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A Rock, a Hard Place, and a Reasonable Suspicion: How the United States Supreme Court Stripped School Officials of the Authority to Keep Students Safe

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance.¹

I. INTRODUCTION

On any given weekday, nearly 50 million students file through schoolhouse doors,² and each time nearly four million teachers are there to greet them on the other side.³ For seven hours a day, 180 days a year, teachers are entrusted with these children.⁴ They educate them and protect them from harm, eat with them and watch them play during recess. They see them develop as years pass. It is no wonder that a child's teacher has been described as his "third parent."⁵

From time to time, however, we are reminded that teachers do not enjoy the extensive powers of a parent. One such reminder came this past year in *Safford Unified School District No. 1 v. Redding*,⁶ in which the United States Supreme Court held that the strip search of a 13-year-old middle school student was unconstitutional.⁷ For many people, learning that schools *could* strip search students came as a shock.⁸ Such searches, however, are not wholly foreign to the schoolyard. Over the past 30 years, quite

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1. *New Jersey v. T.L.O.*, 469 U.S. 325, 385–86 (1985) (Stevens, J., concurring in part and dissenting in part).

2. *Fast Facts*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Feb. 5, 2010).

3. *Id.*

4. *See* LA. REV. STAT. ANN. § 17:154.1 (Supp. 2010).

5. CAROL VANDERHEYDEN, *A TOUCH OF CLASS 2* (2003) (attributing "Teacher: The child's third parent" to Hyman Maxwell Berston).

6. 129 S. Ct. 2633 (2009).

7. *Id.*

8. *See, e.g.*, David Andreatta, *Strip Search Shock—School's Bizarre Policy*, N.Y. POST, Feb. 1, 2005, at 27; Joe Robertson, *Lawsuit Filed over Alleged Strip Search of Third-Graders in Kansas City*, KANSAS CITY STAR, Mar. 25, 2002, at B1.

a few courts have debated whether the strip search of a student was reasonable, and the results have varied.⁹

Why schools would resort to such a measure is not a mystery: Teachers are receiving mixed signals. On the one hand, parents and government officials put immense pressure on schools to play a central role in the fight against student drug use and violence.¹⁰ On the other hand, they express shock at the mere mention of student strip searches and condemn schools for even considering such tactics.¹¹ These mixed signals will result in the paralysis of school officials. Obligated to protect students from harm, but afraid of impending liability, these officials are in desperate need of guidance. Currently, however, Louisiana law does not address the strip search of a student.¹²

This Comment proposes an amendment to the Louisiana law governing the search of a student's person.¹³ Part II of this Comment addresses the prevalence of drug use, violence, and theft in schools and the pressures placed on school officials to combat these problems. It then provides examples of student strip searches and analyzes the harmful psychological effects associated with such measures. An analysis of the Supreme Court's historic decision regarding students' rights, *New Jersey v. T.L.O.*,¹⁴ follows. Part III examines the Court's most recent decision—*Redding*.¹⁵ Part IV reveals the dangers of Louisiana's silence on this issue before critiquing the legal framework that underlies the student strip search. Part V proposes that a warrant requirement will benefit both students and school officials, protecting the former from frivolous strip searches while shielding the latter from liability. Finally, Part VI urges the Louisiana Legislature to quickly adopt appropriate measures.

II. TEACHERS, DON'T LEAVE THEM KIDS ALONE¹⁶

The strip search of a student is not an issue that can be dealt with in a vacuum. Before delving into a constitutional analysis, it is first necessary to examine the confluence of factors leading to such a search—the value of an education, the obstacles in the way

9. See discussion *infra* Part II.E and accompanying notes 117–19.

10. See discussion *infra* Part II.A and accompanying note 28.

11. See *supra* note 8.

12. LA. REV. STAT. ANN. § 17:416.3 (2001).

13. *Id.*

14. 469 U.S. 325 (1985).

15. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

16. See PINK FLOYD, *Another Brick in the Wall, Part II, on THE WALL* (Capitol Records 2000).

of its attainment, and the pressures placed upon school officials to overcome these obstacles. With these factors in mind, examples of student strip searches and research regarding their harmful psychological effects provide an understanding of the context within which these searches occur.

*A. America's Most Important Function*¹⁷

Educating America's youth is a national imperative.¹⁸ To carry out this pervasively important task, public school officials must be empowered to maintain order and discipline in their schools.¹⁹ Justice Powell of the United States Supreme Court recognized this need, writing that "[t]he primary duty of school officials and teachers . . . is the education and training of young people."²⁰ He continued: "A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."²¹ In recent years, however, a school official's ability to maintain discipline and order has been significantly hampered by almost insurmountable obstacles—drug use, violence, and theft.

The prevalence of these obstacles is well documented and poses a significant threat to the educational experiences of students throughout the nation.²² Because drug use, violence, and theft

17. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

18. *Education*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/education/> (last visited Feb. 5, 2010).

19. ROBERT WHEELER LANE, *BEYOND THE SCHOOLHOUSE GATE* 7 (1995).

20. *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring). Louisiana law also recognizes this "compelling interest," declaring that "[e]very teacher is authorized to hold every pupil to a strict accountability for any disorderly conduct in school or on the playground of the school." LA. REV. STAT. ANN. § 17:223(A) (2001).

21. *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring).

22. See, e.g., NAT'L CTR. FOR ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE XII: TEENS AND PARENTS (2007), available at <http://www.casacolumbia.org/download.aspx?path=/UploadedFiles/vilf5lvw.pdf>. In 2007, 80% of high school students and 44% of middle school students personally witnessed drug dealing, use, or possession. *Id.* at 1. Not surprisingly, students in these drug-infested schools were more likely to use drugs themselves. *Id.* at 1–2; see also, e.g., NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2008 (2008), available at <http://nces.ed.gov/pubs2009/2009022REV.pdf>. In the 2005–2006 school year, violent crimes occurred in 78% of public schools. *Id.* at 20. In 2007, 6% of students in grades 9 through 12

contribute to student misbehavior,²³ they are responsible for siphoning resources from where schools need them most—providing students with a proper education.²⁴ The presence of these problems, besides making it more difficult to maintain discipline and provide an education, also has a detrimental effect on a school official's ability to fulfill his or her legal duty—keeping students safe from harm.

Louisiana law imposes on school officials a duty of supervision over their students.²⁵ Such supervision must be reasonable, competent, and “appropriate to the age of the children and the attendant circumstances.”²⁶ If a student suffers physical injury, the law may hold the school board liable if the risk of the student's injury was foreseeable and the exercise of reasonable supervision could have prevented it.²⁷ In other words, Louisiana's school officials are obligated not only to keep a watchful eye on their students but also to intervene should they see harm on the horizon. Today, however, the law is not the only force pressuring school officials to intervene.

Because drug use, violence, and theft pose significant threats to student safety and the maintenance of a proper educational environment, school officials find themselves pressured to act by both the public and the government.²⁸ In the introduction to a

reported that they brought a weapon onto campus during the previous month. *Id.* at vii. One year earlier, students ages 12 to 18 were more likely to be victims of theft while at school than anywhere else. *Id.* at v.

23. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 22, at vi (“[I]n 2003–04, 35 percent of teachers agreed or strongly agreed that student misbehavior interfered with their teaching, and 31 percent reported that student tardiness and class cutting interfered with their teaching . . .”).

24. *Id.* at 62 (commenting upon the practices and procedures adopted by schools to ensure the safety of their students); *see also* NAT'L CTR. FOR ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., *supra* note 22, at iii (commenting that ridding schools of drugs is necessary to “achieve the improvements in academic achievements (and test scores) considered essential to maintain our global competitiveness”).

25. LA. CIV. CODE art. 2320 (2010) (“Teachers . . . are answerable for the damage caused by their scholars . . . while under their superintendence.”); *accord* *Wallmuth v. Rapides Parish Sch. Bd.*, 813 So. 2d 341, 346 (La. 2002).

26. *Wallmuth*, 813 So. 2d at 346.

27. *Id.*; *see also* LA. CIV. CODE art. 2320 (“[R]esponsibility only attaches, when the . . . teachers . . . might have prevented the act which caused the damage, and have not done it.”).

28. *See, e.g.,* LANE, *supra* note 19, at 6 (“Public concern about school crime and classroom order increases the pressure on school officials to control students.”); Joan McDermott, *Crime in the School and in the Community: Offenders, Victims, and Fearful Youths*, 29 CRIME & DELINQ. 270, 278 (1983)

handbook published by the United States Department of Education, the Secretary of Education wrote the following about the role that schools should play in combating drug use:

Schools are uniquely situated to be part of the solution to student drug use. Children spend much of their time in school. Furthermore, schools . . . are major influences in transmitting ideals and standards of right and wrong. Thus, although the problems of drug use extend far beyond the schools, it is critical that our offensive on drugs centers in the schools.²⁹

Although sounding the call for schools to serve as centers for the offensive against drug use and violence makes for good rhetoric, it pressures school boards and officials into adopting policies and practices that many consider overzealous and unwise.³⁰ Of these policies and practices, however, only one has ever been described as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive” —the strip search.³¹

B. Strip Searches

To different people, the term “strip search” may have different meanings. Therefore, it is necessary to define this term and provide examples of *student* strip searches before proceeding to analyze the harmful psychological effects that such searches have on children.

(noting the tendency of the public to place blame for crime in schools on school officials).

29. WILLIAM J. BENNETT, U.S. DEP'T OF EDUC., WHAT WORKS: SCHOOLS WITHOUT DRUGS, at vii (1986), *quoted in* LANE, *supra* note 19, at 7.

30. See, e.g., J. Bates McIntyre, *Empowering Schools to Search: The Effect of Growing Drug and Violence Concerns on American Schools*, 2000 U. ILL. L. REV. 1025, 1052 (criticizing state lawmakers' reliance on “[t]he doctrines of implied consent, plain view, and the automobile exception” to craft statutes empowering school officials to search students' persons or things); Dennis Cauchon, *Schools Struggling to Balance “Zero Tolerance,” Common Sense*, U.S.A. TODAY, Apr. 13, 1999, at 1A (reporting on criticism of zero-tolerance policies as “inflexible, harsh and lacking in common sense”); Ralph C. Martin, II, *Zero Tolerance Policy*, AM. B. ASS'N (Feb. 2001), <http://www.abanet.org/crimjust/juvjus/zerotolreport.html> (referring to zero-tolerance policies as “one-size-fits-all” solutions that redefine students as criminals).

31. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (quoting *Tinetti v. Wittke*, 479 F. Supp. 486, 491 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980)).

1. What Are They and When Do They Occur?

One group of scholars defines a strip search as “the visual inspection of an individual’s body, including those portions usually hidden by undergarments.”³² Although student strip searches may occur for a variety of reasons, almost all begin with the objective of discovering drugs or stolen money.³³ The following examples provide but a brief glimpse of situations in which these searches may occur.

In Atlantic, Iowa, a school official strip searched four high school girls after another student reported that \$100 was missing from the girls’ locker room after gym class.³⁴ Performing each search individually, the school official made the first girl remove her pants and pull her shirt and bra out.³⁵ For the remaining searches, the official required each of the girls to remove her underwear, one to take off all of her clothing, and another to strip down twice after she refused to remove her bra during the first search.³⁶ The missing money was never found.³⁷

After \$26 disappeared from a teacher’s desk in Clayton County, Georgia, school officials strip searched 13 fifth-grade students.³⁸ Dividing the students by sex, the officials escorted them into their respective restrooms four to five at a time.³⁹ A male police officer searched the boys, requiring some to lower their pants and underwear, while having others submit to a visual inspection of their private areas.⁴⁰ A female teacher searched the girls. She required them to “lower their pants and lift their dresses or shirts,”⁴¹ and had many lift their bras, thus exposing their breasts.⁴² Again, the missing money was never found.⁴³

32. Steven F. Shatz, Molly Donovan & Jeanne Hong, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 1 (1991).

33. See, e.g., *Lewis ex rel. Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (discussing a strip search for marijuana); *Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189 (D.S.D. 1998) (discussing a strip search for \$200).

34. Jennifer Jacobs, *Atlantic Search Excluded “Good Girl,” Lawyer Says*, DES MOINES REG., Sept. 19, 2009, at 1.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 951–52 (11th Cir. 2003).

39. *Id.* at 952.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Thomas v. Clayton Cnty. Bd. of Educ.*, 94 F. Supp. 2d 1290, 1294–95 (N.D. Ga. 1999), *aff’d*, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953

Acting on a student tip regarding drug possession,⁴⁴ school officials in Plainville, Connecticut summoned a high school girl's mother to conduct the strip search of her child.⁴⁵ A school official stood in the room as the mother searched her daughter, requiring her to lift her shirt, pull down her bra, and drop her skirt down to her ankles.⁴⁶ When the mother asked the school official if they could stop the search, the school official replied that she could not.⁴⁷ The mother then made the girl pull her underwear away from her body.⁴⁸ The drugs were never found.⁴⁹

As the above examples illustrate, the strip search of a student may occur under a variety of circumstances—some arguably meriting such a search, others not. Regardless, school officials are under immense pressure as they struggle to maintain order in the classroom, safety on the schoolyard, and common sense when dealing with students.⁵⁰ This pressure may sometimes result in a student being strip searched. But these searches are not without accompanying evils. For school officials, a frivolous search may result in potential civil liability⁵¹ and a sullied reputation.⁵² For students, the result may be long-lasting psychological harm.

(2002). When asked about her actions, the teacher responded that the money was to fund a class field trip, and most of these students lived in poverty; the theft, she felt, was a serious problem for the children. Bill Rankin, *No Liability in School's Strip Search*, ATLANTA J. & CONST., Oct. 5, 1999, at 1A. The officer, however, called the search "no big deal." Bill Montgomery, *Firing Over Strip Search of Fifth-Graders Upheld; Officer Called Hunt for \$26 "No Big Deal,"* ATLANTA J. & CONST., June 5, 1997, at 2D.

44. *Phaneuf v. Fraikin*, 448 F.3d 591, 593 (2d Cir. 2006). A student informed school officials that the girl possessed marijuana and was hiding it "down her pants." *Id.*

45. *Id.* at 594.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* The girl later stated that throughout the search, she was "extremely upset and anxious . . . to the point of being hysterical." *Id.*

50. See discussion *supra* Part II.A.

51. In a number of cases, courts have found that school officials conducting unreasonable strip searches of students were not entitled to qualified immunity and were therefore exposed to potential personal liability. See, e.g., *Foster v. Raspberry*, 652 F. Supp. 2d 1342 (M.D. Ga. 2009) (strip search of a high school girl for a missing iPod); *Fewless ex rel. Fewless v. Bd. of Educ. of Wayland Union Sch.*, 208 F. Supp. 2d 806 (W.D. Mich. 2002) (strip search of fourteen-year-old boy for marijuana); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883 (N.D. Ill. 2001) (strip search of 30 students for missing money); *Konop ex rel. Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189 (D.S.D. 1998) (strip search of two seventh-grade students for \$200); *Hines ex rel. Oliver v. McClung*, 919

2. A Strip Search is a Traumatic Event for a Child

The strip search of a child is a traumatic event.⁵³ Members of the Supreme Court characterized such a search as “shocking,”⁵⁴ and “degrading,”⁵⁵ one fairly stating that “[i]t does not require a constitutional scholar to conclude that a nude search of a . . . child is an invasion of constitutional rights of some magnitude.”⁵⁶ These statements, however, are mere generalizations; they do not shed any light on the true harms inflicted upon a child subjected to a strip search. Before school officials should ever consider strip searching a student, they should contemplate these harms.⁵⁷

Individuals subjected to strip searches have reported feeling severely embarrassed and humiliated.⁵⁸ Others felt powerless.⁵⁹ For females, the effects of strip searches can be similar to those experienced by rape victims—“recurrent recollections of the event, inability to concentrate, anxiety, depression, sleep disturbances, and development of phobic reactions,” all of which may persist for years.⁶⁰ Although this alone should give school officials pause before conducting strip searches, the effects that such searches have on children are even more severe.

F. Supp. 1206 (N.D. Ind. 1995) (strip search of five seventh-grade students for \$4.50).

52. See, e.g., Editorial, *Livingston High Reassignments Teach Lessons in Accountability*, MODESTO BEE, Feb. 14, 2005, at B6 (reporting on the demotion of a principal and assistant principal following a strip search of four female students); Christian Nolan, *Schools Learn Lessons from Strip Search Case*, CONN. L. TRIB., Sept. 14, 2009, at 6 (reporting on the firing of a principal and teacher following a search of four students for \$70).

53. See, e.g., Scott A. Gartner, *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, 928–29 (1997); Dana Ingrassia, Note, *Thomas ex rel. Thomas v. Roberts: Another Photo Finish Where School Officials Win the Race for Qualified Immunity*, 26 WHITTIER L. REV. 621, 649–50 (2004).

54. *New Jersey v. T.L.O.*, 469 U.S. 325, 382 n.25 (1986) (Stevens, J., concurring in part and dissenting in part).

55. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642 (2009).

56. *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part) (alteration in original) (quoting *T.L.O.*, 469 U.S. at 382 n.25).

57. Gartner, *supra* note 53, at 930.

58. *Id.* at 928–29; see also, e.g., Marian Gail Brown, *Strip Search Decision Could Affect Ansonia Case*, CONN. POST, June 30, 2009, available at 2009 WLNR 12492132.

59. Gartner, *supra* note 53, at 929.

60. *Id.*; accord M. Margaret McKeown, *Strip Searches Are Alive and Well in America*, 12 HUM. RTS. 37, 42 (1985); Shatz, Donovan & Hong, *supra* note 32, at 12.

Children approaching adolescence have a heightened interest in privacy; for them, privacy serves as an “important . . . marker of independence and self-differentiation.”⁶¹ As a result, “[t]hreats to the privacy of school aged children may be reasonably hypothesized to . . . function as threats to self-esteem.”⁶² Some children even interpret a strip search as a form of sexual abuse.⁶³

These harmful effects are particularly disturbing in light of the pivotal role adolescence plays in a student’s personal development. As one commentator noted:

[A]dolescence is a *formative* stage in the sense that events and experiences that take place during this period place individuals on particular pathways into adulthood that may set the course of their future lives. . . . [M]ost of the serious psychological problems that afflict adults, such as depression or substance abuse, appear first in adolescence. . . . [W]hat happens during adolescence undoubtedly shapes individuals’ views of the world, their mental health, and their likelihood of success as adults.⁶⁴

Because the day-to-day events of adolescence have far-reaching effects on the lives of students, a school official’s decision to strip search should be confined to those instances in which the school’s interest in conducting the search outweighs the detrimental psychological harm to be inflicted upon the child.⁶⁵ This balancing

61. Shatz, Donovan & Hong, *supra* note 32, at 11 (quoting Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 488 (1983)).

62. *Id.*

63. Shatz, Donovan & Hong, *supra* note 32, at 11–13; accord David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem?*, 99 DICK. L. REV. 1, 45 (1994). The two main sources of trauma in cases of sexual abuse are “the use of force or coercion by the abuser” and “a substantial age difference between the abuser and the victim”—two factors almost always present in school strip search situations.” *Id.* (quoting Shatz, Donovan & Hong, *supra* note 32, at 13). Also, although the strip search of a student may be only a single incident, the “duration and repetition of child sexual abuse are unrelated to its traumatic effect.” *Id.* (quoting Shatz, Donovan & Hong, *supra* note 32, at 13) (internal quotation marks omitted).

64. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 32 (2008).

65. See Gartner, *supra* note 53, at 930–31. In Louisiana, a number of school boards have already performed this balancing test and found that the strip search of a student is never an appropriate measure in a school setting. See, e.g., ST. TAMMANY PARISH PUB. SCH. SYS., DISTRICT HANDBOOK FOR STUDENTS AND PARENTS 2010–2011, at 15 (2010), available at <http://www.stpsb.org/files/handbookstudentsparents.pdf>; *Searches of Student’s Person*, ACADIA PARISH SCH. BOARD, <http://www.acadia.k12.la.us/policy/POLICY/JCABA.htm> (last

act, however, is not the only constraint placed upon the school official's decision. An analysis of the legal issues implicated by strip searching a student reveals that constitutional constraints exist as well.

C. The United States Constitution Places Strict Constraints on the Strip Search of a Student

For many years, the applicability of the Bill of Rights to the daily affairs of public schools was unclear.⁶⁶ Historically, the relationship between school officials and school children was governed by the doctrine of *in loco parentis*.⁶⁷ This doctrine stood for the proposition that parents, by sending their children to school, delegated to school officials a portion of their parental authority—primarily “that of restraint and correction, as may be necessary to answer the purposes for which [the school official] is employed.”⁶⁸ Under the doctrine of *in loco parentis*, courts were reluctant to interfere in the “routine business of school administration”⁶⁹ and deemed this hands-off approach necessary for school officials to maintain discipline and command respect from their students.⁷⁰ Some courts went so far as to say that school officials acted as parents and therefore were not subject to the limitations placed upon state actors under the Constitution.⁷¹ Throughout the twentieth century, however, *in loco parentis* began to lose favor

visited Aug. 13, 2010); *Searches of Student's Person*, E. BATON ROUGE PARISH SCH. BOARD, http://www.ebrschools.org/eduWEB1/1000437/docs/policy_manual_japp101608.pdf (last visited Aug. 14, 2010); *Searches of Student's Person*, ORLEANS PARISH SCH. BOARD, <http://www.nops.k12.la.us/uploads/File/board/Policy%20Manual/Merged%20Polices%20REV%20-%20PDF.pdf> (last visited Aug. 14, 2010); *Student Searches*, LIVINGSTON PARISH SCH. BOARD, <http://policy.lpsb.org/JCAB.htm> (last visited Aug. 14, 2010); *Student Searches*, WEBSTER PARISH SCH. BOARD., <http://www.websterpsb.org/WebsterCAPS/Policy/JCAB.htm> (last visited Aug. 14, 2010).

66. See generally Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W. ST. U. L. REV. 105 (2003).

67. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2646 (2009) (Thomas, J., concurring in part and dissenting in part).

68. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (Dawsons of Pall Mall 1966) (1765), quoted in Jenkins, *supra* note 66, at 114.

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

70. Jenkins, *supra* note 66, at 115 (citing *State v. Pendergrass*, 19 N.C. (2 Dev. & Bat.) 365, 368 (1837)).

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

with the United States Supreme Court,⁷² and in the mid-1980s, this doctrine's questionable relationship with the Fourth Amendment was challenged.⁷³ In *New Jersey v. T.L.O.*, one girl and a pack of cigarettes would forever change a student's right to be free from unreasonable searches and seizures.⁷⁴

D. New Jersey v. T.L.O.: A Student's Rights Under the Fourth Amendment

In *T.L.O.*, an assistant principal searched the purse of a high school girl, T.L.O., after a teacher discovered her smoking a cigarette in the school's lavatory—a violation of school rules.⁷⁵ The search revealed cigarettes and a package of cigarette rolling papers.⁷⁶ Aware that possession of rolling papers may implicate marijuana use,⁷⁷ the assistant principal performed a more thorough search of the purse and discovered a small amount of marijuana.⁷⁸ After police obtained this evidence, delinquency charges were brought against T.L.O.⁷⁹

The United States Supreme Court addressed two issues in this case, the first of which was whether the Fourth Amendment, as applied through the Fourteenth, imposes constraints on a public school official conducting a search of a student's person.⁸⁰ Criticizing the doctrine of *in loco parentis*, the Court said that it was “in tension with contemporary reality,”⁸¹ and “not entirely ‘consonant with compulsory education laws.’”⁸² Because school officials “act in furtherance of publicly mandated educational and disciplinary policies,”⁸³ they act “not merely as surrogates for the

72. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”).

73. *T.L.O.*, 469 U.S. 325.

74. *Id.* at 328.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 328–29.

80. *Id.* at 333. The Due Process Clause of the Fourteenth Amendment is the means through which the Fourth Amendment's protections against unreasonable searches and seizures are enforceable against the states. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

81. *T.L.O.*, 469 U.S. at 336.

82. *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 662 (1977)).

83. *Id.*

parents, and [therefore] cannot claim the parents' immunity from the strictures of the Fourth Amendment."⁸⁴ For these reasons, the Court held that it was "indisputable" that the Fourth and Fourteenth Amendments protect a student's right to be free from unreasonable searches and seizures.⁸⁵

The second issue before the Court was whether the Fourth Amendment's formal requirements—a warrant and probable cause—are binding upon a school official who conducts a search of a student's person.⁸⁶ In determining the reasonableness of this search, the Court employed a balancing test.⁸⁷ On the one hand, the Court stated, are the student's "legitimate expectations of privacy and personal security."⁸⁸ It found that "[a] search of a child's person or . . . bag carried on her person . . . is undoubtedly a severe violation of subjective expectations of privacy."⁸⁹ On the other hand, the Court noted, is a school official's "substantial interest . . . in maintaining discipline in the classroom and on school grounds,"⁹⁰ especially in light of the fact that "drug use and violent crime in the schools have become major social problems."⁹¹ Because of these compelling yet competing interests, the Court declared that "a certain degree of flexibility in school disciplinary procedures" is necessary for school officials to maintain security and order.⁹² Dismissing the Fourth Amendment's warrant requirement, the Court stated that "requiring a teacher to obtain a warrant . . . would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."⁹³ As for the level of suspicion necessary to search, the Court said that "a careful balancing of governmental and private interests" revealed that the public would best be served "by a Fourth Amendment standard of reasonableness that stops short of probable cause."⁹⁴

Having cast aside the most basic protections afforded by the Fourth Amendment, the Supreme Court crafted a new test by which to judge the constitutionality of a search of a student's

84. *Id.* at 336–37.

85. *Id.* at 334 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

86. *Id.* at 332.

87. *Id.* at 337.

88. *Id.*

89. *Id.* at 337–38.

90. *Id.* at 339.

91. *Id.*

92. *Id.* at 340.

93. *Id.*

94. *Id.* at 341.

person.⁹⁵ This test rested upon a twofold inquiry.⁹⁶ First, the search must be justified at its inception, meaning that there must be "reasonable grounds 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."⁹⁷ Second, the search must be permissible in scope, meaning 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."⁹⁸ These standards, the Court found, would "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause," while also ensuring "that the interests of students will be invaded no more than is necessary to achieve . . . order in the schools."⁹⁹

Before applying this new test, the Court explained that this case involved two separate searches: the first for the discovery of cigarettes and the second for the discovery of marijuana.¹⁰⁰ With respect to the first search, because T.L.O. was accused of smoking cigarettes in the lavatory—a violation of a school rule—the Court held that the assistant principal acted reasonably in seeking evidence of this infraction,¹⁰¹ even though the mere possession of cigarettes did not violate any such rule.¹⁰² With respect to the second search, the Court held that once the assistant principal discovered the package of cigarette rolling papers, he possessed a reasonable suspicion to believe that marijuana would also be found in T.L.O.'s purse.¹⁰³ This suspicion justified the more intrusive search, leading to the discovery of the marijuana.¹⁰⁴ Thus, the Supreme Court found that both of the assistant principal's searches were reasonable.¹⁰⁵

95. *Id.*

96. *Id.*

97. *Id.* at 342.

98. *Id.*

99. *Id.* at 343.

100. *Id.* at 343–44.

101. *Id.* at 345.

102. The Court explained that "evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 345 (quoting FED. R. EVID. 401).

103. *T.L.O.*, 469 U.S. at 347.

104. *Id.*

105. *Id.*

E. Challenging a Search of a Student's Person: 42 U.S.C. § 1983 and Qualified Immunity

T.L.O. makes it clear that when a public school official searches a student's person, Fourth Amendment protections are at issue. As a result, parents and students, believing that a school official has violated the student's right to be free from unreasonable searches and seizures, may seek damages under 42 U.S.C. § 1983.¹⁰⁶ This statute provides a private citizen with a remedy when his or her federally protected rights have been violated by a public official.¹⁰⁷ Although the benefits of the § 1983 action—providing a means of deterring state actors from willfully ignoring the prohibitions present in the Constitution—are readily apparent,¹⁰⁸ the history of the statute reveals effects that are less than desirable.

Since the creation of the § 1983 cause of action, litigation over alleged constitutional violations became more and more frequent.¹⁰⁹ Initially, this created a concern that imposing liability on a public official may be unfair because of "the often unclear nature of constitutional law."¹¹⁰ Also, it was thought that the mere potential for liability could instill fear in public officials and cause them to abstain from engaging in conduct beneficial to the public good.¹¹¹ For these reasons, the Supreme Court developed an obstacle to a successful § 1983 action—the doctrine of qualified immunity.¹¹²

The doctrine of qualified immunity shields public officials, such as teachers and school administrators, from civil liability, therefore empowering them to perform their duties and exercise

106. 42 U.S.C. § 1983 (2006). This statute provides, in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.

107. Patsy Thimmig, *Not Your Average School Day—Reading, Writing and Strip Searching: The Eleventh Circuit's Decision in Jenkins v. Talladega City Board of Education*, 42 ST. LOUIS U. L.J. 1389, 1392 (1998).

108. Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 263 (1995).

109. See Blickenstaff, *supra* note 63, at 19; Thimmig, *supra* note 107, at 1393.

110. Chen, *supra* note 108, at 264; accord Thimmig, *supra* note 107, at 1393.

111. Chen, *supra* note 108, at 264; accord Thimmig, *supra* note 107, at 1393.

112. See Chen, *supra* note 108, at 264; accord Blickenstaff, *supra* note 63, at 19–20; Thimmig, *supra* note 107, at 1393.

their discretion without fear of liability and litigation.¹¹³ A public official is entitled to qualified immunity “if the law at [the time of the alleged violation is] not clearly established, [meaning that] an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”¹¹⁴ A right is clearly established when “[t]he contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right.”¹¹⁵ This does not mean that “the very action in question has previously been held unlawful,” but that “in the light of pre-existing law the unlawfulness must be apparent.”¹¹⁶

During much of the last three decades, American courts have debated whether the student strip search is a reasonable measure under the Constitution.¹¹⁷ Many found, from the facts of the cases before them, that such a search was unreasonable and therefore violative of the child’s Fourth Amendment rights.¹¹⁸ However, even these courts disagreed as to whether *T.L.O.* “clearly established” the law in this area, and thus whether school officials in each case were entitled to qualified immunity.¹¹⁹ In June of

113. Recent Case, *Redding v. Safford Unified School District No. 1*, 531 F.3d 1071 (9th Cir. 2008) (*en banc*), 122 HARV. L. REV. 811, 811 (2008).

114. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also* *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (stating that a public official is entitled to qualified immunity “if a reasonable [official] could have believed [his or her conduct] to be lawful, in light of clearly established law and the information [the official actually] possessed”).

115. *Anderson*, 483 U.S. at 640.

116. *Id.*

117. *See, e.g.,* *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) (strip search of an entire class for missing prom money); *Lewis ex rel. Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (strip search when student is suspected of “crotching” drugs); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991) (strip search for “small vial containing suspected narcotics”); *Fewless ex rel. Fewless v. Bd. of Educ. of Wayland Union Sch.*, 208 F. Supp. 2d 806 (W.D. Mich. 2002) (strip search when student is suspected of hiding marijuana in his buttocks).

118. *See, e.g.,* *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006) (strip search based solely on an uncorroborated tip is unreasonable); *Beard*, 402 F.3d 598 (strip search conducted without individualized suspicion is unreasonable).

119. *See, e.g.,* *Beard*, 402 F.3d 598 (finding that *T.L.O.* did not clearly establish the law, therefore school official was entitled to qualified immunity); *accord* *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003). *But see, e.g.,* *Fewless*, 208 F. Supp. 2d 806 (relying on *T.L.O.* and Sixth Circuit jurisprudence to find a strip search unreasonable and deny school officials qualified immunity); *Hines ex rel. Oliver v. McClung*, 919 F. Supp. 1206 (N.D. Ind. 1995) (relying on *T.L.O.* and Seventh Circuit jurisprudence to find a strip search unreasonable and deny school officials qualified immunity).

2009, the United States Supreme Court finally addressed these issues in *Redding*.¹²⁰

III. SAFFORD UNIFIED SCHOOL DISTRICT V. REDDING: THE SUPREME COURT SPEAKS

On October 8, 2003, Savana Redding, a 13-year-old honor student, was sitting in her math class when the assistant principal of her school entered and requested that she accompany him to his office.¹²¹ Once in the office, the assistant principal showed Savana a daily planner and its contents—most importantly, four prescription-strength ibuprofen 400 mg pills and one over-the-counter blue naproxen 200 mg pill—all banned by school rules.¹²² Though Savana admitted owning the planner, she denied any knowledge of the pills and informed the assistant principal that, days before, she lent the planner to one of her friends—Marissa Glines.¹²³

The assistant principal then told Savana that he had been notified that she was planning to distribute these pills to other students.¹²⁴ Savana denied the allegation, but nevertheless allowed the assistant principal to search her belongings.¹²⁵ With the aid of an administrative assistant, the assistant principal searched Savana's backpack, finding nothing.¹²⁶ Following this fruitless search, the assistant principal instructed the administrative assistant to take Savana to the nurse's office and search her clothes for the pills.¹²⁷ It was there that Savana Redding was strip searched.¹²⁸

The school officials first required Savana to take off her socks, shoes, and jacket for inspection,¹²⁹ followed by her T-shirt and stretch pants.¹³⁰ After examining Savana's outer clothing, no pills were found.¹³¹ Finally, the school officials required Savana to pull out her bra and shake it—exposing her breasts—and pull out her underwear at the crotch—exposing her pelvic area.¹³² After forcing

120. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

121. *Id.* at 2638.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1075 (9th Cir. 2008) (en banc), *rev'd in part*, 129 S. Ct. 2633 (2009).

132. *Redding*, 129 S. Ct. at 2638.

Savana to undergo “the most humiliating experience of her short life,”¹³³ the school officials did not find any pills.¹³⁴

Following the search, Savana’s mother filed suit against the school district, the assistant principal, the administrative assistant, and the school nurse under 42 U.S.C. § 1983.¹³⁵ The defendants moved for summary judgment, arguing that they were entitled to qualified immunity.¹³⁶ The district court granted the motion, and a panel of the Ninth Circuit Court of Appeals affirmed.¹³⁷ The Ninth Circuit sitting en banc, however, found the search to be unreasonable in light of the Supreme Court’s holding in *T.L.O.*¹³⁸ The Ninth Circuit also found that Savana’s right to be free from unreasonable strip searches was clearly established and therefore denied the defendants the defense of qualified immunity.¹³⁹ The United States Supreme Court granted certiorari.¹⁴⁰

Justice Souter, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito,¹⁴¹ framed the issue as “whether a 13-year-old student’s Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.”¹⁴² Ultimately, the Court held that the strip search of Savana Redding was unreasonable, but because the law was not clearly established at the time of the violation, the assistant principal was entitled to qualified immunity.¹⁴³ However, in doing so, the Court crafted a new standard by which courts must judge the reasonableness of student strip searches.¹⁴⁴

The Court began its analysis by reiterating much of its opinion in *T.L.O.*, giving particular attention to its requirement that courts apply “a standard of reasonable suspicion to determine the legality of a school administrator’s search of a student.”¹⁴⁵ In determining

133. *Redding*, 531 F.3d at 1075 (internal quotation marks omitted).

134. *Redding*, 129 S. Ct. at 2638.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

139. *Id.* The Ninth Circuit did, however, affirm the lower court’s decision regarding the school nurse and administrative assistant, as they were not acting as independent decisionmakers. *Id.*

140. *Id.* at 2639.

141. *Id.* at 2637.

142. *Id.*

143. *Id.* at 2637–38.

144. *Id.* at 2637.

145. *Id.* at 2639. Prior to this statement, the Court noted the “fluid concepts” it found useful in the past when judging the sufficiency of information—“the

whether information is sufficient to satisfy this standard, the Court stated that the required knowledge component for a school search can "readily be described as a *moderate chance* of finding evidence of wrongdoing."¹⁴⁶

Moving on, the Court expounded upon the deference that courts should grant to a school's determination of what constitutes a valid and legitimate school rule.¹⁴⁷ "[S]tandards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed. Except in patently arbitrary instances, Fourth Amendment analysis takes the rule as a given"¹⁴⁸ With respect to the wisdom of rules restricting the presence of drugs on campus, the Court stated, "Teachers are not pharmacologists trained to identify pills and powders, and an effective drug ban has to be enforceable fast."¹⁴⁹ Therefore, an argument that the rule underlying a strip search did not warrant that type of intrusion would be without merit.¹⁵⁰ The Court then addressed the reasonableness of the assistant principal's search of Savana's outer clothing and backpack, beginning its analysis with an examination of the information upon which the assistant principal's suspicion was based.¹⁵¹

One week before school officials searched Savana, a student at the school, Jordan Romero, reported to the assistant principal that "certain students were bringing drugs and weapons on campus, and that he had been sick after taking some pills that he got from a classmate."¹⁵² On the morning of the search, Jordan handed a white pill to the assistant principal, revealed to him that he received it from Marissa Glines, and instructed him that students were planning to take these pills during the lunch break.¹⁵³ The assistant

degree to which known facts imply prohibited conduct . . . the specificity of the information received . . . and the reliability of its source." *Id.*

146. *Id.* (emphasis added). Generally, searches under the Fourth Amendment require probable cause, which "exists where 'the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'" *Id.* (alterations in original) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

147. *Id.* at 2639-40.

148. *Id.* at 2640 n.1.

149. *Id.*

150. *Id.*

151. *Id.* at 2640.

152. *Id.* (internal quotation marks omitted).

153. *Id.*

principal then brought the pill to the school nurse and learned that it was an ibuprofen 400 mg—a pill available only by prescription.¹⁵⁴ This information led the assistant principal to search the pockets and wallet of Marissa Glines, revealing a single blue pill and several white ones.¹⁵⁵ When the assistant principal questioned Marissa as to where she received these pills, she replied, “Savana Redding.”¹⁵⁶ The assistant principal then questioned Marissa about the planner that was in her possession; she denied any knowledge of its contents.¹⁵⁷ After calling the poison control hotline to identify the blue pill—naproxen 200 mg, a commonly used anti-inflammatory drug available over the counter—the assistant principal subjected Marissa to a search similar to the one Savana was soon to undergo.¹⁵⁸ No additional pills were found.¹⁵⁹

It was after this search of Marissa that the assistant principal called Savana into his office.¹⁶⁰ His conversation with her revealed that she and Marissa were friends and that she had lent the planner to Marissa.¹⁶¹ The assistant principal also received reports from staff members confirming Savana’s characterization of the girls’ relationship.¹⁶² The Court stated that this information was sufficient for the assistant principal to infer that both girls were connected to the pills found.¹⁶³ Furthermore, the Court found Marissa’s statement implicating Savana was “sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.”¹⁶⁴

Thus, the Court found that the assistant principal had sufficiently reliable information to constitute a reasonable suspicion that Savana Redding was distributing the pills and that

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* School officials also subjected Marissa to a search of her bra and underwear. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 2641.

162. *Id.* These reports identified Savana and Marissa “as part of an unusually rowdy group” at a school dance earlier in the year—a dance in which “alcohol and cigarettes were found in the girls’ bathroom.” *Id.* In addition, the assistant principal knew that the student who had initially reported the pill-taking plot had been to a pre-dance party at Savana’s house and that, at that party, alcohol was served. *Id.*

163. *Id.*

164. *Id.*

she was carrying them either on her person or in her backpack.¹⁶⁵ Therefore, the search of Savana's outer clothing and backpack was justified at its inception and was not excessively intrusive,¹⁶⁶ meeting the two requirements of a reasonable student search under *T.L.O.*¹⁶⁷ The further search, however, exceeded reason.

The Court began its analysis of this further search by distinguishing it from that of Savana's outer clothing and backpack. The Court stated that "a fair way to speak" of the incident was as a "strip search."¹⁶⁸ Responding to the school officials' claims that they did not actually see any of Savana's intimate parts during the search, the Court noted that the reasonableness, or lack thereof, of a strip search does not depend on "who was looking and how much was seen."¹⁶⁹ Furthermore, the Court commented:

The very fact of Savana's pulling her underwear away from her body in the presence of the two officials . . . necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring *distinct elements of justification* on the part of school authorities for going beyond a search of outer clothing and belongings.¹⁷⁰

Crafting these "distinct elements of justification" was the Court's next task.

The Court began this process by examining the harmful effects that such intrusive searches have on children. The Court noted that Savana's account of the search as "embarrassing, frightening, and humiliating" was consistent with the "experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."¹⁷¹ Requiring a student to expose his or her body in response to an accusation, the Court found, is "reserved for suspected wrongdoers and [is] fairly understood as . . . degrading."¹⁷² The Court noted, however, that "[t]he indignity of the search does not . . . outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*"¹⁷³ In other

165. *Id.*

166. *Id.*

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

168. *Redding*, 129 S. Ct. at 2641.

169. *Id.*

170. *Id.* (emphasis added).

171. *Id.*

172. *Id.* at 2642.

173. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

words, the search must be permissible in scope, meaning “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁷⁴

Elaborating on the scope of this particular search, the Court found that “the content of the [assistant principal’s] suspicion failed to match the degree of intrusion.”¹⁷⁵ This was so because the assistant principal identified the pills prior to the search and was aware of “the nature and limited threat of the specific drugs.”¹⁷⁶ Furthermore, the Court noted that the assistant principal “had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.”¹⁷⁷ Thus, given the nature of the contraband at issue, the strip search was not justified.

Contributing to the failure of the assistant principal’s suspicion was the fact that he “could [not] have suspected that Savana was hiding common painkillers in her underwear.”¹⁷⁸ Though the assistant principal claimed that students in general have been known to conceal contraband in their underwear, the Court stated that the strip search of a student is so extreme an intrusion that it “requires some justification in suspected facts.”¹⁷⁹ Examining the record, the Court did not find any of these “suspected facts” that would justify the strip search. First, the non-dangerous nature of these pills did not raise a suspicion that Savana would stash them in an intimate place.¹⁸⁰ Second, there was no general practice among the school’s students of hiding this sort of contraband in their underwear.¹⁸¹ Third, neither Marissa nor Jordan—the students providing the information upon which the assistant principal’s suspicion was based—suggested that Savana was hiding the pills in her underwear.¹⁸² Fourth, the preceding search of Marissa yielded no contraband.¹⁸³ Finally, the assistant principal failed to inquire as to when Marissa received the pills from Savana.¹⁸⁴ If he had done so and discovered that Savana gave the pills to Marissa

174. *Id.* (quoting *T.L.O.*, 469 U.S. at 341).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

days before, this factor would have weighed against the strip search.¹⁸⁵

After conducting its analysis, the Court announced the new standard governing student strip searches: “[T]he *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.”¹⁸⁶ In other words, before a school official may strip search a student, the official must possess either a reasonable suspicion that the object sought presents a danger to a member of the student community or a reasonable suspicion that a student is concealing evidence of wrongdoing in his or her undergarments.¹⁸⁷

Finding that the assistant principal did not possess either of the two abovementioned justifications, the Supreme Court held that “[t]he strip search of Savana Redding was unreasonable and a violation of the Fourth Amendment.”¹⁸⁸ However, the Court found that *T.L.O.* did not clearly establish the law regarding the strip search of a student and therefore held that the assistant principal, administrative assistant, and school nurse were all entitled to qualified immunity.¹⁸⁹

IV. THE TWIN PITFALLS OF SILENCE AND AMBIGUITY

Because the United States Supreme Court has ruled on the constitutionality of the student strip search, some members of the legal community believe that the law is now “clearly established.”¹⁹⁰ This means that, in the future, a school official who conducts a search falling outside of the constraints imposed by *Redding* may not be entitled to qualified immunity. Louisiana school officials are now in a precarious position: Louisiana law obligates school officials to supervise their children and, should danger appear imminent, to intercede to prevent injury—perhaps even conducting a strip search should the circumstances require.¹⁹¹

185. *Id.*

186. *Id.* at 2643.

187. *Id.* at 2642.

188. *Id.* at 2644.

189. *Id.* at 2643–44.

190. See, e.g., Brown, *supra* note 58; Nolan, *supra* note 52.

191. See LA. CIV. CODE art. 2320 (2010) (imposing upon school officials the duties to supervise students and to prevent injury if the risk of injury is foreseeable); Wallmuth v. Rapides Parish Sch. Bd., 813 So. 2d 341 (La. 2002); see also LA. REV. STAT. ANN. § 17:416.3 (2001) (authorizing school officials to search a student’s person).

These same officials may now, however, be wary of conducting any search that falls within the scope of *Redding* for fear of liability under 42 U.S.C. § 1983. With potential liability looming on either side of the issue, school officials are in serious need of direction.

Currently, Louisiana law is silent on the issue of student strip searches. The statute governing the search of a student's person provides only general guidelines;¹⁹² it fails to address under what circumstances a strip search is warranted and, if warranted, how it should be executed. As the Supreme Court noted in *Redding*, the strip search of a student is "categorically distinct,"¹⁹³ and therefore it requires its own rule. However, merely adopting the Court's "distinct elements of justification"¹⁹⁴ is not enough. The guidelines established in *Redding* are ambiguous and, at times, inadequate. They fail to address important issues confronted by other courts dealing with this issue¹⁹⁵ and require school officials to conduct an almost impossible risk analysis.¹⁹⁶ As a result, school officials are left exposed to potential liability.¹⁹⁷

For these reasons, the Louisiana Legislature should amend the current student-search statute¹⁹⁸ to establish additional safeguards for both students and school officials. Before crafting this amendment, however, it is necessary to explore the conceptual framework underlying the strip search of a student. This requires (1) an examination of the inferences that may or may not be drawn from the Supreme Court's opinions in *T.L.O.* and *Redding*, and (2) an analysis of the Court's "distinct elements of justification" and a school official's ability to apply them in practice.

192. LA. REV. STAT. ANN. § 17:416.3(A)(2)(a). The statute provides only that the search of a student's person "shall be conducted in a manner that is reasonably related to the purpose of the search and not excessively intrusive in light of the age or sex of the student and the nature of the suspected offense." *Id.*

193. *Redding*, 129 S. Ct. at 2641.

194. *Id.*

195. See discussion *infra* Parts IV.A.2.b–c, V.B.1.

196. See discussion *infra* Part IV.B.1.

197. Louisiana Revised Statutes section 17:416.3(B) provides that the school board employing a school official will be responsible for funding the official's defense and for indemnification should he or she be liable for damages. However, the stigma attached to strip searches and the potential for relocation or job loss still hang over the heads of school officials. LA. REV. STAT. ANN. § 17:416.3(B); see, e.g., Rosalio Ahumada, *School Leader "On Hold" for Now*, MERCED SUN-STAR, Jan. 4, 2005, at A1. Also, the burdens of costly litigation are especially troublesome in light of the budgetary shortfalls many school boards now face. See, e.g., Mike Hasten, *Board Sees Need for More State Funding for Schools*, SHREVEPORT TIMES, Oct. 15, 2009, available at 2009 WLNR 20387699.

198. LA. REV. STAT. ANN. § 17:416.3(A)(2)(a).

A. Reconciling Redding and T.L.O.

In *Redding*, the Supreme Court held that a school search conducted below the outer clothing of a 13-year-old female is unconstitutional when supported only by a reasonable suspicion that she possessed contraband of limited threat somewhere on her person.¹⁹⁹ Absent *either* of two elements—a reasonable suspicion of danger *or* a reasonable suspicion that the student is concealing evidence of wrongdoing in her undergarments—such a search is never permissible.²⁰⁰ Thus, in *Redding*, the Court did not create a test entirely separate from that established in *T.L.O.* Instead, it only required that school officials possess additional justification before conducting strip searches of students. The following paragraphs attempt to determine when it is that a search falls within the scope of *Redding* and then describe the circumstances under which such a search will be (1) justified at its inception and (2) permissible in scope. This analysis reveals, however, that under the ambiguous standards enunciated by the Supreme Court, it is nearly impossible to provide any definitive statement regarding the reasonableness of a student strip search.

1. Justified at Inception: What is the Difference Between a Backpack and Bare Skin?

After *Redding*, a court's first task in determining the reasonableness of a student strip search is to ask whether it was justified at its inception.²⁰¹ A search will pass muster under this test when a school official possesses a reasonable suspicion that it will reveal evidence that makes the determination of a violation of a law or school rule more or less probable.²⁰² Although this appears to be a rather simple rule, it requires clarification.

Prior to the Supreme Court's decision in *Redding*, a number of lower courts held that "the level of suspicion required for a search to be justified at its inception varies with the intrusiveness of the

199. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

200. *Id.* at 2641.

201. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

202. In *T.L.O.*, the Supreme Court held that a search will be justified at its inception when a school official possesses a reasonable suspicion "that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341–42. Louisiana law recognizes that evidence, to be relevant, must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." LA. CODE EVID. art. 401 (2006).

search.”²⁰³ In other words, these courts adopted a sliding-scale approach when determining the reasonableness of a strip search, looking at the information upon which the school official’s suspicion was based and asking whether sufficient corroboration from reliable sources existed to justify the search.²⁰⁴ If the search to be conducted was merely of a student’s backpack, it would require a lower level of suspicion—less corroborative evidence or less reliable sources or both—in order to be justified at its inception.²⁰⁵ A strip search, however, would require a higher level of suspicion before a court would deem it lawful. This approach is contrary to the Supreme Court’s logic in *T.L.O.* and its statements in *Redding*.

In *T.L.O.*, the Court defined a search not by its intrusiveness, but by the object sought.²⁰⁶ The Court found that the school official conducted the first search when he looked through T.L.O.’s purse for the cigarettes.²⁰⁷ The fruits of that search—the cigarette wrapping papers—then justified the inception of the second search for marijuana.²⁰⁸ Searches are distinguished, therefore, not by differences in their relative intrusiveness, but by whether the objects sought are from unrelated infractions.²⁰⁹ Furthermore, in *Redding*, the Supreme Court stated that a reasonable suspicion to search a student’s person, regardless of whether it is a strip search or of outer clothing, exists when there is a “moderate chance” of a successful search.²¹⁰ Had the Court wished to impose a sliding-scale requirement, it could have taken this opportunity to do so.

If a school official has a reasonable suspicion that a student possesses evidence of a rule violation on his or her person, the school official’s search is justified at its inception regardless of whether the search is of the student’s backpack, outer clothing, or undergarments. In other words, courts should treat a strip search no

203. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1095 (9th Cir. 2008) (Hawkins, J., dissenting), *rev’d in part*, 129 S. Ct. 2633 (2009) (criticizing the majority’s reliance on *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006), and *Lewis ex rel. Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993)).

204. *See, e.g., Phaneuf*, 448 F.3d at 596–97.

205. *See, e.g., Cornfield*, 991 F.2d at 1321 (“What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.”).

206. *T.L.O.*, 469 U.S. at 343–44.

207. *Id.*

208. *Id.* at 347.

209. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1096 (9th Cir. 2008) (Hawkins, J., dissenting), *rev’d in part*, 129 S. Ct. 2633 (2009).

210. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

differently than any other search of a student's person or belongings for the purposes of the justified-at-inception prong of the *T.L.O.* test; any such disparate treatment is more appropriate under the next prong of the test—whether the search was permissible in scope.

2. Permissible in Scope

A court's second task in determining the reasonableness of a student strip search requires asking whether the search was "reasonably related in scope to the circumstances [justifying the search]"²¹¹ or, stated otherwise, whether the search was permissible in scope. A strip search will satisfy this requirement "when 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."²¹² This prong of the *T.L.O.* test requires further deconstruction.

a. Measures Reasonably Related to the Objectives of the Search

The first requirement of the permissibility-in-scope prong is that "the measures adopted [must be] reasonably related to the objectives of the search."²¹³ This requirement is meant merely to make a court consider "the search's probability of success, examining the nature of the evidence sought and any facts that make it more or less likely such evidence will be found in a specific location."²¹⁴ For example, it would be unreasonable for a school official to search a student's underwear for a crowbar.²¹⁵ Although this is a relatively "straightforward inquiry,"²¹⁶ the remaining factors under this prong do not make for such simple analysis.

b. Not Excessively Intrusive in Light of the Age of the Student

The second requirement of this prong of the *T.L.O.* test demands that the search not be "excessively intrusive in light of the age . . . of the student."²¹⁷ Unfortunately, the Supreme Court

211. *T.L.O.*, 469 U.S. at 340 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

212. *Id.* at 342.

213. *Id.*

214. *Redding*, 531 F.3d at 1103 (Hawkins, J., dissenting).

215. *Id.* at 1104.

216. *Id.* at 1103.

217. *T.L.O.*, 469 U.S. at 342; see also *Redding*, 531 F.3d at 1104 (Hawkins, J., dissenting).

failed to elaborate on what distinctions may be drawn based on the age of a student,²¹⁸ and the lower courts that have addressed this issue passed over it with little, if any, analysis.²¹⁹ However, as one commentator noted, "It should be obvious that, in determining under what circumstances a strip search is permissible, whether the child is two or seven or seventeen is relevant."²²⁰

When determining whether a strip search is excessively intrusive, Louisiana law should recognize the distinctions that exist among students with respect to age. Generally, adolescents are presumed to be as capable as adults of both engaging in criminal behavior²²¹ and understanding "the issues involved in a strip search, including deciding whether to consent."²²² Elementary school students, however, are presumed to be "far less likely to engage independently in criminal activity, including concealing contraband in private areas."²²³ Because of the latter presumption, a younger student's ability to understand the impact of a strip search and to give meaningful consent is questionable.²²⁴ Thus, it appears that the strip search of an adolescent may be more reasonable than a similar search of a younger child. But given the sparse treatment of the age factor, its meaning remains ambiguous and its future impact unknown.

218. See Shatz, Donovan & Hong, *supra* note 32, at 14; Lewis *ex rel.* Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993).

219. Of the courts that considered the age of the student in their analysis, many fail to explain the reasoning behind their decisions. See, e.g., Pendleton v. Fassett, No. 08-227-C, 2009 WL 2849542, at *8 (W.D. Ky. Sept. 1, 2009); Konop *ex rel.* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1204 (D.S.D. 1998); Hines *ex rel.* Oliver v. McClung, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995); Cales v. Howell Pub. Sch., 635 F. Supp. 454, 458 (E.D. Mich. 1985); see also Thimmig, *supra* note 107, at 1411. But see *Cornfield*, 991 F.2d at 1321, for a lengthy discussion of the relevance of a student's age.

220. Shatz, Donovan & Hong, *supra* note 32, at 14. At least one court has agreed with this statement. See *Cornfield*, 991 F.2d at 1319. In *Cornfield*, a sixteen-year-old male high school student was strip searched after school officials spotted what they believed to be "an unusual bulge in [his] crotch area." *Id.*

221. See *Cornfield*, 991 F.2d at 1321; Shatz, Donovan & Hong, *supra* note 32, at 16.

222. *Cornfield*, 991 F.2d at 1321; see Shatz, Donovan & Hong, *supra* note 32, at 17.

223. *Cornfield*, 991 F.2d at 1321; see Shatz, Donovan & Hong, *supra* note 32, at 16-17.

224. See *Cornfield*, 991 F.2d at 1321; Shatz, Donovan & Hong, *supra* note 32, at 17.

c. Not Excessively Intrusive in Light of the Sex of the Student

The third requirement of the permissibility-in-scope prong is that the search must not be “excessively intrusive in light of the . . . sex of the student.”²²⁵ Generally, courts interpret this to mean that the school official who actually conducts the strip search must be of the same sex as the student.²²⁶ Beyond this, however, there is little or no consensus. At least one legal scholar has suggested that courts should interpret this requirement to take into account attributes other than the student’s sex.²²⁷ For example, if a school official was aware of a student’s mental disability or history of physical or sexual abuse, this knowledge may caution against a strip search.²²⁸

Given the language used by the Supreme Court in *T.L.O.*, the former interpretation seems more reasonable. However, the latter provides more leeway for courts seeking to distinguish one strip search from another. Therefore, this factor also remains a source of potential liability for school officials.

d. Not Excessively Intrusive in Light of the Nature of the Infraction

The fourth and final requirement of the permissibility-in-scope prong is that the search must not be “excessively intrusive in light of the . . . nature of the infraction.”²²⁹ Although this requirement appears to contradict the Supreme Court’s refusal to second-guess the wisdom of school rules,²³⁰ an explanation is available. When determining whether the search is justified at its inception, the nature of the infraction is irrelevant.²³¹ As Judge Hawkins of the Ninth Circuit stated, “[N]o school rule is too trivial to allow for

225. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985); *see also* *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1104 (9th Cir. 2008) (Hawkins, J., dissenting), *rev’d in part*, 129 S. Ct. 2633 (2009).

226. *See, e.g., Cornfield*, 991 F.2d at 1320.

227. *Redding*, 531 F.3d at 1104 (Hawkins, J., dissenting).

228. *Id.* Another interesting issue is whether a distinction may be drawn between a typical student and a student athlete. As the Court noted in *Vernonia School District 47J v. Acton*, student athletes voluntarily subject themselves to an environment of communal undress and thus enjoy a lesser expectation of privacy. 515 U.S. 646, 657 (1995); *see supra* text accompanying note 210. Therefore, this may weigh in favor of the reasonableness of a strip search under this interpretation of the sex requirement.

229. *T.L.O.*, 469 U.S. at 342.

230. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2640 n.1 (2009); *T.L.O.*, 469 U.S. at 342 n.9.

231. *Redding*, 531 F.3d at 1104 (Hawkins, J., dissenting).

some form of search. Even the most harmless violations of school policy—chewing gum, wearing hats, passing notes—threaten the educational environment of the student engaging in prohibited activity.”²³² Judge Hawkins then correctly inferred that the nature of the infraction was “properly considered in determining whether [a] search was permissible in scope.”²³³ However, when a *strip* search is at issue, at least one of the standards enunciated in *Redding* appears to depart from this logic.

In *Redding*, the Supreme Court held that when a strip search of a student is at issue, one of two additional elements must be present before the search will be deemed lawful. The first is a reasonable suspicion that the object of the search presents a danger to students.²³⁴ This appears to comport with the inference drawn by Judge Hawkins. If the object sought does present such a danger, then the nature of the infraction is necessarily severe, and the more intrusive strip search is reasonable. The second of these two elements, however, appears to disregard the nature-of-the-infraction requirement.

The alternative element that will justify a student strip search is a reasonable suspicion that the student is hiding evidence of an infraction in his or her underwear.²³⁵ When declaring that a strip search would be reasonable under such circumstances, the Supreme Court did not make any mention of the nature of the infraction at issue. Thus, it appears that the nature-of-the-infraction element in the *T.L.O.* test—at least with respect to this distinct element of justification—is no longer relevant to the determination of whether a student strip search is “excessively intrusive.” For example, under *Redding*, if a school was to ban the possession of baseball cards on campus and a school official received information sufficient to constitute a reasonable suspicion that a student was hiding one of these cards in his or her underwear, the official could then strip search the student without consequence.

In *Redding*, the Supreme Court was correct in holding that the strip search of a student was categorically distinct from other similar searches.²³⁶ In doing so, it modified the *T.L.O.* test to respond to specific concerns with the excessively intrusive nature of a strip search. The Court’s “distinct elements of justification” are the embodiment of this modification.

232. *Id.* at 1105.

233. *Id.* at 1104.

234. *Redding*, 129 S. Ct. at 2643.

235. *Id.*

236. *Id.* at 2641.

B. Distinct Elements of Justification

In *Redding*, the Supreme Court held that the assistant principal did not have a reasonable suspicion to believe either that the pills sought presented a danger to the school community or that Savana was hiding these pills underneath her outer clothing. After a careful analysis of the Court's opinion, however, it is evident that these standards are not adequate in all situations and can leave a school official one mistake away from potential liability.

1. A Reasonable Suspicion of Danger

In its analysis, the *Redding* Court first explained why the assistant principal lacked a reasonable suspicion of danger.²³⁷ In doing so, it looked to three factors: (1) the nature of the threat presented by the pills sought, (2) the amount of the pills suspected to be in circulation, and (3) the amount of the pills suspected to be found on a particular student.²³⁸ In *Redding*, the assistant principal knew that he was searching for anti-inflammatory medication, which the Supreme Court deemed to be of limited threat.²³⁹ The Court then stated that absent a suspicion that large amounts of these pills were in circulation, or that Savana was in possession of a large amount of these pills, the assistant principal's actions were unreasonable.²⁴⁰

The inferences to be drawn from this analysis are many and varied. First, if the assistant principal was not aware of the nature of these pills, would his actions have been more or less reasonable? Earlier in its opinion, the Supreme Court stated, "Teachers are not pharmacologists trained to identify pills and powders, and an effective drug ban has to be enforceable fast."²⁴¹ This statement appears to support an argument that the strip search of Savana Redding would have been more reasonable had the pills never been identified. However, this would create a perverse incentive for

237. *Id.* at 2642–43.

238. *Id.* at 2642. Though the remainder of this analysis addresses a search for illicit pills, a student may be suspected of possessing numerous other dangerous objects, including firearms and knives. See, e.g., Mark F. Bonner, *Students Face Expulsion; Search Finds Knives, Mace*, ADVOCATE (Baton Rouge, La.), Nov. 18, 2005, at 1B; *School Officials Report Southeast, Baker Students Had Guns*, ADVOCATE (Baton Rouge, La.), Feb. 20, 2004, at 16A; Kimberly Vetter, *EBR Student, 13, Pleads Guilty to Bringing Gun onto Campus*, ADVOCATE (Baton Rouge, La.), Oct. 29, 2009, at 3B.

239. *Redding*, 129 S. Ct. at 2642.

240. *Id.*

241. *Id.* at 2640 n.1.

those school officials who wished to conduct a strip search regardless of the potential harm presented by the drug. The school official could merely fail to investigate the nature and threat of the drug, and therefore avoid the scrutinizing eye of the Court. To combat this perverse incentive, a court may find that a school official owes a duty to exercise good faith in identifying the drug. But, again, if he or she is unable to identify the drug after a good faith attempt, does that make the subsequent strip search more or less reasonable? Clearly, the Court's analysis of this factor is ambiguous and subject to much disagreement.

The second and third factors fare no better. If the object of a search is of limited threat, the Court implies that a reasonable suspicion of danger will only exist if a school official suspects either that a large quantity of the object is in circulation or that a particular student has a large quantity on his or her person. This suggests that when determining the reasonableness of a strip search, there is an inverse relationship between the degree of danger presented by the object and the quantity of the object. For example, if a school official suspects that a student is in possession of a very dangerous drug, the quantity of the drug in circulation or in the student's possession will be of little importance. However, as in *Redding*, if the drug is deemed non-dangerous, only a suspicion that a large quantity is either in circulation or on the student will justify the strip search. This factor, too, is sure to be subject to disparate treatment.

The above analysis is useless, however, unless one can answer the very important question: At what point is an object *dangerous enough* to justify a strip search?²⁴² From the Court's opinion in

242. In attempting to determine the reasonableness of a student strip search, should school officials and courts consider a substance's legal classification and the penalty accompanying its possession? Or should they consider other information? For example, look at Louisiana's treatment of two controlled dangerous substances—marijuana and OxyContin. Marijuana is classified as a Schedule I substance because it poses a "high potential for abuse," but has "no currently accepted medical use." LA. REV. STAT. ANN. § 40:963(A)(1)–(2) (2001). The penalty for possession may be as severe as twenty years in prison and a \$5,000 fine. *Id.* § 40:966(E)(3) (Supp. 2010). OxyContin, however, is classified as a Schedule II substance because it does have a "currently accepted medical use" but is accompanied by a "high potential for abuse" which "may lead to severe psychological or physical dependence." *Id.* § 40:963(B)(1)–(3) (2001). The maximum penalty for possession is relatively less severe—five years' imprisonment and a \$5,000 fine. *Id.* § 40:967(C)(2) (Supp. 2010). Assuming school officials are even aware of these provisions (which is unlikely), a reasonable official may conclude that marijuana poses a greater danger than OxyContin, therefore making the strip search of a student for a small quantity of OxyContin less reasonable than a strip search for a similar amount of marijuana. In reality, however, marijuana may pose little or no threat

Redding, all that is clear is that a small quantity of prescription and over-the-counter anti-inflammatory pills is not sufficiently dangerous to warrant a strip search.²⁴³ Students, however, have been known to abuse an assortment of substances.²⁴⁴ As Justice Thomas stated in dissent, the majority opinion places school officials in an “impossible spot” by requiring them to identify the dangerous nature of the item sought and its potential harm to the student body.²⁴⁵

2. A Reasonable Suspicion of Resort to Underwear

After the Court found that the strip search of Savana Redding was not supported by a reasonable suspicion of danger, it then turned to the question of whether the assistant principal had a reasonable suspicion that Savana was hiding the pills in her undergarments.²⁴⁶ Finding that the strip search was not supported by the requisite suspicion,²⁴⁷ the Court weighed a number of factors that are relevant to this inquiry.

The first of these factors requires an almost identical inquiry to that conducted under the previous test: Is the nature of the object sought dangerous, such that the student could be suspected of hiding it in his or her underwear?²⁴⁸ Under this factor, it appears that an object deemed insufficiently dangerous to justify a strip search under the previous test may still be dangerous enough to weigh in favor of the search’s reasonableness, but only if it raises the requisite suspicion—resort to underwear for hiding the object. After *Redding*, all that is clear is that a small quantity of

to students. See, e.g., *Myths and Facts About Marijuana*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/marijuana/factsmyths/> (last visited Feb. 8, 2010). In contrast, the effects of OxyContin are very severe. Abuse of this drug can cause the user to develop a physical dependence, and this may lead to abuse of other drugs, especially heroin. Chris Arnold, *Teen Abuse of Painkiller OxyContin on the Rise*, NAT’L PUB. RADIO (Dec. 19, 2005), <http://www.npr.org/templates/story/story.php?storyId=5061674>. Also, a student who is addicted to OxyContin may resort to theft to support this expensive habit. *Id.* Because abuse of prescription drugs, especially OxyContin, is increasing among teens, *id.*, school officials may well believe that even a very small quantity of this drug poses a danger to a student.

243. *Redding*, 129 S. Ct. at 2642.

244. See *supra* note 242.

245. *Redding*, 129 S. Ct. at 2651 (Thomas, J., dissenting).

246. *Id.* at 2642 (majority opinion).

247. *Id.*

248. *Id.*

prescription and over-the-counter anti-inflammatory pills does not raise such a suspicion.²⁴⁹

The second factor is whether there is a general practice among students at a particular school to hide certain contraband in their underwear.²⁵⁰ The third factor is whether a third party has suggested that the student to be searched is hiding contraband in his or her underwear.²⁵¹ The probative value of these factors is obvious. Consider the hypothetical school rule banning the possession of baseball cards on campus. If in the previous week, a school official caught three students concealing baseball cards in their underwear, and then a sufficiently reliable student informed the school official that a fourth student was concealing a baseball card in his or her underwear, these two facts would weigh heavily in favor of a strip search.²⁵²

The fourth factor weighed in *Redding*, however, is potentially troublesome. The Court suggested that if the preceding searches of Savana's backpack and outer clothing had yielded the sought-after pills, this would have weighed in favor of conducting the strip search.²⁵³ Thus, if a school official has a reasonable suspicion that a student possesses a large quantity of pills, and he finds one of the pills in the student's pocket, a subsequent strip search may be reasonable. But if the school official suspects possession of only one pill, a fruitful search of the student's pocket should obviate the need for a more intrusive search. In weighing this factor, courts and school officials must remember that the legality of a search depends upon "the reasonableness, under all of the circumstances, of the search."²⁵⁴ Therefore, they should still consider all of the abovementioned factors when determining the propriety of a strip search.

In summary, requiring a school official to weigh all of these competing factors and to determine what is or is not reasonable is a daunting task. The overzealous school official may throw caution to the wind and pursue a frivolous strip search, thereby subjecting a child to a very traumatic experience. The more timid school

249. *Id.*

250. *Id.*

251. *Id.*

252. Because the nature of the infraction is no longer relevant to the justification of a strip search, *see* discussion *supra* Part IV.A.2.d., this information may be sufficient to constitute a reasonable suspicion that the student is concealing baseball cards in his or her underwear. Therefore, the strip search would be reasonable under *Redding*'s second distinct element of justification.

253. *Redding*, 129 S. Ct. at 2642.

254. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

official, however, may ignore his or her better instincts for fear of impending litigation. Although with the best of intentions,²⁵⁵ the Supreme Court developed a reasonable suspicion standard that is ambiguous and too complicated to provide clear guidelines for an official faced with the prospect of strip searching a student. There is only one solution to problems such as these—a warrant requirement.

V. ENDING THE SEARCH FOR SALVATION: A WARRANT REQUIREMENT

Imposing a warrant requirement should be Louisiana's first step in creating a comprehensive solution to the problems posed by the strip search of a student. In *T.L.O.*, the Supreme Court found that requiring a school official to obtain a warrant before searching a student "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."²⁵⁶ But as one commentator noted, "However one may feel about the search of a student's purse, the strip search of a student cannot be a 'swift' and 'informal' procedure."²⁵⁷ And as the Supreme Court recognized, strip searches are in a category all their own.²⁵⁸ In light of the extremely complicated reasonable suspicion scheme developed in *Redding*, a warrant requirement is a reasonable and reliable solution: It will protect the privacy interests of students while affording school officials a means to verify the reasonableness of their actions.

A. How Will It Work?

The United States Constitution provides that "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."²⁵⁹ The Louisiana Constitution of 1974 contains an almost identical provision.²⁶⁰ Both federal and

255. Paul R. Baier, "Classic Traits": Souter/Sotomayor, N.H. BAR ASS'N (Aug. 14, 2009), <http://www.nhbar.org/publications/archives/display-news-issue.asp?id=5200> (commenting upon Justice Souter's "compassion and empathy for 13-year-old Savana Redding").

256. *T.L.O.*, 469 U.S. at 340.

257. Shatz, Donovan & Hong, *supra* note 32, at 32.

258. *Redding*, 129 S. Ct. at 2641.

259. U.S. CONST. amend. IV (emphasis added); see also *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

260. LA. CONST. art. I, § 5 ("No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be

state courts recognize, however, that as applied to a search of a *student's* person, the Fourth Amendment requires only a reasonable suspicion.²⁶¹ And for good reason: As the Supreme Court noted in *T.L.O.*, this standard provides to school officials the flexibility needed to maintain security and order,²⁶² and it “spare[s] [school officials]” of “the necessity of schooling themselves in the niceties of probable cause.”²⁶³ Therefore, the requisite degree of suspicion necessary for the issuance of a warrant to strip search a student should be a reasonable suspicion—no more and no less.

Members of the United States Supreme Court, both past and present, have disagreed as to whether the United States Constitution allows a search warrant to issue upon a degree of suspicion less than probable cause.²⁶⁴ This disagreement, however, is irrelevant for the purposes of the warrant requirement proposed by this Comment. As Justice White noted in *T.L.O.*, “[any state] may insist on a *more demanding* standard under its own [c]onstitution or statutes [than that offered by the Fourth Amendment].”²⁶⁵ Furthermore, it has long been recognized that the Louisiana Constitution of 1974 “[embodies] and often [amplifies] the protection of certain individual rights afforded by the pre-existing United States Supreme Court interpretations of the Fourteenth Amendment and Bill of Rights.”²⁶⁶

As one commentator noted, it seems highly illogical “to preclude the imposition of a warrant requirement on searches and seizures that are constitutionally reasonable but not supported by . . . probable cause [as traditionally defined by the courts].”²⁶⁷ Clearly on board with this line of reasoning, Louisiana already allows for the issuance of a warrant upon a reasonable suspicion under at least one set of circumstances.²⁶⁸ Therefore, because the

searched, the persons or things to be seized, and the lawful purpose or reason for the search.”).

261. See, e.g., *Redding*, 129 S. Ct. 2633 (2009); *Lindsey ex rel. Lindsey v. Caddo Parish Sch. Bd.*, 954 So. 2d 272 (La. Ct. App. 2007); *State v. Barrett*, 683 So. 2d 331 (La. Ct. App. 1996).

262. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

263. *Id.* at 343.

264. See *Griffin*, 483 U.S. 868.

265. Gartner, *supra* note 53, at 959 (alterations in original) (emphasis added) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 343 n.10 (1985)).

266. *State v. Perry*, 610 So. 2d 746, 755 (La. 1992).

267. Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385, 1402 (1994).

268. See LA. REV. STAT. ANN. § 40:1563(H)(1) (2008) (granting to the fire marshal the authority to swear and execute warrants issued by a judge when there exists a reasonable suspicion that there has been a violation of “any . . .

United States Supreme Court has held that a mere reasonable suspicion is sufficient to strip search a student,²⁶⁹ the Louisiana Constitution may amplify the protections afforded by its federal counterpart and mandate the issuance of a warrant on the basis of a reasonable suspicion. This would be a wise decision in light of the fact that requiring a warrant to issue before a student may be strip searched will reap benefits not only for the student, but also for the school official.

B. When Will It Work?

Redding establishes that the strip search of a student will only be proper when either of the Supreme Court's distinct elements of justification is present. But as discussed above, these elements are ambiguous. Therefore, Louisiana law should further aid school officials in determining when a student strip search is proper. This requires the law to (1) specify whether such a search requires an individualized suspicion and (2) define the term "strip search."

1. The Need For Individualized Suspicion

Louisiana law should permit a student strip search only when a school official possesses a reasonable and *individualized* suspicion, i.e., a belief that the particular student to be searched committed a particular wrong.²⁷⁰ Of the courts that have addressed this issue, almost all have held that a strip search of a group of students conducted without an individualized suspicion is unconstitutional.²⁷¹ Supreme Court precedent supports this conclusion.²⁷²

law for which he is given responsibility for supervision, enforcement, licensure, or regulation").

269. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

270. *See, e.g., Konop ex rel. Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1201 (D.S.D. 1998).

271. *See, e.g., Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) (strip search of an entire class for missing prom money is unreasonable without individualized suspicion); *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003) (strip search of 13 fifth-grade students for \$26 is unreasonable without individualized suspicion); *Pendleton v. Fassett*, No. 08-227-C, 2009 WL 2849542 (W.D. Ky. Sept. 1, 2009) (strip search conducted with a mere generalized suspicion that a student present on a bus may possess marijuana is unreasonable); *Foster v. Raspberry*, 652 F. Supp. 2d 1342 (M.D. Ga. 2009) (strip search for a missing iPod is unreasonable without individualized suspicion); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 888 (N.D. Ill. 2001) (commenting that "individualized group suspicion is insufficient to establish" the reasonableness of a strip search of 30 students for

When determining the reasonableness of school policies permitting searches of students without individualized suspicion, the Supreme Court looks at three factors: (1) the legitimacy of the student's expectation of privacy, (2) the intrusive nature of the search,²⁷³ and (3) the interest of the school in conducting the search.²⁷³ Application of these three factors to the student strip search reveals that such a search will only be reasonable when a school official possesses an individualized suspicion.

First, the average student possesses a very legitimate expectation that he or she will not be subjected to a strip search.²⁷⁴ Second, it is nearly impossible to imagine a search more intrusive than one requiring a student to expose his or her naked body to a school official.²⁷⁵ As for the third factor, although schools do indeed have a compelling interest in deterring drug use and violence, when weighed against the students' interest in not being strip searched and the excessively intrusive nature of such searches, it may not be so compelling as to justify a blanket strip

money); *Konop*, 26 F. Supp. 2d 1189 (strip search of two seventh-grade students for \$200 was unreasonable absent individualized suspicion); *Hines ex rel. Oliver v. McClung*, 919 F. Supp. 1206 (N.D. Ind. 1995) (strip search of five seventh-grade students for \$4.50 is unreasonable without individualized suspicion). *But see Oliver*, 919 F. Supp. 1206 (implying that a strip search conducted without individualized suspicion may have been reasonable if for a dangerous object, rather than money).

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

273. *Id.* at 661. In *Vernonia*, the Court held that a school policy permitting the random drug testing of student athletes in the absence of individualized suspicion was reasonable under the Fourth and Fourteenth Amendments. *Id.* at 664-65. There, the Court found that the students enjoyed a lesser expectation of privacy because their participation in the athletic program was voluntary and because the students subjected themselves to an environment of communal undress. *Id.* at 657. Also, the search was deemed minimally intrusive because the male students were allowed to remain fully clothed with their backs to the school officials monitoring the search, and the female students performed the test in an enclosed stall concealed from view. *Id.* at 658.

274. *See, e.g., Redding*, 129 S. Ct. at 2641 ("Savana's subjective expectation of privacy against [a strip] search is inherent in her account of it as embarrassing, frightening, and humiliating."); *Beard*, 402 F.3d at 604 ("Students of course have a significant privacy interest in their unclothed bodies."); *Pendleton*, 2009 WL 2849542, at *4 (finding that a female student "certainly had a legitimate expectation of privacy in her partially unclothed body").

275. *See discussion supra* Part II.B.2 and accompanying notes. The cavity search is one example of a search that is clearly more intrusive. But during oral argument, the attorney for Safford Unified School District No. 1 conceded that school officials should *never* be permitted to perform a cavity search of a student. Transcript of Oral Argument at 17, *Redding*, 129 S. Ct. 2633 (No. 08-479).

search of a group of children. The interest in preventing theft is even less compelling because of the absence of potential physical harm.²⁷⁶ Clearly, these three factors, especially the intrusive nature of these searches, weigh heavily in favor of a rule prohibiting the strip search of a student absent individualized suspicion.

Given the Supreme Court's guidance and that of other courts that have dealt with this issue, Louisiana law should not leave school officials in the dark as to whether the blanket strip search of a group of students is a reasonable measure; instead, it should affirmatively declare that it is not. Such a rule will further protect the interests of innocent students and will ensure that school officials do not find themselves on the losing side of a court's decision.

2. Strip Searches Are "Categorically Distinct"

The Supreme Court stated that the search of Savana Redding required either of the abovementioned "distinct elements of justification" because this type of search is "categorically distinct."²⁷⁷ The Court then failed, however, to provide a concrete statement regarding exactly what types of searches fall within this category. The language in the opinion suggests two alternative interpretations—one broad and one narrow.

Under the broad interpretation, the Constitution requires at least one of the distinct elements of justification whenever a student is subjected to a search "going beyond . . . outer clothing and belongings."²⁷⁸ In other words, *Redding* is applicable to *any* search requiring a student to reveal what is hidden below his or her outer clothing. A narrow interpretation, however, is supported by a statement near the end of the Court's decision, which says that the distinct elements of justification are required "before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts."²⁷⁹ Therefore, narrowly interpreted, the Constitution may require application of the *Redding* standards only when a student, if male, is required to

276. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 382 n.25 (1985) (Stevens, J., concurring in part and dissenting in part) (commenting that a strip search "must only be to prevent imminent, and serious harm"); *Beard*, 402 F.3d at 605 (citing *Oliver*, 919 F. Supp. at 1218) ("[A] search undertaken to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons.").

277. *Redding*, 129 S. Ct. at 2641.

278. *Id.*

279. *Id.* at 2643 (emphasis added).

expose his pelvic area, and, if female, is required to display her breasts or pelvic area or both.

Of the two alternatives, Louisiana should adopt the broad interpretation. Its application is simple: If a school official's search will venture beneath a student's outer clothing, the official must have at least one of *Redding's* distinct elements of justification.²⁸⁰ Also, this interpretation is more closely aligned with the definition of a strip search as a "visual inspection of an individual's body" that includes, but is not limited to, parts "usually hidden by undergarments."²⁸¹ In contrast, adoption of the narrow standard would be difficult to apply and would require the reasonableness of a strip search to hinge upon arbitrary factors, such as the revealing nature of the particular undergarments worn by a student on a particular day. By adopting the broad definition, Louisiana law will give school officials clear notice as to when a particular search is governed by the *Redding* standards, making it less likely that these embarrassing and potentially traumatic searches will be conducted without reason.

C. What Are Its Benefits?

As courts have noted on multiple occasions, "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."²⁸² School officials and courts should give this statement special consideration in light of the severe psychological harm inflicted upon children subjected to strip searches.²⁸³ Injecting the decision of a judge, a neutral third party, between the school official and the student will result in a more reliable decision as to whether the underlying circumstances justify the search²⁸⁴—a decision unaffected by the pressures placed upon school officials to keep children safe, no matter the cost.²⁸⁵

280. In *Lindsey ex rel. Lindsey v. Caddo Parish School Board*, 954 So. 2d 272 (La. Ct. App. 2007), a school official required a 15-year-old student to fold down his waist band in an attempt to find \$50. *Id.* at 273–74. Under the proposed broad interpretation, this search would be subject to *Redding* standards.

281. Shatz, Donovan & Hong, *supra* note 32, at 1.

282. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *accord* *State v. Perry*, 610 So. 2d 746, 757 (La. 1992).

283. See discussion *supra* Part II.B.2.

284. See *United States v. Leon*, 468 U.S. 897, 913–14 (1984).

285. See discussion *supra* Part II.A.

Thus, the obvious benefit to students, as well as society as a whole, is that fewer children will be subjected to frivolous and potentially traumatic strip searches while attending school.

As previously illustrated, the *Redding* standards are too ambiguous to put school officials on notice as to when a strip search will be reasonable. Thus, these officials will also benefit from a warrant requirement because it places "the crucial task of making delicate judgments and inferences from facts and circumstances in the hands of a detached and neutral magistrate."²⁸⁶ If school officials attempt to make these determinations on their own, they will find themselves exposed to potential liability under 42 U.S.C. § 1983.²⁸⁷ And in light of the Supreme Court's recent pronouncement in *Redding*, a lower court may find that the law is now clearly established, therefore denying these officials the defense of qualified immunity.²⁸⁸ The warrant requirement can cure this problem.

Besides the increased likelihood of a more reliable decision, allowing a school official to apply for a warrant may entitle the official to qualified immunity even when the search is held unreasonable after the fact. When a school official conducts a strip search pursuant to a warrant issued by a neutral magistrate, the official will almost always possess a good faith belief in the constitutionality of the search and therefore be entitled to qualified immunity.²⁸⁹ This does not mean, however, that school officials should apply for warrants when circumstances do not support this

286. *State v. Edwards*, 787 So. 2d 981, 987 (La. 2001). Not only are judges better trained and more experienced in making determinations such as this one, but they are also absolutely immune from suit. *See, e.g., Knapper v. Connick*, 681 So. 2d 944, 946 (La. 1996) ("Absolute immunity attaches to all acts within a judge's jurisdiction, even if those acts can be shown to have been performed with malice, in order to insure that all judges will be free to fulfill their responsibilities without the threat of civil prosecution by disgruntled litigants.").

287. 42 U.S.C. § 1983 (2006).

288. *See discussion supra* Part II.E.

289. As the Supreme Court recognized in *Anderson v. Creighton*, 483 U.S. 635 (1987), a public official is entitled to qualified immunity if "a reasonable [official] could have believed [his or her conduct] to be lawful, in light of clearly established law and the information [the official actually] possessed." *Id.* at 641. A school official possessing a valid warrant issued by an officer of the judiciary will have such a belief. Thus, only when the circumstances are such that a reasonably well-trained school official would be aware of the blatant invalidity of the search will the official conducting the search be held liable for damages. *Cf. Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986) (explaining that generally a police officer will not be held liable when a judge mistakenly issues a warrant); *Leon*, 468 U.S. at 922–23 (explaining that a warrant issued by a magistrate will usually suffice to show that the police officer was in good faith when conducting a search).

action. Only when a school official has an objectively reasonable belief that the contents of the affidavit are sufficient to establish a reasonable suspicion will that official be entitled to immunity for his or her good faith belief.²⁹⁰ Because the Supreme Court has recognized that school officials are ill-equipped to make complicated legal determinations,²⁹¹ the necessary standard of reasonableness will be fairly low. Still, when the circumstances *clearly* do not support a strip search, yet an overzealous school official applies for a warrant anyway, a judicial officer's mistaken authorization of the search will not shield the official from liability.²⁹²

As for obtaining a warrant, although this will result in a delay before a strip search may proceed,²⁹³ such delay will be minimal. And as previously stated, "the strip search of a student cannot be a 'swift' and 'informal' procedure."²⁹⁴ Louisiana recognizes a number of ways in which school officials can complete this task quickly and efficiently. In particular, the Louisiana Code of Criminal Procedure allows a warrant to issue "by telephone, radio, or such other electronic method of communication deemed appropriate by the judge."²⁹⁵ Additionally, a recent act passed by the Louisiana Legislature permits individuals to submit warrant applications via e-mail.²⁹⁶ Moreover, completing the application for the warrant should not be unduly burdensome. The warrant would issue upon a reasonable suspicion, which requires that only those facts sufficient to show "a moderate chance of finding evidence of wrongdoing" be put forth.²⁹⁷

290. *Malley*, 475 U.S. at 345.

291. *New Jersey v. T.L.O.*, 469 U.S. 325, 344 (1985) (stating that a reasonable suspicion standard will "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause"); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664 (1995) (stating that "spotting and bringing to account drug abuse" is "a task for which [school officials] are ill prepared, and which is not readily compatible with their vocation").

292. *Malley*, 475 U.S. at 345.

293. Because of this delay, school officials may need to detain the student until the warrant is obtained. Courts have recognized that detaining a student for a brief period is reasonable under the Fourth Amendment. *See, e.g.*, *Stockton v. City of Freeport, Tex.*, 37 F. App'x 712 (5th Cir. 2002); *Milligan v. City of Slidell*, 226 F.3d 652 (5th Cir. 2000); *State in Interest of Feazell*, 360 So. 2d 907 (La. Ct. App. 1978).

294. Shatz, Donovan & Hong, *supra* note 32, at 32.

295. LA. CODE CRIM. PROC. ANN. art. 162.1(B) (2003).

296. LA. REV. STAT. ANN. § 9:2603.1 (Supp. 2010) ("An application for any warrant . . . shall not be denied legal effect or enforceability solely because it is in electronic form. Any such application . . . shall have the full effect of law.").

297. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

However, in cases where a delay in conducting a strip search will result in "immediate physical danger to students, teachers, or the official conducting the search,"²⁹⁸ a school official should be able to proceed with the search without a warrant under an "emergency exception."²⁹⁹ For example, if the student is suspected of possessing a dangerous weapon, school officials may act immediately to ensure that the student does not harm others.³⁰⁰ In all other situations, the school official should obtain a warrant before proceeding with a strip search.

In short, requiring a warrant to be issued before a school official may strip search a student will spare both the official and the school board from the burdens of costly litigation and, more importantly, will spare the student from the traumatic effects associated with such an experience. Although this requirement will somewhat delay the search, such delay will be negligible, and its short-term costs will be outweighed by its long-term benefits. Furthermore, this delay will force the school official to momentarily reflect on the facts in an objective manner; many times, this may be all that is needed to prevent the strip search of a child. In light of the Supreme Court's decision in *Redding*, a warrant requirement is a reasonable solution that will further the interests of both school officials and their students.

D. Test Suite

Applying the proposed warrant requirement to a fact pattern similar to the one in *Redding* will illustrate its benefits. Say that a school official has a reasonable and individualized suspicion that a student named Seth is hiding pills somewhere on his person. If the searches of Seth's possessions and outer clothing reveal no pills, the school official may reasonably infer that Seth is hiding the pills beneath his outer clothing. Under the proposed solution, the school

298. Gartner, *supra* note 53, at 978.

299. See *State v. Ludwig*, 423 So. 2d 1073, 1075-76 (La. 1982). Although in *Ludwig*, the Louisiana Supreme Court dealt with the search of a person's residence, the court's reasoning is applicable in this case. There, the court defined the emergency exception as allowing "police officers [to] enter a dwelling without a warrant to render emergency assistance to a person they reasonably believe to be in distress and in need of such assistance." *Id.* at 1075. In the school setting, a school official ought to be able to proceed with a strip search if he or she believes that failure to do so will result in harm to either the student, the student body at large, or the faculty and staff.

300. In this example, although the school official would not enjoy the benefits of a warrant, he or she will almost assuredly possess a reasonable suspicion of danger. Therefore, the strip search would be reasonable.

official will have to obtain a warrant before proceeding any further.

In *Redding*, school officials detained Savana for over two hours before conducting the strip search.³⁰¹ Given the same amount of time, the school official in this hypothetical could easily call or e-mail a local judge and provide him or her with the following information: a student informed school officials that a group of students would consume drugs; this student turned in a pill and implicated Tom as the source; Tom implicated Seth; and Tom and Seth were known friends and had been involved in a prior incident involving alcohol at a school dance. With this information, the judge must determine whether there exists either a reasonable suspicion of danger or a reasonable suspicion of resort to underwear for hiding the pills.³⁰² If the judge finds the information insufficient, he or she can refuse to issue the warrant. The school official would then take appropriate alternative measures, such as sending Seth back to class or calling his parents to pick him up from school. If, however, the judge finds the information sufficient, he or she can issue the warrant. Not only will the school official be shielded from potential liability, but the public can rest assured that the strip search of Seth was the result of the judgment of an independent third party, rather than an overzealous school official.

VI. CONCLUSION

To say that school officials are between a rock and a hard place is a gross understatement. Bubble gum and untucked shirts are not the only problems between a young child and a high school diploma: Assault, drug use, vandalism, theft, poor academic performance, gangs, and teenage pregnancy are the obstacles standing in the way of progress.³⁰³ For the school officials responsible for educating our children, caring for them on a daily basis, and keeping them safe from harm, the decision to resort to a strip search is a difficult one, and common sense will probably restrict such a measure to only those circumstances when it is absolutely necessary. Even then, however, school officials and school boards risk financial liability.

In *Redding*, the United States Supreme Court held the strip search of a 13-year-old girl unconstitutional. Though the Court came to the correct conclusion, in doing so it provided a standard

301. *Redding*, 129 S. Ct. at 2652 n.4 (Thomas, J., dissenting).

302. *Id.* at 2643 (majority opinion).

303. See LANE, *supra* note 19, at 6-12 (1995).

that may prove to be unworkable. For this reason, Louisiana must craft a standard of its own. The strip search of a child should only occur when there is an individualized suspicion and, absent a risk of imminent harm, only with judicial approval. Such a policy will remedy Louisiana's silence and provide clear guidance where before there was only ambiguity. School officials will find safe harbor from liability, and students will neither be unreasonably traumatized nor allowed to bring other injury upon themselves or society.

Undoubtedly, the policies and practices of school administration can sometimes consist of a complicated balancing act. But, as has often been quoted, "The credit belongs to the man who is actually in the arena."³⁰⁴ Now is *not* the time for Louisiana to sit idly by while waiting for the next student strip search to occur. The Louisiana Legislature should amend the statute governing the search of a student's person,³⁰⁵ and it should do so soon.

*Thomas R. Hooks**

304. WILLIAM MANCHESTER, *THE LAST LION, VOLUME I* (1983) (quoting President John F. Kennedy).

305. LA. REV. STAT. ANN. § 17:416.3(A)(2)(a) (2001).

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