The Law of Disposable Children: Searches in Schools°

Tonja Jacobi* & Riley Clafton**

It's the forgotten, discarded, disposable people. That's so often who you find in jail—the forgotten.

—Rev. David Kelly, explaining why he devotes himself to working with children coming out of the juvenile detention system.[1]

Many schools treat children as "disposable."

—Francisco Arenas, Juvenile Probation Officer at Cook County Juvenile Probation.[2]

Schoolchildren are being strip-searched based on little or no reasonable suspicion, and schoolchildren are being targeted for searches based on their race, disability status, gender, or homelessness. This is possible because the Supreme Court has issued only two opinions in its history about the right of schoolchildren to be free from unreasonable searches and seizures in schools. With those two cases, the Court has established a special test for schoolchildren, far more permissive than that applied to those suspected of serious criminal wrongdoing. Two cases in thirty-five years are not enough to regulate the lower courts' oversight of literally millions of searches and seizures conducted in schoolhouses throughout the nation every year—a lack of oversight that lower courts have exploited to permit schools extraordinary discretion over

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* Professor and Sam Nunn Chair in Ethics and Professionalism, Emory University School of Law; tonja.jacobi@emory.edu.

** Law Clerk for the Honorable Richard C. Tallman of the United States Court of Appeals for the Ninth Circuit.

1. Barbara Mahany, *Freeing the Spirit: Drum Circle Unlocks Emotions for Juvenile Inmates*, CHI. TRIB. (July 13, 2008), https://chicagotribune.newspapers.com/image/232092994/?terms=It%27s%20the%20forgotten%20discarded%20disposable%20people.%20That%27s%20so%20often%20who%20you%20find%20jail%E2%80%94the%20forgotten.&match=1 [https://perma.cc/PR2U-FK6K].

2. Interview with Francisco Arenas, Supervisor Grants Coordinator, Cook Cnty. Juv. Prob. (Apr. 23, 2020). Arenas says he "finds it mind-boggling that there is this disposable approach" in the attitudes of some schools towards children. *Id.*

schoolchildren and approve highly invasive searches. The existing literature focuses almost exclusively on the Supreme Court's minimalist jurisprudence; in contrast, this Article uses a combination of methodological approaches to show how the law of searches and seizures in schools operates on the ground by conducting an in-depth case study of one jurisdiction, Illinois. We examine every case decided in Illinois and show that lower courts exploit the porousness of the Supreme Court's test to permit questionable and sometimes even clearly illegal state actions. Yet even a comprehensive study of lower courts fails to fully grasp the extent of the problem: a minuscule proportion of the intrusions on schoolchildren by the state ever become cases—most internal school procedures are never independently reviewed at all, even if they involve unconstitutional intrusions. To understand how common searches and seizures of schoolchildren are and how often they cross the line into unconstitutionality, we draw on testimony from interviews with experts in the field. These interviews reveal that schools discriminate among students based on factors such as race, disability, homelessness, wealth, and community characteristics; and schools target some students for searches that can result in exclusion from school for shockingly long periods. Multiple interviewees independently described the system as treating some schoolchildren as disposable. The judiciary is failing to provide basic protections to our children, and Supreme Court intervention is imperative.

INTRODUCTION

The Supreme Court has had very little to say on the rights of schoolchildren, issuing only two opinions in its history about the right to be free from unreasonable searches and seizures in schools.[3] What it has said has provided little protection: the first of those two rulings, *New Jersey v. T.L.O.*, established an entirely novel standard

3. New Jersey v. T.L.O., 469 U.S. 325 (1985) (permitting searches of schoolchildren based on "reasonable grounds," a threshold lower than reasonable articulable suspicion or probable cause); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (finding unconstitutional a strip search of a thirteen-year-old girl but leaving open the possibility of such a search being constitutional under other factual circumstances). Unless otherwise specified, when we use the term "search," we refer to targeted, individualized searches of schoolchildren—that is, searches of individual students. The Court has occasionally also ruled on non-individualized, non-targeted school searches, such as searches of groups of school athletes participating in voluntary afterschool programs. *See infra* 68. It has also addressed some other aspects of the treatment of schoolchildren, such as limiting the states' ability to discriminate when providing access to education, *see* Plyler v. Doe, 457 U.S. 202 (1982) (prohibiting the state from withholding funds for, or denying education to, children of immigrants in the country illegally), and First Amendment rights, *see* Morse v. Frederick, 551 U.S. 393 (2007) (limiting the free speech of students on topics such as endorsing drug use); Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (establishing a framework for the school regulation of off-campus speech). On the closer attention paid to speech issues, see Tonja Jacobi, *This Supreme Court Guards the First Amendment—And Neglects the Fourth*, WASH. POST (June 28, 2021, 8:11 AM), https://www.washingtonpost.com/outlook/2021/06/28/cheerleader-snapchat-breyer-roberts/ [https://perma.cc/2C7M-FWLW].

of suspicion required for a search to be deemed constitutional, lower than the probable cause standard articulated in the Constitution.[4] As a result, schoolchildren who are not suspected of committing any crime are subject to more intrusions than adult suspects against whom police have articulable suspicion of criminal wrongdoing.[5] The second ruling, *Safford Unified School District No. 1 v. Redding*, showed just how lax the special standard applied only to schoolchildren is: while finding that a strip search of a thirteen-year-old girl was unconstitutional under the facts of a search for ibuprofen based on the uncorroborated allegation of another student under suspicion, the Court made clear such a search could satisfy the low "reasonable grounds" test if the allegation concerned different drugs or there were more reason to suspect drugs would be found in the teenage girl's underwear.[6]

There have been many critiques on the permissiveness of the Supreme Court's jurisprudence as applied to schoolchildren.[7] However, it is not just the laxity of the Court when it acts that is problematic, but also its failure to act—two cases in thirty-five years are not enough to regulate the lower courts' treatment of literally millions of searches and seizures conducted in schoolhouses throughout the nation every year.[8] Indeed, the problem is threefold. First, because the Supreme Court has set out such permissive standards when it comes to the Fourth Amendment rights of students and, in the decades since, has reviewed only a single search case, lower courts have been left largely unsupervised and have extended that permissiveness

4. U.S. CONST. amend. IV.

5. Katz v. United States, 389 U.S. 347, 357 (1967) ("Over and again this Court has emphasized . . . 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."); Terry v. Ohio, 392 U.S. 1, 39 (1968) (establishing that a lower threshold than probable cause, reasonable suspicion, can only be justified for a short, temporary detainment of a suspect by police).

6. 557 U.S. at 377.

7. Almost exclusively, over the decades the literature has focused on the Supreme Court's jurisprudence, with many commentators offering critiques that the Court's doctrine governing school searches and seizures is overly permissive. *See, e.g.*, Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 332 (2011) ("The lowered standard for searches set forth by *T.L.O.* and reiterated by its progeny reduces constitutional freedoms of the individual to an empty guarantee."); Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 156 (1993) ("When the Fourth Amendment has applied, schools have rarely been unable to establish the existence of reasonable suspicion to search . . . ."); Martin R. Gardner, S*tudent 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, 919–25 (1988) (predicting that the reasonable grounds test will have negative consequences for students' Fourth Amendment rights).

8. For details on the numbers of searches and seizures, see *infra* Section III. This failure to act is not limited to the school context: elsewhere, one of us has shown that the Supreme Court systematically avoids addressing the most salient issues in Fourth Amendment law—the doctrines affecting the vast majority of those affected by the criminal justice system, which are also those that disproportionately affect traditionally disadvantaged communities, particularly racial minorities. *See* Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033 (2018).

even further, upholding highly invasive searches. We show that school searches are even more leniently reviewed in the lower courts than in the Supreme Court.[9] In the realm of seizures, the Court has never even laid out a standard delineating the protections afforded to schoolchildren, so lower courts have almost absolute discretion.[10] And even where the Court has provided guidance, given the highly malleable standard it has articulated, lower courts have enormous leeway to permit borderline or questionable state actions. Second, these permissive standards enable school administrators to take intrusive actions against students, knowing that their decisions will seldom reach even lower court review, and if they are reviewed, the standards afford them remarkable flexibility. Even where lower courts ultimately find these searches and seizures unconstitutional, harm is still done by the time the case makes it to judicial review; for instance, students may have already been excluded from school for harmfully long durations.[11]

Yet even this description understates the problem, because reviewing all the lower court cases available still grossly underestimates the number of potentially unconstitutional searches that schoolchildren are subject to. This brings us to the third, and arguably most significant, problem: a minuscule proportion of the intrusions on schoolchildren by the state ever become a case or make it to any sort of review before lower courts or administrative tribunals. The vast majority of searches and seizures are "non-cases" that never get beyond internal school procedures, even if they involve unconstitutional intrusions. To understand how common searches and seizures of schoolchildren are and how often they cross the line into unconstitutionality, we draw on testimony from interviews with experts in the field. With a focus on Illinois as a case study, we conducted eighteen interviews with various experts working on issues relating to school students' lives and educations in Chicago and in Illinois more broadly.[12] They include attorneys representing students, disability advocates, advocates at various charitable organizations, deans of schools, school social workers, school administrators, probation officers in the juvenile justice system, juvenile court judges, post-incarceration reintegration officers, and others.

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9. For details, see *infra* Section III.

10. On the need for the Court to develop a standard for seizures of students, see Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 NEV. L.J. 863 (2018).

11. "[T]he relevant expulsion legislation [105 ILCS 5/10-22.6(a)] stipulates that an expelled pupil '*may* be transferred to an alternative school,' . . . which creates the possibility that a school may instead leave a student without any schooling option for the maximum expulsion period of up to two years." Tonja Jacobi & Riley Clafton, *The Law of Disposable Children: Discipline in Schools*, 2023 U. ILL. L. REV. (forthcoming 2023).

12. All interviews were conducted between late 2019 and 2021 by the authors, with interviews taking place in person, by telephone, or via videoconferencing; detailed records of the interviews are available from the authors. Each interview subject consented to the interview's use in the Article, was shown the detailed record of the interview, and given the opportunity to make any corrections.

What emerges from these interviews is a picture of a system that not only fails many students, but one which permits schools to actively harm some students, discriminate among them, target them for searches that can result in exclusion from school, and prevent their reentry into school for fear of the stigma that they will bring.[13] It also shows that interventions can make an enormous difference, from representation by attorneys to training and mentoring programs for students, teachers, administrators, and law enforcement officers dealing with students. When schoolchildren in these situations have advocates, a compromise can usually be reached.[14] But the reality is most students have no such support, and without representation for students, schools wield largely unlimited power over children's bodies and futures.

Our interviews also reveal that some children are treated very differently, based on factors such as race, disability, homelessness, wealth, and community characteristics. It is important to note that, in addition to the harm that children suffer as a result of the permissive and porous school-search jurisprudence, teachers and administrators also suffer. Enormous disparities in the treatment of children by race and other forms of advantage and disadvantage mean that in some schools the balance has gone the other way, with teachers in fear of students, lawsuits threatened for extraordinarily minor actions, and schools not enforcing rules or even laws because of teachers' fear of lawsuits.[15] As a result, there are two very different systems, and those systems happen to largely coincide with wealth and race. Clearly, more and better judicial guidance is needed.

The high variation in the application of the school-search doctrine in both schools and lower courts is made possible by both the rarity of the Supreme Court's consideration of these issues and the vagaries of the test that the Supreme Court has articulated. In drafting such a permissive test as that found in *T.L.O.*, the Court has largely ceded all regulation of schoolchildren's rights to effectively unsupervised lower court judges and, even more so, to school administrators who have little incentive to broadly protect those rights.

To examine the ramifications of the Court's precedent—as well as the impact of its inaction—Section I begins with a brief outline of the two seminal Supreme Court decisions in this area. With so little jurisprudence from the Supreme Court, to understand how schoolchildren are actually treated in the court system, we need to look to lower courts and how they use the discretion created by the lack of guidance and supervision from the Supreme Court. Accordingly, Section II examines how this doctrine manifests in the lower courts, by conducting a comprehensive review of all published dispositions in Illinois since the 1985 ruling in *New Jersey v. T.L.O.* That study reveals there have been fewer than forty school

13. *See infra* Section III.
14. *See id.*
15. *See id.*

search and seizure cases in the state since *T.L.O.* and that, overwhelmingly, those decisions have been highly deferential to school administrators, even in the face of, at times, shocking treatment of schoolchildren. To illustrate that the issue is not unique to Illinois, but rather that Illinois is representative of a problem of national scope, Section II closes out with examples from other parts of the country. Section III explores how most search and seizure law is actually applied to schoolchildren by examining where the Court's consequences are most felt—the state actions that never become cases, never make it out of internal school proceedings or receive any meaningful review. Our interviews paint a largely depressing picture—of children entirely excluded from the schooling system for up to two years, children denied basic due process rights, and children subjected to highly discriminatory and unlawful targeting, searches, and seizures. As the opening quotes convey, multiple interviewees independently described the system as treating some schoolchildren as disposable.

In the Conclusion, this Article shows that the law of searches and seizures is only one aspect of how the Supreme Court has failed schoolchildren and how the legal system treats schoolchildren as disposable. This Article is one of three in a broad project showing how the legal system treats schoolchildren's constitutional rights with little regard. Schoolchildren are also subject to interrogations, constrained by only one narrow ruling limiting those interrogations—even when conducted by police in cooperation with school administrators.[16] Consequently, our second related project shows that the same pattern persists in relation to interrogations: Supreme Court abdication has led to extreme lower court permissiveness and variability, and as a result, interrogation practices on the ground prove highly problematic,[17]—particularly given the common use of the controversial Reid technique against school-age children.[18] But the problem is more dire than a review of Supreme Court precedent or even lower court rulings would reveal: most experts in the field agree that school searches and interrogations are only part of the problem, and that it is the largely unregulated field of school discipline that is the driving force allowing the law and state to treat children as

16. J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011).

17. *See* Tonja Jacobi & Riley Clafton, *The Law of Disposable Children: Interrogations in Schools* (2021) (unpublished working paper) (on file with authors).

18. *See id.*; Alexa Van Brunt, Opinion, *Adult Interrogation Tactics in Schools Turn Principals into Police Officers*, GUARDIAN (Mar. 19, 2015, 9:01 AM), https://www.theguardian.com/commentisfree/2015/mar/19/interrogation-schools-turns-principals-police-officers [https://perma.cc/PT8Y-GLZ9] ("[H]undreds of school administrators each year[] . . . [sometimes, through] 'professional development' event[s] [sponsored by groups such as the Illinois Principals Association]—are learning the 'Reid Technique,' which [trains them] . . . to induce suspects to confess[, including by] . . . reducing a suspect's feelings of guilt, [and] . . . heighten[ing] suspect anxiety using confrontation."); Douglas Starr, *Why Are Educators Learning How to Interrogate Their Students?*, NEW YORKER (Mar. 25, 2016), https://www.newyorker.com/news/news-desk/why-are-educators-learning-how-to-interrogate-their-students [https://perma.cc/7SCA-3P9G] (critiquing the same).

disposable.[19] Formal discipline proceedings range from detention, suspension, and expulsion, to arrests. Moreover, schools also employ workarounds that avoid accountability for these formal disciplinary actions, including active efforts made to push students out of school, whether for disciplinary issues with a student or in order to maintain the appearance of a certain collective grade-point average in the school. Our third related project therefore shows that without court oversight, school discipline procedures lead to further deterioration of children's privacy rights, hamper their access to education, and foster the "school-to-prison pipeline."[20] Each of these three areas requires immediate response; together they constitute a massive failure by the judiciary.

I. THE SPARSE SUPREME COURT JURISPRUDENCE AND THE NOVEL "REASONABLE GROUNDS" TEST

Prior to 1985, it was unsettled whether the Fourth Amendment applied in schools. The Court had held that students do not "shed their constitutional rights . . . at the schoolhouse gate" when it comes to freedom of speech or expression[21] or the Fourteenth Amendment,[22] but it had also held that school officials have power "to prescribe and control conduct in the schools."[23] On the basis of this caveat, it was argued that teachers and administrators act *in loco parentis* over schoolchildren and therefore exercise the authority of a parent rather than the state—putting such conduct beyond the application of the Fourth Amendment.[24]

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19. *See, e.g.*, Interview with Monica Llorente, Senior Lecturer, Nw. Univ. Sch. L., in Chi. Ill. (Feb. 24, 2020) (saying that school searches constitute only a very narrow part of the problem; most of the cases and issues pertain to school discipline); Interview with Ashley Fretthold, Supervisory Att'y, Child. & Famis. Prac. Grp., Legal Aid Chi. (Feb. 7, 2020) (indicating that her office, charged with assisting families across Cook County, dealt with very few school search cases as compared to expulsion cases).

20. *See* Jacobi & Clafton, *supra* note 11; ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH–STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE (2010); ADVANCEMENT PROJECT WITH PADRES & JOVENES UNIDOS, SW. YOUTH COLLABORATIVE & CHILDREN & FAM. JUST. CTR. OF NW. UNIV. SCH. OF L., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005); Gary Fields & John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, WALL ST. J. (Oct. 20, 2014, 11:30 PM), https://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602 [https://perma.cc/V37Z-KYU7].

21. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969), *abrogated by* Morse v. Frederick, 551 U.S. 393, 408–09 (2007).

22. Goss v. Lopez, 419 U.S. 565, 574 (1975).

23. *Tinker*, 393 U.S. at 507.

24. New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) ("[A] few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students . . . ." (citation omitted).

The Court rejected that claim in *New Jersey v. T.L.O.*,[25] but many other issues were left unanswered.

The reasoning of *T.L.O.* has been thoroughly explored elsewhere: the literature has been overwhelmingly critical and in agreement that the standard the Court established is intentionally "toothless" and has grown more untenable with age in light of the rise of the zero tolerance policies, school resource officers, and the school-to-prison pipeline.[26] Accordingly, our discussion in the following Section of what the case did will be brief. We focus primarily on what the Court left undone and largely unregulated.

A. A Novel and Permissive Test, Applicable Only to Schoolchildren

Respondent T.L.O. was one of two girls allegedly caught smoking in a school lavatory by a teacher.[27] At the time, she was fourteen and a freshman in high school. Smoking in school was a violation of school rules and both students were taken to the principal's office. Assistant Vice Principal Theodore Choplick questioned both girls; while her companion confessed to smoking in the lavatory, T.L.O. denied smoking. In response, Choplick "asked T.L.O. to come into his private office and demanded to see her purse."[28] Upon opening her purse, he found a pack of cigarettes and accused T.L.O. of lying to him. Choplick claimed that, as he reached for the cigarette package, he noticed cigarette rolling papers, which in his experience were "closely associated with the use of marihuana."[29] Suspecting he could find

25. *Id.* at 336–37 ("In carrying out searches and other disciplinary functions pursuant to such policies, 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.").

26. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 185–208 (2018) ("Considerable evidence suggests that even in 1985 the Supreme Court understood lower courts would interpret *T.L.O.* as establishing meager constitutional safeguards within schools and that was its intended outcome."); *see also* Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79 (2014); *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1747 (2015) (arguing that the reasonable suspicion standard is problematic both in effect and doctrinally); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 874 (2012) ("While few would contest that the state interest in providing a functional educational environment is significant, the Court has not attempted to explain why this interest would outweigh the individual student's interest if those interests are in fact in conflict."); Forman, *supra* note 7, at 308 (arguing the search and seizure practices in America's public high schools "are developmentally inappropriate"); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1069 (2003) ("No court has addressed . . . the deepening interconnection between school officials and law enforcement officials, the proliferation of zero tolerance policies and the effects of these policies on behavioral interpretations—when analyzing the Fourth Amendment issues stemming from a particular search."). Note that not all voices have been critical. *See, e.g.*, William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992).

27. *T.L.O.*, 469 U.S. at 328. The facts and discussion in the paragraphs to follow come from the Court's discussion.

28. *Id.*

29. *Id.*

more evidence of her drug use, Choplick searched the entirety of her purse and found "a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing."[30]

Choplick turned the contents of the search over to the police.[31] When police requested that T.L.O.'s mother bring her to the police station, T.L.O. confessed to selling marihuana at the high school. With the confession and Choplick's evidence, the State brought delinquency proceedings against the minor. T.L.O. moved to suppress the evidence found in her purse as the fruit of an illegal search and her confession as tainted by Choplick's Fourth Amendment violation. T.L.O.'s motion was denied on the basis that the search was "a reasonable one," and she was found delinquent.[32] The case worked its way up to the New Jersey Supreme Court, which reversed. Although the New Jersey Supreme Court agreed that there is no Fourth Amendment violation as long as the official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order," the court found the search to be unreasonable because the school had not articulated a rule prohibiting possession of cigarettes, so a search of T.L.O.'s purse had "no direct bearing" on the actual infraction of smoking in the lavatory.[33]

The Supreme Court reversed and, in doing so, established a framework to evaluate school searches that was divorced from the traditional criteria of the Fourth Amendment.[34] The first element of the framework is standard Fourth Amendment jurisprudence: the Court held that, where the search of a child in public school by school teachers and administrators is at issue, the reviewing court must first inquire whether the student had a "reasonable expectation" of privacy in the thing or area searched.[35] If the student did not, no search took place and the student cannot challenge the actions undertaken by the school administrator.[36] But the second

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 325, 330–31.
34. *Id.* at 347 (holding that "the search resulting in the discovery of the evidence of marihuana dealing by *T.L.O.* was reasonable").
35. *Id.* at 338.
36. It is additionally worth noting that the school can in turn shape the students' expectations of privacy through its policies, *see, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995), resulting in the classic *Katzian* problem that the more the government intrudes on privacy, the less that privacy should be reasonably expected. *See, e.g.*, Miller *ex rel.* Miller v. Wilkes, 172 F.3d 574, 579 (8th Cir. 1999), *vacated as moot*, (June 15, 1999) ("Thus students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectation of non-participating students."); *In re* Isiah B. v. State, 500 N.W.2d 637, 641 (Wis. 1993) ("[W]hen the Milwaukee Public School System (M.P.S.), as here, has a written policy retaining ownership and possessory control of school lockers (hereinafter referred to as a locker policy), and notice of the locker policy is given to students, then students have no reasonable expectation of privacy

element was entirely novel: if the court finds that the student does have a reasonable expectation of privacy, the inquiry then proceeds in two steps. First, the court determines whether, at the outset of the search, "there [were] *reasonable grounds* for suspecting that the search [would] turn up evidence that the student [had] violated or [was] violating either the law *or the rules of the school*."[37] Then, at the second stage, the court determines if the actions taken "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."[38] If so, the search is permissible.

It is the fundamental principle of the Fourth Amendment that a search without a warrant is presumptively unreasonable[39] and that searches must be predicated on probable cause.[40] "Probable cause exists where the facts and circumstances within . . . [the officers'] knowledge, and of which they have reasonably trustworthy information are sufficient in themselves to warrant a belief by a man of reasonable caution that an offense has been or is being committed."[41] That high threshold of suspicion is based on the right of the people to be free from searches while going about their daily lives; otherwise, the state could search anyone at any time without needing to articulate a reason for the individual search.[42] The Fourth Amendment protects against these sorts of suspicionless searches by requiring a clear articulation of the basis for suspicion of a specific crime having been, being, or imminently to be committed by that individual.[43]

Although Fourth Amendment jurisprudence contains numerous exceptions to both the warrant and probable cause requirements,[44] the Court has historically

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in those lockers."); *In re* Patrick Y., 746 A.2d 405, 412–13 (Md. 2000) ("School lockers, on the other hand, are not regarded as the personal property of the student. They are classified as school property, part of the plant of the school and its appurtenances, and, no doubt because of that, school officials are permitted to search the lockers as they could any other school property." (internal quotation marks and citations omitted)).

37. *T.L.O.*, 469 U.S. at 342 (emphasis added).

38. *Id.*

39. Katz v. United States, 389 U.S. 347, 357 (1967) (articulating the cardinal principle "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment" in the absence of an exception); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (the absence of a search warrant raises a presumption that the search was unlawful, which the prosecution is required to rebut).

40. U.S. CONST. amend. IV.

41. Brinegar v. United States, 338 U.S. 160, 175–76 (citing Carroll v. United States, 267 U.S. 132, 162 (1925)) (internal quotation marks omitted).

42. Dunaway v. New York, 442 U.S. 200, 208 (1979) ("The 'long-prevailing standards' of probable cause' . . . [are believed to be] 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seeking to give fair leeway for enforcing the law in the community's protection.'" (second and third alterations in original) (quoting *Brinegar*, 338 U.S. at 176)).

43. *See, e.g.*, *Carroll*, 267 U.S. at 153–54 (analyzing searches of vehicles: persons "have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise").

44. Exceptions include searches incident to arrest, *see, e.g.*, United States v. Robinson, 414 U.S. 218 (1973) (upholding an officer's search of a person and packages found on person while

allowed searches predicated on a lesser standard only in extremely limited circumstances and only for very narrow purposes. For example, the Court in *Terry v. Ohio* allowed a limited stop and frisk based only on reasonable suspicion, not probable cause.[45] But in so holding, the Court noted that police could stop someone based on reasonable suspicion only for a very brief period of time, and frisks in these instances are limited to only what would be necessary to discover weapons.[46] Despite recognizing that police have an interest in conducting searches because of the dangerous nature of their jobs, the Court limited the scope of the search, both in terms of timing and level of intrusion, because of the privacy interests protected by the Fourth Amendment:[47] "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security."[48] In crafting a new test only to be applied to schoolchildren, however, the Court showed no such constraint or regard for schoolchildren's personal security and rights.

Not only did the Court eliminate the warrant requirement in the school context and decide that, unlike adults suspected of crimes, schoolchildren are not entitled to the protections of the higher level of suspicion mandated by probable cause, but further, a search of a schoolchild requires less suspicion than that required for a *Terry* stop conducted to investigate potential criminality—a standard which itself is considered by many to be exceptionally permissive.[49] Moreover, a search of a schoolchild can be based on suspicion of the child breaking a school

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conducting an arrest), and searches conducted with consent, *see, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (upholding searches where voluntary and knowing consent is given).

45. Terry v. Ohio, 392 U.S. 1, 27 (1968).

46. *Id.* at 31.

47. *Id.* at 25–26 ("A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation." (citing Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring))).

48. *Id.* at 24–25.

49. I. Bennet Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1262 (2017) (noting that the *Terry* standard allows law enforcement to categorize nearly anything as suspicious, and, consequently allows for racialized policing); Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 54, 55 (2016) (observing that courts have declined to provide any guidance on the standard—instead often relying on the reasoning provided by police officers—and conducting empirical study on the consequences); Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 429 (2004) (explaining that the "watered-down" reasonable suspicion standard exposes "people in urban, minority neighborhoods to intrusive police investigations with virtually no evidence of any intended criminal behavior"); Susan Bandes, Terry v. Ohio *in Hindsight: The Perils of Predicting the Past*, 16 CONST. COMMENT. 491, 493–94 (1999) (claiming that *Terry* has not succeeded because its deferential style of review and malleable standards permit uncontrolled police activity); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1279 (1998) (criticizing the reasonable suspicion standard for empowering police officers to violate the constitutional rights of minorities); William J. Stuntz, Terry's *Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1215 (1998) ("Courts have a fair amount of room to maneuver [to satisfy the reasonable suspicion standard] . . . .").

rule, not the law.[50] These elements constituted a new test applied solely within schoolhouses—the "reasonable grounds" test.[51]

The novelty and permissiveness of this reasonable grounds test is perhaps best illustrated by contrasting it with the one subsequent instance in which a similarly worded[52] "reasonable to believe" standard was applied in the context of vehicle searches incident to arrest.[53] In 2009, the Supreme Court determined that police may "search a vehicle incident to a recent occupant's arrest only *when the arrestee* is unsecured and within reaching distance of the passenger compartment at the time of the search."[54] As a secondary type of reasonable search, the Court also provided that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is '*reasonable to believe* evidence *relevant to the crime of arrest* might be found in the vehicle.'"[55] This test only applies to individuals already under an arrest based on probable cause; moreover, it mandates that the "reasonable to believe" standard applies only when "evidence relevant to the crime of arrest might be found in the vehicle."[56] That is, any search beyond the reach of an arrestee is only reasonable if it relates to the crime for which the arrestee has already been arrested. In contrast, not only may a state actor in a school search a child where there is no arrest, they may do so without any reason to believe there would be evidence relating to a *crime*. As such, this singular subsequent application of a similarly low standard in *Gant* further emphasizes how exceptionally lax the Court has been in regard to searching schoolchildren, rendering them less protected than even those against whom probable cause for the commission of a crime has already been established.

To support its dramatic departure from the foundational tests and principles of the Fourth Amendment, the Court offered two justifications: efficiency and the "preservation of order and a proper educational environment."[57] Taking " notice of the difficulty of maintaining discipline in the public schools today," the Court viewed the warrant requirement to be "unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly

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

51. *Id.* at 343; *see also* Ivan B. Gluckman, *School Searches and the 4th Amendment*, 13 WEST'S EDUC. L. REP. 199, 206 (1984) ("The *T.L.O.* Court imprudently and unnecessarily abandoned this measured [warrant and probable cause] approach by analyzing the challenged search under a broad reasonableness standard.").

52. Whether there is any meaningful difference between the two phrases is yet to be elaborated.

53. Arizona v. Gant, 556 U.S. 332, 335 (2009).

54. *Id.* at 343 (emphasis added) (distinguishing the holding in *New York v. Belton*, 453 U.S. 454, 460 (1981), which held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile").

55. *Id.* (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)).

56. *Id.*

57. New Jersey T.L.O., 469 U.S. 325, 339–340 (1985).

interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[58] Why the breaking of school rules is treated equivalently to criminal conduct is never addressed by the majority, a silence that is noteworthy in light of the fact that the Court said it was particularly concerned about "drug use and violent crime in the schools"[59]—traditional subjects of criminal investigation.[60] In contrast, other exceptions to the probable cause and warrant requirement are often justified for their lack of criminal investigation focus.[61]

As for the departure from the use of probable cause and even reasonable articulable suspicion—the Court's previously articulated standards[62]—the Court's newly minted "reasonable grounds" standard involved balancing "the child's interest in privacy" against the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[63] Although the Court declined to determine that students have "no legitimate expectations of privacy" at all, as the state had argued, the interest students do have in privacy is never discussed.[64] Nonetheless, it is clear that the Court assumed those privacy expectations were very low:

> [T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.[65]

Thus, whereas probable cause is meant to be "trans-substantive"—that is, to not vary with the seriousness of the crime alleged[66]—"reasonable grounds"

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58. *Id.* at 338, 340.

59. *Id.* at 339.

60. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2324 (2019) (discussing the congressional effort to heighten criminal penalties for certain crimes involving "violence or drug trafficking").

61. *See, e.g.*, Camara v. Mun. Ct., 387 U.S. 523, 538 (1967) ("[Cases][w]here considerations of health and safety are involved, . . . are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."); Illinois v. Lidster, 540 U.S. 419, 424–25 (2004) ("Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.").

62. Standards in use since the founding and 1968, respectively. *See* U. S. CONST. amend. VI; Terry v. Ohio, 392 U.S. 1 (1968).

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

64. *Id.* at 340.

65. *Id.* at 341.

66. *See, e.g.*, William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843 (2001) ("Yet Fourth Amendment law mostly ignores substantive criminal law; distinctions among crimes are usually irrelevant when it comes to regulating criminal investigations.").

constitutes a flexible balancing test that will vary on the basis of the suspected infraction and the actions taken by the administrator.

The outcome of T.L.O.'s case is instructive on this standard's workings. The New Jersey Supreme Court had held that evidence of possession of cigarettes found in T.L.O.'s purse had "no direct bearing" on the infraction of smoking in the lavatory, since such possession was not prohibited[67] The Supreme Court disagreed. Although a finding of cigarettes in T.L.O.'s purse would not establish whether she had been smoking in the bathroom, the Court reasoned that the presence of cigarettes in her purse would be relevant to the credibility of her denial that she smoked[68]—which, presumably, would be relevant to the credibility of her denial of violating school rules by smoking on school grounds. On this basis, Choplick's search of T.L.O.'s purse was constitutional because the evidence sought need only be "relevant,"[69] even in this tertiary manner. Thus, the Court rejected the New Jersey Supreme Court's factual conclusion that Choplick had no reasonable grounds to suspect T.L.O.'s purse would contain cigarettes, concluding that Choplick's "hypothesis . . . was itself not unreasonable."[70]

This illustrates that the test articulated exclusively for schoolchildren is not only highly permissive, but that in application, it is practically unconstrained. First, it allows a school administrator to conduct a search where there is an allegation of a violation of school rules, in contrast to every other individualized Fourth Amendment search, which requires illegality.[71] This means that schools, in defining their rules, also define the boundaries of the Fourth Amendment—despite that the Fourth Amendment is meant to *constrain* state actors. Second, an administrator is permitted to search even though any evidence likely to be found would have only tangential bearing on the wrongdoing that the administrator is investigating the student for—Choplick was permitted to search T.L.O.'s bag for cigarettes even though possession of cigarettes was not a violation of school rules.[72] Consequently, the "contrary to school rules" element is effectively unlimited if evidence derived from a search can still be used against the student even when it is not itself prohibited by the school rules. This means that ordinary requirements of connection between the suspicion being investigated and the expectation of what is to be found do not apply. Third, an administrator is permitted to search in reliance on evidence that may be insufficient in and of itself to constitute "reasonable grounds" for the search—such as an uncorroborated statement by another implicated student. This suggests that even the basis for the suspicion will be evaluated with less than

67. *T.L.O.*, 469 U.S. at 344 (quoting *In re* T.L.O., 463 A.2d 934, 192 (N.J. 1983), *rev'd*, *T.L.O.*, 469 U.S. at 345).

68. *Id.* at 345.

69. *Id.*

70. *Id.* at 346.

71. *Id.* at 340 ("Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe that a violation of the law has occurred.").

72. *Id.* at 344.

ordinary care in this analysis. Each of these elements is at odds with the foundational principles of Fourth Amendment jurisprudence.

B. Defining, and Failing to Define, the Boundaries of School Searches and Seizures

Following its holding in *New Jersey v. T.L.O.* in 1985, the Supreme Court provided no additional guidance for, or bounds on, the discretion of lower courts when reviewing school searches targeting individual students[73] until 2009, when the Court decided *Safford Unified School District No. 1 v. Redding*—a case about the constitutionality of a strip search of a thirteen-year-old girl.[74] Savana Redding had been called out of math class by Assistant Principal Kerry Wilson. Wilson questioned Savanna about a day planner containing contraband items, including knives, lighters, permanent markers, and a cigarette. Savana explained that the day planner was hers but that she had lent it to a friend several days prior and none of the contraband items were hers. Wilson next "showed Savana four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school

73. During that time, the Supreme Court did consider non-individualized searches of schoolchildren when it reviewed a policy of suspicionless, blanket drug testing of student athletes under the "special needs" doctrine in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Under special needs jurisprudence, which extends beyond the school context—for instance, to drunk driving checkpoints, *see* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding roadside sobriety checkpoints), and prisons, *see* Bell v. Wolfish, 441 U.S. 520, 559 (1979) (justifying strip search of prisoners because "[a] detention facility is a unique place fraught with serious security dangers")—the Court dispenses with probable cause and warrants where some "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (1985) (Blackmun, J., concurring in judgment). The Supreme Court assesses the constitutionality of these non-discretionary law enforcement programs by weighing the state's interest, the effectiveness of the program, and the level of intrusion on privacy. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37–40 (2000). As in the context of individualized searches of students, the Court was similarly permissive towards programmatic "special needs" searches of schoolchildren, upholding the program of drug testing all student athletes as a special need based on the student athletes' "decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search." *Vernonia*, 515 U.S. at 664–65. Although the cases do not add to the traditional school searches test, they illustrate the devaluation of underage privacy that is a recurring theme throughout this jurisprudence. *See, e.g.*, *id.* at 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."). Additionally, it is noteworthy that lower courts conflate the applicable standards for a suspicionless search, pursuant to a program, and the search of an individual. *See, e.g.*, Burlison v. Springfield Pub. Schs., 708 F.3d 1034, 1040–41 (8th Cir. 2013). Courts have also relied on the doctrine of special needs to uphold the use of metal detectors in schools, *see* Day v. Chi. Bd. of Educ., No. 97 C 6296, 1998 WL 60770, at *5–6 (N.D. Ill. Feb. 5, 1998), drug testing of all students involved in extracurricular activities, *see* Todd v. Rush Cnty. Schs., 983 F. Supp. 799, 806 (S.D. Ind. 1997), *aff'd*, 133 F.3d 984 (7th Cir. 1998), and policies of searching every student who returns from being off campus, *see In re* Sean A., 191 Cal. App. 4th 182, 188 (2010).

74. 557 U.S. 364, 368 (2009). The paragraphs that follow draw on the factual recount from the case.

rules without advance permission."[75] Wilson claimed to have received a report that Savana was giving these pills out to fellow students. Unknown to Savana, Wilson had already confiscated the day planner from a fellow student who claimed Savana had given her the medication, and that student had been strip searched and no additional pills were recovered. Savana denied Wilson's report and agreed to allow a search of her possessions. After going through her backpack and finding nothing, Wilson and an administrative assistant, Helen Romero, sent Savana to the nurse for a search of her clothing. The Court's account of the search is worth setting out:

> Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.[76]

Assessing the challenged search according to the analysis set out by *New Jersey v. T.L.O.*, the Court first held that Wilson was justified in his suspicion of Savana. To support the finding of the suspicion, in addition to the evidence recounted above, the Court noted that Savana had been associated with an "unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom," and another student reported that alcohol had been served at a party at Savana's home.[77] Consideration of the first allegation is jurisprudentially dubious: mere association with a suspect group, standing alone, is exactly the sort of hunch ordinarily rejected in Fourth Amendment analysis.[78] As to the latter allegation, the Court does not explain the connection between drinking off campus and selling prescription pills on campus. Both elements give an impression of delinquency but are hard to characterize as individualized suspicion—an absolute prerequisite in any other context for a targeted search.[79] In any case, since "[t]he

75. *See id.* at 368.

76. *Id.* at 369.

77. *Id.*

78. *See, e.g.*, Spinelli v. United States, 393 U.S. 410, 414 (1969), *abrogated on other grounds by* Illinois v. Gates, 462 U.S. 213 (1983) ("[T]he allegation that Spinelli was 'known' to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." (citing Nathanson v. United States, 290 U.S. 41, 46 (1933))); *cf.* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (finding no probable cause to search an individual when "the agents knew nothing in particular about Ybarra except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale"); Florida v. J.L., 529 U.S. 266, 272 (2000) ("The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.").

79. *See, e.g.*, Navarette v. California, 572 U.S. 393, 396 (2014) (suspicion must relate to "the particular person" and be made on "a particularized and objective basis"); United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*." (quoting Terry v. Ohio,

lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing,"[80] the Court easily concluded that Wilson and Romero were justified in a search of Savana's backpack and outer clothing. Thus, again we see the exceptional permissiveness of the reasonable grounds test applied only to schoolchildren.

The Court, however, had a different take on the school officials' order that Savana remove her clothing and pull her underwear away from her body.[81] Although the school personnel involved claimed not to have "seen anything" when Savana did so, the Court found that:

> 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.[82]

The reasoning employed suggests that the Supreme Court is only willing to attribute more privacy interests to students when searches are highly invasive, as the Court notes that Savana's "subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating."[83] In doing so, for the first time, the Court considers and acknowledges that searches of students can "result in serious emotional damage."[84] Yet despite the potential for harm, the Court did not ban strip searches of children. Instead, the Court explains that strip searches will be assessed under the "reasonableness" framework of *T.L.O.* On the extant facts, the Court determined that Wilson needed an indication that the power or quantity of drugs were dangerous *or* a reason to suspect Savana carried these pills in her underwear in order for the search to be reasonable.[85]

Safford and *T.L.O.* leave open a great deal of latitude for school administrators to be highly intrusive, condoning even strip searches on slightly different facts from those presented by *Safford*. With only these two cases for direction, lower courts are left with significant flexibility and very little concrete guidance or supervision. Even more remarkably, the Court has never adopted *any* standard for how the Fourth

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392 U.S. 1, 21 n.18 (1968))); Tracey Maclin, *The* Pringle *Case's New Notion of Probable Cause: An Assault on* Di Re *and the Fourth Amendment*, 2004 CATO SUP. CT. REV. 395, 411 ("It is a fair summary of the history of the Fourth Amendment to say that the provision reflected the Framers' desire to control the discretion of ordinary law enforcement officers and to eliminate governmental intrusions lacking particularized suspicion.").

80. *Safford*, 557 U.S. at 371.

81. *Id.* at 374.

82. The Court's focus on the fact that Savanna was ordered to pull her underwear away from her body suggests that the Court took less issue with the requirement that she undress.

83. *Id.* at 375.

84. *Id.*

85. *Id.* at 375–76.

Amendment governs the seizure of a child in school.[86] This has left lower courts entirely unrestricted to devise their own standards for a school seizure, standards which typically hinge on "reasonableness,"[87] though sometimes courts apply an even more permissive standard.[88] Accordingly, to understand how the Fourth Amendment is actually applied in practice to the individualized searches and seizures of schoolchildren, we must look beyond the Supreme Court's two sole pronouncements and examine how lower courts deal with these cases. Doing so reveals that invasive searches and coercive seizures occur quite often, including strip searches of students based on very little suspicion.

II. THE ILLINOIS CASE STUDY: SEARCHES AND SEIZURES IN LOWER COURTS

Whereas most scholarly literature focuses on the rare cases that make up the Supreme Court's jurisprudence, occurring less than once a decade, the real impact of the doctrine—as experienced by the students subject to state action each day—lies in the application of the Court's rulings in the lower courts, administrative proceedings, and the schoolhouses. In this Section, we examine the entire universe of cases that arose since *T.L.O.* in one state, Illinois. By conducting a review of all cases in one state, we can begin to understand what the reasonable grounds test looks like in practice. We also conduct a brief national review to confirm that Illinois is not unrepresentative of general lower court tendencies when assessing school searches and seizures.

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86. *See, e.g.*, Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1012 (7th Cir. 1995) ("Although *T.L.O.* dealt only with searches, several circuit courts have relied upon it to find that seizures of students by teachers also come within the ambit of the Fourth Amendment.").

87. *See, e.g.*, J.D. v. State, 920 So. 2d 117, 122 (Fla. Dist. Ct. App. 2006) ("What is reasonable under all of the circumstances for Fourth Amendment purposes at a school is not the same as what may be reasonable for an adult on the street."); Shuman *ex rel.* Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141, 148 (3d Cir. 2005) ("We join these courts of appeals in finding seizures in the public school context to be governed by the reasonableness standard, giving special consideration to the goals and responsibilities of our public schools."); McKinley *ex rel.* Love v. Lott, 2005 WL 2811878, at *6 (E.D. Tenn. Oct. 27, 2005) ("In light of *T.L.O.*'s requirement that a search and seizure be justified at its inception and reasonably related in scope to the circumstances, the Court concludes that Officer Suttles' seizure, search, and arrest of Mr. McKinley were reasonable."); *see also* Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1079 (5th Cir. 1995) (applying "reasonableness" standard to seizure of schoolchildren); Edwards *ex rel.* Edwards v. Rees, 883 F.2d 882, 884 (10th Cir. 1989) (applying the "*Terry* standard" to the seizure of schoolchildren because "the same considerations which moved the Supreme Court to apply a relaxed Fourth Amendment standard in cases involving school searches support applying the same standard in school seizure cases").

88. Some courts have applied a standard even lower than that articulated in *T.L.O.* *See In re* Randy G., 28 P.3d 239, 246 (Cal. 2001) ("The minor argues that the same reasonable-suspicion standard used for school searches should govern the assumed detention here. We disagree. Different interests are implicated by a search than by a seizure, and a seizure is 'generally less intrusive' than a search . . . . Therefore, we conclude instead that detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment." (citations and internal quotations omitted); *In re* D.E.M., 727 A.2d 570, 577 (Pa. Super. Ct. 1999) ("[W]e hold that *Terry's* reasonable suspicion standard is inapplicable to the detention and questioning of a student by school officials." (citations omitted).

It is important to note that even looking at the available decisions of lower courts gives a misleading impression: in the state of Illinois, there have been fewer than forty reported decisions involving the searches or seizures of schoolchildren.[89] The cases reveal that search and seizure issues are primarily raised at suppression hearings in criminal court or in actions brought in federal district courts under 42 U.S.C. § 1983.[90] That is, the cases that arise are either related to the criminal prosecution of schoolchildren or are rare civil suits that address the everyday harm to privacy or the degradation the Supreme Court has recognized can result from school searches.[91] The few cases that are available represent only a tiny percentage of the hundreds of thousands of searches, seizures, and complaints of schoolchildren in this one state in a given year.[92] Accordingly, Section III looks at how searches—most of which are never reviewed by any independent observer—operate in schools on the ground according to experts.

A. Searches in Illinois

Illinois should be a leader in juvenile justice: it was the first state to establish a juvenile court system, in 1899,[93] and was one of the earliest states to make retroactive the Supreme Court's holding in *Miller v. Alabama*,[94] forbidding

89. The total number of relevant cases, thirty-four, includes those addressing searches and seizures of schoolchildren in the traditional Fourth Amendment jurisprudence. We omit from this count the handful of cases concerning allegations of sexual abuse, familial and custody issues, actions against the Illinois Department of Children and Family Services, and the like as beyond the scope of this project.

90. The majority of the cases—more than two thirds—arise in the context of suits under 42 U.S.C. § 1983. As we will discuss, the striking lack of lawsuits highlights the fact that the vast majority of these school actions go unreviewed—never making it beyond the initial appeal process provided by the school, let alone to a court. *See infra* Section III.

91. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009).

92. In Illinois alone in school year 2018–19, over 100,000 students were subject to out-of-school suspensions, and more than 150,000 students were subject to in-school suspensions. *See* ILL. STATE BD. OF EDUC., END OF YEAR STUDENT DISCIPLINE REPORT SCHOOL YEAR 2018–19 (2021), https://www.isbe.net/Pages/Expulsions-Suspensions-and-Truants-by-District.aspx [https://perma.cc/4DHQ-GXUW] (select "2019-20" from the list of reports). These reports do not reveal what proportion of these cases arose in response to school searches or seizures, but our interviews with experts in the field reveal that the most common cause of suspensions are disputes on school grounds, which can be expected to lead to students being seized for some time as part of a disciplinary response, and it is not uncommon for disciplinary procedures such as suspensions to stem from searches. *See* Interview with Francisco Arenas, *supra* note 2 (reporting that food fights used to commonly result in arrests; a decade ago, they were the most common source of arrests); Interview with Michelle Rappaport, Licensed Clinical Sch. Soc. Worker, State of Ill. (April 6, 2020) (reporting that her school tries to avoid suspending, and when they do suspend, it is "only for really significant offenses, such as a fight"); Interview with Hon. Stuart F. Lubin, Cir. Judge, Juv. Jus. Div., Ill. (July 20, 2021) ("[One] of my first cases was the result of a snowball fight that took place off school grounds."). For more detail on school discipline, see Jacobi & Clafton, *supra* note 11.

93. *See* Quinn Myers, *How Chicago Women Created the World's First Juvenile Justice System*, NPR: WBEZ CHIC. (May 13, 2019), https://www.npr.org/local/2019/05/13/722351881/how-chicago-women-created-the-worlds-first-juvenile-justice-system [https://perma.cc/XQ2X-95NJ].

94. 567 U.S. 460 (2012).

mandatory sentences of life without the possibility of parole for juvenile offenders.[95] Yet, our analysis of all of the school search and seizure cases arising in Illinois since the Supreme Court's *T.L.O.* decision show the following: (1) the permissive Supreme Court standard enables lower courts to uphold highly invasive searches and sometimes lower courts go even further, permitting searches contrary to Supreme Court precedent; (2) even where searches are held unconstitutional, the cases show how much power and discretion the state actors believe they wield within schools, which is significant given that most cases never reach external review, nor is there typically even an advocate representing the child in the school's administrative proceedings;[96] and (3) the search test is so pliable that highly similar case facts can lead to opposite outcomes, creating opportunity for bias, racial disparity, unchecked discretion, and deference to the state. These three themes, together and separately, all disfavor and effectively reduce the constraint on, and even accountability of, school officials when they choose how to treat the possessions and bodies of school students. Indeed, they show that the Court permits state actors to wield largely unfettered control over students' bodies and social-emotional, educational, and later life outcomes.[97]

1. Supreme Court Permissiveness Exacerbated by Lower Courts

First, it is worth considering those cases where the Supreme Court's precedent is so lenient that it can be stretched, at times in ways contrary to the law, to permit highly invasive searches. In the case of *S.J. v. Perspectives Charter School*, the Court's vague precedent permitted the Northern District to reason in ways that are freewheeling and arguably extralegal. The case considered a complaint brought by an eighth-grade student, S.J., who alleged that the school security guard, Bowen, and Officer Doe "conducted a search of S.J. Jr., making her remove her shirt, undershirt, pants and shoes. While conducting this search, Doe patted S.J.'s sock-covered feet while Bowen shook the bra she was wearing."[98] The complaint further alleged that the search was undertaken at the direction of Principal Davis and Dean Fitch.

In assessing whether S.J. could show that her rights were clearly established in order to overcome qualified immunity, the district court cited to *New Jersey v. T.L.O.* and reasoned that because the conduct occurred before *Safford* had been decided, there was no clearly established precedent protecting S.J.'s rights.[99] In

95. People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014) (holding that *Miller* announced a substantive rule and is therefore retroactive).

96. Interview with Miranda Johnson, Clinical Professor of Law & Dir. of Educ. Pol'y Inst., Loyola Univ. Chi. Sch. of L., & Diane Geraghty, A. Kathleen Beazley Chair in Child.'s L., Loyola Univ. Chi. Sch. of L., in Chi., Ill. (Feb. 4, 2020).

97. Interview with Amy Meek, Civ. Rts. Bureau Chief, Ill. Att'y Gen.'s Off. (Feb. 18, 2020).

98. S.J. v. Perspectives Charter Sch., 685 F. Supp. 2d 847, 853 (N.D. Ill. 2010). The facts to follow come from the description provided by the court, *id.* at 853.

99. *Id.* at 853–55.

doing so, the court ignored the test clearly established by *T.L.O.*: a search is only constitutional if the school officials can point to some "reasonable grounds" justifying the search.[100] The *S.J.* defendants did not provide *any* rationale for the search in their motions and pleadings.[101] A strip search of an eighth-grade female student, without any rationale provided whatsoever, is clearly unconstitutional even under the permissive Supreme Court standard; if the reviewing court does not know the rationale for the search, it cannot determine whether the search was reasonably tailored to that rationale "in light of the age and sex of the student and the nature of the infraction."[102] Moreover, while the lower court's application of *T.L.O.* instead of *Safford* was analytically correct in the qualified immunity analysis, *Safford* applied the exact test of *T.L.O.* to very similar circumstances as those of *S.J.* and found the state's action clearly unconstitutional. Thus, even without *Safford* as a legal standard, *T.L.O.* dictates that the search in *S.J.* was unconstitutional.

Another example is the case of Brian Cornfield.[103] Sixteen-year-old Brian was found outside of his high school in violation of school rules. When the teacher's aide found him, she reported to Spencer and Frye—Brian's teacher and dean—that Brian "appeared 'too well-endowed.'"[104] Upon hearing a similar report from another teacher and observing Brian himself, Spencer became suspicious that Brian was "crotching" drugs; he prevented Brian from boarding the bus and asked Brian to accompany him to Frye's office to investigate.[105] Spencer and Frye confronted Brian with their suspicion, and Brian "grew agitated and began yelling obscenities."[106] They called Brian's mother for permission to search her son, which she denied. Spencer and Frye proceeded anyway. The administrator's reasoning is worth quoting directly: "Believing a pat down to be excessively intrusive and ineffective at detecting drugs, they escorted Cornfield to the boys' locker room to conduct a strip search."[107] The claim that a pat down could be *more* intrusive than a strip search defies common sense and well-established precedent outside of the

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

101. *See, e.g.*, Reply Brief in Support of Motion to Dismiss, *S.J.*, 685 F. Supp. 2d 847 (No. 09 C 444); Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint, *S.J.*, 685 F. Supp. 2d 847 (No. 09 C 444); Memorandum of Law in Support of Motion to Dismiss Plaintiff's Amend. Complaint, *S.J.*, 685 F. Supp. 2d 847 (No. 09 C 444).

102. *See T.L.O.*, 469 U.S. at 341–43 ("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." (alteration in original) (internal quotation marks omitted) (citing Terry v. Ohio, 392 U.S. 1, 20 (1968))).

103. Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993). The facts to follow come from the description provided by the court.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

school-search context;[108] yet the Seventh Circuit upheld that rationale as valid under *T.L.O.* and found the search reasonable.[109] It did so despite the gross affront to dignity that a strip search entails. As the Supreme Court later made explicit in *Safford*,

> Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.[110]

The lower courts' upholding of the strip searches in *S.J.* and *Cornfield* shows the extent to which the standard can be stretched, due to the lack of further Court guidance or an expectation of rigorous oversight. Indeed, these cases show that the test the Court crafted for the searches of schoolchildren renders schools akin to prisons.[111]

2. Schools' Discretion Expansively Interpreted by School Personnel

The second theme that emerges from the cases is how much discretion schoolteachers, officers, and administrators believe that they wield over students' bodies. When only a tiny fraction of these searches is ever reviewed,[112] the state's perceived power can be even more important than the applicable standards. An example of this effect can be found in the case of *Bell v. Marseilles Elementary School*, a federal district court case in which eight elementary school students sued their School Resource Officer (a police officer stationed at school) under 42 U.S.C. § 1983.[113] In this case, the facts were undisputed: "(1) Officer Long searched 30 students, an entire gym class; (2) The search was for missing money; and (3) Officer Long instructed the students to remove their shirts and/or lower their pants for a visual inspection or an underwear waist band search."[114] Officer Long believed that under

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108. Indeed, the Seventh Circuit defied its own precedent on the matter. *See* United States v. Torres, 751 F.2d 875, 885 (7th Cir. 1984) ("It is even more invasive of privacy, *just as a strip search is more invasive than a pat-down search . . . .*"); *see also* Terry v. Ohio, 392 U.S. 1, 24–25 (1968) ("Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."). Even the standard for searches of arrested criminals provided more protection than that afforded to Brian. *See* Sibron v. New York, 392 U.S. 40, 67 (1968) (upholding a search incident to arrest because "Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects").

109. *Cornfield*, 991 F.2d at 1328 (noting that the reasonableness "determination is inevitably committed to the sound discretion of school personnel").

110. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009).

111. *See, e.g.*, Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 339 (2012) (upholding the constitutionality of strip searches of detainees held for minor offenses).

112. Interview with Monica Llorente, *supra* note 19; Interview with Ashley Fretthold, *supra* note 19; *see also* Interview with Judge Lubin, *supra* note 92.

113. Bell v. Marseilles Elementary Sch.,160 F. Supp. 2d 883, 884–87 (N.D. Ill. 2001). The facts to follow come from the description provided by the court.

114. *Id.* at 886.

Supreme Court precedent, "individualized suspicion of a *group* of students is sufficient in the school setting"[115] to conduct individualized searches of multiple schoolchildren. This is plainly unconstitutional.[116] The district court held so, explaining that while it may have been reasonable to conclude that the missing money had been stolen from someone in the gym class, it was necessary for there to be particularized suspicion to justify a search of each individual student. Additionally, Officer Long contended that the level of intrusion was proportional and justified by its object—stolen money.[117] The district court responded that a strip search for money is not reasonable, citing to other cases in which courts refused to uphold strip searches of students for missing money.[118]

The problem here is not that the district court misapplied the Supreme Court's standard; in fact, the district court correctly concluded Officer Long was not entitled to qualified immunity because his search was so patently unconstitutional.[119] The problem is that the standards are so permissive that administrators, teachers, and officers—like Officer Long and the defendants in similar cases cited to by the district court[120]—operate under the presumption that they have this level of authority over students and their bodies, and act accordingly.

Officer Long's error is not exceptional. For instance, in *Carlson ex rel. Stuczynski v. Bremen High School District 228*,[121] defendant Dean Holman was alleged to have compelled two high school girls

> to remove their gym shorts, gym shirts and underclothes, and to stand naked before her and shake out their gym clothes. Plaintiffs were told by Holman, according to their complaint, that they were

115. *Id.* at 887.

116. *See* Maryland v. Pringle, 540 U.S. 366, 371–73 (2003) ("'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' and that the belief of guilt must be particularized with respect to the person to be searched or seized." (first quoting Brinegar v. United States, 338 U.S. 160, 175 (1949); and then citing Ybarra v. Illinois, 445 U.S. 85, 91 (1979))).

117. "Officer Long contends that this court erred in distinguishing between searches for missing money and searches for drugs and weapons." *Bell*, 160 F. Supp. 2d at 889.

118. *Id.* (citing Konop v. Northwestern Sch. Dist., 26 F. Supp. 2d 1189, 1196 (D.S.D. 1998); Oliver v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995)).

119. *Id.* at 890–91.

120. *See, e.g.*, Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 883 (6th Cir. 1991) ("Inside [Assistant Principal] Easley's office, [student] Williams was asked to empty her pockets which she promptly did. Easley then asked the girl to remove her T-shirt. Although she hesitated and appeared nervous, Williams complied after Easley repeated the request. Williams was then required to lower her blue jeans to her knees. In her deposition, Williams testified that Easley pulled on the elastic of her undergarments to see if anything would fall out, but Easley disputes this contention."); Cales v. Howell Pub. Sch., 635 F. Supp. 454, 455 (E.D. Mich. 1985) ("Plaintiff was then instructed to turn her jean pockets inside-out, and she subsequently completely removed said jeans. Plaintiff was then required to bend over so Defendant Steinhelper could visually examine the contents of her brassiere. The basis for the 'search' was the belief of Assistant Principal Daniel McCarthy that the Plaintiff was in possession of illegal drugs.").

121. Carlson *ex rel.* Stuczynski v. Bremen High Sch. Dist. 228, 423 F. Supp. 2d 823, 825 (N.D. Ill. 2006). The facts in the paragraphs to follow are drawn from the case.

> being ordered to undress because another student in their physical education class reported $60 missing, and Plaintiffs were the last students seen in the locker room.[122]

At the motion to dismiss stage, Holman contended that a "forced strip-search in the presence of a school administrator and another student" is "sufficiently 'similar' to a student voluntarily changing from gym clothes into school clothes" such that there was no constitutional problem.[123] Citing to *Bell*, the district court held that if the students' allegations were proven, they could constitute a constitutional violation.[124] Again, it is not the court's conclusion which should give us pause. What is troubling is that, five years after *Bell* was decided in the same jurisdiction, school administrators continued to believe they possessed this kind of freewheeling authority over schoolchildren—that it was permissible for administrators to require strip searches of multiple students based on facts, or simply unfounded allegations, so minimally suspicious that they could not satisfy even the permissive reasonable grounds test.

Since most searches are never reviewed, even when they are highly intrusive, such as strip searches, then it is overwhelmingly the beliefs of school staff regarding their power over students that determine what kind of intrusions students will be subject to. The permissiveness of the jurisprudence in this area, as well as the lack of review by the Supreme Court, allows school personnel to maintain the belief that they have such power and to exercise that power over students on a regular basis.

3. Inconsistency in Schools' Interpretations of Their Powers Over Schoolchildren

Finally, the *T.L.O.* standard is so malleable that cases with highly similar facts can come out differently, affording a great deal of opportunity for bias, racial disparity, unchecked discretion, and deference to the state. Compare *Doe v. Champaign Community Unit 4 School District*[125] and *Bridgman* ex rel. *Bridgman v. New Trier High School District No. 203*.[126] In the case of *Doe*, Principal Howard was informed that there was a strong marijuana odor emanating in the hallway outside classroom 113.[127] Howard looked in room 113 around 9:00AM and spoke with the students, but she "did not feel that they were the source for the marijuana smell."[128] She checked neighboring room 112, but could not detect the smell, and went on to examine other parts of the school. In the meantime, sixteen-year-old D.M. arrived at school between 9:15 and 9:30 that morning. D.M. hung his coat on

122. *Id.* at 825–26.
123. *Id.* at 827.
124. *Id.* at 826–27.
125. Doe v. Champaign Comty. Unit 4 Sch. Dist., No. 11–3355, 2015 WL 3464076, at *1 (C.D. Ill. May 29, 2015).
126. Bridgman *ex rel.* Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146, 1147 (7th Cir. 1997).
127. *Doe*, 2015 WL 3464076, at *1. The facts that follow are derived from the case, *id.* at *1–3.
128. *Id.*

a hook near the door, and when Howard returned to room 113, she claimed to smell a marijuana smell and concluded it came from D.M.'s coat—even though D.M. had not been present at the school when she began searching for the source of the odor. She asked who the coat belonged to, and D.M. identified it as being his coat. "Principal Howard then observed the class for several minutes and claims to have observed that D.M. had 'droopy, puffy' eyes and that he was laughing and giggling."[129] The plaintiffs dispute that D.M. had red eyes, that his coat smelled, and that he was laughing and giggling; they explained that his eyes were droopy because he had only woken up recently—he was late to school that day.

Principal Howard took D.M., his coat, and his backpack with her to her office.[130] Howard told D.M. "that she had pulled him out of class because he was high."[131] D.M. laughed and told her he did not smoke marijuana, and he explained that he might have droopy eyes because he was tired. Howard then searched D.M.: she had D.M. empty his pockets while she emptied the pockets of the coat, felt the lining, looked through his backpack, and put all of the contents on her desk. D.M. had pulled out the pockets of his jeans to show that they were empty, and "Principal Howard pulled on the inside-out pockets to make sure the pockets were fully pulled out."[132] She next had D.M. remove his shoes so she could check them and had D.M. roll down his socks and pull up his pant legs to check his socks. The remainder of the search was in dispute; D.M. claimed that Howard made him remove his shirt and roll down the top of his pants, while Howard said she had D.M simply "raise" his shirt so she could check his waistline.[133] Either way, Howard's actions constitute a partial strip search. No drugs were found, and she brought D.M. back to his class. No other students were searched, and in his deposition, "D.M. stated that Principal Howard also did not sniff any students other than D.M. and the only other African-American student in class."[134]

The court denied Principal Howard's motion for summary judgment under both prongs of *T.L.O.*[135] In doing so, it noted that under the first prong, there were disputed facts about D.M.'s appearance and the fact that "[t]he first coherent justification that Principal Howard offered for her search of D.M. appears to be in the statement she wrote a week to a week and a half after she searched D.M., which was also after she met with D.M.'s parents."[136] In concluding a jury could find Principal Howard lacked reasonable suspicion, the court pointed out in a footnote that "[n]otably, at Principal Howard's deposition, Principal Howard did not appear

129. *Id.*
130. *Id.* at *2.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at *5–6.
136. *Id.* at *5.

to understand what reasonable suspicion meant."[137] Under the second prong, intrusiveness, the court found that a jury could conclude the search was impermissible in scope, discussing the negative consequences of extreme intrusion and citing to *Safford*:

> One of Principal Howard's major reasons for the search—the smell on D.M.'s jacket—could hardly be used to justify a search of D.M.'s naked upper body and the waistband of his underwear, especially if, as the Plaintiffs allege, Principal Howard no longer smelled marijuana on D.M. once they reached Principal Howard's office. Without the marijuana smell to justify her search, all Principal Howard had to justify her search was D.M.'s "sleepy"-looking eyes. The Court finds that under the scrutiny required by *Safford*, the appearance of D.M.'s eyes, without more, does not amount to a specific reason "to suppose that [D.M.] was carrying [marijuana] in [the waistband of his] underwear."[138]

While D.M.'s case was allowed to proceed, many very similar complaints are dismissed, with courts accepting equally thin arguments by school administrators justifying comparable intrusions. Take the case of Andrew Bridgman.[139] Andrew was a high school freshman in an after-school program, required of him because he had been caught smoking cigarettes. The program coordinator, Miss Dailey, noticed Andrew laughing with other students and noted he was unruly; Andrew disputed that he was acting in an unruly fashion. Dailey then observed Andrew and thought he had bloodshot eyes and dilated pupils, his handwriting was erratic, and some of his answers on his worksheet were "flippant."[140] Dailey pulled Andrew out of the program and into an adjoining room where she accused Andrew of using drugs. Andrew denied using drugs and asked if he could call his mother. Dailey listened to the call and then took Andrew to an adjoining room where the school nurse examined Andrew. The nurse was concerned about the rapidity of Andrew's racing pulse and blood pressure "but at no time reached the conclusion that Bridgman was under the influence of drugs. She also noted that Bridgman's pupils were dilated, but she did not notice that his eyes were bloodshot, or that he was acting strangely in any way."[141]

Despite the nurse's conclusions, Dailey had Andrew remove his outer jersey and hat and empty his pockets for a search. She then had Andrew remove his shoes and socks. They were next going to have the nurse administer an eye examination to test his eyes' reactivity to light, but Andrew's mother arrived and asked if this eye

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137. *Id.* at *5 n.1.

138. *Id.* at *6.

139. Bridgman *ex rel.* Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146 (7th Cir. 1997). The facts to follow come from the description provided by the court, *id.* at 1147–48.

140. *Id.*

141. *Id.* at 1148.

test would definitively prove Andrew was not using drugs. Andrew's mother observed that Andrew's eyes were not bloodshot, nor were his pupils dilated. Dailey and the nurse acknowledged the test would not be definitive, and Andrew's mother took him to a pediatrician to be tested definitively. Andrew tested negatively for drug use.

In reviewing the grant of summary judgement against Andrew, the Seventh Circuit applied the standard of *T.L.O.*[142] The court held that Dailey's expertise as a certified drug addiction counselor indicated her suspicions were reasonable. The opinion is one of complete deference to the school and a discounting of the student's narrative, as the court explained:

> Bridgman's flat contradiction of Dailey's claim that he was behaving disruptively does not create a genuine issue as to that claim. What behavior counts as "unruly" is a matter of judgment, and as the person responsible for the smoking cessation program, Dailey was empowered to make that judgment. As for the observations made by Nurse Swanson and by Bridgman's mother, they occurred some time after Dailey formulated her suspicion that Bridgman was using marijuana. The fact that Bridgman's eyes may not have been noticeably bloodshot by the time Swanson and Ms. Bridgman saw him does not mean they were not bloodshot at the time that Dailey says they were. For these reasons, Bridgman has not demonstrated a genuine issue of material fact, and the challenged search was both justified at its inception and reasonably related to its objectives.[143]

Thus, the court used the fact that one of the key articulated justifications for the search—the student's allegedly unruly behavior—was entirely a matter of subjective interpretation in order to *support* the finding of reasonable grounds for suspicion, rather than to undermine it.[144] The other key articulated justifications for the search—the student's physical appearance and his handwriting—also involved a subjective assessment, and one that was contradicted by others' assessments. Yet the court uniformly accepted the school's interpretation, even though doing so required either discrediting, ignoring, or deeming irrelevant all of the evidence that had been presented by Andrew and his mother, including that:

> Bridgman himself contested Dailey's claim that he was acting in an unruly fashion during the smoking cessation program. Nurse Swanson testified that when she saw Bridgman soon after Dailey formed her suspicions, she did not notice anything strange about Bridgman's behavior. She also did not notice that his eyes

142. *Id.* at 1149.
143. *Id.* at 1150.
144. *Id.* at 1149–51.

> were bloodshot, even though she observed him closely enough to note that his pupils did appear to be dilated. In addition, Bridgman's mother, who arrived after the medical assessment, testified that her son's eyes were not bloodshot and his pupils were not dilated. She also noted nothing odd about his behavior. Dailey's observation that Bridgman's handwriting was erratic is unsupported by any evidence that she had ever seen his handwriting on previous occasions.[145]

The court then held the search was not excessively intrusive on the sole basis that the search was less intrusive than the strip search in *Cornfield*.[146] But such logic is contrary to the test of *T.L.O.*, because the *Bridgman* court failed to determine for itself where that dividing line stands by applying the *T.L.O.* factors. *T.L.O.* requires a reviewing court to ensure that "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction," requiring an individualized assessment of the circumstances.[147] By relying exclusively on the fact that the search at issue was less invasive than the strip search in *Cornfield*, the *Bridgman* court failed to undertake that analysis, because simply comparing the level of intrusion is only half of the analysis: the Supreme Court has made clear that whether a given level of intrusion is justified will depend on the nature of the allegation and the degree of basis for suspicion.[148] For instance, in *Cornfield*, the student was suspected of actually carrying drugs on his person, which was not the case in *Bridgman*. Simply assuming that any search less invasive than one deemed acceptable in different circumstances does not constitute the individualized inquiry *T.L.O.* mandates.

Variability in application of any Supreme Court doctrine in the lower courts is to be expected. However, there is enormous space between cases such as *Doe* and *Bridgman*. The high variance in the application of the school search doctrine in the lower courts is made possible by both the rarity of the Supreme Court's consideration of these issues that are so fundamental to students lives[149] and the vagaries of the test that the Supreme Court has articulated. In drafting such a permissive test as that found in *T.L.O.*, the Court has mostly ceded all regulation of schoolchildren's rights to largely unsupervised lower court judges and, even more so, to school administrators who have little incentive to broadly protect those rights.

Furthermore, the doctrine the Supreme Court developed is so flawed as to mask the extent of these manifold problems manifesting in the lower courts. In

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145. *Id.* at 1149.

146. *Id.* at 1150–51.

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

148. *Id.*

149. *See* Interview with Christine Agaiby Weil, Adjunct Professor, Loyola Univ. Chi. Sch. of L. (Apr. 16, 2020); Interview with Bernice Villalobos, Transforming Sch. Discipline Collaborative (Mar. 3, 2020); Interview with Amy Meek, *supra* note 97.

essence, because the doctrine developed in *T.L.O.* and *Safford* is so malleable, lower courts need not hang their decisions on a particular legal rule or governing principle, reducing the likelihood of an easily discernible circuit split. Consequently, even if the Supreme Court observes disarray among the lower courts, it will not appear as an obvious circuit split, since the fluidity of the doctrine permits such diverse outcomes in lower courts. But the need for Supreme Court intervention is real.

B. Seizures in Illinois

In the absence of any Supreme Court ruling on the applicability of the Fourth Amendment to school seizures, the lower federal and state courts have grappled with the issue and attempted to develop their own standards. In the Seventh Circuit, a standard was articulated in 1995, in *Wallace* ex rel. *Wallace v. Batavia School District 101*.[150] Noting that the Supreme Court has not articulated a standard for seizures, the Seventh Circuit analogized to *New Jersey v. T.L.O.* and sister circuit decisions to hold that "in the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent."[151] Additionally, the court insisted that reasonableness is assessed from an objective perspective, looking not at the teacher's or student's perceptions and intentions, but rather at the circumstances that were known and presented. In articulating this standard, the Seventh Circuit explained that:

> [T]he basic purpose for the deprivation of a student's personal liberty by a teacher is education, while the basic purpose for the deprivation of liberty of a criminal suspect by a police officer is investigation or apprehension. The application of the Fourth Amendment is necessarily different in these situations.[152]

With this reasoning, the Seventh Circuit downplays the harm of a seizure: since it is undertaken for an allegedly educational purpose, rather than an investigatory or apprehensive purpose, the implication is that any seizure of a schoolchild is benign. But instead, the opposite inference could be drawn: ordinarily, a seizure is undertaken in response to suspicion of a wrong that could justify further investigation or even apprehension—whereas in the school context, a seizure is being undertaken without such suspicion, and therefore the court should be *more* restrictive of the state, and more protective of schoolchildren, rather than less. It is quite perverse to use the presumption of the innocence of schoolchildren to justify greater intrusion than is permitted of criminal suspects.[153]

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150. Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1012–14 (7th Cir. 1995). The facts to follow come from the description provided by the court.

151. *Id.* at 1014.

152. *Id.* at 1014.

153. For instance, when the illegality of an item is apparent on its face, such as a balloon full of heroin or a gun case (where guns are illegal), it can be inspected or seized because the incriminating

Illinois state courts—like the Supreme Court—have failed to act. Illinois courts have not adopted any guiding standard for evaluating the seizure of a student. Generally, Illinois courts will assess for reasonableness and apply the reasoning of Supreme Court precedent, both from the school context but also from the Court's traditional jurisprudence governing criminal investigation.[154]

There are very few seizure cases that have been published or otherwise made available in Illinois, but those that are accessible are again telling of the degree of discretion that the state believes itself entitled to wield over schoolchildren's bodies. In *Wordlow v. Chicago Board of Education*, a court from the Northern District of Illinois ruled on a summary judgement motion brought by a six-year-old student, M.M.[155] M.M.'s family brought suit after she was handcuffed by Chicago Public School Security Guard Officer Yarbrough. On the day of the incident, when Officer Yarbrough spoke with M.M.'s special education teacher, Brewer, he was told that M.M. "had taken candy from a teacher and had thrown up on herself. Yarbrough saw vomit on M.M. and knew that Brewer dealt with special needs students such as M.M. At this time, Yarbrough handcuffed M.M." in the presence of her homeroom and special education teacher.[156] Yarbrough claimed that he took this action as a "kind of an isolated time out" and as a "teaching moment."[157] After handcuffing M.M., Yarbrough brought M.M. down to sit at his security desk, where she remained in handcuffs until M.M.'s mother arrived and demanded that they be removed.

The Northern District court held that the seizure was unreasonable as a matter of law, finding there had been no security justification for the seizure.[158] What is particularly troubling is that this same day, Yarbrough had already handcuffed another first grade student.[159] The standards for schoolchildren searches and seizures are, it seems, so permissive that Yarbrough thought it was reasonable to

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nature of the items is "immediately apparent." Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971); *see also* Texas v. Brown, 460 U.S. 730, 731 (1983). In contrast, here, the very fact that there is no reason to expect illegality is being used to *justify* a seizure.

154. *See, e.g.*, People v. McKinney, 655 N.E.2d 40, 43–45 (Ill. App. Ct. 1995) (citing New Jersey v. T.L.O., 469 U.S. 325 (1985)); People v. Parker, 672 N.E.2d 813, 816–17 (Ill. App. Ct. 1996) (citing decisions including Dunaway v. New York, 442 U.S. 200, 217, 219 (1979); United States v. Mendenhall, 446 U.S. 544, 554 (1980); Terry v. Ohio, 392 U.S. 1, 16 (1968); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995); and Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

155. Wordlow v. Chi. Bd. of Educ., 2018 WL 6171792, at *1 (N.D. Ill. Nov. 26, 2018). The facts to follow come from the description provided by the court, *id.* at *1.

156. *Id.* at *5.

157. *Id.*

158. *See id.* at *8–9 ("Yarbrough had no security-related reason to handcuff M.M.—he knew he could not arrest her for taking candy from a teacher, she posed no physical threat given her small size, and the record does not indicate that she exhibited aggressive or resistant behavior." (citations omitted)).

159. *Id.* at *5. ("During the school day on March 18, 2016—before the incident with M.M.—Yarbrough handcuffed another first-grade student, N.H. Shortly after Yarbrough removed his handcuffs from N.H., Brewer arrived at Minyard's classroom door with M.M." (citations omitted)).

regularly handcuff even extremely young children with special needs, simply to teach them a lesson. Again, we see that the lack of judicial guidance gives school personnel the impression that they have even more discretion over schoolchildren's privacy and bodily integrity than they actually do.

Another theme that emerges from this body of cases is a divorce from the rationales which drove the lax standards for schoolchildren in the first place. In the case of *Jaythan v. Board of Education of Sykuta Elementary School*, the court evaluated the complaint and allegations of eight-year-old (and forty-five pound) Jaythan.[160] Jaythan alleged that he had been bullied for months and had reported to the school nurse that he had been hit by another student; beyond suggesting to Jaythan and his mother in a January meeting that Jaythan stay away from those bullying him, the school took no further action. According to the complaint, one day in April, the school librarian, Hrobowski, instructed Jaythan to sit with students who had bullied him in the past. Jaythan explained he did not want to sit at that table due to his experiences with those classmates, but Hrobowski insisted he sit there. Jaythan asked to call his mother, and Hrobowski said he could not. When Jaythan turned to leave the room, Hrobowski stepped in front of him, bumping him with her stomach while saying, "Squad up," and knocked Jaythan over.[161] She then grabbed his wrist, spun him around, dragged him to a seat and shoved him into it, saying, "Don't nobody disrespect me."[162] The librarian then asked all the students present, "Who doesn't want to be Jaythan's friend?"[163] Several raised their hands, and Jaythan began crying and ran out the door to the principal's office. The principal tried ordering Jaythan back to the library and would not let him call his mother. After the principal finally let Jaythan return to his homeroom, his teacher let him go to the nurse and call his mother. When Jaythan's mother took him to the hospital, Jaythan was found to have a sprained wrist and bruising.

In evaluating Jaythan's complaint, the district court cited to both *New Jersey v. T.L.O.* and *Wallace*.[164] Of the *Wallace* standard, the court said that a teacher "may take 'reasonable action' to 'maintain order and discipline,' which 'may certainly include the seizure of a student in the face of provocative or disruptive behavior.'"[165] The court concluded that although it was disruptive that Jaythan refused to follow orders, it was possible that the librarian and principal acted unreasonably, and so the lawsuit was allowed to go forward. In arriving at this conclusion, the court nowhere assesses in any real sense whether the school personnel's actions comport with the rationales of the *T.L.O.* standard—"the

160. Jaythan E. v. Bd. of Educ. of Sykuta Elementary Sch., 219 F. Supp. 3d 840, 842 (N.D. Ill. 2016). The discussion to follow was written using the court's factual summation of the pleadings.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 844.

165. *Id.*

preservation of order and a proper educational environment."[166] Here, the district court's analysis completely fails to answer or ever ask how a librarian's decision to physically accost a student to the point of injury, or to emotionally berate a student, including by relying on crowd-sourced bullying by other students, maintains a proper school environment or preserves order.[167] The standard set by the Supreme Court for the applicability of the Fourth Amendment to schools may be highly permissive, but it is a specified standard, based on specific rationales; it follows that those rationales ought to come into the analysis of potential violations.

The failure to refer to the rationales used to justify the Court's lenient search standard recurs throughout the Illinois seizure cases. In the case of *Daniel S. v. Board of Education of York Community High School*, the district court considered the allegations of Daniel and his friend, Tim, after each ripped their swim uniforms during the high school gym class.[168] According to the complaint, their gym teacher, Mr. Newton, ordered the boys to sit for the rest of the period, including while the other boys went to the locker room to change. After the rest of the boys had showered and were changing, Newton ordered Daniel and Tim to hand over the ripped suits and stand naked in the shower area. He refused to let them cover themselves with towels, and he "screamed expletives at them" while the boys stood naked before their classmates and, eventually, a new group of boys changing for the next gym period.[169] Newton then left the locker room and ordered the boys to stand there while he was gone, and they stood there naked for at least sixteen minutes before another instructor found them and told them to dress themselves. While the district court held that the defendants could not show any authority that Newton's actions were reasonable as a matter of law and permitted the complaint to proceed, the court only noted that "the fact that the boys were made to stand naked for a period of sixteen minutes while the other boys did not even shower naked draws the reasonableness of the action into question."[170] In reaching this understated conclusion, the court at no point queried whether ordering the students to stand naked could possibly have furthered the school's educational mission or maintained order under any circumstances.

Additionally, misapplications of the permissive standards are not only a problem in search cases, as described in the previous Section.[171] In the case of *Bills* ex rel. *Bills v. Homer Consolidated School District No. 33-C*, fifth-grader Robert Bills was pulled from class by a police officer every day for an entire week after a fire

166. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

167. *Jaythan E.*, 219 F. Supp. 3d at 844.

168. 152 F. Supp. 2d 949, 951 (N.D. Ill. 2001). The facts summarized in this paragraph are derived from the description provided by the court.

169. *Id.*

170. *Id.* at 953.

171. *See supra* Section II.A.

broke out in a locker at his school.[172] An officer continued to interrogate Robert even after another student confessed to starting the fire; after the officer again pulled Robert out of class and "questioned him in an allegedly coercive manner," Robert confessed to giving an uncovered propane torch to another student.[173] The school then moved to expel Robert, and Robert brought suit under 42 U.S.C. § 1983. Although the court concluded that the complaint was able to "sufficiently allege a degree of unreasonableness to withstand a motion to dismiss," the court did not discuss, or ever mention, any basis for the officer's suspicion of Bills—or a lack thereof—in its analysis of the complaint.[174] But even under the most generous reading of *T.L.O.* and *Wallace*, some rationale for suspicion must be given for there to even be a possibility of a search or seizure being constitutional. The Fourth Amendment has never been held to permit a seizure targeted at a given individual for the purposes of interrogation without any facts of individualized suspicion.

Finally, we must consider the potential ramifications of the combination of the failings of the Supreme Court to doctrinally regulate the law of seizures in the schoolroom context and the lower courts' highly permissive reading of the Court's already lenient standards, imported from the search doctrine. We have seen that highly intrusive, gratuitously humiliating, and potentially traumatic conduct has been effectuated by school administrators and school police officers, and sometimes condoned by lower courts. *Walgren v. Heun* illustrates the full impact of that permissiveness, and the potentially lethal effect that unconstrained intrusions by school personnel can have on vulnerable children.

Corey Walgren was a sixteen-year-old at Naperville High School.[175] Corey was pulled from lunch by a dean to be interrogated by Naperville Police Officer Heun and a school dean, Madden. Heun and Madden brought Corey to an empty office, closed the door, and began interrogating Corey "in a manner that caused him to suffer extreme psychological distress and fear," by "falsely accus[ing] Walgren of possessing and disseminating child pornography and warn[ing] him that he would be forced to register as a sex offender if he in fact was in possession of child pornography."[176] Having scared Corey and interrogated him with the use of the Reid technique, the officers had Corey turn his phone over. Heun and Madden searched the phone and found no evidence of child pornography; still they pressed on, and "told Walgren that he was in possession of child pornography and that the contents of his phone could result in him having to register as a sex offender."[177]

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172. 959 F. Supp. 507, 509–10 (N.D. Ill. 1997). The facts summarized in this paragraph are derived from the description provided by the court, *id.* at 509–10.

173. *Id.*

174. *Id.* at 513.

175. Walgren v. Heun, No. 17-cv-04036, 2019 WL 265094, at *1 (N.D. Ill. Jan. 17, 2019). The facts and summary to follow come from the description provided by the court, *id.* at *1–2. For more information about the use of the Reid technique in schools, see *supra* notes 17–18.

176. *Id.* at *2.

177. *Id.*

Shockingly, the court provides *no discussion* of what justification the officer and dean had for initiating the interrogation. In fact, the court notes that "prior to the interrogation, Heun [and] Madden . . . lacked any information that Walgren possessed or disseminated any visual depictions that could be considered child pornography or committed any offense that would require him to register as a sex offender."[178] At the end of the interrogation, Corey was then placed in Dean Madden's office and ordered to wait there. Heun and Madden contacted Corey's mother and told her that Corey had possessed and disseminated child pornography, and they needed her consent to conduct a further search of the phone. Corey's mother, Maureen Walgren, said she could be there in fifty minutes. Before she could arrive, Corey escaped from the office he was kept in; in "dire and desperate psychological conditions, he walked to the fifth level of a downtown Naperville parking garage and jumped with the intention of killing himself or causing great bodily harm. Later that day, Walgreen died from injuries sustained from the fall."[179]

Walgren's parents brought an action against the administrators, the school, and the city under 42 U.S.C. § 1983.[180] Relying on *Wallace*, the district court concluded that "even assuming a seizure, the allegations in Plaintiffs' amended complaint do not establish that the Individual Defendants acted in an objectively unreasonable manner."[181] Indeed, "[t]he Court's common-sense conclusion here is that while the Individual Defendants' conduct was problematic and had tragic consequences, the amended complaint alleges no conditions of confinement that exceeded the bounds of an ordinary interrogation."[182] It is difficult to conceive that this conclusion can be correct, even applying the very permissive *T.L.O.* standard to school seizures. The court gave its imprimatur of approval to officers and administrators making false accusations of a federal crime and confining and interrogating a sixteen-year-old without, as the court put it, "any information" that this child had committed a crime, and falsely claiming the ability to permanently stain the child's life with the stigma of labeling him a sex offender—to the point that the child felt such duress that he took his own life.[183]

The public and state legislators were so shocked and appalled by the treatment that led to the death of Corey Walgren that relief came in the form of legislative action—"Corey's Law" represented the first potential change to the detaining and questioning of schoolchildren.[184] Corey's Law requires a "law enforcement officer,

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at *4.
182. *Id.* at *5.
183. *Id.* at *2.
184. Stacy St. Clair, *Prompted by Naperville Teen's Suicide, New Law Requires Parents Be Present Before Police Question Students on School Property*, CHI. TRIB. (Aug. 23, 2019, 5:10 PM), https://www.chicagotribune.com/news/breaking/ct-corey-walgren-new-illinois-law-naperville-teen-suicide-20190823-mws7jtsb2jczdiwdqpqhtagmxu-story.html [https://perma.cc/GVT8-UE8N].

school resource officer, or other school security personnel" to attempt to notify a child's parents and to "make reasonable efforts to ensure that the student's parent or guardian is present during the questioning or, if the parent or guardian is not present, ensure that school personnel, including, but not limited to, a school social worker, a school psychologist, a school nurse, a school guidance counselor, or any other mental health professional, are present during the questioning."[185] The statute is intended to ensure that "that no student is ever alone like Corey was."[186] While the reform is laudable in its goal, and such measures are important for protecting the well-being of the children interrogated by officers, it does not change the authority of school personnel to seize a child or the reality that the same interrogation can be conducted in the same manner by *educators* without any protection for children or even a requirement for *Miranda* warnings.[187] And just as importantly, the statute provides no judicial recourse for failure to adhere to Corey's Law.[188]

C. A Problem of National Scope

This is not a problem that is unique to Illinois; we could have drawn on many other jurisdictions to illustrate the jurisprudential and pragmatic failure to protect schoolchildren's Fourth Amendment rights. Here, we undertake a very brief review to show that the same themes that emerged as a consequence of the minimalist Supreme Court jurisprudence of searches and seizures in the schoolroom in Illinois apply elsewhere in the country.

First, even with such a lenient and malleable standard, lower courts still go beyond the few boundaries imposed by the Court in *T.L.O.* and *Safford*. Consider a case out of New York, *In re Elvin G.*[189] Under the student's version of facts, the school dean responded to a call from a teacher requesting assistance to address an unidentified student's device—potentially a cell phone—being used to make disruptive sounds in class. The dean began searching all of the students, having them turn their pockets out to search for the device. In the process, petitioner Elvin removed a hunting knife from his pocket. Elvin was prosecuted for unlawful possession of a weapon by a person under sixteen; he moved to suppress the hunting knife on the basis that it was illegally obtained in violation of the Fourth Amendment.

The trial court found the search permissible without any individualized suspicion: "The dean clearly had a reasonable basis to believe that some student in the classroom was violating school rules and there is no question that such breach

185. 105 ILL. COMP. STAT. ANN. 5/22–88 (West 2022).

186. St. Clair, *supra* note 184.

187. For further details and discussion of the associated failure of the Supreme Court to regulate interrogations occurring in the schoolroom, see Jacobi & Clafton, *supra* note 17.

188. *See generally* 105 ILL. COMP. STAT. ANN. 5/22–88 (West 2022).

189. *In re* Elvin G., 851 N.Y.S.2d 129 (N.Y. App. Div. 2008), *rev'd*, 910 N.E.2d 419 (N.Y. 2009). The facts to follow come from the description provided by the court.

was disrupting the class."[190] The court fails to acknowledge that the Supreme Court has always held that suspicion, even in the school context, must be individualized in the absence of the application of a special needs test.[191] In reversing, the Court of Appeals of New York did not correct the lower court's unconstitutional dragnet approach, but instead remitted the case for further fact finding.[192] This New York case is reminiscent of the Illinois courts' failure to require individualized suspicion in *Bills*, the court's willful blindness to the lack of suspicious articulable factors in *Walgren*, and—as other cases discussed—school administrators' failure to understand the few limits that the Supreme Court has placed on their power over schoolchildren. In the absence of clear and comprehensive national guidance, state and federal courts across jurisdictions are making the same errors, ignoring foundational principles of the Fourth Amendment in the school context.

Likewise, by no means is it uniquely Illinois administrators and teachers who misapprehend the *T.L.O.* standard; throughout the nation, school personnel misinterpret the *T.L.O.* test (as well as *Safford*'s subsequent delineation of it) as granting them unfettered discretion over students' bodies. For instance, in Maryland, in *Highouse v. Wayne Highlands School District*, it was alleged that defendants West and Kretschmer directed plaintiff, a 16-year-old-student, "to remove his clothing down to his underwear . . . Defendants West and Kretschmer next pulled on the elastic waistband of plaintiff's underwear, exposing plaintiff's pubic and anal areas."[193] This strip search was conducted after another student reported that he was missing $250 dollars that had been left in the gym locker room. Yet, the defendants "had no reason to believe that students hide money in their underwear."[194] Such a strip search was clearly unconstitutional after *Safford*. The court concluded as such, finding that "qualified immunity fails to shield Defendants West and Kretschmer."[195] As before, it is not the court's analysis that is troubling here; rather, the issue is that such a search happened at all with so little justification. More than five years after *Safford*, these school officials believed they could strip search a student's most intimate person for missing money.

Similarly, in Minnesota, in *Hough v. Shakopee Public Schools*, the school conducted daily searches of all special education students:

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190. *Id.* at 131.

191. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) ("The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing.").

192. *In re Elvin G.*, 910 N.E.2d at 420 ("[I]n applying the *Mendoza* factors, we conclude that the record was insufficiently developed to properly determine whether a search occurred and, if so, whether it was reasonable as a matter of law under the circumstances of this case." (citing New Jersey v. T.L.O., 469 U.S. 325 (1985); *Vernonia*, 515 U.S. 646; *In re* Gregory M., 627 N.E.2d 500 (1993))).

193. Highhouse v. Wayne Highlands Sch. Dist., 205 F. Supp. 3d 639, 643 (M.D. Pa. 2016). The facts to follow come from the description provided by the court.

194. *Id.* at 648.

195. *Id.* at 649.

> Every student was searched every day when he or she arrived at school. Generally speaking, students had their backpacks and purses searched, and students were required to empty their pockets, remove their shoes and socks, turn down the waistband of their pants, and sometimes to submit to a patdown search.[196]

The upshot is that courts in other states such as New York, Maryland, and Minnesota are, like Illinois courts, permitting dragnet searches, unjustifiably intrusive strip searches, and other unconstitutional state intrusions against schoolchildren. Our study of cases in Illinois illustrates the depth of the problem, but the problem is also broad: it is a national problem, yet the national court is refusing to act, failing to provide any guidance to schools and lower courts in relation to seizures, and failing to meaningfully enforce the minimal rules it has created in relation to searches.

Such inaction has permitted these state actors to engage in extremely intrusive behavior with little suspicion justifying those intrusions. It has also left it to the discretion of lower courts to approve or disapprove of such actions, with no real guidance from above. Looking only at cases that reach the Supreme Court, even if to critique them, results in vastly underestimating the breadth of the problem of what courts are permitting states to do in the school context. Yet, as the next Section shows, even looking to lower courts understates the problem, as the majority of state intrusions do not even reach the often-token review of lower courts: most state action in schools is never reviewed at all. Consequently, school administrators and law enforcement officers embedded within schools are left to judge for themselves their own powers in relation to their physically and legally vulnerable wards.

III. THE SILENT MAJORITY: THE UNREVIEWED CASES

In this Section, we turn from examining how school searches are treated in courtrooms to how searches are actually conducted in schools by state actors, including school administrators, teachers, principals, deans, and law enforcement officers stationed in schools. It is well-known that examining any kind of on-the-ground phenomena by analyzing court cases yields a biased and unrepresentative sample because most cases are pleaded out[197] or settled before ever reaching a courtroom—if the issue ever becomes a case in the first place given the hurdles of filing, including costs, limited access to representation, and other resource constraints.[198] For instance, it is well-recognized that *Terry* stops that result

196. Hough v. Shakopee Pub. Schs., 608 F. Supp. 2d 1087, 1091 (D. Minn. 2009).

197. *See, e.g.*, Jacobi & Berlin, *supra* note 8, at 2067 ("[I]n 1974, 80% of convictions nationally came from plea-bargaining; today, the figure is approximately 97%. In Arizona, plea-bargaining has been reported to dispose of 99.3% of cases." (citing William T. Pizzi, *The Effects of the "Vanishing Trial" on Our Incarceration Rate*, 28 FED. SENT'G REP. 330, 331 (2016)))

198. The canonical work is George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (showing that the relationship between litigated disputes and

in no evidence being found—as occur hundreds of thousands of times per year in major cities[199]—seldom result in any kind of complaint because there is no real remedy to be expected: there is no evidence to exclude and, even though the indignity of being subject to such stops is recognized by the courts,[200] the compensation that can be expected from a civil claim is typically too low to justify the legal intervention.[201] Accordingly, an understanding of how *Terry* stops are typically conducted cannot be gained from looking at court cases.[202] Looking to court cases to understand how school searches are conducted is similarly problematic: as our interviewees repeatedly emphasize, an overwhelming majority of school searches do not result in court action or even legal complaint, even when they are constitutionally dubious.[203] As such, to understand how children's rights

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settled disputes varies with "the expected costs to the parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement"). *See also* Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 5 J. EMPIRICAL LEAL. STUD. 407 (2008) (studying how case selection affects inferences about decision making throughout the judicial hierarchy); Matthew Sag, *Empirical Studies of Copyright Litigation: Nature of Suit Coding* (Loy. Univ. Chi. Sch. of Law Research Paper, No. 2013-017, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330256 [https://perma.cc/8B36-97DS] (investigating limitations and reliability of the coding of court cases for empirical study).

199. *See, e.g.*, Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 960 (2014) (showing that in 2011 in New York City, there were 678,092 stops, of which only 5.9%—approximately 40,000 stops—resulted in an arrest, suggesting that there were over 638,000 stops in a single year that resulted in finding little or no incriminating evidence); ACLU OF ILL., STOP AND FRISK IN CHICAGO 10 (2015), https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf [https://perma.cc/3LX9-SD3B] ("There were more than 250,000 stops that did not lead to an arrest in Chicago for the time period of May 1, 2014 through August 31, 2014.").

200. As the *Terry* Court itself recognized. *See* Terry v. Ohio, 392 U.S. 1, 17 (1969) ("It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.").

201. *See, e.g.*, SUSAN A. BANDES, AM. CONST. SOC'Y FOR L. & POL'Y, THE ROBERTS COURT AND THE FUTURE OF THE EXCLUSIONARY RULE 7–8 (2009), https://www.acslaw.org/wp-content/uploads/2018/05/Bandes-Issue-Brief.pdf [https://perma.cc/MG24-94VB] (arguing that there are high barriers to such suits, due to the difficulties of finding lawyers to sue police, of convincing juries, and of collecting damage awards against police officers who may be judgment proof); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 599 (2011) (noting that the civil remedies in this context are "generally regarded as an inadequate" remedy).

202. Looking instead to police reports of such stops reveals far more: for instance, a study of stops and frisks in New York in 2011 showed that on average, police identify only 1.6 factors indicating suspicion, with highly subjective and marginally persuasive factors such as furtive glances being the most common factors relied upon. *See* Jacobi, Richardson & Barr, *supra* note 199, at 964.

203. For instance, Judge Lubin reported that whereas many juvenile criminal cases used to arise in his courtroom as a result of school searches, now there are few; he believes that the number depends on who the state Attorney General is and whether they prioritize such cases. Additionally, judges have discouraged schools from referring cases to juvenile court rather than addressing discipline issues themselves. He now sees one tenth of the approximately 2,000 juvenile cases he used to have on his court call when he first took the bench in 1991. *See* Interview with the Hon. Stuart F. Lubin, *supra* note 92. Amy Meek, previously an attorney of the Chicago Lawyers' Committee, says she has participated in several expulsion hearings that resulted from searches in which the searches were not actually related or were very tenuously related to suspicion that the student was engaging in any kind of safety issue or

are actually being respected or curtailed in the schoolroom, it is necessary to go beyond examining cases and investigate at the school level, as this Section does.

This Section draws on eighteen interviews with various experts working on issues relating to school students' lives and educations in Chicago and in Illinois more broadly.[204] They include attorneys representing students, disability advocates, advocates at various charitable organizations, deans of schools, school social workers, judges and probation officers in the juvenile justice system, post-incarceration reintegration officers, and others. We begin by describing typical school searches and seizures. We then detail the considerable disparity between how different children are treated, based on factors such as race, disability, homelessness, wealth, and community characteristics. Finally, we discuss the particularly thorny issue of having law-enforcement officers—including School Research Officers (SROs), law enforcement officers assigned as full-time school officers—conducting searches and seizures of children.[205]

A. Common School Practices and Nonintrusive Searches

Many school searches can be, and are, either unintrusive, or conducted in a manner that is regulated and reasonable, or both. We begin by describing largely unproblematic searches and reasonable search practices, as described to us by various school administrators. However, later Sections show there are considerable disparities in how searches are conducted and who is commonly targeted for closer scrutiny and significantly greater intrusions.[206]

Tom Scotese, a High School Assistant Principal, describes a typical search conducted at his school.[207] In recent years, student vaping—the inhalation of substances through the vapor created by an electronic cigarette—is the main focus of school searches, with approximately twenty searches relating to drug vaping per year and fifty to seventy-five for tobacco product vaping, compared to approximately four for other drugs, most commonly pills.[208] The school closely monitors the bathrooms, as that is where vaping typically occurs. If the student is seen with the electronic cigarette—or vape—they are instructed to hand it over and are interviewed by the Dean. If the student will not hand the product over, then

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serious disciplinary issue. *See* Interview with Amy Meek, *supra* note 97. As Meek explains, the reasonable grounds standard does not apply unless you go the criminal sanction route, but most schools use administrative disciplinary procedures, in which the exclusionary rule does not strictly apply. *See id.*

204. All interviews were conducted with detailed notes being taken and subsequently verified by the interviewee; interview notes are on file with the authors. For details, see *supra* note 12 .

205. Many jurisdictions have raised concerns with, and contemplated reforms of, SROs—Senior Resource Officers—being stationed in schools. *See infra* Section III.D.

206. *See infra* Sections III.B.–D.

207. Interview with Tom Scotese, Former Assistant Sch. Principal (May 4, 2020). Scotese has since retired.

208. Susan Coleman, an assistant superintendent at another school, says they do searches for vaping evidence "probably every day." Interview with Susan Coleman, Assistant Sch. Superintendent (Apr. 24, 2020).

security becomes involved, with the student searched and parents informed. The search is unusually noninvasive, typically consisting of requiring the student to "bunny-ear" their pockets or for the security officer or an administrator to look inside their bags. There are always at least two adults present, and the searcher matches the student's gender. The penalty for these violations is mandatory Saturday detentions or issuance of tickets—a $100 fine paid to the village, with the citation removed from the student's record when they turn eighteen. Only approximately zero to two cases per year result in an arrest.

The content of searches varies by school and by neighborhood. For instance, Sarah Gibson, a school administrator at a charter school in Chicago's Noble network of open enrollment charter schools reports that nine times out of ten, what is found at her school is Mace.[209] This is because their students live in a "really dangerous neighborhood," and the students feel they need such a weapon to get to and from school safely.[210] Gibson reports that the discipline team typically returns the Mace at the end of the day, because they want the children to have it to get home safely. Other contraband is not treated as leniently is Mace, but the staff understand that even the occasional pocketknife that is found is typically possessed "for practical reasons."[211]

Beyond the search of the student and their immediate possessions, other areas can be searched, including cars, but Scotese says such searches are rare and only occur if the student is suspected of having driven to school under the influence of alcohol.[212] He emphasizes that the school never does strip searches. Susan Coleman, an Assistant Superintendent at a wealthy school in the northern suburbs, agrees, saying her school administrators seldom do searches of students' lockers or cars—less than approximately once per month—and when they do so, the searches are based on a lot more information than common searches looking for vapes and other like contraband, typically having to do with either weapons or the distribution of drugs.[213] For example, in one case, a security guard checking for parking violations saw drug scales and materials used for wrapping drugs visible in the front seat of a student's car. They had the student come out and open the compartment, which revealed "a lot of drugs" as well as a list of students who owed money to the student; those students later admitted to buying drugs.

Of note, Scotese reports that although lockers are searched, administrators seldom find anything of interest in locker searches because students know that lockers are easily searched.[214] Scotese describes students as being "really smart"

209. Interview with Sarah Gibson, Sch. Admin., Noble Sch. (Aug. 17, 2021).

210. *Id.*

211. Other ways in which school search practices vary by wealth, race, and other factors, are discussed *infra* Sections III.B–C.

212. Interview with Tom Scotese, *supra* note 207.

213. Interview with Susan Coleman, *supra* note 208.

214. Interview with Tom Scotese, *supra* note 207.

about disguising their vaping, sometimes dividing different parts of the product among multiple students. The strategic response by students to rules is a theme that emerged in many interviews.[215] Similarly, Coleman indicates that she has to deal with reports of students vaping every day, typically in the school bathrooms.[216] The administrators will look at the evidence, such as video footage, to see who was there and how valid the report is, but usually by the time they call the students in and have them empty their pockets, sleeves, and cuffs of their jeans, the students, who are "pretty savvy and wealthy," will more likely than not have disposed of the evidence of their wrongdoing.[217]

Likewise, school administrators are often highly strategic about maximizing their powers over students under the law.[218] For instance, Shobha Mahadev, a child advocate at the Children and Family Justice Center at Northwestern University Pritzker School of Law, gives an example of a student reporting that another student had a BB gun in school.[219] Rather than seeking corroboration of this otherwise unsubstantiated claim, the school administrator searched the child's desk, rather than his backpack, as this is easier to justify under the law.[220] As is explored below, schools are often highly strategic in finding ways to stretch the bounds of the law—numerous experts commented that legal prohibitions have very little bite in most cases because students do not have usually have attorney representation.[221]

In terms of seizures, such as holding students for police to interview, Scotese reports that there are very few circumstances in which he would prevent a student from leaving the school, even if there is a potential criminal case to be investigated.[222] But this varies by school: Michelle Rappaport, a social worker at a therapeutic day school, which serves students with disabilities who have been removed from regular school,[223] says her school's SRO will follow a student who leaves campus and bring them back.[224] At Scotese's school, a physical intervention will only occur where

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215. *See* Jacobi & Clafton, *supra* note 11.

216. Interview with Susan Coleman, *supra* note 208.

217. Susan Coleman notes that the middle school students tend not to be "as street smart, so they are caught much more easily." *Id.*

218. *See generally* Jacobi & Clafton, *supra* note 11 (describing how some administrators will deliberately suspend students on the days of standardized testing and will find means of altogether excluding students they believe will bring down the school's standardized test scores or reputation).

219. Interview with Shobha Mahadev, Clinical Professor of L., Child. & Fam. Just. Ctr., Nw. Univ. Sch. of L., in Chi., Ill. (Feb. 7, 2020).

220. *Id.*

221. *See* Jacobi & Clafton, *supra* note 11.

222. Interview with Tom Scotese, *supra* note 207.

223. For more on the difference between regular schools and therapeutic day schools, see Jacobi & Clafton, *supra* note 11.

224. Interview with Michelle Rappaport, *supra* note 92. For additional discussion of the use of and issues implicated by SROs in schools, see *infra* Section III.D. Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84 CLEARING HOUSE 160 (2011).

there could be a possible harm to the student or someone else.[225] Such safety concerns include a student dealing pills to other students; in that case, the SRO will be involved and can restrain the student. In such cases, the SRO will also conduct the interview of the student; parents are notified and given an opportunity to be present for the interview.

B. Disparities Among Schools

Not all schools, however, exercise power over students with such restraint. Enormous disparities exist in how schoolchildren are treated by different school administrators and school systems. For instance, in contrast to the disinclination to seize students described by Scotese, Berenice Villalobos of Transforming School Discipline Collaborative,[226] an interdisciplinary organization of experts "dedicated to supporting districts and schools to implement equitable and non-exclusionary discipline practices,"[227] says excessive seclusion practices are a major problem. She works with schools to discourage these seclusion practices and has worked with a number of schools flagged for the use of such processes.[228] She reports having observed seclusion used even on students with special needs.[229] We explore seizures in relation to problematic discipline practices—which range from seclusion practices through suspensions, expulsions, and arrests—in our associated project on school discipline; it is in this area that we most clearly see the effect of the school-to-prison pipeline and the treatment of children as disposable.[230] Our experts agree that the most significant impact of school searches is that they can lead to these harmful disciplinary procedures.[231]

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225. Interview with Tom Scotese, *supra* note 207.

226. Interview with Bernice Villalobos, *supra* note 149.

227. TRANSFORMING SCH. DISCIPLINE COLLABORATIVE, https://www.transformschooldiscipline.org/ [https://perma.cc/57QZ-SNVE] (last visited Nov. 5, 2022).

228. *See* Jodi S. Cohen & Jennifer Smith Richards, *"None of the Children at the School are Safe,"* PROPUBLICA: THE QUIET ROOMS (Dec. 12, 2019, 5:00 AM), https://www.propublica.org/article/gages-lake-school-illinois-students-seclusion-restraint [https://perma.cc/52C3-K5EN] ("[A]n investigation . . . revealed that school districts throughout Illinois routinely violated the state's law on isolated timeout, which permitted employees to seclude students only if the children were in danger of hurting themselves or others. Reporters obtained and reviewed thousands of school incident reports that described the emotional and physical trauma suffered by students, most of them with disabilities, after being shut in small rooms alone for long periods.").

229. Interview with Bernice Villalobos, *supra* note 149.

230. Jacobi & Clafton, *supra* note 11.

231. Interview with Amy Meek, *supra* note 97; *see also* DRIVER, *supra* note 26, at 202 ("Even in the 1990s, it had become apparent that schools employed their robust searching authority as a complement to, not as a substitute for, abundant imposition of student suspensions."); CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 78 (2012) ("School administrators are resorting more and more frequently to removing students deemed to be 'problem children' from their schools through suspensions and expulsions . . . . Rates of suspension have increased dramatically for all students, but the spike has been most dramatic for children of color.").

Beyond the classic manifestations of searches of individual students, as described above, far more common school searches consist of non-individualized searches. Michelle Rappaport describes the searches and restrictions that apply to students on a daily basis at her school: when students arrive, they go through a metal detector, and every student must have their backpack searched and empty their pockets.[232] If the detector goes off, the student will be subject to a secondary screening with a wand. If something metal is detected, the student will be required to sit in the office until they are willing to present the object—her school does not conduct forced searches. Rappaport says that few weapons are found, but on occasion drugs are found. Cell phones are prohibited in the school—students check them in and get them back at the end of the day.[233]

But there are vast differences between how non-individualized searches are conducted at different schools. Some of these differences are a product of formal differences in responsibilities—such as between regular schools and therapeutic day schools—but many are not and result instead from different exercises of discretion. Christine Agaiby Weil, who worked for many years as a post-incarceration reintegration officer in the juvenile justice system, reports that it is common for students in Cook County to have to go through three levels of metal detectors and searches just to enter their school. Often, students have to wait outside the school in the cold of Chicago winters to go through security, making school seem like "the most unwelcoming place."[234] This is done, according to administrators, to make the children feel safe, but Weil says that many students who live in areas with high levels of violence feel they need to carry a weapon to get to school safely. Students have told her that if they could walk to school and leave the weapon outside, they would, but they feel fearful getting to school without a weapon. But not all schools are as understanding of this as the Noble school described by Gibson, above.

Bernice Villalobos and others report witnessing the same phenomenon of students carrying weapons out of a genuine fear of becoming a victim of violence, but the responses of schools can be remarkably different.[235] Villalobos provided an example of two students, both Latinx, who were walking down the school hallway when they were stopped by a security officer. They were supposed to be in class

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232. Interview with Michelle Rappaport, *supra* note 92.

233. Sarah Gibson reports that while there are no equivalent searches upon entry at her charter school, until 2021, the school did perform random, whole-floor searches of lockers, called "diamond sweeps." Interview with Sarah Gibson, *supra* note 209. To some degree, she says, administrators viewed these "as an intimidation factor because it was meant to signal to the students not to bring contraband to school." *Id.* These typically arose after a rash of disciplinary incidents and were sometimes used to target one or two particular students, but much of the time the purpose was to send a preventative message to students. *Id.*

234. Interview with Christine Agaiby Weil, *supra* note 149; *see also* LIZBET SIMMONS, THE PRISON SCHOOL: EDUCATIONAL INEQUALITY AND SCHOOL DISCIPLINE IN THE AGE OF MASS INCARCERATION 54 (2016) (discussing the economic and political forces driving a "school security market on the rise and approaching $5 billion in annual sales").

235. Interview with Bernice Villalobos, *supra* note 149; Interview with Amy Meek, *supra* note 97.

but otherwise there was no basis for suspicion of the students, and surely no expectation that evidence of not being in class would be found on their persons or in their possessions. Nonetheless, the security officer searched their backpacks and found a box cutter and a broken vape pen on one student. In subsequent school disciplinary proceedings, the hearing officer accepted the argument that the student was in the hallway "near an area where students are not really allowed" as a sufficient justification to be able to go through the student's backpack—a dubious legal conclusion.[236] The student said he was carrying the box cutter because, during one of his walks to school, he was assaulted by gang members. He carried it as a protective device, as he was very afraid during his walks to and from school. The student was suspended and ultimately expelled. In another example, another Latinx student was in the school bathroom with his friends when a security guard came in and searched the students. Nothing was found, but the student, who described the officer as aggressive and appearing to assume the student was breaking the rules without any basis, responded with aggression, resulting in a physical altercation.[237] The student was also expelled. Villalobos describes the underlying problem: "when you are treating youth in such a way that you are patrolling them, not just security but teachers and administrators, then students aren't going to trust the school and won't want to engage, and this leads to conflict."[238]

In contrast, the response of Susan Coleman's school, which by her account has mostly White and wealthy students, is far more restrained.[239] Coleman describes her school as having parents who are highly litigious, and teachers and administrators are afraid of conducting searches or imposing discipline for fear of being sued. Before conducting a search that extends beyond requiring the students to empty their pockets, the school aims to develop good evidence, relying not just on hearsay, and this requires developing a good relationship with the students. If a student is found with drugs for their own use, the school conducts an intervention, rather than a disciplinary proceeding. Only if the student is distributing and selling the drugs will there be more serious consequences, including outplacement or

236. As we have seen, lower court interpretation of the already low reasonable grounds standard is at times seemingly beyond what the Supreme Court permitted. *See infra* 89. That there is no basis for searching for evidence of something as incorporeal as permission to be in a given place is obvious from the Court repeatedly recognizing that traffic offenses such as driving without a license cannot justify a physical search for evidence. *See, e.g.*, Arizona v. Gant, 556 U.S. at 344 (finding a search impermissible because there can be no expectation of finding further evidence of driving with a suspended driver's license in an automobile); United States v. Robinson, 414 U.S. 218, 233 (1973) (finding a search impermissible because no expectation of evidence of driving on a revoked license would be found in the vehicle).

237. That such escalation is common, particularly among student populations with experiences with trauma, is explored *infra* Section III.D 254. *See also* Jacobi & Clafton, *supra* note 11.

238. Interview with Bernice Villalobos, *supra* note 149.

239. For more on the effect of fear of student lawsuits, see Jacobi & Clafton, *supra* note 11.

expulsion.[240] Even when a student was giving out Valium at the school and a girl overdosed on it, the wrongdoer was expelled but that expulsion was held in abeyance and the student went to a therapeutic day school. And even when knives are found, for the most part the school looks at the context and considers that in this suburban area, the student may simply have the knife to go hunting. In contrast, in the box cutter example that Villalobos cites, the student's attorney pointed out that school rules did not even deem the box cutter to be a weapon; the school district responded that although it is just a box cutter, in a school setting it is a sharp object that can harm someone—a rationale that was accepted by the hearing officer to justify expulsion of that student.

We have seen that different schools respond differently, often reflecting differences in wealth and the school's expectations of student ability to have representation or to bring lawsuits. The next Section shows that, in addition, highly divergent responses can be observed *within* schools, with searches being directed at different students in unequal and arguably highly discriminatory ways.

C. Racial and Other Disparities Within Schools

Divergences are observed by many of our experts in how administrators treat different students within their schools. A number of experts emphasize that everyday policing of students' bodies has a significant impact on their privacy, and is a mechanism of highly discriminatory application of schools' search powers.[241] Amy Meek, formerly senior counsel for the Chicago Lawyers' Committee—a civil-rights organization directed at taking on discrimination—specialized in promoting "access to education by addressing the individual and systemic barriers that disproportionately impact historically disadvantaged communities."[242] She says

240. But note that even when there is expulsion, at Coleman's school, the student goes to the Regional Office of Education's Safe School Program, which provides intensive support to the student at the district's expense. *See* Interview with Susan Coleman, *supra* note 208. This stands in stark contrast to the response to students from less well-to-do neighborhoods, where students are simply funneled into alternative day schools, which have very few resources. *See infra* 284; Jacobi & Clafton, *supra* note 11.

241. Francisco Arenas, a supervisor at Cook County's Juvenile Probation office, observed how difficult it is for children to thrive when they feel they are being constantly watched and surveilled. *See* Interview with Francisco Arenas, *supra* note 2; *see also* Nance, *supra* note 26, at 90 ("The empirical analysis revealed that both student race and student poverty were strong predictors for whether a school chose to employ high surveillance security methods. And, importantly, these findings held true even after controlling for the other above-listed factors that might influence the school officials' decisions to employ strict security measures, such as school crime, neighborhood crime, and school disorder."); DANIEL J. LOSEN & JONATHAN GILLESPIE, CIV. RTS. PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL (2012), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf [https://perma.cc/8P7K-9JRA]; Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 25, 36 (2010).

242. *See, e.g.*, Amy Meek, Senior Counsel, Chi. Law.'s Comm. for Civ. Rts., Equity Gaps and Student Rights During COVID-19, Introductory Remarks at Trauma Responsive Educational Practices

that many schools exploit the Supreme Court's very low standards of suspicion to investigate children as a way to assert control over students' bodies, particularly Black and Brown bodies.[243] Although strip searches are now somewhat circumscribed by *Safford*, Meeks says that any less invasive search is highly unregulated, leaving much to the discretion of the school. And she notes that if searches do not result in criminal cases, searches rarely get any attention, which can harm and even traumatize children by enabling their privacy to be invaded.

This ability of schools to humiliate and traumatize children is starkly illustrated by Noble Charter Schools' recently reformed "bathroom escort policy," which prohibited students from using the restroom during class without an escort. Female students reported that while menstruating, they would sometimes bleed through their clothing as they waited for these escorts.[244] These girls then had to receive special permission to wear their sweatshirts around their waists to cover the bloodstains, as they would otherwise receive demerits for violating dress code, but the girls reported that the dress code is so strict that other students knew what that accommodation signified. Moreover, in order to receive that special permission, the students were named in an email to staff at the school, so that students and staff alike were aware of their humiliation.[245]

Noble's policy was also criticized for being focused on the policing and disciplining of Black students, including through restricting their hairstyles. Indeed, according to Gibson, the administrator of a Noble school, previously there were three times the number of Black males being punished as compared to Hispanic students (at her school, there are no White students).[246] But the public attention given to Noble belies the problem with discriminatory enforcement of dress codes more generally.[247] Amy Meek says that rules over hairstyles, for instance, often focus

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Project Virtual Conference: Evidence-Based Guidance for How Schools Can Respond to a National Mental Health Crisis in the Wake of COVID-19 (June 5, 2020), https://www.clccrul.org/blog/2020/6/9/equity-gaps-and-student-rights-during-covid-19 [https://perma.cc/XK6S-QW5M].

243. Interview with Amy Meek, *supra* note 97.

244. Chelsea Ritschel, *Female Students at Chicago Charter Schools are Reportedly 'Bleeding through their Trousers' Due to Strict Bathroom Policy*, INDEP. (May 1, 2018, 5:34 PM), https://www.independent.co.uk/life-style/chicago-charter-schools-periods-female-bleeding-bathroom-policy-a8331261.html [https://perma.cc/4F8Z-M7LC].

245. *Id.*

246. Noble Schools Network comprehensively changed the disciplinary policy in 2021 after this bad publicity, as well as because alumni, teachers, and parents spoke out about some of the discipline practices; teachers leaving the school as a result of unionization efforts spoke out about the racism inherent in the disciplinary code and practices. Retention numbers dropped, and many came to recognize that the disciplinary practices were harming families—for instance, students were charged a fee of five dollars per detention, which had a very adverse effect on families living on food stamps. Eventually, "more and more of those involved agreed that things were not right." Interview with Sarah Gibson, *supra* note 209.

247. Interview with Amy Meek, *supra* note 97; Interview with Dr. Pamela Fenning, Professor & Co-Program Chair for Sch. Psych., Loyola Univ. Chi. (March 12, 2020); Interview with Michelle Rappaport, *supra* note 92; Interview with Susan Coleman, *supra* note 208.

on common color treatments and style preferences favored by Black students; dress codes often ban sagging pants or pants below the waistline, as commonly favored by young Black boys in particular.[248] And whereas the focus for boys is on such loose-fitting clothing, girls are often targeted for tight-fitting clothing, especially shirts "fitting immodestly," which is particularly used against girls of color. Meek argues these rules are coded discrimination and also invite discriminatory enforcement, due to the discretion inherent in these descriptions. It is typically schools with a majority of Black and/or Brown students that have strict dress codes and strict code enforcement.[249] In contrast, our interviewees at majority White and wealthy schools noted that teachers tend to feel uncomfortable asking students to change their shirts even when they display explicit drug or alcohol messages. For example, Susan Coleman reports that at her school, the dress code was changed to abolish these provisions due to school personnel's discomfort and in response to parents complaining that the dress code was discriminatory toward girls.[250]

It is important to note that the problem is not simply dress codes: Dr. Pam Fenning, Professor of Psychology at Loyola University, Chicago, who specializes in school and educational psychology, reports that other subjective offenses, like insubordination, lead to discretion in enforcement, and enforcement is very racially driven.[251] Her analysis of discipline data has shown that discipline is racially disproportionate in frequency and severity even when controlling for other factors, such as socioeconomic status and offense type.[252]

Students with disabilities are also often subject to greater surveillance, according to Rachel Shapiro, an attorney with the Juvenile Justice Project, which provides legal assistance to students with disabilities, run by Equip for Equality, an advocacy organization for people with disabilities.[253] Sometimes students with disabilities have an explicit agreement with the school that subjects the student to additional surveillance; for instance, if a student with a disability posts a picture of a weapon, the student may have to consent to being searched when entering the school building every day. But Shapiro reports that problems can arise when students are targeted without such a basis. In her practices, she has seen students

248. Interview with Amy Meek, *supra* note 97.

249. *Id.*

250. Interview with Susan Coleman, *supra* note 208. Coleman says that now if something a student wears is very revealing, teachers will approach a guidance counselor or female dean, and the interaction would be treated as a conversation rather than discipline. *Id.*

251. Interview with Dr. Pamela Fenning, *supra* note 247; Interview with Ashley Fretthold, *supra* note 19; *see also* Jacobi & Clafton, *supra* note 11.

252. *See, e.g.*, Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URB. EDUC. 536 (2007); Pamela Fenning & Kisha Jenkins*, Racial and Ethnic Disparities in Exclusionary School Discipline: Implications for Administrators Leading Discipline Reform Efforts*, 102 NASSP BULL. 291 (2018).

253. Interview with Rachel Shapiro, Supervising Att'y, Equip for Equal. (Mar. 30, 2020); *see also Education Justice Project*, EQUIP FOR EQUAL. (OCT. 7, 2022),https://www.equipforequality.org/issues/special-education/special-projects/juvenile-justice-project/ [https://perma.cc/2CKZ-W65S].

targeted by school police officers or particular administrators; she has arranged for the students to switch schools in response to this targeting. Shapiro notes that, in particular, students with mental illness are subject to unfavorable treatment. Students with disorders such as bipolar disorder, mood disorders, and conduct disorders may be high functioning academically, but they can no more control themselves than a student with, for example, autism. But she says students with mental illness disabilities are treated very differently, even compared to other students with disabilities. It is worth reiterating that the restrained and responsible practices described in Section A of this Section are not representative of the entire schooling system.

Dan Losen studies the disparities between schools and says this kind of targeting is part of a general problem of inequality between and within schools, including discrimination on the basis of race, disability, and low income.[254] Dr. Fenning agrees, and says that conflict escalation often arises due to hyper-focused monitoring and controlling of students. Oftentimes, children are targeted not for their individual behavioral records but for coming from a community toward which the school is hypervigilant; as a consequence, highly discretionary bases such as dress, hair, and tardiness can be used as a basis for targeting those children.[255]

D. Police in Schools: SROs (School Resource Officers)

Some of the most infamous treatment of students in schools in Illinois involve SROs, such as when, after a student had her phone out in class and then refused to leave the classroom, two SROs "shove[d the student] toward a stairwell without provocation, then drag[ged] her down the stairs by her leg before shocking her with a stun gun and placing her under arrest."[256] The student, Dnigma Howard, is a special needs student; she is also African-American, both of which, as described *supra*, are student characteristics that are associated with more aggressive policing.

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254. Interview with Daniel Losen, Dir. of Ctr. for Civ. Rts. & Remedies, Civ. Rts Project at UCLA (Apr. 7, 2020).

255. Interview with Dr. Pamela Fenning, *supra* note 247; *see also* SIMMONS, *supra* note 234, at 65–66 ("Data on disciplinary occurrences by infraction type for the fall of 2006 show that half of all suspensions and expulsions were for minor conduct offenses, such as disrespect, profanity, and cutting class."); Russell J. Skiba, Mariella I. Arredondo, Chrystal Gray & M. Karega Rausch, *What Do We Know About Discipline Disparities? New and Emerging Research*, in INEQUALITY IN SCHOOL DISCIPLINE: RESEARCH AND PRACTICE TO REDUCE DISPARITIES 21, 24 (Russell J. Skiba, Kavitha Mediratta & M. Karega Rausch eds., 2016) ("Racial/ethnic disparities in school discipline tend to be most commonly found, not in more serious or safety-threatening behaviors, but rather in more subjective infractions, such as defiance or disrespect, where interpretation rather than objective criteria are at play. Even after controlling for behavioral ratings of misbehavior, classroom teachers still refer a higher rate of students of color to the office." (internal citations omitted)).

256. Fran Spielman, *Committee OKs $300K Settlement to Former CPS Special Needs Student Tased by Cops at Marshall HS*, CHI. SUN TIMES (Dec. 14, 2020, 12:52 PM), https://chicago.suntimes.com/city-hall/2020/12/14/22174801/student-tased-dnigma-howard-settlement-marshall-high-school-cps-chicago-police-schools [https://perma.cc/449G-NAPP].

But events this controversial are not representative—often those that get such attention are those that are recorded by witnesses on phones and made public, resulting in remediation which is never made in the vast majority of all instances. For example, in this case, the student was compensated $300,000 and the SROs were removed from school responsibilities. But the quotidian interactions between SROs and students, interactions that can be highly problematic but do not garner such public attention or ever receive any sort of official review, are those that raise the concerns of our experts.[257]

The presence of SROs in schools is a factor that numerous experts pointed to as highly problematic for student outcomes. Reverend David Kelly of the Precious Blood Ministry of Reconciliation, an organization that serves "young people and families most impacted by violence, incarceration, and structural inequity,"[258] works with students struggling with incarceration, trauma, and discrimination. He regularly goes into juvenile detention centers, jails, and prisons, but most of his work is done when young people come home and are released. He puts it simply: "as a society, if we see kids as threats, and put our money into responding accordingly, we get what we pay for; if you pay for policing, you will get arrests; if you put your money into supportive services and therapy, that will take you in a different direction."[259] He says that children dealing with trauma, who may have a hard time listening to a teacher for forty-five to sixty minutes, need engagement and counselors, not policing. However, it tends to be children in affluent communities who have access to a much higher number of counselors, despite the fact that students in low-income communities may need such resources the most. Bernice Villalobos agrees: she says SROs contribute to a cycle of distrust in communities that are already heavily policed and subject to *Terry* stops.[260] There have been curricula developed to encourage SROs to be more restorative in approach and engaged in the school, but she says SROs by nature are not helpful in schools, as they criminalize the school setting, and just having an SRO presence in the school creates a punitive tone.[261]

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257. *See also* DRIVER, *supra* note 26, at 199 ("In *T.L.O.*, the Supreme Court envisioned a bifurcated world where schools, on the one hand, and police officers, on the other, occupied two distinct spheres. Yet it is clear from the facts of *T.L.O.* itself that those worlds were already beginning to converge.").

258. The Precious Blood Ministry of Reconciliation is a not-for-profit organization that, among other activities, supports individuals who have been incarcerated, along with their families and communities. For more information, see PRECIOUS BLOOD MINISTRY OF RECONCILIATION, https://www.pbmr.org/ [https://perma.cc/KZ8L-Z6QM] (last visited Nov. 5, 2022).

259. Interview with Reverend David Kelly, Dir., Precious Blood Ministry of Reconciliation (May 12, 2020).

260. Interview with Bernice Villalobos, *supra* note 149.

261. *Id.* Bernice Villalobos describes it as traumatic to be in a setting from 7 a.m. to 3 p.m. in which the only interactions are punitive; it creates a subconscious fear for the students interacting with the school, and the security can put students further on edge. *Id.*

Our experts all agree that SROs often lead to escalation of conflict, as they are there to patrol, not remediate.[262] Searches and seizures conducted by SROs, rather than teachers or administrators, are more traumatic, according to Dr. Fenning. SROs are often unknown to the student and they represent the juvenile justice system, whereas an administrator generally has some sort of relationship with the child, and their intention in conducting the invasive practice (be it a search, seizure, or interrogation) will often be better understood by that child.[263] Rachel Shapiro echoes this point, saying it is definitely more traumatic and intimidating to have a search or seizure interaction with a SRO, who ordinarily students do not know and who presents a police presence.[264] In contrast, even if a student is not close with the principal, or has a bad relationship with the principal, the student will still have interacted with this person and see them on a frequent basis in some capacity. There are SROs who build relationships with the students, but that is much more rare than common.[265] As such, most experts agree that SROs should not be in schools, and that simply having a higher standard of suspicion apply to SRO-led searches or interrogations than those conducted by educators is an inadequate solution.[266]

Francisco Arenas, a juvenile probation officer in Cook County, agrees, saying that policing of children and invasive searches and seizures in general have a significant negative impact on students, and this is even more so when conducted by a law enforcement officer.[267] In particular, he has noted that school searches and seizures make reintegration of students who have been incarcerated much more difficult, particularly because schools overreact to any problem with the student. For instance, he sometimes has schools request that probation officers come to the school to pull a child out of class, rather than deal with the student themselves. Being pulled out of class by a probation officer is, he says, traumatic for the child.[268]

Amy Meek says there is very little training of officers in how they should deal with students and that SROs are trained to respond to encounters with any student found in an area without permission to be there by requiring them to turn out their pockets and be searched.[269] As well as being legally questionable, Meek says this is a mindset that will escalate conflicts rather than de-escalate.[270] And SROs are often

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262. *Id.* Villalobos says the problem is particularly pronounced in areas with gang activity. *Id.* She has observed schools displaying bias against students from these areas because of what is happening in the community, resulting in overreaction to threat and escalation of what could be minor conflicts by school administrators and, particularly, SROs. *Id.*

263. Interview with Dr. Pamela Fenning, *supra* note 247.

264. Interview with Rachel Shapiro, *supra* note 253.

265. *Id.*

266. We discuss this in further detail in Jacobi & Clafton, *supra* note 17.

267. Interview with Francisco Arenas, *supra* note 2.

268. *Id.* For further details, see Jacobi & Clafton, *supra* note 11.

269. Interview with Amy Meek, *supra* note 97.

270. *Id.* Dr. Fenning reports that after recent reform, SROs are now required to receive some trauma training at least once to work in a school, but she indicated that there needs to be more done

involved in the worst incidents. Christine Agaiby Weil agrees, describing witnessing a lot of inappropriate behavior from SROs towards students.[271] When she was working on the reintegration of students after those children had been in the juvenile justice system, she saw a fifty-year-old officer flirting with a fourteen-year-old female detainee—she says that the fact that officers behaved like this in front of her indicates how ingrained such behavior was. She also saw SROs physically handling the children, but calling it "playing"—she says boys in the hallways of schools would jump at each other and punch each other; the SROs would sometimes get involved in this, saying they were "just playing," but if the child touched the SRO back, the SRO can change his attitude in a moment and the student could suddenly be in serious trouble.[272]

In 2017, after gathering over ten years of data on practices by law enforcement in Chicago schools, the Shriver Center on Poverty Law released a damning report on Chicago Public Schools (CPS), finding:

> School Resource Officers . . . are not required to undergo any specialized training for interacting with children. Moreover, SROs operate within CPS with little oversight or accountability for their actions. This has led to poor outcomes for students, particularly students of color, impairing their ability to learn and develop, imperiling their civil rights, and increasing their likelihood of being swept into the criminal justice system.[273]

This finding followed other reports, such as the Advancement Project's 2005 conclusion that "CPS has aggressively ignited a schoolhouse to jailhouse track that is ravaging this generation of youth," citing statistics such as that 77% of arrests for simple assaults involving no injuries or weapons were of Black students.[274] In 2019, Chicago Public Schools became the subject of a consent decree between the Chicago Police Department and the state of Illinois; the agreement contains provisions that SROs "will be appropriately vetted, trained, and guided by clear policy in order to cultivate relationships of mutual respect and understanding, and foster a safe, supportive, and positive learning environment for students."[275]

But problems continue in Chicago schools with SROs, as illustrated by the motion considered in 2020 by the Chicago Board of Education to terminate its contract with the Chicago Police, ending the practice of having SROs in Chicago

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around both classroom management and culturally responsive practices, for SROs and teachers alike. Interview with Dr. Pamela Fenning, *supra* note 247.

271. Interview with Christine Agaiby Weil, *supra* note 149.

272. *Id.*

273. *Handcuffs in Hallways: The State of Policing in Chicago Public Schools*, SHRIVER CTR. ON POVERTY L. (Feb. 1, 2017), https://www.povertylaw.org/article/handcuffs-in-hallways-the-state-of-policing-in-chicago-public-schools/ [https://perma.cc/ZQ5U-FUA5].

274. ADVANCEMENT PROJECT, *supra* note 20, at 9. Note that the report was similarly condemnatory about many other school districts around the nation. *Id.*

275. Consent Decree at 11, Illinois v. City of Chicago, No. 17-cv-6260 (N.D. Ill. Jan. 31, 2019).

schools.[276] This motion was catalyzed in part by Minneapolis's decision to remove SROs from schools after the killing of George Floyd on Memorial Day 2020, and also in response to the mistreatment of Dnigma Howard described above. One board member, Elizabeth Todd-Breland, said in voting for the termination: "It is not enough to reform or make a better trained or kinder school-to-prison pipeline."[277] The motion failed 4:3; one board member, Dwayne Truss, said that he voted no purely for safety reasons but supported the goal of removing SROs in principle, saying: "I wish we had an environment possible where we didn't need school resource officers."[278]

The presence of police officers in schools exacerbates some of the other problems described herein. Rachel Shapiro sees how racial and other disparities come together to compound the disparity in treatment of different students, and who ends up in court.[279] She says she has had perhaps ten White students who are court-involved out of about 700–800 of the total clients she represents in school disciplinary defense. She says that it is so rare to have a court-involved White student that there are normally unusual circumstances, particularly significant family dysfunction and gang involvement, that explain why the police are targeting the child. Most of her clients are Black and Latinx, and this is even more the case for her coworkers who speak Spanish. Many parents of these students do not speak English, and so it is more difficult for them to seek help for their children, particularly when they are undocumented and afraid to access resources for fear of garnering state attention. In addition, many of her students are from neighborhoods where they witness and themselves have experiences which cause trauma and have very different experiences with policing. She reports that the response to the students by the SROs and other officers is also very different: "things that a white student would not get in trouble for will be things students of color will be" in trouble for.[280]

Furthermore, searches and seizures are often more difficult for students with disabilities, who may not understand what is going on. Rachel Shapiro says that even

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276. Matt Masterson, *CPS Board to Vote on Removing Police Officers from Schools*, WWTW: NEWS (June 22, 2020, 12:44 PM), https://news.wttw.com/2020/06/22/cps-board-vote-removing-police-officers-schools [https://perma.cc/8QZJ-K6CW]. The proposed motion read, in part: "There is a well-documented history of police misconduct, abuse, violence and disregard of human dignity and Black life . . . . In addition, recent incidents of police violence against Black people across our country, and in our city, are in direct conflict with the values of the District and require us to take action." *Id.*

277. Shruti Singh & Emily Lucas, *Chicago School Board Rejects Plan to Remove Police From Schools*, BLOOMBERG (June 24, 2020, 10:31 PM), https://www.bloomberg.com/news/articles/2020-06-24/chicago-school-board-rejects-plan-to-remove-police-from-schools [https://perma.cc/LJR8-DRL4].

278. *Id.*

279. Interview with Rachel Shapiro, *supra* note 253.

280. *Id.*; *see also* Nance, *supra* note 26, at 86 (discussing analysis of national data and finding that "one out of every four disabled black children was suspended during the 2009–10 school year").

if a student has had experience with police in the past, special needs students may not understand the significance of answering questions from a police officer and typically do not know their rights.[281] The school is supposed to tell an SRO if a student has an IEP (Individualized Education Program[282]) or have the social worker get involved before the officer is involved, which will reduce the trauma of the interaction. But Shapiro says that more often than not, especially if police think there is some imminent threat percolating from the community, the officers will "jump on it" without undertaking that inquiry. But since most students in Chicago schools have to go through metal detectors, the officers know that there is no weapon available to the student, so such escalation is unnecessary.

As Shapiro explains, every IEP involves an intervention plan, individualized for each student with special needs.[283] That intervention plan will stipulate how the student is supposed to be interacted with and involves a crisis plan. Shapiro gives the example of a student sensitive to being touched—in such a case, the IEP will set out guidelines preventing workers from getting within three feet of the student or touching the student. But she reports that often, although the student's social worker and teacher may be on board, once deans, security officers, and principals become involved in a search or seizure, they may not be aware of, may not buy into, or may not follow the plan. She reports that even though many plans say students should not have hands placed on them, that ends up happening despite the IEP, and this can lead to escalation or violence.[284]

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281. Interview with Rachel Shapiro, *supra* note 253.

282. An IEP is "a written document that's developed for each public-school child who is eligible for special education. The IEP is created through a team effort and reviewed at least once a year." Jan Baumel, *What Is an IEP?*, GREATSCHOOLS (Oct. 26, 2022), https://www.greatschools.org/gk/articles/what-is-an-iep/ [https://perma.cc/XC28-BH26].

283. Interview with Rachel Shapiro, *supra* note 253.

284. Unlike most interactions of this kind for students without a documented disability, when an IEP is breached in this way, there are more remedial options available. One option is to go to a mediation. If there have been multiple violations of the IEP, the student can ask for compensatory services for the violation. Those services may be additional resources like tutoring, increased minutes at school, monetary support to get therapy outside of school, etc. If that resolution does not work, the student can ask for a due process hearing with a hearing officer from the state board of education. But this looks like a real trial; it is much more formal than other disciplinary hearings, and so for a parent, it can be very inaccessible to pursue without representation. If the IEP is violated and the interaction results in the discovery of evidence to be used against the student and a criminal charge against the student, when the matter goes to court, Rachel Shapiro with Equip for Equality and other like advocates can become involved to testify to the fact that a violation of the IEP contributed to what happened. Interview with Rachel Shapiro, *supra* note 253. In Cook County, Shapiro says she has been very effective at this because the system's actors—the judges, the defense attorneys, and other repeat actors—know her and they have relationships. *Id.* With this sort of representation, judges are more inclined to institute a bring-back order so they can monitor the student's progress at the Department of Juvenile Justice (DJJ) and will bring the student back in to court to assess if they can get a second chance. But without such representation, students face much more uncertain outcomes: judges have told Shapiro that in the absence of her participation, the outcome would have been different. *Id.* She reports that some of the judges went on a tour of the Illinois Youth Center at St. Charles and they were horrified by conditions there; as a consequence, some of these judges want to prevent sending more children to the DJJ. *Id.*

Our experts agree: school searches are often conducted without proper cause, even under the very low standards required of schools; there are considerable disparities in the way that different schools conduct both individualized and non-individualized searches, and those differences are largely driven by race and poverty; even within schools, there are considerable disparities in who is targeted for searches and in the general policing of student bodies, with Black and Brown students suffering disproportionately; and, finally, it is particularly traumatic for students to be searched by law enforcement officers. The Supreme Court has ignored all of these issues and the impact they have on students.

CONCLUSION: THE IMPACT OF SCHOOL SEARCHES AND SEIZURES

Being subject to intrusive, discriminatory, and, at times, illegal searches and seizures can be traumatizing for children, and often re-traumatizing: while students of color are most at risk of being hyper-surveilled, students who have experienced trauma are similarly vulnerable. This creates a vicious cycle, whereby a student may behave abnormally due to trauma, leading the student to be triggered by certain interactions with school personnel, and therefore inadvertently escalating the situation, as the child can themselves exhibit hypervigilance.[285] For example, Dr. Fenning says a teacher might touch a student on the shoulder and the student, who is on high alert due to being in a high gang or crime area, may jump and react badly to the minor touch; this in turn can lead to a physical showdown based on a simple misunderstanding.[286]

As well as the damage resulting from being subject to searches and seizures—particularly when students know or suspect that they are being targeted for such intrusions due to their race or disability status—there is also the practical impact, in that the fruits of searches and seizures can be used against them, even when the search resulting in the evidence is legally dubious, as we have seen. We observed in Section II how such evidence can be used in the courtroom, but far more common is use of such evidence in school disciplinary procedures. And those disciplinary procedures are equally unconstrained by Supreme Court or even lower court review.

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285. Interview with Dr. Pamela Fenning, *supra* note 247; Interview with Bernice Villalobos, *supra* note 149; Kim, *supra* note 231, at 3 ("Schools use law enforcement tactics including random sweeps, searches of students, drug tests, and interrogations, and they increasingly rely on sworn police officers to patrol their hallways."); Over-Policing in Schools on Students' Education and Privacy Rights, NYCLU (June 14, 2006), https://www.nyclu.org/en/publications/over-policing-schools-students-education-and-privacy-rights [https://perma.cc/2KFW-SFF4] ("The danger, then, in over-policing our schools is that such practices reinforce school environments that are not conducive to educational and social growth. They foster environments where children perceive that they are being treated as criminals; where they are diminished by such perceptions; and where they, consequentially, cultivate negative attitudes toward their schools." (testimony of Donna Liberman, Exec. Dir., N.Y. Civ. Liberties Union)).

286. Interview with Dr. Pamela Fenning, *supra* note 247.

A common response by schools is suspension and expulsion. The most recent data available reflects that in the United States, more than 2,000,000 students were suspended in the 2015-2016 academic year, and more than 100,000 were expelled.[287] These numbers are only estimates, and the actual numbers are almost certainly much higher, as many suspensions of less than a week are imposed informally and never recorded. Moreover, expulsion data do not reflect "push outs"—the processes in which students are pressured to transfer to a new school, without the school having to formally report the school's action as an expulsion.[288] Often students are pushed out into alternative schools, and then the alternative schools push or counsel students out of the school system altogether.[289] These "disciplinary interventions negatively impact student achievement and increase both students' risk of dropping out and their likelihood of future involvement with the criminal justice system."[290] Compounding the issue, these disciplinary measures are almost entirely within the discretion of the individual schools and are utilized in a discriminatory fashion. Studies confirm, for example, that "black students in K-12 schools are 3.8 times as likely to be suspended, and twice as likely to be expelled, as white students. Similarly, students with disabilities are more than twice as likely to receive out-of-school suspensions as students without disabilities."[291]

One may be forgiven for thinking that as upsetting as it may be to be expelled from school, it would not translate to an enormous detrimental impact on a student's life going forward. However, in some jurisdictions, such as Illinois, an expulsion does not simply apply to a given school but rather to an entire school system. And expulsions can occur for up to two years, leaving students potentially excluded from the entire public school system for two years. In Illinois, this is permissible because the relevant legislation provides that a student "*may* be transferred to an alternative school,"[292] which creates the possibility that a school may instead leave a student without any schooling option. School districts typically refute that a child is being entirely denied schooling options on the rationale that

287. *See 2015–16 State and National Estimations*, CIV. RTS. DATA COLLECTION, https://ocrdata.ed.gov/estimations/2015-2016 [https://perma.cc/69DC-56ND] (last visited Nov. 5, 2022) (first choose "Discipline" under the heading "Discipline, Harassment or Bullying, Restraint and Seclusion, and Offenses;" then select "One or more out-of-school suspensions" and "Expulsions with and without educational services"); *see also* SIMMONS, *supra* note 234, at 71 ("The punitive shift in education serves larger political, economic, and social needs in schools by catering to public demands for safe schools and meeting testing standards and their related funding thresholds by gerrymandering the student population.").

288. Interview with Christine Agaiby Weil, *supra* note 149; Interview with Daniel Losen, *supra* note 241; Interview with Dr. Pamela Fenning, *supra* note 247; Interview with Ashley Fretthold, *supra* note 19. For more detailed information about push outs, see Jacobi & Clafton, *supra* note 11.

289. Interview with Amy Meek, *supra* note 97; Interview with Dr. Pamela Fenning, *supra* note 247; Interview with Miranda Johnson & Diane Geraghty, *supra* note 96.

290. EDUC. COMM'N OF THE STATES, POLICY SNAPSHOT: SUSPENSION AND EXPULSION 1 (2018), https://files.eric.ed.gov/fulltext/ED581500.pdf [https://perma.cc/5NRB-2V3V].

291. *Id.*

292. 105 ILL. COMP. STAT. ANN. 5/10-22.6(a) (West 2022).

the student can go to a private school, but that is unrealistic for the vast majority of students both financially and practically, as private schools are unlikely to enroll a student who was expelled.[293] In Chicago Public Schools, there are services when students are expelled, but in larger Illinois there often are not, and more rural areas more commonly use lengthy suspensions and expulsions.[294]

A fuller exploration of these issues is provided in our companion project, looking at discipline in schools,[295] an area almost entirely unregulated by the Supreme Court.[296] But the most vital piece of information is concisely summarized by Dr. Fenning, who says that expulsion for this amount of time from all schooling means "there is basically no chance of educational recovery for that student."[297] Add to this the more well-recognized problem of the "school-to-prison pipeline,"[298] and it becomes clear that some students are simply treated as disposable, given up on by the entire school system and the justice system.

School searches and seizures are not the only way that such an outcome is achieved—interrogations in schools are another area that contributes to this disposability effect, as we explore in our third companion article.[299] All of these problems are made possible by Supreme Court neglect. But all of them could also be resolved by Supreme Court response. Under the law as it stands now, children can be treated as disposable. But they need not be going forward.

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293. The extent of the problem was recognized by lawmakers in Illinois, prompting them to pass legislative reform—but that reform had unintended and highly problematic effects of leaving schools to mask their numbers of expulsions by instead "pushing out" students. Although expulsions are extremely severe, numerous experts consider that the phenomenon of pushing out students is an increasingly large problem. Interview with Amy Meek, *supra* note 97; Interview with Dr. Pamela Fenning, *supra* note 247; Interview with Miranda Johnson & Diane Geraghty, *supra* note 96.

294. Interview with Dr. Pamela Fenning, *supra* note 247. Rachel Shapiro indicated that in her experience, this is a result of those schools reacting more severely to less severe threats than those that occur in CPS. *See* Interview with Rachel Shapiro, *supra* note 253.

295. Jacobi & Clafton, *supra* note 11.

296. Indeed, the Court's jurisprudence in the arena offers anything but a limiting principle. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 681–82 (1977) ("Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law . . . . We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law.").

297. Interview with Dr. Pamela Fenning, *supra* note 247. Dr. Fenning reports that parents with resources may be able to afford some other way to educate their child but it is otherwise unlikely the students will receive meaningful help from the state. *Id.*

298. *See, e.g.*, Catherine Y. Kim, *supra* note 231, at 3; Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. SCH. L. REV. 867, 868 (2010); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016); SIMMONS, *supra* note 234, at 42 ("As has been said of mass incarceration, school discipline uses punishment to manage largescale social problems such as poverty, hunger, homelessness, and youth protective custody.").

299. Jacobi & Clafton, *supra* note 17.