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I. INTRODUCTION

In 2003, a school principal ordered the strip search of a thirteen-year-old girl who he suspected had hidden prescription-strength ibuprofen in her day planner a few days earlier.[1] Although no one had suggested she might be concealing drugs in her clothing, the girl was forced to remove her clothes and pull out her underwear so that the school nurse could look between her breasts and around her pelvic area for pills.[2] The search yielded nothing.[3] Afterward, the teenager, an honor student, was forced to sit alone outside the principal's office for two hours; her parents were not called.[4] The girl's mother sued the school officials for violating her daughter's Fourth Amendment rights, and, after years of extensive litigation, the United States Supreme

1. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2638 (2009).
2. *Id.*
3. *Id.*
4. *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part); *id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

Court heard the case *Safford Unified School District No. 1 v. Redding* in 2009.[5] The Court held that, although the principal may have violated the girl's Fourth Amendment rights, he would not be held liable for his actions.[6]

Unfortunately, this situation is not unique in the United States. Since the Supreme Court's 1985 decision *New Jersey v. T.L.O.*,[7] courts have analyzed school searches, including strip searches, using a reduced Fourth Amendment standard – reasonable suspicion – rather than probable cause, the higher standard more typically employed in situations involving a search. The *T.L.O.* Court found that, while students retain a legitimate expectation of privacy, schools have a countervailing interest in maintaining security and order.[8] Therefore, the *T.L.O.* Court diluted the Fourth Amendment probable cause requirement in the school environment and crafted a two-prong reasonableness test to apply in school search situations.[9] First, the Court held that a search of a student in school can be "'justified at its inception'" by reasonable suspicion instead of probable cause.[10] Second, the Court held that a search is permissible as long as 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."[11]

In *T.L.O.*, a student's purse was searched, but lower courts later applied the two-prong test to students who were strip searched by school officials.[12] Because the policy behind the *T.L.O.* decision does not logically translate to strip search cases, these lower courts, even within circuits, struggled to apply the two-prong test and reached dichotomous conclusions in similar factual situations.[13] Because *T.L.O.* and its progeny were unclear, the law on strip searching in schools became further muddled, and, as a result, courts held that school officials were entitled to qualified immunity when they strip searched students.[14]

Until 2009, the Supreme Court had not addressed the issue of strip searches in schools, and *Safford* provided the Court with the perfect opportunity to redress the strip search violations occurring across the country. The

5. *Id.* at 2638 (majority opinion).

6. *Id.* at 2644.

7. 469 U.S. 325 (1985). Prior to 1985, some courts held that school officials acted *in loco parentis* in dealing with students and thus with absolute immunity as surrogates of the parents. *See, e.g.*, R.C.M. v. State, 660 S.W.2d 552 (Tex. App. 1983). *T.L.O.* made it clear that a school official is a person acting under color of state law, stating that "school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." *T.L.O.*, 469 U.S. at 336-37.

8. *T.L.O.*, 469 U.S. at 337.

9. *Id.* at 341.

10. *Id.* at 341-42 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

11. *Id.*

12. *See infra* notes 64-72 and accompanying text.

13. *See infra* notes 64-72 and accompanying text.

14. *See infra* Part II.C.

parties, amici, and scholars predicted that the Supreme Court would clarify the confusing two-part test and its application to strip searches in schools.[15] *Safford* held that the school principal violated the student's Fourth Amendment rights when he ordered the strip search but shielded the principal from liability under the doctrine of qualified immunity because the law on the issue was unclear.[16] While the Court made some clarifications in the law, it created more ambiguity than lucidity. As a result, the doctrine of qualified immunity will continue to act as a shield, and students will remain subject to strip searches within their schools.

This Article exposes the problems created by *T.L.O.* and its progeny, analyzes the *Safford* decision, and proposes recommendations for lower courts, legislatures, and local school boards to redress the current strip search crisis in public schools. Part II explains the *T.L.O.* two-prong test and illustrates the problems the *T.L.O.* Court and lower courts have had in applying it, specifically in strip search cases. Part III analyzes the *Safford* opinion and its ramifications. Part IV proposes ways in which lower courts, legislatures, and local school boards can redress the problems created by *T.L.O.* and *Safford* so that officials will no longer be protected when they violate their students' Fourth Amendment rights. Part V concludes that without these changes, schools will be unable to provide a safe learning environment for their students.

II. STRIP SEARCHES IN SCHOOLS: *NEW JERSEY V. T.L.O.* AND ITS PROGENY

A student who is strip searched in a public school can bring a civil action claiming that officials violated a federal statutory or constitutional right while acting under color of state law.[17] In these actions, the student must

15. *See, e.g.*, Chris Suedekum, Comment, Safford Unified School District No. 1 v. Redding*: Balancing Students' Rights Against the Government's Interest in Protecting the Educational Process*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 427 (2009) (discussing the Ninth Circuit's en banc decision and predicting possible outcomes of the Supreme Court decision, pending at the time); Brief of Amici Curiae The Rutherford Institute et al. in Support of Respondent at *4, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479); Brief of Amici Curiae the National School Boards Ass'n and American Ass'n of School Administrators in Support of Petitioners at *2, *Safford*, 129 S. Ct. 2633 (No. 08-479); Brief for the United States as Amicus Curiae Supporting Reversal at *30, *Safford*, 129 S. Ct. 2633 (No. 08-479); Brief of Amici Curiae the National Ass'n of Social Workers and its Arizona Chapter et al. in Support of Respondent April Redding at *3-4, *Safford*, 129 S. Ct. 2633 (No. 08-479).

16. *Safford*, 129 S. Ct. at 2644.

17. Parents, acting on behalf of their children, can bring civil claims against public school officials under 42 U.S.C. § 1983 (2006), which provides:

apply the *T.L.O.* two-part test to prove the school official violated the student's Fourth Amendment rights.[18] However, because the test and its underlying policies have created more ambiguities than clarifications for courts that attempt to apply it, the doctrine of qualified immunity has been successfully utilized as a defense to shield school officials from immunity.[19]

Courts have interpreted the warrant and probable cause requirements of the Fourth Amendment[20] to have only a few narrow, "well-delineated exceptions."[21] The main issue raised in *New Jersey v. T.L.O.* was whether searches in schools merited an exception to the warrant and probable cause requirement.[22] The *T.L.O.* Court held that students have a legitimate expectation of privacy at school. However, it found that the expectation of privacy was limited and that school officials were not required to obtain a warrant before searching a student under their authority.[23] In addition to finding an exception to the warrant requirement, the Court found that probable cause was not

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> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Id. While § 1983 does not create a substantive right, it permits an injured person to recover in federal court against people who violate a federal statutory or constitutional right while acting under color of state law. Neuens v. City of Columbus, 303 F.3d 667, 670 (6th Cir. 2002).

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

19. *See infra* Part II.C.

20. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

21. Katz v. United States, 389 U.S. 347, 357 (1967). The United States Supreme Court has enumerated such exceptions. *See* Maryland v. Buie, 494 U.S. 325, 337 (1990) (protective sweep); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (brief stop for traffic violations); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (border searches); Chimel v. California, 395 U.S. 752, 762-63 (1969) (search incident to arrest); Terry v. Ohio, 392 U.S. 1, 30 (1968) (on-the-street stop and frisk searches); Camara v. Mun. Court, 387 U.S. 523, 538-39 (1967) (routine building code inspections).

22. *T.L.O.*, 469 U.S. at 332-33. Although *T.L.O.* examined the Fourth Amendment in terms of the exclusionary rule in criminal cases, the reasoning applies in civil suits as well. *Id.* at 335.

23. *Id.* at 340; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (school children do not "shed their constitutional rights . . . at the schoolhouse gate").

necessary, stating that the school setting requires "some modification of the level of suspicion" normally required to justify a search.[24] Citing *Terry v. Ohio*,[25] the Court reasoned that just as an on-the-street encounter requires less than probable cause, a search at a school could also be justified on less than probable cause where there is a determination of reasonableness based on a careful balancing of governmental and private interests.[26] Thus, in order to prove a violation of the Fourth Amendment in a school setting, the *T.L.O.* decision created a two-part test modeled after the *Terry* stop and frisk search[27] to determine the reasonableness of a search in schools.[28] Under the two-part test, courts consider "'whether the . . . action was justified at its inception'" and whether the search conducted "'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[29]

The Court used a reasonableness standard for both prongs of the test. In defining "justified at its inception," the Court, similar to its rationale for a stop in *Terry*, used a standard less than probable cause, stating, "[A] search . . . 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."[30] Likewise, the Court used a reasonableness standard in defining scope, similar to the frisk standard in *Terry*, stating that "a 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."[31] In discussing the "nature of the infraction," the Court noted that lower courts should defer to the judgment of the school officials and "refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not."[32]

After enunciating the rule, the Court applied it to the situation in *T.L.O.*, where a teacher caught a fourteen-year-old freshman girl smoking in the school bathroom.[33] After the student denied she was smoking, the vice principal demanded to see her purse.[34] When he initially opened the purse, he

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

25. 392 U.S. 1 (1967).

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

27. *Terry*, 392 U.S. at 19-20. Under limited circumstances, the stop and frisk search allows a police officer "to conduct a carefully limited search" of a person when the officer believes "criminal activity may be afoot." *Id.* at 30.

28. *T.L.O.*, 469 U.S. at 341 (citing *Terry*, 392 U.S. at 20).

29. *Id.* (quoting *Terry*, 392 U.S. at 20).

30. *Id.* at 341-42.

31. *Id.* at 342.

32. *Id.* at 342 n.9 ("We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules.").

33. *Id.* at 328.

34. *Id.*

found a pack of cigarettes and rolling papers.[35] He then thoroughly searched the purse and found marijuana, a pipe, and other drug paraphernalia.[36] The Court, applying its newly crafted two-part test, found that the case actually involved two searches – the first for cigarettes, which gave rise to the second, the search for marijuana.[37] The Court found that the initial search of the purse was justified at its inception because the vice principal had reasonable grounds to believe the student had cigarettes in her purse when a teacher reported she was smoking in the bathroom.[38] When the vice principal found the cigarettes in the student's purse, he also discovered rolling papers, which gave rise to a reasonable suspicion that she was carrying marijuana in her purse.[39] The second, more extensive search of T.L.O.'s purse turned up evidence implicating her in selling drugs.[40] The Court found that the scope of the search, including the search of a zippered pocket within the second search, was justified under the circumstances.[41] The Court did not address the age or sex of the student or the nature of the infraction.

Justice Brennan, in his dissent in *T.L.O.*, predicted that the test crafted for school searches would lead to "uncertainty" in the law and that school officials would be "hopelessly adrift as to when a search may be permissible."[42] Justice Brennan complained that the *T.L.O.* standard was a "Rohrschach-like [sic] test"[43] and proposed maintaining probable cause as the appropriate standard in *all* school searches.[44] Justice Stevens, in a separate dis-

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35. *Id.*
36. *Id.*
37. *Id.* at 343-44.
38. *Id.* at 346-47.
39. *Id.* at 347.
40. *Id.*
41. *Id.*
42. *Id.* at 366 (Brennan, J., concurring in part and dissenting in part).
43. *Id.* at 358. The Rorschach test, also known as the ink blot test, is a psychological test in which a respondent's perceptions of inkblots are analyzed in an effort to diagnose any underlying thought disorders. *See, e.g.*, The Original Rorschach Website, http://www.rorschach.org/ (last visited Sept. 7, 2010).
44. *T.L.O.*, 469 U.S. at 368 (Brennan, J., concurring in part and dissenting in part) ("[T]he Fourth Amendment's language compels – that school searches like that conducted in this case are valid only if supported by probable cause.").

> Today's decision sanctions school officials to conduct full-scale searches on a "reasonableness" standard whose only definite content is that it is not the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion.

Id. at 354.

sent, specifically mentioned strip searches, declaring: "One thing is clear under any standard – the shocking strip searches that are described in some cases have no place in the schoolhouse."[45] Five years earlier, the Seventh Circuit found that a strip search of a thirteen-year-old girl was a clear violation of the Fourth Amendment, stating that the search "exceeded the 'bounds of reason' by two and a half country miles."[46] However, since *T.L.O.*, courts have applied the two-prong test to the varied circumstances and issues that arise in strip searches, resulting in dichotomous results and confusing precedent.

A. Prong One: Justified at its Inception

The *T.L.O.* standard for "justified at its inception" created a number of problems for lower courts. First, the Court left unclear whether a sliding scale test should be applied where more suspicion is needed as the intrusion becomes more invasive. Second, the Court refused to provide guidance in cases where there was no individualized suspicion.

1. The Sliding Scale Approach

The *T.L.O.* Court was unclear as to whether a sliding scale approach should be applied. This approach would require a school official to have greater suspicion to perform a more intrusive search. Although the Court did not explicitly mention a sliding scale approach, it held that the second, more intrusive, search of T.L.O.'s purse was justified because the vice principal found more inculpatory evidence – the rolling papers – during the first search.[47] Thus, the Court implied that the more intrusive search for marijuana might not have been justified simply by the report that T.L.O. was smoking in the bathroom. The court noted the "severe violation of subjective expectations of privacy" in a search of a child's person or a closed purse but refused to address the intrusiveness of a locker search,[48] suggesting that a sliding

45. *Id.* at 382 n.25 (Stevens, J., dissenting) (citing Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980)).

46. *Renfrow*, 631 F.2d at 92-93.

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

48. *Id.* at 337-38. In footnote five, the Court refused to address the question of whether a school child has a legitimate expectation of privacy in lockers, desks, or other school property. *Id.* at 338 n.5 (comparing Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it."); People v. Overton, 249 N.E.2d 366, 368 (N.Y. 1969) ("school administrators have power to consent to search of a student's locker"); State v. Engerud, 463 A.2d 934, 943 (N.J. 1983) ("[T]he student had an expectation of privacy in the contents of his locker . . . In it the student stores the kind of personal 'effects' protected by the Fourth Amendment.")).

scale test is appropriate where the level of expectation of privacy increases with the intrusiveness of the search.

After *T.L.O.*, most courts did not apply a sliding scale test to the "justified at inception" prong, but instead simply required reasonable suspicion, no matter how intrusive a search.[49] Thus, the suspicion needed for a search of a purse was the same as the suspicion needed for a strip search. In fact, in some cases, officials started with a search of a purse or backpack and moved on to a more intrusive strip search when they found nothing during the less intrusive search.[50] However, three circuits interpreted *T.L.O.* to require a sliding scale approach so that the suspicion required to justify a search increased as the intrusiveness of the search increased.[51]

The Seventh Circuit, in *Cornfield v. Consolidated High School District*, was the first court of appeals to apply a sliding scale test.[52] In that case, two male school officials, who believed a sixteen-year-old boy was "crotching drugs," forced him to strip naked in a locked locker room for a visual inspection.[53] After applying a sliding scale test, the court found the search was justified at its inception and went on to state that "[w]hat may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may well fall short of reasonableness for a nude search."[54] The court specifically relied on *T.L.O.* to explain the sliding scale test, stating, "A highly intrusive search in response to a minor infraction would not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*"[55]

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49. *See, e.g.*, Brannum v. Overton County Sch. Bd., 516 F.3d 489, 495-96 (6th Cir. 2008); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005); Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160, 1166-67 (11th Cir. 2001); Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991); Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 824 (11th Cir. 1997); H.Y. *ex rel* K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d 1174, 1183 (M.D. Ala. 2007); Watkins v. Millennium Sch., 290 F. Supp. 2d 890, 898-99 (S.D. Ohio 2003); Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1201 (D. S.D. 1998); Singleton v. Bd. of Educ., 894 F. Supp. 386, 390 (D. Kan. 1995); Widener v. Frye, 809 F. Supp. 35, 38 (S.D. Ohio 1992); Cales v. Howell Pub. Sch., 635 F. Supp. 454, 458 (E.D. Mich. 1985).

50. *See, e.g.*, *Williams*, 936 F.2d at 883 (search of girls' lockers, purses, and books produced no drugs, so the assistant principal forced one of the girls to empty her pockets, remove her t-shirt, lower her jeans to her knees, remove her shoes and socks, and, disputably, pull out the elastic of her undergarments).

51. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1087 (9th Cir. 2008) (en banc), *aff'd in part and rev'd in part*, 129 S. Ct. 2633 (2009); Phaneuf v. Fraikin, 448 F.3d 591, 596-97 (2d Cir. 2006); Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1320-21 (7th Cir. 1993).

52. 991 F.2d at 1321.

53. *Id.* at 1319.

54. *Id.* at 1321.

55. *Id.* at 1320. However, in 1995, a district court sitting in the Seventh Circuit made no mention of the sliding scale test when it found a strip search of seventh-grade girls for a missing four dollars and fifty cents to be unreasonable. Oliver v.

In the 2006 case of *Phaneuf v. Fraikin*, the Second Circuit also applied a sliding scale test.[56] Citing the Seventh Circuit, the court held that "*Cornfield* correctly observed that 'as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness.'"[57] The court held that the school official did not have reasonable suspicion "to justify an intrusive, potentially degrading strip search" when the search was based only upon the student's past disciplinary problems, her suspicious denial of wrongdoing, the discovery of cigarettes in her purse, and a tip from a student informant.[58]

The Ninth Circuit, in its en banc decision in *Redding v. Safford Unified School District No. 1*, also applied a sliding scale test.[59] Referencing *T.L.O.*, *Cornfield*, and *Phaneuf*, the court repeated the same language used in these prior cases to hold that the strip search for prescription-strength ibuprofen was not justified at its inception because, while reasonable suspicion may have justified the initial search of the student's backpack and pockets, it was unreasonable to proceed to a strip search.[60] While the Ninth, Second, and Seventh circuits applied this sliding scale version of the test, many courts did not interpret *T.L.O.* in the same manner.

2. Individualized Suspicion

In addition to not clarifying whether the 'justified at its inception' standard entailed a sliding scale test, the *T.L.O.* Court also refused to address the inevitable situation where searches are conducted in schools absent individualized suspicion.[61] In a footnote, the Court simply stated that it would not decide the issue of individualized suspicion but noted that, while "'some quantum of individualized suspicion is usually a prerequisite,'" the Fourth Amendment itself poses no such requirement.[62] "Because the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules, we need not consider the circumstances that might justify

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McClung, 919 F. Supp. 1206 (N.D. Ind. 1995) (court based its reasoning on act that strip search was to recover "grand sum of four dollars and fifty cents").

56. 448 F.3d at 597.

57. *Id.* at 597 (citing *Cornfield*, 991 F.2d at 1321).

58. *Id.*

59. 531 F.3d 1071, 1087 (9th Cir. 2008) (en banc).

60. *Id.* at 1083-84 (distinguishing from facts of *T.L.O.*, where initial search of purse led to rolling papers, which provided suspicion to search purse more thoroughly for other contraband).

61. Individualized suspicion refers to a belief by a school official that a particular individual has violated a law or school policy. Individualized suspicion can be contrasted with a general, nonspecific belief.

62. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).

school authorities in conducting searches unsupported by individualized suspicion."[63]

Because *T.L.O.* did not address the issue, courts applying the two-part test to strip searches in schools struggled to apply an individualized suspicion standard in cases where there was no individualized suspicion. In earlier cases, courts referenced *T.L.O.* when struggling to analyze situations where groups of students were strip searched. For example, in *Oliver v. McClung*, all the girls of a seventh-grade class were strip searched in pairs in a locker room for an allegedly missing four dollars and fifty cents.[64] Citing *Renfrow* and *T.L.O.*, the court found that reasonableness in some circumstances did not make strip searches reasonable in all circumstances.[65] In *Jenkins v. Talladega City Board of Education*, eight-year-old girls were strip searched for seven dollars missing from a teacher's purse even though there was no individualized suspicion that any of them had stolen the money.[66] The *Jenkins* court criticized *T.L.O.* for its vague language and application of the law but found that the school officials could not be held liable.[67] In *Konop v. Northwestern School District*, eighth-grade girls were strip searched by their music teacher as part of a general search for two hundred dollars.[68] Here, the court stated that "a strip search [was] not justified absent individualized suspicion unless there [was] a legitimate safety concern," such as weapons.[69] In *Thomas v. Clayton County Board of Education*, a whole class of fifth graders was strip searched for a missing twenty-six dollars.[70] The trial court found that the search was justified at its inception because the teacher had reason to believe that the money was missing.[71] However, the court, in contradiction to the reasoning in *Konop*, stated that individualized suspicion is not always necessary in a school setting.[72] Clearly, these courts were confused about how to interpret *T.L.O.* in cases without individualized suspicion.

In addition to applying the *T.L.O.* two-part test, lower courts relied on two other recent Supreme Court cases, *Skinner v. Railway Labor Executives' Ass'n*[73] and *Vernonia School District 47J v. Acton*,[74] to analyze group-wide

63. *Id.* (citation omitted).

64. 919 F. Supp. 1206, 1210-11 (N.D. Ind. 1995).

65. *Id.* at 1218.

66. 115 F.3d 821, 827-28 (11th Cir. 1997).

67. *Id.* at 828.

68. 26 F. Supp. 2d 1189, 1192, 1201 (D. S.D. 1998).

69. *Id.* at 1201 (citing New Jersey v. T.L.O., 469 U.S. 325 (1985)).

70. 94 F. Supp. 2d 1290, 1306 (N.D. Ga. 1999), *aff'd sub nom.* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated and remanded*, 536 U.S. 953 (2002).

71. *Id.*

72. *Id.* at 1305. However, the court found that the teacher went beyond the permissible scope when she strip searched each fifth grader individually, "requiring each student, in the presence of other students of the same sex, to partially undress." *Id.* at 1306.

73. 489 U.S. 602, 624 (1989).

strip searches of students where no individualized suspicion was present.[75] In *Skinner*, the Supreme Court permitted urine testing of railway workers without individualized suspicion,[76] and in *Vernonia* the Court permitted urine testing of student athletes without individualized suspicion.[77] In these cases, the Supreme Court balanced the special government need (railway or school safety in terms of drug use) with the individuals' specific privacy interest.[78] Applying this balancing test in 2003, a district court in the Sixth Circuit addressed a case with no individualized suspicion in *Watkins v. Millennium School*.[79] In *Watkins*, three third-grade girls were asked to pull out the waistbands of their pants so that the teacher could look for ten dollars that was missing from her desk.[80] The teacher then took one of the girls into a supply closet and asked her again to pull out her pants.[81] The teacher did not have any individualized suspicion that any of the girls was responsible for the theft.[82] Applying the *Skinner* balancing test, the court found that a missing ten dollars did not justify the intrusion absent individualized suspicion and distinguished the case from other cases where students were suspected of drug use or possession of weapons.[83]

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74. 515 U.S. 646, 653 (1995).

75. For a more in depth discussion of individualized suspicion, see Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897 (1988); Jennifer K. Turner, *A 'Capricious, Even Perverse Policy': Random, Suspicionless Drug Testing Policies in High Schools and the Fourth Amendment*, 72 MO. L. REV. 931 (2007).

76. *Skinner*, 489 U.S. at 634.

77. *Vernonia*, 515 U.S. at 664-65.

78. *Id.* at 661 ("It is a mistake, however, to think that the phrase 'compelling state interest,' in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern . . . . Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."); *Skinner*, 489 U.S. at 633 ("We conclude that the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that . . . the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy interests.").

79. 290 F. Supp. 2d 890, 900 (S.D. Ohio 2003).

80. *Id.* at 894.

81. *Id.*

82. *Id.* at 900.

83. *Id.* at 900-01; *see also* Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290, 1307 (N.D. Ga. 1999) (applying *Skinner* balancing test, court found that privacy interests of students who were strip searched outweighed school's interests in theft of twenty-six dollars), *aff'd sub nom.* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated and remanded*, 536 U.S. 953 (2002).

As illustrated by these cases, in determining whether a strip search was justified at its inception, lower courts have been unclear as to how to apply the *T.L.O.* reasonable suspicion test. Specifically, courts are uncertain as to whether a sliding scale test should be applied and how to approach cases with no individualized suspicion.

B. Prong Two: Scope of the Search

In addressing the second prong of the test, the *T.L.O.* Court stated that the scope of the search will be permissible "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."[84] However, the Court provided little guidance in the areas of the age and sex of the child, the nature of the infraction, and the location of the search.

1. The Age and Sex of the Student

While the Court mentioned the fact that T.L.O. was a fourteen-year-old freshman girl, it did not explain the relevance or significance of her age or sex when applying the facts to the test.[85] As a result, most of the lower courts mimic the *T.L.O.* decision by mentioning the student's age or sex but not explaining why the age or sex is significant in determining the permissibility of the search.[86]

Only two lower courts specifically addressed the significance of a student's age. In *Cornfield*, two male school officials forced a sixteen-year-old boy to strip naked in a locked locker room.[87] The court argued that despite *T.L.O.*'s failure to elaborate on the implication of the child's age, whether the fact that a child is seven or seventeen is relevant.[88] The court focused on the

84. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

85. *Id.* at 328, 343-47.

86. *See, e.g.*, Brannum v. Overton County Sch. Bd., 516 F.3d 489 (6th Cir. 2008); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005); Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated and remanded*, 536 U.S. 953 (2002); Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997); H.Y. *ex rel* K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d. 1174 (M.D. Ala. 2007); *Watkins*, 290 F. Supp. 2d 890 (S.D. Ohio 2003); Singleton v. Bd. of Educ. USD 500, 894 F. Supp. 386 (D. Kan. 1995); Widener v. Frye, 809 F. Supp. 35, 38 (S.D. Ohio 1992); Cales v. Howell Pub. Sch., 635 F. Supp. 454 (E.D. Mich. 1985).

87. Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993).

88. *Id.* at 1321 (citing CHILDREN'S COMPETENCE TO CONSENT (Gary B. Melton et al. eds., 1983); Gardner, *supra* note 75; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS ENOUGH? THE AGES OF RIGHTS AND RESPONSIBILITIES

age of criminal capacity and consent at common law, concluding that adolescents are generally presumed to be as capable of criminal activity as adults but that elementary school children are less likely to engage in criminal activity.[89] In addition, adolescents are able to understand the issues involved in a strip search, including whether to consent, whereas elementary school children would not have such an understanding.[90] The court focused on ages seven and fourteen as useful guideposts for determining the privacy interest based on age, concluding that "the legitimate expectations of privacy that students in school can claim are not monolithic."[91] However, the *Cornfield* court found that the search was reasonable in scope despite the student's adolescent age (sixteen years old) because the strip search was the least intrusive way to confirm or deny their suspicions.[92]

Another case that addressed the age factor is *Konop v. Northwestern School District*.[93] In *Konop*, the district court hearing the case, which involved the strip search of eighth-grade girls, found that "a very young child would suffer a lesser degree of trauma from a nude search than an older child" because adolescents become very self-conscious of their bodies.[94] As a result, the embarrassment and humiliation brought on by a search increases as children get older.[95] The *Konop* court found the "school official[s] should have known that strip searching [these] students without a reasonable basis to believe they committed a crime violate[d] their rights."[96] However, the court's reasoning, rather than focusing on and developing the age factor, was largely directed at reasonable suspicion and the fact that the officials were not searching for guns or drugs instead of focusing on the reasonableness of the students' ages.[97]

Despite the fact that other strip search cases involved students ranging from second grade to high school seniors, other lower courts did not address age in their application of the two-part *T.L.O.* test, nor is there any noticeable pattern of courts permitting strip searches within a certain range of ages.[98]

(1989); Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1 (1991)).

89. *Id.* at 1321.

90. *Id.*; *see also infra* Part III.B.2.b.

91. *Cornfield*, 991 F.2d at 1321.

92. *Id.* at 1323.

93. 26 F. Supp. 2d 1189 (D. S.D. 1998).

94. *Id.* at 1197 (quoting *Cornfield*, 991 F.2d at 1321).

95. *Id.* (finding that strip search of eighth-grade girls without reasonable basis to believe they committed the crime was a violation of their rights).

96. *Id.* at 1207.

97. *Id.* at 1198.

98. *Compare* Brannum v. Overton County Sch. Bd., 516 F.3d 489, 500 (6th Cir. 2008) (Fourth Amendment violation of middle school students), *and* Phaneuf v. Fraikin, 448 F.3d 591, 592 (2d Cir. 2006) (Fourth Amendment violation of high school senior), *and* Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 605 (6th Cir. 2005) (Fourth Amendment violation of high school students), *and* Thomas *ex rel.* Thomas v.

None of the courts discussed the relevancy of a student's gender. The courts that did consider gender did so by considering not the sex of the student searched, as mandated by *T.L.O.*, but instead the sex of the school official performing the actual strip search.[99] These courts often held that the search was reasonable, in part, because an official of the same sex performed the search.[100] For example, the court in *Singleton v. Board of Education* found a search reasonable in scope partly because the search of a male student was conducted by two male officials and the student was not touched inappropriately.[101] Similarly, the court in *Cornfield* noted that a strip search of a student by an official of the opposite sex would "obviously violate this standard."[102]

2. The Nature of the Infraction

In addition to not giving guidance on how to apply the age of the student, the *T.L.O.* Court was unclear in its application of the language "nature of the infraction." The initial alleged infraction in the *T.L.O.* case was smoking cigarettes and the second alleged infraction was possessing marijuana and drug paraphernalia.[103] However, the Court did not address the significance of these infractions in the scope prong of its test, except to note that the inference that T.L.O. was involved in marijuana trafficking was substantial enough to justify the vice principal's second, more intrusive, search.[104] Justice Stevens, in his dissent, expressed concern that under the *T.L.O.* standard,

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Roberts, 261 F.3d 1160, 1177 (11th Cir. 2001) (Fourth Amendment violation of fifth-grade students), *and* H.Y. *ex rel* K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d 1174, 1187 (M.D. Ala. 2007) (Fourth Amendment violation of twelve and thirteen year olds), *and* Watkins v. Millennium Sch., 290 F. Supp. 2d 890, 901 (S.D. Ohio 2003) (plaintiffs presented genuine issue of material fact suggesting a Fourth Amendment violation of third graders), *and* Oliver v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995) (defendant denied Summary Judgment on qualified immunity regarding Fourth Amendment violation of twelve and thirteen year olds), *and* Cales v. Howell Pub. Sch., 635 F. Supp. 454, 457 (E.D. Mich. 1985) (Fourth Amendment violation of fifteen year old), *with* Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993) (no Fourth Amendment violation of sixteen year old), *and* Williams v. Ellington, 936 F.2d 881, 881-82 (6th Cir. 1991) (no Fourth Amendment violation of high school student), *and* Singleton v. Bd. of Educ., 894 F. Supp. 386, 391 (D. Kan. 1995) (no Fourth Amendment violation of thirteen year old).

99. *See, e.g.*, *Cornfield*, 991 F.2d at 1323; *Singleton*, 894 F. Supp. at 391.

100. *See* cases cited *supra* note 99.

101. *Singleton*, 894 F. Supp. at 391.

102. *Cornfield*, 991 F.2d at 1320.

103. New Jersey v. T.L.O., 469 U.S. 325, 343-45 (1985). The Court noted that possession of cigarettes was not a violation of school rules but that the possession of the cigarettes was evidence that the student was violating the rule of not smoking. *See id.*

104. *See id.* at 347.

all school rules would be treated similarly regardless of the nature of the infraction, resulting in searches of students "for curlers and sunglasses in order to enforce the school dress code."[105] The majority opinion addressed Justice Stevens' concern in a footnote by deferring to the judgment of school officials in adopting rules to protect order within the school system.[106] The Court cautioned that judges should not evaluate or second-guess the relative importance of various school rules.[107] Thus, the Court provided little guidance on the nature of the infraction except to defer to the judgment of school officials and to caution courts not to second-guess school policy. As a result, lower courts received little guidance from *T.L.O.* on how to distinguish one violation from another. In addition, some courts, despite the Supreme Court's admonition, determined that certain school policies and violations did not create an imminent harm to justify a strip search.[108]

The lower courts applying *T.L.O.* seemed to agree that a specific infraction must be suspected to justify strip searching a student, and that general misbehavior is not enough. For example, in *Cales v. Howell Public Schools*, a fifteen-year-old girl was caught in the school parking lot when she should have been in class.[109] When confronted, she tried to avoid detection and provided a false name.[110] After school officials searched her purse, the student was subjected to a strip search.[111] Although the principal suspected the student might be involved in drug use, the court refused to "read *T.L.O.* so broadly as to allow a school administrator the right to search a student because that student acts in such a way so as to create a reasonable suspicion that the student has violated *some* rule or law."[112] Instead, the court found that a school official must demonstrate reasonable suspicion that the student has violated a *specific* rule or law.[113]

Most of the specific infractions of rules or laws can be categorized as either drug possession violations or stolen money cases. While courts were more likely to find a strip search permissible when drugs were involved than when small amounts of money were missing, courts seemed to second-guess school policies on imminent danger.

Judges tended to find the scope of strip searches permissible when drugs were involved. For example, in *Williams v. Ellington*, the court found the

105. *Id.* at 377 (Stevens, J., dissenting).

106. *Id.* at 342 n.9 ("We have 'repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'") (majority opinion).

107. *Id.*

108. *See infra* notes 123-30 and accompanying text.

109. 635 F. Supp. 454, 455 (E.D. Mich. 1985).

110. *Id.*

111. *Id.*

112. *Id.* at 457.

113. *Id.*

scope of the strip search was reasonable when officials were looking for a white powdery substance.[114] In *Widener v. Frye*, the court found the scope of the search permissible in light of the nature of the infraction when school officials were looking for marijuana.[115] In *Cornfield*, the court found the search of a student who was suspected of "crotching drugs" permissible because the strip search was the least intrusive way to confirm or deny their suspicions.[116]

On the other hand, judges were less comfortable permitting strip searches to find stolen money. For example, the court in *Oliver v. McClung* found the strip search of all the girls in a seventh grade gym class for a small amount of missing money to be unreasonable.[117] The court distinguished *Cornfield*, *Widener*, and *Williams*, noting that they were all cases where there was reasonable suspicion that the students had drugs, whereas the search in this case was conducted "to recover the grand sum of four dollars and fifty cents."[118] Similarly, in *Konop*, a case involving the strip search of eighth-grade girls in an attempt to find two hundred dollars missing from a gym locker, the court found the search a violation, stating that the school officials were not searching for weapons or drugs and that there was no imminent harm.[119] In *Thomas v. Clayton County Board of Education*, a whole class of fifth graders was strip searched for a missing twenty-six dollars.[120] Both the district court and the circuit court found that, although the teacher had reason to believe the money was missing, she went beyond the permissible scope because the students' privacy interests outweighed the school's interest in the theft of twenty-six dollars.[121] Similarly, in *Beard v. Whitmore Lake School District*, the search of high school students for missing prom money was not permissible in scope because the students' privacy interests in their unclothed bodies outweighed the school's interest in maintaining an atmosphere free of theft.[122]

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114. 936 F.2d 881, 887 (6th Cir. 1991).

115. 809 F. Supp. 35, 38 (S.D. Ohio 1992).

116. Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993). *Contra* Phaneuf v. Fraikin, 448 F.3d 591, 600 (2d Cir. 2006) (strip search of girl suspected of possessing marijuana was Fourth Amendment violation because there was not enough reasonable suspicion to justify search).

117. 919 F. Supp. 1206, 1218 (N.D. Ind. 1995).

118. *Id.* at 1217-18.

119. Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1201-03, 1206 (D. S.D. 1998).

120. 94 F. Supp. 2d 1290 (N.D. Ga. 1999), *aff'd sub nom.* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated and remanded*, 536 U.S. 953 (2002).

121. *Id.* at 1306; *Roberts*, 261 F.3d at 1169.

122. 402 F.3d 589, 605 (6th Cir. 2005). *But see* Singleton v. Bd. of Educ. USD 500, 894 F. Supp. 386, 391 (D. Kan. 1995) (search of thirteen-year-old male student for one hundred and fifty dollars was reasonable in scope).

In cases that did not fall neatly into the illegal drug or missing money categories, courts struggled with schools' policies despite *T.L.O.*'s mandate to defer to school policies. For instance, in *Brannum v. Overton County School Board*, students were secretly videotaped while they undressed in locker rooms.[123] The court found that the school's policy of setting up the video cameras to increase school security was "an appropriate and common sense purpose and not one subject to . . . judicial veto."[124] However, the court held that setting up video cameras in the locker room was not justified when there were no concerns about safety in the locker rooms.[125] In addition, the court admonished the school officials for failing to institute any policies designed to protect the students' privacy, such as advising the students or their parents that the students were being videotaped.[126]

In *Redding v. Safford Unified School District No. 1*, the Ninth Circuit held that school officials' conduct of strip searching a student for prescription-strength ibuprofen violated the student's Fourth Amendment rights, in direct conflict with the deference advocated by *T.L.O.*[127] The court found that, despite the school's concern with the sale of prescription medication, possessing prescription-strength ibuprofen was "an infraction that poses an imminent danger to no one."[128] The court held the strip search for prescription-strength ibuprofen was not reasonable in scope because the officials could not justify the strip search of a thirteen-year-old for an infraction that caused no imminent danger.[129] "Nowhere does the *T.L.O.* Court tell us to accord school officials' judgments unblinking deference. Nor does *T.L.O.* provide blanket approval of strip searches of thirteen-year-olds remotely rumored to have had Advil merely because of a generalized drug problem."[130]

3. The Location of the Search

Just as the *T.L.O.* Court was unclear about how courts should use "age of the student" and "nature of the infraction," it did not specify whether reasonable suspicion was necessary to search a specific location or whether it was enough to justify a search *anywhere* on the student's person or possessions. Even though *T.L.O.* only involved a search of a purse and not a strip search, the Court implied that the location of the search was important, and the court provided some clues as to what would be acceptable. First, the Court discussed the fact that the vice principal could reasonably believe ciga-

123. 516 F.3d 489, 492 (6th Cir. 2008).

124. *Id.* at 496.

125. *Id.* at 499.

126. *Id.* at 497.

127. 531 F.3d 1071, 1085 (9th Cir. 2008) (en banc), *aff'd in part and rev'd in part*, 129 S. Ct. 2633 (2009).

128. *Id.*

129. *Id.* at 1088.

130. *Id.* at 1080.

rettes were hidden in a purse.[131] Second, to justify the more intrusive search deeper into the zipped portion of the purse, the *T.L.O.* opinion relied on the fact that the vice principal found rolling papers in the initial search and therefore had reasonable suspicion that the purse might also contain other paraphernalia or drugs.[132] Thus, while the Court did not specifically address what or where an official could search, it did seem to require some sort of suspicion to search a particular location – not simply to search the student in general.

However, most courts applying *T.L.O.* did not recognize the significance of the location of the search in their analysis. As long as there was reasonable suspicion that the suspect might possess money or drugs, most courts did not address whether the money or drugs were more likely to be found inside the students' clothes than in a locker, purse, or jacket pocket. In fact, many searches simply escalated from purse or jacket to a strip search because nothing was found during the less intrusive search,[133] whereas in *T.L.O.* the more intrusive search was only justified because of the evidence found during the initial search of the purse.[134]

Only two lower court cases either implicitly or explicitly addressed the location of the search. First, in *Cornfield*, the Seventh Circuit found that the strip search into a student's pants was justified because the school officials had specific suspicion that the student was "crotching drugs."[135] Second, in *Safford*, the en banc Ninth Circuit decision specifically stated that the strip search for prescription-strength ibuprofen was not reasonable in scope, in part because the officials had no information that pills were hidden in the student's undergarments.[136] Unlike the initial fruitful search of the purse in *T.L.O.*, the search of the student's bag in *Safford* recovered no evidence to

131. New Jersey v. T.L.O., 469 U.S. 325, 345-46 (1985).

132. *Id.* at 347.

133. *See, e.g.*, Williams v. Ellington, 936 F.2d 881, 883 (6th Cir. 1991) (search of girls' lockers, purses, and books produced no drugs, so assistant principal forced one of the girls to empty her pockets, remove her t-shirt, lower her jeans to her knees, and remove her shoes and socks; the assistant principal then disputably pulled on the elastic of the student's undergarments); Cales v. Howell Pub. Sch., 635 F. Supp. 454, 455 (E.D. Mich. 1985) (student was first asked to empty her purse and then asked to remove her jeans and bend over for visual inspection of contents of her bra).

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

135. Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993).

136. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1085 (9th Cir. 2008) (en banc), *aff'd in part and rev'd in part*, 129 S. Ct. 2633 (2009). The court dismissed the school's other justifications – allegations of alcohol consumption months earlier, a tip that that Redding's friend had been distributing pills, hidden pills in Redding's planner, and pills found on Redding's friend – as not related to a reasonable belief that Redding was hiding pills on her person. *Id.* at 1083.

provide any further suspicion that she might be concealing ibuprofen underneath her clothes.[137]

Generally, lower courts have struggled to apply the second prong of the *T.L.O.* test, which permits a search "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."[138] Because the Court provided little guidance in the areas of the age and sex of the child, the nature of the infraction, and the location of the search, lower courts have applied these factors inconsistently.

C. Qualified Immunity

Because the *T.L.O.* Court found that the school official did not violate the student's Fourth Amendment rights, it did not (nor did it need to) address the issue of qualified immunity. When a plaintiff is able to prove a Fourth Amendment violation, a government official will not be liable if he can prove he is entitled to qualified immunity.[139] The Supreme Court has held that school officials have qualified, but not absolute, immunity, reasoning that liability for every action would unfairly impose upon a school administrator the burden of mistakes made in good faith.[140]

Qualified immunity extends to individuals performing discretionary functions, unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[141] In order for a plaintiff to overcome a defense of qualified immunity, he must show both that the violated right was clearly established and that the right was clearly established in the particular factual context in the case.[142] A right is clearly established if "a reasonable official would understand that what he is doing violates that right."[143] In 2002, in *Hope v. Pelzer*, Justice Stevens wrote:

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is

137. *Id.* at 1075.
138. *T.L.O.*, 469 U.S. at 342.
139. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982).
140. Wood v. Strickland, 420 U.S. 308, 320-21 (1975).
141. *Harlow*, 457 U.S. at 818.
142. *Id.* at 818-19.
143. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

to say that in the light of pre-existing law the unlawfulness must be apparent."[144]

For example, a student who sues a school official for an unreasonable search and seizure must show not only that there was a Fourth Amendment violation but also that the violation was "clearly established" at the time the search occurred so as to defeat the defense of qualified immunity. Because the *T.L.O.* test created many uncertainties in the law and the courts have been inconsistent in their application of *T.L.O.* in strip search cases, the doctrine of qualified immunity has been successfully employed in most cases over the last twenty-five years as a shield to protect school officials from liability.

It would be more logical to expect that, as the law developed after the *T.L.O.* decision, courts would begin to deny the defense of qualified immunity because school officials would have been put on notice by prior decisions. However, no such pattern followed. In fact, earlier cases denied qualified immunity, while later cases, confused by the varied case law, tended to grant qualified immunity. For example, in the 1980 strip search case of *Doe v. Renfrow*, the Seventh Circuit denied the defense of qualified immunity, stating, "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency."[145] In 1985, the Eastern District of Michigan, in *Cales v. Howell Public Schools*, was the first court to apply *T.L.O.* to a strip search case.[146] Although the events of the case occurred before the Supreme Court's ruling in *T.L.O.*, the district court held that the principal who ordered the search was not protected by qualified immunity because the student had a clearly established right to be free from unreasonable searches by school administrators and that *T.L.O.* had lowered the burden from probable cause to reasonable suspicion – neither standard was met in this case.[147]

As the law on strip searches developed and more courts granted immunity to school officials, many lower courts complained about the vague

144. 536 U.S. 730, 739 (2002) (quoting Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985); *Anderson*, 483 U.S. at 640) (internal citations omitted).

145. 631 F.2d 91, 92-93 (7th Cir. 1980) (per curiam).

146. 635 F. Supp. 454 (E.D. Mich. 1985).

147. *Id.* at 458. Two other officials, the secretary and nurse, were granted qualified immunity because they were simply following orders from the principal. *Id. But see* Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991) (granting qualified immunity to defendants who had strip searched a high school student suspected of selling drugs, noting that Supreme Court and courts in the Sixth Circuit have been virtually silent on Fourth Amendment rights of students despite fact that *Cales* was decision by a district court sitting in the Sixth Circuit). For a discussion of the ramifications of the *Williams* decision, see Jacqueline A. Stefkovich, *Strip Searching After* Williams*: Reactions to the Concern for School Safety?*, 93 ED. LAW REP. 1107 (1994).

language of *T.L.O.* and the resulting doctrine of *de facto* absolute immunity. In 1997, in *Jenkins v. Talladega City Board of Education*, the Eleventh Circuit granted qualified immunity to the school officials because "the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible."[148] In its reasoning, the Eleventh Circuit criticized both the Supreme Court's vague language and the Court's application of the two-part test in *T.L.O.*, stating:

> Faced with a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other, it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that . . . all reasonable educators standing in defendants' place – should have known that their conduct violated a clearly established constitutional right.[149]

The Eleventh Circuit seemed to conclude that no educator could be held liable for any search because the law was not, *and could not*, be clarified, and public officials should not be "'obligated to be creative or imaginative in drawing analogies from previously decided cases.'"[150] In essence, the *Jenkins* court declared absolute immunity for strip searches in schools because *T.L.O.* was too general to serve as a useful guide.

Similarly, in *Thomas v. Clayton County Board of Education*, both the district court and the Eleventh Circuit found that the defendants were entitled to qualified immunity because the law "was not so developed in this circuit as to unequivocally trigger an awareness in defendants that they were clearly violating the law."[151] To justify its holding, the district court agreed with *Jenkins* that *T.L.O.* was very general and did not provide any guidance but then asserted that *Jenkins* itself did not provide any further clarification as it did not rule on whether the teachers' actions violated the Fourth Amend-

148. 115 F.3d 821, 828 (11th Cir. 1997). Despite granting qualified immunity, the Eleventh Circuit conceded "that the defendants likely exercised questionable judgment," but the court refused to "engage in polemics regarding the wisdom of the defendants' conduct." *Id.*

149. *Id.*

150. *Id.* at 827 (quoting Adams v. St. Lucie County Sheriff's Dept., 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmonson, J., dissenting)). *But see* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189 (D. S.D. 1998) (disagreeing with *Jenkins*, stating that *T.L.O.* is neither unclear nor confusing and complaining that *Jenkins*' interpretation would lead to absolute immunity).

151. 94 F. Supp. 2d 1290, 1309 (N.D. Ga. 1999), *aff'd sub nom.* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated and remanded*, 536 U.S. 953 (2002); *see also Roberts*, 261 F.3d 1160.

ment.[152] Asserting that the doctrine of qualified immunity sets "high hurdles," the court essentially affirmed *Jenkins*' doctrine of absolute immunity, stating that teachers who make mistakes in judgment are protected "even when a federal court determines that, in hindsight, the teacher's acts exceeded a judicially set standard."[153] The Eleventh Circuit affirmed the district court's opinion in *Thomas*, agreeing that *T.L.O.* did not attempt to establish the contours of the Fourth Amendment within various school situations.[154]

In addition to the vague language in *T.L.O.*, the inconsistent rulings from lower courts struggling to interpret *T.L.O.* have provided more ammunition for school officials to claim the law is unclear so that qualified immunity must apply. As a result, in very similar circumstances, some courts have granted qualified immunity, while others have denied it. For example, where strip searches were conducted because drugs were suspected, some courts granted qualified immunity, whereas others did not.[155] Similarly, inconsistent results occurred with cases involving strip searches for missing amounts of money.[156] In fact, no pattern even exists within each circuit. The Sixth Circuit granted qualified immunity in two strip search cases but denied it in three others.[157] Courts in the Seventh Circuit have granted qualified immunity in one strip search case and denied it in another, and courts in the Eighth and Eleventh Circuits are similarly inconsistent.[158]

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152. *Clayton County*, 94 F. Supp. 2d at 1310.

153. *Id.* at 1311-12.

154. *Roberts*, 261 F.3d at 1170-71.

155. *Compare* Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1085 (9th Cir. 2008) (en banc), *aff'd in party and rev'd in part*, 129 S. Ct. 2633 (2009) (qualified immunity denied where prescription-strength ibuprofen suspected), *and* Cales v. Howell Pub. Sch., 635 F. Supp. 454, 455 (E.D. Mich. 1985) (qualified immunity denied for assistant principal where drugs suspected), *with* Cornfield v. Consol. High Sch. Dist., 991 F.2d 1316, 1324 (7th Cir. 1993) (qualified immunity granted where student suspected of "'crotching' drugs").

156. *Compare* Watkins v. Millennium Sch., 290 F. Supp. 2d 890, 903 (S.D. Ohio 2003) (qualified immunity denied where students strip searched for $10), *and* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1208 (D. S.D. 1998) (qualified immunity denied where students strip searched for $200), *and* Oliver v. McClung, 919 F. Supp. 1206, 1219 (N.D. Ind. 1995) (qualified immunity denied where students strip searched for $4.50), *with* Beard v. Whitmore Lake Sch. Dist., 401 F.3d 589, 601 (6th Cir. 2005) (qualified immunity granted where students strip searched for prom money), *and Clayton County*, 94 F. Supp. 2d at 1312 (qualified immunity granted where students strip searched for $12).

157. *Compare Beard*, 401 F.3d at 606 (qualified immunity granted), *and* Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) (qualified immunity granted), *with* Brannum v. Overton County Sch. Bd., 516 F.3d 489, 500 (6th Cir. 2008) (qualified immunity denied), *and Watkins*, 290 F. Supp. 2d at 903 (qualified immunity denied), *and Cales*, 635 F. Supp. at 458 (qualified immunity denied).

158. *Compare Cornfield*, 991 F.2d at 1324 (qualified immunity granted), *with Oliver*, 919 F. Supp. at 1219 (qualified immunity denied). *Compare* Jenkins v. Talla-

These cases presented confusing and conflicting precedent for school officials and courts trying to apply the *T.L.O.* test in a variety of school settings. As a result, qualified immunity was used as a shield for school officials who had violated students' Fourth Amendment rights because the officials were able to claim that the law on strip searching in schools remained unclear. It was against this inconsistent and confusing backdrop that the Supreme Court granted certiorari in *Safford Unified School District No. 1 v. Redding*.[159] Many scholars and pundits assumed that the Supreme Court had granted certiorari in the case to finally clarify the *T.L.O.* standard in the strip search context; however, the Court missed this critical opportunity.[160]

III. A MISSED OPPORTUNITY TO RECTIFY THE STRIP SEARCH CRISIS: *SAFFORD UNIFIED SCHOOL DISTRICT NO. 1 V. REDDING*

In *Safford Unified School District No. 1 v. Redding*, thirteen-year-old Savana Redding was strip searched in school in an attempt to find prescription-strength ibuprofen in her undergarments.[161] She was implicated by a friend who had been caught with prescription-strength ibuprofen and other contraband in a day planner that belonged to Redding.[162] Redding had loaned the planner to the friend days earlier.[163] After questioning the friend, the principal interrogated Redding.[164] When Redding denied knowledge of the pills, the principal searched her backpack.[165] Although this search revealed nothing, the principal ordered the nurse to strip search Redding.[166] By the end of the search, Redding was wearing nothing but her bra and underwear and was forced to pull them away from her body and shake them, revealing both her breasts and pelvic area.[167] No ibuprofen was found.[168]

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dega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997) (qualified immunity granted), *with Konop*, 26 F. Supp. 2d at 1208 (qualified immunity denied).

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

160. *See, e.g.*, Suedekum, *supra* note 15 (discussing the Ninth Circuit's en banc decision and predicting possible outcomes of the Supreme Court decision, then pending).

161. 129 S. Ct. 2633, 2637 (2009).

162. *Id.* at 2640-41.

163. *Id.* at 2638.

164. *Id.* at 2640-41.

165. *Id.* at 2638.

166. *Id.*

167. *Id.*

168. *Id.*

Savana Redding and her mother sued the school district, alleging that the school district violated Savana's Fourth Amendment rights.[169] The district court found no Fourth Amendment violation,[170] and a divided Ninth Circuit Court panel affirmed.[171] The Ninth Circuit granted an en banc hearing and reversed.[172] The Supreme Court granted certiorari in the case,[173] and the parties and a number of amici filed briefs.[174]

All the briefs called for clarity in the law, with the Respondent school district arguing for clear language that strip searches should be held to a higher level of scrutiny and Petitioner Redding seeking more clarity in qualified immunity standards.[175] Most of the briefs implored the Court to clarify the *T.L.O.* test and its application so that school officials and courts could have adequate guidance and fair notice of their responsibilities to protect students'

169. Redding v. Safford Unified Sch. Dist. No. 1, 504 F.3d 828, 831 (9th Cir. 2007), *rev'd*, 531 F.3d 1071 (9th Cir. 2008) (en banc), *aff'd in part and rev'd in part*, 129 S. Ct. 2633 (2009).

170. *Id.*

171. *Id.* at 836.

172. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071 (9th Cir. 2008) (en banc), *aff'd in part and rev'd in part*, 129 S. Ct. 2633 (2009). Referencing *T.L.O.*, *Cornfield*, and *Phaneuf*, the Ninth Circuit applied a sliding scale test and held that the search was not justified at its inception because, while reasonable suspicion may have justified the initial search of the backpack and pockets, it was unreasonable to proceed to a strip search. *Id.* at 1081. Applying the specific facts, the court found the search was not justified at its inception because it was based primarily on an unsubstantiated tip from an accused student seeking to shift blame from herself to Redding. *Id.* at 1085. In addition, the court found the search was not reasonable in scope because the officials had no information that the pills were hidden in her undergarments, and the officials could not justify the strip search of a thirteen-year-old for an infraction that caused no imminent danger. *Id.* Balancing the trauma intrinsic to a strip search of a child with the school's interest in curbing prescription drug use, the court found that possessing ibuprofen, "an infraction that poses an imminent danger to no one," was excessively intrusive. *Id.* The court held that Redding's rights were clearly established at the time she was strip searched and denied the school's assistant principal the defense of qualified immunity. *Id.* at 1089, 1074.

173. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 987 (2009).

174. In addition to the briefs filed by the parties, the following amicus briefs were filed: Brief of Amici Curiae The Rutherford Institute et al. in Support of Respondent, *supra* note 15; Brief of Amici Curiae the National School Boards Ass'n and American Ass'n of School Administrators in Support of Petitioners, *supra* note 15; Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 15; Brief of Amici Curiae the National Ass'n of Social Workers and its Arizona Chapter et al. in Support of Respondent April Redding, *supra* note 15.

175. *See* sources cited *supra* note 174; *see also* Brief for Respondent at *22, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 852123; Brief for Petitioners at *16, *Safford*, 129 S. Ct. 2633 (No. 08-479), 2009 WL 507028.

constitutional rights.[176] The government's amicus brief specifically stated, "*T.L.O.* cannot plausibly be read to establish the law applicable to such a highly particularized set of facts with the clarity necessary to defeat qualified immunity,"[177] implying that absolute immunity resulted from the ambiguous law created by *T.L.O.* and its precedents. The amicus for the school officials was most compelling in its plea to the Court to clarify *T.L.O.* and "render a decision that gives direction to educators on how properly to apply the justified-at-inception and the reasonable-in-scope prongs established in that case."[178]

A. The Supreme Court's Decision

The majority opinion, written by Justice Souter, reads more like a trial court opinion simply following established precedent than a Supreme Court decision resolving conflicting circuit court law or clarifying muddled jurisprudence. In applying the *T.L.O.* two-prong test, the Court held that the strip search of Redding violated her Fourth Amendment rights but that the principal was entitled to qualified immunity because the law on the issue was unclear.[179]

The opinion first addressed the "justified at its inception" prong and found that the school official had enough suspicion to justify a general search of Redding's backpack and outer clothing and that the search of her bag was not excessively intrusive.[180] In addressing the more intrusive search into Redding's clothing, the Court refused to specifically label or define "strip

176. *See, e.g.*, Brief of Amici Curiae the National School Boards Ass'n and American Ass'n of School Administrators in Support of Petitioners, *supra* note 15, at *17 (stating it would be reasonable for the Court to require a less intrusive search before a strip search, explain the age and gender factor, and give more deference to school officials when there is higher possibility of danger); Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 15, at *17.

177. Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 15, at *9.

178. Brief of Amici Curiae the National School Boards Ass'n and American Ass'n of School Administrators in Support of Petitioners, *supra* note 15, at *3.

179. *Safford*, 129 S. Ct. at 2644. Redding and children's rights advocates seemed ready to claim victory. In a *Washington Post* article after the decision, Redding was quoted as saying that she felt "'fantastic'" because the "'legal battle was to make sure it didn't happen to anyone else.'" Robert Barnes, *Student Strip Search Illegal: School Violated Teen Girl's Rights, Supreme Court Rules*, WASH. POST, June 26, 2009, *available at* http://www.washingtonpost.com/wpdyn/content/article/2009/06/25/AR2009062501690.html. However, because of the Court's failures to clarify the law, strip searches can continue to happen to other students like Savana Redding.

180. *Safford*, 129 S. Ct. at 2641. This reasoning was similar to the reasoning in *T.L.O.*, where the court explained that the principal had reasonable suspicion to search the student's purse for cigarettes because a teacher had accused her of smoking in the bathroom. New Jersey v. T.L.O., 469 U.S. 325, 345-46 (1985).

search," but it conceded that the search of Redding could be called a strip search and then admitted that these types of searches are so degrading that some communities have forbidden them.[181] However, the Court failed to outlaw school strip searches altogether or require a higher level of suspicion to justify them. Instead, it adopted the sliding scale test applied in the Ninth Circuit en banc decision as well as in the Seventh and Second Circuits. Although the Court did not explicitly state that it was adopting the sliding scale test, the Court applied such a test, holding that the "content of the suspicion failed to match the degree of intrusion."[182] The Supreme Court in *Safford* found that the official had reasonable suspicion to search Redding's backpack and outer clothing but not enough suspicion to strip search her.[183]

Next, the Court analyzed the scope prong of the *T.L.O.* test, relying on the standard set out in *T.L.O.* that a 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."[184] Similar to *T.L.O.*'s application of the facts, the *Safford* Court simply mentioned that the student was a thirteen-year-old girl but did not explain how her age or gender factored into the analysis. Instead, the Court focused on the "nature of the infraction" language from the *T.L.O.* opinion.[185] Reasoning that the suspected contraband needed to pose an immediate threat of danger to the students to justify a strip search, the Court held that the prescription pills did not threaten to cause imminent danger to the students.[186] The Court also discussed the location of the search, specifically finding that the school official could not have suspected that Redding was concealing the contraband in her clothes.[187] In its holding, the Court found that the combination of the location of the search and the lack of danger to the other students was "fatal to finding the search reasonable."[188] Despite the Fourth Amendment violation, the Court found that the school officials were entitled to the defense of qualified immunity because the law on the issue of strip searches was unclear.[189]

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181. *Safford*, 129 S. Ct. at 2641-42 (citing New York City Dept. of Educ., Reg. No. A-432, p.2 (2005), *available at* http://docs.nycenet.edu/docushare/dsweb/Get/Document-21A-432.pdf ("Under no circumstances shall a strip-search of a student be conducted.")).

182. *Id.* at 2642 ("But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off.").

183. *Id.* at 2643.

184. *Id.* at 2639 (citing *T.L.O.*, 469 U.S. at 342).

185. *Id.* at 2642.

186. *Id.* at 2636.

187. *Id.* at 2642.

188. *Id.* at 2643.

189. *Id.* at 2644.

B. The Supreme Court's Shortcomings

In failing to require probable cause in all strip searches of students, the Supreme Court in *Safford* missed a critical opportunity to redress Fourth Amendment violations occurring across the country. First, the *Safford* opinion should have distinguished strip searches as far too intrusive for a vague reasonableness test and required probable cause for *all* strip searches in schools. Instead, it simply followed the two-prong test set out in *T.L.O.* for the search of a purse and applied it to strip searches. Second, while the *Safford* opinion clarified some of the ambiguities resulting from *T.L.O.* and its progeny by requiring imminent danger to students and reasonable suspicion to search a specific location, the Court did not go far enough to protect students' rights. As a result, the opinion actually creates more confusion than clarity. Third, the Court incorrectly shielded school officials from liability under the doctrine of qualified immunity. As a result, students will continue to be unprotected from unreasonable strip searches because the law on strip searches remains murky, allowing school officials to escape liability through qualified immunity.

1. The *T.L.O.* Policy Does Not Translate to Strip Searches

The *Safford* Court failed to require probable cause in all strip search cases and was obviously uncomfortable with applying the lower reasonableness standard enunciated in *T.L.O.* to strip search cases. The Court stated,

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.[190]

Thus, while the Court conceded that a strip search was "categorically distinct," it failed to adopt a bright-line test for this specific category of searches.[191] As a result, *Safford* condoned the application of the *T.L.O.* reasonableness test – a test used to justify searches of purses – in strip search incidents, simply because the strip search also occurred in the school environment.

However, the reasonableness standard is inappropriate for a number of reasons. The *T.L.O.* Court justified a lower standard by relying on policy

190. *Id.* at 2641.
191. *Id.*

from *Terry* stop and frisk law, but the policy behind an on-the-street pat-down search does not translate to a strip search within the confines of school walls.[192] Had the *Safford* Court applied the balancing test relied upon in *T.L.O.* to strip search cases, it would have found that the trauma to students from strip searches outweighs a school's interests in preserving order.

The *T.L.O.* decision recognized that students have a legitimate, albeit lower, expectation of privacy at school in their *personal belongings* such as keys, money, and necessities for personal hygiene.[193] They may keep these items in their purses or pockets as they move from classroom to classroom. Many students in lower grades simply hang their backpacks on communal hooks or cubbies within the classroom. However, it does not follow that students have a lower expectation of privacy in their *bodies* simply by walking onto school grounds. In fact, in 1969, the Supreme Court held that school children do not "shed their constitutional rights . . . at the schoolhouse gate."[194]

In order to justify the lower standard of scrutiny, the *T.L.O.* Court relied on the language and reasoning of *Terry v. Ohio*.[195] Just as *Terry* found that the government has an interest in protecting police officers on the street and in preventing crime,[196] *T.L.O.* reasoned that school officials have an interest in maintaining order in their schools.[197] Just as *Terry* reasoned that a limited pat-down search of citizens on the street is justified on less than probable cause, the *T.L.O.* Court applied the same two-part test[198] and reasoned that a search of a student by a school official can be justified on less than probable cause when it is justified at its inception and permissible in scope.[199] While this reasoning for a pat-down search on the street may have transferred to a pat-down of outer clothing or a bag in a school, it is nonsensical to extend that reasoning to justify a strip search where genitals are exposed. Moreover, people who are frisked on the street are presumably less likely to be victims of police abuse of discretion because they are exposed to other citizens and protected by that exposure. Students who are forced to remove their clothing

192. *See supra* note 27 and accompanying text.

193. New Jersey v. T.L.O., 469 U.S. 325, 338-39 (1985).

194. Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

195. *T.L.O.*, 469 U.S. at 341 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

196. *Terry*, 392 U.S. at 21-22.

197. *T.L.O.*, 469 U.S. at 339.

198. *Compare id.* at 341 ("Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception;' 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.'") (citations omitted), *with Terry*, 392 U.S. at 20 ("[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one-whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.").

199. *T.L.O.*, 469 U.S. at 326.

alone within the confines of a closed principal or nurse's office are not similarly protected by other watchful citizens or students. The *Safford* Court should have recognized that while the *Terry* reasoning might apply to searches of purses and lockers in schools, it should not extend to strip searches of students simply because those searches also occur in school.

In justifying the lower standard, the *T.L.O.* Court balanced schools' interests in protecting order with students' privacy interests.[200] Although the *Safford* Court admitted that strip searches are humiliating to students,[201] it failed to apply the same balancing test. Other courts have long recognized the traumatic nature of strip searches, describing them as humiliating, demeaning, degrading, and traumatic.[202] Studies have found children who have been subject to a strip search can be greatly traumatized by the experience.[203] Students who have been strip searched have been found to do worse in school, and often transfer, as Savana Redding did in *Safford*,[204] or drop out.[205] In addition, they often suffer from sleep disturbance, recurrent recollection of the event, anxiety, inability to concentrate, depression, and phobias.[206] Because adolescents are self-conscious about their bodies and relate their bodies to their self-esteem, strip searches can have the same traumatic results as sexual abuse or rape.[207] The fact that the school official is substantially older than the student and is in a position of authority can worsen the traumatic effect.[208] To make matters worse, other students hear about the strip searches and the whole student body no longer trusts the school administration, creating a dysfunctional community. When weighing the likely traumatic harm to the student against the governmental interest in possibly discovering evidence or preventing a possible harm to the school community, the balancing clearly weighs in favor of a heightened level of suspicion, such as probable cause, to

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200. *Id.* at 337.

201. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641 (2009).

202. *See, e.g.*, Chapman v. Nichols, 989 F.2d 393, 395-96 (10th Cir. 1993); Justice v. City of Peachtree City, 961 F.2d 188, 192-93 (11th Cir. 1992); Doe v. Renfrow, 631 F.2d 91, 93-94 (7th Cir. 1980).

203. *See* Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 CRITICAL CRIMINOLOGY 117, 126 (2006).

204. Adam Liptak, *Strip-Search of Girl Tests Limit of School Policy*, N.Y. TIMES, Mar. 24, 2009, at A1, *available at* http://www.nytimes.com/2009/03/24/us/24savana.html?pagewanted=1&_r=3.

205. Finley, *supra* note 203, at 126.

206. Brief of Amici Curiae the National Ass'n of Social Workers and its Arizona Chapter et al. in Support of Respondent April Redding, *supra* note 15, at *7-8 (citing Shatz et al., *supra* note 88).

207. *See* David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 DICK. L. REV. 1, 45 (1994); Shatz et al., *supra* note 88, at 11. Strip searches have also been defined as "visual rape." *See* Paul R. Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. MARSHALL L. REV. 273 (1980).

208. *See* Blickenstaff, *supra* note 207, at 45.

protect the student. The *Safford* opinion failed to balance these interests, relying instead on the *T.L.O.* opinion's analysis that the balance weighs in favor of school officials when they search for drugs in a student's purse.[209]

Thus, the Court applied flawed reasoning to justify strip searches in schools and failed to adequately balance students' interests in remaining free from unreasonable and traumatic searches against schools' interests in maintaining order. Instead, *Safford* should have distinguished strip searches from general searches of students and required school officials to have probable cause to justify strip searching their students.

2. The Court Created More Ambiguity than Lucidity in its Application of the *T.L.O.* Test

Instead of requiring probable cause in all strip search cases, the *Safford* opinion simply applied the *T.L.O.* two-prong test to the facts of the case. The Court failed to define the term "strip search" and instead applied a sliding scale test. In addition, while making some headway into protecting students under the second prong of the *T.L.O.* test, the Court created further ambiguity in a number of other areas. The Court also incorrectly shielded the school officials from liability under the doctrine of qualified immunity. Because the law remains unclear, the doctrine of qualified immunity will continue to effectively act as absolute immunity to protect the unbridled discretion of school officials, and students' Fourth Amendment rights will continue to be violated in the future.

a. The Sliding Scale Test and the Failure to Define "Strip Search"

The *Safford* Court should not have applied a sliding scale test to strip searches. A sliding scale test in this situation is unworkable for a number of reasons. A sliding scale test creates more uncertainty for school officials and courts because there are so many variations along the parameters of general searches in schools. Such a mercurial test leaves officials wondering if a search of a purse is more intrusive than the search of a locker or whether a search of a pocket is more intrusive than the search of a purse. In addition, it will be difficult for school officials and courts to determine whether a strip search has actually occurred using a sliding scale test because the Court refused to label or define the term "strip search."[210]

Even if the Supreme Court had defined "strip search," each subsequent court would be forced to decide the degree of intrusiveness of each strip search under a sliding scale test. Does pulling down pants to the knees require less suspicion than pulling down pants to the ankles? Is lifting a dress

209. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643-44 (2009).

210. *Id.* at 2641 (stating that exact label is not important).

more intrusive than lowering pants? Is searching underwear more or less intrusive than searching a bra? As petitioners and some amici argued in their briefs, a sliding scale test would require school officials to decide which searches were minimally intrusive, requiring only reasonable suspicion, and which were more intrusive searches, requiring something more than reasonable suspicion. The sliding scale approach could "end in hopeless confusion for the school officials who are left with the daunting task of trying to apply it."[211]

Instead of applying a sliding scale test, the Supreme Court should have defined a strip search and required probable cause for all searches meeting that definition. While the Court stated that the exact label for the search in this case was "not important," it conceded that "strip search" was a "fair way to speak of it."[212] This "I know it when I see it" approach[213] provides no guidance to school officials or lower courts when trying to decide where a search falls on the sliding scale. In fact, the definition of strip search is extremely important: if the Supreme Court had provided a definition and required probable cause whenever a school official decided to conduct a search that fell within that definition, school officials and lower courts would have some guidelines to follow so that students would be protected from the unbridled discretion now afforded to school officials.

The Supreme Court's findings on the second, "scope" prong of *T.L.O.*, albeit a bit more helpful than the first, "justification" prong, also fall short in terms of providing enough clarity and precision to overcome a defense of qualified immunity. The Court failed to discuss the relevance of the age and gender of the student. Also, although the Court required imminent danger to students to justify a strip search, it left open the question as to who should decide whether there is a threat of imminent danger – the schools or the courts. Finally, while the Court required school officials to have some suspicion that contraband is located within a student's clothing before performing a strip search, the Court should have required a heightened level of scrutiny – that of probable cause that a student is hiding something in his clothing – to justify an intrusive strip search.

b. The Age and Sex of the Student

While the *Safford* Court mentioned the importance of "age and sex" in its application of the scope of the intrusion prong of *T.L.O.*, it did not distinguish which age or what sex was more at risk for trauma from a strip search, nor did it provide guidance on how to apply these factors in the future. Nei-

211. Brief for Petitioners, *supra* note 175, at *33.

212. *Safford*, 129 S. Ct. at 2641.

213. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring) (describing case-by-case approach to determine whether pornographic film is obscene).

ther had *T.L.O.*[214] In fact, many of the circuit courts were confused with how to apply these factors and needed guidance; most of the circuit court opinions simply stated the age and sex of the students but did nothing with this information.[215] Rather than discussing the sex of the student searched, some courts considered the sex of the school official performing the actual strip search to uphold the reasonableness of the search, in part because an official of the same sex performed the search.[216] While this consideration might be relevant for defending claims of sexual assault against school officials, it does not help decide whether the search itself was reasonable in scope. Instead, the relevant question is whether a child is of the age that she will feel embarrassed and degraded from a strip search.

The Court may have been avoiding the true fact: age and sex are not significant factors, and, in fact, would be difficult for any school administrator to consider. While historical studies have shown that children who reach the age of adolescence are more inclined to be self-conscious of their bodies than younger children, there are no bright line rules to differentiate when a child becomes an adolescent or when an adolescent becomes an adult.[217] Therefore, any attempt to establish a bright line rule would be unfair and counterproductive. Would it be worse to search a physically advanced fourth-grade student or an immature eighth-grade student? Should girls have more of a right to privacy than boys? It makes little sense to ask school officials and courts to treat one class of students (whether based on age or sex) differently from another. Therefore, the *Safford* Court should have expressly mandated that age and sex were not significant factors instead of simply ignoring them.

c. The Danger to Students

In its discussion of the "nature of the infraction" language from *T.L.O.*, the *Safford* Court clarified one aspect of the law by specifically requiring school officials to reasonably believe students are in danger before resorting to a strip search.[218] The *T.L.O.* Court cautioned courts to avoid second-guessing school policies and demanded that courts give school officials broad discretion in crafting rules regarding dangerous situations.[219] However, the *Safford* Court ignored the mandates of *T.L.O.* and substituted its own judgment for that of the school official, finding that the possession of prescription

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

215. *See supra* note 86 and accompanying text. *But see supra* notes 87-97 and accompanying text.

216. *See supra* notes 99-102 and accompanying text.

217. *See* Shatz et al., *supra* note 88, at 15 (noting that ages 7, 14, and 21 appear over and over again in Western societies as important transition points in children's development).

218. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643 (2009).

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

pills did not indicate danger to the students and stating that the ibuprofen caused "imminent danger to no one"[220] and that "nondangerous school contraband does not raise the specter of stashes in intimate places."[221] Thus, while the Court required imminent danger to students in order to justify a strip search, it trivialized the school officials' policy against possession of nonprescription pills, leaving open the question of whether courts can veto school policies in the future.[222]

d. The Location of the Search

In its discussion of scope, the *Safford* opinion also clarified the law regarding the location of a strip search. The Court found that an official must have reasonable suspicion that a student is hiding contraband as well as reasonable suspicion that she is concealing it within her clothes – not just that it would be *possible* to conceal it within her clothes.[223] While some courts had alluded to such a location requirement,[224] especially in cases where there was no individualized suspicion, most courts permitted searches in clothing simply because the item could have been hidden there.[225]

The location requirement from *Safford* was consistent with the application of the facts in *T.L.O.* In *T.L.O.*, the Court found the principal had reasonable suspicion that the student was hiding cigarettes in her purse because a teacher had found her smoking in the bathroom.[226] Initially, a school official found only rolling papers, which provided suspicion for the second, deeper search of the purse for drug paraphernalia.[227] But in *Safford*, no one had accused Redding of stashing the prescription-strength ibuprofen in her under-

220. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1085 (9th Cir. 2008) (en banc), *aff'd in part and rev'd in part*, 129 S. Ct. 2633 (2009).

221. *Safford*, 129 S. Ct. at 2642-43. The United States, in its amicus brief, complained that the Ninth Circuit incorrectly substituted its own judgment for that of the school officials when it found that the ibuprofen caused "'imminent danger to no one,'" relying on *T.L.O.*'s admonition that courts should not reevaluate the school's judgment in reliance on their own views of whether the rule is necessary or worthy of enforcement by intrusive search. Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 15, at *19-20, *25.

222. This criticism is also endorsed by Justice Thomas. *See Safford*, 129 S. Ct. at 2651-52 (Thomas, J., dissenting) ("Such a test is unworkable and unsound. School officials cannot be expected to halt searches based on the possibility that a court might later find that the particular infraction at issue is not severe enough to warrant an intrusive investigation.").

223. *Id.* at 2642-43 (majority opinion).

224. *See supra* notes 135-36 and accompanying text.

225. *See supra* note 133. *T.L.O.* only discussed the search of a student's purse and did not provide further insight into location as a factor. *See supra* notes 131-34 and accompanying text.

226. New Jersey v. T.L.O., 469 U.S. 325, 347 (1985).

227. *Id.*

wear.[228] While *T.L.O.* was not explicit in its location requirement, *Safford* clarified the need for the suspicion to relate to the location searched.[229] However, the *Safford* opinion could have gone further. Instead of requiring mere reasonable suspicion that the item may be concealed within underclothing, the Court should have required probable cause to believe the item is hidden under clothes to justify a search as intrusive as a strip search. Such a requirement is well grounded in Fourth Amendment jurisprudence, as the Supreme Court has found in other cases that "the scope of a lawful search is 'defined by the object of the search and the places in which there is *probable cause* to believe that it may be found.'"[230]

As an unintended consequence, the *Safford* Court's requirement that a school official have reasonable suspicion that an item is hidden in a specific location should help cure situations where strip searches occur in schools without individualized suspicion.[231] School officials have attempted to justify these searches based on the "special needs" exception of *Skinner* and *Vernonia*,[232] reasoning that because schools present a "special need," no individualized suspicion is necessary.[233] However, strip searches are so invasive they should not be used even if a school possesses a "special need." Now, based on *Safford*'s reasoning, an official can no longer simply strip search all students of a fifth-grade class for missing contraband unless he can show a reasonable suspicion that it was hidden under one of the students' clothing. Thus, the *Safford* opinion could be read to prohibit officials from searching a group of students without individualized suspicion.

Therefore, while the *Safford* Court specified that the scope of the search must be justified by imminent danger to students, it failed to clarify who decides the issue of danger within each school system. In addition, while the

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228. *Safford*, 129 S. Ct. at 2642.

229. *Id.* at 2643.

230. Maryland v. Garrison, 480 U.S. 79, 84 (1987) (quoting United States v. Ross, 456 U.S. 798, 824 (1982)) (emphasis added).

231. *See, e.g.*, Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 606 (6th Cir. 2005) (qualified immunity granted despite Fourth Amendment violation when no individualized suspicion was present); Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 951, 956 (11th Cir. 2003) (qualified immunity granted despite Fourth Amendment violation when official had no individualized suspicion). *But see* Brannum v. Overton County Sch. Bd., 516 F.3d 489, 500 (6th Cir. 2008) (qualified immunity denied when no individualized suspicion); H.Y. *ex rel.* K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d 1174, 1190 (M.D. Ala. 2007) (qualified immunity denied with no individualized suspicion); Watkins v. Millennium Sch., 290 F. Supp. 2d 890, 901, 903 (S.D. Ohio 2003) (qualified immunity denied when no individualized suspicion); Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1208 (D. S.D. 1998) (qualified immunity denied with no individualized suspicion).

232. *See supra* notes 73-75 and accompanying text.

233. *See, e.g.*, *Watkins*, 290 F. Supp. 2d at 900; Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290, 1307 (N.D. Ga. 1999), *aff'd sub nom.* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002).

Court clarified that an official needs suspicion that the contraband is concealed in the location searched and may have inadvertently prohibited strip searches in group situations where there is no individualized suspicion, the Court should have required probable cause that the contraband is concealed within a student's clothing to justify a strip search.

3. The Court Incorrectly Shielded the Official with Qualified Immunity

Although the Court correctly held that Redding's Fourth Amendment rights had been violated, it incorrectly found that qualified immunity protected the school official from liability.[234] Referring to a few circuit cases where strip searches were upheld because of qualified immunity, the Court held that the differences of opinion of other judges were enough to require immunity for the school officials in this case.[235] The Court seemed to deny that its holding effectively awarded the school officials absolute immunity, stating:

> We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.[236]

However, the Court's finding on qualified immunity relied on the wrong standard and was unclear. Instead of relying on the differences of opinions of other judges, the Court should have applied the qualified immunity standard it clearly enunciated in 2002 in *Hope v. Pelzer*:

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[237]

If the *Safford* Court had applied this qualified immunity standard, it would have found that it was sufficiently clear to the school official that strip

234. *See Safford*, 129 S. Ct. at 2644.

235. *Id.*

236. *Id.*

237. Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) (citation omitted).

searching a thirteen-year-old was a Fourth Amendment violation based on a single case. In 1980, the Seventh Circuit clearly stated in *Doe v. Renfrow* that "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude."[238] In *Renfrow*, an objective actor, a drug-sniffing dog, singled out the student.[239] In *Safford*, a student who had been caught with pills accused another student of providing them to her.[240] There was no accusation that Redding currently possessed any pills, nor was it suggested that she was concealing them in her clothes.[241] *Renfrow* called the strip search a "violation of any known principle of human decency" and denied school officials the qualified immunity defense.[242] Unknown to most followers of the *Safford* case, the school official had in fact strip searched three students (Redding, her friend, and another student who had provided some information about drug trafficking at the school).[243] In addition, the principal forced Redding to wait alone for over two hours outside his office after she was strip searched.[244] Such an abuse of discretion by a school principal can hardly be deemed reasonable under any standard.

In addition to citing *Renfrow*, the Court could have focused on a plethora of circuit cases that provided notification to the officials that their conduct violated the Fourth Amendment. Interestingly, in its discussion of qualified immunity, the Court chose to mention only three of those prior federal court strip search cases – *Williams*, *Jenkins*, and *Thomas* – despite the variety of cases from which to choose.[245] All three cases protected the school officials with qualified immunity. In *Williams*, one of the first cases to apply the *T.L.O.* test, the Sixth Circuit found that the courts had been virtually silent on the Fourth Amendment rights of students and therefore concluded that the school officials had no notice of the application of the new law.[246] But in *Safford*, the Supreme Court could make no such claim in light of the plethora of federal strip search cases since 1985. Ironically, both the *Jenkins* and *Thomas* opinions specifically criticized the *T.L.O.* standard, claiming it was unworkable because it was too general to serve as a working guide and infer-

238. 631 F.2d 91, 92-93 (7th Cir. 1980).

239. *Id.* at 91-92.

240. *Safford*, 129 S. Ct. at 2640.

241. *Id.* at 2642.

242. *Renfrow*, 631 F.2d at 92-93.

243. Liptak, *supra* note 204.

244. *Safford*, 129 S. Ct. at 2645 (Ginsburg, J., concurring in part and dissenting in part).

245. *See* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160, 1171-72 (11th Cir. 2001), *vacated and remanded*, 536 U.S. 953 (2002); Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997); Williams v. Ellington, 936 F.2d 881, 889 (6th Cir. 1991).

246. *See Williams*, 936 F.2d at 884-85.

ring that school officials were protected by *de facto* absolute immunity.[247] In both cases, the courts found that the school officials violated the Fourth Amendment by going beyond the permissible scope in their strip searches but granted qualified immunity.[248]

Instead of focusing on the immunity discussion in these cases, the Court should have determined that the Fourth Amendment violations found in those cases provided notice to the officials that their actions – while perhaps not clear violations at the time – were now clear violations as established by those courts. By avoiding discussion of the actual violations found in those cases and selectively ignoring many other strip search cases where violations were found but qualified immunity was denied,[249] the Court incorrectly granted the defense of qualified immunity to protect the school officials.[250]

Thus, while the *Safford* Court did find a Fourth Amendment violation and made some important clarifications in the law, it incorrectly relied on the inappropriate lower reasonableness standard from *T.L.O.*, failed to clarify some of the ambiguities in the first and second prongs of the *T.L.O.* test, and incorrectly shielded the school officials with qualified immunity. As a result, lower courts and school officials can simply distinguish their strip searches by differentiating the facts or hiding behind *de facto* absolute immunity when strip searching students. Justices Stevens and Ginsburg, in their separate opinions, attacked the majority for failing to explicitly modify or clarify the application of the *T.L.O.* test as well as for finding qualified immunity. Justice Stevens specifically complained about the failure to clarify the law and further admonished the Court for finding qualified immunity based on seemingly divergent views about *T.L.O.*'s application by circuit courts.[251] Justice Ginsburg sharply rebuked the school official for abusing his authority when he ordered the strip search and then required Redding to wait two hours outside his office with no attempt to call her parents.[252] Even Justice Tho-

247. *See Jenkins*, 115 F.3d 821, 828 (11th Cir. 1997); Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290, 1312 (N.D. Ga. 1999) (teachers who make mistakes in judgment are protected "even when a federal court determines that, in hindsight, the teacher's acts exceeded a judicially set standard"), *aff'd sub nom.* Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated and remanded*, 536 U.S. 953 (2002).

248. *See Jenkins*, 115 F.3d at 828; *Clayton County*, 94 F. Supp. 2d 1290.

249. *See, e.g.*, Brannum v. Overton County Sch. Bd., 516 F.3d 489, 499-500 (6th Cir. 2008); H.Y. *ex rel.* K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d 1174, 1189-90 (M.D. Ala. 2007); Watkins v. Millennium Sch., 290 F. Supp. 2d 890, 903 (S.D. Ohio 2003); Konop v. Nw. Sch. Dist., 26 F. Supp. 1189, 1203-04 (D. S.D. 1998).

250. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2933, 2646 (2009) (Thomas, J., dissenting).

251. *Id.* at 2645 (Stevens, J., concurring in part and dissenting in part).

252. *Id.* at 2646 (Ginsburg, J., concurring in part and dissenting in part) ("Wilson's treatment of Redding was abusive and it was not reasonable for him to believe that the law permitted it.").

mas, in a dissent, complained that the majority opinion has imposed a "vague and amorphous standard on school administrators."[253]

IV. PROPOSALS TO REDRESS THE CONTINUING FOURTH AMENDMENT VIOLATIONS IN SCHOOLS

Because the *Safford* Court failed to effectively clarify existing Fourth Amendment jurisprudence in school strip searches, students remain susceptible to unreasonable searches and seizures on school grounds. However, lower courts, state governments, and local school boards can implement specific laws and policies to ensure that the law is clear so that school officials will not be shielded from liability in the future. Federal, state, and local governments should redress the shortcomings of the *Safford* opinion by banning strip searches altogether or at least requiring probable cause to justify a strip search at its inception. Additionally, courts and school boards should further clarify the scope of the search prong and craft policies to ensure that school officials have clear guidelines on the issue of imminent danger and location of the search. School boards should also craft other helpful policies to ensure that the least intrusive measures possible are used when searching students in schools.

A. Prong One: Justified at Its Inception

Although *Safford* refused to ban strip searches in schools or to require probable cause in all such cases, states can provide their citizens with more protections than those found in the United States Constitution. In fact, the Court in *T.L.O.* specifically suggested that New Jersey might choose to provide greater protection to its citizens under its own constitution or by crafting legislation.[254]

253. *Id.* (Thomas, J., dissenting). Justice Thomas recommended that the Court should have found no Fourth Amendment violation and instead called for a reversion to the rule of *in loco parentis*, giving school officials almost complete discretion and absolute immunity over the discipline of its students, claiming "[p]reservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a Constitutional imperative." *Id.*

254. *See* New Jersey v. T.L.O., 469 U.S. 325, 343 n.10 (1985) ("Of course, New Jersey may insist on a more demanding standard under its own Constitution or statutes.").

1. Ban Strip Searches or Require Probable Cause

States should ban school strip searches altogether. Many states have already passed legislation that bans strip searches in schools, including New Jersey,[255] California,[256] Iowa,[257] Oklahoma,[258] South Carolina,[259] and Washington.[260] Wisconsin has gone even further and made it a criminal act.[261] Other states should follow suit and write legislation that protects students by banning strip searches in schools. If states have no such legislation, local school boards should consider writing policies that absolutely ban strip searches in schools. Some school boards have already done so. For example, the New York City Department of Education specifically prohibits strip searches of students under all circumstances.[262] In the alternative, state legislatures, state courts, or local school boards could prohibit strip searches absent probable cause.[263] Florida, for example, already permits strip searches only where there is probable cause in law enforcement situations.[264]

2. Define the Term "Strip Search"

If a jurisdiction requires probable cause to justify strip searches or bans them altogether, it must also define the term "strip search." Some states have already done so through state legislation. For example, Wisconsin's statute defines a strip search as "a search in which a detained person's genitals, pubic

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255. N.J. STAT. ANN. § 18A:37-6.1 (West 1999).

256. CAL. EDUC. CODE § 49050 (West 2009). California does not specifically use the term "strip search" but prohibits a search that involves: "(a) Conducting a body cavity search of a pupil manually or with an instrument; (b) Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil." *Id.*

257. IOWA CODE § 808A.2(4)(a)&(b) (2010).

258. OKLA. STAT. tit. 70, § 24-102 (2010). Oklahoma's statute specifically prohibits a broadly defined "strip search": "No student's clothing, except cold weather outerwear, shall be removed prior to or during the conduct of any warrantless search." *Id.*

259. S.C. CODE ANN. § 59-63-1140 (2009).

260. WASH. REV. CODE § 28A.600.230(3) (2010).

261. WIS. STAT. § 948.50(3) (2010).

262. *See* New York City Dept. of Educ., Reg. No. A-432, p.2 (2005), *available at* http://docs.nycenet.docushare/dsweb/Get/Document-21/A-432.pdf.

263. The probable cause standard has been thoroughly discussed in other cases and considers not only the reasonable suspicion but also the reliability of the knowledge of suspicion. *See, e.g.*, Aguilar v. Texas, 378 U.S. 108, 113 (1983); Illinois v. Gates, 462 U.S. 213, 244 (1983); Spinelli v. United States, 393 U.S. 410, 418-19 (1969).

264. *See* FLA. STAT. § 901.211 (2010) (referring to law enforcement, not school officials).

area, buttock or anus, or a female person's breast, is uncovered and either is exposed to view or is touched by a person conducting the search."[265] Oklahoma's statute defines a strip search much more broadly to include the removal of a "student's clothing, except cold weather outerwear."[266] Many state legislatures have already defined the term strip search to include situations where underwear need not be fully removed.[267]

In addition to definitions imposed by state legislatures, some courts have defined the term strip search. For example, the First Circuit defined a strip search as "an inspection of a naked individual, without any scrutiny of the subject's body cavities."[268] The Seventh Circuit defined a strip search in inmate situations as "a visual inspection of a naked inmate without intrusion into the person's body cavities."[269] The Supreme Court in *Safford*, although unwilling to define the term strip search, was willing to admit that the pulling of Redding's underwear away from her body could be considered a strip search.[270]

Only a handful of states have banned strip searches and defined the term. Other states should follow suit. If states choose not to ban strip searches or define the term, they should require a school official to have probable cause before asking students to remove their clothing in school. If these changes are implemented at the state or local level, jurisdictions can provide more protections to the citizens than the current federal Constitutional law as interpreted by *T.L.O.* and *Safford.*

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265. WIS. STAT. § 948.50(2)(b).

266. OKLA. STAT. tit. 70, § 24-102 (2010).

267. *Compare* CAL. EDUC. CODE § 49050 (strip search included "[r]emoving or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil"), *and* WIS. STAT. § 948.50(2)(b) (strip search is one in which "a person's genitals, pubic area, buttock or anus, or a female person's breast, is uncovered and either is exposed to view or is touched by a person conducting the search"), *with* OKLA. STAT. tit. 70, § 24-102 ("No student's clothing, except cold weather outerwear, shall be removed prior to or during the conduct of any warrantless search.").

268. Blackburn v. Snow, 771 F.2d 556, 561 (1st Cir. 1985); *see also* Savard v. Rhode Island, 338 F.3d 23, 25 (1st Cir. 2003) (en banc) (defining strip searches as "visual inspections of the naked body"); Roberts v. Rhode Island, 239 F.3d 107, 108 n.1 (1st Cir. 2001) ("A 'strip search' involves a visual inspection of the naked body of an inmate.").

269. Peckham v. Wisc. Dep't of Corr., 141 F.3d 694, 695 (7th Cir. 1998).

270. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641 (2009) ("The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it.").

B. Prong Two: Scope of the Search

Even in states where the first prong of the *T.L.O.* test remains intact (those states that do not require probable cause at the inception or ban such strip searches outright), state courts and local school boards should permit strip searches only in a location where the officials have probable cause that the student is hiding the contraband and only in instances where there is an immediate danger to the students. Because age and sex do not provide any helpful guidance to courts, they should not be factors in the analysis of scope.[271]

1. The Location of the Search and Individualized Suspicion

Lower courts should mandate that school officials be permitted to search a location only where they have probable cause that the items may be found. Although the *Safford* Court only required reasonable suspicion,[272] this location condition should be explicitly mandated by lower courts in all strip search cases, and the level of scrutiny should be raised to the higher standard of probable cause. Once implemented, this requirement should help cure situations where strip searches occur in schools without individualized suspicion. With a location requirement, an official would not be able to strip search all students of a fifth-grade class for missing contraband. Instead, he would only be able to strip search a particular student if he has probable cause that the item in question would be found under that student's clothing. Thus, searching a group of students without individualized suspicion would no longer be permitted.

2. The Immediate Threat of Danger

In addition to mandating a location requirement, lower courts should mandate that school officials be permitted to resort to a strip search only when there is an immediate threat to the health and safety of the school, such as weapons or drugs. The *Safford* decision stated that one of the fatal deficiencies of the search for the prescription-strength ibuprofen was the lack of "any indication of danger to the students."[273] Lower courts should do the same and permit strip searches only when there is immediate danger to students.

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271. *See supra* Part III.B.2.b.

272. *Safford*, 129 S. Ct. at 2643.

273. *Id.* at 2642-43; *see also* Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 15, at *16 (relying on New Jersey v. T.L.O., 469 U.S. 325 (1985)).

Determining when students are in immediate danger is a more difficult question in light of the confusing dicta from *Safford*. While *T.L.O.* mandated that courts should not second-guess school officials when determining the nature of the intrusion,[274] the *Safford* opinion rejected this mandate and trivialized the officials' concerns about nonprescription medication.[275] To rectify this inconsistency, lower courts should only be able to second-guess school policies when there are no written school policies available to the community. If there are no such written policies, the courts may apply their own judgment regarding imminent risk to students.

School boards are best suited to write and implement specific policies regarding student strip searches at a local level. Currently, all states except Hawaii have delegated day-to-day management of school systems to their school boards.[276] Board members are elected to their positions, and they develop and implement educational policies throughout their system.[277] School boards should dictate through written policy what situations create imminent danger in the school system, such as the possession of weapons, illegal drugs, or prescription-strength ibuprofen.

If the policies are written by the school board and approved by the parents in the community, the courts should not be able to substitute their judicial opinion in place of the policy. The Sixth Circuit, in denying qualified immunity in *Brannum*, admonished the school officials for failing to institute policies designed to protect the privacy of the students, such as by advising the students or their parents that the students were being videotaped.[278] If the school board had notified the parents with clearly written policies, the court would not have had to speculate as to the school's motives and priorities.

Written policies provide notice to courts, school officials, parents, and students regarding the types of situations that would warrant strip searches in a school. If the policies are not acceptable to parents and students, they can work with the school board to make modifications. Because school board members are elected officials, parents retain some control over the policies implemented in the school district. Community involvement would help educate both the school officials and the parents in understanding and shaping the students' rights within the school systems. Thus, strip searches for small sums of money could not be justified without a written policy stating that petty thefts create an imminent risk or danger to the students and thus warrant strip searches; such a policy would most likely not be acceptable to parents in the community. As a result, Justice Stevens' concern in his dissent in

274. *T.L.O.*, 469 U.S. at 341-42.

275. *Safford*, 129 S. Ct. at 2642-43. *Contra id.* at 2652, 2654 (Thomas, J., dissenting).

276. Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 964 (1997).

277. *Id.*

278. Brannum v. Overton County Sch. Bd., 516 F.3d 489, 497 (6th Cir. 2008).

T.L.O.[279] would be mitigated because school officials would be hard-pressed to explicitly identify the theft of ten dollars, a dress code violation, or a chewing gum violation as one that would create a danger to the community.[280]

Thus, courts should not second-guess written policies in place within a school system. School boards and communities should promulgate and monitor policies that fairly protect both the educational and safety commitments of teachers and students' rights.

3. Other Helpful Policies

School boards that choose not to ban strip searches outright should prescribe the manner in which strip searches can be performed, such as requiring that they be performed in the least intrusive way possible.[281] Some jurisdictions have already created such policies.[282] For example, in *H.Y. ex rel. K.Y. v. Russell County Board of Education*, the school district had clear policies in its handbook.[283] The first policy addressed general searches of students, stating that "officials 'when possible should avoid frequent and unnecessary group searches.'"[284] According to the policy, group searches are only justified

> (1) when there are reasonable grounds to believe that evidence of "illegal or dangerous activities" will be found; (2) when the search is justified by the "immediacy of the circumstances" and the "need to protect the safety and welfare of students;" and (3) "when the invasiveness of the search method employed is minimal."[285]

The handbook then discussed strip searches, concluding that if a more intrusive search is needed, the officials "shall call the parents of the students involved and report their suspicions to the police who shall be responsible for any such searches."[286]

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279. *T.L.O.*, 469 U.S. at 385-86 (Stevens, J., concurring in part and dissenting in part).

280. If school boards did identify a dress code violation as a danger to the community, the parents could change the policy by pressuring school boards.

281. For example, in *Watkins v. Millennium School*, the school system had a policy that stated, "[T]he search of a Student's person or intimate personal belongings shall be conducted by the Chief Executive Officer. This person should be of the Student's gender and conduct the search in the presence of another staff member of the same gender." 290 F. Supp. 2d 890, 894-95 (S.D. Ohio 2003).

282. *See* H.Y. *ex rel.* K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d 1174, 1182 (M.D. Ala. 2007); *Watkins*, 290 F. Supp. 2d at 894-95.

283. 490 F. Supp. 2d at 1182.

284. *Id.*

285. *Id.*

286. *Id.*

In promulgating such written policies, school boards can protect both the teachers and the students. First, school officials would have clear guidelines regarding the permissibility of strip searches and the parameters for such searches. The *T.L.O.* Court wanted to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause."[287] By providing clear rules directly to the school officials, school boards can educate the officials. School officials are much more likely to read these guidelines promulgated by their school boards than to research, read, and understand the nuances of *T.L.O.*, *Safford*, and other conflicting cases to understand the rules on strip searching within a particular school district. School boards can also create training programs for the school officials within their respective systems. That mechanism can educate the teachers, nurses, and administrative officials as to when a strip search is warranted and how to perform one within both constitutional and local limits. By providing clear guidelines, schools can avoid expensive litigation and protect school officials from liability.

Second, written policies will help protect students from an abuse of discretion by school officials. For example, in *Watkins v. Millennium School*, the school had a policy that the school's chief executive officer perform any search of a student.[288] The court refused to grant qualified immunity when a teacher searched third-grade students because the school's policy put her on notice that she was not permitted to perform the search.[289] The *Watkins* court cautioned that noncompliance with policies subjected students to the teacher's sole discretion, which is exactly what *T.L.O.* sought to avoid.[290] Likewise, the court in *H.Y.* specifically mentioned the policy against group searches, although it did not specifically state it was relying on that policy, when it denied the defense of qualified immunity.[291] Similar policies can help both parents and school officials determine and understand what is appropriate within the school district and protect students from the abuse of discretion by teachers and administrators.

287. New Jersey v. T.L.O., 469 U.S. 325, 343 (1985).
288. 290 F. Supp. 2d 890, 894-95 (S.D. Ohio 2003).
289. *Id.* at 903.
290. *Id.* at 901.
291. *H.Y.*, 490 F. Supp. 2d at 1189-90.

V. CONCLUSION

Savana Redding was subjected to an intrusive, traumatic invasion of her privacy at her own school when she was forced to expose her body simply because the school principal had a hunch that she might be hiding prescription-strength ibuprofen in her underwear. Despite the Supreme Court's finding of a Fourth Amendment violation, the principal was shielded by the doctrine of qualified immunity because the law was unclear.[292]

Well before Savana Redding's unfortunate experience, the Supreme Court, in *New Jersey v. T.L.O.*,[293] established the law of searches within schools. Although the *T.L.O.* Court held that students should be afforded their Fourth Amendment rights,[294] twenty-five years of confusing and muddled case law has diluted those rights so they are almost nonexistent.[295]

The *Safford* case presented the Supreme Court with the perfect opportunity to rectify the problems resulting from the ambiguous law created by *T.L.O.* and its progeny of strip search cases. Unfortunately, the Court failed to adequately protect students' Fourth Amendment rights. First, the Court refused to modify the *T.L.O.* standard so that strip searches in schools have a higher level of scrutiny than a search of a purse. Instead, the Court applied a mercurial sliding scale test that has led and will lead to more confusion and complications in applying the law. Second, the Court, in making some clarifications within the second prong of the *T.L.O.* test, created more ambiguity than clarity and did not go far enough to protect students from school officials' discretion. To add insult to injury, instead of clarifying the law, the *Safford* Court illustrated the ongoing ambiguity by shielding the school official from liability because the law on the issue was unclear.

Although schools in the United States tend to publicly promote learning through a safe, supportive, nurturing, and positive environment,[296] students

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292. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643-44 (2009).

293. 469 U.S. 325 (1985).

294. *Id.* at 333.

295. *See supra* notes 155-58 and accompanying text.

296. *See, e.g.*, Safford United School District Beliefs, http://www.saffordusd.k12.az.us/exec/eSiteInfo.asp?set_site_to=RAC&division=RAC:+Home&group_is=&id=40 (last visited Sept. 10, 2010) (promoting positive school climate); Safford United School District Mission Statement, http://www.saffordusd.k12.az.us/exec/eSiteInfo.asp?set_site_to=RAC&division=RAC:+Home&group_is=&id=39 (last visited Sept. 10, 2010) (promoting respect for others); Edison Public School District, http://www.edisonpublicschools.org/Board%20of%20Education/BoardofEducationMembers.htm (last visited Sept. 10, 2010) (mission statement promoting safe and supportive learning environment); Burning Tree Elementary School – About Our School, http://www.montgomeryschoolsmd.org/schools/burningtreees/about/ (last visited Sept. 10, 2010) (mission statement promoting safe, nurturing environment).

will feel vulnerable in their learning environments because school administrators can continue to violate their Fourth Amendment rights and hide behind the doctrine of qualified immunity. To redress this crisis in our school system, state and local governments will need to address the *Safford* deficiencies and protect students at the local level. First, state and local government should require probable cause for strip searches or ban them altogether. At the very least, they should define the term strip search so that all interested parties know when one has occurred. Second, courts and local school boards should prohibit strip searches unless there is imminent danger to students and then permit such searches only when there is probable cause that the contraband is hidden under an individual student's clothing. Local school boards can promulgate policies that protect both the students and the teachers. In addition, school boards can educate teachers, parents, and students so that all parties are on notice and the community can work together to create a safe educational environment for students.

Once these explicit cures, clarifications, and policies are in place, school officials will not be able to hide behind the doctrine of qualified immunity when they violate students' Fourth Amendment rights. Only then will students feel adequately protected from Fourth Amendment violations within their schools. Schools that truly promote learning in a safe environment should take the lead in implementing these changes rather than strip searching the very students they claim to protect.