Countering Criminalization: Toward a Youth Development Approach to School Searches

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Abstract

Every since *New Jersey v. T.L.O.*, the dominant narrative, particularly in inner-city schools, has been that school children are dangerous and violent, drug dealing, gang affiliated, and out of control. Under the rubric of school safety, students are stripped of the full protection afforded by the 4th Amendment while being subjected them to a model of school discipline that utilizes law enforcement officers to enforce school rules. Such policies alienate targeted youth from mainstream society, increasing the lure of counter-culture ideas, decreasing the legitimacy of the rule of law, and feeding the school-to-prison pipeline.

In section one, I examine and critique the current paradigm of school search jurisprudence which largely ignores age as a factor in determining the reasonableness of a search. I also address the increased use of police officers to enforce school discipline. Drawing on neuroscience and developmental psychology, in section two I discuss the developmental needs of youth, in light of recent Supreme Court cases involving the rights of juveniles. I also examine positive youth development, an approach that focuses on strengthening youth by encouraging healthy development.

Section three focuses on the developmental implications of search and seizure practices in America’s public high schools and seeks a way to strike a developmentally appropriate balance between safety and privacy in the context of school searches. To encourage positive development, adolescents’ burgeoning sense of autonomy must be nurtured and supported rather than diminished and disregarded. I call this a ‘positive youth development approach’ to school searches.

In conclusion, I suggest doctrinal and policy changes that counter the trend of increasing youth criminalization by encouraging positive youth development. I argue that, if implemented
correctly, probable cause is more a developmentally appropriate standard. Therefore, it should be the unitary standard in school searches.
Countering Criminalization: Toward a Youth Development Approach to School Searches

Sarah Jane Forman*

“That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”
--- West Virginia v. Barnette, 319 US 624 (1943)

“F***in with me cuz I'm a teenager/ With a little bit of gold and a pager/ Searchin my car, lookin for the product/ Thinkin every ni**a is sellin narcotics.” --NWA. “F**K the Police”

Introduction

In many of America’s public high schools, a dangerous lesson is being taught. It is not in any textbook or lesson plan, nor is it the subject of a pop-quiz or standardized test, yet it is reinforced everyday in the hearts and minds of students as they are patted, frisked, and searched by school police, sniffed by drug detecting dogs, or confined by fences topped with barbed wire.\(^1\) It is a lesson in inferiority, in lowered expectations of privacy, and second class citizenship. It is a lesson that perpetuates the social norms that criminalize youth. It is a lesson that stays with them for life.

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\(^1\) Layron Livingston, New dress code, barbed wire fence at John Tyler raises new concerns, available at http://www.kltv.com/global/Story.asp?a=12523930; Christopher O’Donnell, School's prospects seem dim (describing school in Bradenton, Florida surrounded by a chain-link fence and barbed wire) Sarasota Herald Tribune (FL) August 31, 2010; Associated Press, Barbed-wire offends superintendent, Houston Chronicle, February 27, 2010; Virginia Pilot and Ledger-Star (Norfolk, VA) “correctional” look all wrong for school, November 29, 2008; Providence Journal Bulletin, Schools on the Edge, June 17, 2008; Times Educational Supplement, March 20, 2009. (Advising school administrators to “Remind pupils that school is probably one of the safest places to be. . . . Go through each of the things they can see in their day-to-day school life and show photos of them in and around your school: walkie talkies so teachers can keep in touch with each other; fewer entrances to the school (most schools only have one way in - often with full-time receptionists); identity cards for pupils and teachers and special passes for visitors; swipe cards to get in and out of the building; CCTV cameras to check on playgrounds and corridors; and higher fences and walls, often with barbed wire on top.”)
In theory, a public education should provide all Americans with access to resources that will cultivate literate, skilled, critical thinkers who are prepared to participate in higher education and the global marketplace. But perhaps the most important role of public education is in the creation of republican citizens.\(^2\) As Chief Justice Warren eloquently stated in *Brown v. Board of Education*, “[public education] is the very foundation of good citizenship.”\(^3\) Since Brown, the Court has continually recognized the crucial role of education in American society, noting that “public schools [are] a most vital civic institution for the preservation of a democratic system of government,” and that “education is necessary to prepare citizens to participate effectively and intelligently in our open political system....”\(^4\) While including civic education in the curriculum is important, part of this citizen education is achieved through extra-curricular political and legal socialization that occurs in school because school is a place where students’ regularly interact with social control authorities such as school officials and police officers, and are exposed to rules, social norms, and moral values of mainstream society.\(^5\) The Court itself acknowledges the

\(^2\) “The extent to which we take the commitment to democracy seriously is measured by the extent to which we take the commitment to education seriously.” Hilary Putnam, A Reconsideration of Deweyan Democracy, 63 S Cal L Rev 1671, 1697 (1990). “The American decision for independence added a further dimension to the concept of the informed citizen .... Republican governments, it was well known, rested on the virtue of their citizens: their public-spiritedness, their willingness to subordinate private interest to public good, their capacity to monitor their rulers for signs of tyrannical ambition, their knowledge of the essential rights government existed to protect. A republican government required a republican society.... Americans had to be made into republican citizens, citizenship required education ....” Jack N. Rakove, Once More into the Breach: Reflections on Jefferson, Madison, and the Religious Problem, in Making Good Citizens: Education and Civil Society 241 (Diane Ravitch & Joseph P. Viteritti eds., 2001); Roger Finke, Religious Deregulation: Origins and Consequences, 32 J. Church & State 609 (1990).


socialization function of school, citing to research regarding education and political socialization.⁶

Unfortunately, in the years since Brown many of the gains in educational equality have been lost and the achievement gap between suburban and urban schools has widened.⁷ The passionate rhetoric regarding citizen education epitomized by Brown has faded away as large metropolitan school districts face a myriad of serious challenges, including inadequate funding, low literacy and high drop-out rates, teen pregnancy, and legitimate school safety concerns. Amid such headline-grabbing issues, public education’s special function of preparing young people for democratic citizenship is sidelined. Citizen education gives way to “ghetto education” where, instead of being “[inculcated with] the habits and manners of civility as values . . . indispensable to the practice of self,” students are treated as threats to public safety the minute they walk through the metal detector at the school house door.⁸ Once inside, they are regulated through mechanisms of fear and control, often unable to avail themselves of even basic constitutional rights.⁹ “Educating for citizenship, work and the public good has been replaced

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⁶ “[E]ducation provides the means to absorb the values and skills upon which our social order rests.” Plyler v. Doe, 457 U.S. 202, 221-222 (1963); “These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.” Ambach v. Norwich, 411 U.S. 68, 77 (1979) (Citing R. Dawson & K. Prewitt, Political Socialization 146-167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 114, 158-171, 217-220 (1967); V. Key, Public Opinion and American Democracy 323-343 (1961).)


⁸ Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)). I will address the phenomenon of “ghetto education” in a forthcoming article.

⁹ NAACP, Dismantling the School to Prison Pipeline available at http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf (discussing how under-funding, over-policing, extensive testing regimes, alternative schools placements and over-zealous discipline policies leave students with unmet educational needs and contribute to the school to prison pipeline.) For example, in Wake County North Carolina, the Wake County Public School System interrogates students, without proper Miranda warnings, in the presence of police and without a parent, guardian or lawyer present. Larson Langberg, Cary Brege, Zero Tolerance for the School to Prison Pipeline in Wake County, Advocates for Children’s Services Issue Brief December 2009. Available at
with models of schooling in which students, especially poor minority youth, are viewed narrowly either as threats or as perpetrators of violence.”\(^\text{10}\) Citizen education devolves into ghetto education when schools adopt “disciplinary practices that closely resemble the culture of prison.”\(^\text{11}\) Even the physical structures of some schools resemble prison.\(^\text{12}\) The socialization that occurs in these schools criminalizes youth by normalizing restrictive means of social control. Children socialized in such an environment are ill prepared for active and engaged citizenship but well on their way to political marginalization, disenfranchisement and incarceration.

The dominant narrative of youth criminalization, which applies in particular force to inner-city, minority students, casts school children as dangerous, violent, drug dealing, gang affiliated, out of control troublemakers. Teachers and fellow students need protection from these menacing ambassadors of street thuggery. The Supreme Court adopted this narrative in *New Jersey v. T.L.O.*, where, under the rubric of school safety, students were stripped of the full protection afforded by the 4th Amendment. Rather than probable cause, reasonable suspicion became the standard in school searches. The sacrifice of students’ rights in the name of public safety comes at a cost, especially because public schools provide such an important forum for democratic socialization. School is where children learn about the law and, at times, encounter the law for themselves. Those encounters can either foster Constitutional notions of autonomy

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\(^{11}\) Henry A. Giroux, "Youth in a Suspect Society," Palgrave/McMillan (2009) NEED PAGE #. The War on Kids, a Documentary by Cevin Soling depicts how American public schools continue to become more dangerously authoritarian, controlling children by subjecting them to prison-like security, arbitrary punishment, and forced prescription of dangerous drugs such as Ritalin.

\(^{12}\) “Schools look an awful lot like prisons, and sometimes schools look more like prison than actual detention centers [do].” Erica Meiners, Right to Be Hostile: Schools, Prisons, and the Making of Public Enemies 3 Routledge, Taylor and Francis Group.
and individual liberty, or undercut them. Moreover, society has an interest in the development of “fundamental values necessary to the maintenance of a democratic political system.”

Models of school discipline that undervalue these concepts through reduced individual privacy for students and the increased use of law enforcement officers to enforce school rules “construct a narrow range of meaning through which young people define themselves” because law, and the Constitution in particular, is more than just a set of rules. It also serves as a tool of political and legal socialization, sending a normative message to those within its reach about their relationship with government, society, and the law itself.

What kind of message is conveyed when students are subjected to pats, frisks, sniffs, and searches on a regular basis? Children, particularly adolescents, who are subjected to these searches under the very low bar of reasonable suspicion may feel that the law is unfair and question its legitimacy because they have been treated with distrust and disrespect by adults in positions of authority.

Even if they do not understand the vagaries of reasonable suspicion and how it differs from probable cause, young people can appreciate basic concepts of fairness, dignity and respect. Repeated experiences with legal actors who seem to abuse their authority

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14 Jeffrey Fagan, Tom Tyler, Legal Socialization of Children and Adolescents, (2005). Columbia Public Law & Legal Theory Working Papers. Paper 0594, page 231. Available at: http://lsr.nells.org/columbia_pllt/0594; 567. Tyler and Fagan’s research demonstrates the respect demonstrated by legal actors, such as the police, school disciplinary staff, and store security guards, shape adolescents’ perceptions about the legitimacy of the law and legal actors. See also Brenda L. Townsend, The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions, 66 Exceptional Children 381, 382-83 (2000) (arguing that when disciplinary rules are perceived as unfair students feel rejected and powerless and are sent a message that they are not capable of following the rules.); Hawkins, J. D., & Weis, J. G. (1985). The social development model: An integrated approach to delinquency prevention. Journal of Primary Prevention, 6, 73-97 (arguing that students who perceive disciplinary actions as unfair, undemocratic, and inconsistent with their values may appear disrespectful of the disciplinary rules because they are pessimistic about their own ability to succeed in school and thus have no incentive to comply with school rules.).

15 Richard L. Curwin, Allen N. Mendler and Brian D. Mendler, Discipline with Dignity, (1988) (Arguing that attacks on dignity are the most significant contributor to chronic behavior problems in school because when students’ value and self worth are consistently undermined they protect their fragile sense of self worth by rejecting mainstream values and notions of success.)
contributes to a sense of humiliation, rejection and alienation that eventually leads students to seek acceptance and recognition in other, less “mainstream,” venues. The constant suspicion with which students are regarded under the current paradigm pushes them into a defensive posture that hinders their ability to become active and engaged citizens of their community and nation. Disengaged from the “fundamental values necessary to the maintenance of a democratic political system,” youth salvage their dignity by plugging into an oppositional culture born in despair and steeped in violence, decreasing the legitimacy of the rule of law, and, in some instances, feeding the school-to-prison pipeline.

This anti-social conditioning is particularly detrimental to high school age youth because adolescents undergo significant psychological, intellectual and emotional development. Brain science and developmental psychology tell us that adolescent youth are in the process of

The deep sense of frustration, born out of their inability to gain acceptance of teachers, administrators and school officials colors their attitudes and beliefs about the legitimacy of school rules and the benefits of conforming to the rules.

16 Elijah Anderson, Code of the Street, Decency, Violence and the Moral Life of the Inner City (1999) 96-97 (“when students become convinced that they cannot receive their props from teachers and staff, they turn elsewhere, typically to the street, encouraging other to follow their lead . . .(investing) themselves in the so-called oppositional culture . . .such a resolution allows these alienated students to campaign for respect on their own terms, in a world they control. Impacted by profound social isolation, the children face the basic problem of alienation, many students become smug in their lack of appreciation of what the business of the school is and how it is connected to the world outside.”

17 Ambach v. Norwick, 441 U.S. 68, 77 (1979). Wayne N. Walsh, Annals 88, 93, The Effects of School Climate on School Disorder “One of the benchmark studies relating school violence to dimensions of school climate was the Safe School Study by the National Institute of Education (1978). Using questionnaires, data were collected from students, teachers, and principals from 642 U.S. public schools. Community data from each school were prepared from the 1970 census. The institute's report clearly suggested that school administration and policies make a significant difference in victimization rates. Certain policies, the report stated, reduced disorder in schools: decreasing the size and impersonality of schools; making school discipline more systematic; decreasing arbitrariness and student frustration; improving school reward structures; increasing the relevance of schooling; and decreasing students' sense of powerlessness and alienation.

In a reanalysis of the Safe School Study data, Gottfredson and Gottfredson (1985) related student and teacher victimization to various factors internal and external to schools. Schools with the worst discipline problems were schools where the rules were unclear, unfair, or inconsistently enforced; schools that used ambiguous or indirect responses to student behavior (for example, lowered grades in response to misconduct); schools where teachers and administrators did not know the rules or disagreed on responses to student misconduct; schools that ignored misconduct; and schools where students did not believe in the legitimacy of the rules. Other major factors related to high levels of victimization included school size; inadequate resources for teaching; poor teacher-administration cooperation; inactive administrations; and punitive attitudes on the part of teachers.”
developing their identities and understanding their place in society.\textsuperscript{18} During this time, youth are being “hardwired,” shaped and programmed into patterns of thought and behavior that impact the way they interact with the world around them and determine what kind of adults they will become. As a result, they have very fragile identities which make them particularly vulnerable to outside pressures and influences. During the teenage years, children learn as much from the socializing interactions with peers and authority figures as they do from textbooks. Therefore, the draconian disciplinary policies of America’s urban public schools, where children are viewed with suspicion and treated like threats, create a self-fulfilling prophecy – when students are treated as threats to society, they become threats to society.\textsuperscript{19}

This article will focus on the search and seizure practices in America’s public high schools and why such practices are developmentally inappropriate. In section I, I will examine and critique the current paradigm of school search jurisprudence. I discuss how the Court’s analysis largely ignores age as a factor in determining the reasonableness of a search. This section also addresses the increased use of police officers to enforce school discipline. Drawing on neuroscience and developmental psychology, section II discusses the developmental needs of youth, particularly in light of recent Supreme Court cases involving juveniles. The Court’s endorsement of recent research in the area of adolescent brain development has important implications for school search jurisprudence because reasonableness is an evolving standard that

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\textsuperscript{18} Webster’s Dictionary defines adolescence as the period of life from puberty to maturity, terminating legally at the age of majority. For the purposes of this article, I use the term to refer to young people between the ages of 12 and at least 19 years of age. Because the developmental studies suggest that brain development is not complete until the early 20’s, there is an argument that, at least developmentally, adolescence continues past the legal age of majority.
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can accommodate multiple interests. Section III explores ways to strike a developmentally appropriate balance between safety and privacy in the context of the educational environment. In this section I discuss positive youth development and socialization, particularly as these concepts relate to notions of privacy, autonomy, and the legitimation of the law. I suggest a new paradigm for school search and seizure, which I call a ‘positive youth development approach’ to school searches. Because of the special role public education plays in the creation of republican citizens, any school search framework should account for the realities of adolescent brain development and the particular tension between vulnerability and responsibility that occur in youth. Students and society have a convergent interest in a public education system that creates law-abiding citizens capable of making positive contributions to society. Therefore, when determining the reasonableness of a school search, this interest should be included in the balance.

In conclusion, I suggest doctrinal and policy changes to school search and seizure that will help counter the trend of increasing youth criminalization by using the negative Fourth Amendment right as a tool for democratic socialization and positive youth development. I argue that probable cause is a more a developmentally appropriate standard for searches that take place in school, the training ground of citizenship. Probable cause is a clearly defined, workable standard that protects against arbitrariness and the perception of arbitrariness. Therefore, probable cause should be the unitary standard in school searches. I also suggest important implementation procedures that will bolster the socialization function of these new Fourth Amendment rights for students. Finally, in recognition that, at least for now, the applicable standard is reasonable suspicion, I examine how this standard can be implemented in a way that will advance positive youth development in school searches that are conducted by school officials.
The Poisonous Pedagogy of New Jersey v. T.L.O.

Back in the days, our parents used to take care of us
Look at ‘em now, they even fu**** scared of us.
--Biggie Smalls Things Done Changed

A. Suspicious Minds

The principal case in school search jurisprudence that created the current standard of reasonable suspicion is *New Jersey v. T.L.O.*, a 1985 case involving the search of a fourteen year old high school student’s purse.\(^{20}\) A teacher found T.L.O. and another student smoking in a school bathroom in violation of the school disciplinary code.\(^{21}\) The teacher sent T.L.O. to the assistant principal’s office where T.L.O. denied smoking.\(^{22}\) The assistant principal then searched her purse and discovered a pack of cigarettes and rolling papers.\(^{23}\) “Suspecting” that T.L.O.’s purse might contain additional drug-related evidence, the assistant principal conducted a more thorough search of the purse.\(^{24}\) This search uncovered “a small amount of marijuana, 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 drug dealing.”\(^{25}\) The assistant principal turned over this evidence to the police and the State charged T.L.O. as a juvenile delinquent.\(^{26}\) T.L.O. filed a motion to suppress, which was


\(^{21}\) *T.L.O.* at 328.

\(^{22}\) *T.L.O.* at 328.

\(^{23}\) *T.L.O.* at 328.

\(^{24}\) *T.L.O.* at 328.

\(^{25}\) *T.L.O.* at 328.

\(^{26}\) *T.L.O.* at 329.

In 1985, state and federal courts approached school searches in three different ways. In those days, the only public officials found in public schools were teachers and administrators, so the question was whether the 4th amendment applied to those officials at all. Some states regarded school officials as beyond the Fourth Amendment’s reach because they were private citizens acting in loco parentis.\footnote{T.L.O. at 333 (citing D.R.C. v. State, 646 P. 2d 252 (Alaska App. 1982); In re G., 11 Cal App. 3d 1193 (1970); In re Donaldson, 269 Cal. App. 2d 509 (1969); R.M.C. v. State, 660 S.W. 2d 552 (Tex App. 1983); Mercer v. State, 450 S.W. 2d 715 (Tex. Civ. App. 1970).} At the other end of the spectrum were states that required school officials to have probable cause before conducting in-school searches.\footnote{T.L.O. at 333 (citing State v. Mora, 397 So. 2d 317 (La.) The Court also cites cases in which the probable cause standard was applied to school searches involving police M. v. Board of Ed. Ball-Chatham Community Unit School Dist. No. 5, 429 F. Supp. 288, 292 (SD Ill. 1977); Pica v. Weblogs, 410 F.Supp. 1214, 1219-1221 (ND Ill 1976); State v. Young, 234 Ga. 488, 498, 216 S. E. 2d 586, 594 (1975); and cases that applied probable cause where the school search was highly intrusive, M. M. v. Anker, 607 F.2d 588, 589 (CA2 1979).} However, a majority of states took the middle ground, which was the approach taken by New Jersey and ultimately adopted by the Supreme Court. Under this approach, the Fourth Amendment applies to searches by school officials but “the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause.”\footnote{T.L.O. at 333 (citing See, e. g., Tarter v. Raybuck, No. 83-3174 (CA6, Aug. 31, 1984); Bilbrey v. Brown, 738 F.2d 1462 (CA9 1984); Horton v. Goose Creek Independent School Dist., 690 F.2d 470 (CA5 1982); Bellnier v. Lund, 438 F.Supp. 47 (NDNY 1977); M. v. Board of Ed. Ball-Chatham Community Unit School Dist. No. 5: In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); State v. Baccino, 282 A. 2d 696 (Del. Super. 1971); State v. D. T. W., 425 So. 2d 1383 (Fla. App. 1983); State v. Young, supra; In re J. A., 85 Ill. App. 3d 567, 406 N. E. 2d 958 (1980); People v. Ward, 62 Mich. App. 46, 233 N. W. 2d 180 (1975); Doe v. State, 88 N. M. 347, 540 P. 2d 827 (App. 1975); People v. D., 34 N. Y. 2d 483, 315 N. E. 2d 466 (1974); State v. McKinnon, 88 Wash. 2d 75, 558 P. 2d 781 (1977); In re L. L., 90 Wis. 2d 585, 280 N. W. 2d 343 (App. 1979).}
Therefore, on certiorari, the Court found that while the Fourth Amendment applies to school searches, probable cause is not required because [it] is not an irreducible requirement of a valid search.”

31 Reasonableness is all the Fourth Amendment requires. To determine what was “reasonable” in the context of public school, the Court balanced students’ interest in privacy against the “substantial interest” of teachers and administrators in maintaining school discipline. Although the Court agreed that students have a legitimate expectation of privacy at school, “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.”

The Court explained:

We join the majority of courts that have examined this issue in concluding that the 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.

And, just like that, probable cause was “jettisoned” in favor of reasonable suspicion.

T.L.O. is a significant turning point in Fourth Amendment Jurisprudence because it was the first time the court departed from the probable cause standard for full scale searches. If this had

31 T.L.O. 469 U.S. at 342.

32 T.L.O. 469 U.S. at 342

33 T.L.O. at 339.


35 T.L.O. at 341.

36 Justice Brennan, in his dissent point out “The Court's decision jettisons the probable-cause standard -- the only standard that finds support in the text of the Fourth Amendment -- on the basis of its Rohrscach-like "balancing test." T.L.O. 469 U.S. at 357.

37 T.L.O. 469 U.S. at 357. Although, in the years after T.L.O., the Court expanded the use of the reasonableness balancing test to other types of searches. See Griffin v. Wisconsin, 483 U.S. 868 (1987), (warrantless searches of the homes of probationers); O'Connor v. Ortega, 480 U.S. 709 (1987) (warrantless searches of government employee's office, desk, or file cabinets);
been a full scale search situation outside of school, probable cause would have been the necessary standard. For example, if T.L.O. was an adult (or a juvenile, for that matter) accused of violating a municipal smoking ban, probable cause would be required before the government could conduct a search of her purse.\footnote{As of July 2010, over 3,000 US cities had passed some form of smoking restriction. See American Non-Smoker's Rights foundation, Overview List – How many Smoke Free Laws?, available at http://www.no-smoke.org/pdf/mediaordlist.pdf. Some create criminal penalties. See e.g., Calabasas, Cal., Mun. Code §§ 8.12.030-040 (2006)(making violation of the non-smoking ordinance a misdemeanor), available at http://www.cityofcalabasas.com/pdf/agendas/council/2006/021506/item2-O2006-217.pdf; Lexington-Fayette County Code of Ordinances §§ 14.97-1049 (2003)(penalizing violators with fines and criminal prosecution in certain cases), available at http://library.municode.com/index.aspx?clientId=11163&stateId=17&stateName=Kentucky; Minn. Stat. § 144.417 (making violation of State Clean Indoor Air Act a petty misdemeanor).} Although over the decades the Courts’ Fourth Amendment jurisprudence has followed a long and winding road, the general preference for searches pursuant to warrants justified by probable cause still exists.\footnote{Prior to the late 1960’s, the Supreme Court’s Court's Amendment Jurisprudence was fairly straightforward and predictable. See e.g., Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); Carroll v. United States 267 U.S. 132 (1925); Bringer v. United States, 338 U.S. 160 (1949). Before the police could undertake a search of a person or their property or affect an arrest, they had to have a warrant justified by probable cause. Limited exception to the warrant requirement was made on the basis of exigent circumstances. United States v. Rabinowitz, 339 U.S. 56 (1950) (holding that the Fourth Amendment permits a warrantless search incident to a lawful arrest); United States v. Jeffers, 342 U.S. 48, 51 (1951) (warrant not required in "exceptional circumstances."). During this time, the Fourth Amendment right was grounded in property rights. See e.g., Olmstead v. United States, 277 U.S. 438, 464 (1928); Silverman v. United States, 365 U.S. 505, 510-12 (1961); Morgan Cloud, The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory, 48 Stan. L. Rev. 555, 567 (1996). In the late 1960’s the Court switched from a property analysis to a privacy analysis to resolve search and seizure cases. See Warden v. Hayden, 387 U.S. 294, 300-10(1967); Katz v. United States, 389 U.S. 347, 353 (1967). Under a privacy analysis, the locus of the right bestowed by the Fourth Amendment is individual privacy, which is deserving of constitutional protection if 1) a person exhibits an actual subjective expectation of privacy and 2) this expectation is one that society recognizes as reasonable. Katz, 389 U.S. at 361 (Harlan, J., concurring). Under this framework, the Court created a hierarchy of privacy expectations: expectations that society is willing to recognize receive full protection, diminished expectations of privacy receive minimal protection, and expectations of privacy that society is unwilling to recognize receive no protection. Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (holding that an automobile passenger cannot challenge the legality of a vehicle's search because they have no legitimate expectation of privacy in the passenger compartment of the vehicle). The sliding scale of privacy expectations paved the way for the abandonment of probable cause in some warrantless searches because in the case of diminished privacy rights, reasonableness was all that was required. See Terry v. Ohio, 392 U.S. 1 (1968) (creating a balancing test to determine the reasonableness of the search of a person). However, Terry is limited to a very brief period of detention, and only a cursory pat down of the outer clothing of an individual for the purpose of checking for weapons.) And while some would argue that the exceptions to the warrant requirement have swallowed the rule, probable cause
still remains the sine-qua-non of reasonableness, even when a warrant is not required.\textsuperscript{40} Probable cause is presumed to be reasonable because it is the procedural safeguard upon which warrants rest, and a search pursuant to a warrant based on probable cause is the only kind of search explicitly authorized by the Amendment.\textsuperscript{41} Probable cause is found to exist where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that "an offense has been or is being committed."\textsuperscript{42}

Under this standard, using the previous example, if the individual suspected of violating the smoking ban (let’s call her Tracy) is confronted by police and denies the allegation, the inquiry ends. As in the school setting, it is generally the smoking, not the mere possession of cigarettes is that constitutes the offense.\textsuperscript{43} If the police want to go further and search Tracy’s purse for evidence of a violation, they must have specific, trustworthy information that such evidence will be found there. For example, probable cause would exist if a reliable witness saw

\textsuperscript{40} Whren v. United States, 517 U.S. 806, 818-19 (1996) (holding searches and seizures are presumed reasonable when police have probable cause). With regard to the rule-swallowing nature of exceptions to the warrant requirement, see e.g., Scott Sunby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry 72 Minn. L. Rev. 383 439-440 (arguing against a sliding-scale privacy inquiry); Julie Rikelman, Justifying forcible DNA testing Schemes Under the Special Needs Exception To The Fourth Amendment: A Dangerous Precedent, 59 Baylor L. Rev. 41, 67 (warning against the continued expansion of the special needs exception.); Tracey Maclin, Justice Thurgood Marshall: Taking. 77 Cornell L. Rev. 723, 797 (stating that the consent exception has swallowed the rule requiring warrants before the search of a home can be undertaken); Susan Klein, Civil In Rem Forfeiture and Double Jeopardy, 82 Iowa L. Rev. 183,274 n.65 (“the exceptions for exigent circumstances and seizures incident to arrest swallow the rule.”).

\textsuperscript{41} Tracey Maclin, When the Cure For the Fourth Amendment is Worse Than The Disease, 68 S. Cal. L. Rev. 1, 21

\textsuperscript{42} Brinegar v. United States, 338 U.S. 160, 176 (1949). The Fourth Amendment to the Constitution of the United States right guarantees “[t]he of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. 4th Amend.

\textsuperscript{43} Although the New Jersey Supreme Court recognized this distinction (“Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.”), State in Interest of T.L.O., 463, A.2d. 934, 943 (1983), the United States Supreme Court reasoned that possession of cigarettes would be relevant evidence of a violation of the school rule in question. T.L.O. at 345. Therefore, since the assistant principal had a reasonable suspicion that the purse would contain cigarettes, the search was justified. \textit{Id.}
Tracy put the extinguished cigarette into her purse or this action was clearly captured on a video surveillance camera. Otherwise, there is no probable cause to search her purse. A mere suspicion, however reasonable, will not justify such a “severe violation of subjective expectations of privacy.”\textsuperscript{44} Unlike reasonable suspicion, probable cause requires more than a “common-sense” suspicion.\textsuperscript{45} If, as in \emph{T.L.O.}, there is nothing beyond common sense to connect the purse to the violation, Tracy’s “right to be left alone” remains mostly intact, whereas T.L.O.’s has been severely violated.\textsuperscript{46} Under probable cause, the adult citizen is given the benefit of privacy, whereas under reasonable suspicion, the student, citizen-in-the-making, is not.\textsuperscript{47}

In fleshing out the how the reasonable suspicion standard should be applied in the context of school searches, the Court drew on \emph{Terry v. Ohio}’s two part reasonableness inquiry.\textsuperscript{48} Under \emph{Terry}, a search is reasonable if it is “justified at its inception” and “reasonably related in scope to

\begin{itemize}
\item \textsuperscript{44} \emph{T.L.O.} at 338.
\item \textsuperscript{45} In \emph{T.L.O.}, the Court characterizes the assistant principal’s suspicion as “the sort of "common-sense [conclusion] about human behavior" upon which "practical people" -- including government officials -- are entitled to rely. \emph{N.J. v. T. L. O.}, 469 U.S. 325, 346 (U.S. 1985) (citing United States v. Cortez, 449 U.S. 411, 418).
\item \textsuperscript{46} “[The makers of our Constitution] conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” \emph{Olmstead v. United States}, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\item \textsuperscript{47} I do recognize that the Supreme Court also articulated a reasonable suspicion standard for searches conducted by public employers on their employees in \emph{O’Conner v. Ortega}, 480 U.S. 709 (1987). However, for reasons mentioned in the introduction and further discussed in sections II and III, high school age children are particularly susceptible to their environment and the public school setting plays a critical role in socializing young people into the laws and norms of our democratic republic. The unique vulnerabilities of youth in conjunction with the special legal socialization function of mandatory public education distinguishes public school from public employment. Public employees are, generally, adult citizens who have (presumably) already been socialized into civil society.
\item \textsuperscript{48} \emph{T.L.O.} at 342. The majority cites Terry as precedent for the notion that a search can be legal even if based reasonable suspicion. However, the Court’s reliance on Terry for this point is arguably misguided because as Justice Brennan explains in his dissent “[t]he line of cases begun by \emph{Terry v. Ohio}, 392 U.S. 1 (1968), provides no support [for a standard less than probable cause when a full scale search is at issue], for they applied a balancing test only in the context of minimally intrusive searches that served crucial law enforcement interests. The search in Terry itself, for instance, was a "limited search of the outer clothing.” Id., at 30.” The search of T.L.O was a full scale search as are most school searches today.
\end{itemize}
the circumstances which justified the interference in the first place." Under this standard, the Court concluded that the search of T.L.O.’s purse was reasonable.

Because the search of T.L.O. was based on an individualized suspicion, the Court did not address whether individualized suspicion was required under the newly minted reasonableness standard for searches by school officials but hinted that it may not be. Individualized suspicion is a requirement of probable cause.

The Court justified its departure from probable cause, in part, by acknowledging the growing crisis of violence, weapons, drugs and crime in schools. Words like “safety,” “security,” “order,” and “misbehavior” are repeated throughout the opinion. Juvenile crime was at its peak in the 1980’s and the Court was clearly responding to the national fervor over this issue. Writing for the majority Justice White acknowledges that “[s]chool disorder has often

49 Terry v. Ohio, 392 U.S., at 20. It is interesting to note that Terry was intended to apply only to limited weapons searches for the safety of the officer. It expressly did not apply to searches for evidence, although, in many cases, school searches are just that.

50 T.L.O. 333, 343.

51 “In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." N.J. v. T. L. O., 469 U.S. 325, 342 (U.S. 1985) (Citing United States v. Martinez-Fuerte, 428 U.S. 543, 560-561 (1976). See also Camara v. Municipal Court, 387 U.S. 523 (1967)).

52 See e.g., Ybarra v. Ill., 444 U.S. 85, 91 (U.S. 1979)(“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.”)

taken ugly forms: drug use and violent crime in schools have become a major social problem.”

Justice Powell’s concurrence states “school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.” The United States, in its amicus curiae brief supporting a lower standard of suspicion in school searches (which was cited by the Court), used empirical studies on school violence to conclude that "many schools are in such a state of disorder that not only is the educational atmosphere polluted, but the very safety of students and teachers is imperiled." Even Justice Brennan in his dissent agrees that “we can take judicial notice of the serious problems of drugs and violence that plague our schools.” With these concerns weighing heavily on one side of the balance, student privacy concerns were in serious peril.

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Residents decry delinquency; teens say they're 'hanging out' Newsday (New York) June 29, 1988, Wednesday, BROOKHAVEN EDITION.


55 T.L.O. at 350.

56 “In 1978, the National Institute of Education (NIE), an agency of the Department of Education, reported that each month in America's secondary schools 282,000 students were physically attacked; 112,000 students were robbed by means of force, weapons, or threats; and 2,400,000 students had their personal property stolen. NIE, U.S. Dep't of Education, 1 Violent Schools -- Safe Schools: The Safe School Study Report to the Congress iii, 74-75 (1978). NIE also reported that almost 8% of urban junior and senior high school students missed at least one day of school a month because they were afraid to go to school. With respect to secondary school disorder affecting teachers, NIE reported that each month 6,000 teachers were robbed; 1,000 teachers were assaulted seriously enough to require medical attention; 125,000 teachers were threatened with physical harm; and 125,000 teachers encountered at least one situation in which they were afraid to confront misbehaving students. NIE Report 64, 75.Id. at 63.” Brief for United States as Amicus Curiae 39-41.

57 T.L.O. at 357.

58 “[W]hat the Court giveth in applying the Fourth Amendment to the schools, it perhaps taketh away by invoking the balancing approach.” Id. 920. Martin R. Gardner, Student Privacy in the Wake of T.L.O.: An Appeal For An Individualized Suspicion Requirement for Valid Searches and Seizures in The Schools 22 Ga. L. rev. 897, 906-909, 919-925. See also Besey Levin, educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in Public School, 95 Yale L.J. 1647, 1669.
To some extent, T.L.O. was part of a broader trend in the narrowing of Fourth Amendment rights in response to the “war on drugs”, a strategy that has been largely unsuccessful, and much decried but fueled by a powerful narrative that awakens deeply held, if often irrational, fears.59 Like the narrative of the “war on drugs” the narrative of the dangerous, potentially violent youngster roaming the halls of our public schools, ready to shoot and kill “has features of what sociologists describe as a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat.”60 In the immediate wake of T.L.O, scholars and commentators saw the writing on the wall with regard to the Fourth Amendment rights of students and tried to suggest ways to cabin its reach, but the holding inevitably created a slippery slope that in the following years, the Court slid down, and fell off.61 The unanswered questions of T.L.O., including the role of law enforcement, its applicability to blanket searches without individualized suspicion (such as dog


60 Elizabeth S. Scott and Laurence Steinberg, Blaming Youth, 81 Tex. L. Rev. 799, 807. “The elements of a moral panic include an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community. Although the fervor typically fades in a relatively short time, panics can effectively become institutionalized if legal and policy changes result.” Id., (citing Erich Goode & Nachman Ben-Yehuda, Moral Panics: The Social Construction of Deviance (1994)).

61 See e.g., Irene Rosenberg, :New Jersey v. T.L.O.: of Children and Smokescreens:, 19 Fam. L.Q. 311 (1985) ("[T]he decision may well have a spillover effect . . . . It is therefore questionable whether the Court will be able to resist the pull of the T.L.O. case."); Myrna G. Baskin & Laura M. Thomas, Note: School Metal Detector Searches and the Fourth Amendment: An Empirical Study, 19 U. Mich. J.L. Reform 1037, 1054 (1986) ("Although T.L.O. sidesteps the constitutionality of blanket school searches by reserving any opinion on whether individualized suspicion is an essential element of the reasonableness requirement, the Court in other contexts has repeatedly stressed that the Terry reasonable suspicion standard requires particularized suspicion. There is no reason why individualized suspicion should not also be extended to the school setting.) (citations omitted). The concern over issues left unanswered by T.L.O. (such as whether individualized suspicion is required) became manifest as the Court used T.L.O to justify suspicionless searches of student athletes in Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) and of all students who participate in extra curricular activities in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, (2002).
sniffs and metal detectors), and the extent to which students have a legitimate expectation of privacy in desks, lockers, and now cell phones, are not easily resolved. Meanwhile, the narrative of youth criminality as a serious threat to society remains a potent theme in American culture and a driving force of public policy.\(^{62}\)

However, what was kept at bay in 1985 continues to bubble below the surface, as tensions between students and school officials continue to brew. Things came to a head in

*Safford Unified School District v. Redding*, 129 S. Ct. 2633(2009), a case in which 13-year-old honor student Savana Redding was strip searched on the basis of a tip by another student that she


Culturally, whether violent “gangsta” rap lyrics actually contribute to violent behavior has yet to be demonstrated with any conclusiveness. *See*, e.g., Jeanita Richardson, Kim Scott, *Rap Music and its Violent Progeny: America’s Culture of Violence in Context* Journal of Negro education, Vol. 71,No. 3 pp. 175-192. However, the thuggish image of masculinity promoted by rap music is one of the dominant portrayals of black youth in popular culture. Violent lyrics that glorifying killing, drugs, and criminal behavior contribute to a perception that the youth (Black or otherwise) who listen to this music, are inherently dangerous. At a Senate Commerce Committee hearing in June of 1998, a teacher of 13-year-old Mitchell Johnson, who was accused of gunning down classmates at school, told lawmakers her student was influenced by the violence portrayed in the rap music he played repeatedly before the shooting. The Senator who called the hearing, expressed concern that the music industry marketed the most violent music to teens. The hearings also targeted violent lyrics from “shock rocker” Marilyn Manson, who appeals to White teens. *See* Eun-Kyung, *Debate Over Rap Lyrics Continues, Rap Lyrics May Have Influenced School Shootings*, The Associated Press June 17, 1998 available at http://www.cbsnews.com/stories/1998/06/16/entertainment/main11983.shtml. As an example of the type of lyrics in question, in Bone Thugs N Harmony’s “Ganksta Attitude”, rapper Bizzy proclaims:

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“You see no pistol's in the holster
Watch the dot's on your forehead
I'm gunnin' while you're runnin'
And there's plenty of bloodshed
There's no sympathy over killin'
I already warned you
You crossed the path of a maniac
So now you're a goner.”
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In “Disposable Teens”, Manson warns:

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“’The more that you fear us
the bigger we get
the more that you fear us
the bigger we get
and don't be surprised, don't be surprised
don't be surprised when we destroy all of it.”
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might have ibuprofen on her person in violation of school policy.\textsuperscript{63} The Court reasoned that the assistant principal did not have sufficient suspicion to warrant a strip search because the allegations against Savana did not indicate that the drugs presented an immediate danger or that they were concealed in her underwear.\textsuperscript{64} While \textit{Redding} is a victory for student privacy because it sets a floor for violations under the reasonable suspicion standard, it sets that floor at complete humiliation, which is not representative of most searches.\textsuperscript{65} Moreover, the Redding Court did find that the assistant principal had sufficient suspicion to justify searching Savana’s backpack and outer clothing.\textsuperscript{66} There is some language in \textit{Redding} that addresses adolescent vulnerabilities and the corresponding importance of personal privacy.\textsuperscript{67} Perhaps this language can be utilized in the future to advance the privacy rights of students in the school search context. But for now, as a practical matter, \textit{Redding} does not alter the basic framework of T.L.O and thus its applicability to the average school search is limited because it does not prevent school


\textsuperscript{64} \textit{Redding} at 2642.

\textsuperscript{65} As Judge Wardlaw said in writing for the majority of the Ninth Circuit Court of Appeals “[the strip search of a thirteen year old girl] is a violation of any known principle of human dignity.” \textit{Redding v. Safford Unified Sch. Dist. No. 1}, 531 F.3d 1071, 1089 (9th Cir. 2008).

\textsuperscript{66} \textit{Redding} at 2641.

\textsuperscript{67} Most notably, Justice Souter states that the reasonableness of Savana's expectation of bodily privacy "is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure." \textit{Redding} at 264. Justice Souter cites two sources: \textit{Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent at 6-14, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009)} (No. 08-479), 2009 WL 870022, available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-479RespondentAmCu5ProHealthOrgs.pdf, and \textit{Irwin A. Hyman & Donna C. Perone, The Other Side of School Violence: Educator Policies and Practices that may Contribute to Student Misbehavior, 36 J. Sch. Psychol. 7, 13 (1998)} (noting that "strip searches ... can result in serious emotional damage").
officials from conducting invasive searches of backpacks, purses, and outer clothing on little more than a hunch.\footnotereference{68}

Although it does not alter the T.L.O. framework, Redding is illustrative of the length to which schools will go to enforce school rules and exemplifies the problem with the amorphous reasonable suspicion standard as it currently applies to school searches. While it should “not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights” in the case of Savana Redding, it took nine such scholars from the nation’s highest court to settle the matter.\footnotereference{69} The problem is that reasonable suspicion provides so much latitude for searching school officials that almost anything can be construed as reasonable.\footnotereference{70} This is evidenced by the fact that even though the Court found the strip search of Savana Redding unreasonable under the Fourth Amendment, they extended sovereign immunity to the School Board because the prima facie unreasonableness of the search was not clearly established by T.L.O. or other case law.\footnotereference{71} The Court found that there were “numerous” and

\footnotereference{68} The factors that contributed to the assistant principal’s initial suspicion of Savana Redding were 1) an uncorroborated statement from a student who was found to have ibuprofen pills in her pocket who claimed the pills came from Savana; 2) Savana’s association with an “unusually rowdy group at the school's opening dance”; and 3) an uncorroborated claim from another student that alcohol had been served a party at Savana’s house the night of the dance. Under a probable cause standard, unsubstantiated self-serving claims and what is essentially an allegation of normal teenage behavior at a school dance would not justify a search. Redding at 2638.

\footnotereference{69} Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1089 (9th Cir. 2008). Souter’s majority decision in Redding does try to remove some of the ambiguity from the reasonable suspicion standard by stating that reasonable suspicion requires “a moderate chance of finding evidence of wrongdoing.” Redding at 2639. Souter also attempts to flesh out how reasonable suspicion should operate in school searches, describing a sliding scale that requires a search to be justified by corresponding factual support. For a more thorough discussion on this aspect of Redding see Lewis Katz, Safford Unified School District No. 1 v. Redding, and the Future of School Strip Searches, 60 Case W. Res. 363.

\footnotereference{70} Martin H. Belsky, Random vs. Suspicion-Based Drug Testing in the Public Schools--A Surprising Civil Liberties Dilemma, 27 Okla. City U.L. Rev. 1, 19-21.

\footnotereference{71} Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2644 (U.S. 2009).
“well reasoned” cases that expressed a “disuniform view of the law” regarding strip searches.\footnote{72} The diversity of opinion regarding strip searches is symptomatic of the general state of the reasonable suspicion case law: in any given category, behavior on either end of a spectrum can invite suspicion.\footnote{73} “Behavior, hearsay, seemingly innocent comments, and observations can all form legitimate bases for action.”\footnote{74}

If anyone and anything can be viewed as suspicious, the exercise of discretion becomes particularly susceptible to all kinds of bias, including racial bias because what constitutes a

\footnote{72} “[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.” Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2644 (U.S. 2009)

\footnote{73} For a good breakdown of the arbitrary nature of reasonableness determinations, see Martin H. Belsky, Random vs. Suspicion-Based Drug Testing in the Public Schools--A Surprising Civil Liberties Dilemma, 27 Okla. City U.L. Rev. 1, 19-21 (Citing cases that demonstrate courts’ vacillation between factors constituting reasonable suspicion: “[a] student is sullen; a student is boisterous. . . . See, e.g., Cornfield v. Consol. High Sch. Dist. 230, 1992 U.S. Dist. LEXIS 2913, at *17 (N.D. Ill. Mar. 13, 1992) (student's sullenness a ground for reasonable suspicion); Hedges v. Musco, 33 F. Supp. 2d 369, 373 (D.N.J. 1999) (student's sudden gregariousness a ground for reasonable suspicion). . . . A student is unusually quiet; a student is unusually noisy. . . . See, e.g., Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 367 (employer's drug-testing policy enumerating "changes in personal traits” as ground for suspicion); Stockett v. Muncie Ind. Transit Sys., 221 F.3d 997, 1000 (7th Cir. 2000) (unusually calm demeanor a ground for reasonable suspicion); . . . A student seems overtired; a student seems overactive. . . . See, e.g., Krashawsky v. Upper Deck Co., 56 Cal. App. 4th 179, 190 (Ct. App. 1997) (lathargic demeanor a ground for reasonable suspicion); Hill v. Koon, 732 F. Supp. 1076, 1079 (D. Nev. 1990) (hyperactivity a ground for reasonable suspicion). . . . A student withdraws from his or her associates; a student tries to push his or her associates too hard. . . . See, e.g., Willis v. Anderson Cmtv. Sch. Corp., 158 F.3d 415, 423 (7th Cir. 1998) (isolation and drug use); Hedges, 33 F. Supp. 2d at 373. A student shows up late for an extracurricular activity; a student shows up unusually early for an activity. . . . See, e.g., Bertram v. Pennsylvania Sch. Dist., 1999 U.S. Dist. LEXIS 7916 (lateness a ground for reasonable suspicion); Knox, 158 F.3d at 367 (changes in behavior--including showing up unusually early--a ground for reasonable suspicion). . . . A student seems sloppy or careless; a student seems too meticulous. See, e.g., United States v. Taylor, 956 F.2d 572, 582 (6th Cir. 1992) (Keith, J., dissenting) (fact that deplaning passenger was more sloppily dressed than other passengers a ground for reasonable suspicion); Krashawsky, 56 Cal. App. 4th at 190 (excessive meticulousness a ground for reasonable suspicion); . . . A student's eyes seem glazed; a student's eyes seem too focused. . . . Earls v. Bd. of Educ., 242 F.3d 1264, 1273 (10th Cir. 2001) (glazed eyes a ground for reasonable suspicion); United States v. McRae, 81 F.3d 1528, 1531 (10th Cir. 1996) (intensely focused eyes a ground for reasonable suspicion). . . . A student can't look you straight in the eye; a student stares at you fixedly. . . . See, e.g., Cornfield v. Consol. High Sch. Dist. 230, 1992 U.S. Dist. LEXIS 2913, (avoiding eye contact a ground for reasonable suspicion); McRae, 81 F.3d at 1528 (fixed stare a ground for reasonable suspicion). . . . A student wears unusual clothes or suddenly changes his clothing style; the student wears the same clothes day after day. . . . See, e.g., Taylor, 956 F.2d at 582 (Keith, J., dissenting) (unalso clothes offered as a reason to justify search). . . . A student's friends or associates tell a faculty or administrative advisor that the student "seems to be out of it:" a student's friends or associates refuse to talk to the advisor about anything having to do with the student. See, e.g., Alabama v. White, 496 U.S. 325 (1990) (hearsay evidence can be used to establish reasonable suspicion). . . . Obviously, there can be other examples where any articulated basis of suspicion will be accepted as reasonable.’}

reasonable suspicion is based on a subjective interpretation of behavior.\textsuperscript{75} Potentially innocent behavior can be transformed into a reasonable suspicion to search when “deep-seated, perhaps unconscious, affections, fears, and aversions” affect decision making.\textsuperscript{76} The cultural narrative of the dangerous young black thug distorts the perception of all urban adolescent.\textsuperscript{77} Therefore, like officers on the street, school officials, no matter how well meaning, are influenced in their decision making process by race-based stereotypes about students.\textsuperscript{78} While explicit bias is

\textsuperscript{75} As Professor L. Song Richardson explains in her critique of the reasonable suspicion standard in stop-and-frisk encounters between citizens and police: “Terry . . . allows officers to stop and frisk an individual based on their interpretation of an individual’s ambiguous behavior. . . . The behavioral assumption underlying the reasonable suspicion test is that a well-intentioned officer is capable of interpreting identical behavior similarly, regardless of the race of the individual they are observing. While this behavioral assumption is intuitively appealing, it does not withstand scientific scrutiny. Officers may non-consciously use a more lenient standard when judging the behavior of Whites versus Blacks. . . Non-conscious stereotype activation in the presence of Black individuals can cause officers to interpret ambiguous behaviors performed by Blacks as suspicious, aggressive, and dangerous while similar behavior engaged in by Whites would go unnoticed.” L. Song Richardson, 
\textit{Arrest Efficiency And The Fourth Amendment, Minnesota law Review}, Forthcoming (citations omitted). In this article, Professor Richardson applies a behavioral realist framework to stop-and-frisk Fourth Amendment Doctrine. She utilizes research in the field of implicit social cognition, which demonstrates how unconscious biases affect behavior, to argue that the \textit{Terry} standard, which was adopted by T.L.O., results in arbitrary, and thus, unreasonable intrusions on privacy. One of the doctrinal reforms she suggests is discarding the reasonable suspicion standard in favor of probable cause.

\textsuperscript{76} See Randall Kennedy, \textit{Race, Crime and Law} (1997) 144-145.

\textsuperscript{77} The news media is a dominant purveyor of the narratives of youth, race and crime. \textit{See e.g.}, Franklin D. Gilliam, Jr. \& Shanto Iyengar, \textit{Prime Suspects: The Influence of Local Television News on the Viewing Public}, 44 Am. J. Pol. Sci. 560, 562 (2000)(study demonstrating how news media’s crime reporting can condition attitudes toward race and crime); Paul Colomy \& Laura Ross Greiner, \textit{Making Youth Violence Visible: The News Media And The Summer of Violence}, 77 Denv. U.L. Rev. 661, 681 (“There is abundant evidence suggesting that “mainstream America,” particularly white mainstream America, associates (and has long associated) African American and Latino male adolescents and young adults with violence, danger, and disorder. There can be little doubt that this association, powerfully reinforced by continuous coverage of the high profile assaults on children and exemplary (white) adults--attacks the media attributed explicitly and exclusively to young Latinos and African American males--figured significantly in the creation of a more ominous category of transgressing adolescent.” Even when not racially coded, youth violence is often sensationalized in the media. For example, the Thursday March 2, 2000 edition of the Washington Post, featured a front page story about a shooting by a six-year-old who killed one victim; a much more deadly attack at a McDonald’s involving a 39-year-old shooter appeared later in the paper. (Claiborne, \textit{1st-Grader Shoots Classmate to Death} A1; Slevin and Sanderson Pa. \textit{Hostage-Taker Surrenders After Fatal Shootings” A2}).

\textsuperscript{78} Rowan L. Pigotta and Emory L. Cowen, \textit{Teacher Race, Child Race, Racial Congruence, and Teacher Ratings of Children’s School Adjustment}, (studying teacher ratings of students’ behavior, competencies and future educational prognoses based on race. The study found that “American children were judged by both (Black and White) teacher groups to have more serious school adjustment problems, fewer competencies, more negatively stereotypic personality qualities, and poorer educational prognoses than White children.”). Sophie Trawaltera, Andrew R. Todda, Abigail A. Bairdb and Jennifer A. Richeson, \textit{Attending To Threat: Race-Based Patterns of Selective Attention}, 44 J. Experimental Soc. Psychol. 1322 (“The stereotype of young Black men as criminal is deeply embedded in the collective American consciousness (and unconscious). . . . The present findings offer the sobering suggestion that the association between young Black men and danger has become so robust and ingrained in the minds of social perceivers that it affects early components of attention.”)
relatively easy to prove and clearly illegal, implicit bias is almost impossible to prove and can impact discretionary decisions to much the same effect.\(^79\) The result is that under a reasonable suspicion standard, students of color are more likely to be singled out for searches than their White counterparts.\(^80\) The effects of this kind of disparate treatment on adolescents will be discussed later, but the potential for biased decision-making inherent in reasonable suspicion is, in and of itself, a cause for concern.

Yet, the flexibility and discretion that reasonable suspicion provides is exactly why it appeals to school administrators.\(^81\) Without some flexibility and discretion, how can school officials be expected to keep their campuses safe? In a post-Columbine world, officials need to make snap decisions without having to navigate hyper-technical rules.\(^82\) Moreover, the potential for abuse of the reasonable suspicion standard is mitigated by the fact that teachers and administrators care for their students and want them to succeed. “[T]here is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal

\(^{79}\) Whren v. United States, 517 U.S. 806, 812 (1996). “Although the Court in Whren refused to consider the subjective motive of the law enforcement officers in making a stop, they acknowledged that “the Constitution prohibits the selective enforcement of the law based on considerations such as race.” See also State v. Soto, 734 A.2d 350 (1996) (using statistical evidence to support finding that State Police were stopping minority motorists solely on the basis of race).


\(^{81}\) See generally, Petition for a Writ of Certiorari, Safford Unified School District v. Redding, 2008 U.S. Briefs 479 (arguing that anything more than reasonable suspicion “places student safety and school order at risk by impairing the ability of school officials to effectively carry out their custodial responsibility”); Brief of Amicus Curiae National School Boards Association and American Association of School Administrators in Support of Petitioners, Safford Unified School District v. Redding, 2008 U.S. Briefs 479 (U.S. Nov. 13, 2008) (“Deference to educators’ judgments recognizes that the role of the courts in school administration should necessarily be limited to avoid placing unwise constraints on the ability of those educators to preserve the learning environment and protect the safety of students.”); Brief of Amicus Curiae United States in support of petitioner, New Jersey v. T.L.O., 1983 U.S. Briefs 712 (U.S. July 31, 1984) (supporting reasonable suspicion because “there is no need for the judiciary to impose rigid constraints on school officials in their day-to-day work.”)

\(^{82}\) Petition for a Writ of Certiorari, Safford Unified School District v. Redding, 2008 U.S. Briefs 479 (Under a reasonable suspicion standard school officials “ retain the flexibility to respond swiftly and informally to protect students and maintain order.”)
responsibility for the student's welfare as well as for his education.”

Educators, unlike officers enforcing the criminal law, often “enter the profession . . for the chance to make a positive difference in students’ lives, despite limited pay, resources, and appreciation.”

Requiring them to adhere the rules of criminal procedure in their interactions with students detracts from the informality of the student-teacher relationship and potentially hinders their ability react effectively to dangerous situations. Moreover, parents, legislators, and policy makers look to teachers and school officials as the first line of defense in the war on drugs and violence in America’s schools. I will address these important and valid concerns in greater detail in Section III below. For now, suffice it to say that undoubtedly, maintaining safety and orderliness is an important responsibility for schools today, just as it was when T.L.O. was decided.

However, the reality in public schools has changed significantly in the 25 years since that decision. The nexus between law enforcement and school officials has become an important part of school disciplinary policy in a way that was perhaps unforeseen in 1985. The introduction of law enforcement into the school disciplinary process affects all aspects of the school social climate, including the “special relationship” between students and teachers.

The Elephant in the Room

The T.L.O. court was careful not to discuss the standard required in searches conducted by or in conjunction with police because the facts of the case did not present this issue. Neither

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86 T.L.O. 469 U.S. at 342 footnote 7.
do any of T.L.O.’s progeny, including Redding.\textsuperscript{87} Despite the Court’s continuing silence on this issue, there is an elephant in the room that has grown over the years.\textsuperscript{88} Now it is too big to ignore.\textsuperscript{89} Policing, or in many instances, over policing, has, in some areas, replaced school safety as the major concern in public education.\textsuperscript{90}

\textsuperscript{87} Redding v. Safford Unified Sch. Dist. No. 1, 129 S. Ct. 2633 (2009); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S. Ct. 2559 (2002); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). If T.L.O. created a proverbial slippery slope with regard to warrantless searches in public schools, Veronia and Earls slide down that slope and nearly fall off a cliff. Veronia allows for suspicion-less drug testing of student athletes and Earls allows the same for all students involved in extra-curricular activities. It seemed that the next step was for the court to approve of suspicion-less searches conducted by drug sniffing dogs. There is currently a circuit split with regard to whether such searches violate student’s Fourth Amendment rights, and the Court has thus far refused to settle the issue. Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999).

\textsuperscript{88} Search and seizures involving police at school is rich area of litigation. Courts are divided with regard to how school police should treat students vis a vis the Fourth Amendment. Some have found that probable cause is required: see e.g., F.P. v. State, 528 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1988); State v. Tywayne H., 933 P.2d 251, 254 (N.M. Ct. App. 1997)(officers involved were not SRO, but had been hired by the school as security at a school dance); A.J.M. v. State (In re A.J.M.), 617 So. 2d 1137, 1138 (Fl. Dist. Ct. App. 1993)( “Where a law enforcement officer directs, participates or acquiesces in a search conducted by school officials, the officer must have probable cause for that search, even though the school officials acting alone are treated … to a lesser constitutional standard.”). Most other courts have found that school police are authorized to search students under the same standard as school officials. See e.g., T.S. v. State, 863 N.E.2d 362 (Ind. Ct. App. 2007) (finding that SROs are school officials under T.L.O.); Shade v. City of Farmington, 309 F.3d 1054, 1060 (8th Cir. 2002); State v. N.G.B., 806 So. 2d 567, 568-69 (Fl. Dist. Ct. App. 2002); In the Matter of Josue T., 128 N.M. 56 (N.M. Ct. App. 1999) State v. Angelia D.B. (In the Interest of Angelia D.B.), 211 Wis. 2d 140, 159 (Wis. 1997)(holding that the level of suspicion does not change when a school police officer conducts a search); J.A.R. v. State, 689 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 2d Dist. 1997) (“If a school official has a reasonable suspicion that a student is carrying a dangerous weapon on his or her person, that official may request any police officer to perform the pat-down search for weapons without fear that the involvement of the police will somehow violate the student's Fourth Amendment rights or require probable cause for such a search.”); People v. Dilworth, 169 Ill. 2d 195, 210 (Ill. 1996)(applying reasonable suspicion to school searches conducted by school resources officers). In a third approach, the Tennessee Supreme Court found that the applicable standard depends of the role and function of the SRO within the school. See R.D.S. v. State, 245 S.W.3d 356 (Tenn. 2008). See generally Wayne R. LaFave, Search and Seizure § 10.11 (discussing three categories of cases)

\textsuperscript{89} “[T]he National Association of School Resource Officers (NASRO), serves as an example of the growth in the number of school police officials. Although NASRO is a relatively young organization, having been formed in 1991, in a decade and a half NASRO built a roster of more than 15,000 members. As to estimates of the number of school police officers in the United States, analyses of Law Enforcement Management and Administrative Statistics (LEMAS) data show that more than a third of all sheriffs' offices and almost half of all local police departments have assigned sworn officers to serve in schools, with a total of more than 17,000 officers serving in schools, and that public school districts employ more than 3,200 sworn officers.” Ben Brown, Understanding and assessing school police officers: A conceptual and methodological comment, Journal of Criminal Justice Volume 34, Issue 6, November-December 2006, Pages 591-604.

\textsuperscript{90} N.Y. Civil Liberties Union, Criminalizing the Classroom: The Over-Policing of New York City Schools 4 (2007), available at http://www.nyclu.org/files/criminalizing the classroom report.pdf (documenting the rise in police in New York City's public schools and its negative impact on students); Norberto Valdez, Marcia Fitzhorn, Cheryl Matsumoto, and Tracey Emslie, Police in Schools: The Struggle for Student and Parent Rights, 78 Denv. U. L. Rev. 1069 (2001) (providing a case study of the police practices in Northern Colorado schools. Specifically, the authors provide specific examples of “high school children being questioned by the [law enforcement] officers without another adult present and without notification of parents.”; Marian Wright
The influx of law enforcement into public school can be attributed in part to the national fervor over school violence that motivated the T.L.O. court to strip students of full Fourth Amendment Protection in the first place and in part to a well-meaning but over-zealous response to highly-publicized acts of violence committed at schools around the country in the past decade.\textsuperscript{91} Police officers who are placed into public schools are referred to as School Resource Officers or SROs. Although SROs have been utilized in public schools since the 1960’s,\textsuperscript{92} the use of police in schools has been steadily on the rise during the last 15 years.\textsuperscript{93} On their facebook page the National Association of School Resource Officers describe school policing as the “fastest growing” area of law enforcement.\textsuperscript{94} In 2007, almost seventy percent of public school students ages twelve through eighteen reported that police officers or security guards patrol their hallways.\textsuperscript{95} The U.S. department of education reports that police are a daily presence in over half of the public high schools in the nation.\textsuperscript{96}

\textsuperscript{91} The late 1990’s saw a rash of high-profile school shootings: Pearl, Mississippi; West Paducah, Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania; Springfield, Oregon; Richmond, Virginia; and most memorably, Littleton, Colorado. There were twenty-five deaths from school shootings in the 1996-97 school year and forty in the 1997-98 school year. The massacre at Columbine High School in Littleton left fifteen dead in one day in 1999.

\textsuperscript{92} The first one in Flint, Michigan, in 1953. See Mulqueen, Connie (1999) School resource officers more than security guards, American School & University (July 1999 v. 71 i.11) Retrieved April 8,2003, from www.web7.infotrac.galegroup.com


\textsuperscript{94} Available at http://www.facebook.com/NASRO.org?v=info.

\textsuperscript{95} In 2007, 69% of public school students ages 12-18 reported the presence of security guards and/or assigned police officers in their school. http://nces.ed.gov/programs/crimeindicators/crimeindicators2008/ind_20.asp.

\textsuperscript{96} Bureau of Education Statistics (2008).
The Safe Streets Act of 1968 defines a school resource officer (hereinafter “SRO”) as "a career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with school and community-based organizations. . . to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school."97 Ideally, SROs are available to help provide leadership examples for all students on campus.98 Police intervention into public education is often viewed as a way to improve the relationship between students and the police.99 Under the “triad” model adopted by many school resource officer programs, SROs are expected to do more than just enforce the law: they also teach and mentor students.100

In these roles, police not only maintain discipline but secure students’ social boundaries.101 “An analysis of police programs in schools reveals that police officers function simultaneously as security officers, risk educators, informant-system operators, and counselors,


99 The duties of an SRO as defined by The Safe Streets Act include developing crime prevention efforts for students; educating likely school-age victims in crime prevention and safety; developing community justice initiatives for students; and training students in conflict resolution, restorative justice, and crime awareness. 42 U.S.C. 3796dd-8.


101 However, because the level of crime and disorder in a particular school will dictate how much time a SRO can dedicate to the various roles, SROs in inner city schools will spend most of their time doing law enforcement and very little time teaching or mentoring. Peter Finn, Michael Shively, Jack McDevitt, William Lassiter, Tom Rich, Comparison of Program Activities and Lessons Learned Among 19 School resource Officer (SRO) Programs, 2005. P.15. available at http://www.ncdjjdp.org/cpsv/pdf_files/SRO_Natl_Survey.pdf.
and that they mobilize students and staff to play these roles as well.”102 School resource officers are in the school every day and are part of the school community. They know who the “good kids” are and who the “bad kids” are and they try to protect the entire school from those “bad kids.” “The main purpose [of having police in school] is to develop rapport with the students so that students trust them enough to either inform them about other classmates planning violent incidences or turn to SROs for help when they themselves are in trouble.” 103 This image of the friendly, trustworthy police officer who can identify and prevent disciplinary infractions before they happen is appealing but perhaps a bit too idyllic to ring true in the most turbulent schools. Here, where the brute forces of marginalization wreak havoc in all aspects of the community, police are viewed with extreme distrust.104 Children in these schools already have adversarial relationships with law enforcement, which is only exacerbated by their presence in the school.

Thus, the influence of police in the schools can have an impact that extends beyond the good intentions of advocates of SRO programs because “the presence of these officers shapes the school social climate and students’ legal socialization.”105 In T.L.O. Justice Powell justified the lowered standard in school searches by recognizing that “[t]he special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and


to facilitate the charging and bringing of such persons to trial. Rarely does this type of relationship exist between school authorities and pupils.”

By incorporating police into schools, the line between school officials and law enforcement officer is blurred and the “special relationship” between students and teachers deteriorates into one that is increasingly adversarial. Using police as the school disciplinarians allows “teachers and administrators to rely on these officers to help them enforce control, even for non-violent and otherwise routine student mischief.” This is evidenced by the increasing number of school-based arrests for minor incidents in recent years. Increasing the number of school-based arrests changes the nature of school discipline because crime then becomes the prism through which students are viewed and the criminalization of youth “becomes the most valued strategy in mediating the relationship between educators and students.”

Because of the close nexus between school administrators and law enforcement, the “hallways of our nation's public schools” have become portals to “the revolving door of the

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106 T.L.O. 469 U.S. at 350.


109 See e.g., Paul J. Hirschfield, Preparing for Prison? The Criminalization of School Discipline in the USA, 12 Theoretical Criminology 79,80 (2008) (“problems that once invoked the idea and apparatus of school discipline have increasingly become criminalized”); Daveen Rae Kurutz, School Arrests, Citations Jump by 46 Percent, Pittsburgh Tribune-Rev. Aug. 23, 2008 (documenting a 46 percent increase in the number of school-based arrests and citations in Allegheny County in a single year); Children’s Defense Fund, America’s Cradle to Prison Pipeline 125 (2007) (finding a tripling in the number of school-based arrests in Miami-Dade County from 1999-2001); Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track 15 (2005) (noting growth in the number of school-based arrests in select jurisdictions).

criminal justice system.” School police take advantage of the lowered standard of suspicion by conducting searches of students and their belongings in conjunction with school officials. Other jurisdictions allow school resource officers to search students under the reasonable suspicion standard even when they are acting on their own authority. The supreme court of Kansas determined that school resource officers are "school officials" because they are not employed by an entity whose primary responsibility is law enforcement. However, regardless

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111 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

112 Police Search Avondale Students (describing a search at a high school in Auburn Hills, Mi where the Auburn Hills Police Department assisted school employees in searching student's book bags, purses and coats) available at http://www.clickondetroit.com/education/22838815/detail.html. See also In re K.S., 183 Cal. App. 4th 72 (a California Court of Appeal decision involving a student whose clothing was searched by a school official based on a tip proved by a police detective. While conducting the search, the school official was accompanied by the police. The court ruled that reasonable suspicion was the appropriate standard because the police never explicitly requested the official to conduct the search.); Vassals v. Land 591 F.Supp.2d 172(E.D.N.Y. 2008) (concluding that the reasonable suspicion standard applied to a search of a high school student conducted by high school authorities in conjunction with law enforcement agents.); In re L.A., 21 P.3d 952, 960-61 (Kan. 2001)(finding that because “[t]he statutory function of a school security officer is to protect school district property and the students, teachers, and other employees on the premises of the school district,” they can search students under the reasonable suspicion standard and are not required to give Mirada warnings.); In the Matter of Josue T., 128 N.M. 56 (N.M. Ct. App. 1999) (reasoning that reasonable suspicion is the appropriate standard for searches conducted by school resources officers because such officers are acting as the arm of the school official .”); State v. Angelia D.B. (In the Interest of Angelia D.B.), 211 Wis. 2d 140, 152 (Wis. 1997)(holding that reasonable suspicion applies to searches by school resources officers when they conduct searches “in conjunction with school officials and in furtherance of the school's objective to maintain a safe and proper educational environment.”); J.A.R. v. State, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997)(applying the reasonable suspicion to a search conducted by school resource officer after a school official initiated the investigation); People v. Alexander B., 220 Cal. App. 3d 1572, 270 Cal. Rptr. 342, 343-44 (Cal. Ct. App. 1990)(finding that reasonable suspicion applies to searches by school police if the investigation is initiated by a school official); Cason v. Cook, 810 F.2d 188, 191-92 (8th Cir. 1987)(applying the reasonable suspicion standard where a school official and a school resource officer searched a student in response to a report of theft). It should be noted that courts do require probable cause where outside police officers initiate a search or where school officials act at the behest of law enforcement officers not associated with the school. See e.g., R.D.S. v. State, 245 S.W.3d 356 (Tenn. 2008) (recognizing that law enforcement officers must have probable cause to search students ); State v. Tywayne H., 933 P.2d 251, 254 (N.M. Ct. App. 1997)(applying probable cause where search of student was “conducted completely at the discretion of the police officers.”); In re Thomas B.D., 486 S.E.2d 498, 499-500 (S.C. Ct. App. 1997) (requiring probable cause when police conducted a search in furtherance of law enforcement objective, rather than on behalf of school); F.P. v. State, 528 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1988) (applying probable cause to a search performed by a school resource officer at the behest of a police investigator not assigned to the school system).


of who employs them and whether they are officially labeled school resource officers or not, police assigned to schools are law enforcement officers, and, as the Tennessee Supreme Court recognizes, “school officials and law enforcement officers play fundamentally different roles in our society.”\textsuperscript{115} In spite of all the talk about teaching and mentoring students, when the going gets tough most SRO’s are going to fall back “on doing what they were trained to do and what they . . . know how to do: enforce the law.”\textsuperscript{116} When they detain, question, and arrest those who violate school rules they “function as adversaries” of the students.\textsuperscript{117} They are there to detect and deter crime, to “facilitate the charging and bringing of [students] to trial.”\textsuperscript{118} They collect evidence that can be used against students in courts of law and along the way, students are transformed into criminals. When such evidence is obtained through a search justified by a reasonable suspicion, students get the worst of both worlds: they face the full panoply of punishments under the juvenile or criminal justice systems, but without the constitutional protections that normally inhere to such proceedings.

B. Les Leçons Dangereuses

Schoolchildren are criminalized in other ways as well. Metal detectors greet them as they enter the building.\textsuperscript{119} Once inside, they are not only under the watchful eye of uniformed and

\textsuperscript{115} R.D.S. v. State, 245 S.W.3d 356, 368 (Tenn. 2008).

\textsuperscript{116} Peter Finn, Michael Shirley, Jack McDevitt, William Lassiter, Tom Rich, Comparison of Arogram Activities and lessons learned Among 19 School resource Officer Programs, (2005).

\textsuperscript{117} T. L. O., at 350(Powell, J. Concurring).

\textsuperscript{118} T. L. O., at 350(Powell, J. Concurring).

armed SROs but also constant video surveillance.\textsuperscript{120} Schools conduct random sweeps for contraband.\textsuperscript{121} Police dogs are brought to school, sniffing students and their lockers.\textsuperscript{122} Draconian zero tolerance policies subject violators to harsh punishments such as suspension or expulsion regardless of the circumstances.\textsuperscript{123} In conjunction with the lowered expectations of privacy embodied in the reasonable suspicion standard, such policies foster an authoritarian environment that is more like a prison than a place of learning and where the lessons that are


\textsuperscript{123} Henry Giroux, Mis/Education and Zero Tolerance, 87 “Zero tolerance laws make it easier to expel students then for school administrators to work with parents, community justice programs, religious organizations, and social service agencies. Moreover, automatic expulsion policies so little to produce safer schools.”
learned are ones of fear and control. "Schools are where children learn their role in society. Now children are learning that they should always expect to have police around, and they can't necessarily expect fairness."124 As Justice Steven points out in his dissent in T.L.O.:

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth. Although the search of T. L. O.'s purse does not trouble today's majority, I submit that we are not dealing with "matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."

The concern that Justice Stevens voices in this dissent is even more pressing in light of the expanding role of law enforcement officers and other tools of control utilized by public schools that result in the criminalization of students. The lowered standard for searches set forth by T.L.O. and reiterated by its progeny reduce constitutional freedoms of the individual to an empty guarantee. Reasonable suspicion exacerbates the "conflict between establishing an environment for the transmission of democratic values and the mixed message sent to the nation's youth that order and discipline are given more emphasis than their individual rights."126

For public school students, the government not only intrudes on their personal privacy without a warrant or compelling circumstance, but does so with the sanction of the very institutions that are charged with the responsibility of “awakening the child to cultural values, in preparing him for

124 Polly Schullman, Responding to violence in Schools, Science Magazine May 4, 1002 quoting sociologist Aaron Kupchik


126 See Traci B. Edwards, Note, Shedding Their Rights at the Schoolhouse Gate: Recent Supreme Court Cases Have Severely Restricted the Constitutional Rights Available to Public School Children, 14 Okla. City U. L. Rev. 97, 98-99 (1989) (“The goal of public education is to instill democratic values while maintaining order and discipline. But in protecting that goal, courts send undemocratic signals to school students when they limit the constitutional protections available to them.”).
later professional training, and in helping him to adjust normally to his environment.”

A student can be taught a lesson about the 4th Amendment’s protections against search and seizure in the morning, forced to submit to a search in the afternoon, and charged with a crime the following day. Disciplinary regimes that fail to value or adequately recognize students’ autonomy and individual liberty “strangle the free mind at its source” by “[teaching] youth to discount important principles of our government as mere platitudes.”

Instead of nurturing, protecting, and educating children, public schools are teaching youth three dangerous lessons when we strip them of the full protection afforded by the 4th Amendment. First, compromising notions of freedom and personhood contained in the Constitution erode its normative significance and leads to a belief that the “cherished ideal” of the Fourth Amendment is either meaningless or illusory. This teaches students that they are somehow unworthy or undeserving of its full protection. For socially and economically disadvantaged students (who are more likely to attend large, inner-city schools where police presence is high and security measures are harsh) this lesson is particularly harmful because it perpetuates the social expectations that have marginalized their communities for decades.

Second, creating second class rights creates second class citizens with lowered expectations of privacy. “An encounter pursuant to an expansive school search policy or statute is likely to impress upon a student that he or she is inherently untrustworthy or that people who have authority may wield it without regard to individual liberties.”

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127 Brown v. Board or Edcuation.

128 (Although, it is more likely than not that they are not getting that 4th amendment lesson at all due to No Child Left Behind and cutbacks that eliminate civics classes.) cite

129 West Virginia v. Barnette, 319 US 624 (1943)

130 J. Bates McIntyre, EMPOWERING SCHOOLS TO SEARCH: THE EFFECT OF GROWING DRUG AND VIOLENCE CONCERNS ON AMERICAN SCHOOLS, 2000 U. Ill. L. Rev. 1025, 1049.
understanding of such a basic percept of American democracy, such individuals are less capable of knowing when their rights have been violated or resisting a violation before it happens, even when they leave the school setting. Thus, rather than being prepared for citizenship, they are prepared for correctional institutions where only minimal individual rights are afforded. “Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.”

Third, children who are subjected to school searches may feel that the law is unfair as applied to them because they have been treated with distrust and disrespect by adults in positions of authority. In turn, youth develop negative views of school and distrust of law enforcement that alienates them from mainstream society, increasing the lure of counter-culture ideas (such as gangs and other anti-social groups). “Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation’s students can be convicted through the use of arbitrary methods destructive of personal liberty they cannot help but feel that they have dealt with unfairly.”

This causes a crisis of legitimacy under which the rule of law, which is viewed as unjust, is disregarded in favor or street codes of honor, respect, and loyalty.

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Subjecting young people to the humiliation of seemingly arbitrary searches while at school chips away at their dignity and self-respect.\textsuperscript{134} State-operated schools may not operate as enclaves of totalitarianism where students are searched at the caprice of school officials . . . . Students look to teachers, school administrators, and others in positions of authority as models for their own behavior and development into responsible adults.\textsuperscript{135} Reasonable suspicion, increased presence of law enforcement and other disciplinary policies that criminalize adolescent behaviors, transform schools into places where students are treated like threatening figures that must be carefully regulated in order to maintain safety and order. Youth are given very little room to engage in conduct that is normal and developmentally appropriate, such as experimenting with different identities, risk-taking, and challenging adults or persons of authority.\textsuperscript{136} Instead, they are expected to conform to unrealistic behavioral objectives or face harsh consequences. Students who are searched under a reasonable suspicion standard may face suspension, expulsion or even a referral to juvenile or criminal court as a result of the search.\textsuperscript{137} Perhaps even worse are the shame, humiliation, and loss of dignity that a student may feel regardless of the outcome of the search.\textsuperscript{138} The expectation that students can “shed their


\textsuperscript{137} There is little empirical evidence regarding the number of suspension, expulsions, and referrals to juvenile court that are based on evidence recovered during non-consensual searches of students. However, [FIND STATS RE SCHOOL GENERATED POSSESSION CASES]

constitutional rights when they enter the school house door” without suffering negative developmental outcomes is unrealistic. It does not account for the specific developmental context of adolescence and the important role of school as a socializing institution.  

C. How Age Gets Lost in the TLO Inquiry

Not only is high school is an important time because “[t]he schoolroom is the first opportunity most citizens have to experience the power of government” but also because the teenage years are crucial to the psychosocial, cognitive and neurological development of human beings. The lessons that are being taught by watered-down constitutional rights and authoritarian security measures are all the more dangerous because of the unique vulnerabilities of the adolescent mind. While I will discuss this further in the following sections, it is important to note here that age is an important factor for reasons that are based in science and gaining recognition in Constitutional jurisprudence.

The T.L.O. court itself explicitly cites age as a factor in determining the reasonableness of a search. As discussed in the preceding section, the reasonableness of a school search is determined by the two-prong Terry inquiry. The Court states:

[A] search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are

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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.\footnote{\textit{T.L.O.} 342 (emphasis added).}

The requirement that school searches not be “excessively intrusive in light of the age and sex of the student and the nature of the infraction,”\footnote{Id.} is a small, but important addition to \textit{Terry’s} two-part inquiry. \textit{Terry} does not require police to consider whether a search is excessively intrusive in light of the age (or sex, for that matter) of the suspect.\footnote{\textit{Terry v. Ohio}, 392 U.S. 1} This language indicates the Court was aware that there is something different about schoolchildren, and that age plays a role in this difference. However, the Court does not elaborate on this or give any guidance as to how the age component should be factored into the reasonableness determination. In fact, it is never mentioned again in the opinion.

None of the school search cases following \textit{T.L.O.} have elucidated how or why age should be accounted for when determining the permissible scope of a search.\footnote{See \textit{e.g.}, \textit{Vernonia Sch. Dist. 47J v. Acton}, 515 U.S. 646 (1995) (holding the school district’s suspicionless drug testing program of student athletes was reasonable and, therefore, constitutional under the Fourth Amendment); \textit{Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls (Earls) III}, 536 U.S. 822 (2002) (holding public high school policy of suspicionless drug testing of students participating in extracurricular activities was reasonable and did not violate the Fourth Amendment); \textit{Safford Unified Sch. Dist. #1 v. Redding}, 129 S. Ct. 2633 (U.S. 2009) (holding that the strip search of a 13-year old student was unreasonable and a violation of the Fourth Amendment).} The cases involving suspicionless drug-testing of students do not even raise the issue. In these cases, the Court finds the character of the intrusion is “negligible” and “minimal,” thus obviating further discussion of the permissible scope.\footnote{“Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.” \textit{Vernonia Sch. Dist. 47J v. Acton}, 515 U.S. 646, 658 (U.S. 1995); “Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students’ privacy is not significant.” \textit{Earls}, 536 U.S. 822, 834 (U.S. 2002).} \textit{Redding} does inject age back into the discussion, acknowledging that
“adolescent vulnerability intensifies the patent intrusiveness of the exposure.” However, as in 
*T.L.O.* there is no meaningful discussion of age as a factor. Why should the age of a student 
even be considered? Is the age limitation placed on the permissible scope of a search related to 
students’ privacy or liberty interests? Should Constitutional protections increase or decrease as 
the student gets older? Although the Court cites to a brief by the National Association of Social 
Workers (NASW) explaining why age is an important factor to consider when determining the 
reasonableness of a search and calling for a new “framework to analyze . . . reasonableness,” the 
Court does not incorporate any of this discussion into their opinion. Thus, while the *Redding* 
Court had the opportunity to reexamine the *T.L.O.* framework in light of adolescent 
developmental concerns, it chose not to. Nevertheless, although the binary balance between the 
state’s interest in school safety and the students’ privacy interest remains unchanged, at least the 
Court does reiterate that age is a factor when determining the permissible scope of a search.

Even though *Redding* involves a search that is deemed “categorically distinct” from 
searches of “outer clothing and belongings,” hopefully the age-based developmental distinctions 
raised by the NASW amicus brief will resurface in future school search cases considered by the 
Court, meriting a more meaningful analysis of age as a factor. In the following section, I 
these explore these developmental differences by first examining the scientific research and then

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147 See *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, Brief for National Association of Social Workers et al. as Amici Curiae 4. “[C]hildren are not just short adults . . . children and youth are developmentally different from adults and must be treated appropriately . . . Here, those developmental differences require not only a different framework to analyze the reasonableness of Fourth Amendment searches, but also a clear understanding of the effects of excessively intrusive searches on children and youth.”

148 “[T]he rule of reasonableness as stated in T. L. O., [requires that] "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place. . . .The scope will be permissible . . . when it is “not exceedingly intrusive in light of the age . . . of the student and the nature of the infraction." *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2642 (U.S. 2009) (Citing New Jersey V. T.L.O., 469 U.S., at 341).

focusing on how the Supreme Court has incorporated this research into its Constitutional jurisprudence. This discussion lays the groundwork for the first part of my ultimate inquiry into whether a different framework for analyzing the reasonableness of school searches is more developmentally appropriate. After considering the science of adolescent brain development I will turn to the role of public education in advancing positive youth development and democratic socialization through increased privacy rights for students.

II. Youth Development and the Law: We’re Not in Jersey Anymore

Caterpillar: “Who are YOU?”
Alice: This was not an encouraging opening for a conversation. “I -- I hardly know, sir, just at present -- at least I know who I was when I got up this morning, but I think I must have been changed several times since then.” – Alice in Wonderland

The law has both embraced and rejected the concept of adolescence as a unique developmental phase requiring a separate theoretical approach for adolescents and adults. The creation of a separate system of juvenile justice exemplifies a recognition that adolescents are developmentally different than adults and must be treated accordingly.150 The wave of state legislation in the 1990’s that “abandoned or reduced traditional discretionary-waiver authority of juvenile courts” represents an opposing view that teenagers are not only dangerous and violent but also responsible enough to be punished in a manner similar to adult offenders.151 Rather than science, both approaches have been undergirded by “[c]ommon sense and casual observation”

150 “Theories of adolescence as a developmental stage importantly distinct from both childhood and adulthood always have been central to juvenile justice, underlying not only the core idea - that of having a separate system at all - but also the attributes of that system.” Terry A. Maroney, The False Promise of Adolescent Brain Science in juvenile Justice, 85 Notre Dame L. Rev. 89, 95.

151 Gregory A. Loken and David Rosettenstein, The Juvenile Justice Counter-Reformation: Children and Adolescents as Adult Criminals, 18 Quinniac L. Rev. 351.
which, regardless of the approach, has justified protectionist policies aimed at regulating adolescent behavior.\textsuperscript{152}

More recently, the paternalistic lens through which children, including adolescents, have been viewed by the law is shifting into a paradigm of increased autonomy, rights, and dignity for youth.\textsuperscript{153} The developmental differences between adolescents and adults, once based in common sense, are now documented by behavioral and criminological research.\textsuperscript{154} There is a consensus among researchers that the transition to adulthood is a time of profound growth, change and development.\textsuperscript{155} The attributes of youth, which once led policy makers to restrict rights, have

\textsuperscript{152}See, generally, United Nations Convention on the Rights of The Child. “Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.” Preamble; Martin Guggenheim, \textit{Ratify the U.N. Convention on the Rights of the Child, But Don’t Expect Any Miracles}, 20 Emory Int’l L. Rev. 43, 44-45 “American children possess an abundance of rights. The largest number and kinds of rights they possess are statutory in nature and commonly enacted by state and local legislatures. But even if we focus on solely on rights that adults are guaranteed by the Constitution.”


become the basis for an expansion of rights in certain areas. In particular, constitutional protections that are predicated on “evolving standards” have been adjusted to better account for developmental psychology and the science of adolescent brain development. *Roper v. Simmons* and *Graham v. Florida* are two recent Supreme Court cases that have advanced the Constitutional rights of children under the Eight Amendment through a new appreciation of the vulnerabilities associated with adolescence due to structural and functional differences in the brain that influence behavior. Similar to the Eight Amendment, the Fourth Amendment’s reasonableness requirement is an evolving standard that has changed over time to conform to societal norms. Can the cognitive, psychosocial, and neurological vulnerabilities demonstrated through scientific research and recognized by the Court in *Simmons* and *Graham* be incorporated into the Constitutional framework for school searches? In this section I take a look at the science and the cases which will inform the subsequent discussion regarding a developmental approach to school searches.

The Supreme Court’s reliance on adolescent brain development studies and developmental psychology in connection with the Eight Amendment’s prohibition on cruel and unusual punishment has generated considerable scholarship in the area of juvenile justice. Other scholars have explored the impact of adolescent brain development on the Fifth

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156 See generally *Roper v. Simmons, Graham v. Florida.*


159 See, e.g., Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 28-60 (2008).
Amendment Rights of Juveniles.\textsuperscript{160} Much of the scholarship focuses on the competence and culpability of juveniles in the context of criminal law or criminal procedure. However, neuroscience and psychology may have limited application in these areas because of “equality and autonomy concerns” to which “no adequate limiting principle has yet been articulated.”\textsuperscript{161} However, with respect to the Fourth Amendment, the primary concern is not competence or culpability but susceptibility. If, as the science suggests, the human brain is being “hardwired” during adolescence, to what extent can students’ individual liberties can be encroached upon by the government without sacrificing positive youth development?\textsuperscript{162} Therefore, instead of militating against individual autonomy, a Fourth Amendment framework that is developmentally appropriate would actually afford adolescents greater autonomy and equality by freeing them from unjust suspicion and arbitrary interference with their privacy. Moreover, while most scholars argue that adolescents should be treated differently than adults, in the Fourth Amendment context I argue that adolescents should be treated at least equally to adults. This approach does not posit that adolescents should have rights co-extensive to adults because they are the same as adults. Rather, the developmental uniqueness of adolescence dictates that factors beyond privacy and school safety be considered when applying the Fourth Amendment to high school students.


\textsuperscript{161} 85 Notre Dame L. Rev. 89, 118

\textsuperscript{162} According to Dr. Jay Giedd at the National Institute of Mental Health in Bethesda, Md who led some of research on adolescent brain imaging, “If a teen is doing music or sports or academics, those are the cells and connections that will be hardwired. If they're lying on the couch or playing video games or MTV, those are the cells and connections that are going to survive.” Frontline, Inside The Teenage Brain Available at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html.
C. The Science

1. The Old

Conventional wisdom has always recognized that adolescence is a turbulent time.\(^{163}\) Teenagers are notoriously moody, immature and prone to risk taking.\(^{164}\) Despite this, until recently, most neuroscientists believed that the human brain underwent the most significant changes very early in life, during early childhood.\(^{165}\) Studies of brain tissues from younger individuals showed that newborns had synaptic densities equal to that of adults, and that density steadily increased during the first two years of life until it was fifty percent greater than that of adults.\(^{166}\) It was believed that the synaptic density then decreased between ages two and sixteen, and remained largely constant from age sixteen to seventy two.\(^{167}\) Similarly, it was believed that neuronal density was very high in newborns, declining steeply during the first six months of life, then continuing to decline throughout infancy and childhood.\(^{168}\) These results led researchers to conclude that the brain was fully grown by age seven, and the fact that synaptic density was still higher than in the adult brain meant that from age seven on, synapses would gradually be lost.


\(^{164}\) See e.g., Charles E. Irwin, Jr. Adolescent Risk taking 7,7 (Nancy J. Bell & Robert eds., 1993)


\(^{166}\) Usually, nerve cells are not in direct physical contact. There are microscopic gaps between nerve cells called synapses. Communication between nerve cells takes place across synapses. "The synaptic architecture of the cerebral cortex defines the limits of intellectual capacity, and the formation of appropriate synapses is the ultimate step in establishing these functional limits." Patricia S. Goldman-Rakic, Jean-Pierre Bourgeois, and Pasko Rakic, "Synaptic Substrate of Cognitive Development: Synaptogenesis in the Prefrontal Cortex of the Nonhuman Primate," in N. A. Krasnegor, G. R. Lyon, and Patricia S. Goldman-Rakic, eds., Development of the Prefrontal Cortex: Evolution, Neurobiology, and Behavior (Baltimore: Paul H. Brookes Publishing Co., 1997), p. 27.

\(^{167}\) Peter R. Huttenlocher, Synaptic density in human frontal cortex — Developmental changes and effects of aging, Brain Research Volume 163, Issue 2, 16 March 1979, Pages 195-205

\(^{168}\) Neuronal density refers to the ratio between nerve cells and other matter (non-nerve cells in the human brain.)
through a process of pruning, by which unused or nonfunctioning synapses would degenerate.\textsuperscript{169}

Under this theory, teenagers were, at least developmentally, identical to adults.

2. The New

During this time, however, research was limited by the unavailability of teenage brains to autopsy.\textsuperscript{170} Even when MRI technology made it possible for researchers to analyze the brains of living individuals, lingering concerns over the safety of exposing younger subjects to MRIs meant that it wasn’t until the 1990s when the NIH approved such studies in younger children.\textsuperscript{171}

When these studies were finally performed, they revealed that although the pruning process did occur in childhood, there was also a secondary period of rapid development around puberty, with gradual pruning occurring through adolescence and into young adulthood.\textsuperscript{172}

\textsuperscript{169} John Brierley, Give me a child until he is seven : brain studies and early childhood education, Falmer Press 1987.


In particular, the research showed that there are increases in cortical gray matter during the preadolescent years, with a subsequent decrease after adolescence.\(^{173}\) In the frontal lobes, which are involved with response inhibition, emotional regulation, planning and organization, there is a reduction in gray matter between adolescence and adulthood that is due to intensive pruning of neural connections.\(^{174}\) The prefrontal cortex, which is thought to be involved in goal directed behaviors, such as rule learning, and emotional processing also experiences considerable remodeling of nerve connections.\(^{175}\) At the same time, the adolescent brain undergoes significant myelination, wherein connections between nerve cells (axons) are insulated by a substance called myelin also known as “white matter.”\(^{176}\) This streamlines the connections inside the brain by increasing the speed at which impulses can travel along the nerve cell.\(^{177}\) As part of the myelination process, neural connections between the frontal regions of the brain and the amygdala (a part of the limbic system that is responsible for impulse reactions including emotional processing of fear) “become denser” as emotional and cognitive processes are integrated.\(^{178}\) Thus, while grey matter decreased during adolescence, white matter increases.\(^{179}\)


\(^{174}\) See e.g., Jay N. Giedd, Brain Development During Childhood and Adolescence: A Longitudinal MRI Study, 2 Nature, Neuroscience 861; Elizabeth Sowell, In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neuroscience 859

\(^{175}\) Linda Patia Spear, Neurobehavioral Changes in Adolescence, 9 Current Directions Psychol. Sci. 111


\(^{177}\) See Johnson SB, Blum RW, and Giedd J, Adolescent maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, Journal of Adolescent Health; 45:216-221, 217.

Dr. Jay Giedd, a lead researcher in longitudinal neuroimaging studies of the adolescent brain, refers to this as the “use it or lose it principle” because the brain is pruning back unused nerve connections and strengthening used connections to make them more effective.\textsuperscript{180} Thus, the rapid growth, pruning, and myelination that occurs inside the adolescent brain, referred to as neuromaturation, affects the way adolescents process information by allowing the brain to “transfer information between different regions more efficiently.”\textsuperscript{181}

Because “[b]ehavior depends on the formation of appropriate interconnections among neurons in the brain,”\textsuperscript{182} these findings suggest that the development of functions associated with these parts of the brain are permanently affected during adolescence.\textsuperscript{183} Environmental factors also have a direct influence on brain development, affecting which neuronal pathways in the brain will be retained and which will be lost as a result of pruning.\textsuperscript{184} Essentially, the brain is being hardwired during adolescence. “If a teen is doing music or sports or academics, those are the cells and connections that will be hardwired. If they’re lying on the couch or playing video games or [watching] MTV, those are the cells and connections that are going to


\footnotesize{\textsuperscript{180} Frontline, Inside The Teenage Brain (quoting Dr. Jay Giedds) Available at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html.}

\footnotesize{\textsuperscript{181} See Johnson SB, Blum RW, and Giedd J, Adolescent maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, Journal of Adolescent Health; 45:216-221, 217.}


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\footnotesize{\textsuperscript{184} 2005 UTLR 695, referring to Peter R. Huttenlocher, Synaptic Density in Human Frontal Cortex- Developmental Changes and Effects of Aging, 163 Brain Res. 195}
survive.” If brain development is influence by environmental factors, then the way teenage students are treated in school impacts how their brains develop. When teenagers are treated like criminals, or forced into a defensive posture toward authority due to adversarial relationships with teachers, school officials or SROs which connections are strengthened and which wither away?

3. The Future

Of course, the applicability this research to search and seizure has certain limitations. There are no studies that specifically link invasive search and seizure policies to particular behavior patterns or developmental outcomes. Scholars have confronted this issue in the context of juvenile justice reform, warning against overstating conclusions or relying too much on the current research in formulating policy. Certainly, more research needs to be done before anyone can state conclusively that a low standard of suspicion and increased police presence during school searches leads to negative developmental outcomes. However, this does not negate the studies’ relevance and usefulness as a framework within which school search and seizure can be analyzed. For example, as discussed above, the research does show that adolescents are extremely susceptible to outside influences, and this has rather straightforward implications in the context of search and seizure. Part of adolescent susceptibility is a tendency

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186 Email from Dr. Richard Lerner, July 29, 2010. (available upon request)

187 See Jay D. Aronson, Neuroscience and Juvenile Justice, 42 Akron L. Rev. 917,929 (2009) (“we must not submit to a new kind of biological determinism which posits that behavior is merely the “calculable consequence of an immense assembly of neurons firing.”) (quoting Dean Mobbs et al., Law, Responsibility and the Brain, 5 PLOS Biology 693,693 (2007); Emily Buss, Rethinking The Connection Between Developmental Science and Juvenile Justice, 76 U. Chi. L. Rev. 493(2009)( even a “sophisticated understanding of child development does not, in itself, answer any legal questions.”); Terry A. Maroney, The false Promise of Adolescent Brain Science in Juvenile Justice, 85, Notre dame L. Rev. 89,170 (2009)(“adolescent brain science never should be the primary argument for juvenile justice reform.”);
to “overestimate adult authority” which renders them vulnerable to government over-reaching in the context of school searches particularly when the government actors are not “bounded in any meaningful way by recognizable principles of the Fourth Amendment which were developed to apply to adults.”

Therefore, additional research should be conducted in the hope that, over time, we can gain a better understanding of the specific ways in which the pedagogy of punishment, including aggressive search and seizure policies, effects adolescent development. In the meantime, it is fair to say that while there is much we do not know, there is much that we do know. The brain development studies discussed above are rich with information that can be used in the context of school searches. Moreover, research on bullying/harassment, peer victimization and child maltreatment demonstrates positive links between the treatment of adolescents and developmental outcomes. This research is instructive because some parallels can be drawn between the kind of non-accidental physical and emotional harm characteristic of bullying/harassment, peer victimization and maltreatment and the routine subjugation of young people to arbitrary searches that can, and often do, lead to harsh disciplinary consequences. In addition, bullying, harassment, and maltreatment all involve an imbalance of power between the perpetrator and the victim, just as search as seizure involves an imbalance of power between the actor and the subject.

While a thorough review of the bullying/harassment, peer victimization and maltreatment literature is beyond the scope of this article, some of the findings are particularly revealing and

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provide a potential roadmap for future research involving school search and seizure. Bullying and harassment are closely related and are often used interchangeably in the literature because both involve forms of peer aggression that result in victimization. Bullying has been defined as both repeated exposure “to negative actions on the part of one or more students” and “a systematic abuse of authority.”189 There is a great deal of research on bullying and peer victimization.190 Most of the studies are in agreement that victimization is a cause of psychosocial distress.191 Studies have shown that adolescents who were bullied had lower self-esteem, lower grades, greater dislike of school, and increased rates of absenteeism and violence-related behaviors compared to those who were not bullied.192

Similarly, in the area of child maltreatment, which is usually defined as abuse and/or neglect by family or caretakers, studies suggest that “experiences with abuse, neglect, and other types of trauma may affect the development of brain systems that regulate responsiveness to

189 Kathleen Staseen Berger, Update on Bullying at School: Science Forgotten?, Developmental Review 27 (2007) 90-126 (citation omitted).


stress in way that may be maladaptive in terms of mental health.”

This is because the brain changes in response to environmental stimuli such as trauma and stress. For example, “high levels of stress hormones can interfere with” the process of myelination, which as discussed above, plays a critical role in the brain’s ability to efficiently conduct nerve impulses between the two hemispheres of the brain. In particular, adolescent maltreatment has been found to have “pervasive influence” affecting later negative outcomes, including anti-social behavior such as criminal behavior, substance abuse, health-risking sex behaviors, and suicidal thoughts.

The findings of these studies suggest several areas for future research including further exploration of the causal relationship between invasive search and seizure practices and negative developmental outcomes. Depending on the age, family situation, and previous socialization of the student, it is possible to hypothesize that current search and seizure practices could be stressful or, in some cases, traumatic experiences that, like bullying, harassment, and maltreatment, could affect brain development and lead to psychosocial distress.

However, even in the absence of further studies, the prevailing research has the potential to inform school search policy. The Supreme Court’s use of brain development science in the context of juvenile’s 8th Amendment rights has implications for juvenile’s 4th Amendment rights.

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as well. By understanding how the Court used the science in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. ___ (2010), we can begin to conceptualize how a new, developmentally appropriate 4th Amendment framework can emerge.

D. The Cases

1. Simmons

When *Roper v. Simmons* was decided by the Court in 2005, many of the longitudinal studies utilizing functional magnetic resonance imaging (fMRI scans) to study adolescent brain development were relatively new although there was a growing body of scholarly literature that centered around implications of this research for juvenile law and the death penalty in particular. The research supported what juvenile advocates had argued for years: adolescents "are more vulnerable, more impulsive, and less self-disciplined than adults." The *Simmons* Court found that juveniles lacked maturity, “are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure” and have characters that are “more transitory” and “less fixed” than adults. The Court drew on its previous decision in *Atkins v. Virginia*, which held that the execution of the mentally retarded violated the Eight Amendment. In Atkins the Court reasoned that deficiencies in reasoning and judgment among the mentally retarded “undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”

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197 See e.g., Elizabeth Cauffman & Laurence Stienberg (Im)maturity and Judgment in Adolescence: Why Adolescents may be Less Culpable than Adults, 18 Behav. Sci. & L 741 (2000); Elizabeth Scott & Lawrence Steinberg, Blaming Youth, 81 Tex. L. Rev. 799 (2003); Laurence Steinberg & Elizabeth Scott, Less guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty, 58 Am. Psychologist 1009 (2003).


199 *Roper v Simmons*, 543 U.S. at 569-70.

that the profound differences in the adolescent brain establish the “diminished capacity of juveniles” thus excluding them from the category of “worst offenders” for which the death penalty is reserved.\textsuperscript{201} In Simmons age is the defining factor that renders the practice of juvenile executions Constitutionally unsound.\textsuperscript{202} The Court uses science to explain why age is so important to their analysis.

The Court cites to multiple amicus briefs which use neuroscience and developmental psychology to explain why adolescents are uniquely situated.\textsuperscript{203} The Simmons amici specifically discuss the brain development studies discussed above. The American Medical Association joined by six other organizations as amici explain that “[c]utting-edge brain imaging technology reveals that regions of the adolescent brain do not reach a fully mature state until after the age of 18.”\textsuperscript{204} The American Psychological Association’s brief specifies: “[r]ecent research suggests a biological dimension to adolescent behavioral immaturity: a human brain does not settle into its mature, adult form until after the adolescent years have passed and a person had entered adulthood.”\textsuperscript{205} Likewise, in their brief the Coalition for Juvenile Justice states that: “[r]ecent neurological studies show that during adolescence the brain undergoes a period of massive

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\begin{itemize}
\item \textsuperscript{201} Roper v. Simmons at 570.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} See Roper v. Simmons, 2003 U.S. Briefs 633 (U.S. July 16, 2004). Sixteen amicus briefs were filed with the Court in support of the respondent Christopher Simmons. Eight of those briefs reference adolescent brain development.
\item \textsuperscript{205} Roper v. Simmons, Brief for the American psychological Association, and the Missouri psychological Association as Amici Curiae Supporting Respondent.
\end{itemize}
reorganization. . . the most critical part of the brain develops 95 percent of its capacity.”206 The ABA reiterates: “recent scientific research supports the conclusion that brains of juveniles are less developed that those of non-mentally retarded adults.”207 Similarly, the amicus briefs of the National Legal Aid and Defender Association, the Conference of Catholic Bishop and Other Religious Organizations, Missouri Ban on Youth Executions, and the Juvenile Law Center (in conjunction with 51 other organizations) all reference brain development as a serious issue for the court to consider.208

Of all the amici, the American Medical Association and the American Psychological Association briefs provide the most thorough review adolescent brain development research. The American Psychological Association beings their argument by alluding to “behavioral studies and recent neurological research.”209 The American Medical Association simply refers to “science.”210 The briefs then go on to explain the research and the link between brain immaturity and adolescent behavior. “[P]sychological immaturity may effect a young person’s decisions, attitudes, and behavior in the role of defendant in a way that . . . may be quite

206 Roper v. Simmons, Brief of the Coalition for juvenile Justice as Amicus Curiae in Support of respondent,

207 Roper v. Simmons, Brief Amicus Curiae of the American bar Association in Support of the Respondent


210 Roper v. Simmons, BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, NATIONAL ASSOCIATION OF SOCIAL WORKERS, MISSOURI CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL MENTAL HEALTH ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT
important to how they make choices, interact with police, relate to their attorneys, and respond to the trial context.”

Brain studies establish an anatomical basis for adolescent behavior.”

During oral argument, a majority of the questions posed to Simmons’ attorney related to the scientific evidence documented in these briefs. Justice Kennedy, the author of the majority opinion, specifically asked for comments on the scientific evidence presented in the science briefs. It is not surprising then that “[t]he science brief figured prominently in the panoply of arguments available to Justice Kennedy when writing the Court's opinion.” The opinion heavily quotes the evidence presented in the science briefs: “the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth.” The Simmons Court was able to utilize the science because, according to the majority, the Eight Amendment embodies “evolving standards” of decency that can accommodate new understandings of adolescent development provided by the scientific research. While Simmons was a turning point for juvenile rights, in its immediate wake the relevance of the Court’s endorsement of adolescent brain development research to other aspects of juvenile law, even other Eight Amendment considerations, was unclear. Although scholarship abounded, many were skeptical of the decision’s reach.

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213 Transcript of Oral Argument at 4, Simmons, 543 U.S. 551 (No. 03-633).

214 Transcript of Oral Argument at 4, Simmons, 543 U.S. 551 (No. 03-633).


216 Simmons, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

2. Graham

The Court revisited the issue in 2009, when it heard arguments in *Graham v. Florida*, an Eight Amendment case involving the application of life without parole sentences to juvenile offenders. As in the *Simmons* case, *Graham* generated several amici briefs that discussed adolescent brain development.\(^{218}\) The American Medical Association and the American Academy of Child and Adolescent Psychiatry filed a science brief in support of neither party that was nearly identical in substance to the American Medical Association brief filed in *Simmons*. Likewise, the American Psychological Association, The American Psychiatric Association, The National Association of Social Workers, and Mental Health America filed a brief in support of the juvenile petitioner that used the same brain development arguments that were successful in *Simmons*.\(^{219}\) “Research in developmental psychology and neuroscience--including the research presented to the Court in *Simmons* and additional research conducted since *Simmons* was decided--confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified.”\(^{220}\) During the oral argument Graham’s attorney’s cites “science” as reason “to draw the line at 18” with regard to life without parole sentences. \(^{221}\)

Again, the scientific arguments that had provided a basis for *Simmons* proved persuaded the Court that the particular vulnerabilities of adolescence warranted greater protection under the Eight Amendment. “No recent data provide reason to reconsider the Court’s observations in *Simmons* about the nature of juveniles. As petitioner’s amici point out, developments in

\(^{218}\) See e.g., *Graham v. Florida*, 2008 U.S. Briefs 7412 (U.S. July 23, 2009)


\(^{221}\) “Roper states, and the science -- States that base it on the science, that at that age we cannot make a determination about whether or not the adolescent will or will not reform. . . . the Court in Roper struggled with where to draw the line between maturity and immaturity and it concluded, rightly so, to draw the line at 18 based on both the science and [\(^{*}12\)] the legislative determinations.” TERRANCE JAMAR GRAHAM, Petitioner v. FLORIDA., 2009 U.S. Trans. (U.S. Trans. 2009).
psychology and brain science continue to show fundamental differences between juvenile and adult minds.” The Court cites Simmons heavily and makes similar arguments about the mutable character of juveniles. "[J]uveniles . . . are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." The Court held that a sentence of life without the possibility of parole for a non-homicide offense violates the Eight Amendment with respect to juvenile offenders. Again, the Court recognizes that “evolving standards of decency” guide the decision.

Graham strengthens Simmons and advances the rights of adolescents by taking the discussion of adolescent brain development out of the context of death and into new territory. Some of the concern with Simmons was that it had limited applicability to other areas of law because “death is different.” If there is uncertainty about the developmental status of adolescents, it seems reasonable to shield them from the most extreme and final punishment our system can impose. Graham moves the discussion of adolescent development beyond the death penalty. The importation of Simmons ’adolescent brain development discussion into this arena may signify the Court’s willingness to consider the applicability of this research to other doctrines. As Justice Roberts asserts in his concurrence, “Simmons ’conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases.” The pertinence in

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225 “[T]he death penalty is different from other punishments in kind rather than degree." Solem v Helm, 463 U.S. 2777, 290 (1983). Prior to the Graham decision some commentators did not believe the court would find the scientific evidence persuasive in a life without parole case. See e.g., Terry A. Maroney, The False Promise of Adolescent Brain Science in juvenile Justice, 85 Notre Dame L. Rev. 89, 95.

terms of the Fourth Amendment is not necessarily in the holding itself but how the Court got there. The science not only suggests that adolescents are less culpable than adults, but that they have “a heightened susceptibility to negative influences and outside pressures” and their character is “more transitory and "less fixed" than that of an adult.” Negative environmental pressures may create patterns of behavior that, under the “use it or lose it principle” described by Dr. Giedd, become fixed over time as the adolescent matures into adulthood.

The Supreme Court’s recognition and use of adolescent brain development studies in Simmons and Graham is encouraging, particularly because the use of developmental research in the resolution of constitutional questions has been controversial at times. The Court faced sharp criticism when it cited to social science research in footnote eleven of Brown v. Board of Education. Scholars and Justices continue to debate the proper place of science in Constitutional interpretation. For many critics “the problem is not that the social sciences are

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228 Footnote 11 reads:


Brown, 347 U.S. at 494 n.11.


insufficiently scientific. The problem is that they are too scientific for the normative task at hand.\textsuperscript{230} As a result of the social science debate, courts tend to ignore psychology and other social sciences in favor of a common sense approach.\textsuperscript{231} However, common sense offers only limited insight into psychological, emotional or social development. Moreover, as it relates to children, common sense often becomes a proxy for paternalism, justifying state infringement into their fundamental rights.\textsuperscript{232} \textit{Simmons} and \textit{Graham} raise the possibility that the current Supreme Court may be willing to move away from traditional notions about the place of children in the constitutional polity and consider developmental research when defining the Constitutional rights of adolescents. The question then becomes, how does the science, which was so influential in \textit{Simmons} and \textit{Graham}, impact a Constitutional inquiry into Fourth Amendment reasonableness? The Court’s acknowledgement that adolescents "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" and that their characters are "not as well formed"\textsuperscript{233} has relevance to the Fourth Amendment analysis of school searches. “[A]lthough

\textsuperscript{230} Anne C. Dailey, \textit{Developing Citizens}, 91 Iowa L. Rev. 431, 448.

\textsuperscript{231} "Almost twenty years ago, Dr. Arlene Skolnick pointed out that there are three strategies taken by policymakers, lawyers, and judges toward psychology (and other social sciences) (1) they ignore it, by far the most common approach; (2) they rely on it for expert advice, assuming that the research findings contain clear policy mandates waiting to be put into effect; (3) they tend to be manipulative in using it – the expert is called in to put the stamp of science on what is basically a value judgment. . . .Dr. Solnick proposes “a fourth alternative, namely, that legal and policy decisions concerning children should be informed by developmental research, even though such decisions cannot be determined by psychological considerations alone.” Robert Shepherd, Jr., \textit{Commentary: A Developmental Perspective on the Adjudication of Youthful Offenders: Comments on Steinberg and Cauffman’s ‘The Elephant In The Courtroom}, 6 Va. J. Soc. Pol’y & L. 429,430-311;


\textsuperscript{233} Graham v. Florida, 130 S. Ct. 2011, 2026 (U.S. 2010)(quoting Roper v. Simmons)
the necessities for a public school search may be greater than for one outside the school, the psychological damage that would be risked on sensitive children by random search \(\text{[es]}\) insufficiently justified by the necessities is not tolerable.\textsuperscript{234} Moreover, the public school setting is an important forum for the democratic socialization of young people.\textsuperscript{235} Thus, in light of adolescents’ unformed characters, “compelling authorities to justify their use of power in terms of applicable legal standards may not be so bad after all” because it will instill a sense of personhood in the Constitutional sense, a key component of democratic citizenship.\textsuperscript{236}

III. From Science To Substance

Children should be educated and instructed in the principles of freedom.

John Adams, Defense of the Constitutions, 1787

Although there is an applicable legal standard for school searches, that standard, reasonable suspicion, is so amorphous and flexible that it places very little limitation on government action. As we have seen, only when a student is subjected to complete humiliation is the searching school official’s authority called into question.\textsuperscript{237} Many legal scholars agree that the standard of reasonable suspicion in school searches needs to be reconsidered.\textsuperscript{238}

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\textsuperscript{236} Leon Letwin, After Goss v. Lopez: Student Status as a Suspect Classification?, 29 STNLR 627, 652.

\textsuperscript{237} Redding, 129 S. Ct. 2633, 2641 (U.S. 2009).

that reasonable suspicion is constitutionally problematic because, the lack of a clearly articulated individualized suspicion requirement further eviscerates the already low threshold of “reasonableness.”\(^{239}\) Furthermore, as Michael Pinard points out, the “increased interdependency” between law enforcement agencies and public schools “creates a disconnection between rights and ramifications” when the standard for school searches is reasonable suspicion.\(^{240}\) As discussed in Section II of this article, the influx of police into public school in conjunction with the reasonable suspicion standard creates opportunities and even incentives for abuse because it blurs the line between school officials and law enforcement officers.\(^{241}\) Others have observed that it denigrates American values by creating a slippery slope down which other cherished ideals are slowly sliding.\(^{242}\)

All of these concerns are still urgent and valid. To this body of critique, I submit another pressing concern: reasonable suspicion is not a developmentally appropriate standard because a school environment where youth are criminalized and denied basic privacy rights is detrimental to positive youth development. “A system predicated on hostility to student rights runs the risk not only of forfeiting this educational opportunity but of exacerbating the very difficulties it is


\(^{240}\) Pinard, Michael, From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities, 45 Ariz. L. Rev. 1067, 1070

\(^{241}\) “These different standards encourage law enforcement officers to persuade school officials to conduct searches on their behalf when the level of suspicion does not rise to probable cause, relying on the lower reasonableness standard as a bootstrap.” Pinard 45 Ariz. L. Rev. 1067, 1092.

seeking to cure.” The malleability of the adolescent brain suggests “that adolescence may provide a sort of ‘second chance’ to refine behavior control.” Under this view, even troubled teenagers have the capacity to develop into productive young citizens. Because adolescents spend a significant amount of time in school, the school environment plays a large role in their development -- for better or for worse. Within the school environment, exposure to rights can be an instrument of positive development by making democratic socialization a part of the developmental process. Conversely, students’ future potential is limited when behaviour patterns formed in response to negative environmental influences become entrenched as nerve connections in the brain responsible for those behaviours are strengthened by repeated use.

The need for safe schools, and the danger posed by even a single violent actor with a gun are great. Therefore, when it comes to preventing violence at school, the violent actor often serves as the example upon which policy is shaped. The Court’s school search jurisprudence is

243 Leon Letwin, After Goss v. Lopez: Student Status as a Suspect Classification?, 29 STNLR 627, 652.


247 (As compared to other violent crimes, school shootings are uncommon. However, they never fail to shock the conscience and for this reason they grab headlines whenever they happen. For example, the See e.g., Teen kills himself and another, too; Nebraska school shooting Detroit Free Press (Michigan) January 6, 2011 Thursday; Fatal school shooting tied to fledging gang activity Birmingham News (Alabama) February 10, 2010 Wednesday; Fla. girl charged in fatal school shooting School Violence Alert January 1, 2009; Fatal school shootings trial scheduled for July The Burlington Free Press (Vermont) September 25, 2007 Tuesday; Student kills 1, injures 2 in high school shooting Chicago Tribune November 9, 2005 Wednesday; 10 Dead After School Shooting; Boy kills grandparents, then fires on students and staff on a Minnesota Indian reservation. Los Angeles Times March 22, 2005 Tuesday; SCHOOL SHOOTING KILLS TEEN IN NEW ORLEANS; THREE OTHER STUDENTS WERE INJURED BY STRAY BULLETS. FOUR TEENAGE SUSPECTS WERE ARRESTED, Orlando Sentinel (Florida) April 15, 2003 Tuesday, FINAL; Suspect tells investigators he planned to kill himself; California school shooting: Records show he counted out 40 bullets before class Telegraph Herald (Dubuque, IA) March 14, 2001, Wednesday; TEEN'S RAGE TURNS DEADLY :HIGH SCHOOL SHOOTING KILLS 1, WOUNDS 23 SEATTLE POST-INTELLIGENCER May 22, 1998, Friday; KY. TEEN KILLS 3 IN SCHOOL SHOOTING RAMPAGE The Herald-Sun (Durham, NC) December 2, 1997 Tuesday.
no exception: in the balance between safety and privacy, safety takes precedence.\footnote{248\textsuperscript{248} See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) (internal citations omitted); T.L.O., 469 U.S. 325, 339 (1985) (internal citations omitted).} For many, the sacrifice of students’ privacy rights is worth the gain in safety and security for all members of the school community. For others, the lack of privacy in school is symptomatic of a culture of disempowered citizenship and a general lack of agency vis-à-vis the state.\footnote{249\textsuperscript{249} Paul J. Hirschfield, Katarzyna Celinska, Beyond Fear: Sociological Perspectives on the Criminalization of School Discipline, Sociology Compass Volume 5, Issue 1, pages 1–12, January 2011} For these populations, the fear of school violence is real but so is the frustration and contempt towards a justice system that seems built on racial subordination.\footnote{250\textsuperscript{250} See generally, Elijah Anderson, Code of the Street, Decency, Violence and the Moral Life of the Inner City (1999) 36-37. See also Amruta Ghanekar and Sara Taveras, MIMIC: Tackling the Root Causes of Juvenile Delinquency (discussing a community based program organized by ex-offenders concerned with the high number of youth entering the juvenile justice system), available at http://www.phиласocialinnovations.org/site/index.php?option=com_content&view=article&id=116%3Amimic-tackling-the-root-causes-of-juvenile-delinquency&catid=21%3Afeatured-social-innovations&Itemid=35&showall=1.} Therefore, in this context, in order for the balance between safety and privacy to be weighed adequately “the degree of community resentment aroused by particular practices” must be considered when an assessing “the quality of the intrusion upon reasonable expectations of personal security caused by those practices.”\footnote{251 Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 365.}

A school search framework that better accounts for the developmental needs of youth would appreciate that adolescents are future autonomous citizens in the process of developing a sense of personhood. A developmentally appropriate paradigm would mitigate against resentment and frustration by encouraging positive youth development and democratic socialization. To this end, the Fourth Amendment right to be free from unreasonable search and seizure must be viewed as a vehicle through which adolescents’ capacity to become “mature citizens capable of democratic self government and . . . self realization” can be developed.\footnote{252 John H. Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. rev. 1756m 1771-74 (1981).}
Such an approach would recognize that there is a coincidence of interest shared by students, school officials, and society in developing democratic citizens. This unifying interest should be considered in the balance of interests when determining Fourth Amendment reasonableness. In this section, I will examine positive youth development and democratic socialization, which has both political and legal dimensions. Concepts of privacy, autonomy and personhood are important to political socialization whereas legal socialization relates to perceptions of the law and legal authorities. I then set forth a ‘positive youth development approach’ to school searches which incorporates into the reasonableness balance the convergent interest in a public education system that creates law-abiding, autonomous, right-holding citizens.

A. The Positive Youth Development Approach

The science suggests, and the Court accepts, the notion that negative environmental influences can impact adolescent development in negative ways. “Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment--and, indeed, their actions are shaped directly by family and peers in ways that adults’ are not. . . . Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control.” The logical contra positive is that positive environmental factors can encourage positive development in adolescents. This proposition has been adopted by youth advocates in many different disciplines and is referred to as “positive youth development” (PYD) or the “youth development approach” (YDA). “Positive youth development is an approach that seeks to achieve one or more of the following objectives: bonding, resilience, social competence, emotional competence, cognitive competence, behavioral competence, moral competence, self-determination, spirituality, self-efficacy, clear and positive identity, belief in the future,
recognition for positive behavior, opportunities for prosocial involvement, prosocial norms."  

Instead of “‘viewing adolescent development through the lens of problems and deficits’ . . . positive youth development focuses on strengthening protection in youths' lives while simultaneously reducing risk. The notion is to move beyond simple risk avoidance - for that will never be enough to ensure well-being - and capitalize on building resilience through competency development”

This approach is utilized by entities ranging from state health departments, non-profit educational schools, public defender offices, to juvenile court programs. There is an emerging body of literature regarding the application of PYD to juvenile justice. The positive youth development approach “gained significant traction beginning in the 1990s.” Around the same time, the research findings on adolescent brain development were being released. The science of adolescent brain development supports the key facets of the youth development approach: “that children are different from adults, are capable of change, and need support and opportunities for healthy development.”

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teenage brain, adolescence provides an “opportunity to help youth become responsible adults” by laying “a foundation . . . that will help them make informed decisions.” This is exactly what the positive youth development approach aims to do by focusing on the inherent strengths of young people, which includes the potential for structural and functional change due to the plasticity of the adolescent brain, and the strengths that exist in their environment, referred to as “ecological development assets,” which can help youth mature into successful adults. As Dr. Giedd describes, the teenage brain is “not done being built.” Therefore “if the strengths of youth are aligned across adolescence with ecological developmental assets, then every young person’s development can be improved.” School is an example of one such ecological development asset. A students’ experience of the high school environment, and the types of resources provided to the student can cultivate adolescent change in a positive direction.

B. The Democratic Socialization Function of Public Education

The notion that public school is a primary mechanism for the socializing of America’s youth is not new. Courts and scholars have long recognized the importance of public education in the formation of democratic citizens. Although some scholars are critical of certain aspects


of the socialization process, one thing is certain: the socialization that occurs in public school derives not only from the curriculum but from institutional practices as well. Professor Betsy Levin posits, “if the educational institution is wholly undemocratic, students are likely to get mixed signals with regard to the democratic values needed to function as citizens in our society: the way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civics textbooks.”

As discussed in Section I above, students are learning powerful lessons from their interactions with school officials and school police. The harsh disciplinary practices of what I have described as a “ghetto education” socialize youth in ways that are antithetical to democratic citizenship. In order for public high schools to engage in citizen education, which necessarily includes democratic socialization, student privacy rights must be taken seriously. “Undoubtedly, the approaches tomorrow's leaders will take toward the [Fourth] Amendment will be shaped by the lessons they learn as today's school children.”

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This is because rights, like institutional practices and text book lessons, can contribute to
democratic socialization.265

The socializing role of student Fourth Amendment Rights is particularly important
because individual privacy is a hallmark of democratic citizenship.266 Privacy is also the
overriding concern of the Fourth Amendment’s protections against unreasonable search and
seizure.267 “Constitutional protection of privacy is tied closely to the more basic right to be
afforded dignity and self-respect -- in short, to be treated as a person.” 268 Individual privacy is
closely connected to individual autonomy, another important facet of citizenship, because
negative privacy rights carve out a sphere of constitutionally protected space within which an
individual can make autonomous decisions about one’s life. However, because the right to
engage in autonomous decision-making has traditionally been predicated on the capacity for
mature, rational decision-making, children’s privacy rights have been limited. 269 Even assuming
that a model of children’s privacy rights that limits such rights due to immaturity and an
undeveloped capacity for autonomous choice is justified as applied to younger children,

265 See Anne C. Dailey, Children's Constitutional Rights, Minn. L. Rev. (forthcoming 2011)(setting forth a “developmental
theory of children’s rights” that “emphasize(s) the socializing role of children’s rights.”)

266 Stephen J. Schnably, Beyond Griswold: Foucauldian and Republican Approaches to Privacy, 23 Conn. L. Rev. 861, 872
describing constitutional theories that connect the protection of privacy with a conception of democratic citizenship).

267 U.S. Const. 4th Amend.

Searches and Seizures in the Schools, 22 Ga. L. Rev. 897, 905-906

269 Even cases granting children privacy rights curtail those rights in significant ways. See Bellotti v. Baird, 443 U.S. 622, 634
(1979)( recognizing “three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those
of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the
importance of the parental role in child rearing.”); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52,74 (1976)( “The
Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children
than of adults.”). See also T.L.O. at 341 (“[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.”)
adolescents present a challenge to this model because of their unique developmental situation. Unlike younger children, adolescents are developing the social skills that will carry them forward to successful adulthood; the requisite nerve connections that make create the capacity for mature, rational decision-making are in the process of being formed.

Autonomy, privacy, independence, personal freedom, self-determination and responsibility are areas that all adolescents explore as they mature into adulthood. As a result of this “growing need for independence” adolescents may embarrass easily and seek a greater sense of privacy in their personal lives For students, the school environment serves as the laboratory for this developing sense of privacy. According to Professor Gary Melton, "as children approach adolescence, privacy becomes important as a marker of independence and self-differentiation. Threats to the privacy of school-aged children may be reasonably hypothesized to . . . threats to self-esteem." This can have an even greater impact on students in inner-city schools because school may be one of the more “private” environments they experience.

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which suburban, middle-class people may regard as public may take on meaning as private places for inner-city, lower-class children. Consequently, expectations of privacy are likely to “vary with social and physical environments.”

When youth are reconceived as people with “citizenship potential,” that is, having a developing capacity for autonomy, rights take on different role. “[R]ather then entitlements that protect an existing capacity” they serve to cultivate a capacity that is being created. If student rights are recognized for their socializing role, schools can nurture adolescent’s emerging sense of privacy and develop student’s capacity for autonomous choice though fastidious application of students’ Fourth Amendment rights. “[T]hrough their daily experiences children and adolescents develop . . . . a sense of themselves as separate from and connected to others, an understanding of the conditions under which to seek physical and psychological aloneness or interaction, and understanding of the possible range of such experience, and the uses of each of these for self-enhancement or regrouping. At the same time, these experiences give children and adolescents a view of societal norms with respect to certain behaviors and activities and provide a way of interpreting these as valued or not valued, good or bad. In this way children's experiences with privacy feed back into their sense of self-esteem and help define the range, limits, and consequences of individual autonomy within our society.”

If fact, the Court has implicitly endorsed such a view in some of its First Amendment cases involving free speech in public schools. In these cases, the Court is concerned with how restrictions on free speech and the

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276 See West Virginia State Board of Education v. Barnett, 319 U.S. 624, 637 (1943)(holding that schools cannot compel students to recite the pledge of allegiance)(“That they are educating the young for citizenship is the reason for scrupulous
free exchange of ideas will affect the citizenship potential of school children. When reconceived as an instrument of democratic socialization, the restriction of student Fourth Amendments raises similar concerns.

Even assuming that adolescents’ brain plasticity and psychosocial immaturity makes them poor decision makers, “mental disability need not obviate . . . [their] status as a person.”

Rather, the fact that they are in a critical developmental phase, progressing ever closer toward adult personhood, is exactly why their fledging sense of autonomy should be respected and nurtured.

Affording them the full measure of privacy guaranteed by the Fourth Amendment is developmentally appropriate because it would actively encourage school officials and SRO’s to “support [the] gradual passage toward adulthood . . . by granting [the student] the full rights of an adult when his interests are jeopardized by the state” and reduce the possibility for abuse by well-meaning but overzealous actors. *T.L.O.* and *Redding* both recognize that students have a right to privacy, albeit and abrogated one. However, there is reason to believe that increased privacy rights for students would be psychologically and developmentally beneficial.

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bestow a sense of autonomy and personhood, which is so crucial during adolescence and an important precursor to democratic citizenship.

Furthermore, adolescents’ experience with privacy rights can impact their legal socialization to the extent that these experiences shape their attitudes toward law and legal authority.\textsuperscript{281} “[Notions of the legitimacy of the law] are part of a broader developmental phenomenon of self-definition with regard to authority structures common to adolescence, and the resolution of autonomy-related issues, including those involving relationships with authority figures, is a central task of this period.”\textsuperscript{282} Although little research has been done regarding adolescent legal socialization, research shows that adult legal socialization is directly related to compliance with the law and cooperation with legal actors, such as police.\textsuperscript{283} However, one study that did focus on adolescents found that perceptions of procedural justice did correlate to views regarding the legitimation of the law.\textsuperscript{284} This suggests that adolescents who feel that they have been treated fairly by legal authorities such as SROs will be legally socialized into a positive orientation toward legal authority in general. Therefore, a model of school search and seizure that increases the perception of procedural justice will increase institutional legitimacy and compliance with school disciplinary rules.

\textbf{B. Restoring the Balance}

\textsuperscript{281} Jeffrey Fagan, Tom Tyler, \textit{Legal Socialization of Children and Adolescents}, Social Justice research Vol. 18, No. 3 p. 220.


\textsuperscript{283} Tom Tyler, \textit{Why People Obey the Law: Procedural Justice, Legitimacy and Compliance}. 1990

As Justice Kennedy writes in *Graham* “criminal procedure laws that fail to take a defendant’s youthfulness into account at all would be flawed.” But how do we take “youthfulness into account” in a way that is consistent with both maintaining safe schools and creating democratic citizens? One way is to identify the factors that make youthfulness an important consideration, and then incorporate these factors into the reasonableness calculus, balancing this interest (as well as personal privacy) against school safety. With regard to adolescents, their youthfulness is important because “this is the developmental period during which . . . an adult-like understanding of society and its institutions” are being formed. School search jurisprudence can better account for the developmental realities of adolescence in much the same way that Eight Amendment jurisprudence now does. The Court arrived at the holdings in *Simmons* and *Graham* by referring to "the evolving standards of decency that mark the progress of a maturing society" inherent in the Eighth Amendment’s proscription against cruel and unusual punishment. Similarly, the Fourth Amendment’s reasonableness balancing test “does not operate in a vacuum; instead, it must comport with evolving societal norms.”

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287 *Simmons*, 543 U.S. 551,561 (U.S. 2005)

evolving standard that is based on what "society is prepared to recognize as ‘reasonable.'” The current school search and seizure model balances student privacy interests against the state’s interest in maintaining safe schools. This binary approach creates a false choice because there are other interests at stake.

I submit that both society and students have a significant interest in the development of future citizens. This interest, which I will refer to as a “development interest,” should be taken into account when determining what is reasonable under the Fourth Amendment. The framework that emerges when the development interest is factored into the reasonableness balance is a youth development approach to school search and seizure because the development interest militates in favour of a school search standard that promotes democratic socialization and thus encourages positive youth development. “The greater the area in which juveniles are free to pursue their own interests, and to act responsibly without interference, the better able they are to respond to society’s many demands upon them.”

Under this new paradigm, students’ Fourth Amendment rights become a tool of democratic socialization, enhancing young people’s capacity for autonomous decision making and lending legitimacy to the law and legal authorities. A youth development approach mandates a probable cause standard, the standard that bestows the presumption of reasonableness on all search and seizures because it requires a particularized,

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289 See Florida v. Riley, 488 U.S. 445, 454-55 (1989) (O'Connor, J., concurring) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). “In determining the meaning of ‘reasonable,’ the Court, in effect, has created a common law of reasonableness rather than relying on a constitutional definition found in the Fourth Amendment. In this way, the Fourth Amendment is like the Eighth Amendment, which also depends on a common-sense notion of what society defines as "cruel and unusual punishment." George C. Thomas III and Barry S. Pollack, Saving Rights From Remedy: A Societal View of The Fourth Amendment, 73 B.U.L. Rev. 147, 154.

290 Kaufman, 1031.
articulable basis for suspecting a disciplinary violation has occurred before a search can be undertaken. 291

The youth development approach would address the three ‘dangerous lessons’ set forth in section II of this article. First, it would give practical meaning, based in actual experience, to the Constitution’s lofty guarantees of privacy thus enhancing the “perception of rights as entitlements applicable to oneself.”292 Second, the youth development approach would encourage positive youth development because it would respect adolescents’ developing sense of autonomy by requiring the state to “justify coercive intervention” into their privacy.293 Third, it would promote an orientation toward law and legal authority that is based on respect and trust rather than fear and control. This will yield better developmental outcomes for students because it nurtures pro-social rather than anti-social patterns of behavior.294 Moreover, it increases the perception of fairness and equity of legal rules which fosters a sense of institutional legitimacy towards schools’ disciplinary regimes.295

291 See Whren v. United States, 517 U.S. 806, 818-19 (1996) (holding searches and seizures are presumed reasonable when police have probable cause).

292 Melton, G., Toward “Personhood” for Adolescents: Autonomy and Privacy as values in Public Policy, American psychologist 38:1 99-1-3 91983).

293 Kaufman, 1029.

294 [A]lthough the necessities for a public school search may be greater than for one outside the school, the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable. And it must also be emphasized that the scope of permissible search and, for that matter, the scope of undue risk of psychological harm, will vary significantly with the age and mental development of the child.” People v. D., 34 N.Y.2d 483, 490, 315 N.E.2d 466, 471, 358 N.Y.S.2d 403, 410 (1974).

Furthermore, a shift to a probable cause standard would also address the problem of the expanding nexus between school officials and law enforcement. This was the elephant in the room in *New Jersey v. TLO*. Since that case was decided, police have become a prevalent fixture in public schools and it is more likely that disciplinary infractions will lead to school based arrests and even criminal prosecutions. Under a probable cause standard students who are searched and criminally prosecuted based on the fruits of the search will have weightier grounds to support suppression motions. Probable cause would alter the current methodology of school discipline wherein every student is viewed as a potential safety threat and treated like a criminal suspect when accused of violating school rules. Moreover, probable cause would place limits on the discretion of school officials and SRO’s “bent upon searching particular students suspected of wrongdoing at school” who, under the current framework, have very “few constraints.”

296 See Stephen Cox. And Mario Gaboury, *Creating More Labels: Examining Juvenile Arrests in Urban and Suburban Police Departments*, Paper presented at the annual meeting of the American Society of Criminology, Royal York, Toronto 10-26 -2009 available at: http://www.allacademic.com/meta/p33380_index.html (analyzing Juvenile arrest data from a large Connecticut city and two neighboring towns and finding that the majority of police arrests in the city were at public schools and were typically made by school-based police officers); *Hard Lessons: School Resource Officer Programs and School Based Arrests in Three Connecticut Towns*, a Report of The American Civil Liberties Union and The American Civil Liberties Union of Connecticut, available at http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf. (finding a high rate of school based arrests by SROs in the two of the three school districts studied, the third district had a higher suspension and expulsion rates which perhaps obviated the need for school based arrests.)

297 “In a very real sense, each and every student stands accused, has become a "suspect," in generalized school searches, especially given the special relationship of trust which supposedly exists between student and teacher. Surely a student even indirectly accused by his teacher as a possible thief or drug user suffers a greater indignity and loss of self-esteem by being subjected to a generalized search than does an airline passenger passing through a metal detector or a driver a checkpoint.” 22 Ga. L. Rev. 897, 909 (citing Gary Melton, *Children, Politics, and Morality: The Ethics of Child Advocacy*, 16 J. CLINICAL CHILD PSYCH. 357, 361 (1987) “[r]esearch psychologists have discovered that two of the most stressful events in the lives of young people (fourth through sixth graders) are being accused of lying and being sent to the school principal. Presumably, therefore, students perceive being accused of wrongdoing at school as extremely stressful, both because of a fear of unpleasant sanctions and because the accusations are experienced by the young person as an affront to personal dignity and self-esteem.”

Critics of the youth development approach to school searches might reason that schools’ moral and legal duty to maintain a safety is so compelling, no interest can outweigh it. If probable cause were to prevent even one student with a gun from being searched, the consequences could be disastrous and thus a lower standard of reasonable suspicion is always justified. After all, school safety is to education policy what national security is to domestic policy – invasions of privacy that would be otherwise unacceptable are considered a necessary evil that contributes to the greater good. Critics also might argue that the problem isn’t a lack of rights for students, but too many. The internet is abuzz with blog posts and opinion commentary on the need for more, not less school discipline. “[S]tudents [who bring drugs or weapons to school]can create a bitter and fearful environment for students interested in learning, and students who care are grateful when the frequent fliers in the disciplinary system are removed from their classes.” Under this view, perhaps the “development interest” is not a societal interest in making democratic citizens out of troublemakers, but rather a societal interest in guaranteeing a safe learning environment for the ‘good kids’. As the world outside gets more violent, school should be a place where children can be free from fear. Finally, because this approach to school searches draws support from scientific studies involving adolescent brain development, it is potentially vulnerable to criticism if the research is refuted or supplanted by new discoveries.

While I acknowledge these concerns, I remain committed to the notion that the rights embodied in the Fourth Amendment are so essential to a basic citizen identity that even without

299 See William C. Banks & M. E. Bowman, Executive Authority for National Security Surveillance, 50 Am. U. L. Rev. 1, 4 (2000)( arguing that it is justifiable to sacrifice individuals liberties in the name of national security).

300 Comment posted by David Campbell on the Washington Post’s All Opinions are Local Blog on February 23, 2011, in response to a front page article on Zero tolerance Policies.
the science or the emphasis on children’s rights – the right to be left alone is at the core of Constitutional liberty and freedom and must remain inviolate. “[T]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.”

The fact that children are the right holders in the context to school search and seizure should not undermine our commitment to zealously protect such an “indispensable freedom.”

However, school safety is of paramount importance, and must always be accounted for when formulating effective search and seizure protocols. A probable cause standard is not mutually exclusive of school safety. As Justice Brennan pointed out in his dissent in T.L.O.:

“in Illinois v. Gates, 462 U.S. 213 (1983), this Court expounded at some length its view of the probable-cause standard. Among the adjectives used to describe the standard were "practical," "fluid," "flexible," "easily applied," and "nontechnical." See id., at 232, 236, 239. The probable-cause standard was to be seen as a "common-sense" test whose application depended on an evaluation of the "totality of the circumstances." Id., at 238.”

Schools’ ability to keep students safe will remain intact because the flexibility and fluidity that

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302 “[The Fourth Amendment's protections], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.” Brinegar v. United States, 338 U.S. 160, 18081 (1949) (Jackson, J., dissenting).
teachers and school administrators depend upon is inherent in the probable cause standard. In fact, "in most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test."\(^{303}\)

Moreover, a move to probable cause would not foreclose school officials from conducting *Terry* stops (under a reasonable suspicion standard) when necessary for safety.

While a youth development approach to school searches that adopts a probable cause standard is not a panacea for our ailing public school system, if implemented correctly, it is one small step toward educating for citizenship and restoring legitimacy of the rule of law in the eyes of marginalized youth. The probable cause is a more suitable standard in school searches because it provides greater protection to youth, is developmentally appropriate and sends a message to students that they are entitled to the rights and protections of citizenship, thus restoring legitimacy and encouraging engagement and participation in civil society.

A youth development approach to school searches also requires changes in the way school searches are conducted. A doctrinal shift to probable cause is not enough because even if the Court overrules *T.L.O.*, it cannot legislate best practices from the bench. Boards of education must adopt policies which assure that the probable cause standard is implemented in a manner that respects student’s rights and fosters positive youth development. Capitalizing on the socializing value of rights, SROs and school officials should always notify students or their rights before conducting a search and explain why the student is being searched. This would be akin to a Fourth Amendment Mirada warning, employing simple, easy to understand language that conveys core rights. The exact language could be determined by individual school boards in

conjunction with teachers, students and parent groups. For example, a school might adopt the following notification: “[student’s name], your [backpack, purse, jacket, pockets, etc] is about to be searched. We have a right to search you because [state the underlying probable cause i.e. Mrs. Smith saw you smoking in the restroom]. This means we have probable cause to think [state underlying violation i.e. you were smoking on school property]. You do not have to make any statements at this point. We will be as respectful of your privacy as possible, but we do have to search you now.”

In addition, police involvement in all school searches should limited as much as possible. Schools should adopt memoranda of understanding (MOU) with police departments that clearly define the role of SROs in the context of schools’ educational mission. The MOU should emphasize that probable cause is required before a search can be undertaken. In the absence of an immediate threat to school safety, teachers and school officials should be the ones actually conducting the searches. Furthermore, clear standards should govern when and how the fruits of school searches are turned over to police for law enforcement purposes. These standards should limit the situations in which students are referred to juvenile, family or adult criminal court by keeping most matters within the school’s disciplinary process.

School search practices can be modified to this end even under the reasonable suspicion school standard. For example, in their whitepaper on policing in schools, the ACLU sets forth a model governing document that includes language on students’ rights in the context of both

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searches conducted by SRO’s and school officials.\textsuperscript{305} The model governance document sets forth the standard in police initiated searches as probable cause, and explicitly prohibits SRO’s from “ask[ing] school officials to search a student’s person, possessions, or locker in an effort to circumvent these protections.” The standard for searches by school officials is reasonable suspicion, and the model governance document excludes SRO’s from participating in such searches absent compelling circumstances.\textsuperscript{306} Moreover, the 4\textsuperscript{th} Amendment “notice” described above could also be utilized under a reasonable suspicion standard.

\textbf{IV. Conclusion}

\textit{“The authority of those who teach is often an obstacle to those who want to learn.”}  
\textit{-- Cicero}

The current reality in urban public schools is that students are subjected to a pedagogy of punishment that treats students as if they pose a threat to society rather than as if they are young citizens deserving of autonomy and personhood status. Students in the public education system are often treated like criminals, and this is exacerbated by reduced Fourth Amendment protections in school searches. Abrogating Fourth Amendment rights of students in the name of public safety is not good public policy because such measures, in conjunction with other harsh disciplinary practices and increased police presence in schools, fail to achieve their purported public safety outcomes in the long term. Rather, such policies may actually induce youth to behave more anti-socially, rendering schools less safe. Therefore, although the safety gains are low, the developmental setbacks for the developing adolescent are high: when students are


treated as threats to society, they become threats to society. The counterproductive nature of these policies stems from the fact that they do not account for the developmental needs of adolescents and thus they produce outcomes that are inconsistent with the stated objectives of public education.

Schools should not cultivate authoritarian environments where school officials wield absolute and unfettered power. Rather, their disciplinary policies and practices should comport with their special role in the socialization of future democratic citizens to this end, they should respect students’ autonomy, dignity and individual rights. School search law should reflect a developmentally accurate assessment of public safety concerns, students’ privacy interests, and the joint interest of students and society in the creation of democratic, law-abiding citizens. A youth development approach to school searches incorporates this joint interest into the reasonableness determination and, in doing so, calls for a probable cause standard in school searches.