBABLE CAUSE STANDARD DEFINED-Torres '12

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence? Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

School officials and police officers are held to different standards during school searches. When a police officer whose duties normally are performed elsewhere comes into a school and initiates a search or gets school officials to do so on his/her behalf, the police officer and school official usually are held to a higher standard than if school officials acted independently of the police. Police officers conducting a search typically are held to a higher standard than are school officials because of the legalities surrounding their job. This higher standard means probable cause and requires a search warrant. Probable cause means that it is more likely than not that the police officer will find the evidence that is sought. Thus, police officers must have probable cause to believe that a crime has been committed and that the evidence of the crime will be found in the place to be searched (Temple Law Review 1994). Probable cause is established when facts and circumstances based on trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that some type of illegal activity or crime has been committed (Draper v. U.S., 358 U.S. 307; 79 S. Ct. 329; 3 L. Ed. 2d 327 [1959]). In such cases, a search warrant is required. Supreme Court case law indicates that rumor, mere suspicion, and even strong reason to suspect are not equivalent to probable cause. Probable cause is the sum total of layers of information and synthesis of what police have heard, known or observed as trained officers (Smith v. U.S., 337 U.S., 137; 69 S. Ct. 1000; 93 L. Ed. 1264 [1949]).



**PRO****PROBABLE CAUSE JUSTIFIED: MUST TURN THE TIDE AGAINST STUDENT RIGHTS****WE MUST TURN THE TIDE AGAINST EROSION OF STUDENT RIGHTS-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

Because the school setting demands "constant submission to authority" [in the words of Mai Linh Spencer] and is imposing harsher criminal penalties on students who misbehave, the legal rights of schoolchildren ought to be given the highest legal protection afforded by the nation's courts. Regrettably, the opposite is true. Bowing to public fears and legislative pressures, trial and appellate courts have reduced the Fourth Amendment rights of students to an abstraction. The nation's courts no longer seem interested in scrutinizing the specific facts surrounding the search of a student to determine if police had probable cause or even reasonable suspicion. Instead, courts search for a policy justification—e.g, minimizing disruptions to school order or protecting the safety of students and teachers—to uphold the search, even when police use evidence seized under lower and increasingly porous search standards to convict minors in adult criminal court. Given the current atmosphere of widespread fear and distress precipitated by the September 11, 2001, tragedy there is little reason to expect courts will impose any restrictions on searches in schools. Ironically, children are unsafe in public schools today not because of exposure to drugs and violence, but because they have lost their constitutional protections under the Fourth Amendment.

**MUST REJECT CURRENT CURTAILING OF THE 4TH AMENDMENT FOR STUDENTS TO STOP MORE INTRUSIVE SEARCH-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence? Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

Judicial customs have enormous implications for student liberties, however. Disparate interpretation and implementation are expected phenomena, as the aftermath of Brown clearly demonstrates. If law is to adequately and justly protect the individual from state incursions, then it must address civil liberty issues with greater attention and specificity. Koloms (2010) suggests Fourth Amendment jurisprudence in the realm of students' rights since T.L.O. has been "diluted as a result of judicial uncertainty in the adjudication of the T.L.O. standard" (p. 171). She argues further that the T.L.O. "standard needs to be thoroughly re-worked and clarified in order to prevent courts from condoning highly intrusive searches of students" (p. 199). The outlook for equitable use of law will hinge mostly on the efforts of lawmakers and policymakers, school boards and district administrators, practitioners, and researchers to ensure fair interpretation and application. Although regional politics or values may implicitly encourage excessive discretion, school leaders are obligated to abide by rulings in a manner consistent with constitutional law. Whether it requires a continuous monitoring of changes in law, being more conscientious of one's biases, or clearly articulating policies, school leaders are essential to the proper implementation of law.



**COURTS HAVE SHREDED STUDENT RIGHTS IN SCALING BACK CONSTITUTIONAL PROTECTIONS-Kucharson '04**

[M. Casey; Attorney; Please Report to the Principal's Office, Urine Trouble: The Effect of Board of Education v. Earls+ on America's Schoolchildren; Akron Law Review; 2004; 37 Akron L. Rev. 131]

The Supreme Court once said that students do not "shed their constitutional rights ... at the school-house gate," n160 but after the Earls decision one would not be too far off the mark to say that the rights of students are now shredded when they walk through the schoolhouse gates. n161 The disparate treatment of schoolchildren and politicians illustrates that the special needs doctrine can be manipulated to meet [\*170] whatever end the Court subjectively feels is the best outcome. n162 Recognizing that the special need doctrine has no anchor in the Fourth Amendment and serves as a string-puppet for the Court's shifting values should raise serious concerns about the implications of the Earls decision. It is not inconceivable that Earls will lead to an avalanche of suspicionless testing policies not based on evidence of drug use or other concrete evidence, but based on amorphous principles of ensuring student health and well being. n163

The national crisis America is facing regarding adolescent drug use is by no means a problem that can be ignored. n164 It is indisputable that the government has an extremely important interest in keeping our students drug free. n165 However, analyzing the possible negative ramifications that flow from suspicionless drug testing policies, like the one adopted in Earls, demonstrate that this interest should not be absolute. n166 The Courts must never forget: "the greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding." n167



**PROBABLE CAUSE JUSTIFIED: CONSTITUTION SHOULD APPLY TO STUDENTS IN SCHOOL**

**THE CONSTITUTION SHOULD GUIDE HOW SCHOOLS INTERACT WITH STUDENTS, EVEN WITH DISCIPLINE IN MIND-  
Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The mission of public schools is to maximize the academic and social development of their students. In performing that function, occasional misdeeds by youngsters or employees cause districts to investigate violations and mete out punishment.

The situations in which school officials can conduct a search, what level of suspicion is necessary to legally justify it, when contraband can be seized, and what process must precede any consequences are all subject to the U. S. Constitution and the special protections it extends.



## **PROBABLE CAUSE JUSTIFIED: ZERO TOLERANCE POLICIES HAVE INCREASED THE NEED OF FIRMER STUDENT RIGHTS**

### **ZERO-TOLERANCE POLICIES CALL INTO QUESTION THE EXCEPTIONS CARVED OUT IN THE 4th AMENDMENT FOR SCHOOLS-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

In 1999, when two students gunned down classmates at Columbine High School in Littleton, Colo., school officials across the country saw a need to impose more stringent disciplinary measures. In the wake of the incident, which drew nationwide horror and attention, schools became more vigilant about investigating potential violations. Most significantly, perhaps, many passed “zero-tolerance” policies that specified strict punishments for certain offenses. The circumstances behind the infraction didn’t matter.

A zero tolerance policy is unflinching, faithfully mandating punishment if certain offenses have been committed. For example, when a student is found on campus with a knife, the policy might provide for immediate placement in an alternative high school. It does not matter that the student might have taken it from a student intent on committing suicide.

The zero-tolerance approach raised questions about both the investigatory techniques being employed and whether a student’s due process was being sufficiently respected. Although schools are somewhat more relaxed now than in the immediate aftermath of Columbine, the ripples of that debate continue today.

### **EXTREME SECURITY MEASURES VIOLATE STUDENT DIGNITY AS WELL AS THEIR RIGHTS AND FREEDOMS-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

Despite the fact that schools are safe and that school violence is decreasing, school administrators have instituted extreme security measures, some involving devices such as cameras, metal detectors, and locks. In addition, the presence of law enforcement personnel on campuses has increased dramatically, and students are routinely subjected to undercover sting operations and surprise searches, some of which include the use of drug-sniffing dogs. These measures violate students' dignity as well as their constitutional right to due process and freedom from unreasonable searches and seizures. Students face a greater risk from the erosion of their constitutional rights than from the threat of violence.

**INCREASED NATIONAL ATTENTION ON SCHOOL VIOLENCE HAVE FORCED SCHOOLS TO CRANK UP POLICE-LIKE ENFORCEMENT OF RULES-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

So what factors, if any, bear on this hypothesized inconsistency in administrative choice? Several scholars point to a growing police atmosphere in schools, manifested in part by the national media's evolving obsession and "framing" (Birkland & Lawrence, 2009) of isolated acts of extreme school violence, as well as an increasingly punitive orientation of student disciplinary policy and actions (Hyman & Perone, 1998). As such, some researchers have argued that the narrow focus on awareness and prevention of negative student behavior has minimized the importance and influence of organizational, policy, cultural, and administrative elements (Henry, 2009; Hyman & Perone, 1998). As Hyman and Perone (1998) suggest, the "supposed interdiction and preventative techniques, especially those that depend on police procedures, and the use of negative motivational techniques, such as corporal punishment and psychological assault, may only serve to increase student alienation, misbehavior, and desire to 'get even'" (p. 22). Nevertheless, Hyman and Perone concede, as do other researchers (Theriot, 2009), that the body of research exploring the link between administrative discretion and disciplinary action remains thin and largely based on anecdotal evidence.

**PROBABLE CAUSE JUSTIFIED: ZERO TOLERANCE POLICIES INEFFECTIVE**

**NO EVIDENCE EXISTS THAT ZERO-TOLERANCE POLICIES ACTUALLY IMPROVE CLASSROOM MANAGEMENT OR STUDENT BEHAVIOR-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

Since the mid-1990s, a growing number of schools have adopted zero tolerance policies under which students receive predetermined penalties for any offense, no matter how minor. Students have been expelled or suspended from school for sharing aspirin, Midol, and Certs tablets, and for bringing nail clippers and scissors to class. There is no credible evidence that zero tolerance measures improve classroom management or the behavior of students. Such measures are not only ineffectual, but also appear to have a negative impact on children of color. Research indicates that black children are more likely than are whites to be expelled or suspended from school under zero tolerance.

**PROBABLE CAUSE JUSTIFIED: STUDENTS ARE COERCED INTO SEARCH**

**VOLUNTARY SEARCH IS A POOR CONSTRUCT; STUDENTS MUST CONSENT TO SEARCH OR FACE DISCIPLINE IN MANY SCHOOLS-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

Some school policies require students to provide consent to a search or risk discipline. In at least one federal circuit, the court has upheld this policy (*DesRoches v. Caprio*, 1998). In this case, all but one student consented to a search of their personal belongings. The search of the consenting students revealed nothing. Pursuant to school board policy, DesRoches was suspended for 10 days for failure to consent to the search. The student claimed that his Fourth Amendment rights were violated because the administrator did not have reasonable suspicion to search him. The court held that when the search of all other students in the class failed to reveal the stolen item, the administrator had reasonable, individualized suspicion to search DesRoches. Therefore, his discipline for failing to consent to a legal search was upheld.

## **PROBABLE CAUSE JUSTIFIED: SCHOOLS USE ENHANCED INTERROGATION THAT TAKES ADVANTAGE OF IMMATURE JUVENILES**

### **AGGRESSIVE INTERROGATION TECHNIQUES THAT ARE USED IN SCHOOLS TAKE ADVANTAGE OF THE UNDEVELOPED STATE OF JUVENILE EXECUTIVE FUNCTION, LEADING TO FALSE CONFESSIONS AND MISREADING OF THE SITUATION- Starr '16**

[Douglas; Co-Director of the Graduate Program in Science Journalism at Boston University; WHY ARE EDUCATORS LEARNING HOW TO INTERROGATE THEIR STUDENTS?; New Yorker; 25 March 2016;

<http://www.newyorker.com/news/news-desk/why-are-educators-learning-how-to-interrogate-their-students>; retrieved 14 August 2016]

Other parties, though, have raised concerns about Reid-style interrogations in schools. By now, it's well known that the brains of young people are not fully developed, especially in regard to executive function. Young people tend to be impulsive, suggestible, poor at risk assessment, and lacking an appreciation for long-term consequences—characteristics that make them vulnerable to false confession. For that reason, the International Association of Chiefs of Police warns against using even mildly coercive tactics with children. In its 2012 guide to interviewing juveniles, the association—without specifically naming Reid—decries several of the company's common practices, including using body language as a clue to deception. Children and teen-agers “may commonly slouch, avoid eye contact, and exhibit similar behaviors,” the guide says. “Officers should not interpret these everyday teenage mannerisms as indicators of deception.” This misinterpretation of cues may contribute to the relatively high proportion of juveniles who confess to crimes that they did not commit. In the largest and most recent study of its kind, Samuel R. Gross, a professor at the University of Michigan Law School and the editor of the National Registry of Exonerations, examined the cases of eight hundred and seventy-three people who were exonerated between 1989 and 2012. Among the cases that Gross surveyed, forty-two per cent of the juveniles who were exonerated had falsely confessed, compared with only eight per cent of adults. Nearly twice as many eleven- to fourteen-year-olds falsely confessed as did fifteen- to seventeen-year-olds.

## PROBABLY CAUSE JUSTIFIED: "SPECIAL NEEDS" EXEMPTIONS BAD

### **SPECIAL NEED STANDARD IS NOW WAY TOO WIDE-Lithwick '02**

[Dahlia; Senior Editor @ Slate; The Supreme Court's torturous justification of high-school urine tests; Slate; 3 July 2002; [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/07/urinalysis.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/07/urinalysis.single.html); retrieved 15 August 2016]

But more alarming is the specter of the infinitely growing maw of the "special needs" exception to what was once a constitutionally sacred warrant requirement for state searches. No longer is "special need" to circumvent the warrant defined merely by the danger you pose to the public while on the job. A bare government assertion that there's a "war on" will suffice. It's worth recalling that with a "war on terror" just ramping up, the most "special need" the government should have right now is a warrant.

### **THE USE OF "SPECIAL NEEDS" EXEMPTIONS, INCLUDING IN SCHOOL SEARCH, HAS BADLY DISTORTED THE 4th AMENDMENT-Marshall '13**

[Thurgood; Associate Justice of the US Supreme Court; Summarized in Conor Friedersdorf; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013; <http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

In the four years since this Court first began recognizing "special needs" exceptions to the Fourth Amendment, the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable cause requirement in a patchwork quilt of settings: public school principals' searches of students' belongings, public employers' searches of employees' desks; and probation officers' searches of probationers' homes. Tellingly, each time the Court has found that "special needs" counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided "reasonableness" balancing inquiry, it has concluded that the search in question satisfied that test. I have joined dissenting opinions in each of these cases, protesting the "jettisoning of... the only standard that finds support in the text of the Fourth Amendment" and predicting that the majority's "Rohrschach-like 'balancing test'" portended "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens."

**SHOULD NOT ALLOW SPECIAL NEEDS EXCEPTIONS TO THE 4th AMENDMENT; THE CONSTITUTION DOESN'T EXIST WHEN IT IS CONVENIENT TO DO SO-Marshall '13**

[Thurgood; Associate Justice of the US Supreme Court; Summarized in Conor Friedersdorf; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013; <http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

The Court today takes its longest step yet toward reading the probable cause requirement out of the Fourth Amendment. For the fourth time in as many years, a majority holds that a "special need, beyond the normal need for law enforcement," makes the "requirement" of probable cause "impracticable." With the recognition of "the Government's interest in regulating the conduct of railroad employees to ensure safety" as such a need, the Court has now permitted "special needs" to displace constitutional text in each of the four categories of searches enumerated in the Fourth Amendment: searches of "persons," "houses," "papers," and "effects."

The process by which a constitutional "requirement" can be dispensed with as "impracticable" is an elusive one to me. The Fourth Amendment provides that

the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The majority's recitation of the Amendment, remarkably, leaves off after the word "violated," but the remainder of the Amendment -- the Warrant Clause -- is not so easily excised. As this Court has long recognized, the Framers intended the provisions of that Clause -- a warrant and probable cause -- to "provide the yardstick against which official searches and seizures are to be measured." Without the content which those provisions give to the Fourth Amendment's overarching command that searches and seizures be "reasonable," the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term. Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when "special needs" make them seem not.

**ALLOWING FOR "SPECIAL NEEDS" EXEMPTIONS TO THE 4TH AMENDMENT JUSTIFIED THE EROSION OF RIGHTS IN THE POST-9/11 ERA-Friedersdorf '13**

[Conor; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013; <http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

In a story on the secret body of law being created by the FISA court, The New York Times reports that "in one of the court's most important decisions, the judges have expanded the use in terrorism cases of a legal principle known as the 'special needs' doctrine and carved out an exception to the Fourth Amendment's requirement of a warrant for searches and seizures, the officials said." A judicially created exception to the Fourth Amendment?! How did that happen, you might wonder.

The newspaper explains:

The special needs doctrine was originally established in 1989 by the Supreme Court in a ruling allowing the drug testing of railway workers, finding that a minimal intrusion on privacy was justified by the government's need to combat an overriding public danger. Applying that concept more broadly, the FISA judges have ruled that the N.S.A.'s collection and examination of Americans' communications data to track possible terrorists does not run afoul of the Fourth Amendment...

The article goes on to quote a legal expert who explains why the FISA court's expansion of the 1989 precedent is highly dubious (and not just because it was issued in secret, though that is also problematic). And the FISA court's interpretation is wrongheaded.

But that doesn't mean it wasn't anticipated by civil libertarians when that bygone case put us on the slippery slope we've tumbled down. It is thus the perfect time to return to Justice Thurgood Marshall's dissent in *Skinner v. Railway Labor Executives' Association*.

**SPECIAL NEEDS EXEMPTIONS TO THE 4TH AMENDMENT MEAN THAT EXTRAORDINARY VIOLATIONS OF PRIVACY CAN OCCUR WITH ABSOLUTELY NO EVIDENCE THAT ANY MEMBER OF A SUBJECT CLASS IS GUILT-Marshall '13**

[Thurgood; Associate Justice of the US Supreme Court; Summarized in Conor Friedersdorf; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013; <http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

Until today, it was conceivable that, when a Government search was aimed at a person and not simply the person's possessions, balancing analysis had no place. No longer: with nary a word of explanation or acknowledgment of the novelty of its approach, the majority extends the "special needs" framework to a regulation involving compulsory blood withdrawal and urinary excretion, and chemical testing of the bodily fluids collected through these procedures. And until today, it was conceivable that a prerequisite for surviving "special needs" analysis was the existence of individualized suspicion. No longer: ...the regulatory regime upheld today requires the post-accident collection and testing of the blood and urine of all covered employees -- even if every member of this group gives every indication of sobriety and attentiveness.

**SPECIAL NEEDS EXCEPTIONS EXPOSE OUR MOST PRIVATE INTERESTS TO GOVERNMENTAL INCURSION-Marshall '13**

[Thurgood; Associate Justice of the US Supreme Court; Summarized in Conor Friedersdorf; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013; <http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process of eliminating altogether the probable cause requirement for civil searches -- those undertaken for reasons "beyond the normal need for law enforcement." In its place, the majority substitutes a manipulable balancing inquiry under which, upon the mere assertion of a "special need," even the deepest dignitary and privacy interests become vulnerable to governmental incursion. By its terms, however, the Fourth Amendment -- unlike the Fifth and Sixth -- does not confine its protections to either criminal or civil actions. Instead, it protects generally "the right of the people to be secure."

**PROBABLE CAUSE JUSTIFIED: "SPECIAL NEEDS" HAS A VERY LOW BAR****ALLOWING MANDATORY DRUG TESTS IN SCHOOLS IS A VERY LOW BAR ON "SPECIAL NEEDS" EXCEPTIONS TO THE 4TH AMENDMENT-Lithwick '02**

[Dahlia; Senior Editor @ Slate; The Supreme Court's torturous justification of high-school urine tests; Slate; 3 July 2002; [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/07/urinalysis.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/07/urinalysis.single.html); retrieved 15 August 2016]

The question in Earls was whether school districts may constitutionally conduct warrantless, suspicionless searches of all public-school students engaged in extracurriculars. The court decided that school districts may conduct such tests, using what was once a very limited "special needs" exception to the requirement that government actors must have probable cause, even for "administrative" (as opposed to law enforcement) searches. Initially, these special needs cases involved suspicionless drug tests for individuals in jobs that would be highly dangerous if performed while high. With Earls, it's enough that the government thinks that, dang, something should be done about drugs.

**SPECIAL NEEDS TESTS HAS LOW STANDARDS; THE "SUBSTANTIAL" NEED IN ONE CASE WAS THE PERCEPTION BY SOME TEACHERS THAT STUDENTS USE DRUGS-Lithwick '02**

[Dahlia; Senior Editor @ Slate; The Supreme Court's torturous justification of high-school urine tests; Slate; 3 July 2002; [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/07/urinalysis.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/07/urinalysis.single.html); retrieved 15 August 2016]

The big constitutional fake-out comes with the assertion that the "substantial" state interest in winning the drug war is more compelling than it was in Chandler. Despite testimony from the school board that drugs are not a real problem at present, the school board announces, and Justice Thomas agrees, that there is indeed a drug problem in a sleepy high school in Oklahoma where 797 students have been tested under the policy and three (all athletes) tested positive. Why? Because: "Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs." Speaking openly! At school? Perish forbid. Also: "A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the 'drug situation.'" Now people in the community probably also call the board to discuss the "Britney Spears situation," but we can't urine-test students for being bimbos. So, there must be a drug problem.

**ALLOWING THE 4TH AMENDMENT TO BE COMPROMISED DUE TO A SUSPICION THAT STUDENTS MIGHT USE DRUGS EVISCERATES ANY STANDARDS SET FOR "SPECIAL NEEDS" EXCEPTIONS TO THE 4TH AMENDMENT-Lithwick '02**

[Dahlia; Senior Editor @ Slate; The Supreme Court's torturous justification of high-school urine tests; Slate; 3 July 2002; [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/07/urinalysis.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/07/urinalysis.single.html); retrieved 15 August 2016]

Thomas cuts the last possible tether to Vernonia (where there was actual evidence of a drug problem) with this winning constitutional shrug: Even if there's no problem, there may be a future problem. "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."

Thomas finally eviscerates the public safety requirement that once characterized all the "special needs" exceptions. Railroad workers and customs officers endangered the public with drug use. Students, Thomas says, endanger themselves. And that is enough for the court to approve the program. It's enough to force every single American to also submit to suspicionless drug-testing, but Thomas neglects to mention this.



**"SPECIAL NEEDS" STANDARD IS SILLY AND CAN BE TWISTED TO MEET ANY PARTICULAR NEED-Kucharson '04**

[M. Casey; Attorney; Please Report to the Principal's Office, Urine Trouble: The Effect of Board of Education v. Earls+ on America's Schoolchildren; Akron Law Review; 2004; 37 Akron L. Rev. 131]

Earls gave the Supreme Court an opportunity to halt its continuing consumption of individual's rights by engaging in a judicial whimsy labeled as "special needs" balancing. n102 The Supreme Court's decision in Earls rested in large part upon the importance of the governmental concern in preventing drug use by school children entrusted to the school's care. n103 Preventing drug use has consistently been used to uphold suspicionless drug tests in other arenas outside the school walls. n104 However, in Chandler v. Miller, the most recent preceding case involving suspicionless drug testing, the Supreme Court demonstrated that the special needs analysis can be twisted to fit any result the Court desires. n105 The incongruity between the Earls and Chandler decisions [\*154] drains the credibility of the special needs doctrine and calls into question the real reasons behind the Earls ruling. n106

**"SPECIAL NEEDS" IS INCONSISTENTLY USED BY COURTS-Kucharson '04**

[M. Casey; Attorney; Please Report to the Principal's Office, Urine Trouble: The Effect of Board of Education v. Earls+ on America's Schoolchildren; Akron Law Review; 2004; 37 Akron L. Rev. 131]

In Chandler, the Georgia legislature enacted a statute that required all candidates for specified state offices to verify they had taken and passed a drug test. n107 The Supreme Court held the state requirement did not fit within the special needs requirement of Fourth Amendment, mainly because (1) Georgia had failed to demonstrate a drug use problem among state officeholders, and (2) the requirement was not well designed to identify candidates who used drugs. n108 The Court went on to state that making a symbolic gesture to illustrate the government's commitment to fighting drug abuse does not constitute a sufficient reason to infringe on personal privacy. n109 A "special" need must be [\*155] exhibited to relax Fourth Amendment protection, which is distinguishable from a "symbolic" need. n110 Just five years after Chandler, the Supreme Court granted certiorari to Earls, which contained the same important facts that the Court drew on to justify why testing of political candidates was unconstitutional in Chandler. n111 Specifically, Earls involved a drug-testing regime with no immediate or concrete evidence of drug abuse among students participating in non-athletic extracurricular activities, n112 and the school [\*156] district failed to demonstrate that the drug testing policy was well designed to identify student drug users. n113 Surprisingly, the drug testing Policy in Earls was held constitutional despite facts that the children were subjected to more intrusive testing procedures n114 and had little control to which school personnel the test results were disseminated. n115 It is difficult to find a concrete justification of why the Court, only a few years earlier relying on similar facts, determined that obligating politicians to submit urine samples crossed the constitutional line, but a more invasive search concerning students does not. n116 The Court's [\*157] disparate treatment of politicians and schoolchildren is conclusive evidence that the special needs analysis used by the Court is a "factual tug-of-war" rooted in nothing more than a subjective view of the tolerability of "certain government intrusions." n117 The outcome of suspicionless drug testing cases is determined by which side of the scale the Court believes it should place its "judicial thumb." n118



## **PROBABLE CAUSE JUSTIFIED: COURTS HAVE HISTORICALLY DEFERRED TO INDIVIDUAL SUSPICION**

### **HISTORICALLY, WE HAVE UNIVERSALLY AVOIDED ALLOWING FULL-SCALE SEARCH, AND DEFERRED INSTEAD TO INDIVIDUAL SUSPICION-Marshall '13**

[Thurgood; Associate Justice of the US Supreme Court; Summarized in Conor Friedersdorf; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013; <http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

Until recently, an unbroken line of cases had recognized probable cause as an indispensable prerequisite for a full-scale search, regardless of whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions to the warrant requirement. Only where the Government action in question had a "substantially less intrusive" impact on privacy, and thus clearly fell short of a full-scale search, did we relax the probable cause standard. Even in this class of cases, we almost always required the Government to show some individualized suspicion to justify the search...

## **PROBABLE CAUSE JUSTIFIED: HARMS TO 4<sup>TH</sup> AMENDMENT ARE HURT THE POOR AND MINORITIES**

### **ZERO-TOLERANCE POLICIES PLUS AGGRESSIVE INTERROGATION COUPLED WITH NO 4TH AMENDMENT PROJECTS CAN BE PARTICULARLY TROUBLING FOR MINORITY STUDENTS-Starr '16**

[Douglas; Co-Director of the Graduate Program in Science Journalism at Boston University; WHY ARE EDUCATORS LEARNING HOW TO INTERROGATE THEIR STUDENTS?; New Yorker; 25 March 2016;

<http://www.newyorker.com/news/news-desk/why-are-educators-learning-how-to-interrogate-their-students>; retrieved 14 August 2016]

Using Reid-style interrogation in schools can also run counter to educators' efforts to keep their students out of the criminal-justice system. In 1994, Congress passed the Gun-Free Schools Act, which mandated that students who brought a weapon to school be expelled. This zero-tolerance policy was later extended to other behaviors, including drug use, but none of it has actually made schools safer. On the contrary, studies show that such policies disproportionately affect minority students, create a hostile school atmosphere, and do not effectively discourage misbehavior. In a report published last May, the President's Task Force on 21st Century Policing called for an end to zero tolerance, noting that it has expanded "the school-to-prison pipeline by criminalizing the behaviors of children as young as kindergarten age." In January, 2014, the U.S. Department of Education issued a letter calling for a therapeutic approach toward students who misbehave. "There's been a real pendulum swing," Naomi Goldstein, a professor of psychology at Drexel University and the director of the Juvenile Justice Research and Reform Lab, told me.

### **THE REGIONAL DIFFERENCES IN THE WAY CIVIL RIGHTS ARE INTERPRETED IN SCHOOLS HURTS STUDENTS, PARTICULARLY MINORITIES-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence?

Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

Carp and Rowland's (1983) findings of discrepancies in civil rights' rulings by region of the country provide a basis to explore whether a similar effect occurs among courts with respect to students' Fourth Amendment rights. Presumably, these rulings transmit distinctive values to schools and communities about norms of acceptable behavior that often go about uncontested (Welner, 2001). Although not captured directly by the findings in the present analysis, the possibility for lower courts to project norms of acceptable administrative conduct may provoke overzealous disciplinary action or inhibit fully reasonable intrusions into student privacy by school officials. Equally troubling is the prospect that students already facing challenging social circumstances (e.g., inner-city schools) encounter aggressive practices that weaken trust in the school system and, worse, increase the likelihood for future acts of delinquency and crime (NAACP Legal Defense and Education Fund, n.d.). Variation in ruling outcomes by region may reflect differing and enduring political and cultural beliefs pertaining to administrative discretion and students' rights. For these reasons, this study examines how courts decide on students' Fourth Amendment rights across regions of the country (i.e., Northeast, Southeast, Central, and West). Implications for students' rights and school leaders are discussed in closing.

**THE IMPACT ON 4TH AMENDMENT PROTECTIONS HAVE DISPARATE IMPACT IN TERMS OF RACE AND CLASS-Lemieux '11**

[Scott; Assistant Professor of Political Science @ the College of Saint Rose; These Are Your Rights on Drugs; The American Prospect; 19 May 2011; <http://prospect.org/article/these-are-your-rights-drugs>; retrieved 11 August 2016]

As with the broader drug war, civil-liberties violations have a disparate impact in terms of race and class. It is generally not wealthy white suburbanites who have to worry about being stopped and frisked on the streets or having their doors broken down. Like the grotesquely harsh sentencing disparity between powder and crack cocaine possession, this erosion of Fourth Amendment rights has persisted because wealthy people are largely insulated from its effects.

**URBAN SCHOOLS TEND TO PUT IN PLACE STRICTER NO TOLERANCE POLICIES, MAKING THE 4TH AMENDMENT QUESTIONS MORE SIGNIFICANT-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence? Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

As for the statistically greater likelihood that courts will rule against urban students more so than nonurban student, the concern becomes whether the deck will persistently be stacked against the urban student in light of assumptions that urban schools face greater social challenges and risks. What is more, urban schools are far more ethnically and racially diverse, which would seem to require that school leaders in these situations have a meticulous knowledge of the law to avoid unnecessary aggression. Evidence presented earlier suggests discrepancies in the manner in which students are disciplined by race (Eitle & Eitle, 2004; Raffaele-Mendez, Knoff, & Ferron, 2002; Owen, 2005; Skiba et al., 2002). In truth, schools in urban areas tend to face more complex criminal circumstances and are inclined to adopt rigid safety policies as a result (Beger, 2002; Stefkovich & Guba, 1998; Stefkovich & Miller, 1999; Stefkovich & O'Brien, 1997). In reality, judges faced with drugs or weapons cases may sense a societal compulsion to rule by the requirements of criminal statutes and give less merit to the reasonableness of a search. One scholar suggests (McKinney, 1994) that courts will still rule favorably for states even if criminal objects are obtained illegally and students' civil rights are breached.

**AN ANALYSIS OF SEARCHES SHOWS THAT WIDER LATITUDE IS TAKEN IN MORE URBAN AND POOR SCHOOLS, OR SCHOOLS WITH A HIGH MINORITY POPULATION, MAKING APPLICATION UNEVEN-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

The findings together revealed that school enrollment, the minority population of the school and community, and the poverty of community significantly predicted the likelihood of certain events occurring related to the search. In summary, the results suggest that the administration of the search (i.e., intrusiveness) may be strongly influenced by school size, school minority population, and poverty level, whereas the likelihood that evidence recovered in a search results in criminal prosecution was more considerable in larger schools and schools in high-minority communities. The identification of a significant relationship or one approaching significance suggests patterns of irregularity similar to those identified in Salomone's (1992) study of Hazelwood. Although only suggestive, the implications for student rights and ethical leadership are far reaching. The dissenting Supreme Court justices in all four Fourth Amendment rulings warned that straying too far from the intent of the Fourth Amendment would in time make student rights vulnerable. For instance, the high-stakes treatment of evidence (i.e., evidence used for criminal prosecution) seemed to occur more prevalently in larger schools and high-minority communities than in other demographic contexts. The findings, in sum, suggest deficits in leaders' skills and ability to explore discipline from contrasting ethical dimensions.

## **PROBABLE CAUSE JUSTIFIED: WIDE SEARCH POWER HURTS THE ABILITY TO TEACH FUTURE CITIZENS**

### **STUDENTS MUST BE ABLE TO EXERCISE THEIR CONSTITUTIONAL RIGHTS TO BECOME RESPONSIBLE CITIZENS IN OUR DEMOCRACY-Cambron-McCabe '09**

[Nelda; Professor of Educational Leadership; Miami University; Phi Delta Kappan; June 2009; Page 709]

Students must learn how to become responsible citizens, and few places are more significant in developing those skills of citizenship than the public schools. However, if students are going to learn to become responsible citizens in a democracy, they must be able to exercise their constitutional rights. In its seminal 1969 case on student expression, *Tinker v. Des Moines Independent School District*, the Supreme Court declared: "Students in school as well as out of school are 'persons' under the Constitution. They are possessed of fundamental rights that the state must respect." (1)

### **SUBJECTING STUDENTS TO WIDE AND UNREASONABLE SEARCH HURTS A SCHOOL'S ABILITY TO FOSTER FUTURE CITIZENSHIP-Lithwick '02**

[Dahlia; Senior Editor @ Slate; The Supreme Court's torturous justification of high-school urine tests; Slate; 3 July 2002; [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/07/urinalysis.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/07/urinalysis.single.html); retrieved 15 August 2016]

But all these bizarre defenses ignore two vital facts: that making a kid, particularly a good kid, pee in a cup just to enter a science fair is obscene; and it's especially obscene because, to quote Justice Breyer (himself quoting the *New Basic History of the United States*, 1968), schools "prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves." If schools foster civility by treating schools as "prisons," to quote Justice Scalia at oral argument in *Earls*, don't be surprised if students someday become as civilized as prisoners.

### **THE DRASTIC SECURITY MEASURES IN SCHOOLS ARE COUNTERPRODUCTIVE, CREATING AN ATMOSPHERE OF MISTRUST AND ALIENATION-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

Growing public anxiety over acts of violence in schools has prompted educators and state lawmakers to adopt drastic measures to improve the safety of students. In the wake of recent high-profile campus shootings, schools have become almost prison-like in terms of security and in diminishing the rights of students. Ironically, a repressive approach to school safety may do more harm than good by creating an atmosphere of mistrust and alienation that causes students to misbehave.



**DESPITE THE EFFECTIVENESS OF STUDENT SEARCH TO DETER BAD BEHAVIOR, OVERUSE OF SEARCH COMPROMISES STUDENT RIGHTS AND UNDERMINES TRUST-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

One common form of maintaining discipline in schools is the administration of student searches. Searches occur in a variety of ways, ranging from routine locker searches to searches of students' bodies, and they serve as a powerful deterrent against delinquent behavior. U.S. Supreme Court decisions have consistently touted reasonableness as the standard for searching students, freeing school officials from certain legal requirements (e.g., warrant requirement) and thus affording greater flexibility. Yet, while the law permits discretion, the use of that discretion is not always required. Overzealous use of discretion may compromise students' rights and undermine trust in the education process.



**PROBABLE CAUSE JUSTIFIED: WIDE SEARCH POWER TURNS SCHOOLS INTO PRISONS****LOW BAR FOR SEARCHES IN SCHOOLS TURN SCHOOLS INTO PRISONS-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

Increasingly, the search efforts of police officials stationed in public schools mirror the actions of prison guards. For example, to create a drug-free environment, schools are allowing police officers to conduct random preemptive searches of students' lockers and personal property using specially trained sniff dogs. Over 1,000 schools in 14 states use drug-sniffing dogs supplied by a Texas company called Interquest Detection Canines. The profit motive is a powerful incentive to expand canine searches to schools that have no demonstrable drug problems. One school board has even formed a partnership with the U.S. Customs Department to send dogs into classrooms for drug-detection training exercises. In writing about canine searches in Boston public schools, journalist Marcia Vigue describes the following scene:

Secrecy is the key. Students, teachers, and parents are not warned in advance; some student handbooks do not even explain that [searches] might occur from time to time.... During the searches, the dogs respond to German commands like "sook"—which means search—by pushing their snouts against lockers and nudging their noses into bags and coats. Sometimes, after students have been told to leave, the dogs pass through classrooms and other rooms to sniff students' belongings.

**MUST AVOID SCHOOLS BECOMING ENCLAVES OF TOTALITARIANISM AND RESPECT CONSTITUTIONAL RIGHTS-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

Despite the substantial need for schools to maintain order while exercising their custodial and tutelary responsibilities over students, the Supreme Court has held that schools, acting as state agents, must respect students' constitutional rights. n187 For example, in *Tinker*, the Court stated that "state-operated schools may not be enclaves of totalitarianism," and that "[s]chool officials do not possess absolute authority over their students." n188 Further, when the Court found that schoolchildren retain a legitimate expectation of privacy, it declared that it was not ready to hold that "the schools and the prisons need be equated for purposes of the Fourth Amendment." n189

**COURT ACTION EMBOLDENS SCHOOL ADMINISTRATORS TO TAKE MORE RISKS RELATED TO DISCIPLINARY DECISION-MAKING-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence? Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

Furthermore, in light of *Redding*, the effect of minimal consequences to violating students' civil liberties deserves greater scrutiny. One may suggest that the high court in *Redding* inadvertently created a standard of immunity for school officials if ample disagreement can be proven in the manner in which state and federal courts rule on student privacy. In the absence of fear of liability, school officials may be more inclined to take risks in disciplinary decisionmaking.



**PROBABLE CAUSE JUSTIFIED: WIDE SEARCH POWER PRONE TO ABUSE, EVEN IF IT PROVIDES BENEFIT**

**DESPITE ANY CLEAR BENEFIT TO THE DISCRETION ALLOWED SCHOOL ADMINISTRATORS TO IGNORE THE 4TH AMENDMENT, IT IS PRONE TO ABUSE-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

There is little doubt that the four opinions have advanced our understanding of the applicability of the Fourth Amendment in public schools. Since T.L.O., it seems quite clear that the Court elects to largely defer to the wisdom and expertise of practitioners when deciding what circumstances meet the reasonableness requirement. While discretion provides immeasurable benefit to the school in the way of safe and orderly learning environments, it is occasionally prone to abuse, intentional and unintentional. A concern of this study is the ability and inability of leaders to recognize the ethical dimensions of their decisions. The following section explores issues relative to administrative discretion.



**PROBABLE CAUSE JUSTIFIED: SCHOOLS NOT APPROACHING SEARCH WITH EDUCATION IN MIND****PROMINENT STRIP SEARCH CASES DEMONSTRATE THAT SCHOOLS DON'T APPROACH THOSE INVASIVE SEARCHES FROM A PERSPECTIVE OF EDUCATION OR TEACHING RESPONSIBILITY-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

Moreover, in each strip search case mentioned earlier, there appeared to be no effort to teach students responsibility nor any attempt to make the most of teachable moments. The lessons that seem to be taught here are that students have no dignity and no right to privacy and, if suspected of wrongdoing, they will be subject to humiliation. As Justice Brennan noted in an early search decision, "schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms" (Doe v. Renfrow, 1981, pp. 1027-1028).

**AN ANALYSIS OF SCHOOL SEARCHES SHOW THAT THERE ARE ETHICAL DEFICITS IN THE REALM OF CARING AND PROFESSIONALISM ACROSS SEARCHES-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

The findings as a whole seem to connote ethical deficits in the realms of caring, critique, and the profession. Realizing that some students may be more likely to face more intrusive searches and criminal prosecution suggests shortcomings in leaders' vision of their moral and nurturing responsibilities. Under the ethic of caring, Noddings (2002) suggests that teachers and leaders must learn to care but students must also learn to be cared for. Moral action in discipline demands thoughtful educational programming. In a comment concerning troubled children, Noddings argues, "The best course of action seems to transform the whole school climate. In a caring climate, in a 'full-service school,' violence prevention programs must add the skills and knowledge need to resist forms of violence" (p. 26). By and large, schools focus minimally on the social context and peer influences that mitigate student behavior and instead focus mainly on the student offense. As for the ethic of critique, the finding that students of color encounter the criminal justice system to a greater degree suggests a considerable lapse in ethical leadership and decision making. Similar to findings by the NAACP, the results of this analysis call for greater awareness of the "social reproductive" attributes of discipline policy that seemingly impinge more severely on communities with schools densely populated by children of color. The implications for criminalizing school offenses are enormous and create lifelong setbacks that are oftentimes difficult to recover from, especially for children already dealing with complex social circumstances. Last, in regards to the ethic of profession, it is abundantly clear that leaders ought to reflect more on their ethical worldviews and how they contrast competing ethical paradigms as well as ethics codified by the profession. In light of the changing demographic complexion of schools, the expectations and responsibilities of school leaders today are greater than ever before, especially with respect to student discipline.

## **PROBABLE CAUSE JUSTIFIED: SCHOOLS WILL RESPOND BETTER TO NARROW OR STRICT RULES**

### **SCHOOLS RESPOND BETTER TO MORE STRICTLY DEFINED SETS OF RULES AND EXPECTATIONS-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

In general, the Supreme Court's rulings in Fourth Amendment jurisprudence involving public schools have been narrowly articulated. Courts seldom offer administrative advice to school officials. For instance, Kirp (as cited in Elmore & McLaughlin, 1988) found that judicial orders demanding school districts to establish exact proportions of White and Black students and faculties met greater success than those demanding more abstract results, such as the "quality of an integrated education" (p. 32). In short, the Supreme Court ruling itself does not change the behavior (Peltason, 1972).

### **PATCHWORK LAWS AND GUIDELINES HAVE NOT BROUGHT SCHOOLS THE GUIDANCE THEY NEED REGARDING SEARCH- Yearout '02**

[Jason E.; JD Candidate @ College of William & Mary School of Law; INDIVIDUALIZED SCHOOL SEARCHES AND THE FOURTH AMENDMENT: WHAT'S A SCHOOL DISTRICT TO DO?; William & Mary Bill of Rights Journal; February 2002; 10 Wm. & Mary Bill of Rts. J. 489]

Some states have attempted to fill the jurisprudential void not within the judicial branch, but via executive action from the governor, the state department of education, or select statewide task forces. n8 Other states have attempted to tackle the problem through the legislative process. n9 However, solutions such as broad recommended guidelines, although well-meaning, suffer from the same critical problem as the current lack of judicial clarity regarding school searches: their generality and "one size fits all" approach to the Fourth Amendment rights of students fails to give each school district adequate direction, particularly in light of several commonplace fact scenarios on which lower courts currently disagree. Indeed, in the vast majority of cases, "school security, like security for other applications, is not simple and straightforward." n10 "No two schools will have identical and successful security programs - hence, a security solution for one [\*492] school cannot just be replicated at other schools with complete success." n11 The Supreme Court has further complicated the situation by consistently denying certiorari to subsequent cases that could clarify the Court's stance on this increasingly troublesome, and frequently complex, quandary. n12 This Note will argue that the Supreme Court should examine any of several factual scenarios that school districts regularly confront and establish per se rules or, at the very least, articulate more specific factors to consider before undertaking individual searches within public schools.



## **PROBABLE CAUSE JUSTIFIED: UNLIMITED SEARCH POWER PERPETUATES CULTURE OF CONTROL**

### **GIVING POWER TO SEARCH PERPETUATES THE CULTURE OF PEOPLE WHO EXERCISE CONTROL-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

Reiss (1971) contended that discretion is a largely inferential phenomenon, given that the motivating element of discretion will often invite different reactions in different situations. For instance, in previous studies of police searches, this scholar found that police were unable to clearly distinguish between what differentiated a legal warrantless frisk from a standard search. Similar to law enforcement, schools adopt patterns of behavior manifested by a "prevailing culture of those people who exercise control" (Chesler, Chowfoot, & Bryant, as cited in Rossow, 1984, p. 427). In schools, tasks and activities are concealed to a degree, and minimal coordination and control exist between levels of the organization. As Meyer and Rowan (1983) contended, schools are made up of ritual classifications that have secured legitimacy over time, which have allowed its uncertain and irrational nature to remain largely unchallenged within and outside the institution. Given these circumstances, schools will likely comply differently. In light of the extensive autonomy given to schools, the problem that concerns me is whether Supreme Court law, in all its complexities, can be implemented in practice in a fair and equitable way if schools operate in a "loosely coupled" (p. 18) and "particularistic" way (Lufler, as cited in Rossow, 1984, p. 427).

**PROBABLE CAUSE JUSTIFIED: REASONABLENESS STANDARD BD**

**REASONABLENESS STANDARD GRANTS TOO MUCH AUTHORITY TO UTILIZE SEARCH FOR TRIVIAL POLICY INFRACTIONS-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

School attributes seemed to exert considerable influence over interpretation and practice. Scholars have called attention to multiple factors having an impact on the capacity of organizations to comply fully with rulings. Wasby (1973) argued that organizations with high degrees of autonomy and uncertain technologies are less likely to comply with a Supreme Court ruling in the same way. For these reasons, the dissenting justices in T.L.O. were troubled by the inexactness of the majority opinion's standard of "reasonableness." They argued that it would likely extend school administrators an "overly generous" (p. 381) amount of unchecked discretion to search for the "most trivial" (p. 371) of policy infractions. These justices were particularly concerned with the "reasonableness" of the second administered search in T.L.O., which they argued went beyond the initial suspicion for cigarettes. It was the belief of the dissenting justices that the second search was a misguided use of "reasonableness."

**PROBABLE CAUSE JUSTIFIED: DRUG TESTS BAD**

**FORCING DRUG TESTS INTO SCHOOLS TO BE INVOLVED IN ACTIVITIES IS A DESPERATE MOVE THAT LACKS ANY CONSTITUTIONAL JUSTIFICATION-Lithwick '02**

[Dahlia; Senior Editor @ Slate; The Supreme Court's torturous justification of high-school urine tests; Slate; 3 July 2002; [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/07/urinalysis.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/07/urinalysis.single.html); retrieved 15 August 2016]

At the end of the term last week, the Supreme Court handed down a raft of 5-4 decisions that will make the entire country more like high school and make high school more like prison. The court held—among other things—that elected judges may behave more like student council candidates ("I promise more theme dances and strict construction for everyone!") and parochial schools may be treated like public ones. But the court also voted to allow public schools to treat their students—future citizens—as though they're likely to commit a drug crime.

The holding in Board of Education of Pottawatomie County v. Earls shouldn't just enrage students and parents unwilling to see their kids shamed just for joining the band. It should terrify any of us who fear that in promoting a War on Something, the court might be prepared to suspend all rules of constitutional interpretation based on the preposterous legal theory that "Heck, we oughtta try something." The majority opinion in Earls reflects some of the worst results-based decision-making we've seen since Bush v. Gore. And like Bush v. Gore, it is rooted in panic, expediency, and a twisting of prior precedent to fit the facts.



**PROBABLE CAUSE JUSTIFIED: STRIP SEARCHES BAD**

**STUDENT STRIP SEARCHES VIOLATE ETHICAL PRACTICES OF SCHOOL ADMINISTRATORS-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

If we apply the ethic of the profession to the practice of student strip searches, we find it difficult to understand how school officials can justify the practice of strip-searching students. Certainly, these searches do not respect students' privacy rights, nor do they afford these students the dignity that every human being deserves. They show a lack of respect for the child being searched and, as in the Cornfield case, a lack of respect for the parent who refused consent.

**VERY INVASIVE SEARCHES, LIKE STRIP SEARCHES, DO LITTLE TO TEACH RESPONSIBLE BEHAVIOR AND MAY ACTUALLY ENCOURAGE BAD BEHAVIOR-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

The student search-and-seizure rulings in T.L.O. and, most recently, Redding illustrate the remarkable effects of articulation, interpretation, and implementation of a Supreme Court ruling and its implications for administrative discretion, student rights, and the promise and potential of law and policy. These cases collectively illustrate that school leaders possess a significant amount of discretion in determining whether a student search is necessary in a particular situation. In lieu of conducting student strip searches for drugs or weapons, for example, school leaders do have alternative choices to teach students the importance of responsibility to not only themselves but the entire school community. Obviously, schools need to maintain a safe and orderly environment. However, students clearly have rights to privacy and dignity. As such, school authorities have the obligation to act responsibly and teach students to assume responsibility. Conducting highly intrusive strip searches on students and making examples of students who misbehave by humiliating them shows disrespect toward those students (Stefkovich & O'Brien, 2004). Perhaps even more important, these actions teach students that disrespect is acceptable behavior toward others. What is difficult to predict with any certainty from Redding are the decision's long-term implications on school leaders' administrative judgment. Will implementers interpret and enforce the ruling equally, fairly, and ethically knowing that the risks for legal liability appear slim?



## **LOCAL OR REGIONAL STANDARDS BAD: INCONSISTENT STANDARDS ARE CONFUSING AND DANGEROUS**

### **VAGUENESS AND DIFFERENT POLICIES FROM JURISDICTION TO JURISDICTION LEAVES CONFUSION FOR ALL INVOLVED-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

The courts have recently expanded the right of school officials to conduct student searches, resulting in part from recent acts of school violence and heightened public scrutiny. A search that was illegal 20 years ago now may be a legal search. Unfortunately, no definitive test exists for determining what constitutes a legal search. Moreover, what may be legal in one jurisdiction could be illegal in another locality because search law is so fact- and context-specific. This vagueness leaves teachers, administrators, policymakers, and school security and law enforcement personnel wondering what constitutes a legal search of a student in a public school.

### **4TH AMENDMENT APPLICATION VARIES DRAMATICALLY FROM REGION TO REGION-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence? Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

Overall, the findings suggest a considerable regional effect associated with highly discretionary elements of Fourth Amendment law. Regarding the lack of clarity in high court rulings, it has been routinely emphasized that exogenous factors influence the manner to which Supreme Court rulings are interpreted and applied (Goldman & Jahnige, 1985; Johnson & Canon, 1984; Levine & Becker, 1973; Peltason, 1961; Wasby, 1973). These influences generally stem from ideological disagreements or the general ambiguity of high court opinions. Perhaps consistent with prior studies (Chang, 1987; Clark, 1985; Fishman & Strauss, 1990; Gordon, 1989; Mitau, 1967; Reutter, 1982), the effect may result from normative political or cultural values within a region, which should be investigated in future studies.

### **THE LACK OF GUIDANCE FROM CURRENT JURISPRUDENCE ON STUDENT SEARCH GIVES AN OVERLY GENEROUS RANGE OF POWER TO SCHOOL ADMINISTRATORS-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

T.L.O., Vernonia, Earls, and Safford underscore the complexity of school adherence. The rulings taken together seem to reveal a tension between the interests of the state and the interests of students. This dilemma deserves greater attention in the law and educational literature to be sure. One obvious concern involves the limited practical guidance offered by the rulings, which may inadvertently afford school officials an overly generous range of power. With few exceptions, the Court usually defers to the expertise of school officials when educational solutions are required (e.g., discipline).

**THE AMBIGUITY OF RULINGS LIKE T.L.O. MAKES THE PROBABILITY FOR IRREGULARITY IN ADMINISTRATIVE ACTION HIGH-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

Although the T.L.O. Court expressed concern about searches "overly intrusive in light of the age and sex of the student and the nature of the infraction" (p. 342), formulaic guidance to determine legally acceptable forms of searches was not provided. In the absence of exact legal language in T.L.O., the probability for irregularity in administrative choice and action across settings would seem high. As a consequence, situations may arise where schools inadvertently disregard students' rights for the sake of security and order. Despite U.S. Supreme Court rulings emphasizing a balance between schools' interest in maintaining order and student privacy, McKinney (1994) suggests that the balance between and student may be somewhat tipped toward school officials. Recent studies (Morris, 2005; Owen, 2005; Skiba et al., 2002) suggest discrepant disciplinary choice and action by school officials on the basis of students' race. Should biases exist, the discretion permitted in T.L.O. and the three subsequent cases assumes greater import. Absent clear legal contours around search and seizure, school officials are seemingly left with considerable discretion to decide what is appropriate in the form of search, which may result in greater irregularity in the choice of search selected for the same or similar offenses.

**REGIONS TREAT STUDENT SEARCH DIFFERENTLY-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence? Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

For search intrusiveness, courts overwhelmingly ruled favorably for schools when the threat to student privacy was minimal, meaning the use of a less intrusive search or a single search. The odds of students winning cases involving less intrusive searches in the West are slim at best according to the findings of this study. When addressing the standard of reasonableness relative to intrusiveness of searches, Justice Stevens suggested that an ambiguous standard with regard to "scope" elicits an uncertainty that may give school administrators an "overly generous" amount of discretion (New Jersey v. T.L.O., 1985, p. 381). Nevertheless, the evidence suggests that schools will generally prevail if the search is minimally intrusive. As for the number of separate searches--the second variable of intrusiveness--greater variability in student case outcomes occurred between regions. Courts in the Northeast and Central regions seemed more inclined than other regions to support additional searches of students. The intent of "reasonableness," according to the T.L.O. Court, gives school officials the power and authority to manage and sustain order and discipline through "dictates of reason and common sense" (p. 343) while at the same time safeguarding students' interests. The legal understanding of "common sense" may mean different things to different people, however. In the absence of clarity, research suggests that discrepancies in administration of law will likely endure (Dolbeare, 1973; Goldman & Jahnige, 1985; Johnson & Canon, 1984; Wasby, 1973). Future research will need to explore these differences in search frequency, looking closely at subjective factors that ultimately persuade school leaders to intensify search efforts.

**STUDENT SPEECH AND PUBLICATION CASES UNDERLINE THAT POWER GIVEN TO ADMINISTRATORS MEANS VAST REGIONAL DIFFERENCES IN POLICY-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

The vague contours of discretion were revealed in a study of the effect of Hazelwood School District v. Kuhlmeier on student publication censorship. Salomone (1992) found that school interpretation of the ruling was substantially related to its national location. For instance, school officials in the southern region of the country exceeded all other parts of the country by 10% to 15% as far as administrative control over student publications. Principals in the study were asked whether the Hazelwood decision, school community pressure, or board pressure was a pivotal factor in the increase of authority over the school paper. Large school systems (32%), as well as southern (28%) and northeastern regions (30%) of the country, attributed the expansion of authority more to Hazelwood than other independent variables on average. Salomone's findings suggest a contextual dimension to discretion that begs further research in this area. The inconsistent approach to the Hazelwood underscores the critical role of ethics in school leadership.

**LOCAL OR REGIONAL STANDARDS BAD: CREATES DIFFERENTIAL TREATMENT BASED ON RACE**

**SCHOOL ADMINISTRATOR DIGRESSION CREATES DIFFERENTIAL TREATMENT ON THE BASIS OF RACE-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

Because policies are "blunt" instruments and have limited utility with regard to regulating behavior, wide latitude is afforded to school officials acting in good faith. Discretion is a murky area; it is oftentimes defined in contextual or idiosyncratic ways. Research on school discipline has noted some of this complexity. Prior studies on school discipline suggest, for instance, possible differential treatment of students on the basis of race (Eitle & Eitle, 2004; Mendez, Knoff, & Ferron, 2002; Owen, 2005; Reyes, 2006; Skiba, Michael, Nardo, & Peterson, 2002).



**LOCAL OR REGIONAL STANDARDS BAD: COURTS ADMIT NO CLEAR STANDARD EXISTS**

**COURTS THEMSELVES HAVE AGREED THAT THERE IS NO CLEAR CUT RULE THAT DEFINES REASONABLE SUSPICION-  
Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

Although the legal standard for reasonable suspicion is clear, the application of it in different contexts is not always as clear. The Court has even noted that articulating precisely what reasonable suspicion means . . . is not possible. Reasonable suspicion is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. (Ornelas v. United States, 1996, at 695)



**WE MUST REASSERT THE 4TH AMENDMENT WITH INCREASED PRESENCE OF LAW ENFORCEMENT IN SCHOOLS-Pinard '03**

[Michael; Assistant Professor at the University of Maryland School of Law; From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities; Arizona Law Review; Winter 2003; 45 Ariz. L. Rev. 1067]

The Article concludes that the current standards which govern the Fourth Amendment's application in public school searches need to be revamped in light of the increased interdependency n13 between school officials and law enforcement authorities in the years following New Jersey v. T.L.O. This convergence has greatly altered the methodologies and philosophies of school discipline processes. Most significantly, it has led to increased use of the juvenile and criminal justice systems to monitor and punish a broadened array of student conduct. As a result, there is a widening gulf between the more expansive use of law enforcement personnel in school discipline, along with the broadened categories of behaviors that could potentially introduce students to the criminal justice system, and the narrow (and narrowing) protections afforded students under the Fourth Amendment.

**POLICE IN SCHOOLS: SCHOOL USING AGGRESSIVE INTERROGATION, HARMING STUDENTS**

**THE LACK OF MIRANDA RIGHTS OR PROBABLY CAUSE IN SCHOOLS IS DANGEROUS IN LIGHT OF THE INTERROGATION BEING TAUGHT TO SCHOOLS-Starr '16**

[Douglas; Co-Director of the Graduate Program in Science Journalism at Boston University; WHY ARE EDUCATORS LEARNING HOW TO INTERROGATE THEIR STUDENTS?; New Yorker; 25 March 2016;

<http://www.newyorker.com/news/news-desk/why-are-educators-learning-how-to-interrogate-their-students>; retrieved 14 August 2016]

Things get especially complicated when interrogations take place in school, where students have fewer legal rights than in a police station. School officials do not need a warrant or probable cause to search a student's locker or backpack, nor are they required to give a Miranda warning prior to an interrogation, no matter how severe the offense. According to Barry Feld, a professor at the University of Minnesota Law School and a specialist in juvenile law, the power differential between students and administrators has a significant effect. "All these kids are thinking is, 'How do I get out of here without my parents finding out?' " Feld said.

## **POLICE IN SCHOOLS: POLICY MAY OR MAY NO BE HELD TO CONSTITUTIONAL STANDARDS IN SCHOOLS**

### **THE SUPREME COURT HAS NOT CLARIFIED WHAT HAPPENS WHEN A SCHOOL ADMINISTRATOR SEARCHES IN CONCERT WITH LAW ENFORCEMENT-Pinard '03**

[Michael; Assistant Professor at the University of Maryland School of Law; From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities; Arizona Law Review; Winter 2003; 45 Ariz. L. Rev. 1067]

In light of the more formalized relationships that have been forged between public schools and law enforcement authorities in the years following T.L.O., lower courts have confronted Fourth Amendment challenges by students charged with criminal offenses emanating from school searches by or involving law enforcement authorities. As explained above, the Supreme Court in T.L.O. did not consider the level of suspicion necessary when school officials act in "conjunction with or at the [\*1081] behest of law enforcement agencies" n61 because the school administrator acted alone in searching T.L.O.'s belongings. n62

### **SCHOOL RESOURCE OFFICERS MAY OR MAY NOT NEED TO ADHERE TO PROBABLY CAUSE PROTECTIONS DEPENDING ON THEIR PERCEIVED ASSIGNMENT-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

School officials need only reasonable suspicion to search students in public schools, but sworn law enforcement officials normally must have probable cause to search students. Probable cause to search exists when "known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband . . . will be found" (Ornelas v. United States, 1996, at 696). But are law enforcement officials assigned to schools to maintain safety subject to the reasonable suspicion standard or the higher probable cause standard? The answer depends on whether the court views law enforcement personnel assigned to the school as school officials or law enforcement officials.

### **COMPLICATED RELATIONSHIPS BETWEEN LAW ENFORCEMENT AND SCHOOL OFFICIALS MAKE PROBABLY CAUSE REQUIREMENTS CLOUDY-Pinard '03**

[Michael; Assistant Professor at the University of Maryland School of Law; From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities; Arizona Law Review; Winter 2003; 45 Ariz. L. Rev. 1067]

Because of their narrow constructs, most courts and several commentators would require that, for probable cause to be the level of suspicion against which a school search involving law enforcement authorities should be measured, law enforcement personnel must initiate the search. n162 This, in turn, mandates that officers [\*1099] actually be present and actively involved in the search. n163 The problem is that these standards fail to gauge completely the entangled relationships between school officials and law enforcement authorities that have formed from the escalated use of law enforcement measures to enforce school rules, n164 as well as the concomitant increased reliance on the criminal justice system to punish student violators.

## **POLICE IN SCHOOLS: STANDARDS ARE LOWERED FOR LAW ENFORCEMENT IN SCHOOLS DUE TO LACK OF 4<sup>TH</sup> AMENDMENT PROTECTIONS**

### **COURTS HAVE DECREASED THE STANDARDS OF SEARCH FOR POLICE OFFICERS INSIDE OF SCHOOL BUILDINGS DOING ADMINISTRATIVE WORK-Child Protection Law Report '05**

[High school resource officer may search student without consent; Child Protection Law Report; August 2005; page 83]

A high school resource police officer who has reasonable suspicion of drug possession may search a student whether or not the student consents, the Court of Appeals of North Carolina ruled.

Durham County Deputy Sheriff and School Resource Officer Eric Wade Carpenter worked exclusively at a high school as the school's resource officer. He "assisted school officials with school discipline matters and taught law enforcement related subjects." Deputy Carpenter also helped school personnel in monitoring the hallways.

In December 2003, Deputy Carpenter smelled marijuana on a student in the hallway. He asked the student to accompany him, two assistant principals, and two unidentified students to the school's weight room. Deputy Carpenter asked the student if he had anything on him, to which the student replied that he did not.

Deputy Carpenter then requested to search the student and the student did not object. A demand that the student empty his pockets, "produced a plastic bag ... containing ten small plastic bags of marijuana." The student was found by the trial court to be delinquent.

Searches conducted by school officials--with or without a student's consent--are permissible as long as "reasonable grounds exist for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985).

The North Carolina appellate court decided that for purposes of searching a student, a school resource police officer is the equivalent of a school administrator or other official. Therefore, the limitations on searches by other police officers do not apply. The court explained that resource officers "work in conjunction with" school personnel and are primarily accountable to the school district rather than the police department.

### **COURTS HAVE ALLOWED POLICE A LOWER STANDARD OF SEARCH IN CONTEXT OF SCHOOLS-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

The Dilworth decision is representative of a series of recent cases in which trial and appellate courts have lowered the bar for student searches by police officers. Instead of protecting schoolchildren from arbitrary police intrusion, courts have given law enforcement officials the widest latitude to search students. For example, state appellate courts have redefined police search conduct as "minor" or "incidental" to justify application of the reasonable suspicion standard. Appellate courts have also suggested that the lesser reasonable suspicion test should be applied when police search at the request of school officials or are present when school authorities engage in a search. Courts have even upheld dragnet suspicionless searches of school lockers and police-directed canine searches of students' property with no warnings. Due to these decisions, public school children may now be searched on less than probable cause and prosecuted in adult court with the evidence from the search

**COURTS HAVE ALLOWED POLICE IN SCHOOLS TO DO BROADER SEARCHES IN VIOLATION OF THE 4TH AMENDMENT AS THEY WERE AN AGENCY OF THE SCHOOL ADMINISTRATION-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

The Dilworth decision stands in stark opposition to Fourth Amendment precedents that require the probable cause test to be met when evidence from a search by a law enforcement official forms the basis of a criminal prosecution. For example, in *A.J.M v. State* (1993), the T.L.O. standard does not apply to a search by a sheriff's officer who was serving as a school resource officer and was asked to conduct a search by the school principal; in *F.P. v. State* (1988), the T.L.O. standard does not apply where a search is carried out at the behest of police.

**SCHOOL RESOURCE OFFICERS MAY BE SEEN AS AGENTS OF THE SCHOOL, LOWERING THE SEARCH STANDARDS-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

When the police or school administrators act at one another's request, they run the risk of becoming one another's agents. Such a relationship could change the standard necessary to conduct a student search. Some courts treat police officers as school officials subject to the lower standard of reasonable suspicion when they search students at the request of school administrators (In the Interest of Angelia D.B., 1997). Other courts hold that school officials conducting a search on the basis of information from the school resource officer are acting as agents of the police and are, therefore, subject to the higher standard of probable cause (*State of New Hampshire v. Heitzler*, 2000). The mere presence of a sworn law enforcement officer during a search by a school administrator does not trigger the need for probable cause (*Florida v. D.S.*, 1996).

**POLICE IN SCHOOLS: WIDE POLICE POWERS IN SCHOOLS = ABUSE**

**ALLOWING POLICE WIDE POWERS IN SCHOOLS OPENS THE DOOR TO WIDESPREAD ABUSE OF STUDENT RIGHTS-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

Justice Nickels, dissenting in Dilworth, severely criticized the majority for lowering the search standard for a school police officer when he stated:

I cannot agree with the majority that a police officer whose self-stated primary duty is to investigate and prevent criminal activity may search a student on school grounds on a lesser [F]ourth amendment standard than probable cause merely because the police officer is permanently assigned to the school and is listed in the student handbook as a member of the school staff. The majority's departure from a unanimous line of Federal and State decisions places form over substance and opens the door for widespread abuse and erosion of students' [F]ourth amendment rights to be free from unreasonable searches and seizures by law enforcement officers.



## SLIPPERY SLOPE: STUDENT RIGHTS ARE AN IMPORTANT LABORATORY OF BROADER RIGHTS

### CONTINUAL EXPANSION OF SEARCH PROGRAMS, LIKE DRUG TESTS, WILL EVENTUALLY FAN OUT INTO THE ENTIRE SCHOOL POPULATION-Hartman '03-'04

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

One final public policy consideration deals with the future of drug-testing programs as a whole, and is not restricted to any one factor in the Supreme Court's balancing test. Although this particular consideration does not apply to any of the factors in the test, it is an important concern that must be considered when discussing the impact of any constitutional issue. The Supreme Court has already upheld two types of high school drug-testing programs, and the possibility is left open to uphold programs in other contexts as well. If drug-testing programs continue to be upheld, eventually every student group is in danger of being subjected to a suspicionless drug-testing program. Conceivably, schools may reach the point where they require every student in school to submit to a drug test, regardless of student group affiliation.

### MUST REESTABLISH STANDARDS FOR STUDENT PRIVACY OR WE RISK PERMITTING MORE INVASIONS OF MINORS IN AND OUT OF SCHOOL-Torres '12

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

Others, however, see the Vernonia ruling and, to a greater degree, the Earls decision as having "breathed new life into what many viewed as the all-but-dead doctrine of in loco parentis" (Dupre, 1996, p. 87). Stanislauczyk (1996) argues that unless a common standard of student privacy is restored, the Fourth Amendment will continue to attract less judicial scrutiny than other civil liberty domains. Similar to those of T.L.O. and Vernonia, the ruling in Earls will likely endure bending and manipulation over time (Stanislauczyk, 1996, p. 1079), permitting drug testing of a wider population of minors inside and outside the school.

### SPECIAL NEEDS EXCEPTIONS REPRESENT A SLIPPERY SLOPE, DEGRADING PRIVACY AND 4TH AMENDMENT PROTECTIONS-Lithwick '02

[Dahlia; Senior Editor @ Slate; The Supreme Court's torturous justification of high-school urine tests; Slate; 3 July 2002; [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2002/07/urinalysis.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2002/07/urinalysis.single.html); retrieved 15 August 2016]

The special needs doctrine is an odd duck: In 1989 the court decided *Skinner v. Railway Labor Executives' Association*, allowing railroad workers to be tested for drug use to ensure public safety in a highly regulated industry. That same year it decided in *Treasury Employees Union v. Von Raab* that a drug-testing program for customs officials was constitutional, again because of the compelling state interest in ensuring that "front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." The next slide down this slippery slope was an easy one, and so in 1995 the court upheld, by a 6-3 vote, the constitutionality of a school district's policy of drug-testing student athletes without suspicion. Turning to its trusty "special needs" balancing test, the court in *Vernonia School District v. Acton* balanced the "privacy expectations" of student athletes against the urgency of the government's war on drugs. Not surprisingly, the students (whom the court felt were used to walking around naked in public anyhow) lost.

**DECISIONS RELATED TO SCHOOLS AND SEARCH HAS BROAD IMPACT ON HOW WE LOOK AT PRIVACY AND PROCESS ON A BROADER SCALE-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The collision between the need to keep students safe and give them due process and the desire to let them learn and grow will continue to be a central question for schools for years to come. The results will say a lot about how much we value both privacy and process.

**WE MUST DRAW LINES ON LIMITLESS SEARCHES IN SCHOOL BEFORE ALL ACTIVITY UNDER ALL CIRCUMSTANCES IS MONITORED-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

Since the early-to-mid-1990s, around the time that the Gun Free School Zones Act n230 was signed into law, schools have begun to implement strict zero tolerance policies. n231 Although zero tolerance policies were initially implemented to combat possession of weapons in schools, with the intended consequence of making schools safer, such policies have expanded to include other behavior viewed as disruptive or dangerous, such as drug and alcohol use. n232 Such zero tolerance policies have led to students being subjected to interference by school officials for conduct that many would consider trivial. n233 Some schools have even begun to require every student entering the school to pass through a metal detector in order to screen out those attempting to bring weapons into the school. n234 If the trend of schools imposing suspicionless drug-testing programs on students is not halted at some point, then schools may see them as a routine attempt at maintaining order and discipline. Consequently, schools may begin to impose them on any and all groups of students, including non-competitive extracurricular activities such as multi-cultural club or peer mentor programs, with the eventual step of imposing suspicionless drug tests on every student in attendance at the school, much like subjecting every student entering the school to a metal detector search.

**THE PRESENCE OF POLICY IN SCHOOLS HAS EXPANDED THE SCOPE OF STUDENT SEARCH WITH NO END IN SIGHT-Beger '04**

[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

Police have adopted other aggressive search tactics on school campuses, such as herding students into hallways for unannounced weapons searches, known as "blitz operations." At Shawnee Heights and Seaman High School in Kansas City, signs warn students driving into school parking areas that they have just consented to searches of their vehicles "with or without cause" by school administrators or police officers. Scores of other schools across the country have adopted similar vehicle search policies. Groups of students have even been strip-searched by police officers to locate money missing from a classroom. There seems to be no end in sight to the aggressive search methods police are willing to use on students in the name of safety.



**THE DRUG WAR IS AN INEFFECTIVE POLICY, MAKING THE CURB ON CIVIL LIBERTIES THAT MUCH MORE OFFENSIVE-  
Lemieux '11**

[Scott; Assistant Professor of Political Science @ the College of Saint Rose; These Are Your Rights on Drugs; The American Prospect; 19 May 2011; <http://prospect.org/article/these-are-your-rights-drugs>; retrieved 11 August 2016]

All of these civil-liberties violations might be more tolerable if they were part of a valuable and effective policy. But while the drug war has been successful at locking up huge numbers of people (especially young African American men), it's done little to reduce drug use. Alas, the drug war has been far more effective in curbing our civil liberties.

**THERE IS NO DRUG EXCEPTION (OR ANY OTHER EXCEPTION) TO THE CONSTITUTION-Marshall '13**

[Thurgood; Associate Justice of the US Supreme Court; Summarized in Conor Friedersdorf; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013; <http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

The fact is that the malleable "special needs" balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not.

There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest. Because abandoning the explicit protections of the Fourth Amendment seriously imperils "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men," I reject the majority's "special needs" rationale as unprincipled and dangerous.

**THE 4TH AMENDMENT EXCEPTIONS ALLOWED FOR SCHOOLS SUBJECT STUDENTS TO HUMILIATING SEARCHES IN THE  
NAME OF DRUGS-Lemieux '11**

[Scott; Assistant Professor of Political Science @ the College of Saint Rose; These Are Your Rights on Drugs; The American Prospect; 19 May 2011; <http://prospect.org/article/these-are-your-rights-drugs>; retrieved 11 August 2016]

The Supreme Court has also ignored the Fourth Amendment by allowing law enforcement to submit government employees and students at public schools to humiliating, invasive drug tests without individualized suspicion or any evidence of a drug problem. In one case, the Court upheld random drug searches by Customs Service agents despite the lack of evidence of drug abuse. The decision so infuriated Justice Antonin Scalia -- not exactly a bleeding heart -- that his dissent decried the "immolation of privacy and human dignity in symbolic opposition to drug use." This description applies to much of the Court's drug-war-related Fourth Amendment jurisprudence, including decisions Scalia has written or joined.

**IN A FIT OF ANTI-DRUG PARANOIA, THE SUPREME COURT HAS DIMINISHED 1ST AND 4TH AMENDMENT RIGHTS FOR STUDENTS-Lemieux '11**

[Scott; Assistant Professor of Political Science @ the College of Saint Rose; These Are Your Rights on Drugs; The American Prospect; 19 May 2011; <http://prospect.org/article/these-are-your-rights-drugs>; retrieved 11 August 2016]

Students have been particular victims of the drug-war frenzy. The Court has given school administrators wide discretion in conducting searches without probable cause and has also upheld policies that require students to submit to drug testing as a condition of participating in any extracurricular activity. The Court has also sacrificed the First Amendment in the name of the war on drugs. The same justices who believe that corporations have a virtually unlimited right to spend money to elect preferred candidates upheld the suspension of a student for holding an innocuous banner across from the school reading "Bong Hits 4 Jesus."

**A/T: SEARCHES HAVE GOOD OUTCOMES/ARE WELL-INTENTIONED**

**NO MATTER HOW WELL-INTENTIONED, UNLIMITED SEARCH IS LIMITED BY THE CONSTITUTION-Marshall '13**

[Thurgood; Associate Justice of the US Supreme Court; Summarized in Conor Friedersdorf; Staff Writer; Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment; The Atlantic; 10 July 2013;

<http://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>; retrieved 11 August 2013]

I recognize that invalidating the full-scale searches involved in the FRA's testing regime for failure to comport with the Fourth Amendment's command of probable cause may hinder the Government's attempts to make rail transit as safe as humanly possible. But constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well-intentioned, must always be pursued within constitutional boundaries. Were the police freed from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this spectre reflects our shared belief that even beneficent governmental power -- whether exercised to save money, save lives, or make the trains run on time -- must always yield to "a resolute loyalty to constitutional safeguards." The Constitution demands no less loyalty here.



**A/T: COURTS PROTECTING STUDENTS**

**THE TREND OF COURTS IS TO SCALE BACK ANY 4TH AMENDMENT PROTECTIONS FOR STUDENTS IN SCHOOL-Beger '04**  
[Randall R.; Associate Professor of Sociology at the University of Wisconsin Eau Claire; Increased School Security Measures Violate Students' Rights; How Can School Violence Be Prevented?; 2004; Gale Group Databases]

This article examines law enforcement expansion in schools and the vanishing Fourth Amendment rights of public school children. The climate of fear generated by recent school shootings has spurred school administrators to increase security through physical means (locks, surveillance cameras, metal detectors) and to hire more police and security guards. State lawmakers have eagerly jumped on the school safety bandwagon by making it easier to punish school children as adults for a wide range of offenses that traditionally have been handled informally by teachers. Instead of safeguarding the rights of students against arbitrary police power, our nation's courts are granting police and school officials more authority to conduct searches of students. Tragically, little if any Fourth Amendment protection now exists to shield students from the raw exercise of police power in public schools.



## **A/T: COURTS GRANT WIDE POWERS, JUSTIFYING THE SITUATION**

### **EVEN IF COURTS ARE NOT WILLING TO HOLD SCHOOL ADMINISTRATORS RESPONSIBLE FOR BAD SEARCHES, SCHOOL ADMINISTRATORS HAVE ETHICAL RESPONSIBILITIES TO ACT APPROPRIATELY-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

For example, in *Thomas v. Roberts* (2001), a student strip search case decided 4 years before *Redding*, school officials' strip-searched an entire classroom of students for a missing \$26. Despite the court finding the strip searches illegal under the Fourth Amendment, the school officials involved in the searches were granted immunity from liability. The court reasoned that since no law or cases had yet demonstrated that such actions were illegal, neither the school nor the officials could be held financially responsible for damages suffered by the students resulting from the strip searches. While it is understandable that courts do not wish to tie the hands of school administrators with legal restrictions in their daily decision-making activities, student strip search cases raise serious ethical concerns (Stefkovich, 2006).

### **WE MUST COMPEL SCHOOL ADMINISTRATORS TO TAKE ON AN ETHIC OF THE PROFESSION WITH DEALING WITH VERY INVASIVE SEARCHES, LIKE STRIP SEARCHES-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

A review of Fourth Amendment case law involving student strip searches clearly indicates that students have legal rights to privacy. Similarly, school administrators are afforded wide latitude in the implementation of those privacy rights. Based on an analysis of existing student strip search case law and in the absence of a definitive solution to this problem, this article argues for an ethical model called the "ethic of the profession" (Shapiro & Stefkovich, 2010; Stefkovich, 2006; Stefkovich & O'Brien, 2004) to be applied to strip search incidents.

**A/T: MUST BALANCE INTERESTS**

**AS IT CURRENTLY STANDS, MUCH AMBIGUITY HAS BEEN INTRODUCED IN THE PROCESS AS PART OF THE "BALANCING" ACT BETWEEN STUDENT RIGHTS AND SCHOOL AUTHORITY-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Differentiated jurisprudence? Examining students' fourth amendment court decisions by region of country; Journal of School Leadership; November-December 2012; page 1087]

The following study examines federal and state court decisions in student Fourth Amendment cases between the New Jersey v. T.L.O. ruling in 1985 and 2003. The Fourth Amendment of the U.S. Constitution serves as the legal touchstone for searches and seizures, affording citizens the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While each of the four U.S. Supreme Court cases relating to student privacy and search and seizure has addressed the issues of practical significance (e.g., drug testing, strip searching), uncertainty remains over other administrative aspects that are largely discretionary and subjective (e.g., determining a reasonable search, involving police in searches, establishing a severity of the need for random student drug testing).

## CON

### **BALANCING CONCERNS JUSTIFIED: PRIVACY DEBATES SHOULD HAPPEN AT THE SCHOOL LEVEL**

#### **THE NATURE OF BALANCING CONCERNS MEAN THAT MOST OF THE INDIVIDUAL CASES REGARDING PRIVACY AND RIGHTS HAPPEN AT THE SCHOOL LEVEL-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

Issues of privacy, search and seizure, and due process rights can be highly charged and emotional. Because it calls for balancing school safety and discipline versus student rights, many of these cases never get to court, but are settled by discussions with school officials.

#### **SCHOOLS ARE GIVEN THE CHALLENGING TASK OF BALANCING RIGHTS WITH SCHOOL INTERESTS TO MAINTAIN SAFETY, ETC.-Cambron-McCabe '09**

[Nelda; Professor of Educational Leadership; Miami University; Phi Delta Kappan; June 2009; Page 709]

Courts have given school officials considerable leeway in censoring speech that represents the school, that is obscene or lewd, and that promotes illegal activities. At the same time, officials must respect students' private speech unless it is, or has the potential to be, disruptive in the school environment. Furthermore, students' Fourth Amendment rights require school authorities to substantiate that a reasonable suspicion exists before they conduct a search and that the search is not overly intrusive. Before imposing punishment, students must be afforded procedural due process.

#### **SCHOOLS DO HAVE ENHANCED POWERS, BUT, MUST CAREFULLY BALANCE THAT WITH STUDENT RIGHTS-Cambron-McCabe '09**

[Nelda; Professor of Educational Leadership; Miami University; Phi Delta Kappan; June 2009; Page 709]

As noted, courts have given school officials considerable latitude in maintaining a school environment conducive to learning. Officials can limit particular speech if it poses potential disruption; they can impose punishment for infractions after providing students an opportunity to be heard; and they can initiate student searches when a reasonable suspicion exists that students are committing or have committed offenses. At the same time, school officials are charged with preserving the delicate balance between students' rights and their own responsibilities for managing the educational environment. They must be able to justify disciplinary regulations and practices as necessary to carry out the school's educational mission.

## **BALANCING CONCERNS JUSTIFIED: SCHOOLS ARE UNIQUE, REQUIRING A BALANCED APPROACH**

### **YOU CAN BALANCE PRIVACY OF STUDENTS WITH THE NEED FOR FLEXIBILITY TO MAINTAIN ORDER IN SCHOOLS WITHOUT PROBABLE CAUSE-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

Further, the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. n55 Instead, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." n56 Such an inquiry mandates the application of a two-pronged test. n57

### **PRIVACY AND SAFETY NEED TO BE CAREFULLY BALANCED IN SCHOOLS-Essex '04**

[Nathan L.; Professor of Education Law at the Southwest Tennessee Community College; Clearing House; November/December 2004; page 5]

To search or not to search is a perplexing issue facing school leaders. On one hand, school officials are responsible for providing a safe and orderly learning environment for all students. On the other hand, they must recognize and respect students' personal rights. Achieving this delicate balance often is difficult for school officials.

### **A UNIQUE NEED EXISTS IN SCHOOLS TO BALANCE RIGHTS AND THE NEED TO MAINTAIN SCHOOL SAFETY-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

Students in U.S. public schools have the Fourth Amendment right to be free from unreasonable searches. This right is diminished in the school environment, however, because of the unique need to maintain a safe atmosphere where learning and teaching can occur. Schools must strike a balance between the student's right to privacy and the need to maintain school safety.

### **SAFE SCHOOLS AND CONSTITUTIONAL RIGHTS MUST BE BALANCED-Cambron-McCabe '09**

[Nelda; Professor of Educational Leadership; Miami University; Phi Delta Kappan; June 2009; Page 709]

Now more than ever, as our society is characterized by a fear of violence, drugs, and terrorism, educators face significant pressures to safeguard students in schools. But as educators work to ensure safe schools, they also must be vigilant in safeguarding students' constitutional rights.



## **BALANCING CONCERNS JUSTIFIED: T.L.O. BALANCES STUDENT RIGHTS AND NEED FOR FLEXIBILITY APPROPRIATELY**

### **TLO PROVIDES FOR A REASONABLENESS STANDARD THAT PROVIDED FLEXIBILITY INSIDE THE SCHOOL ENVIRONMENT, MINDING ALL OF THE CIRCUMSTANCES-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

In T.L.O., the Supreme Court ruled that the warrant requirement is "unsuited to the school environment" (p. 340). Instead, the Court determined that "special needs" inherent in the public school context justified adopting a standard by which the legality of a search would depend on the "reasonableness, under all the circumstances" (p. 341) of the search. T.L.O.'s standard of reasonableness sought to strike a balance between students' expectations of privacy and school officials' need to maintain a safe and orderly student learning environment.

### **THE REASONABLENESS STANDARD BALANCES THE NATURE OF THE SEARCH WITH 4TH AMENDMENT RIGHTS-Cambron-McCabe '09**

[Nelda; Professor of Educational Leadership; Miami University; Phi Delta Kappan; June 2009; Page 709]

School officials can meet the T.L.O. "reasonableness standard" when searches are based on specific facts (or evidence) and individualized suspicion. However, the more intrusive the search, the greater the level of suspicion required. Searching a student's backpack is less intrusive than searching a student's person or conducting a strip search, thereby requiring a lower level of suspicion. (9)

### **NEW JERSEY VS. TLO CAREFULLY BALANCES GOVERNMENT AND PRIVATE INTERESTS-Vaughn and del Carmen '97**

[Michael S.; Assistant Professor of Criminal Justice, Georgia State University; and Rolando V., Professor of Criminal Justice at Sam Houston State University; The Fourth Amendment as a tool of actuarial justice: the "special needs" exception to the warrant and probable cause requirements; Crime and Delinquency; January 1997; page 78]

Justice Blackmun, in a concurring opinion, stated that the Court has long recognized some "exceptions to the probable-cause requirement where a careful balancing of governmental and private interests suggests that the public interest is best served by a lesser standard." He added that "I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with a `special law enforcement need for greater flexibility.'" He further opined that the framers of the Constitution explicitly stated that a search is "reasonable only if supported by a judicial warrant based on probable cause"; and thus it is "only in those exceptional circumstances in which `special needs', beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers" (New Jersey v. T.L.O. 1985, p. 351). Justice Blackmun's use of "special needs" in T.L.O. was in a concurring opinion, and T.L.O. itself relied, to a large extent, on the fact that the search was not for the purposes of identifying a violation of the criminal law. Thus the "special needs" doctrine was meant to be used only in nonlaw enforcement situations involving "exceptional circumstances" where flexibility and practicality demanded a softening of the warrant and probable cause requirements.

**BALANCING CONCERNS JUSTIFIED: COURTS HAVE CREATED A CAREFUL BALANCE****COURTS HAVE BALANCED OUT EXPECTATION OF PRIVACY WITH INDIVIDUAL SUSPICION WHEN DEALING WITH STUDENTS-Eckes '13**

[Suzanne E., JD; Associate Professor at Indiana University; Searching a student's sedan: what are the recent trends in litigation? Students have expectations of privacy at school, but educators have the right to search students' personal possessions if it is deemed "reasonable;" Principal Leadership; November 2013; page 8]

Importantly, under T.L.O., a school search must be both "justified at its inception" (e.g., there are reasonable grounds to believe that the search will turn up evidence that the student violated a school policy) and "reasonable in scope" (e.g., the search is not overly excessive). When considering whether a search is justified at its inception, courts have delineated different expectations of privacy. Some courts have noted that because students have a high expectation of privacy for their personal possessions, school officials must have individualized suspicion to search them. On the other hand, students have a lower expectation of privacy for their school lockers than for their backpacks or handbags; therefore, school officials in many jurisdictions are generally not required to have individualized suspicion to conduct locker searches. The greater expectation of privacy involved, the more likely that individualized suspicion will be necessary.

**PROPER CHECKS EXIST TO CURB SCHOOL ADMINISTRATOR POWER TO SEARCH STUDENTS AND PROTECT RIGHTS-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

In order to protect students' rights at school, courts have properly articulated checks upon school officials and the police so that they may not conduct illegal searches and use that evidence against students. The most important of these checks is that the search must be based on reasonable suspicion.(FN18) This means that narcotics dogs, in most instances, cannot be used to sniff a student's body without individualized suspicion that the student has violated or is violating either the law or the rules of the school.(FN19) If such a search were conducted, it would most likely amount to an illegal intrusion on the student's rights and infringe upon his or her personal dignity and security.(FN20)

**COURTS HAVE PUT IN CHECKS WITH STRATEGIES LIKE DRUG DOGS-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

Since narcotics dogs are used in close proximity to students, the courts have established checks in the system, so that the student's sense of personal autonomy is not eroded. Yet the underlining theme is that most students have no expectation of privacy in the smell emanating from their vehicle on school property. Similarly, some students have no expectation of privacy in school either, where the school retains control over their lockers and the students have been provided with notice of this policy.

## **CURRENT STANDARDS GOOD: STUDENTS HAVE MOST RIGHTS THEY HAVE ENJOYED IN HISTORY**

### **CURRENT EXPECTATIONS GIVE MORE PRIVACY TO STUDENTS THAN PREVIOUSLY; REASONABLE SUSPICION IS NOW REQUIRED TO SEARCH THINGS LIKE STUDENT LOCKERS-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

Similarly, if the school does not retain extensive control over lockers and implement a policy to demonstrate that such control is retained, students will be deemed to have a higher expectation of privacy and may be able to limit random searches of their lockers. Before this check was implemented, school districts could randomly search any locker; now they are required to articulate the reasonable suspicion that led them to a particular locker, absent a narcotics dog indication. The problem with controlling lockers is analogous to automobiles insofar as school officials cannot obtain instant access to either on a whim. Instead reasonable suspicion must be obtained first, and narcotics dogs can provide reasonable suspicion while simultaneously protecting the privacy of students.

**CURRENT STANDARDS GOOD: INVASIVE SEARCHES ARE BLOCKED BY CURRENT STANDARDS****COURTS HAVE RULED THAT THE REASONABLENESS STANDARD WOULDN'T ALLOW STRIP SEARCHES FOR LOW-IMPACT INFRACTIONS-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

Ever since the Supreme Court's 1985 decision in T.L.O., school leaders have had the legal right to search a student's outer clothing, such as jackets or backpacks, even if there is only a reasonable chance of finding any incriminating evidence. Since the T.L.O. decision, however, the constitutional status of student strip searches has been in legal limbo. In the court case Safford Unified School District v. Redding (2009; hereafter, Redding), the U.S. Supreme Court recently ruled on June 25, 2009, in a majority 8-1 decision that school officials acted unconstitutionally and violated a student's Fourth Amendment rights when conducting a strip search of Savana Redding, a 13-year-old middle school student looking for prescription-strength ibuprofen. The student strip search was based solely on an accusation from another fellow student that Redding possessed nonprescription ibuprofen pills. A subsequent strip search of Redding did not uncover any pills. Writing for the Court majority, Justice David Souter concluded that school officials' suspicion of wrongdoing was "enough to justify a search of [Ms. Redding's] backpack and outer clothing" (p. 2641). But a student strip search is of another order of magnitude, as Justice Souter later argued, when administered on a person "whose adolescent vulnerability intensifies the patent intrusiveness of the exposure" (p. 2641).

**SUPREME COURT HAS HELD THAT A STRIP SEARCH TO FIND AN OVER-THE-COUNTER MEDICATION IS NOT REASONABLE AND NOT COVERED UNDER THE 4th AMENDMENT EXCEPTIONS FOR SCHOOLS-Feldman '13**

[Amy; Legal Education Consultant to the National Constitution Center; When does a public school have the right to search its students?; Constitution Daily from the National Constitution Center; 31 May 2016; <http://blog.constitutioncenter.org/2013/05/when-does-a-public-school-have-the-right-to-search-its-students/>; retrieved 14 August 2016]

T.L.O.'s case was at the heart of the case brought by then-13-year-old Savana Redding, who was strip-searched down to her underwear by officials at her middle school who suspected that she was hiding over-the-counter ibuprofen tablets. Savana sued her school district, claiming unreasonable search and seizure, and her case went all the way to the Supreme Court.

In the case of Safford Unified School District v. Redding—25 years after the T.L.O. case—the Supreme Court found that Savana's rights had, in fact, been violated and stated that a search by a school must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Given that 13-year-old Savana was accused of having an over-the-counter medication, forcing her to strip was excessively intrusive and therefore unreasonable.

**CURRENT RIGHT TO SEARCH IS NOT UNLIMITED, AND WOULD BLOCK STRIP SEARCHING FOR STOLEN ITEMS-Feldman '13**

[Amy; Legal Education Consultant to the National Constitution Center; When does a public school have the right to search its students?; Constitution Daily from the National Constitution Center; 31 May 2016; <http://blog.constitutioncenter.org/2013/05/when-does-a-public-school-have-the-right-to-search-its-students/>; retrieved 14 August 2016]

A high school in Quebec recently came under fire after 28 students who were taking a math test were strip-searched by teachers. The teacher had asked the students to place their cellphones on her desk during the exam, and when one cell phone went missing, all of the students were called into a room, told to strip, and then searched to see who had taken the phone.

In the United States, that would have been a good test in constitutionality—and one that the teachers would have failed. What rights does a public school have to search its students? It had some rights, but not unlimited rights.

**SOME COURTS HAVE RULED AGAINST BROAD SEARCHES WITH DRUG DOGS-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

One federal court has recently held that the use of drug-sniffing dogs on a student's person requires individualized, reasonable suspicion. Prevention of drug abuse, according to this court, does not justify the dog sniffing the person because it intrudes on the expectation of privacy and security (B.C. v. Plumas Unified School District, 1999). This case changed practices in many school districts—those schools no longer use the dogs to sniff around students.



**THE SUPREME COURT HAS DECLARED THAT STRIP SEARCHES FOR LOW-LEVEL CONTRABAND VIOLATES THE REASONABLENESS STANDARD-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

Roughly 24 years later, the U.S. Supreme Court would turn again to the matter of reasonableness, this time focusing on the intrusiveness of the search--a variable of interest in the present study. In *Safford*, a 13-year-old middle school student was sent to the vice principal's office upon the finding of a day planner containing contraband, which belonged to her but was not in her possession, and on the basis of an allegation that she was distributing over-the-counter and prescription-strength pain relievers to other students. Students in possession of pain-relieving drugs, over the counter or prescription, without parental permission violated school policy. The vice principal authorized a search of her backpack, which yielded no contraband. The principal then instructed the female administrative assistant, along with the school nurse, to administer a more extensive search of the female student's person. The student was instructed to "pull her bra out and to the side and shake it, and to pull out the elastic on her underpants" (p. 2638). This led to exposure of the student's breasts and pelvic area. Appealing the U.S. Ninth Circuit's decision favoring the student's claim of an unlawful search and the denial of qualified immunity to the vice principal, the school district petitioned the high court for reversal of judgment. Affirming and reversing in part, the U.S. Supreme Court affirmed the U.S. Ninth Circuit's finding that the strip search was unconstitutional. In the Court's view, the search clearly violated the reasonableness standard by extending the search from the backpack to the student's body parts when the suspected offense posed minimal danger to other students. As the majority expressed, "the reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure" (p. 2641). The Court was not persuaded that the "content of the suspicion" corresponded to the "degree of intrusion" (p. 2642). As to the immunity challenge, the high court disagreed with the Ninth Circuit, holding that school district officials in the present case should have been entitled to qualified immunity due to substantial judicial divergence as to what conditions qualify for damages. Referring to "divergent conclusions" reached by lower courts, the majority concluded that "differences of opinion" among lower court cases with "well-reasoned majority and dissenting opinions" were sufficient enough to cast doubt on exact circumstances warranting damages (p. 2643).

## **CURRENT STANDARDS GOOD: SUPREME COURT HAS HELD THAT ENHANCED SCHOOL SEARCH POWER IS CONSISTENT WITH THE 4<sup>TH</sup> AMENDMENT RIGHTS OF STUDENTS**

### **THE SUPREME COURT HAS HELD THAT REASONABLE SEARCHES IN SCHOOLS ARE WITHIN THE PARAMETER OF THE 4th AMENDMENT-Feldman '13**

[Amy; Legal Education Consultant to the National Constitution Center; When does a public school have the right to search its students?; Constitution Daily from the National Constitution Center; 31 May 2016; <http://blog.constitutioncenter.org/2013/05/when-does-a-public-school-have-the-right-to-search-its-students/>; retrieved 14 August 2016]

The Supreme Court, in considering *New Jersey v. T. L. O.*, looked to the Fourth Amendment, which states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Justice Byron White, who wrote the decision of the Supreme Court, said that the Fourth Amendment not only prevents the police from conducting unreasonable searches and seizures, but that “equally indisputable is the proposition that the 14th Amendment protects the rights of students against encroachment by public school officials.”

Justice White stated that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.” The court stated that in order to be reasonable, the search could not be excessively intrusive.

Given that the search of the purse was not, according to the court, unreasonable or excessively intrusive, T.L.O. lost her case. That said, the case provides the requirement for schools and the protection for students that schools must show that a search of a student is reasonable given the circumstances.

## **CURRENT STANDARDS GOOD: STUDENTS HAVE DUE PROCESS RIGHTS, EVEN WITHOUT PROBABLY CAUSE**

### **4th AMENDMENT ALREADY GIVES DUE PROCESS RIGHTS TO STUDENTS BEFORE BEING SEARCHED, EVEN WITHOUT PROBABLE CAUSE-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The Fourth Amendment prohibits “unreasonable” searches and seizures. The Fifth Amendment’s Due Process Clause is triggered as the follow-up step, commanding that school officials who plan to discipline a student or employee must first provide the alleged wrongdoer with two rights:

Specific information about the charges and the evidence behind it.

A chance to tell his or her side of the story.

That’s known in legal circles as “notice and an opportunity to be heard.” Without following these due process steps, any punishment that is given—no matter how legitimate—can be overturned.

## **CURRENT STANDARDS GOOD: STUDENT RIGHTS ARE MINDED WHILE ALLOWING FOR FLEXIBILITY**

### **COURTS HAVE APPLIED 5TH AMENDMENT PROTECTIONS FOR STUDENTS THROUGH A FLEXIBLE HEARING PROCESS- Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The Fifth Amendment is concerned with fundamental fairness. It means that school officials cannot hold or punish a student without stating the reason and providing an opportunity to contest the charges. Courts over the years have said that a hearing does not have to be elaborate. When the offense and potential penalty are small, the due process requirement can be met with an informal conversation in the principal's office. When the offense is great and penalties such as long-term suspension, expulsion, job loss, or referral for criminal charges loom, then a formal, "full-blown" hearing with an adversarial process and potential legal representation are more in order.

**CURRENT STANDARDS GOOD: EXISTING APPLICATION OF THE 4<sup>TH</sup> AND 5<sup>TH</sup> AMENDMENTS  
PROVIDE ADEQUATE PROTECTIONS FOR STUDENTS**

**THE 4TH AND 5TH AMENDMENTS ALREADY PROVIDE PROTECTIONS TO PUBLIC SCHOOL STUDENTS, ESPECIALLY AS  
COMPARED TO PRIVATE SCHOOL STUDENTS-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The hurdles erected by the U. S. Constitution's Fourth and Fifth Amendments are exclusive to the nation's public schools. Private K-12 institutions have far more leeway to conduct unfettered investigations, withhold findings if they choose, and unceremoniously ask a student or faculty member to leave. Tuition and employment contracts rule private school relationships, while America's social compact and legal contract (the Constitution) governs how public officials must act.

## **CURRENT STANDARDS GOOD: CURRENT STANDARDS BALANCE SAFETY AND STUDENT RIGHTS**

### **COURTS HAVE BALANCED 4TH AMENDMENT RIGHTS WITH THE NEED TO KEEP SCHOOLS ARE AND DRUG FREE-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

Situations where the Fourth Amendment (and depending on the results, the Fifth Amendment) might apply:

Drug testing students in extracurricular activities.

Drug-sniffing dogs on campus.

Locker searches and metal detectors.

Backpacks, wallet, and personal computer searches.

Searching a student's car in the parking lot.

Given the need for school safety, the authority to conduct searches and reprimand students frequently pre-empts a student's right to privacy or demand for greater process. But it's hardly an open invitation. Schools routinely lose court cases when searches they conduct are not reasonable at the start or become too sweeping once they begin.

## **CURRENT STANDARDS GOOD: REASONABLE SUSPICION STANDARD HAS BEEN HONED BY COURTS**

### **COURTS HAVE PROVIDED INTERPRETATIONS OF THE REASONABLE SUSPICION STANDARD TO HELP CREATE RULES FOR SCHOOLS-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

In *New Jersey v. T.L.O.*, a teacher's report of a student smoking in the bathroom justified a search of the student's purse. Since this landmark decision, several cases have debated what constitutes reasonable suspicion:

Four students huddled together, one with money in his hand and another with his hand in his pocket, does not provide reasonable suspicion (*A.S. v. State of Florida*, 1997).

An anonymous phone call advising an administrator that a student will be bringing drugs to school, coupled with the student's reputation as a drug dealer, creates reasonable suspicion to search the student's pockets and book bag (*State of New Hampshire v. Drake*, 1995).

A report made by two students to a school official that another student possesses a gun at school constitutes reasonable suspicion to search the student and his locker (*In re Commonwealth v. Carey*, 1990).

An experienced drug counselor's observation of a student who appears distracted and has bloodshot eyes and dilated pupils justifies taking the student's blood pressure and pulse (*Bridgman v. New Trier High School District No. 203*, 1997).

The fact that the search of all but one student in a class fails to reveal allegedly stolen property gives school officials reasonable suspicion to search that student (*DesRoches v. Caprio*, 1998).

The odor of marijuana in the hall does not provide reasonable suspicion to search all students' book bags, purses, and pockets (*Burnham v. West*, 1987).

### **STATES AND LOWER COURTS CAN HELP CRAFT THE RULES OF THE REASONABLENESS STANDARD-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of *Safford Unified School District v. Redding* for school leaders; *Journal of School Leadership*; January 2011; page 42]

Yet when the intent of the ruling was uncertain, vague, or insufficiently met through legislative channels, litigation permitted courts to once again assume an active role in the formulation of the same policy through providing either clarification or creating avenues toward political resolution, which appeared to be the case with *Redding*. Lower courts in more than a few strip search cases would comment on the imprecision of precedent--particularly, reasonableness. Not leaving things to chance, several states have opted to pass legislation banning strip searching. Salomone (1990) referred to this type of interaction as "law and politics [reshaping] each other" (p. 115).

## **CURRENT STANDARDS GOOD: "SPECIAL NEEDS" EXEMPTIONS TO THE 4<sup>TH</sup> AMENDMENT GOOD**

### **SPECIAL NEEDS EXCEPTIONS TO THE 4TH AMENDMENT ARE IMPORTANT TO MAKING THE JUSTICE SYSTEM FLEXIBLE IN SPECIAL CIRCUMSTANCES-Vaughn and del Carmen '97**

[Michael S.; Assistant Professor of Criminal Justice, Georgia State University; and Rolando V., Professor of Criminal Justice at Sam Houston State University; The Fourth Amendment as a tool of actuarial justice: the "special needs" exception to the warrant and probable cause requirements; Crime and Delinquency; January 1997; page 78]

A result of the criminal justice system assuming more responsibilities for societal problems has been an effort to augment governmental efficiency. Simon and Feeley (1995) maintain that actuarial justice "provides a useful analytic grid in which to interpret the emerging set of practices, discourses, and objectives in the criminal process" (p. 149). Using this approach, this article shows how the "special needs" exception to the Fourth Amendment warrant and probable cause requirements has become a tool of actuarial justice. Law enforcement personnel have long argued that adhering to the warrant and probable cause requirements burden and inconvenience; crime-control efforts. Searches allowed under the "special needs" analysis serve the administrative needs of the police, thereby justifying dispensing with the warrant and probable cause impediments so the criminal justice apparatus can operate more efficiently. The view that probable cause and a warrant are bureaucratic requirements that should be subordinate to the needs of streamlined justice is an integral part of actuarial justice. This paradigm shift, in which enhanced governmental exigency and heightened administrative expediency take precedence over hitherto protected constitutional rights, is reshaping the constitutional landscape of Fourth Amendment jurisprudence. As the "crime industry" expands and as actuarial justice continues to be accepted as mainstream law, the use of the "special needs" exception will further diminish the scope of Fourth Amendment protections.

### **SPECIAL NEEDS EXCEPTIONS ARE WELL RECOGNIZED; WHEN A NEED EXISTS BEYOND SIMPLE LAW ENFORCEMENT, PROBABLE CAUSE IS NOT REQUIRED-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

In beginning its analysis, the Court reinforced the principle that some searches do not require a warrant or probable cause when the Government can show "special needs, beyond the normal need for law enforcement," that dispense with these requirements. n89 After showing that it has such special needs, the Government is not obliged to show any individualized suspicion when it can satisfy a context-specific inquiry that examines the competing private and public interests advanced by the parties. n90



**CURRENT STANDARDS GOOD: REASONABLE SUSPICION STANDARD GOOD**

**COURTS HAVE SET UP GOOD STANDARDS FOR REASONABLENESS TO AVOID PURE SPECULATION, GOSSIP AND UNRELIABLE INFORMATION-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

In Myers the Court articulated the law's requirements that school officials and police officers who use narcotics dogs on school property to conduct warrantless searches. According to Myers, a reasonableness standard applies when a search is initiated and conducted by school officials or where school officials initiate a search using the police, but limit their involvement to a minimum.(FN6) In order for a search to be reasonable, the school must satisfy two criteria. First, the search must be justified from its inception, meaning that a school official must have reasonable grounds for suspecting that the search will reveal evidence that the student has violated or is violating either the law or the rules of the school.(FN7) This means that pure speculation, gossip and unreliable information cannot be the basis for a justified search.

**THE REASONABLE SUSPICION STANDARDS GIVES SCHOOLS THE FLEXIBILITY IT NEEDS TO DEAL WITH THREATS IN CONTEXT OF A STUDENT'S AGE, GENDER AND THE NATURE OF INFRACTIONS-Eckes '13**

[Suzanne E., JD; Associate Professor at Indiana University; Searching a student's sedan: what are the recent trends in litigation? Students have expectations of privacy at school, but educators have the right to search students' personal possessions if it is deemed "reasonable;" Principal Leadership; November 2013; page 8]

School officials have more leeway to search students than law enforcement officials do when searching citizens. Although police officers must obtain a warrant that is based on "probable cause" to search someone, the less stringent standard of "reasonable suspicion" applies to school officials. The T.L.O. court (1985) reasoned that school officials have a substantial interest in maintaining discipline and therefore need only reasonable suspicion to conduct a search. The reasonableness standard for schools was intended to "ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools" (p. 343). To determine whether school officials had reasonable grounds to search, courts often consider the student's age and sex, the reliability of information, and the nature of the infraction, among other factors.

## **CURRENT STANDARDS GOOD: 4<sup>TH</sup> AMENDMENT ITSELF CALLS FOR REASONABLE SEARCH**

### **THE SUPREME COURT HAS INTERPRETED THE 4TH AMENDMENT TO SAY THAT PROBABLE CAUSE IS NOT ALWAYS REQUIRED, BUT, RATHER, THAT SEARCHES BE REASONABLE-Pinard '03**

[Michael; Assistant Professor at the University of Maryland School of Law; From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities; Arizona Law Review; Winter 2003; 45 Ariz. L. Rev. 1067]

With respect to the level of suspicion necessary to search students, the Court stated that probable cause is not an "irreducible requirement" of a legal search. Rather, the Court explained, the core of the Fourth Amendment requires that searches be reasonable. Accordingly, the Court balanced the privacy interests of students with the need for school officials to maintain order, and held that searches conducted by these officials need not be based on probable cause; rather, the searches must depend only "on the reasonableness, under all the circumstances, of the search." It then [\*1074] stated that reasonableness must be determined by a two-part test: First, the action must have been "justified at the inception." Second, the search must have been "reasonably related in scope to the circumstances which justified [it] in the first place." The Court applied this test to declare the official's search reasonable for Fourth Amendment purposes.

### **4TH AMENDMENT ITSELF DOES BASE ITS STANDARD ON REASONABLE SEARCHES-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

The Fourth Amendment does not protect the people against all searches, but only against unreasonable searches. Therefore, government officials can conduct a [\*236] search if it qualifies as reasonable, according to a Fourth Amendment analysis. However, different circumstances lead to different determinations of what constitutes a reasonable search.

### **THE 4TH AMENDMENT ITSELF IS BASED ON A REASONABLENESS STANDARD-Staros and Williams '07**

[Kari and Charles; Associate Directors of the American Bar Association's Division for Public Education; Search and seizure in the schools; Social Education; January-February 2007; page 27]

This is so because what constitutes a Fourth Amendment search depends not on what the activity looks like, but on whether it can be said to have invaded one's "reasonable expectation of privacy." And this expectation of privacy must be "reasonable" in more than one sense. When someone claims that a government search has violated his privacy rights, courts will ask (1) whether that person has exhibited an actual subjective expectation of privacy, and (2) whether that subjective expectation is one that society is prepared to recognize as objectively reasonable. See *Katz v. United States*, 389 U.S. 347 (1967).

## **CURRENT STANDARDS JUSTIFIED: SCHOOL OFFICIALS ARE NOT LAW ENFORCEMENT OFFICERS**

### **SCHOOL OFFICIALS ARE DIFFERENT THAN POLICE OFFICERS BECAUSE THEY LACK CRIMINAL ENFORCEMENT POWER-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The Fourth Amendment is concerned with privacy and making sure that government entities, such as public schools, do not get overzealous in investigating violations. Investigatory techniques in a school setting often mirror activities used by police officers, but school probes lack the criminal enforcement power.

### **CLEAR LINES EXIST BETWEEN SCHOOL ADMINISTRATOR SEARCHES AND POLICE SEARCHES-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

Furthermore, school officials are allowed to request assistance from police and use narcotics dogs to sniff around both lockers and automobiles. While the police may be present for the search and be in charge of the narcotics dogs, they cannot personally search the student or otherwise use a school official to conduct a search that was not initiated upon the reasonable suspicion of a school official. To allow otherwise would grant police officers the ability to circumvent the probable cause requirement for a legal search. The only requirement that is placed upon use of a narcotics dog is that it prove to be a reasonably reliable source upon which to predicate a search. Given the highly involved training the dogs receive, this requirement should be easily met in most instances.

### **A CLEAR LINE EXISTS FOR SCHOOL-BASED OR LAW ENFORCEMENT SEARCH: SCHOOL ADMINISTRATORS MUST STICK TO SEARCHES THAT END IN A DISCIPLINARY HEARING-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

The primary purpose of student searches is to maintain a safe learning environment. Discipline and conviction are two secondary purposes. Usually, law enforcement personnel conduct searches to reveal evidence of a violation of the law. The seized evidence then can be used in a criminal trial to convict the student of a crime. School administrators conduct a search to gather evidence for school discipline. At times law enforcement and school administrators may, therefore, have different purposes for a potential search. One crucial difference in their purposes is the ability to use the results of an illegal search in a disciplinary hearing but not in a criminal proceeding.

**COURTS HAVE DRAWN GOOD LINES BETWEEN ON AND OFF CAMPUS SEARCH TARGETS AND HAVE DIRECTED SCHOOL OFFICIALS TO LEAVE OFF-CAMPUS SEARCHES TO LAW ENFORCEMENT-Eckes '13**

[Suzanne E., JD; Associate Professor at Indiana University; Searching a student's sedan: what are the recent trends in litigation? Students have expectations of privacy at school, but educators have the right to search students' personal possessions if it is deemed "reasonable;" Principal Leadership; November 2013; page 8]

A May 2013 case addressed whether school officials are permitted to search vehicles that are parked off-campus (*J.P. v. Millard Public Schools*, 2013). In a 6-1 decision, the Nebraska Supreme Court held that off-campus searches should be conducted by law enforcement agencies instead of school officials. J.P., the high school student involved in this case, left the school campus to retrieve something from his truck without permission. The assistant principal searched J.P.'s pockets in his office after he returned to campus and did not find anything illegal. He later searched the student's truck without permission and discovered some rolling papers and two drug pipes. The student was suspended for 19 days. The student's father alleged that the search of his son's truck was illegal under the Fourth Amendment. Finding in favor of the father, the court noted that the T.L.O. (1985) decision did not apply to school personnel during off-campus searches unless that search was related to a school-sponsored event and ordered that the suspension be expunged from J.P.'s record. The court rejected the school district's argument that "driving to and from school is a school-sponsored activity and is a nexus to the school" (p. 901). The school district unsuccessfully relied on several cases that expanded the T.L.O. standard to searches that were conducted while a student was attending a school-sponsored event off-campus (e.g., *Hassan v. Lubbock Independent School District*, 1995; *Shade v. City of Farmington, MN*, 2002).

## **CURRENT STANDARDS JUSTIFIED: SCHOOLS ARE RESPONSIBLE FOR STUDENT SAFETY AND CARE, JUSTIFYING FLEXIBILITY ON SEARCH**

### **A SPECIAL NEED EXISTS FOR SCHOOLS TO ACT IMMEDIATELY TO RESPOND TO THREATS TO STUDENTS OR THE EDUCATIONAL PROCESS-Staros and Williams '07**

[Kari and Charles; Associate Directors of the American Bar Association's Division for Public Education; Search and seizure in the schools; Social Education; January-February 2007; page 27]

But on the facts of the case before it, the justices concluded that the search by the school official in this case did not violate T.L.O.'s Fourth Amendment rights. In his opinion, concurring with the majority opinion authored by Justice White, Justice Blackmun explained that although children do have expectations of privacy in school, against these expectations must be weighed "the special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself." Thus school officials need to satisfy a "reasonableness" standard before searching their students or their belongings. But they do not need to obtain a warrant or even have probable cause.

### **SCHOOL ENVIRONMENTS ARE THE SPECIAL NEEDS THAT MEET THE TEST TO WAIVE PROBABLE CAUSE REQUIREMENTS-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

In this case, the Court found that special needs that make the probable cause requirement impracticable exist in the public school context. n106 This is because the probable cause requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and because of the "substantial need of teachers and administrators for freedom to maintain order in the schools." n107 After satisfying this threshold inquiry, the Court applied the relevant factors of the balancing test.

### **SCHOOL ADMINISTRATORS ARE GRANTED POWER TO SEARCH DUE TO THEIR ACCOUNTABILITY TO KEEP STUDENTS SAFE IN THE SCHOOL ENVIRONMENT-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

School administrators face severe threats to school safety and are simultaneously held increasingly accountable to the public and policymakers to keep students safe. To keep schools safe, most administrators err on the side of searching rather than not searching. Administrators' judgments are protected by governmental immunity as long as the search is not knowingly or willfully illegal. In fact, an administrator will not incur civil liability unless his or her conduct violates clearly established statutory or constitutional rights (*Harlow v. Fitzgerald*, 1982). Immunity is not dependent on whether the actual search violated the law but rather on the objective reasonableness of the search. Immunity protects administrators acting in good faith in a gray area of the law.

**SCHOOLS SHOULD HAVE SOME FLEXIBILITY TO SAFEGUARD THOSE ENTRUSTED IN THE SCHOOL'S CARE-National School Boards Association '11**

[National School Boards Association; Schools Need Broad Authority to Conduct Searches of Students; Teens and Privacy; 2011; Gale Group Databases]

The Court most recently reaffirmed the need for deference in *Morse* [v. Frederick (2007)]. While *Morse* did not address a student search, the Court again noted the critical importance of combating student drug use by stating "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." It would be a strange result indeed if the law allows educators to protect students from speech promoting drug use but unduly constrains them from actually attempting to find and confiscate the drugs themselves when there are reasonable grounds to believe drugs are present at school.

**COURTS HAVE RECOGNIZED THE NEED FOR SCHOOLS TO CONTROL THEIR INTERNAL ENVIRONMENTS, NOT POSING PENALTIES FOR SCHOOLS THAT CROSS CONSTITUTIONAL LINES-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of *Safford Unified School District v. Redding* for school leaders; *Journal of School Leadership*; January 2011; page 42]

There exists a delicate balance between preserving students' rights to privacy and school officials' responsibilities to maintain order and discipline (Arum, 2003). In addition to its position within a legal perspective, school officials' action can be considered an ethical or moral decision. U.S. courts have been careful to give school authorities wide discretion on issues relating to balancing student rights with school safety. And as the courts point out, drugs present a real scourge to our society and destroy the lives of young people. Court decisions involving student strip searches, including the Supreme Court's most recent opinion in *Redding*, illustrate that even when courts rule that a student strip search is unconstitutional, they are reluctant to take a strong legal or ethical stand on prohibiting these intrusive searches, and they are unwilling to award monetary damages to the injured student plaintiffs.

**SPECIAL NEEDS TO EXIST IN SCHOOLS TO HOLD BACK FULL 4TH AMENDMENT PROTECTIONS-Hartman '03-'04**

[Jared M.; NOTE: *Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?*; *Journal of Law and Health*; 2003/2004; 18 J.L. & Health 229]

Before application of the balancing test, the threshold inquiry of whether the circumstances require either a search warrant or probable cause, or whether special needs exist that would render the warrant and probable cause requirements impracticable, must be satisfied. n156 The Supreme Court has held that such special needs do exist in the public school context because the requirement that a search be based on probable cause would unduly interfere with the need to maintain order and to exact swift discipline. n157 Because Groveport Madison is a public school in Ohio, courts are highly likely to find that the school has special needs that would justify imposition of a search based on less than probable cause. Subsequent to satisfaction of this inquiry, the balancing test must weigh in favor of the school in order for its suspicionless drug-testing program to be upheld.



**THE COURTS RECOGNIZE A DIFFERENT 4TH AMENDMENT STANDARDS FOR SCHOOLS BECAUSE STUDENTS ARE IN THEIR CARE-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The Fourth Amendment prevents unjustified government intrusion into private places, such as clothes, lockers, and one's body. In cases outside the school setting, the overriding question is whether someone has a reasonable expectation of privacy.

The standard for the Fourth Amendment is different and considerably lower in the school context. The criminal standard requires law enforcement officials to demonstrate that they have "probable cause" that a crime has been committed. Often that means presenting evidence to a judge and obtaining a warrant before police can take the intrusive steps of conducting a search of private property.

On school grounds or when students are within school district care—like a field trip—the standard is "reasonable suspicion" and no warrant is necessary. While privacy is still a factor, that relaxed approach allows school officials to conduct a search when one might be prohibited by the police.

**SCHOOLS SHOULD BE ALLOWED LEEWAY WITH DRUG TESTING AS THEY ARE RESPONSIBLE FOR STUDENT SAFETY-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

With respect to drug testing, opinions are varied with regard to discretion. Goodwin (2002) contends that the Court in Earls appropriately gave school officials the final say in meeting the "reasonableness" standard in view of persistent concerns regarding drug use and peer influence. Educators, according to Goodwin, bear the responsibility of ensuring safety.

**STUDENTS ENJOY DIMINISHED PRIVACY IN A SCHOOL CONTACT AS SCHOOLS ARE DIRECTLY RESPONSIBLE TO MAINTAIN DISCIPLINE, HEALTH AND SAFETY-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

The first consideration was the nature of the students' privacy interests implicated by the search. n129 The Court found that students enjoy a diminished expectation of privacy in the public school context, "where the State is responsible for maintaining discipline, health, and safety." n130 In general, schoolchildren have a lowered expectation of privacy, but those who compete in competitive extra-curricular activities voluntarily submit to even greater control than what the rest of [\*245] the student body is subjected to. n131 Therefore, the students enjoyed a limited expectation of privacy. n132



**WITH GOOD POLICY AND PROCEDURE, COURTS ARE WILLING TO UPHOLD SCHOOL SEARCH TO MAINTAIN SAFETY-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

Good policies can guide educators' actions, but school staff members need to remember that what constitutes a legal student search depends upon the context. Despite the lack of clarity about whether to apply reasonable suspicion or probable cause in different situations, courts are more willing now than ever to find student searches legal to preserve safety. In the final analysis, school personnel should balance the student's expectation of privacy with the school's unique need to create and preserve a safe learning and working environment.

**STUDENT SEARCH IS AN IMPORTANT TOOL FOR KEEPING SCHOOLS SAFE-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

Littleton, Jonesboro, Springfield, West Paducah, and Pearl. The school tragedies in these communities brought the threat to school safety into the public conscience and moved school safety onto the U.S. public agenda. Safety threats, once thought to be only an urban problem, are a concern for urban, rural, and suburban areas alike. Although schools are among the safest places for children to be, education policymakers and administrators continue to look for ways to protect students and staff. One tool for keeping schools safe is the use of student searches.

**CURRENT STANDARDS JUSTIFIED: SCHOOL SAFETY JUSTIFIES LOWERING STUDENT RIGHTS PROTECTIONS****SCHOOLS HAVE A SUBSTANTIAL INTEREST IN STUDENT AND SCHOOL SAFETY, JUSTIFYING SCALING BACK 4TH AMENDMENT PROTECTIONS-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

Across America, school administrators and teachers encounter the divergent challenges of educating children while contemporaneously affording them an environment free of drugs and violence. When the Supreme Court granted school officials the authority to search students in accordance with the Fourth Amendment, it empowered school officials to cultivate a safe learning environment by relaxing the requirements for searching student suspected in illegal activity from probable cause to reasonable suspicion.(FN1) Recently, the Supreme Court of Indiana allowed the use of canine narcotics dogs to sniff the exterior of automobiles parked on school grounds.(FN2) While some scholars believe use of narcotics dogs is a blatant violation of students' Fourth Amendment rights, they fail to recognize the "substantial interests of teachers and administrators in maintaining discipline [and safety] in the classroom and on school grounds."(FN3)

**INTERNAL SCHOOL SAFETY JUSTIFIES LOWERING THE PROTECTIONS IN SEARCHES CONDUCTED IN SCHOOLS-Vaughn and del Carmen '97**

[Michael S.; Assistant Professor of Criminal Justice, Georgia State University; and Rolando V., Professor of Criminal Justice at Sam Houston State University; The Fourth Amendment as a tool of actuarial justice: the "special needs" exception to the warrant and probable cause requirements; Crime and Delinquency; January 1997; page 78]

Courts also have allowed nonlaw enforcement personnel to conduct law enforcement searches to collect evidence for delinquency proceedings against schoolchildren.(10) This was the case in Matter of Gregory M. (1993), where a high school security officer conducted a frisk of a student's book bag after the officer heard an "unusual metallic thud" (p. 580) when the student threw the book bag on a metal shelf. Although the officer suspected the presence of a gun, a violation of law, the frisk and subsequent warrantless search of the bag were upheld by the Court of Appeals of New York pursuant to the "special needs" of internal school security. According to the court, the "special" and compelling "needs" of school security to prohibit guns on school grounds overshadowed the minimal privacy interests the student possessed in the "investigatory touching" of the book bag. The court opined that school searches are legal when based on less than reasonable suspicion if they are conducted for nonlaw enforcement purposes and they serve school interests. The court concluded that it was immaterial that the fruits of the search were later used in a criminal prosecution because the intent of the search was school related.

**THE NEED FOR SCHOOL SAFETY AND TO PREVENT DRUG ABUSE JUSTIFY THE LOWER STANDARDS FOR SCHOOL**

**ADMINISTRATORS-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

Use of narcotics dogs is an appropriate means through which educators can ensure the safety of the students and provide a friendly educational environment. Furthermore, school officials' interest in providing security is synonymous to that used at airports to ensure that planes do not contain illegal contraband or explosive materials.(FN23) Likewise, restraints are in place that will keep the school officials or police from overstepping their constitutional powers as is evidenced by the requirement that the police cannot tip off school officials to circumvent the probable cause requirement. Use of trained narcotics dogs is an appropriate means through which the school can protect students while affording them ample privacy in the dignity of their persons.

Since teachers have a unique relationship to their students, both in administering discipline as part of their educational function and in protecting the well-being of all children in their care and custody, it is appropriate that school officials be given greater flexibility in complying with Fourth Amendment requirements.(FN24) Use of narcotics dogs allows for that flexibility and simultaneously grants the added protection that students and administrators need to perform their functions at school. Thus, use of narcotics dogs should be implemented in every school district throughout the nation.



**CURRENT STANDARDS JUSTIFIED: MINORS ARE DUE LESS PRIVACY RIGHTS**

**THE AGE OF SCHOOLCHILDREN DIMINISHES THEIR EXPECTATION OF PRIVACY-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

[\*243] In addressing the first factor, the Court found that schoolchildren have a diminished expectation of privacy because they are placed under the school's authority, the nature of which is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." n108 Even though students have a diminished expectation of privacy in general, student athletes in particular have an even lower expectation of privacy because they voluntarily submit to a degree of control greater than what is imposed on other students. n109 Athletes submit to such a degree of regulation because they are required to undergo preseason physical examinations, either obtain health insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with other rules imposed by the team coaches and the school's athletic director. n110 Further, athletes engage in communal undress and showering. n111

## **CURRENT STANDARDS JUSTIFIED: VULNERABILITY OF MINORS JUSTIFIES EXCEPTIONS TO RULES**

### **AGE AND VULNERABILITY OF STUDENTS JUSTIFIES THE SCHOOL EXCEPTIONS FOR THE 4th AMENDMENT-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

The reason the U. S. Supreme Court has recognized the need for a different standard for public schools is to take into account the age and vulnerability of the student population and the need of school officials to look out for their health and safety.

## **CURRENT STANDARDS JUSTIFIED: COURTS HAVE CONSISTENTLY HELD UP ENHANCED SEARCH FOR SCHOOLS**

### **COURTS HAVE UPHELD THAT SCHOOLS MAY SEARCH BAGS-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

School officials need reasonable suspicion to search personal items. The key case, decided by the U. S. Supreme Court in 1985, was *New Jersey v. T.L.O.* In that case, an assistant principal opened and searched a purse after a student was accused of violating the school's no-smoking policy. The search turned up a pack of cigarettes, rolling papers, marijuana, a pipe, money, and other items.

The court concluded that school officials acted within the Constitution and did not need a warrant because they had reasonable grounds for suspecting that a search would turn up a violation of school rules.

## **CURRENT STANDARDS JUSTIFIED: DRUGS JUSTIFY ENHANCED SEARCH FOR SCHOOLS**

### **COMBATTING DRUG ABUSE JUSTIFIES ENHANCED ABILITY TO SEARCH FOR SCHOOL OFFICIALS-National School Boards Association '11**

[National School Boards Association; Schools Need Broad Authority to Conduct Searches of Students; Teens and Privacy; 2011; Gale Group Databases]

T.L.O. itself represents this Court's first recognition of the need to defer to school officials' efforts to combat drug abuse. "Maintaining order in the classroom has never been easy," the Court noted, "but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." Because of this alarming trend, the Court appropriately acknowledged "that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship."

### **POTENTIAL THREATS LIKE DRUG ABUSE PROVIDE IMMEDIACY TO THE DRUG ISSUE JUSTIFYING MORE FLEXIBILITY FOR SCHOOLS TO SEARCH STUDENTS-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

Third, the Court addressed the nature and immediacy of the government's concerns and the effectiveness of the search at reaching them. n117 The nature of the government's concerns--combating drug use by schoolchildren--was important because of the adverse effects that drugs have on the physical and psychological maturation processes, and because such effects pose an immediate threat of physical harm to athletes that are under the stress of physical competition. n118 Regarding the immediacy of the government's concerns, the Court found the need to combat drug [\*244] use in this particular school district was great because the school was in a "state of rebellion . . . fueled by alcohol and drug abuse," and the athletes served as the role models for this rebellious subculture. n119 Regarding the program's efficacy, focusing the search on the leaders of the rebellious subculture, who were also subjected to the more immediate threat of physical harm, effectively addressed the school's concerns. n120 Because the balancing test favored the school's interests in implementing a suspicionless drug-testing program over the students' privacy interests, the Supreme Court upheld the program as "reasonable and hence constitutional." n121

**SEARCHES TO PREVENT THE DEVELOPMENT OF HAZARDOUS CONDITIONS IS RECOGNIZED BY JURISPRUDENCE AS BEING AN EXCEPTION TO THE 4TH AMENDMENT-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

Ordinarily, searches conducted by law enforcement agents in pursuit of evidence of criminal activity require a judicial warrant based on probable cause, unless exigent (emergency) circumstances exist that excuse the warrant requirement. n47 The few exigent circumstances that justify a warrantless search include such situations as when officers are in hot pursuit of a fleeing felon, n48 and when officers have a reasonable belief that evidence is being destroyed. n49 Even in the absence of such exigent circumstances, police officers are permitted to conduct a warrantless search of automobiles when they have probable cause to believe the automobile contains evidence of criminal activity. n50 However, the Court has stated that the probable cause requirement is "'peculiarly related to criminal investigations' and may be unsuited to determining the reasonableness of administrative searches where the 'Government seeks to prevent the development of hazardous conditions.'" n51 High school drug-testing programs fall under this category--school searches are administrative searches, and the drug-testing programs aim to deter drug abuse before it becomes an epidemic. Therefore, school officials are not imposed with the burden of having to obtain either a judicial warrant or probable cause before conducting a search.

**DUE TO THE CIRCUMSTANCES OF VIOLENCE OF DRUGS IN SCHOOLS, COURTS HAVE REFUSED TO PROHIBIT SEARCHES BY SCHOOL OFFICIALS IN SCHOOLS-Feldman '13**

[Amy; Legal Education Consultant to the National Constitution Center; When does a public school have the right to search its students?; Constitution Daily from the National Constitution Center; 31 May 2016; <http://blog.constitutioncenter.org/2013/05/when-does-a-public-school-have-the-right-to-search-its-students/>; retrieved 14 August 2016]

In an age in which school shootings are an unfortunate occurrence and drugs on high school grounds are common, no court has said that schools are prohibited from searching students—even strip-searching students—particularly in cases that involve the suspicion of weapons or contraband on the school grounds.

If you look at your district’s policy, it will likely contain an explanation of when and how it will conduct searches.



**DRUG USE IN SCHOOLS IS SO DISRUPTIVE THAT IT JUSTIFIES ENHANCED STUDENT DRUG TESTING POLICIES-National School Boards Association '11**

[National School Boards Association; Schools Need Broad Authority to Conduct Searches of Students; Teens and Privacy; 2011; Gale Group Databases]

The Court continued this deferential approach in analyzing the constitutionality of the student drug testing policies at issue in [Vernonia School District v.] Acton [(1995)] and [Board of Education v.] Earls [(2002)]. In Acton, this Court emphasized society's interest in combating student drug use. "That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our nation's schoolchildren is at least as important as enhancing efficient enforcement of the nation's laws against the importation of drugs." The Court explained that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." Discussing further the systemic problem of drug abuse as a rationale for deferring to educators' judgment about how to combat the problem, the Court wrote that "of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." In Earls, the Court reiterated its view that deference to educators when combating drug abuse is appropriate in deciding the constitutionality of school searches. "The drug abuse problem among our nation's youth has hardly abated since [Acton] was decided in 1995. In fact evidence suggests that it has only grown worse." Nor has the concern abated since Earls was decided. In some ways, at least, it has grown worse. For example, the most recent data on female juvenile arrests reveals that drug-related arrests have increased by 15 percent since 1997.

**PREVENTION OF DRUG ABUSE IS THE MOST COMMONLY CITED JUSTIFICATION FOR RANDOM SCHOOL SEARCHES-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

School officials conduct individual searches when they suspect that a student or a small group of students possesses evidence of a violation of the law or school rules. Such searches are subject to the reasonable suspicion standard. Officials conduct random or blanket searches not because of individualized suspicion, but as a preventive measure. Examples of random searches include the use of metal detectors in school entrances and sweeps of parking lots and lockers. The legality of a random search depends on whether the school has a compelling interest or special need that warrants the use of a search without suspicion. The most common need articulated by schools is the prevention of drug abuse.

**DRUG TEST POLICIES HAVE BEEN NARROWED DOWN TO THOSE IN SCHOOL ACTIVITIES WHERE SUBSTANTIAL INTEREST EXISTS, NOT BLANKET DRUG TESTS FOR STUDENTS-Cambron-McCabe '09**

[Nelda; Professor of Educational Leadership; Miami University; Phi Delta Kappan; June 2009; Page 709]

Concerns about student drug use have led school officials to institute drug-testing programs in schools. (10) In 1995, in *Vernonia School District 47J v. Acton*, the Supreme Court held that a school district's drug policy that required random testing of all athletes did not violate students' Fourth Amendment rights. The Court found the policy was narrowly tailored to athletes, where risk of harm was significant; was minimally intrusive; and furthered the school officials' responsibility to care for students. This decision did not open the door for blanket drug testing of all students. However, when individualized suspicion exists, specific students can be tested without violating their constitutional rights.

**STUDENT DRUG TESTS HAVE BEEN CLEARED BY THE COURTS AS REASONABLE DUE TO A THREE PART TEST-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; *Journal of School Leadership*; March-April 2012; page 261]

Mass suspicionless searches. Although individualized suspicion was not seen as an "essential element of reasonableness" by the T.L.O. Court, it did concede that that while some searches required individualized suspicion, others may be exempted if the "privacy interests implicated by the search are minimal" (p. 342) and precautions are in place to discourage arbitrary discretionary practices. In 1995, the high court accepted its first case pertaining to the constitutionality of drug testing students and, hence, the applicability of the individualized suspicion requirement in schools. In *Vernonia v. Acton* (1995; hereafter, *Vernonia*), a seventh grader, James Acton, sought membership on the school football team but was prohibited from participating because he and his parents declined to consent to random urinalysis. Reversing the U.S. Ninth Circuit court's ruling, the U.S. Supreme Court found the district's drug-testing policy reasonable and thus constitutional. Referring to *United States v. Martinez-Fuerte* (1976), Justice Scalia writing for the majority concluded that per the individualized suspicion requirement, "the Fourth Amendment imposes no irreducible requirement of such suspicion" (pp. 560-561). Referring to the drug crisis in the *Vernonia* schools, the Court reasoned that random drug testing was permissible on the basis of three criteria: (1) Students who decide to participate in athletics subject themselves to a "reduced expectation of privacy" (e.g., communal undress in the locker room) and greater regulation and control (e.g., physicals, waivers, conduct); (2) procedures and processes of drug testing must be relatively unobtrusive such that the sample collection is not overly intrusive and the use and examination of the urine sample is tightly monitored and controlled; and (3) a severity of need must be present to justify the search--in other words, the "nature and immediacy" of the concern must be important enough to override students' expectation of privacy.

**BECAUSE SCHOOLS HAVE A COMPELLING INTEREST TO ENSURE THE PROPER SCHOOL ENVIRONMENT, MANDATORY DRUG TESTING IS JUSTIFIED-Vaughn and del Carmen '97**

[Michael S.; Assistant Professor of Criminal Justice, Georgia State University; and Rolando V., Professor of Criminal Justice at Sam Houston State University; The Fourth Amendment as a tool of actuarial justice: the "special needs" exception to the warrant and probable cause requirements; Crime and Delinquency; January 1997; page 78]

"Special needs" and drug testing of student athletes. James Acton, a seventh-grade student, wanted to play football without being drug tested, although the school district adopted a policy that mandated drug tests for all student athletes. Acton and his parents challenged the testing program, saying it violated the Fourth Amendment's prohibition against unreasonable search and seizure. In *Vernonia School District 47J v. Acton* (1995), voting 6 to 3, the Supreme Court upheld the testing program under the "special needs" exception. According to the Court under T.L.O., the school had an important, perhaps compelling, interest in ensuring the proper school environment, including drug-free student athletes. Moreover, it held that under the concept of *in loco parentis*, all students, but particularly student athletes, possess a diminished expectation of privacy within the school context when balanced against the intrusiveness of the search and the severity of the "special need." Citing *Skinner* and *Griffin*, the Court opined that because the test results could not be used by law enforcement officials in a criminal prosecution, the test was deemed reasonable under the Fourth Amendment. The Court concluded that the district could use the testing program to determine who was fit for participation in school athletics because athletes are role models, school athletics is a "highly regulated" activity, and the school has a responsibility to protect student athletes from harmful drugs.

**EVEN URINE TESTS CAN BE SITUATED TO NOT BE PARTICULARLY INVASIVE-Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

In addressing the second factor, the Court found the invasive nature of the drug-testing program to be negligible. n112 The Court first noted, "the degree of intrusion depends upon the manner in which production of the urine sample is monitored." n113 In this case, the conditions in which the urine samples were furnished were "nearly identical to those typically encountered in public restrooms." n114 Further, the Court addressed the invasiveness according to the manner in which the information obtained from the search was used. This was not excessively invasive because the information was used solely to detect illicit drug use in order to screen students from participation in athletics. n115 Additionally, the information was furnished only to a limited class of school officials on a need-to-know basis, and the information was not passed on to law enforcement personnel for law enforcement purposes. n116

**COURTS HAVE CLEARED DRUG TESTS FOR ALL STUDENTS ENGAGED IN ACTIVITIES AS LEGAL-Torres '12**

[Mario S.; Associate Professor of Educational Leadership at Texas A&M University; Gauging ethical deficits in leadership and student discipline: an analysis of fourth amendment case law; Journal of School Leadership; March-April 2012; page 261]

The Court in Vernonia limited its discussion to randomly drug testing student athletes but not other student classifications. This would change in Board of Education v. Earls (2002; hereafter, Earls). In the fall of 1998, a school district in Tecumseh, Oklahoma, adopted a policy requiring all middle school and high school students to submit to drug urinalysis before membership and participation in all competitive extracurricular activities, including the Future Homemakers of America, the Academic Team, the Future Farmers of America, band, choir, cheerleaders, and, of course, athletics. The policy permitted continual random drug testing in addition to possible drug testing of individuals based on reasonable suspicion. Although the U.S. Tenth Circuit found that the school system "failed to demonstrate [that a drug problem] existed among Tecumseh students participating in competitive extracurricular activities" (p. 828), the U.S. Supreme Court reversed, turning largely to the reasoning established in Vernonia. Thus, each element was met (the expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need). In Earls, the Court stressed the point that school districts should not be discouraged from implementing drug-testing measures, even in the absence of a drug crisis.

**THE VOLUNTARY NATURE OF SCHOOL ACTIVITIES JUSTIFIES DRUG TESTING IN ATHLETICS-Darden '06**

[Edwin; Attorney and School Law Consultant; Search and seizure, due process, and public schools; Center for Public Education; 5 April 2006; <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview/Search-and-seizure-due-process-and-public-schools.html>; retrieved 11 August 2016]

An Oregon school district's drug-testing policy reached the U. S. Supreme Court in 1995. In Vernonia School District 47J v. Acton, justices ruled that it is fine for a district to require students participating in interscholastic athletics to submit to a urinalysis. Opponents argued that the policy violated the Fourth Amendment, because it was not based on specific suspicion of the person.

The Supreme Court said the school had accurately judged that athletes were the leaders of the drug culture. Because students voluntarily participated in athletics, they placed themselves under the rule. The Court also noted that the test's purpose was not punishment, but remediation and health.

That idea was expanded upon by the Tecumseh, Okla., school district. Its Supreme Court case established that school districts have a right to impose random drug testing as a condition for students to participate in virtually any extracurricular activity.

**DRUG TESTING IS ACCEPTABLE ACCORDING TO COURTS BECAUSE IT INVOLVES A VOLUNTARY ACTIVITY-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

Drug-testing programs are another form of a random search. In 1995, the Supreme Court upheld a drug-testing program for student athletes because the school had a documented drug epidemic; participation in athletics was optional; the athletes had a lessened expectation of privacy because they participated in communal showering; the athletes had a heightened risk of injury; the athletes were the leaders of the drug culture; the testing procedure was minimally intrusive; and the consequence of a positive test was not discipline but treatment (Vernonia School District 47J v. Acton, 1995).



## PROBABLE CAUSE IN SCHOOLS BAD: IMPRACTICAL

### IT IS UNFEASIBLE TO INTRODUCE CONSTITUTIONAL PROTECTIONS INTO SCHOOL DISCIPLINE POLICY-Keans '07

[Eleftheria; Articles Editor; STUDENT INTERROGATIONS BY SCHOOL OFFICIALS: OUT WITH AGENCY LAW AND IN WITH CONSTITUTIONAL WARNINGS; Boston College Third World Law Journal; Spring 2007; 27 B.C. Third World L.J. 375]

The Ferguson test will not require constitutional warnings in every school discipline situation because the factors of the test will not be met in every situation. n315 The Ferguson test and its factors limit the applicability to situations in which school officials are seeking out evidence against a student with the intent to turn that evidence over to law enforcement. n316 School functioning will not be impaired because of the Ferguson test or by requiring school officials to sometimes give Miranda warnings, as concerned the Superior Court of Pennsylvania in *Commonwealth v. Dingfelt*, which wrote:

School officials do stand in the position of loco parentis and as such are entitled to retain a degree of control over the school's students and its environment. For these reasons they should not be limited to the degree that would result in making it necessary to warn students of their constitutional rights everytime [sic] a problem of discipline arose and especially when the problem of discipline occasions the knowledge of the commission of the crime. It would be utterly ridiculous for a teacher who confronted a student for throwing a rubber [\*414] band across the classroom to be under a duty to give Miranda warnings before telling the student to empty his pockets. n317

### IT IS IMPRACTICAL TO IMPOSE PROBABLE CAUSE STANDARDS IN SCHOOL SITUATIONS-Hartman '03-'04

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

As a threshold matter, the Court considered whether the school had special needs that made the probable cause requirement impracticable, which would justify the imposition of a search based on less than probable cause. n125 The Court stated that schools have special needs to dispense with the probable cause requirement because of the impracticality of requiring such a stringent standard in the school setting. n126 The Court relied primarily on precedent by stating, "this Court has previously held that 'special needs' inhere in the public school context." n127 For further support, the Court stated that a Fourth Amendment inquiry "cannot disregard the schools' custodial and tutelary responsibility for children." n128 Subsequently, the Court applied the relevant factors of the balancing test.

**ALTERNATIVE: ETHIC OF THE PROFESSION APPROACHES SOLVE**

**"ETHIC OF THE PROFESSION" APPROACHES ALLOW ADMINISTRATORS LATITUDE TO DEAL WITH CHANGING AND EVOLVING CIRCUMSTANCES WHILE KEEPING IN MIND WHAT IS BEST FOR THE STUDENT-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

The ethic of the profession calls for school leaders to consider professional and personal ethical principles and codes, as well as standards of the profession and individual professional codes, to create a dynamic model that places the "best interests of the student" above all else. This ethical approach strives to consider "moral aspects unique to the school leadership profession and the questions that emerge as educational leaders become more aware of their own personal and professional codes of ethics" (Shapiro & Stefkovich, 2010, p. 18). It also takes into account standards of both the school community and the larger community (see Figure 1 for a diagram of the ethic of the profession).

**THE "BEST INTERESTS OF THE STUDENT" APPROACH BY SCHOOL ADMINISTRATORS ALLOW FOR ETHICAL EDUCATION WHILE GIVING FLEXIBILITY TO DEAL WITH ONGOING SITUATIONS-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

In prior research, Stefkovich (2006) defined best interests as a process that recognizes that students have rights, including the rights of human dignity and privacy afforded to all individuals. These rights carry responsibilities, however, on the part of both the students and the educators. In other words, school officials have the responsibility to instruct students about ethical behavior, to make the most of teachable moments, and to model appropriate ethical behavior. Intertwined in these concepts is the idea of respect--that which students have for themselves as well as all others in the school community. This conceptualization of respect implies mutuality--for example, students respecting teachers and teachers in turn respecting students, a concept supported by philosophers (Buber, 1965) as well as educational scholars (Lawrence-Lightfoot, 1999).

[FIGURE 1 OMITTED]



**A/T: DRUG DOGS BAD**

**NARCOTIC DOGS AREN'T EVEN CONSIDERED SEARCHES UNDER THE 4TH AMENDMENT-Reynolds '07**

[Tyler; The Fourth Amendment: The Appropriate Use of Drug Dogs to Search Vehicles on School Grounds; Journal of Law & Education; October 2007; page 589]

Because narcotic dogs are "so limited both in the manner in which the information is obtained and in the content of the information revealed by such procedures,"(FN13) dog sniffs are not searches requiring probable cause under the Fourth Amendment.(FN14) Accordingly, in a school setting, the school official must only abide by the reasonable standard(FN15) for a search to be legal. From this premise, it follows that school officials are granted permission to personally sniff around the crevice of trunks or doors of vehicles to ascertain the smell of drugs.(FN16) In reality, the sniffing of trunk crevices is no different from leaning down to view in a window, which is perfectly legal under the plain view doctrine.(FN17)

**MOST COURTS HAVE RULES THAT DRUG DOGS DON'T EVEN RISE TO THE STANDARD OF SEARCH SINCE THE AIR IS FREELY WAFTING AROUND LOCKERS-Ehlenberger '01-'02**

[Kate R.; Assistant Executive Director, Commonwealth Educational Policy Institute, Virginia Commonwealth University; The Right to Search Students; Educational Leadership; December 2001/January 2002; <http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx>; retrieved 14 August 2016]

Perhaps the most controversial random search is the use of drug-sniffing dogs in schools. The right of school officials or police to use dogs to detect drugs in students' belongings is well established. In fact, most courts conclude that such detection is not a search because the dogs merely sniff the air around the property and that students do not have an expectation of privacy in the air around their belongings.

**LEGAL OR CONSTITUTIONAL MANDATES TEND TO ENCOURAGE THE DEVELOPMENT OF MINIMUM STANDARDS, DISCOURAGING POLICIES THAT EXCEED TO PROTECT-Torres, Brady and Stefkovich '11**

[Mario S., Associate Professor of Educational Administration and Human Resource Development @ Texas A&M; Kevin P., Assistant Professor of Leadership, Policy and Adult and Higher Education at North Carolina State-Raleigh; and Jacqueline, Professor of Educational Policy Studies at The Pennsylvania State University; Student strip searches: the legal and ethical implications of Safford Unified School District v. Redding for school leaders; Journal of School Leadership; January 2011; page 42]

Vague legal principles coupled with minimal monitoring and administrative checks afford school officials considerable discretion. In such situations, regulations and rules at the local level are needed to constrain and normalize behavior. Mandates assume conformity despite differences in the capacity to conform; they also assume that the desired behavior would not occur without their use (McDonnell & Elmore, 1987). Mandates theoretically involve considerable costs for both the enforcing and implementing agencies; the enforcing agency bears the cost of surveillance, while the implementing agency must fiscally adapt its conditions. Because mandates are typically coercive, inflexible, and adversarial, they tend to promote minimum standards, which provide little incentive to exceed the minimum requirement.



**A/T: 4<sup>TH</sup> AMENDMENT JUSTIFIES PROBABLE CAUSE**

**THE 4TH AMENDMENT IS NOT PARTICULARLY CLEAR CUT AND HAS MANY EXCEPTIONS PUT IN PLACE BY THE COURTS-  
Hartman '03-'04**

[Jared M.; NOTE: Pee-To-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?; Journal of Law and Health; 2003/2004; 18 J.L. & Health 229]

Despite the apparent clarity of this language, its application in particular instances has been quite controversial. For example, it is not always clear what types of expectations of privacy are protected, or what types of searches must satisfy a Fourth Amendment scrutiny. Additionally, case law has created some exceptions to the requirement of a warrant based on probable cause, thereby allowing a search to be supported by either reasonable suspicion or less in certain circumstances. n34