Comments

Safford Unified School District No. 1 v. Redding: A Missed Opportunity to Restore Fourth Amendment Rights to School Children

By STEVE DISHAROON*

> *In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.*[1]

Introduction

THIS PROFOUND OBSERVATION by Justice Fortas is perhaps lost on the majority of today's U.S. Supreme Court. Recently given the chance to make this promise a reality for American school children, the Court instead maintained a misguided precedent, and declined to recognize rights and remedies to which students are entitled under the Fourth Amendment to the U.S. Constitution.

This Note analyzes the recent Supreme Court case of *Safford Unified School District No. 1 v. Redding* ("*Redding*"),[2] and argues the Court erred in three respects. First, it should have overturned the flawed precedent of *New Jersey v. T.L.O.* ("*T.L.O.*"),[3] and recognized that

* Class of 2010. B.A., University of California, Santa Cruz. Thank you to my friends and family for supporting me and engaging my interests in law and politics. Thank you also to the U.S.F. Law Review for its excellent work in developing this paper. Finally, I would like to thank Professor Julie Nice, who was the first to alert me to the *Redding* case. Also, the zeal and energy that Professor Nice brings to the classroom has truly inspired me; she has motivated me to pursue my passions in law and life.

1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).
2. 129 S. Ct. 2633 (2009).
3. 469 U.S. 325 (1985).

school children are entitled to the same basic Fourth Amendment protections as adults—namely, the default requirements of a warrant and probable cause in order to search an individual's person or property.[4] Second, the Court failed to put an end to the horrific practice of public school officials strip searching students;[5] the Court should have ruled such searches categorically unreasonable under the Fourth Amendment. Finally, the Court's qualified immunity analysis is flawed in that it allows mere judicial disagreement to control whether a plaintiff is entitled to relief.

Part I explains the relevant Fourth Amendment principles at work in this context. Part II provides an historical background to the *Redding* case: it discusses the landmark *T.L.O.* decision and critiques two circuit court cases that applied the *T.L.O.* rule to strip searches. Part III describes the procedural and factual background of the *Redding* decision. Part IV analyzes the Fourth Amendment issues in *Redding* and argues the Court erred in that it (1) did not extend basic Fourth Amendment rights to school children, and (2) failed to categorically ban student strip searches. Part V analyzes the qualified immunity issue in *Redding* and argues the Court should not have granted immunity to the individual defendants. This Part also calls for a new qualified immunity standard that will ensure a remedy to students whose rights are violated by school officials.

I. Traditional Fourth Amendment Principles

The Fourth Amendment, which applies to the states by way of the Fourteenth Amendment,[6] reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable

4. The term "children" is no doubt broad. In the context of this Note, "children" are individuals who are not yet eighteen-years-old but still old enough such that they (1) are fully cognizant of their rights, and (2) do not require special care that necessitates intrusion into their bodily privacy. This Note is not concerned with defining a specific age at which a child attains Fourth Amendment protections. The focus here is to advocate for the *increase* in those protections; it is left for another time to determine the exact scope (i.e., a minimum age requirement).

5. A strip search is defined generally as a "visual inspection of an individual's body, including those portions usually hidden by undergarments." Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 1 (1991); *see also* Ralph D. Mawdsley & Jacqueline Joy Cumming, *Student Informants, School Strip Searches, and Reasonableness: Sorting Out Problems of Inception and Scope*, 230 EDUC. L. REP. 1, 12 (2008) ("A strip search involves students' removal of some or all of their clothing at the direction of teachers or administrators.").

6. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

> cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[7]

Fourth Amendment protections only apply if there is (1) state action,[8] and (2) a search of an area in which a person has a reasonable expectation of privacy.[9] The Court has clarified that school officials are state actors in this context.[10] The Court has also recognized students maintain a reasonable expectation of privacy in their bodies[11] and in the personal belongings they bring to school.[12]

After these preliminary requirements are satisfied, the question becomes whether a particular search violates the Fourth Amendment. The Court has made clear that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[13] These exceptions include searches that are incident to arrest,[14] circumstances in which a valid exigency requires immediate action,[15] and situations in which consent is obtained.[16] Therefore, the general rule is that a search is unlawful unless it is supported by a warrant issued upon probable cause.[17] In determining whether probable cause exists, the issuing magistrate or judge should "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit

---

7. U.S. CONST. amend. IV. While the Amendment addresses both searches and seizures, this Note is only concerned with the former.

8. *See T.L.O.*, 469 U.S. at 333 (holding the Fourth Amendment "applies to searches conducted by public school officials").

9. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). Justice Harlan's approach has been recognized as the governing standard. *See* Peter Winn, Katz *and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1 (2009).

10. *T.L.O.*, 469 U.S. at 336–37.

11. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641–42 (2009). *But see* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (holding that student athletes have a reduced expectation of privacy).

12. *See, e.g.*, *T.L.O.*, 469 U.S. at 338–40.

13. *Katz*, 389 U.S. at 357 (footnote omitted); *see also* United States v. Jeffers, 342 U.S. 48, 51 (1951) ("Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes.") (citations omitted).

14. Chimel v. California, 395 U.S. 752, 762–63 (1969).

15. Mincey v. Arizona, 437 U.S. 385, 393–94 (1978).

16. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

17. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973).

before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[18]

In the absence of an exception to the warrant requirement, a search may still be lawful if it is deemed reasonable under the circumstances.[19] These types of searches are based on the theory that the plain language of the Fourth Amendment only prohibits unreasonable searches, and does not always require a warrant or probable cause.[20] Such searches are typically administrative, rather than personal, and usually involve relatively minor invasions of privacy.[21] That being said, the Court has applied this standard to searches of the person. In *Terry v. Ohio* ("*Terry*"),[22] the Court allowed law enforcement to stop an individual (technically, a "seizure" under the Fourth Amendment) and perform a cursory pat-down search even though the officer lacked probable cause to believe a crime was taking place. The rationale for the Court was that the officer maintained a reasonable suspicion that the frisk was necessary to protect officer safety.[23] Such reasonable suspicion must be based on specific and articulable facts.[24]

Importantly, the *Terry* Court required that reasonable suspicion rise to the level of probable cause before an officer could perform a "full blown" search or arrest.[25] The Court has since reiterated that "[o]rdinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe

18. Illinois v. Gates, 462 U.S. 213, 214 (1983); *see also* Carroll v. United States, 267 U.S. 132, 161 (1925) (explaining that probable cause is a reasonable belief, based on specific facts and circumstances, that "warrant a man of prudence and caution in believing that [an] offense has been committed").

19. Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534–39 (1967).

20. *See Almeida-Sanchez*, 413 U.S. at 277.

21. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 598–99 (1981) ("The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.").

22. 392 U.S. 1 (1968).

23. *Id.*

24. *See id.* at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.") (citation omitted).

25. *Id.* at 10 ("If the 'stop' and the 'frisk' give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal 'arrest,' and a full incident 'search' of the person.").

that a violation of the law has occurred."[26] Therefore, with the exception of the minimal frisk allowed by *Terry*, warrantless searches of individuals require probable cause—the only difference is that in a warrantless search, the officer, rather than a judge or magistrate, determines if probable cause exists.

In sum, searches generally require a warrant. If a search takes place without a warrant, it is presumed unlawful until the government can prove that either (1) it has satisfied an exception to the warrant requirement, or (2) there is a special governmental interest, coupled with a low expectation of privacy (i.e., that the reasonableness standard should govern). Even if a warrant is not required, there still must be probable cause in order to conduct a "full blown" search of a person (i.e., beyond a frisk). This well-accepted doctrine remained the law until 1985, when the Supreme Court carved out perhaps the largest exception to traditional Fourth Amendment protections—the so-called "special needs" exception.[27]

II. Backdrop to *Redding*: *T.L.O.* and Subsequent Circuit Cases

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

In 1985, the Supreme Court decided *New Jersey v. T.L.O.*, addressing, for the first time, the issue of searches of public school students conducted by school officials.[28] The case arose out of an incident at a high school in New Jersey.[29] A teacher reported to the principal's office that she saw the defendant student smoking in a bathroom.[30] The vice principal spoke with the student and, unconvinced by her denials, conducted an extensive search of the student's purse.[31] An initial search produced a pack of cigarettes and rolling papers. A second, more in-depth search revealed marijuana, drug paraphernalia, and evidence that the student was involved in selling drugs.[32] This evidence

26. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); *see also id.* at 358 (Brennan, J., dissenting) ("An unbroken line of cases in this Court have held that probable cause is a prerequisite for a full-scale search.").

27. *See* Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU Educ. & L.J. 71, 75 (1999) (arguing that the "special needs" exception is "the latest and most broad exception to the warrant requirement of the Fourth Amendment").

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

29. *Id.* at 328.

30. *Id.*

31. *Id.*

32. *Id.*

was given to the police, and the state brought delinquency charges against the student.[33]

The student moved to suppress the evidence based on the theory that it was obtained through a violation of her Fourth Amendment rights, and the matter eventually reached the U.S. Supreme Court.[34] The Court first clarified that the Fourth Amendment extends to searches performed by public school officials.[35] However, it determined that such searches are governed by the "reasonableness" clause of the Fourth Amendment, and, therefore, it employed a balancing test that compared the individual's privacy rights with the "government's need for effective methods to deal with breaches of public order."[36] From this balancing act, the Court found that public schools are excepted from the warrant requirement of the Fourth Amendment.[37]

This exception is known as the "special needs" exception. With this exception, the government need not procure a warrant when it has a "special need" to search, and the school environment is a setting where such a need exists.[38]

The Court also found that school officials do not need probable cause to conduct a "full blown" search: "Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[39] The Court devised a two-part test to analyze whether a particular search is reasonable. First, the search must be "justified in its inception," which requires "reasonable grounds" to believe that the search will reveal evidence of wrongdoing—a violation of either the law or the school's administrative policies.[40] Second, the search must be "permissible in its scope," which requires the official conducting the search to employ methods that 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."[41]

---

33. *Id.* at 329.

34. *Id.* at 331.

35. *Id.* at 336–37.

36. *Id.* at 337.

37. *See id.* at 340 ("[W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority.").

38. *See id.* at 341; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

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

40. *Id.* at 341–42.

41. *Id.* at 342.

Thus, the Court removed not one, but two of the basic Fourth Amendment requirements: the warrant requirement and the need for probable cause. As such, *T.L.O.* represents an unprecedented and highly disturbing departure from traditional Fourth Amendment requirements.[42] Furthermore, the Court's standard is vague and can be manipulated by judges to find virtually any search valid if there is a shred of "reasonableness."[43] Two federal circuit court decisions are illustrative of this problem.

B. Applying *T.L.O.* to Student Strip Searches: The *Williams* and *Cornfield* Decisions

A number of federal circuit courts have struggled to apply the two-part test established by the *T.L.O.* Court.[44] One of the most problematic issues is how to evaluate strip searches of students—based on the *T.L.O.* reasonableness test or a higher Fourth Amendment standard (since *T.L.O.* did not concern a strip search). In the two cases that follow, the court applied the former.

1. *Williams by Williams v. Ellington*

a. Factual and Procedural History

In *Williams by Williams v. Ellington* ("*Ellington*"),[45] a student informant reported to her high school principal, Ellington, that the plaintiff, Williams, and another girl, Michelle, were inhaling a white powdery substance.[46] Ellington believed the report was reliable and investigated the situation.[47] She discovered one additional piece of "evidence" pertaining to Williams: one of Williams' teachers reported that, during the previous semester, she had found a note under Wil-

42. *See supra* Part I; *see also* 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, 932 (1997) ("Not only are strip searches a rarity in the law, but so too are warrantless searches supported by less than probable cause.").

43. *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, 43 (1994).

44. Gartner, *supra* note 42, at 949 ("Regrettably, the Supreme Court's 'guidance' in *T.L.O.* has offered little help to school personnel and courts alike, as evidenced by the case law since 1985."); *see* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643–44 (2009) (explaining the different approaches that circuit courts have taken under the *T.L.O.* decision).

45. 936 F.2d 881 (6th Cir. 1991).

46. *Id.* at 882.

47. *Id.*

liams' desk that discussed parties and referenced drug use.[48] On a later day, the same student informant reported that "those girls are at it again."[49] Ellington confronted the girls, at which time Michelle produced a small vial that contained "rush," a legal substance.[50] Unconvinced that he had obtained all the evidence, Ellington proceeded to conduct several searches of Williams:[51] first, Ellington had Williams' assigned locker searched; then, a second locker that Williams used was searched; next, Williams' books and purse were searched; and finally, Ellington had female officials strip search Williams by requiring her to remove her shirt and lower her jeans to her knees.[52]

Williams (by her father) sued the district and the officials in their individual capacities pursuant to 42 U.S.C. § 1983 (2000) ("Section 1983").[53] First, the court addressed the issue of qualified immunity. The general rule regarding qualified immunity is that officials will not be held liable as long as the unconstitutionality of their conduct is not "clearly established" such that they should have known they were violating someone's rights.[54] The court found that both the district and the individual defendants were qualifiedly immune from suit.[55] The court also found that the strip search was justified under the Fourth Amendment:

> A study of the record leads us to conclude that Ellington and the remaining Defendants were not unreasonable in suspecting, based on the information available at the time, that a search of Williams would reveal evidence of drugs or drug use. Further, Defendants were not unreasonable, in light of the item sought (a small vial containing suspected narcotics), in conducting a search so personally intrusive in nature.[56]

48. *Id.* ("When [the teacher] questioned Williams about the letter, the student passed it off as a joke . . . .").

49. *Id.* at 883.

50. *Id.* "Rush" is legal to possess, but inhaling it is an unlawful misuse of the substance. *Id.* at 882.

51. While Michelle was also searched, she was not a party to this appeal, and therefore, violations of her Fourth Amendment rights will not be discussed here.

52. *Ellington*, 936 F.2d at 883.

53. *Id.* Section 1983 is the means by which citizens can procure damages and equitable relief when state officials have violated their rights. *See* 42 U.S.C. § 1983 (2000). Contrast this with the "motion to suppress" used by the student in *New Jersy v. T.L.O.*, 469 U.S. 325, 337 (1985).

54. *Ellington*, 936 F.2d at 883–85. Qualified immunity is discussed in greater detail *infra* Part V.

55. *Id.* at 885, 889. Qualified immunity is discussed further *infra* Part V. This Note does not confront municipality immunity, which is at issue when a school district is sued.

56. *Ellington*, 936 F.2d at 887.

Thus, the court was convinced it had satisfied the two-part *T.L.O.* test. This strip search, according to these judges, was reasonable in its inception and reasonable in its scope.

b. Analysis

One of the more disconcerting aspects of this case is how the court foregoes individualized suspicion and allows suspicion of one individual to be imputed to another.[57] Specifically, there was more reason to believe that Michelle, not Williams, was in violation of a school rule or law: Michelle's father reported that she had stolen money from him, and that he feared she was using drugs; on the day of the alleged drug use, Michelle was acting strange and claimed she had the flu; and Michelle, not Williams, was the one who actually produced evidence of potential wrongdoing (the vial).[58] Still, the court seems to view this evidence as somehow adding to the suspicion vis-à-vis Williams. The only facts that implicated Williams directly were the uncorroborated and unreliable reports of a fellow student, one who could have had ulterior motives.[59] The note found by Williams' teacher does not bear on whether Williams was using drugs on this particular day: it had been found the previous semester and, at worst, referred to drug use *off* campus.[60]

This case serves as an example of how courts can use the vague *T.L.O.* standard to uphold searches that would never be lawful in a non-school environment. The case proves that *T.L.O.* went too far by removing the warrant and probable cause requirements, and by refusing to require individualized suspicion. School officials *could have* tried to procure a warrant in this case: there were no exigent circumstances or other indications that an immediate search was necessary. Of course, such an attempt would have failed because there was no probable cause to search Williams' person. Ultimately, this case shows that even if *T.L.O.* was right to eliminate the warrant requirement, the probable cause standard must be maintained to prevent highly intrusive and patently unreasonable searches, such as these.

57. The *T.L.O.* Court did not resolve whether individualized suspicion is a requirement of the two-part reasonableness test. *T.L.O.*, 469 U.S. at 342 n.8.

58. *Ellington*, 936 F.2d at 882–83.

59. *See id.*

60. *Id.* at 882.

2. *Cornfield v. Consolidated High School District No. 230*

a. Factual and Procedural History

In *Cornfield v. Consolidated High School District No. 230* ("*Cornfield*"),[61] Cornfield brought a Section 1983 claim against his teacher ("Spencer"), the dean ("Frye"), and his school district after he was subjected to a strip search.[62] The events leading up to the search began when a teacher's aide reported to Spencer and Frye that she had noticed "an unusual bulge in Cornfield's crotch area."[63] Fearing that Cornfield was "crotching drugs," Spencer and Frye questioned Cornfield and attempted to gain consent to search him—Cornfield refused.[64]

In part because they believed a pat down search to be excessively intrusive, Frye and Spencer decided to strip search Cornfield.[65] They escorted Cornfield to the boys' locker room, made sure no one was present, then locked the door.[66] Cornfield was forced to undress completely, while the two men watched.[67] Cornfield then changed into a gym uniform, as the men looked through his clothes.[68] Although irrelevant for Fourth Amendment purposes, it is worth noting they found no evidence of wrongdoing.[69]

The circuit court upheld the search as reasonable.[70] It also found that the officials were qualifiedly immune.[71] Under the two-part *T.L.O.* test, the court first asked whether the search was permissible in its inception. It found that "a number of relatively recent incidents reported by various teachers and aides as well as their personal observations" gave Spencer and Frye reasonable suspicion to search.[72] The incidents were as follows: (1) on previous occasions, Cornfield had

61. 991 F.2d 1316 (7th Cir. 1993).

62. *Id.* at 1319.

63. *Id.*

64. *Id.* The court states that when called, Cornfield's mother declined to consent to the search of her son. *Id.* The court implies Cornfield also expressly refused to consent; otherwise the Fourth Amendment claim would have failed here. *See supra* Part I (explaining that consent satisfies an exception to traditional Fourth Amendment requirements).

65. *See Cornfield*, 991 F.2d at 1319. The absurdity of this reasoning appears lost on the court, as it did not so much as question it. *See id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1323.

71. *Id.* at 1324. Judge Easterbrook criticized this as an advisory opinion since finding the search reasonable mooted the immunity issue. *Id.* at 1328 (Easterbrook, J., concurring).

72. *Id.* at 1323 (majority opinion).

allegedly stated he was dealing drugs and would test positive for marijuana; (2) Spencer believed Cornfield had failed a drug rehabilitation program; (3) Cornfield once brought a bullet to school; (4) a bus driver reported smelling marijuana "from where Cornfield was sitting"; (5) students had previously reported seeing Cornfield in possession of, and smoking, marijuana; (6) Cornfield allegedly told Spencer he constantly thought about drugs; (7) Cornfield had allegedly "crotched" drugs before; and (8) this was the first time Spencer had noticed "the unusual bulge in Cornfield's crotch area."[73]

The court then asked whether the search was permissible in its scope.[74] The court decided the issue in a single paragraph: since Spencer and Frye believed drugs were hidden in the crotch area, performed the search in the "privacy" of the boys' locker room, stood a fair distance away from Cornfield, and "did not physically touch him or subject him to a body cavity search," the search was reasonable in scope.[75]

b. Analysis

The eight factors the court pointed to in upholding the inception of the search no doubt raise concerns about Cornfield's well-being, but not one bears on the question of whether he was in possession of drugs on that particular day. Reasonable suspicion requires "specific and articulable facts."[76] Such facts these are not: each relates to past incidents, many are unreliable (based on hearsay or uncorroborated informant information), and most were adamantly denied by Cornfield and his mother.[77] Still, the court apparently believed that *more is inherently better*, and found the search reasonable in its inception.[78]

The factors the court used to uphold the scope of the search also do not properly weigh on the issue. For one, the idea that not performing a cavity search somehow adds to the reasonableness of what was done is ridiculous: there is virtually always a more intrusive search that an official could have conducted, and it has no bearing on the reasonableness of the search that was performed. Second, the location of the search is irrelevant: whether it was performed in the boys' locker room, the nurse's office, or an unoccupied classroom, none of

73. *Id.* at 1322.
74. *Id.*
75. *Id.*
76. *See, e.g.*, Minnesota v. Dickerson, 508 U.S. 366, 374 (1993).
77. *Cornfield*, 991 F.2d at 1322.
78. *Id.* at 1323.

this bears on the issue of the intrusion itself. Indeed, the only factor related to the reasonableness of the scope is the claim the officials believed that the drugs were located in the crotch area. This bears on the issue of whether the scope of the strip search was necessary to ferret out the alleged infraction. But, of course, a mere belief is not enough, and this search should have been found unreasonable in scope as well as in its inception.

A final note on *Cornfield* relates to how the court addresses its own precedent. Thirteen years earlier, and prior to the *T.L.O.* decision, the Seventh Circuit decided *Doe v. Renfrow* ("*Renfrow*").[79] That court took a very different approach to the issue of strip searching children: "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 principles of human decency*."[80] The *Cornfield* court takes this to mean simply that "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness."[81] The court also states that its "sharp condemnation of the conduct of the school officials in [*Renfrow*] stemmed from the fact that the strip search of Doe was executed without any individualized suspicion and without reasonable cause."[82] But this seems to miss the point of the *Renfrow* court, which referred to a strip search as an "invasion of constitutional rights" and a violation of "human decency."[83] There is no qualification, no ambiguity. The *Renfrow* court understood that student strip searches are simply wrong, by any measure. The manner in which the *Cornfield* court does away with the *Renfrow* opinion appears to be a desperate attempt to legitimize its decision in the face of a previous case that, being too well-reasoned and righteous, could not simply be ignored.

---

79. 631 F.2d 91 (7th Cir. 1980).

80. *Id.* at 92–93 (emphasis added). The court continued:

> We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles. It is not enough for us to declare that the little girl involved was indeed deprived of her constitutional and basic human rights. We must also permit her to seek damages from those who caused this humiliation.

Id. at 93.

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

82. *Id.* at 1324 (citation omitted).

83. *Renfrow*, 631 F.2d at 92–93.

III. The *Redding* Decision: Factual and Procedural History

In June 2009, the Supreme Court again addressed the issue of searches of public school students.[84] In this case, a mother sued the school district and three officials after her daughter, Savana, was subjected to a strip search.[85] Savana, thirteen at the time, was searched because the officials feared she was in possession of ibuprofen and naproxen, both prohibited under school rules without prior permission.[86]

A week before the search, a student reported to the assistant principal, Wilson, that he had received pills from a fellow student, Marissa, which had made him sick.[87] He gave Wilson one of the pills, which was later identified by the school nurse, Schwallier, as prescription ibuprofen.[88] A subsequent questioning of Marissa resulted in the following: Wilson confiscated a day planner that contained contraband;[89] Marissa produced an additional pill, identified by the nurse as over-the-counter naproxen; and Marissa claimed that Savana had supplied the ibuprofen.[90] Despite her cooperation, Marissa was then strip searched.[91]

---

84. The Court also addressed student searches in 1995 when it upheld a school's policy of randomly drug testing student athletes. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) ("Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional."). The immense overbreadth of this ruling was captured by Justice O'Connor in her dissent: "By the reasoning of today's decision, the millions of [public school] students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search." *Id.* at 667 (O'Connor, J., dissenting). *See also* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 838 (2002) (extending *Vernonia* by permitting suspicionless drug testing of students that participate in *any* extracurricular activity).

85. Safford Unified Sch. Dist. No.1 v. Redding, 129 S. Ct. 2633, 2638 (2009).

86. *Id.* at 2637–38. The Court assumes the legitimacy of the rule, as school rules are only invalidated when they are "patently arbitrary," which this rule is not. *See id.* at 2640 n.1.

87. *Id.* at 2640.

88. *Id.*

89. The planner included "several knives, lighters, a permanent marker, and a cigarette." *Id.* at 2638.

90. *Id.* at 2640.

91. *Id.* Specifically, the Court states that "Marissa was then subjected to a search of her bra and underpants . . . ." *Id.* While this raises some ambiguity regarding whether it was a strip search or a search of only her clothes after they had been removed in private, the Court implies the former. Justice Souter would no doubt have noted the material fact of her disrobing in private prior to the search. Marissa was not a party to the appeal, meaning that her Fourth Amendment rights were not addressed by the Court, but this Note would

At that point, Savana was called into the principal's office, where Wilson showed her the day planner.[92] Savana admitted that it was her planner, but said that none of the incriminating items belonged to her, adding that she had lent the planner to Marissa a few days earlier.[93] Wilson recognized Savana as one of a group of girls who had been reported as "unusually rowdy" at a recent school dance.[94] Wilson, therefore, decided to search Savana's backpack and outer clothing.[95] The Court held the *T.L.O.* reasonableness standard was satisfied as to these initial searches: Marissa's statement that the pills had come from Savana, coupled with the reports of Savana's behavior at the dance, was enough to "warrant suspicion that Savana was involved in pill distribution."[96]

The searching did not end here.[97] At the direction of Wilson, Schwallier and an administrative assistant, Romero, took Savana to the nurse's office.[98] Presumably, Wilson did not accompany them.[99] In the office, Schwallier and Romero ordered Savana to remove all of her clothes except her undergarments.[100] She was then told to pull her bra and underpants away from her body so that the officials could see if she was hiding pills.[101] The Court found this strip search to be a violation of Savana's Fourth Amendment rights, reasoning "the content of the suspicion failed to match the degree of intrusion."[102]

Since this was a claim for damages brought under Section 1983, as opposed to a criminal case in which the victim of the unlawful search was trying to suppress seized evidence, the Court then turned to the question of whether the school officials were qualifiedly immune.[103] The Court granted immunity, reasoning "the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to

like to acknowledge that she too suffered an unwarranted and unacceptable violation of her rights.

92. *Id.* at 2638.

93. *Id.*

94. *Id.* at 2641.

95. *Id.*

96. *Id.*

97. The Court treated the situation as one evolving search, which was reasonable in inception but unreasonable in scope. This Note disagrees, and argues there were at least three separate searches: one of her clothes, one of her backpack, and one of her body.

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

99. *See id.* Wilson is male, and Schwallier and Romero are both female. *See id.*

100. *Id.*

101. *Id.*

102. *Id.* at 2642.

103. *Id.* at 2643.

counsel doubt that we were sufficiently clear in the prior statement of law."[104]

IV. Analysis of the Fourth Amendment Issues

A. The Court Should Have Restored Students' Fourth Amendment Rights

The Court was correct that the strip search was excessively intrusive and violative of the Fourth Amendment. However, a Fourth Amendment violation should have been found even if the officials had stopped after the initial search of Savana's backpack and outer clothing. It is disturbing that the Court believes that rowdy behavior at a school dance (not an uncommon phenomenon) can add to the suspicion that an individual is engaged in "pill distribution."[105] The only real evidence that Savana possessed pills was Marissa's statement. Since the behavior of the dance cannot reasonably serve as corroboration, Marissa's statement was unreliable.[106] The fact that the Court could uphold the initial search is indication that *T.L.O.* is a flawed precedent: the reasonableness standard is simply too weak and malleable to function as an adequate safeguard against the Constitution's prohibition on "unreasonable searches and seizures."[107] Therefore, the *Redding* Court should have overruled *T.L.O.* and put an end to the moratorium on the probable cause requirement in school searches.

Furthermore, it is unnecessary to have such a wide sweeping school exception to the warrant requirement. There already exists an exigency exception, which allows school officials to conduct reasonable warrantless searches and seizures when justified by the immediacy and dangerousness of a situation.[108] Assuming that public schools are appropriate arenas for an exception to the warrant requirement, probable cause should still be required.[109] Specifically, if there is no consent, then a search of a student's belongings should only proceed if there is probable cause to believe a violation of the law or school

104. *Id.* at 2644.
105. *Id.* at 2641.
106. *See* Mawdsley & Cumming, *supra* note 5, at 6–9 (discussing the issue of student informant reliability).
107. U.S. Const. amend IV.
108. *See* Mincey v. Arizona, 437 U.S. 385, 393–94 (1978).
109. *See* New Jersey v. T.L.O., 469 U.S. 325, 358 (1985) (Brennan, J., dissenting) ("[P]robable cause . . . is the constitutional minimum for justifying a full-scale search, regardless of whether it is conducted pursuant to a warrant or . . . within one of the exceptions to the warrant requirement.").

rules is in progress or has taken place.[110] And, as argued *infra*, a search of a student's person should be prohibited.[111]

By upholding the *T.L.O.* test, the Court sanctioned the view that public school students are the only non-prisoner citizens undeserving of the protection of probable cause prior to a full-scale search.[112] Such a view is in direct contradiction to the promise of the Court in *Tinker v. Des Moines Independent Community School District* ("*Tinker*"): "Students in school as well as out of school are 'persons' under our Constitution."[113] It also conflicts with basic notions of equality and decency. Yet, despite the *Tinker* promise, "many would argue that schoolchildren rate as second-class citizens as far as their Fourth Amendment protection against unreasonable search and seizure is concerned."[114] This is discriminatory, even dehumanizing, as it treats students "as things or subjects to be manipulated or programmed . . . ."[115] To put an end to this inequality, students should be given the same protections as adults: that is, a presumption that a warrant is required, and if the warrant is validly excepted, a strict condition of probable cause before a full search of personal belongings can proceed. Indeed, one commentator argues that, "[i]f the Fourth Amendment is to be anything other than a hollow, unenforceable right, the same standards that apply to adults must be applied to safeguard children . . . ."[116]

B. The Court Should Have Outlawed Student Strip Searches

Some searches are so intrusive that they are unreasonable under any circumstances—student strip searches are the ultimate example.[117] A growing number of states apparently agree, and have en-

110. *See supra* Part I (describing probable cause). The question of whether desks and lockers should fall into the category of a student's "belongings" is beyond the scope of this Note.

111. *See infra* Part IV.B.

112. *See T.L.O.*, 469 U.S. at 360 (Brennan, J., dissenting) (noting that no other case has permitted a full-blown search on less than probable cause). *But see* Bell v. Wolfish, 441 U.S. 520, 558–60 (1979) (holding that prison inmates and pretrial detainees can be strip searched on less than probable cause).

113. 393 U.S. 503, 511 (1969); *see also* U.S. CONST. amend. IV (referring, unequivocally, to "the people," not the "adult people").

114. Gartner, *supra* note 42, at 954.

115. Scott C. Berman, *Student Fourth Amendment Rights: Defining the Scope of T.L.O. School-Search Exception*, 66 N.Y.U. L. Rev. 1077, 1129 (1991) (quoting Rich, *The Student's Right to Privacy*, EDUC. DIG., Apr. 1985, at 32, 33).

116. Gartner, *supra* note 42, at 938.

117. *See* Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980); *see also* Tarter v. Rayback, 742 F.2d 977, 982 (6th Cir. 1984) ("We note that not only must there be a reasonable ground to institute the search, the search itself must be reasonable. Thus, for example, the

acted legislation that prohibits strip searches of students by school officials.[118] But the Court has refused to address the issue, let alone to hold that such searches are categorically unreasonable (i.e., unlawful) under the Fourth Amendment. The only Supreme Court case to directly address the constitutionality of strip searches (of adults) did so in the prison context.[119] Even there, in the context of the search of pretrial defendants and convicted prisoners[120] (both detained upon probable cause) several justices expressed deep concern with the practice.[121] By failing to ban student strip searches, and indeed, through its sanctioning of the practice,[122] the *Redding* Court has placed students in the same category as prisoners.

The question must be asked, in light of the context in which these searches take place, what are the public schools teaching school children? Such flagrant disrespect for constitutional principles sets a terrible example for students, teaching them that constitutional rights are only for some.[123] They now know discrimination is acceptable, so long as there is a "good reason" for it. As a result, there is a fundamental hypocrisy at work: students are expected to salute the flag, respect authority, and follow the law, while school officials need little more than a hunch to subject these students to extreme indignity and potential trauma.

---

authority of the school official would not justify a degrading body cavity search of a youth in order to determine whether a student was in possession of contraband in violation of school rules.").

118. *See, e.g.*, CAL. EDUC. CODE § 49050 (West 2006); IOWA CODE ANN. § 808A.2(4) (West 2003); OKLA. STAT. ANN. TIT. 70, § 24-102 (West 2005); WASH. REV. CODE ANN. § 28A.600.230(3) (West 2009); WIS. STAT. ANN. § 948.50 (3) (West 2005) ("Any official, employee or agent of any school or school district who conducts a strip search of any pupil is guilty of a Class B misdemeanor.").

119. Bell v. Wolfish, 441 U.S. 520, 558–60 (1979). The case was brought by prisoners who were submitted to what is likely the most humiliating and dehumanizing type of strip search—the body cavity search. The case describes the search as follows: "If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected." *Id.* at 558 n.39. Nevertheless, the Court declined to require individualized suspicion for these searches and held that they can be conducted on less than probable cause. *Id.* at 558–60.

120. *See id.* at 526.

121. *See id.* at 576–77 (Marshall, J., dissenting) ("In my view, the body-cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity and common decency."); *see also id.* at 594 (Stevens, J., dissenting) ("The body-cavity search—clearly the greatest personal indignity—may be the least justifiable measure of all.").

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

123. *See Gartner*, *supra* note 42, at 942 ("If schools violate that right [to privacy], as they do when they conduct strip searches, students will naturally come to view the Fourth Amendment and other constitutional provisions as mere platitudes, not to be taken seriously.").

Many commentators have discussed the traumatic effect that a strip search can have on students.[124] Strip searches have been compared to rape and have reportedly led to anxiety, depression, sleep disorders, and other psychological injuries.[125] One of the reasons that they can be particularly damaging to children is that younger individuals are often self-conscious about their bodies and more likely than adults to be intimidated by older, more powerful (and usually trusted) authority figures, such as teachers, principals, and other school officials.[126] This abuse of authority and trust is unacceptable. If a school official believes a student is concealing contraband on his or her person, that official should simply call the student's parents or notify the police.

The need for this delegation, as opposed to officials taking matters into their own hands, is further supported by the fact that school administrators are not experts in law enforcement.[127] They are unqualified in matters of probable cause and reasonable suspicion. Ironically, the *T.L.O.* Court expressed this concern with respect to a school official's inability to determine probable cause: "By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[128] This reasoning is backwards. If officials cannot be trusted to understand a certain constitutional standard, then they should not be relieved of its constraints. Instead, they should be prohibited from engaging in conduct that requires such understanding. While school officials deserve deference in their administration of the nation's schools, it goes too far to give them special exemptions from constitutional constraints.

In sum, strip searches of school children must be ruled categorically unreasonable under the Fourth Amendment because no level of

124. *See id.* at 928 ("While some may walk away 'merely' embarrassed or degraded, the experience paralyzes and traumatizes others."); *id.* at 931 ("'Strip searches by school officials are tantamount to child abuse and are ethically and constitutionally unacceptable.'") (quoting Jim McKinnon, *Ban Strip Searches, U.S. Judge Is Asked*, PITT. POST-GAZETTE, Aug. 21, 1993, at B4); *see also* Blickenstaff, *supra* note 43, at 45 ("Although adults are affected by strip searches as well, children are especially susceptible to psychological harm."); Shatz, *supra* note 5, at 11 ("Evidence from psychologists supports the assumption that *any* search of a school age child or adolescent has a greater impact than would such a search of an adult because the development of a sense of privacy is critical to a child's maturation.").

125. *See* Gartner, *supra* note 42, at 929.

126. *See id.* at 930.

127. *See id.* at 956.

128. *See* New Jersey v. T.L.O., 469 U.S. 325, 343 (1985).

state interest can justify such extreme intrusions into personal privacy. Strip searches are (1) contrary to the education process, (2) psychologically damaging, and (3) inappropriate given school officials' lack of training and qualification in law enforcement and constitutional matters.

There remains the issue of the *Terry* frisk, distinct from a strip search, but still inappropriate to perform on a student. Pat down searches involve many of the same risks and problems as strip searches. In fact, an argument could be made that being physically touched by school officials may be *more* traumatic than disrobing in front of them. Also, as with strip searches, school officials lack the expertise of law enforcement to determine when and if a pat down is warranted.

However, if a *Terry* frisk of students is permitted, then it must proceed under the same standards as it does with adult suspects: that is, an official can only perform a cursory pat down of the person's outer clothing if there exists reasonable suspicion to believe such action is needed to protect the official's safety.[129] Under this standard, a frisk would have been unlawful in all the strip search cases cited in this Note, as none involved threats to the safety of the officials involved.[130]

V. Analysis of the Qualified Immunity Issue

A. A Brief Background on Qualified Immunity

There are two forms of immunity for governmental officials acting in their official capacity.[131] The first, "absolute immunity," applies to a select group of officials: the President of the United States, legislators, prosecutors, judges, and executive officers performing adjudicative functions.[132] Officials who do not fall into one of these categories must argue for "qualified immunity."[133] The justification for both

129. Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

130. *T.L.O.*, *Ellington*, and *Cornfield* involved suspicions that the students had engaged in prohibited conduct or were in possession of drugs. *See supra* Part II. *Redding* involved suspicion that the student possessed unauthorized medication. *See supra* Part III. *Talladega* and *Thomas* involved suspicions that the students had stolen small amounts of money. *See infra* Part V. None of these situations involved threats to the official's safety.

131. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Individual immunity is distinct from municipality immunity, for example, regarding a school district's liability. *See generally* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978). Municipality immunity is beyond the scope of this Note, which is primarily concerned with the rights and actions of individuals.

132. *Harlow*, 457 U.S. at 807.

133. *Id.*

forms of immunity is to "shield [officials] from undue interference with their duties and from potentially disabling threats of liability."[134] Immunity law is functional rather than formalistic: it only applies if this justification is satisfied.[135]

The Supreme Court has devised a rule for determining when qualified immunity should be granted: "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[136] The Court went on to say, "Where an official *could be expected to know* that certain conduct would violate statutory or constitutional rights . . . [a plaintiff] may have a cause of action."[137] Thus, there appears to be two distinct aspects to the rule: rights need to be "clearly established," but at the same time, there is a definite focus on reasonableness—the question of whether the official *should have known* that the conduct violated the plaintiff's rights.

This Note argues that, while the rule may have been vague before *Redding*, the Court should have clarified the unambiguous reasonableness standard. In any event, qualified immunity—even under the preexisting standard—should not have been granted.

B. The Qualified Immunity Issue in *Redding*

1. Immunity Should Not Have Been Granted to the Individual Defendants

The *Redding* Court was wrong to grant qualified immunity to the school officials because the law was "clearly established." The Court did not alter the *T.L.O.* rule; it simply applied it to find a specific search unreasonable.[138] Justice Ginsburg argued this point in her dissent from the grant of qualified immunity.[139] Justice Stevens agreed:

> Nothing the Court decides today alters this basic framework. It simply applies *T.L.O.* to declare unconstitutional a strip search of a 13-

---

134. *Id.* at 806. This Note is only concerned with qualified immunity, as school officials do not fall into any of the groups that receive absolute immunity.

135. *Id.* at 810–11.

136. *Id.* at 818 (citation omitted). Additionally, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that [particular] right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

137. *Harlow*, 457 U.S. at 819 (emphasis added).

138. *See infra* Part V.B.2.

139. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2646 (2009) (Ginsburg, J., concurring in part and dissenting in part) ("The Court's opinion in *T.L.O.* plainly stated the controlling Fourth Amendment law.").

> year-old honors student that was based on a groundless suspicion that she might be hiding medicine in her underwear. This is, in essence, a case in which clearly established law meets clearly outrageous conduct.[140]

Instead of recognizing this and respecting Savana's right to a civil remedy, the majority allows mere disagreement among federal judges to determine the issue.[141] This is inappropriate for at least two reasons. First, "the clarity of a well-established right should not depend on whether jurists have misread [Supreme Court] precedents."[142] Second, the four cases cited by the majority as evidence that the law was not "clearly established"[143] were *not* "well-reasoned," despite the majority's contentions. These cases should have been dismissed as simply wrong.

The Court first cited the original Ninth Circuit decision in *Redding*, which declined to find a Fourth Amendment violation in Savana's strip search.[144] The citation to the appellate court is curious, as *Redding* itself indicates the Ninth Circuit opinion was flawed.[145] The *T.L.O.* rule is predicated on reasonableness: if the Ninth Circuit truly erred in its analysis of the rule's application, then the reviewing court should find the lower court's decision unreasonable. Yet, the Court cites it as evidence of a reasonable misunderstanding of the rule.

The second case cited was *Ellington*, which, as discussed *supra* Part II.B.1, engaged in a highly flawed Fourth Amendment analysis.[146] The third and fourth cases cited by the Court are disturbing. First was *Jenkins v. Talladega City Bd. of Ed.* ("*Talladega*"),[147] which granted immunity to officials who strip searched two eight-year-old girls in an effort to recover a missing seven dollars.[148] Next was *Thomas v. Roberts* ("*Thomas*"),[149] which granted qualified immunity to officials who conducted strip searches of an entire fifth grade class because twenty-six dollars had gone missing.[150]

140. *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part).

141. *Id.* at 2643–44.

142. *Id.* at 2645.

143. *Id.* at 2643–44.

144. *See id.* at 2638.

145. This is implicit in the Court's partial affirmance of the *en banc* Ninth Circuit opinion, which overruled the earlier Ninth Circuit decision that had upheld the search of Savana as permissible under the Fourth Amendment. *See id.* at 2638.

146. *Id.* at 2643.

147. 115 F.3d 821 (11th Cir. 1997).

148. *Id.* at 822–23.

149. 323 F.3d 950 (11th Cir. 2003).

150. *Id.* at 952.

This is deeply troubling. *T.L.O. clearly* established the impermissibility of the strip searches that took place in *Talladega* and *Thomas*—*T.L.O.* included in its test that searches are unreasonable if "excessively intrusive in light of the age and sex of the student and the *nature of the infraction*."[151] The nature of the alleged infractions in these cases, theft of seven and twenty-six dollars, respectively, clearly do not permit the excessive intrusiveness of the searches performed.

Not only did the Court give undue weight to judicial disagreement, but the decisions that it cited are in clear conflict with the *T.L.O.* mandate. The Court should have taken this into account in its analysis of cases that purport to show the law was not clearly established. No weight should have been given to these cases. The Court should have recognized the law *was* clearly established, meaning that Savana was entitled to be "made whole" by the civil law system.

2. The Court Failed to Ensure Future Violations Would Be Remedied

Even if the Court was correct that the law had not already been clearly established, it *should have* clearly established it. But the case offers no clarity regarding the preexisting law. Instead, the "*Redding* Rule," though purportedly "clear," is anything but:

> We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of [a student's] resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.[152]

At first blush, the Court seems to clarify there must be a threat of danger before a strip search can take place. However, it adds that if there is reasonable suspicion that the student may have resorted to hiding "evidence of [*any*] wrongdoing" in his or her outer undergarments, then a strip search is permissible. This means the rule is unchanged, since *T.L.O.* already required reasonable grounds that evidence of wrongdoing would be found in the location to be searched.[153]

151. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (emphasis added).
152. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643 (2009).
153. *See T.L.O.*, 469 U.S. at 341.

C. The Qualified Immunity Standard Should Be Revised

Even if qualified immunity was properly granted in this case, the Court should have revised the standard so as to prevent defendants, such as those in *Redding*, from skirting liability in the future. Courts must prevent government officials from engaging in such reprehensible conduct. Indeed, without an adequate remedy, there is little to deter officials from intruding on individual rights, since the odds are likely they will never face liability.

Language in the *Redding* case provides an idea for how to improve the standard. Justice Souter stated, "The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.'"[154] Unfortunately, though, this does not seem to be entirely accurate; the conduct in *Williams* was "outrageous," the intrusions in *Cornfield* were "outrageous," and the search for common anti-inflammatory medicine in the underwear of a thirteen-year-old girl was "outrageous."[155] Not to mention the patently "outrageous" searches conducted in *Talledega* and *Thomas*.[156] Yet qualified immunity was granted to the officials in each of these cases.[157]

It is time to establish a qualified immunity standard that is truly based on "outrageous" conduct. An objective reasonableness test should be employed: officials should not be granted qualified immunity *unless* they demonstrate their conduct was objectively reasonable (that is, a reasonable person would assume that it was lawful). This test would not leave the possibility for relief in the hands of judges who, despite their usual legal expertise, at times fail to clearly convey the law. The clarity of a rule inevitably is subject to the practical limitations, and inevitable ambiguity, of the written word. To solve these problems, this new standard would not base immunity on the prose of any particular opinion. Instead, it would eliminate the possibility of immunity if an objective person should have known that the conduct, being so outrageous, unwarranted, or unduly intrusive, was unlawful.

---

154. *Redding*, 129 S. Ct. at 2643 (quoting K.H. v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990)).

155. *See supra* Parts II.B, III.

156. *See supra* Part V.B.1.

157. *See supra* Parts II.B, III & V.B.1. Of course, in some of these cases, the courts also found no Fourth Amendment violation at all, but that is a different issue. *See* discussion *supra* Part II.B.

Conclusion

The *Redding* Court was correct in recognizing the unlawfulness of the strip search of Savana. But the Court deserves no praise regarding the remainder of the opinion. Other than this one obvious conclusion, it got nothing right. When given the chance to establish Fourth Amendment equality for school children, it deferred to a flawed precedent. When finally confronted with the issue of school officials strip searching students, it side-stepped the problem. And when offered the opportunity to provide a remedy for the abuse of constitutional rights, it yielded to officials who were "just doing their jobs." As a result, school children remain under-protected, and officials can continue to strip search students with a high likelihood of impunity.

As explained by Justice Blackmun, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[158] Today's Court has forgotten this fact, as evidenced by its failure to see that school children are properly protected under our Constitution.

158. Planned Parenthood of Cent. Mo. V. Danforth, 428 U.S. 52, 74 (1976).