

STRIP SEARCHES IN PUBLIC SCHOOLS: CHILDREN MAY NOT SHED THEIR CONSTITUTIONAL RIGHTS AT THE SCHOOLHOUSE GATE, BUT SOME HAVE BEEN FORCED TO SHED THEIR DIGNITY

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INTRODUCTION

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple *common sense* would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous...¹

If these words, written in a Seventh Circuit per curium decision, are true, then common sense is sorely lacking in some schools² and courts³ throughout the United States. We all know

¹ Doe v. Renfrow, 631 F.2d 91(7th Cir. 1980)(emphasis added).

² See e.g. Brannum v. Overton County School Bd., 516 F.3d 489 (6th Cir. 2008); Redding v. Safford Unified School Dist. No. 1, 504 F.3d 828 (9th Cir. 2007); Beard v. Whitmore Lake School Dist., 402 F.3d 598 (6th Cir. 2005); Phaneuf v. Fraikin, 448 F.3d 591, 596 (2d Cir.2006); Thomas ex rel. Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003); Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997); Cornfield by Lewis v. Consolidated High School Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993); Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984)Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (same); H.Y. ex rel. K.Y. v. Russell County Bd. of Educ., 490 F.Supp.2d 1174 (M.D. Ala. 2007); Carlson ex rel. Stuczynski v. Bremen High School Dist. 228, 423 F.Supp.2d 823 (N.D. Ill. 2006); Fewless ex rel. Fewless v. Board of Educ. of Wayland Union Schools, 208 F.Supp.2d 806 (W.D.Mich. 2002); Higginbottom ex rel. Davis v. Keithley, 103 F.Supp.2d 1075 (S.D.Ind. 1999); Sostarecz v. Misko, 1999 WL 239401 (E.D.Pa. 1999); Sostarecz v. Misko, No. CIV. A. 97-CV-2112, 1999 WL 239401 (E.D.Pa. Mar.26, 1999); Konop for Konop v. Northwestern

that many public schools face enormous problems with drugs and violence. Have these problems become so severe that school officials must strip search students in order to protect the school as a whole? Does the constitution allow them to do so?

The Supreme Court has never specifically addressed whether it is constitutionally permissible for public school officials to strip search students; however, the Court has held that children do not “shed their constitutional rights ... at the schoolhouse gate.”⁴ In *New Jersey v. T.L.O.*, the Court held that children at school have a right to a reasonable expectation of privacy which is protected by the Fourth Amendment, but the unique needs of the school environment required a modification of application of that right.⁵ The general Fourth Amendment rule is that a search is constitutionally unreasonable unless it is conducted pursuant to a warrant supported by probable cause.⁶ However, the Court found that the special needs of the school setting made it impractical to require school officials to learn the rules of probable cause and apply for a

School Dist., 26 F.Supp.2d 1189 (D.S.D. 1998); *Oliver by Hines v. McClung*, 919 F.Supp. 1206 N.D.Ind. 1995); *Cales v. Howell Public Schools*, 635 F.Supp. 454 (E.D.Mich.1985); *Bellnier v. Lund*, 438 F.Supp. 47 (N.D.N.Y.1977); *Allen v. Koon*, 720 F.Supp. 570 (E.D.La. 1989); *Bellnier v. Lund*, 438 F.Supp. 47 (D.C.N.Y. 1977); *Lamb v. Holmes*, 162 S.W.3d 902 (Ky. 2005); *Kennedy v. Dexter Consol. Schools*, 129 N.M. 436 (2000); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41 (W.Va. 1993); *Rone By and Through Payne v. Daviess County Bd. of Educ.*, 655 S.W.2d 28 (Ky.App. 1983).

³ See *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991) (holding that a fruitless strip search of a child was reasonable because the school officials believed the child was hiding drugs, the drugs were small enough to be hidden under clothing, and they could not find the drugs anywhere else); *Redding v. Safford United Sch. Dist. 1*, 2007 U.S. App. LEXIS 22521 (9th Cir) (same in a search for prescription strength Advil).

⁴ *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 507 (1969).

⁵ *New Jersey v. T.L.O.*, 469 U.S. 325 (1982)

⁶ *Katz v. U.S.*, 389 U.S. 347 (1967)

warrant before searching a student’s belongings.⁷ Thus, a search by a school official must only be supported by a reasonable suspicion and be reasonable in scope in light of all circumstances, such as the age and gender of the student and the nature of the infraction.⁸ This reasoning – that probable cause and warrants can be abandoned when it is impractical to require them – has been used in other settings, such police stop and frisk situations and government-run hospitals; and has become known as the “special needs” doctrine.

The thesis of this paper is that the special needs doctrine does not allow school officials to strip search students. Part I will examine Supreme Court decisions that have defined the rights afforded to school children under the Fourth Amendment. Part II will apply the general rules formulated by the Supreme Court to the specific issue of strip searching students and will compare and contrast various circuit court cases that have dealt with the issue. Part III will look at legislative responses to the problem and will conclude with recommendations.

I. FOURTH AMENDMENT RIGHTS IN THE PUBLIC SCHOOL SETTING

A. Background

The Fourth Amendment is divided into two clauses – the first guarantees a right to be free from unreasonable searches and seizures; the second requires that warrants be specific and issued pursuant to probable cause.⁹ To determine how these clauses relate to each other and what the

⁷ T.L.O., 469 U.S. at 341.

⁸ Id. at 342.

⁹ The text of the Fourth Amendment reads:

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

term “unreasonable” means, the Supreme Court has looked to history.¹⁰ In the seminal case *Boyd v. United States*, the Court found that the Fourth Amendment was a response to colonial general warrants and writs of assistance which allowed government officials to search without restriction and without justification and were denounced by the Framers and their contemporaries as “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book.”¹¹ The Court later restated this sentiment in *Camara v. Municipal Court* when it said “[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”¹² With this purpose in mind, the Court has held that a government search is *per se* unreasonable and violates the Fourth Amendment unless conducted pursuant to a specific warrant supported by probable cause.¹³ However, the Court has gradually carved out numerous exceptions to the warrant-probable cause requirement.¹⁴

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.

¹⁰ For a more detailed history of the Fourth Amendment see Phillip A. Hubbart, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 18-88; Robert M. Bloom, SEARCHES, SEIZURES, AND WARRANTS 1-17.

¹¹ *Boyd v. United States*, 116 U.S. 616, 625 (1886) (quoting James Otis); *see also* *Stanford v. Texas*, 379 U.S. 476 (1965); *Frank v. Maryland*, 359 U.S. 360 (1959); *Weeks v. United States*, 232 U.S. 383 (1914).

¹² *Camara v. of City and County of San Francisco*, 387 U.S. 523, 528 (1967)

¹³ *Katz v. U.S.*, 389 U.S. 347, 357 (1967) (“...searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.”)

¹⁴ *See e.g.* *United States v. Matlock*, 415 U.S. 164 (1974) (consent); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plain view); *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Chimel v. California*,

B. The “Special Needs” exception to the Warrant Requirement

A warrant and probable cause are not required “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”¹⁵ To determine whether a non-criminal search is exceptional enough to abandon the probable cause-warrant standard, the Court balances the need

395 U.S. 752 (1969) (search incident to arrest); for a methodical look into the search incident to arrest exception to the warrant requirement as it apply to searches of a recent arrestee’s car, see Rachael Moran, *In Search Of A Meaningful Fourth Amendment: Why Thornton v. United States Should Not Be Interpreted As Permitting Searches Incident To Arrest For Evidence Unrelated To The Crime Of Arrest* (publication information forthcoming).

¹⁵ T.L.O., 469 U.S. at 351 (Blackmun concurring in judgment). The special needs doctrine developed from the administrative search exception to the probable cause standard. In *Camara v. Municipal Court*, a case concerning the search of a home for health code violations, the Court introduced the idea that the reasonableness of a search can be determined by balancing “the need to search against the invasion which the search entails.” 387 U.S. 523 (1967). The Court considered the government interest at stake (fire prevention and other community safety concerns) to be both extremely important and difficult to achieve using traditional notions of probable cause and individualized suspicion. *Id.* The Court balanced this concern against the minimal intrusion involved in a safety inspection and held that a relaxing of the probable cause standard was justified so that a search warrant could be obtained without probable cause as long as there was a reasonable statutory framework in place that prevented arbitrary government action. *Id.*

This narrow exception to the probable cause standard quickly grew to encompass non-administrative searches, and the warrant requirement was abandoned as well in *Terry v. Ohio*. *Terry v. Ohio*, 392 U.S. 1 (1968). The Court found that a brief pat down search prior to a police interrogation was not primarily intended to investigate criminal activity; rather, its purpose was to protect the safety of the police officer and others in the area. Thus, the constitutionality of the search was determined, not by the probable cause standard, but determining whether the search was reasonable under the circumstances.

of the government to conduct the search against the degree of intrusion into the individual's legitimate expectation of privacy.¹⁶ If the primary purpose of the search is to uncover evidence of a crime, then the special needs balancing test is not used.¹⁷ On the government's side of the balancing test, the Court has looked to factors such as whether "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,"¹⁸ whether immediate action on the part of the government official is needed,¹⁹ and the importance of the purpose served by the search.²⁰ On the other side of the balance, the court considers the intrusiveness of the search. Generally, a search will be considered reasonable if the intrusion is held to be slight compared to the purpose that necessitated the search or if reasonable expectations of privacy are limited under the circumstance.²¹

After conducting this initial balancing test to determine if a type of search is reasonable, the Court sometimes goes on the use a two-prong test, first developed in *Terry v. Ohio*, to determine if the particular search in controversy was reasonable.²² The first prong, whether the

¹⁶ See e.g. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

¹⁷ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

¹⁸ *O'Connor v. Ortega*, 480 U.S. 709 (1987).

¹⁹ See e.g. *T.L.O.*, 469 U.S. at 352 ("the stop and frisk could not be subjected to a warrant and probable-cause requirement, because a law enforcement officer must be able to take immediate steps to assure himself that the person he has stopped to question is not armed with a weapon that could be used against him")(explaining *Terry v. Ohio*'s holding).

²⁰ See *Vernonia School District 47j v. Acton*, 515 U.S. 646, 660-662 (1985).

²¹ *Id.* at 657.

²² See *Terry v. Ohio*, 392 U.S. 1 (1968); *New Jersey v. T.L.O.*, 469 U.S. 325 (1982); *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987).

search was reasonable at its inception, is satisfied if the searcher had a reasonable suspicion that some wrongdoing had occurred prior to the search.²³ The second prong, whether the search was reasonable in scope, is satisfied if the search was “reasonably related in scope to the circumstances which justified the interference in the first place.”²⁴

A search conducted pursuant to an exception to the probable cause-warrant standard must “...be strictly circumscribed by the exigencies which justify its initiation.”²⁵ Thus, a *Terry* pat down search is limited to “that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.”²⁶ Similarly, in *Ferguson v. City of Charleston*, the Court noted that a state-run hospital may have a special need to determine whether its patients abuse drugs and may test its patients for drugs upon admittance;²⁷ however, the hospital was held to have violated the Fourth Amendment where it set up a drug testing program in tandem with the local police department and routinely reported the results of the tests to the police.²⁸ While the hospital could conduct a warrantless search to protect the health of its patients (a special need), it could not do so if the immediate purpose of the search went beyond the special need that would justify a warrantless search under some circumstances.²⁹

C. The Special Needs of Public Schools

²³ *Terry*, at 27.

²⁴ *Terry*, at 20-21

²⁵ *U.S. v. Robinson*, 414 U.S. 218, 227-228 (1973).

²⁶ *Id.* at 228.

²⁷ A drug test is a search for Fourth Amendment purposes. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

²⁸ *Id.*

²⁹ *Id.*

The Supreme Court applied this special needs analysis in three cases involving the reasonableness of searches of school children.³⁰ The first case, *New Jersey v. T.L.O.*, determined whether a warrant and probable cause are needed when a school official searches a student's personal property.³¹ In *T.L.O.*, two girls were caught smoking in the bathroom by a teacher. The teacher brought the girls to the vice principal's office where T.L.O. denied that she smoked.³² The principal searched T.L.O.'s purse for evidence of smoking.³³ He immediately found cigarettes. He also saw, in plain view, rolling papers, empty bags, and other evidence of marijuana dealing; therefore, he continued to search.³⁴ As he looked through the compartments of the purse, he found more evidence of drug dealing and so contacted T.L.O.'s parents and the police.

First, the Court held that the Fourth Amendment applied to the search because the principal was acting as a government official.³⁵ Next, the Court applied the special needs balancing test to determine that the search was reasonable even without a warrant or probable

³⁰ In fact *T.L.O.* marks the first appearance in Supreme Court jurisprudence of the idea that "special needs" beyond the needs of ordinary law enforcement could justify a warrantless search. 469 U.S. 325, 351 (Blackmun concurring). This idea was soon adopted by a majority opinion in *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987), a case involving the search of a government employee's office.

³¹ *N.J. v. T.L.O.*, 469 U.S. 325 (1984)

³² *Id.* at 328.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Prior to this holding a few lower courts had held that school officials were not restrained by the Fourth Amendment because they act *in loco parentis*. See *D. R. C. v. State*, 646 P. 2d 252 (Alaska App. 1982). *T.L.O.* resoundingly rejected this analysis. *T.L.O.*, 469 U.S. at 336-337.

cause.³⁶ In applying the test to the school context, the Court found that searches conducted by school officials served the “substantial” government interest of maintaining discipline so that education can take place,³⁷ that “requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools,”³⁸ and that the intrusion in the student’s privacy was limited considering that a student’s reasonable expectation of privacy is reduced while at school.³⁹

Thus, in the school context, reasonableness turns on a balancing that weighs schoolchildren’s legitimate expectation of privacy against the government’s “substantial interest” in maintaining order and discipline in school. To determine whether any particular search violated this reasonableness standard, the Court adopted *Terry v. Ohio*’s two-prong test.⁴⁰ First, the Court asked whether the search was justified at its inception. A search is justified at its inception if there are reasonable grounds for suspecting that the search will turn up evidence that the student violated or is violating either the law or school rules. The Court noted, in dicta, that, in general, individualized suspicion is required unless the intrusion into privacy is minimal and

³⁶ Id. at 340-342.

³⁷ Id. at . The Court found that special needs of schools make the warrant and probable cause requirement impractical in a way that is comparable to police stop and frisks searches. In both of these cases, the searching officials are searching primarily to preserve common safety rather than to investigate a crime and must act immediately in order to achieve that goal.

³⁸ Id. at 340.

³⁹ Id.

⁴⁰ Id.

there are safeguards in place that restrict the government official's discretion.⁴¹ Second, the Court asked whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place." A search is reasonable in scope if the measures used in the search were "reasonably related to the objectives of the search and were not excessively intrusive in light of the age and sex of the student and nature of the infraction."⁴²

*Vernonia School District 47J v. Acton*⁴³ and *Board of Education v. Earls*⁴⁴ determined whether a school search can be reasonable absent individualized suspicion of wrongdoing. The Court answered in the affirmative, but only after concluding that the intrusion into privacy was minimal, adequate safeguards were in place to prevent any further intrusions into privacy, and the purpose of the search was very important or even compelling. In *Acton*, the Court held it is constitutionally permissible for a school to require student athletes to submit to a drug test prior to participating in sports even if there is no individualized suspicion that the child is using drugs.⁴⁵ The Court did not use the *T.L.O.* two-prong test⁴⁶ but only used the general special

⁴¹ Id. at fn 8

⁴² Id. It is not clear what the court intended by including the nature-of-the-infraction as a factor. In Justice Steven's dissent, he stated that the rule against smoking in this case was too trivial to justify a search. The majority contradicted his argument only by explaining that they did not want lower courts to decide the importance of the infraction in determining the reasonableness of the search. So if the importance of the infraction is not relevant, then the Court did not explain how the nature of the infraction was relevant. Perhaps, this factor is meant only to rule out searches for non-evidentiary infractions, such as running down the hallways.

⁴³ 515 U.S. 646 (1995)

⁴⁴ 536 U.S. 822

⁴⁵ Id.

needs balancing test: intrusion into the privacy interest at stake versus government’s interest. The intrusion into privacy was held to be limited in these cases because the urine sample was produced in relative privacy and the test was confidential and not turned over to police.⁴⁷ Moreover, the Court found that the legitimate privacy expectation of school children is limited by the state’s responsibility for the children’s discipline, health, and safety; and that student-athletes have an even more limited privacy interest because they voluntarily consent to participate in a regulated activity that involves dressing in locker rooms.⁴⁸ On the other side of the balance, preventing drug use in school was found to be an “important” and perhaps “compelling” government interest.⁴⁹ *Earls* extended the *Acton* holding to include all extracurricular activities.⁵⁰

II. Strip searches in Public Schools

A. A Survey of Cases: Circuit split?

⁴⁶ Perhaps the Court did not use the two prong test because the first prong requires a reasonable suspicion that the search will turn up evidence of wrongdoing, but these searches here were required even if the school had no reason to suspect that any one person being searched had violated a rule. At least one court has concluded that the *Acton* balancing test is the appropriate test where a search is conducted absent individualized suspicion, but the two prong TLO test should be used where individualized suspicion is present. *Beard v. Whitmore Lake School Dist*, 402 F.3d 598 (2005).

⁴⁷ *Id.*

⁴⁸ *Acton*, 515 U.S. at 657.

⁴⁹ *Id.*

⁵⁰ *Earls*, 536 U.S. 822.

While the Supreme Court has not directly addressed the issue of strip searches in public schools, several circuits have. There is very little consistency in the way these cases are analyzed so a circuit split is probably not the right term. The only generalization that can be made is that strip searches for anything other than drugs will probably be found to be unreasonable, but searches for drugs have gone either way. The Sixth Circuit was the first to examine the issue in *Williams by Williams v. Ellington*.⁵¹ A principal received reports from a student that another student, Williams, was using a drug contained in a vial at school. The principal first called the Williams into his office to question her. She admitted that she had used an inhalant called ‘rush’ (which was legal to possess but not to use) and showed him the small vial that contained the drug. After a search of her locker and belongings turned up no other drugs, the principal ordered a strip search because he believed she was hiding more drugs. No drugs were found.

The court used the *T.L.O.* two-prong analysis. First it held without explanation that the search was reasonable at its inception.⁵² Then, the court held the strip search was reasonable in its scope because the principal was looking for something small and was not able to find the drugs anywhere else. This turns the *T.L.O.* analysis on its head. In *T.L.O.*, the Court held that the principal could continue to search in a more invasive manner (searching through the closed compartments of *T.L.O.*’s purse) because he continued to find more evidence as he searched. Here, the court held that the principal could continue to search in a more invasive manner (a strip

⁵¹ 402 F.3d 598 (2005)

⁵² Since the student had been seen using drugs and admitted to doing so, this conclusion is reasonable but the court should have at least gone through the analysis.

search) because the principal did not find anything in the less invasive searches.⁵³ Moreover, the court completely disregarded the *T.L.O.* court's admonishment to consider what is reasonable in scope in light of the student's age and gender. As explained in the section below, a strip search for drugs – especially under the circumstances here where the student had already given the principal the drugs she admitted to possessing – can not be considered reasonable because the child is put at risk of experiencing a psychological trauma.

When the same circuit was confronted with a case involving a strip search for missing money, the court came to a different conclusion even though the *T.L.O.* court told courts not to consider the relative importance of one infraction over another in determining whether the scope of a search is reasonable. In *Beard v. Whitmore Lake School District*,⁵⁴ twenty high school students were strip searched after their gym teacher discovered that several hundred dollars were missing. The money was not found during the searches.

The court applied the *T.L.O.* two prong test in holding the searches were unreasonable. The court assumed without holding that the search was justified at its inception because it was reasonable to believe that some sort of search is needed when property is reported stolen. However, the search was held not reasonable in its scope. To reach this conclusion, the court applied the *Acton* balancing test because there was no showing of individualized suspicion as the

⁵³ The *T.L.O.* standard was pulled word for word from the *Terry v. Ohio* pat down standard so that case law interpreting *Terry* can shed light on what is reasonable here. When a police officer conducts a *Terry* search, the scope of the search is limited to a brief pat down search for weapons. If the pat down does not reveal any weapons, the officer cannot make an ad hoc decision to conduct a more thorough search for weapons based on a suspicion that a weapon must be hidden somewhere. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)

⁵⁴ 936 F.2d 881 (1991)

entire class was searched. It held that the students had a significant expectation of privacy in their bodies, the intrusion was highly invasive, and that, while the government interest at stake was important, it was not important enough because health and safety were not at issue. Based on this reasoning, it would seem that *Williams* is still good law in this circuit despite its faulty reasoning simply because health and safety are at issue where drugs are involved.

In another case involving missing money, the Eleventh Circuit held that a strip search was unreasonable.⁵⁵ Here, thirteen fifth graders were strip searched because \$26 was missing from the teacher's desk. The court held that the searches were not justified at inception because there was no individualized suspicion.

The Seventh Circuit's first post-*T.L.O.* case was *Cornfield v. Consolidated High School District*.⁵⁶ Once again, a student was strip searched in a fruitless attempt to find drugs. A group of school officials suspected that the student was hiding drugs under his clothing because he had a history of behavioral problems, had dropped out of rehab, and had an unusual bulge in his pants. However, no drugs were found in the search. The court held the search was reasonable using the *T.L.O.* test. While acknowledging that the search was highly intrusive and potentially traumatic, the school officials' belief that the student was hiding drugs in his clothing was held to be reasonable under the circumstances. At least in this case, there were specific facts that pointed

⁵⁵ *Thomas v. Riley*, 261 F.3d 1160 (2001). The facts of this case are particularly disturbing. While the search was going on, a police officer who had come to school to teach the DARE program entered the classroom. Rather than stop the search, the police officer took a group of boys into the bathroom and demonstrated what to do by pulling his own pants down. He also told the boys that if they did not cooperate they could be suspended or sent to jail. *Id.* at 1164.

⁵⁶ 991 F.2d 1316 (1993)

to drugs being hidden under clothing, but the court did not place enough emphasis on the potentially traumatic harm that a strip search can cause.

The Second Circuit was confronted with a similar student strip search case in *Phaneuf v. Cipriano*.⁵⁷ Here, a high school student was strip searched for marijuana because another student told school personnel that the girl was going to hide the drugs down her pants during a mandatory bag search prior to a field trip. No drugs were found. Although the facts here, like those in *Cornfield* pointed to drugs being specifically hidden under clothing, this court came to the opposite conclusion. The court held the search was not reasonable at its inception because the tip from the other student was insufficient to create a reasonable suspicion that the girl was hiding drugs on her person.⁵⁸

The most recent circuit to decide a strip search case was the Ninth in *Redding v. Safford United School District 1*.⁵⁹ The case was recently reheard en banc so may be overturned, but the reasoning of the case points out the trouble that courts have in applying the reasonableness standard where any kind of drugs are involved. Savanna Redding, a 13 year old, was strip searched by a school administrative assistant after another student told school officials that she was involved in drug distribution at the school. Savanna was an honors student with no history of disciplinary problems but school officials noted that she had acted in an unusually rowdy

⁵⁷ 448 F.3d 591 (2006)

⁵⁸ The issue of the reliability of another student's tip comes up frequently in these cases. Here is another instance where age is a relevant factor. Courts look to criminal cases involving adult informants to determine whether the school personnel can reasonably rely on the veracity of the student tip. *See e.g. Redding* at 15. However, it is not clear that this is a valid analogy. Children often will "tell" on each other for a variety of reasons. Some courts have taken this into account but have not analyzed it thoroughly. *See e.g. Phanauf v. Cipriano* 448 F.3d 591 (2006).

⁵⁹ 2007 U.S. App. LEXIS 22521

manner at a recent school dance and was known to have a friendship with another student, who was also identified by the informant. The principal went to a classroom to ask the other identified student to come to his office. While in the classroom, he noticed a binder on a nearby empty desk and asked the classroom teacher to find out who it belonged to. When the teacher opened the binder, she found several small pills and a knife. The school nurse identified the drugs as prescription strength Advil (roughly the equivalent of two regular strength pills). The girl being questioned told school officials that she got the drugs from Savanna and that a group of friends planned to take them at lunch time. Savanna denied any involvement with drugs. When more drugs could not be found elsewhere, both she and the other girl were strip searched by the school nurse but no drugs were found during the searches. Savanna sued.

The court held that the search was reasonable using the *T.L.O.* test. The search was found to be justified at its inception. The court held there were reasonable grounds to believe that she was hiding drugs because the informant was right about Savanna's friend being involved with the drugs and her friend claimed that she got the drugs from Savanna. In deciding that the search was reasonable in scope, the court considered the following factors: the size of contraband was small enough to fit under clothing and she had no pockets, no drugs were found in her back pack, the importance of the government's interest in preventing abuse of prescription strength drugs, and that no men were present during the search and no one actually touched her. Like the *Williams* case on which it relied, the court turned *T.L.O.* on its head. In *T.L.O.*, the Court found that the uncovering of evidence can create a reasonable suspicion that more evidence will be found. In contrast, the appellate courts have held the absence of any evidence creates a reasonable suspicion that more searching needs to be done. Also, the court looked to the small size of the contraband as a reason to permit a potentially traumatic search to take place. If this

factor is taken to its logical conclusion, then a strip search would be justified if the school was searching for missing money or even a missing crayon. To even bring this factor into the analysis only confuses the issue. Notably, the Supreme Court did not mention size as a relevant factor in *T.L.O.*

Given that the circuit courts have not developed a consistent analytical framework to evaluate school strip searches, the question that presents itself is whether the Supreme Court has provided enough guidance for them to do so. The Court has used two methods to determine whether a search by a school official is constitutional: the two prong *T.L.O.* standard of reasonableness under specific circumstances and the broader balancing test that is used to explain the special needs that justify the absence of probable cause and warrants in the school setting. Using either method, strip searches of students are unconstitutional. As Justice Stevens pointed out in his critique of the *T.L.O.* standard: “One thing is clear under any standard -- the shocking strip searches that are described in some cases have no place in the schoolhouse.”⁶⁰

B. Special needs, the *T.L.O.* standard, and strip searches

Under the *T.L.O.* test’s first prong, a search of any kind must be justified at its inception. This rule turns on whether the school official reasonably believes that a search will turn up evidence of wrongdoing. This prong says nothing of how or where the search is to be conducted. Thus, whether the search is of a student’s purse, locker, urine, or body is not material to the first prong. In contrast, the second prong directly speaks to the scope of the search. The scope must

⁶⁰ *T.L.O.* at 381 fn. 25

be limited to what is reasonable in light of the child's age and gender. Here, whether the search is of the student's locker or of their nude body is of great importance.

While the Court did not clearly state how age and gender could affect the reasonableness of a search, psychological and anecdotal evidence and common sense demonstrate the effect that age has on the reasonableness of a strip search.⁶¹ Children from a very young age are taught and understand the idea of "private parts," and as they enter pre-adolescence and adolescence, the idea of public nudity becomes particularly embarrassing.⁶² Adults who have been subject to strip searches have shown signs of trauma;⁶³ and children – at least those who are old enough to no longer need an adult's help to dress – are considered even more likely to be traumatized by a strip search because of the important role that a developing sense of privacy and autonomy over their bodies plays in overall psychological development.⁶⁴ Students who are subjected to strip searches have reported that they no longer feel safe in school and do not trust their teachers.⁶⁵ A

⁶¹ Steven F. Shatz, Molly Donovan & Jeanne Hong, *The Strip Search Of Children And The Fourth Amendment* 26 U.S.F. L. Rev. 1, 11 (1991); for a collection of quotes from interviews of children who have been stripped searched see Scott Garner, note, *Strip Searches Of Students: What Johnny Really Learned At School And How Local School Boards Can Help Solve The Problem* 70 S. Cal. L. Rev. 921, 928-931 (1997).

⁶² *Id.* See also *Cornfield*, 991 F.2d at 1321("The impact of the search will also vary with the age of the child. Perhaps counterintuitively, a very young child would suffer a lesser degree of trauma from a nude search than an older child. As children go through puberty, they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older.")

⁶³ Shatz et al, *supra* n 62

⁶⁴ *Id.* at 17-19

⁶⁵ *Phaneuf v. Fraikin*, 448 F.3d 591 (2006)

child who is strip searched may even suffer from the experience as though they had been sexually abused; thus a strip search can cause lasting psychological damage.⁶⁶

Of course, differences in disposition will lead some child to experience a strip search as only a mild embarrassment, but the school cannot know beforehand whether an individual child will be mildly embarrassed by a strip search or severely traumatized. They do know or reasonably should know that there is a strong possibility of the latter given the psychological evidence outlined above and the common sense notion that children should only allow their parents and their doctors to see them without clothes. In fact, many schools have formal educational programs designed to prevent sexual abuse that teach children to not comply when adults ask them to do something that makes them feel unsafe.⁶⁷

Thus, when examining the reasonableness of the scope of a search under *T.L.O.*'s second prong, the decision cannot be based on any particular child's reaction to the deprivation of privacy. The issue is whether it can be reasonable for a school official to strip search any school aged child given the extreme harm that can be caused by a strip search. The second prong of *T.L.O.* can rarely, if ever, be satisfied as the search will almost never be reasonable in scope in light of the child's age. The search is not only highly intrusive but excessively so because the search can result in lasting psychological harm to a child.

Moreover, the message that a strip search sends to children about their rights as citizens is a concern that some courts have raised. Justice Brennan wrote, “[s]chools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard

⁶⁶ Shatz et al, *supra*, n 62.

⁶⁷ See <http://www.childhelp.org/gtbt>.

the fundamental principles underpinning our constitutional freedoms.”⁶⁸ Even if a child is not psychologically traumatized by the strip search, an immeasurable harm is inflicted when a school sends a message to its students that constitutional rights can be ignored by those with power. The degree of indignity experienced in a strip search compared to an illegal property search emphasizes the point to the child.

Strip searches implicate concerns that were not addressed *T.L.O.*, *Acton* and *Earls*. These cases did arguably involve situations where “the burden of obtaining a warrant [would be] likely to frustrate the governmental purpose behind the search.”⁶⁹ In *T.L.O.*, the principal was acting to swiftly enforce an ordinary school rule in order to preserve a sense of discipline in the school. If he had to apply for a warrant based on probable cause before he could punish students for smoking, then punishment could be delayed and other students might get the idea that they too could break a few school rules.⁷⁰ The lack of discipline would in turn make it more difficult for the school to serve its ultimate purpose – the education of students. In *Acton* and *Earls*, the schools were faced with the more serious problem of preventing drug abuse. The school chose to deal with this problem by uniformly administering a urine test to distinct groups of students. The groups chosen arguably were rationally related to the purpose of searches – especially in *Acton* where there was a concern that student-athletes leadership skill were influencing other students to use drugs and that the athletes could injure themselves if they used drugs while playing sports. Most importantly, the intrusion into the student’s privacy was limited in these cases. The results

⁶⁸ Doe v. Renfrow, 451 U.S. 1022 (1981)(dissenting in the denial of certiorari)

⁶⁹ Camara v. Municipal Court, 387 U.S. at 532-533.

⁷⁰ Justice Blackman noted the trouble that a pea shooter can cause unless it is quickly taken away. *T.L.O.*, 469 U.S. at 352 (Blackman, concurring)

of the drug test were confidential and the method chosen to obtain the sample protected the student's privacy to the maximum extent possible under the circumstances.

Strip searches, however, fall outside the exigency that allows school to conduct warrantless searches. Strip searches can be distinguished from *T.L.O*, *Acton*, and *Earls* because the intrusion into privacy is much greater, the intrusion itself undermines the purpose that the Supreme Court articulated to justify the search – the maintenance of a safe environment where learning can take place, and the purpose of the search would not be undermined by the burden of obtaining a warrant. Under the special need doctrine, a warrant and probable cause can be dispensed with only when the importance of the government's (non-law enforcement) purpose in conducting a search outweighs the importance of the privacy interest invaded – the greater the intrusion, the greater the purpose must be to balance the scale. This requirement is not met in the case of strip searches; therefore, the warrant and probable cause standard are appropriate and should be constitutionally required.

The privacy interest that children have in their own bodies is exceedingly high. The psychological evidence outlined above only underscores the common sense point of view expressed by the Seventh Circuit in the quote used to open this paper. Given the trauma that can be suffered by children who are strip searched, the purpose of the government interest at stake would have to be exceedingly important to dispense with the traditional probable cause-warrant requirement of the Fourth Amendment under the special needs doctrine. The purpose the Court used to justify a basic search in the school setting is admittedly very important. However, in contrast to ordinary searches, a strip search itself can undermine the purpose of the search. Just as schools cannot effectively teach when students create an unsafe environment,⁷¹ neither can the

⁷¹ See *T.L.O.*, 469 U.S. at 339-340.

school teach effectively if the school personnel create the same feeling. Well-intentioned school personnel in pursuit of an ordered and safe school environment may inadvertently create the reverse, at least from the student's point of view. Thus, a warrantless strip search under these circumstances is clearly unreasonable as it is not only highly intrusive and traumatic, it would tend to detract from the purpose of the search – maintaining a safe environment for students.

Additionally, even if the purpose of education were served by a strip search, the importance of the search will not outweigh the importance of the privacy interest invaded. If on one side of the scale is a right to not be sexually traumatized by government officials; the other side of the scale must have more than the government's interest in maintaining an orderly school environment. The need to act swiftly and informally to preserve discipline among children cannot be used to justify a practice that can in fact undermine a child's safety and security. Even the government's interest in preventing drug use among children does not rise to that level – the scale will have protection from the harm of drugs on one side and protection from harm of sexual trauma on the other side. The scales are at best balanced. This is not to say that schools should do nothing when they suspect a child is hiding drugs, but that they should not “swiftly and informally” perform strip search.⁷²

Under normal circumstances, as noted by the Supreme Court in *T.L.O.*, swift and informal action is needed to discipline school children. However, when a child is suspected of doing something so beyond the bounds of normal behavior that a strip search may be necessary,

⁷² A reasonable argument could be made that a warrantless strip search could be justified to prevent an imminent risk of substantial physical harm to other students, such as if a child were hiding a gun or other similar weapon under his clothing. However, there is no recorded case of a strip search being conducted in a school under such circumstances.

then a more deliberate decision making process is in order. The interests of both the school and the student are better served if a detached magistrate makes that decision rather than the school officials who are involved in the situation. The most reasonable course of action for the school would be to conduct an ordinary search of the student's property – if *T.L.O.* standards are met – and require the child to stay in a specified location, such as the principal's office, until the police arrive with a search warrant. This would allow the school to enforce discipline while avoiding a violation of the student's constitutional right. Of course, police involvement is no guarantee that rights will not be violated, but at least the police receive extensive training in the probable cause standard and the importance of warrants. Several states have come to the same conclusion and have enacted statutes that require a search warrant be obtained by a law enforcement officer before a student can be strip searched.⁷³

III. Recommendations

The warrantless strip search of school children by school official is a violation of the Fourth Amendment. The search cannot be justified by the special needs exception to the warrant requirement that allows school officials to conduct ordinary searches of a student's belongings so that the school can maintain a safe environment where learning can take place. The intrusion in to the child's privacy is extreme, and the purpose of the search is undermined by the psychological harm that the search can inflict on the child. Rather than create a safe environment, a school that strip searches its students may create an environment where the

⁷³ Wis. Stat. § 118.32; Rev. Code Wash. § 28A.600.230; S.C. Code § 59-63-1140; 70 Okl. St. § 24-102; N.J. Stat. § 18A:37-6.1; R.S.Mo. § 167.166

relationship between students and teachers breaks down to such a point that the students actually feel less safe. If the issue of such strip searches should ever reach the Supreme Court, the searches should be held to be a per se violation of the Fourth Amendment.

In the meanwhile, rather than wait for courts to slowly sort out the rules to apply to determine whether it is reasonable to subject child to psychological trauma, the remaining states should follow the lead of the states that have enacted statutes that forbid school officials to conduct strip searches of students. Moreover, as this is an issue of federal constitutional significance, a federal statute would be appropriate. Last year, the House approved the "Student and Teacher Safety Act of 2006" which would have codified *T.L.O.*'s holding.⁷⁴ The bill also required all schools that receive federal funding to develop official search policies. However, this bill was decried in the blogosphere as the "Strip Search Bill" because critics noted that *T.L.O.* has been construed to allow strip searches in some jurisdictions.⁷⁵ I have argued that this is an erroneous construction of *T.L.O.* yet it will still have the force of law in those jurisdictions until the decisions are overturned.⁷⁶ To counter this, the bill should be reintroduced with an amendment modeled after Wisconsin statute which clearly states, "Any official, employee or agent of any school or school district is prohibited ... from conducting a strip search of any pupil."⁷⁷

⁷⁴ HR 5295

⁷⁵ See www.drugpolicy.org/news/092006search.cfm; technocrat.net/d/2006/9/21/8096.

⁷⁶ See e.g. *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991); *Redding v. Safford United Sch. Dist. 1*, 2007 U.S. App. LEXIS 22521 (9th Cir).

⁷⁷ Wis. Stat. § 118.32

IV. Conclusion

The right to be secure against unreasonable searches protects us against absolute and unfettered government intrusions into our private life; however, there are clearly times when privacy must yield to other needs. The Fourth Amendment states that privacy may yield to other needs provided that a magistrate issues a warrant based on probable cause to suspect wrongdoing. The Supreme Court has decided that privacy may also yield to non-criminal investigatory needs without a warrant if the need to search is more important than the individual's privacy under the circumstances. Schools need to enforce their rules in order to create a safe environment where learning can flourish. It is important for schools to maintain order and discipline so that learning can take place, and school officials are rightly concerned about violence, drug use, and other criminal behavior among the student population. However, a child's right to privacy and autonomy over their bodies is equally important; therefore, a school can not be justified in conducting a strip search without a warrant and probable cause.

Ideally, schools should deal with children who engage in criminal behavior with an eye toward helping that child make better choices in life by providing both academic and emotional guidance. That is what teachers are trained to do. Teachers and school officials do not routinely receive more than cursory training in search and seizure law if they receive any training at all. This is sufficient to meet the normal needs of teachers when they must ask a child to turn out their pockets or remove the contents of their book bags.

However, if a child has engaged in behavior so beyond the norm that a strip search may be necessary to prevent harm to other children, then in order to lessen the chance of an arbitrary and unnecessary invasion of a constitutionally protected privacy interest, trained law enforcement officers should be called to help school personnel deal with a situation that is

beyond their expertise. Otherwise, school officials and teachers may unknowingly violate students' constitutional rights and cause irreparable harm to the students that they intend to help.