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Keywords

Students--Legal status laws etc., Searches and seizures

FROM T.L.O. TO SAFFORD: A CLOSE LOOK AT THE U.S. SUPREME COURT'S DECISIONS ON SEARCHES OF STUDENTS AND THE PRINCIPLES THAT EMERGE FROM THESE CASES

3 Wm. Mitchell J.L. & Prac. 2

By: Professor Michael K. Jordan*

I. INTRODUCTION

Few, if any, would question the need to interdict the movement of drugs across the borders of the United States. The problems caused by the sale of drugs on our streets and the resulting indirect and direct hardship on every citizen cannot be doubted. Now the tough question: how far are we willing to go in stopping, or at least curtailing this drug trafficking? Should we subject individuals who have no history of drug use to drug testing simply because they are involved in the front-line defense against drug traffickers? Is the risk that these individuals may have their integrity compromised by drug use sufficient to justify drug testing of them, even if there is no evidence of their using drugs? Consider safety in public transportation. We all want to believe that the person at the controls of a speeding train is not under the influence of drugs or alcohol and is operating the train safely by following all the rules and regulations governing its operation. If there is an accident should the engineer be subjected to drug testing to determine if he was under the influence of drugs and/or alcohol? Finally, think about our schools and the safety and sobriety of our children. There is no doubt as to the legitimacy of the desire of parents and school officials to have students educated in a safe drug-free environment. What type of actions may a school adopt to insure this and to what extent must the school defer to the desire of students to be free from the restraints imposed by these measures? Is random drug testing of all students in the schools an inappropriate balance between these competing interests? Perhaps selective testing based upon some criteria determined by the school district alone or in consultation with parents.

These questions are not as theoretical or unrelated as one might think. Over the past 25 years the United States Supreme Court has been grappling with these very issues.¹ Whether delineating the circumstances under which a governmental entity may subject citizens to drug testing or how and when a school district may ameliorate a drug problem among students, the Court has attempted to balance the interests of society against the privacy interest of the individual tested. As Justice Scalia noted there are some absolutes in

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¹ See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

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Fourth Amendment law, however, outside of these areas the constitutionality of a search depends largely upon the social necessity that prompts the search.²

The Supreme Court's decision last term in *Safford Unified School District v. Redding*³ returned to this troublesome issue of balancing the interests of society against the privacy interests of its members, in this case the privacy interests of students. At issue in *Safford* was the constitutionality of a strip search performed on a thirteen-year-old female student by school officials searching for Ibuprofen and naproxen.⁴ At first glance there would seem to be little if any similarity between drug testing an employee after a train accident and strip searching a student. However, both cases involved a special area of Fourth Amendment law described by the Court as "special needs, beyond the normal need for law enforcement."⁵ The Court has cited its school search opinions as authority for propositions articulated in cases involving searches ranging from drug testing of employees to searching a probationer's home.⁶ It appears that, like it or not, the principles governing the search of our children in school are linked to our anxiety over the interdiction of drugs at our borders and the ability of a governmental employer to search an employee's office.⁷

The focus of this article will not be on the diverse areas in which the Fourth Amendment special needs doctrine has been applied. Instead, the Court's decision in *Safford* will be examined to assess its significance for those who are called upon to advise public school teachers and administrators on the circumstances under which students may be searched. To that end, we must first review the major Supreme Court decisions on searches in public schools that preceded *Safford*. There are three cases that formed the backbone of Fourth Amendment law as applied to public schools: *New Jersey v. T.L.O.*,⁸ *Vernonia School District v. Acton*,⁹ and *Board of Education of Independent School District No. 92 Pottawatomie County v. Earls*.¹⁰ These cases will be examined in some detail as they provided the basic principles governing the constitutionality of certain types of school searches. Emphasis here is placed on certain types of searches, because as will become apparent in discussing these cases, the Court was always careful to note that its ruling in any given case did not have blanket applicability to other types of searches that could occur in public schools. Therefore, the analysis will focus on the types of searches conducted in each case: searches conducted by school officials of a student's person or personal items carried by the student.

² See *Von Raab*, 489 U.S. at 681.

³ *Safford Unified Sch. Dist. No. #1 v. Redding*, 129 S.Ct. 2633 (2009).

⁴ *Id.* at 2638.

⁵ *Skinner*, 489 U.S. at 619-20.

⁶ See, e.g., *Chandler*, 520 U.S. at 313-18 (drug testing candidates for office); *Skinner*, 489 U.S. at 619 (drug testing railroad employees); *Griffin*, 483 U.S. at 873 (probation search); *Ortega*, 480 U.S. at 724 (search of employee's office).

⁷ See *Von Raab*, 489 U.S. at 665, 672; see *Ortega*, 480 U.S. at 723-24.

⁸ *T.L.O.*, 469 U.S. 325.

⁹ *Vernonia*, 515 U.S. 646.

¹⁰ *Pottawatomie*, 536 U.S. 822.

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After this survey of the Court's previous decisions, *Safford* will be discussed to determine what it adds to our understanding of the authority of school officials to conduct intrusive searches of a student's person or items which she may have in her possession. Specifically, *Safford* provides some needed guidance on fine-tuning the balance struck between the competing interests present: the privacy interests of students versus the interests of parents and school administrators in maintaining order and safety in schools.

II. WHERE WE STARTED

A. SMOKING IN THE GIRL'S LAVATORY: *T.L.O.*¹¹

We start with that fateful day on March 7, 1980 when two girls were observed by a teacher smoking in a lavatory at Piscataway High School.¹² Smoking in the lavatory was a violation of the high school's rules and the girls were promptly taken to the principal's office.¹³ In response to questioning by Vice Principal Choplick, T.L.O. denied smoking while her companion admitted to the rule violation. Since a teacher witnessed the smoking, Choplick searched T.L.O.'s purse and found a pack of cigarettes.¹⁴ He immediately accused her of lying and he noticed the purse contained a pack of rolling papers.¹⁵ Experience had taught him that rolling papers are associated with marijuana use.¹⁶ He, therefore, conducted a more thorough search of her purse.¹⁷ Ultimately, a small amount of marijuana was discovered along with other evidence suggesting that T.L.O. was using drugs and selling them to other students.¹⁸ The fruits of the search also served as the basis for bringing juvenile charges against T.L.O. During the course of these proceedings, T.L.O. alleged the search of her purse violated the Fourth Amendment. It was this issue that was before the Supreme Court.¹⁹

The threshold question was whether the Fourth Amendment applied to school officials. The Court had very little trouble in finding that it did. The Fourth Amendment's prohibition against unreasonable searches and seizures had never been limited to law enforcement officials. The purpose of the Amendment is to protect

¹¹ *T.L.O.*, 469 U.S. 325.

¹² *See id.* at 328.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See id.* at 328.

¹⁹ *See T.L.O.*, 469 U.S. at 329-30.

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the privacy and security of individuals from arbitrary invasions by governmental officials.²⁰ Choplick exercised authority over T.L.O. by virtue of his being a representative of the state. The search was, therefore, governmental action within the meaning of the Fourth Amendment.²¹

The Court then began its inquiry into whether the standards governing searches by law enforcement officials applied to school officials.²² Ultimately, the standard governing all searches is that they must be reasonable.²³ However, reasonableness is context specific and is not an absolute standard.²⁴ What is reasonable conduct by a teacher in searching a student may not be reasonable when engaged in by a police officer attempting to detect crime.²⁵ The reasonableness of Choplick's search ultimately depended upon a balancing of the individual's (student's) legitimate expectations of privacy and personal security against the government's (school's) interest in maintaining public order. In fact, the balancing of interests analysis answers two questions in Fourth Amendment analysis. First, whether Choplick was required to obtain a warrant if the search of T.L.O. was to be found reasonable? Second, could he search her only if he had probable cause to believe a crime had been committed? The text of the Fourth Amendment states both the warrant and probable cause requirements.²⁶

As to the first question, the Court held that school officials need not obtain a warrant before searching students under their authority.²⁷ Students have legitimate expectations of privacy that society is prepared to recognize.²⁸ They often have a legitimate need to bring personal property to school and may find it necessary to carry these items in purses or wallets.²⁹ But, this need does not outweigh the school's interest in maintaining what the Court characterized as a substantial interest in maintaining discipline and order

²⁰ See *id.* at 335.

²¹ See *id.* at 336-37. The Court acknowledged the argument that schools act *in loco parentis* in their dealings with students. A school's authority is therefore the same as a parent's and schools are, therefore, not acting as the State. This reasoning was not adopted in this case and it was pointed out this theory was in tension with the Court's previous holdings where the Court found that students were subject to the protection of the First and Fourteenth Amendments. See *id.* at 336.

²² See *id.* at 337.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.* at 337.

²⁶ U.S. Const. amend. 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*

²⁷ See *T.L.O.*, 469 U.S. at 340.

²⁸ See *id.* at 339.

²⁹ See *id.*

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while also maintaining the informality of the student-teacher relationship.³⁰ Given this substantial interest and the school vindicating this interest through what the Court described as swift and informal disciplinary procedures, requiring that school officials obtain a warrant would frustrate this interest.³¹

The next issue was whether school officials must have probable cause to search a student. A search without a warrant does not automatically mean that it can be conducted without probable cause. Once again the Court resorted to balancing interests to determine if searches by school officials should be considered one of the limited number of instances where a search could be reasonable within the meaning of the Fourth Amendment even though the official lacked probable cause to believe a violation of law had occurred.³² The question became whether a balancing of the private and public interest "...suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause...."³³ Without much discussion, the Court noted that it was joining the majority of courts that had examined this issue and concluded that the accommodation of the privacy interests of schoolchildren with the substantial needs of teachers and administrators to maintain order in schools does not require probable cause to support a search of students. The Fourth Amendment only required that Choplick acted reasonably under all of the circumstances.³⁴

Given the Court's view that it was developing a standard to be applied in the real world of school discipline imposed by teachers and administrators who are not trained in the law, one would expect some type of clear formulation of or guidelines as to what constitutes reasonableness. Guidance was provided in the form of two questions that administrators or teachers should ask in assessing the reasonableness of their actions: (1) was the search justified at its inception?; and (2) was the search as actually conducted reasonably related in scope to the circumstances that justified the invasion of the privacy interest?³⁵ A search is justified at its inception if the school official had reasonable grounds (not probable cause) for suspecting that the search will lead to the discovery of evidence that the student was violating or had violated either the law or the rules of the school.³⁶ The scope of the search is proper in scope if it is conducted in a manner that is reasonably related to the objectives of the search and not excessively intrusive given the age and sex of the student and the nature of the rule violation.³⁷ As applied to Choplick's search, it was both justified at its

³⁰ *See id.* at 339-40.

³¹ *See id.*

³² *See id.* at 340-41.

³³ *Id.* at 341.

³⁴ *See id.* at 341. In contrast to this standard, a court reviewing a probable cause determination by a magistrate would have to ask whether there was a substantial basis for the magistrate to conclude that the information provided created a fair probability that contraband or evidence of a crime would be found if a warrant were issued. *See Illinois v. Gates*, 462 U.S. 213, 237-38 (1983).

³⁵ *T.L.O.*, 469 U.S. at 341.

³⁶ *See id.* at 342.

³⁷ *See id.*

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inception and proper in scope.³⁸ The initial discovery of the two girls smoking in the lavatory followed by T.L.O.'s denial of the rule infraction justified the initial search of her purse for evidence of the infraction: cigarettes in her purse.³⁹ The subsequent discovery of the marijuana justified a further search of the purse for evidence of further violations of rules or the law.⁴⁰

Armed with *T.L.O.*, teachers and administrators were provided with what appeared to be practical guidelines as to when and how students could be searched. Remember, context is essential in assessing the validity of a search. *T.L.O.* was a case involving individualized suspicion: Choplick could identify the two students who were suspected of violating a school rule and a specific student whom he suspected of using and/or selling drugs.⁴¹ The Court explicitly stated that it was not addressing the legitimacy of a search that at its inception was not grounded in individualized suspicion, although it acknowledged the possibility that individualized suspicion was not always a necessary component of reasonableness.⁴²

There were other arguments raised against the legitimacy of the search and, in addressing these contentions, the Court provided further guidance as to how to apply the two-part test. One could argue, for example, that a search is reasonable only if the official were searching for evidence of a *serious* rule violation. That is, a school's interest in order is triggered by violations of rules that actually serve the interest in maintaining order. Does smoking in the girls' lavatory really undermine order and discipline at Piscataway High School?⁴³ After all, sneaking a smoke in the lavatory is akin to a high school rite of passage. The answer to this question appeared to be that it was not a relevant question for the Court to answer in assessing the constitutionality of the search.⁴⁴ School officials, not judges, should evaluate both the relative importance of offenses and which rules are necessary to maintain order and promote the educational mission of the school.⁴⁵ The outer limit of this deference to school officials appeared to be rules that, while promoting

³⁸ See *id.* at 329-30.

³⁹ It could be argued that if Choplick found cigarettes in the purse that would not prove that the girls actually smoked them in the bathroom. Moreover, possession of cigarettes was not prohibited. Thus the search was flawed at its inception since Choplick's search could not turn up evidence that would prove a violation of the rules. The Court rejected this type of reasoning and labeled it "hair-splitting." Instead, the Court considered whether Choplick acted in a common sense fashion and drew the type of conclusions about human behavior, which practical people draw. The answer to that question is: Yes. The presence of cigarettes in the purse might not prove that T.L.O. had been smoking, but it is circumstantial evidence that she might have smoked recently. See *id.* at 328, 345-46.

⁴⁰ See *id.* at 345-46.

⁴¹ See *id.* at 328.

⁴² See *T.L.O.*, 469 U.S. at 342.

⁴³ This was one of Justice Stevens' objections raised in his dissenting opinion. See *id.* at 376-78.

⁴⁴ See *id.* at 328.

⁴⁵ See *id.* at 340.

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order, ran afoul of some other substantive constitutional guarantee. These types of rules would be subject to judicial review.⁴⁶

Finally, we know that school officials under the circumstances present in *T.L.O.* are not governed by the probable cause standard but are subject to the lower standard of reasonableness. This falls below probable cause, but how far below? The only guidance given by the Court is that "...reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment....'"⁴⁷ But given the Court's statements about the informal nature of student-teacher relations and the need for flexibility in school discipline, it would be fair to say that teachers and administrators could operate on the basis of common sense conclusions about student behavior supported by their experience in dealing with students.⁴⁸

Simple! Not quite! Change the facts in *T.L.O.* a bit. Let's say there is still a rule against smoking in the lavatory and the school's vice principal has some evidence that there is widespread smoking occurring in the lavatories (cigarette on the floors-the odor of cigarette smoke), though he and the teachers cannot catch students in the act. Moreover, teachers and administrators do not have the time to station themselves in the lavatories to deter or apprehend violators. The vice principal decides to implement a policy that subjects all backpacks, purses and pockets in students' clothing to a search by teachers to determine if students are bringing cigarettes into the building. The rationale for the rule is simple: if cigarettes can be kept out of the school, students cannot smoke them in the lavatories. Notice how the no-smoking rule is the same and would presumably receive the same deference granted to it in *T.L.O.* Moreover, the disorder the rule is attempting to prevent remains the same. The difference, however, is that this rule would allow searches even though the teacher did not have evidence that the student who is being searched possessed cigarettes, or if the student possessed them, will actually smoke them in the lavatory. Certainly the need to detect and prevent smoking is the same, but is the power to search affected by the absence of specific evidence pointing to an individual student as a violator or potential violator? With this difference between the two cases, should we still apply the *T.L.O.* analysis? If the answer is yes, then how could we say the searches were justified at their inception when there is no evidence that a particular student actually violated the no-smoking rule? Substitute use of drugs for cigarette smoking and drug testing for searching purses and pockets, and what you are left with are the issues raised in the next two cases where the Court revisited the issues surrounding searches of students.

⁴⁶ See *id.* at 342.

⁴⁷ *Id.* at 346 (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)).

⁴⁸ See *id.* at 346.

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B. DRUG FREE ATHLETES AND PROTECTING THE FUTURE HOMEMAKERS OF AMERICA: *Vernonia*⁴⁹ and *Pottawatomie*.⁵⁰

In the 1980's, schools in Vernonia experienced a sharp increase in drug use among its students.⁵¹ The drug use included both athletes and non-athletes, but the athletes were the leaders of a burgeoning drug culture.⁵² The school district initially responded to the problem by offering classes and speakers designed to deter drug use but these efforts were to no avail.⁵³ A student athlete drug policy was adopted, which required that students who wished to play sports, and their parents, sign a form consenting to drug testing.⁵⁴ The program involved randomly selecting athletes to provide urine samples.⁵⁵ The samples were sent to an independent laboratory for testing to determine the presence of various drugs.⁵⁶ Positive test results led to a series of sanctions based upon whether it was the first, second or third positive test result.⁵⁷ All of the sanctions involved restricting the ability of the student to participate in athletics.⁵⁸ The school did not share the results with the police or anyone outside the school.⁵⁹

The school district had evidence that there was a drug problem.⁶⁰ It also had evidence that narrowed the population of suspected users or leaders in the drug culture down to student athletes.⁶¹ Quite reasonably, it adopted a policy designed to detect and deter drug use within the targeted population.⁶² What it did not have was a policy that restricted testing based upon evidence of a *specific individual* using drugs and participating in athletics. Unlike *T.L.O.* there was no individualized suspicion. However, it quickly became apparent in the Court's analysis that the validity of the drug testing would turn on its reasonableness under the

⁴⁹ See 515 U.S. 646.

⁵⁰ See 536 U.S. 822.

⁵¹ *Vernonia*, 515 U.S. at 648.

⁵² See *id.* at 649.

⁵³ See *id.*

⁵⁴ See *id.* at 650.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *Vernonia*, 515 U.S. at 651.

⁵⁸ See *id.*

⁵⁹ See *id.* at 650-51.

⁶⁰ See *id.* at 648.

⁶¹ See *id.* at 649.

⁶² See *id.* at 650.

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circumstances in which the testing occurred and not simply on the absence or presence of individualized suspicion.⁶³

The analysis began with the Court folding the *T.L.O.* decision into a broader category of cases involving the special needs of government officials beyond that of law enforcement.⁶⁴ Quite simply, these were instances where individuals subject to the restrictions of the Fourth Amendment conducted a search but the purpose of the search was for reasons other than crime detection.⁶⁵ Prior to *Vernonia*, the Court had applied this special needs moniker and analysis to drug testing of railroad employees and employees of the United States Customs service.⁶⁶ The question was whether the same special needs analysis that justified drug testing without individual suspicion in other contexts applied in schools. On the other hand, did *T.L.O.* impose a requirement of individualized suspicion on all searches in schools?⁶⁷ That is, was there something unique about the privacy interests of students in schools that required school officials to have individualized suspicion?

This question was answered rather quickly when the Court explicitly stated that the Fourth Amendment does not impose an absolute requirement of individualized suspicion on special needs searches.⁶⁸ Once again, the essential question was the reasonableness of the search; individualized suspicion was simply one factor bearing on this question.⁶⁹ The presence or absence of individualized suspicion was one more factor to consider in balancing the intrusion into an individual's privacy against the governmental interest advanced by the intrusion.⁷⁰ While reasonableness generally requires a judicial warrant when law enforcement officials are searching to discover evidence of a crime,⁷¹ a different balance may be struck in the special needs context which could result in constitutionally permissible searches conducted without a warrant; with less than probable cause; and no individualized suspicion.⁷² Thus the fact that students were being drug tested did not require an analytical framework different from that applied outside of schools.

As with employee drug testing, the Court balanced three factors to assess the validity of the drug testing of student athletes.⁷³ The Court considered the nature of the privacy interest involved, the character of the

⁶³ See *Vernonia*, 515 U.S. at 652-60.

⁶⁴ See *id.* at 653.

⁶⁵ See *id.* at 652-60.

⁶⁶ See *Von Raab*, 489 U.S. at 665; see also *Skinner*, 489 U.S. at 619.

⁶⁷ *Vernonia*, 515 U.S. at 660-66.

⁶⁸ See *id.* at 653.

⁶⁹ See *id.* at 654-65.

⁷⁰ See *id.*

⁷¹ See *Skinner*, 489 U.S. at 619.

⁷² See *Vernonia*, 515 U.S. at 653-54.

⁷³ See *id.* at 654-64.

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intrusion, and the nature and immediacy of the governmental interest as well as the efficacy of the means chosen to meet that interest.⁷⁴ The Court had very little trouble finding that students generally and athletes in particular have reduced expectations of privacy.⁷⁵ The custodial and tutelary nature of the school's authority allowed it to compel students to submit to various physical exams.⁷⁶ Moreover, athletes regularly undress and shower under circumstances that offer little, if any, privacy.⁷⁷ This reduced privacy expectation was outweighed by an intrusion (collecting a urine sample) that was viewed as negligible. The collection procedure was no more intrusive than the excretory function performed by these students every day in the school bathrooms.⁷⁸ Finally, the state's interest was important, perhaps even compelling. Detecting the use of drugs among school children was a significant enough interest to justify the use of drug testing without individualized suspicion.⁷⁹ In the context of high school athletes this assumed an added importance since drug use combined with athletics increased the possibility of harm to a student athlete.

Vernonia could be read as not opening the floodgates for drug testing in public schools under any circumstances. The school district had evidence that student athletes were at the center of the drug culture.⁸⁰ Individualized suspicion for testing was not present but the district could point to an identifiable group of students who were known to be involved in the drug culture and had created disciplinary problems.⁸¹ Even though the school did not have evidence of specific students using drugs, those who were tested were members of a discrete group that was targeted based upon evidence of drug use within that group. Thus, the testing was based upon the previous experience of the district as opposed to hunches or general animosity toward athletes. The district's testing program was arguably consistent with the purpose of the Fourth Amendment of preventing arbitrary invasion of the privacy and security of individuals by governmental officials.⁸² So, should *Vernonia* be interpreted as requiring that a school may conduct drug testing only if individualized suspicion is present, or if there is evidence that the individual tested is a member of a group that the school, through previous experience, knows is involved in drug use? *Pottawatomie* helped to reduce, if not eliminate, doubts as to whether drug testing could be implemented with little evidence of an existent drug problem within a discrete group of students.⁸³

⁷⁴ See *id.* at 654-57, 658-59, 660-64.

⁷⁵ See *id.* at 654-58.

⁷⁶ See *id.* at 654-57.

⁷⁷ See *id.* at 657.

⁷⁸ See *id.* at 658.

⁷⁹ See *id.* at 661.

⁸⁰ See *id.* at 648-49.

⁸¹ See *id.* at 648-49.

⁸² *T.L.O.*, 469 U.S. at 335.

⁸³ See *Pottawatomie*, 536 U.S. at 834-35.

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In *Pottawatomie* the school district implemented a drug testing policy for participants in competitive extracurricular activities.⁸⁴ This policy would include members of the Future Farmers of America and Future Homemakers of America.⁸⁵ There was evidence of some drug use, but little, if any, evidence that a pervasive problem currently existed in the general student population or among students participating in *all* competitive extracurricular activities.⁸⁶ One contention advanced was that there may have been some evidence of a drug problem, but not enough to justify the breadth of the program adopted.⁸⁷ In response, the Court noted that there was evidence of a drug problem at the school; however, it also stated that a demonstrated drug use problem is not necessary in all cases.⁸⁸ Evidence of an existent problem would support the school's assertion of a special need to conduct suspicion-less drug testing, but it was not absolutely necessary.⁸⁹ In addition, the Court noted that it had already held that government officials could drug test customs officials as a purely preventive matter when there had been no evidence of an existent drug-use problem among these officials.⁹⁰ Immediately after this observation the position of customs officials was equated with that of students because drug use by either group posed special dangers. The pervasive drug use problem in *society* justified the need for testing that detected as well as deterred drug use.⁹¹ This was particularly true with students: a vulnerable population requiring protection because of the dangers posed by childhood drug use.⁹²

These statements clearly suggest that even though the school in *Pottawatomie* may have had evidence of an existing problem, the result in the case did not turn on the existence of or amount of evidence the school possessed at the time the testing was implemented. This reading of the Court's position is supported by how it applied its opinion in *Vernonia* to this case.⁹³ *Vernonia* was read as being consistent with special needs drug testing in schools where there may *not* have been evidence of an existent drug use problem.⁹⁴ This was achieved through the observation that a student's privacy interest is generally lessened in public school because of the school's custodial and disciplinary responsibilities.⁹⁵ *Vernonia* was not based solely

⁸⁴ *See id.* at 826.

⁸⁵ *See id.*

⁸⁶ *See id.* at 834-35.

⁸⁷ *See id.*

⁸⁸ *See id.* at 835 (citing *Chandler v. Miller*, 420 U.S. 305, 319 (1997)).

⁸⁹ *See Pottawatomie*, 536 U.S. at 835.

⁹⁰ *See id.* at 835 (citing *Nat'l Treasury Employee Union v. Von Raab*, 489 U.S. 673 (1989)).

⁹¹ *See id.* at 836-37.

⁹² *See id.*

⁹³ *See id.* at 830-38.

⁹⁴ *See id.* at 830.

⁹⁵ *See Pottawatomie*, 536 U.S. at 830-32.

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upon the reduced privacy expectations of student athletes. Instead, privacy is reduced, in part, by the amount of control that schools exercise over all students.⁹⁶ By reducing all students' privacy interest any balancing that is done would tend to tip the scale in favor of a school's interests. For example, a member of the Future Homemakers of America would not disrobe in preparation for competition, as a student athlete would, but both athletes and homemakers are subject to the discipline, control and supervision of teachers. Members of both groups voluntarily participated with the knowledge that they would be subject to rules that limited their freedom.⁹⁷ All students would seem to have reduced expectations of privacy while some may have their privacy reduced even further by participating in specific activities while in school.⁹⁸

After the Court explained why students have diminished reasonable expectations of privacy, it turned to the other side of the balance: the school's interest.⁹⁹ Even though the school district in *Vernonia* had evidence of an existent drug problem within a discrete group of the students, that type of evidence did not appear to be necessary.¹⁰⁰ What is required is the identification of an important enough interest to justify the intrusion into a student's privacy.¹⁰¹ A school's need to prevent and deter drug use among school children, given the known national drug problem, provides an important enough interest with sufficient immediacy to justify the drug testing policy implemented in *Pottawatomie*.¹⁰² Certainly, a program that targeted a group known to be using drugs would have greater efficacy. However, this approach ignores the custodial responsibility of schools. Deterrence is as important as elimination of a problem.¹⁰³ The Court stated it made "little sense" to require a school to wait for a substantial portion of the school population to use drugs before it decided to act.¹⁰⁴ Whether the school had a great deal or little evidence of drug abuse, the existence of a societal drug problem was enough to establish the school's interest in deterrence and that interest could be weighed in the balancing process.¹⁰⁵

From *T.L.O.* to *Vernonia* there emerged some clear principles. Searches of students were placed into the larger category of special needs searches where the state's interest in conducting the search was unrelated

⁹⁶ *See id.*

⁹⁷ *See id.* at 832.

⁹⁸ It is important to remember that this general reduction in privacy does not grow out of the school acting *in loco parentis*. In *Vernonia* the Court explicitly stated that it had rejected this idea in *T.L.O.* *See Vernonia*, 515 U.S. at 655. It was the nature of the control exercised by the school in its custodial and tutelary capacities that reduced a student's reasonable expectation of privacy. *See id.* at 655; *Pottawatomie*, 536 U.S. at 830-31.

⁹⁹ *See Pottawatomie*, 536 U.S. at 834-37.

¹⁰⁰ *See id.* at 834-38.

¹⁰¹ *See id.*

¹⁰² *See id.* at 835-36.

¹⁰³ *See id.* at 836.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 836-37.

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to crime detection.¹⁰⁶ The custodial and tutelary responsibilities of school districts were the special needs driving the Court's analysis of the searches.¹⁰⁷ The Court was hesitant to second guess a school administrator's assessment of the importance of the rule violation which served as the basis for initiating the search. The national drug problem was also pointed to as a major factor to consider when assessing the validity of drug testing.¹⁰⁸ It is a potential problem even in school districts that cannot identify an existent problem within the student population. The national drug epidemic became the backdrop against which a school's responsibilities and actions were assessed.

How far could these principles be extended? May schools act to eliminate all drug use or only illicit drugs? There is also the question of the types of searches permissible. In *T.L.O.* it was a student's purse, while *Vernonia* and *Pottawatomie* involved collecting and analyzing urine.¹⁰⁹ May an administrator require a student to disrobe as part of a search for drugs? Certainly, the national drug problem continues to exist and a school's custodial responsibilities in the face of this problem have not abated. As to the privacy interest of the students, it could be argued that the mere presence of a student in school would diminish that privacy interest enough so that it is outweighed by the school's need to discharge its responsibility to protect students. But is the privacy interest of a student in intimate parts of his body diminished enough to be outweighed by the school's mode of searching for drugs? Urinating in a bathroom while someone is present may be similar to how one normally uses a public bathroom. The question though is whether having a student disrobe and expose intimate parts of her body is an intrusion into her privacy that is similar to other types of intrusions that schools routinely initiate as part of their custodial and tutelary responsibilities. *Safford* began the process of addressing these questions.¹¹⁰

III. STRIP SEARCHING FOR NAPROXEN & IBUPROFEN

Savana Redding was in her math class when Assistant Principal Kerry Wilson came to the class and asked her to accompany him to his office.¹¹¹ Redding, who was thirteen years old at the time, was shown a day planner which contained knives, lighters, a permanent marker and a cigarette, all of which were contraband items under the rules of the school.¹¹² Redding acknowledged ownership of the planner but denied ownership of the contraband.¹¹³ She explained that she had loaned the planner to a friend (Marissa Glines)

¹⁰⁶ See *Vernonia*, 515 U.S. at 653; see *T.L.O.*, 469 U.S. at 351 (Blackmun, J. concurring).

¹⁰⁷ See *Vernonia*, 515 U.S. at 655; see *T.L.O.*, 469 U.S. at 336.

¹⁰⁸ See, e.g., *Vernonia*, 515 U.S. at 661-62.

¹⁰⁹ See *Pottawatomie*, 536 U.S. 822; see *Vernonia*, 515 U.S. 646; see *T.L.O.*, 469 U.S. 325.

¹¹⁰ See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633 (2009).

¹¹¹ See *id.* at 2638.

¹¹² See *id.*

¹¹³ See *id.*

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a few days earlier.¹¹⁴ Wilson then showed her four prescription strength Ibuprofen pills and one over-the-counter naproxen pill.¹¹⁵ Both pills were banned under school rules without advance permission.¹¹⁶ Wilson told her that he had received reports that she was distributing these pills to other students.¹¹⁷ She denied distributing pills and agreed to a search of her belongings.¹¹⁸

The initial search of Redding's backpack revealed nothing.¹¹⁹ She was taken to the school nurse's office where her clothes were searched for pills.¹²⁰ The search began with Redding being asked by the school nurse (a female) to remove her jacket, socks, and shoes.¹²¹ She was then told to remove her pants and T-shirt.¹²² Finally, she was directed to pull her bra out and pull out the elastic on her underpants.¹²³ Both her breast and pelvic area were exposed to some degree.¹²⁴ The search did not reveal any pills.¹²⁵

As the Court had done in the previous cases, schools were acknowledged as falling into the special needs category of searches.¹²⁶ But was the analysis governed by *Vernonia/Pottawatomie* or *T.L.O.*? Wilson was searching for drugs that may have been legal, but their possession in school without prior permission was not allowed.¹²⁷ He was also searching Redding based upon specific evidence that pointed to her as the culprit.¹²⁸ This was a search based upon individualized suspicion and, therefore, *T.L.O.* was used rather than *Vernonia*.¹²⁹ In fact, in Part II of the opinion, where Fourth Amendment principles governing the case were

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See Safford*, 129 S.Ct. at 2638.

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See Safford*, 129 S.Ct. at 2638.

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See id.* at 2639.

¹²⁷ *See id.* at 2638.

¹²⁸ *See id.* (stating that Wilson had received a report that Savana was giving pills to fellow students).

¹²⁹ *See id.* at 2642.

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summarized, the Court did not cite *Vernonia* or *Pottawatomie*.¹³⁰ It focused exclusively on cases addressing the question of when an official has sufficient information to support a belief that a search will uncover evidence of a crime.¹³¹

Given Wilson's belief that Redding was secreting pills in her clothing, the questions before the Court were: (1) whether his belief was reasonable and (2) whether the scope of the search was reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.¹³² Before addressing these questions the Court provided further guidance on the difference between reasonable suspicion and probable cause. Recall that *T.L.O.* did not give a precise explanation of the difference between the two, though one was clearly left with the impression that reasonable suspicion was a common sense notion of what one could conclude from any given set of facts.¹³³ In this case the Court equated the knowledge component of probable cause as raising a fair probability or a substantial chance that the known facts imply prohibited conduct.¹³⁴ Reasonable suspicion requires only a moderate chance of finding evidence of wrongdoing.¹³⁵ While this formulation may lack mathematical precision, it is consistent with the Court's previous statements in *T.L.O.* that school administrators should not be compelled to educate themselves in the nuances of probable cause.¹³⁶ They ought to be held to a standard of reason and common sense.¹³⁷

Did Wilson have a moderate chance of finding evidence of a rule violation at the time he conducted the strip search? This question cannot be answered without ascertaining what Wilson knew before he called Redding into his office. A week before Redding was searched a student told Wilson that some students were bringing weapons and drugs on campus.¹³⁸ At a later time the same student gave Wilson a white Ibuprofen pill that he said was given to him by Marissa Glines.¹³⁹ Wilson called Glines out of class and retrieved a day planner that was close to her.¹⁴⁰ The planner contained the contraband previously mentioned and a search of Glines uncovered blue and white pills and the admission that she was given the pills by

¹³⁰ *See id.* at 2639 Part II.

¹³¹ *See id.*

¹³² *See id.* at 2641-43.

¹³³ *See supra* note 34.

¹³⁴ *See Safford*, 129 S.Ct. at 2639.

¹³⁵ *See id.*

¹³⁶ *See T.L.O.*, 469 U.S. at 343.

¹³⁷ *See id.*; *see supra* note 39.

¹³⁸ *See Safford*, 129 S. Ct. at 2640.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

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Redding.¹⁴¹ The blue pills were later identified as naproxen.¹⁴² It was at this point that Wilson called Redding into his office and questioned her about the day planner and the contraband found in it.¹⁴³

There were actually two searches that occurred. The first was Redding's backpack and outer clothing.¹⁴⁴ Based upon what Wilson knew prior to this search he had information that created a moderate chance of finding evidence of a rule violation. There was contraband brought into the school, which Wilson discovered, and a student identified Glines as the source of the pills.¹⁴⁵ Wilson questioned Glines who then identified Redding. In effect, Wilson had two student informants who implicated other students in misconduct. The Court recognized the potential for complicating the *T.L.O.* analysis by requiring Wilson to assess the reliability of the student informants.¹⁴⁶ That is, should Wilson be required to make an independent investigation into the reliability of Glines and the other student who initially told him about drugs and weapons being brought on campus?¹⁴⁷ Instead of pursuing this approach, the Court simply noted that the reliability of information is simply one of the factors to be considered in assessing whether Wilson had reasonable suspicion.¹⁴⁸ Given the information possessed by Wilson, the initial search of the backpack and the outer clothing was reasonable. It was not excessively intrusive and was based upon reasonable suspicion.¹⁴⁹

The second search, the strip search, was more troubling. Redding's recounting of the search as embarrassing and humiliating was accepted by the Court as a reasonable response to the experience.¹⁵⁰ A search in which an adolescent is exposing her breast and pelvic area to school officials to some degree could cause serious emotional damage.¹⁵¹ This does not, however, mean that the strip search presumptively

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See Safford*, 129 S. Ct. at 2641.

¹⁴⁵ *See id.* at 2640.

¹⁴⁶ *Id.* at 2639.

¹⁴⁷ *See id.*; *see Aguilar v. Texas*, 378 U.S. 108 (1964); *see Spinelli v. U.S.*, 393 U.S. 410 (1969) (citing 5 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, (2d ed. 1987)).

¹⁴⁸ *See Safford*, 129 S. Ct. at 2639. In effect, the Court followed the approach taken in *Illinois v. Gates*, 462 U.S. 213, 237-38 (1983), where it rejected the bifurcated inquiry used in *Aguilar*, 378 U.S. 108 and *Spinelli*, 393 U.S. 410. The reliability of the student informant is one factor to be considered in assessing, under the totality of the circumstances, whether there was probable cause to search. *See Gates*, 462 U.S. at 238. In school searches, however, the determination would be reasonable suspicion rather than probable cause. *See generally*, 5 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 495-97 (2d ed. 1987).

¹⁴⁹ *See Safford*, 129 S.Ct. at 2641.

¹⁵⁰ *See T.L.O.*, 469 U.S. 325.

¹⁵¹ *See id.* at 2641-42.

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violated the Fourth Amendment. Remember, *T.L.O.* is based upon a balancing of interests.¹⁵² Wilson had reasonable cause to search for contraband (the pills) but the information he had and the interest he was vindicating justified a level of intrusion that stopped with Redding's backpack and outer clothing.¹⁵³ This is apparently what the Court meant when it observed that a search which exposed an adolescent girl's breasts and pelvic area to school officials was "...categorically distinct requiring distinct elements of justification on the part of the school authorities for going beyond a search of outer clothing and belongings."¹⁵⁴ What this means is that even with a sufficient justification to commence some type of search, *T.L.O.* requires that the scope of Wilson's search be commensurate with his objective of finding naproxen and/or Ibuprofen.¹⁵⁵

Wilson's search involved what the Court believed was an extremely intrusive search with insufficient suspicion that it would *pay off*.¹⁵⁶ What reduced the probability of a payoff? The heart of the problem was that Wilson was searching for specific drugs that violated the school policy but were commonly used pain relievers. These drugs only posed a threat if used in large numbers and he had no information suggesting that was occurring within the student body.¹⁵⁷ He also lacked any evidence that there was a general practice among students in the school of hiding contraband in their underwear.¹⁵⁸ So, even if one believed that Wilson should have been overly cautious and assumed an individual student might possess and consume large amounts of these pain relievers, he still did not have information to support a reasonable suspicion that large quantities would be kept in a student's underwear.¹⁵⁹ Put another way, he did not have sufficient information to create a moderate chance of finding large quantities of these drugs in Redding's underwear. Under *T.L.O.*, an intrusion of this magnitude requires a reasonable suspicion of danger or specific information that evidence of wrongdoing was hidden in her underwear.¹⁶⁰ Both were lacking in this case.¹⁶¹

Arguably there are some inconsistencies between the Court's observations in its *T.L.O.* decision and *Safford*. Previously the Court clearly stated that school officials are afforded a high level of discretion in assessing what rules were needed in schools to maintain discipline and order.¹⁶² This point was reiterated

¹⁵² See *supra* note 22 and accompanying text.

¹⁵³ See *Safford*, 129 S.Ct. at 2641.

¹⁵⁴ See *Safford*, 129 S.Ct. at 2641.

¹⁵⁵ See *id.*; see *T.L.O.*, 469 U.S. at 341-42.

¹⁵⁶ See *Safford*, 129 S.Ct. at 2642.

¹⁵⁷ See *id.* at 2636.

¹⁵⁸ See *id.* at 2642.

¹⁵⁹ See *id.*

¹⁶⁰ See *T.L.O.*, 469 U.S. at 341-42.

¹⁶¹ See *Safford*, 129 S.Ct. at 2643.

¹⁶² See *supra* note 39 and accompanying text.

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in *Safford*.¹⁶³ The national drug problem continues unabated and presumably school administrators must still use their discretion to develop effective methods to detect and deter drug use in their schools. *Safford* is not necessarily inconsistent with any of these observations. It is consistent with what the Court said in many of its previous opinions. Every search is assessed within the specific context in which it occurred. The result is surprising if one assumes that the previous opinions were reducing a student's reasonable privacy expectations to the point where any intrusion would be outweighed by the school's interest, regardless of the nature of the intrusions. Clearly, *Safford* represents both a rejection of that notion and an affirmation of a point previously made by the Court.

School officials still possess a high degree of discretion in setting and enforcing rules designed to maintain order and safety in schools. There is, though, an outer limit on this discretion. The limitation begins at the point where some other competing constitutional protection is threatened.¹⁶⁴ In this case, that point is the privacy interest a student has in intimate parts of her body. As was seen in the previous cases, privacy interests are not absolute; however, the nature and level of an intrusion into intimate parts of a student's body required a greater and more specific threat than was present. The decision affirms a principle that the Court has acknowledged in a variety of contexts. Children do not shed their constitutional rights at the school house door.¹⁶⁵

CONCLUSION

This review of the Supreme Court's school search cases discloses some clear principles which the Court has provided for guiding teachers and administrators assigned the task of conducting searches of students. A search conducted based upon individual suspicion is subject to the *T.L.O.* two-part analysis. Moreover, the test was intended to be applied in a common sense fashion with a high degree of deference to the common sense judgment of school officials who are conducting the search. But there is a limit on that deference and that limit begins to take hold when the search invades intimate parts of the body. It would appear that, true to the standard articulated in *T.L.O.*, the scope of the search really is tied to the reasonableness of its objectives and the level of intrusiveness given the age and sex of the student.

A word of caution, however, is in order here. Keep in mind all searches are context specific and the Court did not say anything in its opinion that would suggest that a strip search of a thirteen-year-old female is unconstitutional under all circumstances. What if there had been evidence that students were secreting large amounts of legal drugs in their underwear? Even though the Court pointed to the absence of this circumstance in the case, would it have found the search constitutional if this fact were present? Would the mere possibility that a student might consume large quantities of the drugs justify a search that the Court

¹⁶³ See *Safford*, 120 S.Ct. at 2640; see *supra* note 1.

¹⁶⁴ See *supra* note 34 and accompanying text; see *Safford*, 120 S.Ct. at 2643 (“[T]he Fourth Amendment places limits on the official, even with the high degree of deference that the courts must pay to the educator’s professional judgment.”).

¹⁶⁵ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); see *T.L.O.*, 469 U.S. at 336 (students are subject to First and Fourteenth Amendment protections in school).

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insisted was a categorically distinct type of search? Or, would the Court allow this type of search only for illegal drugs? Keep in mind there are other threats in schools, gangs, for example. Would a strip search be appropriate to search for gang paraphernalia such as types of clothing? The definitive answer to this question will have to await the Court's next decision.

Finally, *Safford* did not involve random drug testing and the Court did not say anything in its decision to undermine the authority of *Vernonia* and *Pottawatomie*. In fact, the authority of these two cases was impliedly strengthened by how the Court characterized strip searches. A wall of separation, so to speak, was placed between this line of cases and *Safford* by the Court referring to a strip search as either being a categorically different search or a quantum leap in the level of invasion of privacy. For the time being, random drug testing of athletes and mandatory drug testing of students who participate in competitive extracurricular activities are permissible. But, given the existence of the national drug epidemic, may a school randomly test *all* students regardless of the participation or lack of participation in extracurricular activities? This, too, will have to await the Court's next decision.