

## **Student Note: Societal Concerns Over the Drug Epidemic Have Turned America's Public Schools into Constitutional Dead Zones**

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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. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

-Justice Jackson, 1943<sup>1</sup>

### **INTRODUCTION**

During President Biden's 2023 State of the Union Address, he shared the heartbreaking, yet relatable, story of a young girl named Courtney.<sup>2</sup> Courtney, like many Americans, discovered pills in high school.<sup>3</sup> She became severely addicted and unfortunately, at the young age of twenty, passed away as a result of a fentanyl overdose.<sup>4</sup> As President Biden stated, Courtney's story is “all too familiar to millions

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1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

2. Joe Biden, President of the U.S., State of the Union Address (Feb. 7, 2023).

3. *Id.*

4. *Id.*

of Americans.”<sup>5</sup> While President Biden commended Courtney's family for working to end the stigma surrounding overdose, and advocating for legislation reform, he also acknowledged the necessity that there be government support so these families do not have to battle this alone.<sup>6</sup>

Fentanyl is responsible for the deaths of more than 70,000 Americans a year.<sup>7</sup> That statistic, and the problem it represents, is startling. It is startling enough that President Biden needed to address it during his State of the Union Address, and startling enough that he called on our government to "launch a major surge" to stop the production, sale, and trafficking of fentanyl.<sup>8</sup>

While alarming, the fentanyl death statistic alone does not begin to fully represent America's drug epidemic. In 2017, former President Trump declared a national public health emergency.<sup>9</sup> Between the years of 2000 and 2020, drug overdoses accounted for nearly one million deaths in the United States.<sup>10</sup> In 2021 alone, more than 106,000 individuals in the U.S. died from drug-involved overdoses, involving both illicit drugs and prescription opioids.<sup>11</sup> President Biden's call upon lawmakers is not the first of its kind, and certainly will not be the last. Despite the efforts of both private American citizens and government actors, the opioid and illicit drug crisis remains one of the toughest battles in the United States.

Courtney's story represents the harsh reality that adolescents are also affected by drug abuse and overdose. Nationwide, 2.08 million twelve to seventeen-year-olds report having used drugs in the last month.<sup>12</sup> Nearly nine percent of eighth graders have used illicit drugs in the last month, and twenty-one percent report having tried illicit drugs at least once.<sup>13</sup> By the time adolescents are in the twelfth grade, nearly

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Combating the Opioid Crisis: Schools, Students and Families*, U.S. DEP'T. OF EDUC., <https://www2.ed.gov/documents/opioids/site.pdf> (last visited Apr. 14, 2024).

10. *Drug Abuse Statistics*, NAT'L CTR. FOR DRUG ABUSE STAT., <https://drugabusestatistics.org> (last visited Apr. 14, 2024).

11. *Drug Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE (June 30, 2023), <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates>.

12. *Drug Use Among Youth: Facts & Statistics*, NAT'L CTR. FOR DRUG ABUSE STAT., <https://drugabusestatistics.org/teen-drug-use/> (last visited Apr. 14, 2024).

13. *Id.*

forty-seven percent of them have tried illicit drugs.<sup>14</sup> Unfortunately, since 1999, opioid overdose deaths have increased 500 percent among fifteen to twenty-four-year-olds.<sup>15</sup> In the twenty-first century alone, opioid-related overdoses among this age group have increased annually by nearly thirty-one percent.<sup>16</sup> While these statistics are shocking, they are merely a glimpse into the severity of drug abuse among adolescents.

As a result of the drug epidemic, millions of American families are petrified by the possibility that they may lose a child to drug overdose. In response to fears such as these, many families turn to their public school systems for help.<sup>17</sup> This has resulted in schools that were once safe and secure refuges for impressionable children, becoming institutions that foster fear among students, parents, teachers, and faculty.<sup>18</sup> Schools have a responsibility to their students and community to provide a safe environment for children's education, which inherently requires the ability to maintain order and discipline.<sup>19</sup> As fears emerge within society, schools are often given even more responsibility in addressing and minimizing these points of concern. Therefore, it is not surprising, given the severity of America's drug epidemic, that keeping drugs and their resulting violence out of schools has become a top priority across the nation.<sup>20</sup> While this priority is clearly warranted, it has produced grave consequences for America's public-school children's constitutional rights. Specifically, it has caused public-school children to suffer the burden of lawmakers' repeated inability to combat the drug epidemic, despite the many calls from government officials and Americans to do so.

Since lawmakers have failed to rectify the situation, the result has been increased discipline and regulation of our school children, and that in turn has resulted in the Supreme Court repeatedly getting involved in regulating public-school's behavior. While the Court determined long ago that public-school policies and procedures relating

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14. *Id.*

15. *Id.*

16. *Id.*

17. See T. Nikki Eckland, *The Safe Schools Act: Legal and ADR Responses to Violence in Schools*, 31 URB. LAW. 309, 310-11 (1999).

18. *Id.* at 309-10.

19. Judge Tom, *Can a School Official Search a Student?*, ASK THE JUDGE (Aug. 27, 2007), <http://askthejudge.info/can-a-school-search-a-student/>.

20. *Id.*

to drug use are subject to constitutional restraints, it has allowed public schools to satisfy these restraints with a lesser standard than is required for law enforcement regulating the behavior of Americans at large.<sup>21</sup> Specifically, the Court has provided public schools with extensive leverage and discretion, and that has created dead zones for students' constitutional rights. Which then begs the question, why subject public schools to a constitutional framework at all?

The Supreme Court, relying on fifty years of precedent, clarified in the 1969 case *Tinker v. Des Moines Independent Community School District* ("*Tinker*") that children assuredly do not "shed their constitutional rights. . . at the schoolhouse gate."<sup>22</sup> However, the Court then proceeded to hand down decisions that entirely contradict this notion. In the 1985 landmark case, *New Jersey v. T.L.O.* ("*T.L.O.*"), the Supreme Court held that for searches conducted by public-school officials, a "careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause."<sup>23</sup> Specifically, the Court chose to apply a standard of reasonable suspicion to determine the legality of a school official's search of a student which, "will be permissible in its scope 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."<sup>24</sup> This reasonable suspicion standard, hereinafter referred to as the "T.L.O. standard," became the foundational analysis used by the Court when assessing cases involving school officials searching students for evidence of drug use. Unfortunately, the more the T.L.O. standard was applied, the less it served its purpose of balancing public-school officials' interests with students' constitutional rights and ensuring reasonableness.

While it is completely understandable that public-school officials are faced daily with issues that threaten school safety and students' well-being, the way in which these issues are addressed must be restrained by students' constitutional rights. Allowing societal concerns of drug use to trump the rights of students, specifically in the context of their Fourth Amendment right against unreasonable search

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

22. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

23. *T.L.O.*, 469 U.S. at 341.

24. *Id.* at 342.

and seizures, results in constitutional dead zones. Of all places, constitutional dead zones should not exist in institutions that exist to educate and encourage our children to become informed citizens of our democracy.<sup>25</sup>

This Note will unveil how America's public-school children are suffering the consequences of our government being unable to combat the drug epidemic that plagues our country. This Note will examine how the Supreme Court has attempted to balance the interests of both students and public-school officials when handling searches pertaining to potential disciplinary matters relating to drugs. This Note will specifically demonstrate how the Supreme Court has fallen short in protecting students' Fourth Amendment rights by providing schools with far too much discretion in creating disciplinary policies and procedures. Further, this Note will demonstrate how this discretion has resulted in America's public schools becoming constitutional dead zones for their students. Finally, this Note will suggest it may be time for society to reflect on what we deem most important in our public schools - preventing drug use or protecting students' constitutional rights.

## I. SEARCH AND SEIZURE FRAMEWORK

### A. Overview of The Fourth Amendment

The Fourth Amendment of the Constitution reads:

The right of the person to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>26</sup>

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25. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

26. U.S. CONST. amend. IV.

A search under the Fourth Amendment “occurs when an employee or agent of the government violates an individual’s reasonable expectation of privacy.”<sup>27</sup> The Supreme Court held in *Katz v. United States* that a reasonable expectation of privacy contains a two-fold requirement: (1) that a person has exhibited an actual (subjective) expectation of privacy, and (2) that the expectation be one that society is prepared to recognize as “reasonable.”<sup>28</sup>

Searches, rather than seizures, are primarily at issue in the application of the Fourth Amendment to the public-school setting. Nonetheless, seizures do occasionally occur.

A seizure under the Fourth Amendment occurs when three requirements are met: (1) the seizure be accomplished through means intentionally applied; (2) a reasonable person in the same situation had to believe that they were not free to leave at their own will; and (3) a physical constraint of the suspect is attempted whether through the application of physical force or the suspect submits to an act or show of authority.<sup>29</sup>

## B. The Fourth Amendment's Application to the States

The Fourteenth Amendment's Due Process Clause states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>30</sup> The Due Process Clause applied the Bill of Rights to the States through a process referred to as the incorporation doctrine.<sup>31</sup> Following the passage of the Fourteenth Amendment and its Due Process Clause, the Supreme Court held in a string of cases that the incorporation doctrine includes the Fourth Amendment rights to be free

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27. Definition of Fourth Amendment, CORNELL L. SCH.: LEGAL INFO. INST. (May 2023), [https://www.law.cornell.edu/wex/fourth\\_amendment#:~:text=A.,individual's%20reasonable%20expectation%20of%20privacy](https://www.law.cornell.edu/wex/fourth_amendment#:~:text=A.,individual's%20reasonable%20expectation%20of%20privacy).

28. *Katz v. U.S.*, 389 U.S. 347, 360-61 (1967).

29. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989); *U.S. v. Drayton*, 536 U.S. 194, 197 (2002); *Cal. v. Hodari D.*, 499 U.S. 621, 625 (1991).

30. U.S. CONST. amend. XIV, § 1.

31. See Definition of Incorporation Doctrine, CORNELL L. SCH.: LEGAL INFO. INST. (Oct. 2022), [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine).

from unreasonable search and seizures and to have excluded from criminal trials any evidence illegally seized.<sup>32</sup>

### C. The Fourteenth Amendment's Application to Public-School Officials

On re-argument, the State of New Jersey in *T.L.O.* proposed that while public-school officials are state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them because the Fourth Amendment was intended to regulate only searches and seizures performed by law enforcement officers.<sup>33</sup> In responding to this argument, the Supreme Court reaffirmed that, “the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment.”<sup>34</sup>

The Supreme Court pointed out it has never limited the Amendment's prohibition on unreasonable searches and seizures to only apply to law enforcement's conduct.<sup>35</sup> Rather, the Court has long considered the Fourth Amendment's strictures as restraints on “governmental action,” which is, “upon the activities of sovereign authority.”<sup>36</sup> The Fourth Amendment has been found to restrain the conduct of many individuals including civil and criminal authorities, building inspectors, Occupational Safety and Health Act inspectors, and even firemen entering privately owned property and premises.<sup>37</sup> The Supreme Court, citing their observation in *Camara v. Municipal Court*, stated, “[the] basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”<sup>38</sup> Since an individual's interest in privacy and personal security suffers regardless of whether the government's motivation is to investigate a

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32. *See* *Duncan v. La.*, 391 U.S. 145, 147- 48 (1968).

33. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985).

34. *Id.*

35. *Id.* at 335.

36. *Id.* (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)).

37. *Id.*

38. *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

violation of criminal law or other statutory or regulatory standards, it is “anomalous” to conclude that an individual and their private property are fully protected by the Fourth Amendment only when the individual is a suspect of criminal behavior.<sup>39</sup>

Several courts had previously held that school officials were exempt from the Fourth Amendment's restraints because of “the special nature of their authority over schoolchildren.”<sup>40</sup> Specifically, these courts concluded that school administrators and teachers act in “*loco parentis*,” meaning their authority is that of a parent rather than the State, and therefore not subject to Fourth Amendment restraints.<sup>41</sup> The Supreme Court rejected this reasoning because it is in tension with not only contemporary reality, but precedent.<sup>42</sup> The Court referenced its holding in *Tinker*, which subjected school officials to First Amendment requirements, in determining that if school authorities are considered state actors for the purpose of constitutional guarantees of freedom of expression and due process, it is difficult to understand why school authorities would be deemed to exercise parental rather than public authority when conducting searches of students.<sup>43</sup> In a more general sense, the Supreme Court also recognized that the notion of parental delegation as a source of school authority is not completely “consonant with compulsory education laws.”<sup>44</sup> Public-school officials today act in furtherance of publicly mandated educational and disciplinary policies more so than exercising authority voluntarily conferred on them by parents.<sup>45</sup> Therefore, the Supreme Court concluded in *T.L.O.* that when carrying out searches and seizures pursuant to publicly mandated policies, public-school officials act as state representatives rather than surrogates for parents, and do not qualify for parental immunity from the restraints of the Fourth Amendment.<sup>46</sup> Accordingly, public-school officials are required to act within the restraints of the Fourth Amendment.

## II. CASES

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39. *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967)).

40. *Id.* at 336.

41. *Id.*

42. *Id.*

43. *Id.*

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

45. *Id.*

46. *Id.* at 336-37.



The following cases will not only demonstrate how the Supreme Court came to establish the T.L.O. standard for assessing the legality of searches and seizures conducted by public-school officials, but also how this standard has been routinely misconstrued to justify almost any behavior of public-school officials as “reasonable,” to the detriment of students' constitutional rights.

### A. New Jersey v. T.L.O

To understand how the application of the T.L.O. standard resulted in constitutional dead zones, it is necessary to understand why the Supreme Court chose this standard, and what purpose it intended to serve.

On March 7, 1980, two female students attending a public school in Middlesex County, New Jersey were discovered smoking in the bathroom by a teacher.<sup>47</sup> One of the students was respondent, T.L.O., who was fourteen years old at the time.<sup>48</sup> The students were taken to the Principal's office because smoking in the bathroom violated school rules.<sup>49</sup> Upon arrival, Assistant Vice Principal Mr. Choplick questioned T.L.O. who denied she had been smoking in the bathroom and claimed she did not smoke at all.<sup>50</sup> Mr. Choplick discovered a pack of cigarettes and a pack of cigarette rolling papers in T.L.O.'s purse after demanding to see it.<sup>51</sup> Based on his experience with high school students, he believed that possession of rolling papers was associated with the use of marijuana.<sup>52</sup> Therefore, because he suspected that a closer examination of the purse would yield further evidence of drug use, he proceeded to search the purse thoroughly.<sup>53</sup> The search revealed a small amount of marijuana, a pipe, several empty plastic bags, a substantial quantity of money in one-dollar-bills, an index card that appeared to list students who owed T.L.O. money, and two letters that implicated T.L.O. in

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47. *Id.* at 328.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

selling marijuana.<sup>54</sup> Mr. Choplick notified T.L.O.'s mother, and the evidence found in T.L.O.'s purse was turned over to the police.<sup>55</sup> Complying with the police's request, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marijuana at the high school.<sup>56</sup>

The procedural history of the case demonstrates how divided courts were on how to properly assess the legality of a search conducted by a public-school official, and how necessary it was for a standard to be established that could be easily applied.

Based on the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County.<sup>57</sup> T.L.O. moved to suppress the evidence seized by Mr. Choplick and her subsequent confession, on the grounds that Mr. Choplick's search of her purse violated the Fourth Amendment, and the unconstitutional search tainted her confession.<sup>58</sup> The Juvenile Court denied the motion to suppress because, while it applied the Fourth Amendment to searches carried out by public-school officials, it concluded Mr. Choplick's search was reasonable and therefore permissible.<sup>59</sup> Specifically, the Juvenile Court determined that:

a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.<sup>60</sup>

Applying this standard, the Juvenile Court believed the initial decision of Mr. Choplick to search T.L.O.'s purse was justified by his suspicion that T.L.O. had violated school rules.<sup>61</sup> Once he had opened the purse, the evidence of marijuana violations were in plain view, which then

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54. *Id.*

55. *Id.*

56. *Id.* at 329.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

permitted a more thorough search to determine the nature and extent of T.L.O.'s drug-related activities.<sup>62</sup> Having held the search as reasonable, the Juvenile Court found T.L.O. delinquent and she was sentenced to a year of probation.<sup>63</sup>

On appeal from the Juvenile Court's judgment, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation.<sup>64</sup> T.L.O. appealed this ruling, which the Supreme Court of New Jersey reversed, and ordered the suppression of the evidence found in T.L.O.'s purse.<sup>65</sup> The Supreme Court of New Jersey agreed with the Juvenile Court's standard permitting a warrantless search by a public-school official so long as reasonable grounds exist to believe the student is disturbing school order.<sup>66</sup> However, the Supreme Court of New Jersey did not agree with the Juvenile Court's conclusion that under this standard Mr. Choplick's search was reasonable.<sup>67</sup> The majority concluded the evidence in T.L.O.'s purse had no bearing on the accusation against T.L.O., because merely possessing cigarettes, as opposed to smoking them in the bathroom, was not against school rules, and a mere desire for evidence that would discredit T.L.O.'s statement that she did not smoke did not justify searching her purse.<sup>68</sup> Further, even if a reasonable suspicion that T.L.O. was carrying cigarettes in her purse would justify a search, Mr. Choplick had no such suspicion.<sup>69</sup> While the Supreme Court of New Jersey left aside whether Mr. Choplick had reason to open the purse at all, it held that the evidence he saw inside the purse did not justify the more thorough search of T.L.O.'s papers and effects that followed.<sup>70</sup>

The Supreme Court granted the state of New Jersey's certiorari petition, which raised only the question of whether evidence unlawfully seized by a public-school official should be barred from consideration in juvenile delinquency proceedings.<sup>71</sup> As a result of the State of New

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62. *Id.* at 329-30.

63. *Id.* at 330.

64. *Id.*

65. *Id.*

66. *Id.* at 330-31.

67. *Id.* at 331.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

Jersey having conceded previously that the reasonableness standard devised by the New Jersey Supreme Court for determining the legality of a school search was appropriate and had been correctly applied to the facts at issue, by this stage the State was merely contending that the remedial purposes of excluding unlawfully seized evidence were not well served by applying it to searches conducted by public-school officials.<sup>72</sup> However, the Supreme Court, having doubts on the wisdom of deciding that question apart from the broader question of what limits, if any, the Fourth Amendment places on public-school officials, decided to reargue the legality of such searches.<sup>73</sup> Ultimately, after hearing arguments on the legality of the search, the Supreme Court reversed the judgment of the Supreme Court of New Jersey, and determined the search of T.L.O.'s purse did not violate the Fourth Amendment under the new reasonableness standard which the Supreme Court established in this case.<sup>74</sup>

Following the Court's reaffirmation that the Fourth Amendment applies to searches conducted by public-school officials, the Court noted that while the underlying command of the Fourth Amendment is that searches and seizures always be reasonable, "what is reasonable depends on the context within which the search takes place."<sup>75</sup> In determining the standard of reasonableness for governing a specific class of searches, such as those conducted by public-school officials, a balancing test must be performed between the need for the search and the invasion the search entails.<sup>76</sup> One side of the balancing test is individuals' legitimate expectations of privacy and security; and on the other side, the government's need for effective methods to deal with breaches of public order.<sup>77</sup> In the context of public schools, the balancing test would occur between students' expectations of privacy, and the substantial interest of public-school officials in maintaining order.<sup>78</sup>

The Court began its reasonableness analysis by concluding that, "a search of a child's person or of a closed purse or other bag carried on

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72. *Id.*

73. *Id.* at 332.

74. *Id.* at 332-33.

75. *Id.* at 337.

76. *Id.*

77. *Id.*

78. *Id.* at 339.

her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."<sup>79</sup> Therefore, so long as T.L.O.'s subjective expectation of privacy in the contents of her purse was one that society was ready to recognize as legitimate and reasonable, it would be protected by the Fourth Amendment.<sup>80</sup> The Court rejected the State of New Jersey's argument that a child has "virtually no legitimate expectation of privacy in articles of personal property 'unnecessarily' carried into a school," because while it is a difficult task for public-school officials to maintain discipline, it is not so difficult that students in public schools cannot claim a legitimate expectation of privacy.<sup>81</sup> Further rejecting New Jersey's argument, the Court acknowledged that students may need to carry with them to school a variety of non-contraband items, and there are no grounds for concluding they have waived their rights of privacy in these items merely by bringing them onto school property.<sup>82</sup>

However, while the Court validated students' expectations and interests in privacy, it concluded they must be weighed against the substantial interests of public-school officials in maintaining order and discipline on school property.<sup>83</sup> Given the rise in school disorder, and the fact that "ugly" drug use in schools had become a major societal issue in the years prior to 1985, the Court recognized the need for a degree of flexibility in school disciplinary procedures.<sup>84</sup> To meet this degree of flexibility, the Court determined public-school officials are not required to adhere to restrictions placed on law enforcement.<sup>85</sup> Specifically, public-school officials do not need to obtain a warrant before searching a student under their authority, as requiring teachers to obtain a warrant prior to searching a child that is violating school rules (or criminal law), "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in schools."<sup>86</sup> Additionally, public-school officials do not need to have probable cause

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79. *Id.* at 337-38.

80. *See id.*

81. *Id.*

82. *Id.* at 339.

83. *Id.*

84. *Id.*

85. *Id.* at 340.

86. *Id.*

to conduct a search.<sup>87</sup> Rather, in the context of public schools, the legality of a search of a student should depend on the "reasonableness, under all the circumstances of the search."<sup>88</sup> This conclusion officially instituted the reasonable suspicion test for searches conducted by public-school officials.<sup>89</sup>

To determine the reasonableness of a search, the Court formulated a twofold inquiry to be assessed: "first, one must consider 'whether the . . . action was justified at its inception,' and second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"<sup>90</sup> Under ordinary circumstances in a public-school setting, a search of a student by a school official or teacher "will be justified at its inception when there are 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."<sup>91</sup> This type of search, "will be permissible in its scope 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."<sup>92</sup>

At the time, the Court justified its decision to institute a reasonable suspicion standard in the context of public-school searches because it felt this standard would neither unduly burden public-school officials nor permit unrestrained intrusions on students' privacy.<sup>93</sup> The Court proposed that this standard would spare public-school officials from becoming experts in probable cause and permit them to act according to the "dictates of reason and common sense," while also ensuring "that the interests of students will be invaded no more than is necessary to achieve a legitimate end of preserving order in the schools."<sup>94</sup>

In applying its new reasonableness standard to the facts of this case, the Court concluded the search of T.L.O.'s purse was in no way

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87. *Id.* at 341.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 341-42.

92. *Id.* at 342.

93. *Id.* at 343.

94. *Id.*

unreasonable for Fourth Amendment purposes.<sup>95</sup> An examination was given to both the initial search of T.L.O.'s purse for cigarettes, and the more thorough search that followed the discovery of rolling papers.<sup>96</sup> The initial search was found to be reasonable because the relevance of T.L.O.'s possession of cigarettes to the question of whether she had been smoking in the bathroom and to the credibility of her denial, provided the "necessary nexus" between the cigarettes being searched for, and the infraction of smoking in the bathroom which was under investigation.<sup>97</sup> Therefore, so long as Mr. Choplick had a reasonable suspicion that T.L.O. was carrying cigarettes in her purse, the search was justified even though the cigarettes, if found, were simply evidence of a violation.<sup>98</sup> Further, because it was a reasonable conclusion of Mr. Choplick to assume if T.L.O. were smoking in the bathroom, she was carrying cigarettes in her purse, he did not act unreasonably in deciding to search the purse.<sup>99</sup> The subsequent search was also found to be reasonable because the discovery of rolling papers sufficiently provided a reasonable suspicion that T.L.O. was also carrying marijuana in her purse.<sup>100</sup> Since the Court concluded the search was reasonable under its new standard, the Court reversed the New Jersey Supreme Court's decision to exclude the evidence found in T.L.O.'s purse, finding the decision to exclude that evidence on a Fourth Amendment basis to be "erroneous."<sup>101</sup>

Although the Court found the search in this case to be reasonable, it clearly had high hopes for the standard of reasonableness it established in determining this case. The Court instituted the standard of reasonable suspicion as a means to satisfy its goal of balancing both students' privacy interests and public-school officials' interests in maintaining order and discipline. Unfortunately, the Court's goal was short-lived. The Court succeeded in its desire to provide public-school officials with enough discretion to handle disciplinary matters. However, that discretion has been applied in ways that have stripped

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95. *Id.*

96. *Id.* at 343-44.

97. *Id.* at 345.

98. *Id.*

99. *Id.* at 347.

100. *Id.*

101. *Id.* at 347- 48.

public-school students of their constitutional rights entirely. So, while this decision initially appeared to have been in furtherance of the *Tinker* statement which assured students do not "shed their constitutional rights. . . at the schoolhouse gate," it ultimately was the grounds for that statement becoming untrue.<sup>102</sup> As the following cases will demonstrate, the Supreme Court's decision to institute a Fourth Amendment assessment standard focused entirely on the "reasonableness" given the circumstances, created constitutional dead zones in public schools. Specifically, these cases will demonstrate how the Court tends to find anything "reasonable," when it is in the name of protecting our children from societal issues such as drug use.

### **B. Vernonia School District 47J v. Acton**

Ten years after *T.L.O.*, the Supreme Court granted certiorari for *Vernonia School District 471 v. Acton* ("*Vernonia*") to assess the legality of a public-school policy requiring students to be drug tested in order to participate in school athletics.<sup>103</sup> The family of James Acton ("James") brought suit against Vernonia School District 47J ("District") after James was prohibited from playing football because he and his parents would not sign the drug testing consent forms required by the school.<sup>104</sup> The Actons claimed the District's drug testing policy violated both the Fourth and Fourteenth Amendments of the Constitution.<sup>105</sup> Despite *T.L.O.* implementing a standard which should have made it easier on courts to assess the legality of searches conducted by public-school officials, the procedural history of this case demonstrates how courts remained divided on what the outcome of these cases should be. Initially, the Acton family's claims were dismissed by the District Court for lacking merit.<sup>106</sup> The United States Court of Appeals for the Ninth Circuit reversed this decision, finding the District's drug testing policy did violate the Fourth and Fourteenth Amendment, which the Supreme Court eventually held to be in error.<sup>107</sup>

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102. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

103. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

104. *Id.* at 651.

105. *Id.*

106. *Id.* at 652.

107. *Id.*



Drugs had never been a major problem in the District's schools until a few years prior to the suit when school officials and teachers noticed an increase in disciplinary referrals, which they blamed on a "sharp increase in drug use."<sup>108</sup> The District believed that student athletes were leading the "drug culture," which caused concern because drug use has been found to increase the risk of sports-related injuries.<sup>109</sup> In an effort to combat this issue and its related concerns, the District held a parent "input night" to discuss implementing a policy that would authorize random urinalysis drug testing of students who participated in athletic programs.<sup>110</sup> Following this discussion, the school board approved the Student Athlete Drug Policy ("Policy") because the parents in attendance gave their unanimous approval.<sup>111</sup>

The Policy applied to all students that participated in interscholastic sports.<sup>112</sup> To play a sport, the student and their parents had to sign a written consent form that permitted the school to test the student at the beginning of the sport season, and randomly throughout the season.<sup>113</sup> Tests were conducted in locker rooms where only the student and an adult monitor of the same sex were present.<sup>114</sup> Male students produced a sample at a urinal with their back to the monitor.<sup>115</sup> Monitors could watch and listen for sounds of urination from at least twelve feet behind the male student.<sup>116</sup> Female students produced samples in an enclosed bathroom stall, and monitors could only listen for sounds of urination from outside the stall.<sup>117</sup> Once the student produced a sample, the monitor checked it for signs of tampering, and then placed it in a vial.<sup>118</sup> The samples were then sent to an independent laboratory with no identifying information to protect the anonymity of

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108. *Id.* at 648.

109. *Id.* at 649.

110. *Id.* at 649-50.

111. *Id.* at 650.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

the students.<sup>119</sup> Only school administrators and athletic directors had access to the results of the tests.<sup>120</sup>

Since the Supreme Court had previously held that the state-compelled collection and testing of urine constitutes a “search” under the Fourth Amendment, assessing the legality of this search implicated the T.L.O. standard.<sup>121</sup> While the Court applied the T.L.O. standard in assessing the search at issue in this case, it failed to do so in the way intended.

This assessment began with a consideration of the nature of the student’s privacy interests upon which the Policy at issue intruded.<sup>122</sup> The Court found it central to this consideration that the subjects of the Policy were children who had been “committed to the temporary custody of the State as schoolmaster.”<sup>123</sup> Relying on the following statement from *T.L.O.*, the Court mistakenly contended that schools’ supervisory responsibility controls this aspect of the reasonableness analysis: “a proper education environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”<sup>124</sup> This statement was not only taken out of context but gravely misconstrued. While it was acknowledged in *T.L.O.* that a special relationship exists between students and school officials, the notion that public-school officials have parental power over students in the context of searches was explicitly rejected.<sup>125</sup> Instead, the Court found that school’s authority in disciplinary matters comes largely in part from publicly mandated education and disciplinary policies and, therefore, when conducting searches, public-school authorities are state actors.<sup>126</sup> Accordingly, *Vernonia*’s reliance on *T.L.O.*’s mere acknowledgement of the need for supervisory responsibility is entirely contradictory to its determination that the Fourth Amendment restrains public-school officials.<sup>127</sup> Specifically, *Vernonia*’s contention that students’ privacy interests are subject to school’s authority is unwarranted.

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119. *Id.* at 650-51.

120. *Id.* at 651.

121. *Id.* at 651-52.

122. *Id.* at 654.

123. *Id.*

124. *Id.* at 655.

125. *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985).

126. *Id.*

127. *See id.*

Regardless, the Court proceeded to cite instances where students are subjected to various physical examinations and vaccine requirements to justify the notion that students in a school environment have a lesser expectation of privacy than the population generally.<sup>128</sup> Such a contention implies that a child being required to get vaccinated in order to prevent a smallpox outbreak somehow equates to them being monitored while urinating in order to play a sport. It was also determined that student athletes have an even lower expectation of privacy than other students.<sup>129</sup> Since student athletes dress and shower in locker rooms, the Court contended they cannot expect to have much of an expectation of privacy.<sup>130</sup> Even further, because the District required that students get a physical medical examination to try out for a sports team, the Court contended the students voluntarily subjected themselves to more regulation.<sup>131</sup> Such contentions imply that students changing and showering in front of their peers or being assessed by a doctor conducting a medical examination are somehow no less intrusive than being observed while they urinate by their teachers or other elders personally known to them. In summation, the Court concluded that students who voluntarily participate in school athletics should expect intrusions upon their “normal rights and privileges, including privacy,” as if students are capable of knowingly waiving their constitutional rights merely because they want to try out for a sports team.<sup>132</sup>

Following this conclusion, the Court then turned to consider the character of the intrusion at issue.<sup>133</sup> Excretory functions, such as collecting urinalysis samples, have understandably been shielded as being exceedingly private.<sup>134</sup> However, it had previously been determined that the degree of intrusion would depend on the manner used to monitor the urinalysis.<sup>135</sup> After considering the conditions associated with the District’s Policy, the Court determined they were no different than what occurs in a public bathroom.<sup>136</sup> This conclusion

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128. *Vernonia*, 515 U.S. at 657.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.*

133. *Id.* at 658.

134. *Id.*

135. *Id.*

136. *Id.*

seems entirely unreasonable. Where would a child go to a public bathroom alone with an authority figure whom they personally know and whose sole purpose of being there is to watch and listen to them urinate? The answer is clearly nowhere. It is absurd to think a child would feel as comfortable in a public bathroom as they would when complying with the District's Policy. Therefore, the Court's determination that the privacy interests compromised by the process used by the District to collect the samples was negligible is unjustified and entirely unfair to students.<sup>137</sup>

Lastly, the Court considered "the nature and immediacy of the governmental concern at issue, and the efficacy of [the Policy] for meeting it. . ."<sup>138</sup> In assessing the nature of concern, the Court noted that deterring drug use among our schoolchildren is highly important given the heightened effects drugs have on students during their school years.<sup>139</sup> The Court also reemphasized the fact that the Policy targeted only school athletes, who were at risk for sports-related injuries if they were using drugs.<sup>140</sup> As for immediacy of the District's concerns, the Court was not inclined to question the District's assessment of its crises, essentially trusting their judgment.<sup>141</sup> In assessing the efficacy of the means the District enacted to address the drug problem, the Court felt it seemed self-evident that a drug problem being encouraged by student athletes is addressed adequately by ensuring that student athletes do not use drugs.<sup>142</sup>

In conclusion, the Court conceded to the fact that suspicionless drug testing would not necessarily be constitutionally acceptable in other contexts.<sup>143</sup> Rather, this Policy only passed constitutional muster because of the Court's unwarranted emphasis on the public school's authority, and their efforts to subside societal concerns regarding the drug epidemic.<sup>144</sup>

*Vernonia's* repeated reliance on assessing the government's responsibilities, "as guardian and tutor of children entrusted to its care,"

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137. *See id.*

138. *Id.* at 660.

139. *Id.* at 661.

140. *Id.* at 662.

141. *Id.* at 662-63.

142. *Id.* at 663.

143. *Id.* at 665.

144. *See id.*

is contradictory to *T.L.O.*<sup>145</sup> Additionally, its proposition that, "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake," is unwarranted.<sup>146</sup> While the Court in *T.L.O.* never drew the line of when a school official transitions its responsibility from guardian and tutor to state actor, it did explicitly hold that when conducting a search, they are representatives of the State for purposes of the Fourth Amendment.<sup>147</sup> Therefore, it is irrelevant to an analysis utilizing the T.L.O. standard to consider the behavior of guardians and tutors, since the standards purpose is to ensure that school officials, who are deemed state actors for purposes of the Fourth Amendment, acted reasonably in conducting a search of a student.<sup>148</sup>

Lastly, the Court concluded the opinion by noting that the primary guardians of the District's children agreed with this Policy, and that they found no basis to contradict the judgment of these parents or the school board.<sup>149</sup> Given *T.L.O.*'s determination that when performing searches, "school officials act as representatives of the State, not merely as surrogates for the parents," the parent's approval of the Policy should be irrelevant to the Court's assessment of the Policy's constitutionality.<sup>150</sup> Rather, the assessment should depend on the policies and laws that exist to protect the students' rights.

The T.L.O. standard was established as a means for balancing both governmental and private interests.<sup>151</sup> While the T.L.O. standard examines whether the scope of the search was related to its objective, and the search was not excessively intrusive in light of the circumstances, its intention was inherently to require a consideration of students' privacy interests when assessing the legality of a search.<sup>152</sup> The *Vernonia Court's* misinterpretation of the T.L.O. standard, specifically its commitment to negating students' privacy interests as a result of school's authority, is detrimental to students' constitutional rights. The

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145. *See id.*

146. *See id.*

147. *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985).

148. *See id.*

149. *Vernonia*, 515 U.S. at 665.

150. *See T.L.O.*, 469 U.S. at 336.

151. *Id.* at 341-43.

152. *See id.*

Court overlooked a key piece of the balancing test which the T.L.O. standard set out to satisfy — the students. It is highly concerning that the Court in *Vernonia* seems to have concluded that students' interests are second to the schools' interests and societal concerns relating to the drug epidemic. Even more concerning is the notion that students' rights are somehow subjective to what public-school officials, and in this case, their parents, determine them to be. Such conclusions are not only in opposition of the T.L.O. standard but are in opposition of students' constitutional rights.

The *Vernonia* decision is one of many examples which exemplifies how public schools have become constitutional dead zones because of the Court's repeated disregard of students' privacy interests. While the holding of *T.L.O.* began to suggest that the *Tinker* statement assuring that students do not "shed their constitutional rights. . . at the schoolhouse gate," was not true in practice, the Court in *Vernonia* solidified that suggestion by conditioning the statement to now read, "while children assuredly do not 'shed their constitutional rights. . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school."<sup>153</sup>

### C. Board of Education v. Earls

The following case, *Board of Education v. Earls* ("*Earls*"), demonstrates the danger that comes from the Court relying on misguided principles, such as those in *Vernonia*, to determine the legality of a search conducted by a public-school official. Specifically, how providing school officials with too much discretion encourages the encroachment on even more students' constitutional rights. In this case in particular, the school at issue implemented a suspicionless drug testing policy virtually identical to the one in *Vernonia*; however, this policy was applied to more than just athletes.<sup>154</sup>

In the fall of 1998, the Tecumseh, Oklahoma School District ("District") instituted the Student Activities Drug Testing Policy ("Policy") which required all middle and high school students who wished to participate in an extracurricular activity to consent to drug

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153. *Vernonia*, 515 U.S. at 655-56.

154. *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002).

testing.<sup>155</sup> As in *Vernonia*, the Policy required students to take a drug test before participating in an extracurricular activity and submit to random drug testing during participation.<sup>156</sup> Even further than *Vernonia*, the District also required students to agree to be tested at any time "upon reasonable suspicion."<sup>157</sup> The drug tests were to be conducted by urinalysis designed to detect only the use of illegal drugs.<sup>158</sup>

Both respondents were high school students.<sup>159</sup> Respondent Lindsay Earls ("Lindsay") was involved in choir, marching band, the Academic Team, and the National Honor Society.<sup>160</sup> Respondent Daniel James ("Daniel") (collectively with Lindsay and parents, "Respondents") wanted to participate in the Academic Team.<sup>161</sup> Lindsay and Daniel along with their parents brought an action against the District challenging the tests and alleging that the Policy violated their Fourth Amendment rights.<sup>162</sup> Respondents also alleged that the District failed to identify a special need for testing students involved in extracurricular activities, and that the Policy neither addressed a proven problem nor promised to bring benefit to students or the school as a whole.<sup>163</sup>

While the procedural history of *Vernonia* demonstrates that despite the T.L.O. standard courts were still divided on what the outcome of these cases should be, the procedural history of *Earls* is even more demonstrative. Specifically, it is evident from the procedural history that courts struggled to know how to apply the T.L.O. standard, especially given the misguided principles proposed by the Court in *Vernonia*, which seemed to merely complicate the assessment. The United States District Court for the Western District of Oklahoma, relying on *Vernonia's* principles, rejected Respondents' claims and granted summary judgment to the District.<sup>164</sup> In its determination, the District Court stated that the District need only show a history of drug abuse rather than a drug problem of "epidemic proportions," to support

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155. *Id.* at 826.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 826-27.

163. *Id.* at 827.

164. *Id.*

a finding of reasonableness.<sup>165</sup> The United States Court of Appeals for the Tenth Circuit reversed, holding that the Policy did violate the students' Fourth Amendment rights.<sup>166</sup> The Court of Appeals agreed with the District Court that the Policy's constitutionality needed to be evaluated in the context of the school setting.<sup>167</sup> However, the Court of Appeals concluded that in order to impose a suspicionless drug testing program, a school would need to demonstrate that an identifiable drug abuse problem exists among a sufficient number of those students being tested, such that testing those students would actually redress its drug problem.<sup>168</sup> Therefore, because the District failed to demonstrate such a problem existed among the District's students participating in extracurricular activities, the Policy was unconstitutional.<sup>169</sup> The Supreme Court granted certiorari and eventually reversed the Court of Appeals holding.<sup>170</sup>

Following precedent, the Court reviewed the District's Policy for reasonableness.<sup>171</sup> The Court began by addressing Respondents' argument that drug testing must be based on some level of individualized suspicion.<sup>172</sup> By relying on *Vernonia's* unwarranted emphasis on considering the schools supervisory responsibility for children in assessing reasonableness, the Court determined that, "a finding of individualized suspicion may not be necessary when a school conducts drug testing."<sup>173</sup> Essentially, the Court found that because precedent had found that "special needs" are inherent in public school contexts, schools need not have suspicions of a particular student using drugs.<sup>174</sup> Rather, the Court need only have a suspicion that at least one student, of all the students in the testing pool, is using drugs for the test to have sufficient grounds.<sup>175</sup>

Following *Vernonia's* principles, the Court proceeded to analyze the reasonableness of the Policy by supposedly balancing the

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165. *Id.*

166. *Id.*

167. *Id.* at 827-28.

168. *Id.* at 828.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 829.

173. *Id.* at 830.

174. *Id.* at 829-30.

175. *See id.*



intrusion on students' privacy interests against the legitimate interests of the government.<sup>176</sup> After "considering" both the nature of the privacy interests of the students and the character of the intrusion imposed by the Policy, the Court found that the invasion of the students' privacy was insignificant, "[g]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results are put. . ."<sup>177</sup> The term "considering" has been placed in quotes because although the Court stated it was considering both the interests of students and the school, the only true consideration conducted was regarding the interests of the public school. No explicit analysis was conducted related to students' privacy rights. Rather, relying on *Vernonia*, it was merely stated that students' privacy interests were limited in the public school context because of the government's responsibilities as guardians and tutors of school children.<sup>178</sup> Further, Respondents' argument that students participating in nonathletic extracurriculars had a higher expectation of privacy than athletes was quickly disregarded on the grounds that the Court did not decide *Vernonia* by distinguishing between athletic and nonathletic extracurriculars.<sup>179</sup> It was instead determined based on the school's custodial responsibility and authority.<sup>180</sup> Additionally, the Court viewed athletic and nonathletic extracurriculars as synonymous because the students involved in both voluntarily subjected themselves to invasions of privacy.<sup>181</sup> Specifically, because nonathletic extracurriculars may occasionally require students to engage in off-campus travel, engage in communal undress, and are governed by rules and regulations not applicable to the entire student body, a student's expectation of privacy is the same regardless of which extracurricular activity they participate in.<sup>182</sup> In summation, the Court concluded that the students affected by this Policy in particular had a limited expectation of privacy even though they were not athletes.<sup>183</sup>

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176. *Id.* at 830.

177. *Id.* at 834.

178. *Id.* at 830.

179. *Id.* at 831.

180. *Id.*

181. *Id.*

182. *Id.* at 832.

183. *Id.*

The Court then "considered" the character of the intrusion imposed by the Policy by relying on *Vernonia's* principle that the degree of intrusion on a student's privacy expectation when producing a urine sample depends on the way it was monitored.<sup>184</sup> The Policy was essentially identical to the one in *Vernonia*, except male students were allowed to produce their sample in an enclosed stall with a monitor outside rather than watching from a few feet behind.<sup>185</sup> The Policy required the test results to remain confidential and released to school officials only on a need to know basis.<sup>186</sup> Although Respondents pointed out that on one occasion the choir teacher failed to effectively protect against the disclosure of students' confidential information by leaving students' prescription drug lists where other students had access to view them, the Court disregarded this as merely "one example of alleged carelessness."<sup>187</sup> Further, because the choir teacher would be someone in the "need to know" category when taking students on off-campus trips, the Court concluded she would have had access to this information even before the Policy was enacted, and therefore the Policy could not be blamed for her carelessness.<sup>188</sup> Lastly, because the school does not report positive test results to law enforcement, and students are allowed three positive test results before being suspended from their extracurricular activity, the Court found that the character of intrusion was insignificant.<sup>189</sup>

Following this half-hearted balancing of interests, the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them, were considered.<sup>190</sup> However, this time, a thorough consideration was actually conducted because the subject matter was not students' interests. In 1995, at the time *Vernonia* was decided, the Court articulated the importance of the government's prevention of drug use among schoolchildren given the extent of the drug problem.<sup>191</sup> Seven years later at the time *Earls* was decided, evidence suggested that the drug abuse problem among youth had only worsened.<sup>192</sup>

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184. *Id.*

185. *Id.* at 832-33.

186. *Id.* at 833.

187. *Id.*

188. *Id.*

189. *Id.* at 833-34.

190. *Id.* at 834.

191. *Id.*

192. *Id.*

Accordingly, the Court pointed out that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school."<sup>193</sup> This statement essentially summarizes the motive for not only the outcome of this case, but all cases where students' constitutional rights are at risk due to concerns related to drug abuse.

The Court reaffirmed that the District was faced with a drug problem when the Policy was adopted.<sup>194</sup> Nonetheless, Respondents contended the evidence provided by the District to demonstrate a drug problem was insufficient, and argued there was no real or immediate interest that would justify drug testing all students participating in an extracurricular activity.<sup>195</sup> The Court responded by stating that because the District provided evidence that a drug problem exists, the District sufficiently "shore[d] up the need" for the program.<sup>196</sup> Given the "need to prevent and deter the substantial harm of childhood drug use," and because the Court has previously upheld preventive drug testing, it found no reason to require a school district to wait for a substantial amount of its students to be using drugs to institute a drug testing program that would deter drug use.<sup>197</sup> This conclusion again reiterates the incredible discretion provided to schools in assessing and attempting to combat their drug problems.

The Court found the District's Policy was "entirely reasonable" given not only the evidence presented by the District, which suggested drug use, but also the nationwide drug epidemic.<sup>198</sup> Further, the Court explicitly rejected the Court of Appeals' test that would have required a school district to demonstrate an identifiable drug abuse problem before imposing a suspicionless drug testing policy, because it felt that such a test would be difficult to administer.<sup>199</sup> Because the Court failed to establish a "threshold level of drug use" sufficient to justify a drug testing program for students, it refused to establish what would be a

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193. *Id.*

194. *Id.* at 835.

195. *Id.*

196. *Id.*

197. *Id.* at 836.

198. *Id.*

199. *Id.*

"constitutional quantum" of drug use sufficient to establish a drug problem.<sup>200</sup>

The Court also rejected Respondents' argument that drug testing should be based upon an "individualized reasonable suspicion of wrongdoing."<sup>201</sup> The Court felt this sort of regime would not be any less intrusive and would likely lead to unfair targeting of certain groups of students.<sup>202</sup> Regardless, even if there was a less intrusive standard for permitting searches of students, the Court has repeatedly held that the Fourth Amendment does not prohibit employing more intrusive means so long as they are reasonable, therefore, a regime of this sort would not be required.<sup>203</sup> Further, the Court believed an individualized reasonable suspicion requirement would burden the already difficult task of maintaining order and discipline.<sup>204</sup>

Finally, the Court found that testing students participating in extracurricular activities was a reasonably effective means for addressing the District's legitimate concerns regarding drug use.<sup>205</sup> By evaluating the Policy's constitutionality in the context of public-school's custodial responsibilities (rather than students' constitutional rights, which should be the focal point), the Court concluded that the Policy effectively served the District's interest in protecting its student's health and safety.<sup>206</sup>

This case, which relied heavily on the misguided principles of *Vernonia*, thoroughly demonstrates how far the Court has strayed from its holding in *T.L.O.*, which stressed the importance of assessing students' privacy rights. The more the Court finds cases such as these to pass constitutional muster, the more schools will expand these policies to affect more and more groups of students and their rights. This trend of the Court seems to suggest that even if a school attempted to drug test an entire study body without cause, it would likely be justified as reasonable. Such an assumption is not far-fetched when considering that our public schools have become constitutional dead zones because of the incredible discretion provided to schools by this Court.

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200. *Id.*

201. *Id.* at 837.

202. *Id.*

203. *See id.*

204. *Id.*

205. *Id.*

206. *Id.* at 838.

### D. Safford Unified School District v. Redding

The following 2009 case, *Safford Unified School District v. Redding*, highlights the horrifying lengths our schools take in conducting searches for drugs, likely because of the discretion provided to them by Supreme Court precedent. Specifically, this case demonstrates the need for the Court to start drawing boundaries and truly adhering to the intentions set forth in *T.L.O.*, as it seems the Court has failed to protect our students' constitutional rights.

Thirteen-year-old Savana Redding was in math class at Safford Middle School one day in October of 2003.<sup>207</sup> Assistant principal, Mr. Wilson, came into her classroom and asked Savana to accompany him to his office where he showed her a day planner that contained several knives, lighters, a permanent marker, and a cigarette.<sup>208</sup> Savana, in response to Mr. Wilson's questioning, explained that while the planner was hers, she had lent it to a friend a few days prior, and the items uncovered by Mr. Wilson were not hers.<sup>209</sup> Mr. Wilson then presented Savana with four white prescription strength ibuprofen pills and one over-the-counter blue naproxen pill, both of which were banned by school rules.<sup>210</sup> Mr. Wilson questioned Savana about the pills and indicated that he received reports that she was giving them to other students.<sup>211</sup> Savana responded that she knew nothing about the pills, and denied giving them to other students, but agreed to let Mr. Wilson search her belongings.<sup>212</sup> With the help of an administrative assistant, Mr. Wilson searched Savana's backpack, and found nothing.<sup>213</sup> Nevertheless, the administrative assistant took Savana to the school nurse's office for a further search.<sup>214</sup> The administrative assistant and the school nurse asked Savana to remove her jacket, socks, shoes, pants, and t-shirt, leaving her in only her bra and underwear.<sup>215</sup> As if that was

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207. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368 (2009).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 369.

215. *Id.*

not intrusive enough, the administrative assistant and the school nurse then instructed Savana to pull her bra out to the side and shake it and pull out the elastic of her underwear.<sup>216</sup> This action exposed her breasts and pelvic area.<sup>217</sup> The search turned up no pills.<sup>218</sup>

Savana's mother filed suit against Safford Unified School District #1 ("District"), Mr. Wilson, the administrative assistant, and the school nurse for conducting a strip search, which she alleged violated Savana's Fourth Amendment rights.<sup>219</sup> These individuals moved for summary judgment and raised a defense of qualified immunity.<sup>220</sup> "The District Court for the District of Arizona granted the motion on the ground[s] that there was no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed."<sup>221</sup> A closely divided Circuit sitting en banc reversed.<sup>222</sup>

The Ninth Circuit, weighing in favor of students' constitutional rights for possibly the first time, "held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in [*T.L.O.*]."<sup>223</sup> The Circuit then found that Savana's right was clearly established at the time of the search, by applying the test for qualified immunity: "[t]hese notions of personal privacy are 'clearly established' in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches."<sup>224</sup> The Circuit reversed summary judgment as to Mr. Wilson and affirmed summary judgment in favor of the administrative assistant and school nurse because they did not act as independent decision makers.<sup>225</sup>

The Supreme Court granted certiorari to explore whether Savana's Fourth Amendment rights were violated when she was subjected to a search of her bra and underwear by public-school officials acting on reasonable suspicion that she brought banned pills to

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216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 369-70.

school.<sup>226</sup> Concluding that there was no reason to suspect the drugs presented a danger or were being kept in her underwear, the Court held that the search violated the Constitution.<sup>227</sup> However, due to the fact that “there [was] reason to question the clarity with which the right was established,” Mr. Wilson was granted qualified immunity from liability for ordering the unconstitutional search.<sup>228</sup>

Relying on *T.L.O.*, the Court applied the reasonable suspicion standard to determine the legality of Mr. Wilson's search of Savana.<sup>229</sup> Given the facts of the case, the Court found there was sufficiently plausible information provided which warranted the suspicion that Savana was involved in distributing banned pills to classmates.<sup>230</sup> A week prior to Savana's search, another student had come forward and told school officials that students were bringing drugs and weapons to school.<sup>231</sup> That same student also told Mr. Wilson that he was given a pill, which ended up being a prescription strength ibuprofen, by a female classmate named Marissa.<sup>232</sup> Marissa was removed from class and was found with Savana's day planner which contained the contraband items.<sup>233</sup> A search of Marissa's wallet and pockets revealed a blue pill which was allegedly given to her by Savana, several white pills, and a razor blade.<sup>234</sup> At the instruction of Mr. Wilson, Marissa was subjected to a search of her bra and underwear as Savana would later be.<sup>235</sup> That search, like Savana's, turned up no additional pills or evidence.<sup>236</sup> It was at this point that Savana was brought into Mr. Wilson's office.<sup>237</sup>

The Court indicated that if a student is suspected of giving classmates banned pills, it is reasonable to suspect that the student is carrying them on their person and/or their belongings.<sup>238</sup> Therefore, no issue was given to Mr. Wilson's search of Savana's bookbag, or even the

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226. *Id.* at 368.

227. *Id.*

228. *Id.*

229. *Id.* at 370.

230. *Id.* at 373.

231. *Id.* at 371-72.

232. *Id.*

233. *Id.* at 372.

234. *Id.*

235. *Id.* at 373.

236. *Id.*

237. *Id.*

238. *Id.* at 373-74.

subsequent search of Savana's outer clothing because the Court concluded neither of these were excessively intrusive.<sup>239</sup> However, issue and thorough consideration were given to the subsequent search that required Savana to pull out her bra and underwear, which the Court addressed as a “strip search.”<sup>240</sup>

While the administrative assistant and school nurse claimed they saw nothing when Savana followed their instructions, the Court refused to “define strip search and its Fourth Amendment consequences” based on who was looking and how much they saw:<sup>241</sup>

Savana pulling her underwear away from her body in the presence of the two [school] 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, and requir[es] distinct elements of justification [by] school authorities for going beyond a search of outer clothing and belongings.<sup>242</sup>

Savana's individual subjective expectation of privacy against a search of this kind was inherent due to her account of it as embarrassing.<sup>243</sup> The reasonableness of her expectation (as the Fourth Amendment standard required) was “indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the intrusiveness of the exposure.”<sup>244</sup> This exposure inherently registers a different meaning to adolescents than other experiences in other school circumstances, say for example, changing for gym class.<sup>245</sup> Agreeing with this sentiment, a number of communities have even determined that strip searches of a student for any reason are so degrading that they may never be reasonable.<sup>246</sup>

While the indignity of the search does not outlaw it, it does implicate the rule of reasonableness that “the search as actually conducted [be] reasonably related in scope to the circumstances which

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239. *Id.*

240. *Id.* at 374.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 375.

245. *Id.*

246. *Id.*



justified the interference in the first place.”<sup>247</sup> Such scope will only be permissible when it is “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>248</sup> Given the circumstances surrounding Savana's search, the Court concluded the content of the suspicion did not match the degree of intrusion.<sup>249</sup> Mr. Wilson knew prior to the search that the pills at issue were common pain relievers and “must have been aware of the nature and limited threat of the specific drugs” being searched for.<sup>250</sup> Accordingly, Mr. Wilson had no reason to suspect any individual students were receiving a large number of pills.<sup>251</sup> Nor did Mr. Wilson have any reason to suspect Savana was concealing pills in her underwear, as no evidence existed that it was a general practice among the student body to hide contraband in their underwear, no one had suggested Savana was doing that, and the preceding strip search of Marissa yielded no pills.<sup>252</sup> Therefore, Mr. Wilson did not have a strong enough suspicion to justify a search as extensive and intrusive as the one conducted on Savana.<sup>253</sup> In summation, the Court found that because there was no indication of danger to the student body from the power of the drugs at issue or their quantity, and no reason to suspect Savana was carrying them in her underwear, these deficiencies were fatal to finding the search reasonable.<sup>254</sup>

However, even as intrusive as the Court determined Savana's search to be, the Court refused to speak ill in any fashion on Mr. Wilson and his behavior, claiming he was simply motivated to eliminate drugs from his school in order to protect its students.<sup>255</sup> Additionally, the Court stated that just as parents tend to overreact in protecting their children from potential dangers, school officials may do the same.<sup>256</sup> This statement seems to overlook the fact that parents and school officials are vastly different for Fourth Amendment purposes. But as

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

248. *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

249. *Id.*

250. *Id.* at 375-76.

251. *Id.* at 376.

252. *Id.*

253. *Id.*

254. *Id.* at 376-77.

255. *Id.* at 377.

256. *Id.*

cases such as this one indicates: the Court tends to provide educators and their professional judgment with a high degree of deference to a fault.

Although *T.L.O.* directed that school officials limit the intrusiveness of a search in light of circumstances such as the age and sex of a student and the nature of the infraction, and Mr. Wilson failed to do so, the Court concluded that qualified immunity was warranted in this case given the differences of opinion among various lower courts regarding how the *T.L.O.* standard applies to such searches.<sup>257</sup> Essentially, the Court felt that although qualified immunity is not a guaranteed product of nonuniform views of the law, in the cases regarding school strip searches and the existence of numerous instances with well-reasoned majority and dissenting opinions, doubt exists that the Supreme Court was sufficiently clear in the prior statement of law.<sup>258</sup> Therefore, while the strip search of Savana was unreasonable and a violation of her Fourth Amendment right, Mr. Wilson, the administrative assistant and the school nurse were protected from liability through qualified immunity.<sup>259</sup>

Perhaps this case provides hope that the *Tinker* statement, assuring students do not "shed their constitutional rights. . . at the schoolhouse gate," can be true in practice. However, that hope does not diminish the grave concern that comes from the fact that we as a society have let things get this far. The fact that it took a young girl being strip searched in her public school over a mere suspicion that she may be carrying a few over the counter pain pills is what it took for the Court to recognize that perhaps the standard was unclear, is discouraging. While we can commend the Court for properly applying *T.L.O.* in this case to stand up for Savana's constitutional rights, we cannot overlook the fact that although it acknowledged there are issues with the standard, it failed to provide a better one with harsher boundaries and more protection for students. Additionally, it should not be overlooked that even though the Court found the search to be against Savana's Fourth Amendment Rights, the Court refrained from not only holding Mr. Wilson accountable, but even of speaking ill of him. The Court downplaying Mr. Wilson's misconduct by chalking it up to overreacting and being

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257. *Id.* at 378-79.

258. *Id.*

259. *Id.* at 379.

motivated to protect his students merely reiterates the theme evident in all the cases examined in this Note — that the Court is much more willing to protect and defend the schools' interests than those of the students. This case demonstrates how dire the situation is within our public schools, and specifically how our children are suffering because of societal concerns.

### III. AN APPROACH TO MOVING FORWARD

It is undisputed that America has been, and likely will continue to be, battling a severe drug epidemic. It is also hard to dispute that the drug epidemic has prompted severe fear within society. As lawmakers have been unable to end or prevent the worsening of the drug epidemic, institutions within society are having to combat it in the way they see fit. Specifically, public school systems across America are being burdened with the difficult task of minimizing parental fear regarding drug use. In response to that burden, schools are proposing policies and disciplinary procedures to deter, prevent, and rectify drug use within their student bodies. As a result of these policies and procedures, the Supreme Court became involved to ensure public schools' behavior is within the parameters of students' constitutional rights. Unfortunately, it seems they have failed to adequately provide this protection and have likely exacerbated the issue. Had the Supreme Court stepped in early on and subjected school authorities to Fourth Amendment restraints either identical to or closely resembling those placed on law enforcement, we likely never would have gotten to the point where Savana's search in *Safford* would have even occurred, let alone be held constitutional by at least one court. But as precedent demonstrates, that is not what happened. The Supreme Court was more concerned about burdening teachers and school officials in their already difficult jobs, and ensuring schools had adequate discretion in handling disciplinary issues. While these are valid concerns, at what point did we stop giving concern to the students and their constitutional rights? If the institution of public schools is to be a learning ground for the future of our democracy, perhaps more concern should be given to students' rights within our society as citizens, regardless of their age.

When the Court heard the case of *T.L.O.*, it was evident that a standard needed to be established to use in assessing the legality of

searches conducted by public-school officials. Responding to that need, *T.L.O.* held that for these searches, a careful balancing of both governmental and private interests suggested that it was in the best interest of the public that a Fourth Amendment standard of reasonableness that stopped short of probable cause be used in these situations.<sup>260</sup> Therefore, the Court settled on a standard of reasonable suspicion.<sup>261</sup> The Court justified the T.L.O. standard because it felt this standard would neither unduly burden public-school officials nor permit unrestrained intrusions on students' privacy.<sup>262</sup> Unfortunately, the standard only satisfied one of those intentions.

As precedent demonstrates, in almost every case where students' privacy interests are up against the interests of the public school, the students lose. The T.L.O. standard that was proposed as a means for balancing both of these interests equally never seems to fully suffice. And unfortunately, it seems the Court has become willing to justify just about anything as "reasonable," so long as it is in the best interest of the school and the society to which the school is accountable to. Which then begs the question, if students' constitutional rights will fail nearly every time, why hold these searches to a constitutional analysis at all?

If the Court truly desired to set a standard which would be equally applied across every state and every school board, it could easily do so. Yet it has repeatedly failed to set guidelines that would allow for such. The Court could create guidelines for nearly every step of this standard. For example, it could require a school to provide proof that at least twenty percent or more of a certain group of students are using drugs. It could also set guidelines for how invasive a search may be given the potential infraction. Say for example a student is caught smoking cigarettes in the bathroom, the Court could limit the ability of a school official to only search the outer clothing and baggage on the student at the time they were caught. Or for example, if a student was suspected of carrying Tylenol to school, which is against school rules, the Court could require the student only be asked if they are carrying it, or a school official only search their book bag, rather than conduct a full-body strip search. All these aforementioned guidelines are just examples. The Court has at its disposal avenues for which to assess what

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

261. *Id.*

262. *Id.* at 342-43.

percentiles would sufficiently prove drug use within a school. It also has the ability to work alongside the Department of Education to set guidelines on disciplinary policies and procedures. In conclusion, the Court is capable of doing much more to protect students' rights than merely creating a standard that is ambiguous, subjective, discretionary, and tends to find anything reasonable. Therefore, its refusal to do so is simply uncalled for.

Given the fact that the Court is fully aware that a better formulated standard is necessary, as implied by its opinion in *Safford*, and its unwillingness to create such, perhaps society should begin to assess whether we are willing to accept public schools as institutions where we willingly forsake our children's constitutional rights. If the Supreme Court can't advocate for and protect our students' constitutional rights, and we are seemingly okay with that, why do we continue to pretend they have them at all?

As a society, we recognize that in certain places and institutions, individuals do not have the same constitutional rights they have elsewhere. For example, we recognize our right to privacy differs when in an airport, our right to freedom of speech differs when in crowded spaces, and our right to bear arms differs in where we are located. While *Tinker* assured that, students do not "shed their constitutional rights. . . at the schoolhouse gate," maybe that is not what we as a society continue to support, given the increasing dangers which are arising in schools.<sup>263</sup>

The Court in *T.L.O.* explicitly rejected the notion that the situation was "so dire that students in the schools may claim no legitimate expectation of privacy."<sup>264</sup> Further, while the Court had previously recognized that the need to maintain order in prisons requires that prisoners have no legitimate expectations of privacy, the Court stated, "[w]e are not yet ready to hold that the schools and the prisons need to be equated for purposes of the Fourth Amendment."<sup>265</sup> However, that statement was made in 1985. Given the increasing severity of the drug epidemic, among other societal fears which have arisen between now and then, perhaps the Court is now ready to hold

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263. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

264. *T.L.O.*, 469 U.S. at 338.

265. *Id.* at 338-39.

schools to be equated with prisons for Fourth Amendment purposes. Its precedent seems to suggest so.

By no means does this Note suggest students should not have constitutional rights in a public school. Rather, this Note suggests that we as a society need to determine what, if any, of our students' rights we are willing to recognize and protect. Specifically, if we would prefer our students surrender certain constitutional rights in public schools to protect them from societal concerns, we should establish that.

As of right now, students are faced with the fact that they are carrying the burden of the lawmaker's inability to combat the drug epidemic. This lack of a clear standard protecting students' rights could reasonably be expected to leave students feeling unprotected and disillusioned relative to the Courts and the Constitution. If we were to conclude that students' rights are limited in certain ways when attending public schools, this narrative could be rewritten. Public schools would no longer be considered constitutional dead zones. Students could be taught that the Constitution exists to protect them and their peers, and that sometimes that requires certain limitations. Public schools would not be where students' constitutional rights cease to exist, rather they would merely be uniformly limited across the country for the sake of students' safety. That narrative, while unfortunate, is certainly more beneficial to protecting the free mind of our youth and would emphasize rather than discredit the important principles of our government.

### CONCLUSION

The Supreme Court's attempt at balancing both students' privacy interests and the governments' interests when conducting searches in the public-school context have been detrimental to students' constitutional rights. Given the severity of the drug epidemic and the inability of lawmakers to combat the epidemic, it is likely schools will continue to be burdened by parental concerns regarding student's drug use. Therefore, if the Court is unable or unwilling to provide a standard which adequately protects students' privacy interests and rectifies the fact that our public schools have become constitutional dead zones, it may be time for our society to determine what, if any, constitutional rights of our children we'd like to recognize in public schools.

